

**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:)
INNOVATIVE MITIGATION)
SOLUTIONS LLC)**

**PRELIMINARY ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT
WITH RESPECT TO APPLICATION
FOR PERMIT NO. 37-22852**

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 April 2012, in the appropriate local and statewide newspapers. 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. The Applicant filed an Amended Application for Permit No. 37-22682 (“Application 37-22682”) with the Department on September 4, 2013.
5. Application 37-22682 was advertised in October 2013, in the appropriate local and statewide newspapers. Two new parties protested Application 37-22682 and one new party intervened.
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. Item 10.a of the Department’s Application for Permit form asks, “Who owns the property at the point of diversion?” The Applicant responded to question 10.a, “Various parties – easements will be sought.”
8. Item 10.b of the Department’s Application for Permit form asks, “Who owns the land to be irrigated or place of use?” The Applicant responded to question 10.b, “Members of Cliffside Homeowners Association, Inc.”

9. Item 10.c of the Department's Application for Permit form states, "If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing." The Applicant responded, "Lease Agreement". No lease agreements have been submitted by the Applicant evidencing legal authority to use lands described by Application 37-22852 as the point of diversion or the place of use.
10. 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.
11. 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.
12. 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 are common but not exactly the same
13. Four consolidated pre-hearing conferences were held on the following dates: February 27, 2014; September 8, 2014; December 15, 2014; and February 4, 2015.
14. 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.
15. 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 ("Response to Reply").¹

The Motion for Summary Judgment and Memorandum seek dismissal of 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 37-22852.

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).

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

¹ 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.

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.

Rule 45.01.c of the Department's Water Appropriation Rules states 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, 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.

IDAPA 37.03.08.45.01.c.i.

Here, Protestants assert that Application 37-22852 must be rejected because the Applicant "has not provided any lease evidencing any authority to use the Comstock Canal for recharge . . . [n]or has [the Applicant] provided any evidence that it has sought to exercise eminent domain to use the Comstock Canal for recharge purposes." *Memorandum* at 9. The Hearing Officer agrees. There is no information in the record demonstrating the Applicant has legal access to the property necessary to operate the project proposed in Application 37-22852, or authority to exercise eminent domain authority to obtain such access. Protestants are entitled to judgment as a matter of law that Application 37-22852 was not filed in good faith. See IDAPA 37.03.08.45.01.c.i. The Hearing Officer will reject Application for Permit 37-22852.

ORDER

Based upon and consistent with the foregoing, the *Motion for Summary Judgment* with respect to Application 37-22852 is GRANTED. Application 37-22852 is REJECTED.

Dated this 26 day of May 2015



Mathew Weaver
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th 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, certified mail with return receipt, postage prepaid and properly addressed to the following:

Document Served: Preliminary Order Granting Motion for Summary Judgment with Respect to Application for Permit No. 37-22852

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

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

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

Heart Rock Ranch LLC
PO Box 3724
Hailey, ID 83333

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

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

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

Frank Erwin
711 East Ave N
Hagerman, ID 83332

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

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

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

Harry S Rinker
PO Box 7250
Newport Beach, CA 92658

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

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

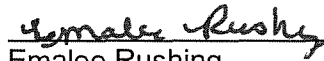
COURTESY COPIES TO:

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
USDA Forest Service
1805 Hwy 16 Rm 5
Emmett, ID 83617

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


Emalee Rushing
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.