

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS)	
FOR PERMIT NO. 37-22682 AND)	
37-22852 IN THE NAME OF:)	ORDER DENYING MOTION FOR
INNOVATIVE MITIGATION)	SUMMARY JUDGMENT WITH
<u>SOLUTIONS LLC)</u>	RESPECT TO APPLICATION
	FOR PERMIT NO. 37-22682

BACKGROUND

1. On February 10, 2012, Wood River Mitigation Solution LLC filed Application for Permit No. 37-22682 with the Idaho Department of Water Resources (“Department”). The application proposes diversion from the Big Wood River for ground water recharge.
2. Application for Permit No. 37-22682 was advertised in the appropriate local and statewide newspapers in April 2012. Twenty four parties either protested the application or intervened in the contested case proceeding related to the application.
3. Wood River Mitigation Solution LLC filed a name change with the Department on June 6, 2013, changing the name to Innovative Mitigation Solutions LLC (“Applicant”).
4. An Amended Application for Permit No. 37-22682 (“Application 37-22682”) was received on September 4, 2013. Changes to Application 37-22682 included revised points of diversion and places of use.
5. Application 37-22682 was advertised in the appropriate local and statewide newspapers in October 2013. Two new parties protested Application 37-22682 and one new party intervened in the contested case proceeding related to the application.
6. On October 21, 2013, the Applicant filed Application for Permit No. 37-22852 (“Application 37-22852”) with the Department. Application 37-22852 also proposes diversion from the Big Wood River for ground water recharge.
7. Application 37-22852 was advertised in February 2014, in the appropriate local and statewide newspapers. Fifteen parties either protested Application 37-22852 or intervened in the contested case proceeding related to the application. Some of the protestants were also protestants to Application 37-22682.

8. An initial Pre-hearing Conference was held for Application 37-22682 on February 27, 2014. During the Pre-hearing Conference Application 37-22852 was discussed and the possibility of consolidation was considered.
9. On April 15, 2014, the Hearing Officer issued an Order consolidating Applications 37-22682 and 37-22852. The Consolidating Order noted it was most efficient to consolidate the matter for the following reasons: both applications have a common applicant; issues identified by the protestants for each application are similar if not the same, and protestants to the separate applications were common but not exactly the same
10. Four consolidated Pre-hearing Conferences were held on the following dates: February 27, 2014; September 8, 2014; December 15, 2014; and February 4, 2015.
11. On March 13, 2015, the Hearing Officer issued a Scheduling Order and Notice of Hearing, which provided timelines for expert reports and depositions. In addition, the Scheduling Order and Notice of Hearing established May 28, 2015, as the date for the fifth Pre-hearing Conference, and established a formal hearing date for June 8 – 12, 2015.
12. On April 16, 2015, protestants Thomas M. O’Gara Family Trust and the Lower Snake River Aquifer Recharge District (“Protestants”), by and through their counsel of record, filed a *Motion for Summary Judgment* in the above-captioned matter (“Motion for Summary Judgment”). The following documents were received in support of, or response to, the Motion for Summary Judgment.
 - Protestant’s *Memorandum in Support of Motion for Summary Judgment* (Memorandum) dated April 16, 2015.
 - Affidavit of Amy L. Runser dated April 16, 2015.
 - Affidavit of Paul L. Arrington dated April 16, 2015.
 - Big Wood Canal Company’s *Response to Motion for Summary Judgment* dated April 29, 2015.
 - Applicant’s *Response to Motion for Summary of Judgment* dated April 30, 2015.
 - Protestant’s *Reply in Support of Motion for Summary Judgment* dated May 5, 2015.
 - Applicant’s *Response to Reply in Support of Motion for Summary Judgment* dated May 8, 2015.¹

13. The Motion for Summary Judgment and Memorandum seek dismissal of

¹ On May 8, 2015, IMS filed the *Applicant’s Response to Reply in Support of Motion for Summary Judgment* (“Response to Reply”). On May 11, 2015, Protestants filed a *Motion to Strike* requesting that the Hearing Officer not consider the Response to Reply and strike the filing from the record. The Department’s Rules of Procedure do not authorize the filing of the Response to Reply. See IDAPA 37.01.01.270.02 & IDAPA 37.01.01.565. The Hearing Officer will not consider the Response to Reply in this proceeding.

both Applications 37-22682 and 37-22852. Because the facts surrounding each application are separate and unique, the Motion for Summary Judgment will be considered and ruled upon separately for each application. This order only addresses Application 37-22682.

