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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	**MOTION TO STRIKE**

COME NOW, Protestants, the THOMAS M. O'GARA FAMILY TRUST and LOWER SNAKE RIVER AQUIFER RECHARGE DISTRICT, by and through counsel of record, and move the Hearing Officer for an order striking the *Applicant's Response to Reply in Support of Motion for Summary Judgment* (the "Response to Reply"), filed on May 8, 2015. The pealing should be stricken because it is not authorized under the rules, it is repetitive, and it is non-responsive.

The Department's rules of procedure govern the filings of motions. Rules 260 and 565 both speak to motions before the Hearing Office. While each authorizes the filing of a motion and response, none authorize a "Response to Reply" as was filed by the Applicant in this case. Since the Applicant does not have any authority to file the Reponses to Reply, the Hearing Office should not consider the filing and should strike it from the record.

In addition, the Response to Reply is repetitive. The Applicant repeats the same arguments contained in its previously filed response brief. *See Response to Reply* at 1 ("The first

three reasons below were provided in the Applicant's response dated April 30, 2015"). Such repetitive arguments should be stricken.

Furthermore, the Response to Reply is non-responsive to the issues presented in the summary judgment motion. Whereas the Protestants' motion speaks to several legal failings of the applications, the Applicant's Response to Reply is limited to an argument of procedural issues that have no bearing on the merits of the pending motion. As such, the Hearing Office should strike the Response to Reply.

Finally, a portion of the Applicant's arguments warrant response. The Applicant argues that since the phrase "summary judgment" is not included in the Department's procedural rules, such motions are not appropriate in these administrative proceedings. The Applicant is wrong. First, Rule 206 governs the filing of motions. If provides that a party may file a motion and "state the relief sought." Through their motion, the Protestants' sought "summary judgment" due to the lack of any material fact on the issues presented. Importantly, at no time has the Applicant ever identified any disputed issue of material fact relating to the Protestants' motion.

It is also wrong to argue that summary judgment is not appropriate in administrative proceedings. Indeed, where there is no issue of material fact, summary judgment is appropriate:

> The Department's Rules of Procedure (IDAPA 37.01.01) do not specifically set forth a process for filing motions for summary judgment. Administrative hearings before the Department are not governed by Rule 56 of the Idaho Rules of Civil Procedure. (IDAPA 37.01.01.052) Rule 564 of the Department's Rules of Procedure gives the presiding officer the authority to request briefs or statements of position from the parties. Generally, summary judgment is only appropriate in cases where the material facts of the case are not in dispute. Because it appeared that there were few, if any, disputed material facts in this case, the Department asked the parties to file summary judgment motions setting forth their respective positions. Although IWRB, in its response brief, identified certain facts that are still in dispute regarding the extent of beneficial use occurring under Permit 37-7842, none of the facts identified by IWRB are material to the outcome of this proceeding. Therefore, summary judgment is appropriate.

Recommended Order Granting Petitioners' Motion for Summary Judgment & Rescinding Extension of Time, In the Matter of Permit No. 37-7842 in the Name of the Idaho Water Resource Board (Nov. 30, 2011).

In the recent proceedings on the Rangen delivery call, the Hearing Office (Director Spackman) issued decisions on summary judgment, identifying the standard as follows:

> Summary judgment is only appropriate when genuine issues of material fact are absent and the case can be decided as a matter of law. I.R.C.P. 56(c); *Ida-Therm, LLC v. Bedrock Geothermal, LLC*, 293 P.3d 630, 632 (2012). In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *Pioneer Irr. Dist. v. City of Caldwell*, 288 P.3d 810,813 (2012).

Order Denying Rangen, Inc's Motion for Partial Summary Judgment (Apr. 25, 2013).

The law is clear and applies equally to these administrative proceedings. If there is no genuine issue of material fact, then summary judgment is appropriate. The Protestants explained in their motion the legal failings of the applications. The Applicant has not provided any information to dispute the material facts. As such, summary judgment is appropriate.

Accordingly, the Hearing Office should strike the Response to Reply since it is an unauthorized filing, it is repetitive and it is non-responsive.

DATED this 11th day of May, 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 11th day of May, 2015, I served a true and correct copy of the foregoing, via email to the following:

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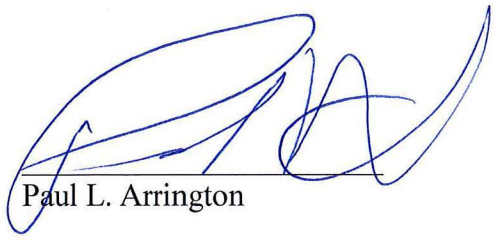

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