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DEPARTMENT OF
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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 FOR ORDER
PROHIBITING THE
UNAUTHORIZED PRACTICE OF
LAW & MEMORANDUM IN
SUPPORT**

COME NOW, Protestants, the HEART ROCK RANCH, GOLDEN EAGLE HOA, RINKER CO., SPENCER ECCLES, LOWER SNAKE RIVER AQUIFER RECHARGE DISTRICT AND THE THOMAS M. O'GARA FAMILY TRUST, by and through counsel of record, and submit this **MOTION FOR ORDER PROHIBITING THE UNAUTHORIZED PRACTICE OF LAW**, seeking to prevent David Tuthill from representing the Applicant, Innovative Mitigation Solutions, LLC in these proceedings, pursuant to Idaho Code § 3-402.

Idaho strictly governs the practice of law within the state. Under Idaho Code, a Board of Commissioners is created to establish standards and requirements for admission to the State Bar. *Idaho Bar Commission Rules* § 2.¹ Prior to taking a professional exam seeking a license to practice law in Idaho, an applicant must meet the following qualifications:

Qualifications. Before receiving permission to take the bar examination and for admission to practice law in Idaho, the Applicant must:

¹ The Rules can be viewed at https://isb.idaho.gov/pdf/rules/ibcr_sec02_admissions.pdf.

- (1) Be at least eighteen years of age;
- (2) Be lawfully admitted to this country;
- (3) Have, or will have received, a juris doctorate or bachelor of laws degree or an equivalent basic law degree from an Approved Law School. Submission of a law school transcript in a form satisfactory to the Board shall be considered compliance with this Rule;
- (4) Have demonstrated the essential eligibility requirements to practice law pursuant to Rule 201 and have met all requirements in the Admission Rules; and
- (5) Be a person of good moral character

Bar Rule 202(a). Individuals who meet these qualifications, and pass the professional exam, are qualified to practice law in the State of Idaho.

An individual must be a qualified attorney in order to practice law in the State of Idaho. Alternately, an individual who is not qualified cannot practice law in Idaho. Such actions are considered the “Unauthorized Practice of Law.” *Idaho Bar Commission Rules* § 8, Rule 801(i) (“Unauthorized Practice of Law means the practice of law without being duly qualified to do so, as prohibited by statute, court rule, or case law of the state”). The unauthorized practice of law is illegal and anyone taking such actions is subject to fines and/or imprisonment:

If any person shall, ***without having become duly admitted and licensed to practice law within this state*** ... practice or assume to act or hold himself out to the public as a person qualified to practice or carry on the calling of a lawyer within this state, he shall be guilty of an offense under this act, and on conviction thereof be ***finned not to exceed five hundred dollars (\$500), or be imprisoned for a period of not to exceed six (6) months, or both***, and if he shall have been admitted to practice law he shall in addition be subject to suspension under the proceedings provided by this act.

I.C. § 3-420 (emphasis added).

The applicant in this case is Innovative Mitigation Solutions, LLC (“IMS”). As a limited liability company, IMS is “an entity distinct from its members.” I.C. § 30-6-104. Yet, it appears

that Mr. Tuthill, a member of IMS, intends to represent IMS at the hearing on this matter. At the pre-hearing conference held on May 28, 2015, Mr. Tuthill stated that he would be the only representative from IMS attending the hearing. Such actions constitute the unauthorized practice of law and are illegal. *See Kyle v. Beco Corp.*, 109 Idaho 267, 271 (1985) (“The general rule among this and other states has been that representation of another person before a public agency or service commission constitutes the unauthorized practice of law”). As such, the Hearing Office should enter an order prohibiting Mr. Tuthill from representing the applicant in these proceedings.

The Department’s rules of procedures speak to representation at hearing. They provide, at Rule 202:

202. REPRESENTATION OF PARTIES AT HEARING (RULE 202).

01. Appearances and Representation. To the extent authorized or required by law, appearances and representation of parties or other persons at formal hearing or prehearing conference must be as follows:

- a. Natural Person. A natural person may represent himself or herself or be represented by a duly authorized employee, attorney, or family member, or by a next friend if the person lacks full legal capacity to act for himself or herself.
- b. A partnership may be represented by a partner, duly authorized employee, or attorney.
- c. A corporation may be represented by an officer, duly authorized employee, or attorney.