LEGAL STANDARD

In ruling on a motion for summary judgment, the Hearing Officer must liberally construe facts in the existing record in favor of the nonmoving party, and draw all reasonable inferences from the record in favor of the nonmoving party. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007). Summary judgment is appropriate if “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). If there are conflicting inferences contained in the record or reasonable minds might reach different conclusions, summary judgment must be denied. *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). In order to meet its burden, the moving party must challenge in its motion and establish through evidence the absence of any genuine issue of material fact on an element of the nonmoving party's case. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530, 887 P.2d 1034, 1038 (1994). If the moving party fails to challenge an element or fails to present evidence establishing the absence of a genuine issue of material fact on that element, the burden does not shift to the nonmoving party, and the non-moving party is not required to respond with supporting evidence. *Id.*

ANALYSIS

Idaho Code § 42-203A(5) states in pertinent part:

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 . . . 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.


The applicant bears the burden of proof regarding all factors set forth in Idaho Code § 42-203A(5). IDAPA 37.03.08.040.04.

Here, Protestants assert the Hearing Officer should reject Application 37-22682 because it is not made in good faith and is speculative, conflicts with the local public interest, and conflicts with the conservation of water resources. *Memorandum* at 6-17. However, summary judgment is inappropriate because Protestants have not met their burden of establishing through evidence the absence of a genuine issue of material fact regarding the issues of whether Application 37-22682 was made in good faith and is speculative, conflicts with the local public interest, or conflicts with the conservation of water resources. The Hearing Officer will deny the Motion for Summary Judgment with respect to Application 37-22682.

ORDER

Based upon and consistent with the foregoing, the *Motion for Summary Judgment* with respect to Application for Permit 37-22682 is DENIED.

Dated this 22 day of May 2015



Mathew Weaver
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of May 2015, true and correct copies of the document(s) described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed to the following:

Document Served: Order Denying Motion for Summary Judgment with Respect to Application for Permit No. 37-22682

Innovative Mitigation Solutions
2918 N El Rancho Pl
Boise, ID 83704

Idaho Dept of Fish & Game
Magic Valley Region
324 S 417 E, Suite 1
Jerome, ID 83338

Trout Unlimited Inc.
Attn: Peter Anderson
910 W Main St, Suite 342
Boise, ID 83702

Idaho Conservation League
C/O Marie Callaway Kellner
PO Box 844
Boise, ID 83701

Blaine County Commissioners
Attn: Larry Schoen
206 1st Ave South, Suite 300
Hailey, ID 83333

Western Watersheds Project
Attn: Jon Marvel
PO Box 1770
Hailey, ID 83333

Lane Ranch H.O.A.
Golden Eagle H.O.A.
c/o Sun Country Mgmt
PO Box 1675
Sun Valley, ID 83353

Walker Sand & Gravel Ltd. Co.
Attn: Brad Walker
PO Box 400
Bellevue, ID 83313

Heart Rock Ranch LLC
PO Box 3724
Hailey, ID 83333

Peter Trust LP
2300 W Sahara Ave, Ste 530
Las Vegas, NV 89102

Frank Erwin
711 East Ave N
Hagerman, ID 83332

Peter Trust LP
P.O. Box 642
Sun Valley, ID 83353

Harry S Rinker
PO Box 7250
Newport Beach, CA 92658

Idaho Power Company
c/o Barker Rosholt & Simpson
Attn: John K Simpson
PO Box 2139
Boise, ID 83701-2139

Idaho Rivers United
Attn: Kevin Lewis
PO Box 633
Boise, ID 83701

Redstone Partners LP
c/o Steve Beevers
1188 Eagle Vista Ct
Reno, NV 89511

Peter L Sturdivant
PO Box 968
Hailey, ID 83333-0968

Eccles Flying Hat Ranch LLC
Eccles Window Rock Ranch
PO Box 3028
Salt Lake City, UT 84110

Big Wood Canal Company
c/o Craig Hobdey
PO Box 176
Gooding, ID 83330

Brockway Engineering
2016 N Washington St, Ste 4
Twin Falls, ID 83301

The Valley Club, Inc.
City of Hailey
c/o Givens Pursley LLP
Attn: Michael Creamer
PO Box 2720
Boise, ID 83701-2720

Office of the Attorney General
Attn: W. Dallas Burkhalter
PO Box 25
Boise, ID 83707

Dry Lot, LLC
Lower Snake River Aquifer
Recharge District
Thomas M. O'Gara Family Trust
c/o Barker Rosholt & Simpson
Attn: Travis Thompson
195 River Vista Pl, Ste 204
Twin Falls, ID 83301

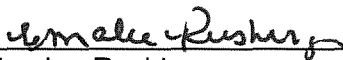
Bureau of Land Management
Attn: Fred Price
1387 S Vinnell Way
Boise, ID 83709-1657

Wood River Land Trust
Attn: Patti Lousen
119 E Bullion St
Hailey, ID 83333

Office of the Attorney General
Attn: Clive Strong
PO Box 83720
Boise, ID 83720-0010

Steve Spencer
US Forest Service
161 E. Mallard, Suite A
Boise, ID 83702

Pepin Corso-Harris
11 Purple Sage Lane
Bellevue, ID 83313


Emalee Rushing
Administrative Assistant