This Rule only authorizes representation “to the extent authorized or required by law.”

As stated above, Idaho Law specifically prohibits the “representation of another person before a public agency” by any non-lawyer. *Kyle, supra*. Mr. Tuthill is not an attorney and does not claim to be an attorney. Any attempt by him to represent IMS in these proceedings will constitute the unauthorized practice of law.

Rule 202 cannot provide an exception to the prohibition against the unauthorized practice of law. In *Kyle, supra*, the Supreme Court was asked to review a denied request by Beco Corp. to allow its “president and sole shareholder” – a non-attorney – to represent Beco before the Industrial Commission. 109 Idaho at 270-71. The Industrial Commission rejected Beco’s request – concluding that such actions would constitute the unauthorized practice of law. *Id.* On appeal, the Supreme Court affirmed the decision, holding:

The general rule among this and other states has been that representation of another person before a public agency or service commission constitutes the unauthorized practice of law, where the proceedings before those tribunals are held for purposes of adjudicating the legal rights or duties of a party.

...

From a careful and comprehensive analysis of all the . . . authorities, . . . the following rules seem to be deducible: First, that the process of admitting to the bar comprehends fixing standards as to mental and scholastic qualifications and determining whether the applicant possesses such requirement; second, that the exercise thereof is a judicial function, inherent in the courts; and third, the legislature may enact valid laws in aid of such functions and may, if in furtherance thereof, fix minimum requirements, but in no event, maximum; and may not require the courts to admit on standards other than as accepted or established by the courts, and that any legislation which attempts to do so is an invasion of the judicial power and violative of the constitutional provisions establishing the separate branches of government and prohibiting the legislature from invading the judiciary.

Kyle, 109 Idaho at 271-72. The Court concluded by confirming that it is the “final arbiter of who may practice law in this State” and that there is no authority to allow “non-lawyers to appear on behalf of a corporation” before an agency:

Thus, the final arbiter of who may practice law in this State is this Supreme Court. The legislature could not have delegated to the Industrial Commission the power -- which the legislature itself lacks -- to allow laypersons to represent parties in adjudicative proceedings. Only this Court could authorize corporate agents who are non-lawyers to appear on behalf of a corporation before the Industrial Commission. This we decline to do. ***Rather, we hold that, where an entity chooses to incorporate under the laws of this State and to thereby receive the benefits and privileges extended to corporations, it***

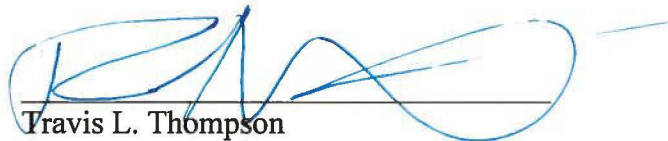
cannot, when convenient, ask the court to ignore its corporate status and extend to it the advantages to which an individual person is commonly entitled.

Id. at 272.

Mr. Tuthill chose to form IMS as an LLC. By doing so, Mr. Tuthill will “receive the benefits and privileges extended to” an LLC in Idaho. At the same time, however, IMS must be represented by an attorney in proceedings before the Department. The Supreme Court has not authorized any non-lawyer to practice law before the Idaho Department of Water Resources. Accordingly, the Hearing Office should enter an order prohibiting the representation of IMS by Mr. Tuthill at the hearing.

DATED this 4th day of June, 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 4th day of June, 2015, I served a true and correct copy of the foregoing, via email to the following:

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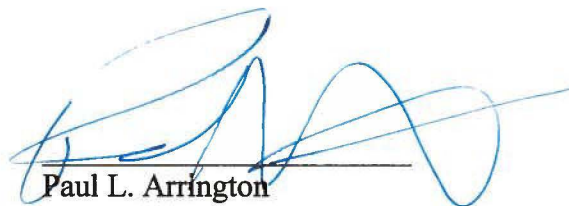
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