

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATIONS)	ORDER DENYING PETITION FOR
FOR PERMIT NO. 37-22682 AND)	RECONSIDERATION OF PRELIMINARY
37-22852 IN THE NAME OF:)	ORDER GRANTING MOTION FOR
INNOVATIVE MITIGATION)	SUMMARY JUDGMENT WITH
SOLUTIONS LLC)	RESPECT TO APPLICATION FOR
_____)	PERMIT NO. 37-22852

BACKGROUND

On October 21, 2013, Innovative Mitigation Solutions LLC ("Applicant") filed Application for Permit No. 37-22852 ("Application 37-22852") with the Idaho Department of Water Resources ("Department").¹ Application 37-22852 proposes diversion of 10 cfs from the Big Wood River for ground water recharge.

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."

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."

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".

On April 16, 2015, protestants Thomas M. O'Gara Family Trust and the Lower Snake River Aquifer Recharge District, 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:

¹ Prior to this filing, the Applicant also filed with the Department Application for Permit No. 37-22682. That application also proposes diversion from the Big Wood River for ground water recharge. On April 15, 2014, the Hearing Officer issued an order consolidating Applications 37-22682 and 37-22852. This order only concerns Application 37-22852.

- *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 ("Response to Motion for Summary Judgment").
- *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").

The Motion for Summary Judgment and Memorandum sought dismissal of Application 37-22852. The Memorandum stated 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.

On May 26, 2015, the Hearing Officer issued a *Preliminary Order Granting Motion for Summary Judgment With Respect to Application for Permit No. 37-22852* ("Preliminary Order"). The Hearing Officer stated: "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." *Preliminary Order* at 4. The Hearing Officer concluded Protestants were "entitled to judgment as a matter of law that Application 37-22852 was not filed in good faith" and rejected Application 37-22852. *Id.*

On May 27, 2015, the Department received *Applicant's Request to Reconsider Preliminary Order Granting Motion for Summary Judgment With Respect to Application for Permit No. 37-22852* ("Request for Reconsideration"). The Applicant explained "Applicant concurs with the analysis of the Hearing Officer . . . regarding the need for the Applicant to have possessory interest in the place of use at the time the application is filed." *Request for Reconsideration* at 1. "Applicant inadvertently failed to submit a copy" of the "lease information" for Application 37-22852. *Id.* "Accordingly the Applicant now provides a copy of the lease, attached." *Id.* Attached to the Request for Reconsideration is a document entitled "Place of Use Lease Between Cliffside Homeowners Association, Inc., Landlord and Innovative Mitigation Solutions, LLC, Tenant" ("Place of Use Lease").

On June 5, 2015, Protestants Heart Rock Ranch, Golden Eagle HOA, Rinker Co.²,

² Rinker Co. is associated with the notice of protest filed in the name of Harry Rinker.

Spencer Eccles³, Lower Snake River Aquifer Recharge District, and the Thomas M. O'Gara Family Trust ("Protestants") filed with the Department an *Opposition to Applicant's Request to Reconsider Preliminary Order Granting Motion for Summary Judgment With Respect to Application for Permit No. 37-22852* ("Opposition"). Protestants complain that discovery requests were submitted to the Applicant in December, 2014, seeking information regarding any lease or other possessory interest in the Comstock Canal, and that no information was provided in response. *Opposition* at 1. Protestants also complain that the Applicant submitted the Place of Use Lease for the first time as an attachment to the Request for Reconsideration. *Id.* at 2. Protestants assert the Place of Use Lease is "not sufficient to demonstrate a possessory interest in the Comstock Canal" because it "only speaks to the 'place of use' for the recharge activities" and "there is no agreement speaking to the diversion of water from the headgate of the Comstock Canal," which is the point of diversion identified on Application 37-22852. *Id.* Protestants conclude "the Applicant has not demonstrated that it has 'legal access to the property necessary to construct and operate the proposed project,' IDAPA 37.03.08.045.01.c." and request the Hearing Officer deny the Request for Reconsideration. *Id.* at 3.

On June 10, 2015, the Applicant filed with the Department *Applicant's Reply to Protestants' Opposition to Request to Reconsider Preliminary Order Granting Motion for Summary Judgment With Respect to Application for Permit No. 37-22852* ("Reply"). The Applicant concurs "that lack of a possessory interest in the property designated as the place of use is speculation, and that persons may not file an application for a water right and then seek a place of use thereof." *Reply* at 1. "However, the Applicant does not concur with the position of the Protestants that possessory interest in the point of diversion is required at the time the application is filed. Nor does the Applicant need possessory interest in the entire reach of the canal when the application is filed." *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

³ Spencer Eccles is associated with notices of protest filed in the names of Eccles Flying Hat Ranch, LLC and Eccles Window Rock Ranch, LLC.

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.

As an initial matter, the Hearing Officer concludes the Place of Use Lease filed by the Applicant for the first time as an attachment to the Request for Reconsideration is untimely. 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". The Place of Use Lease should have been filed with Application 37-22852. The Applicant should also have submitted the Place of Use Lease in response to Protestants' December 2014 discovery requests seeking information regarding any lease or other possessory interest in the Comstock Canal. In addition, the Memorandum supporting the Motion for Summary Judgment specifically identified the Applicant "has not provided any lease evidencing authority to use the Comstock Canal for recharge." *Memorandum* at 9. Because the Place of Use Lease is untimely filed, the Hearing Officer should not consider the Place of Use Lease and should deny the Applicant's Request for Reconsideration.

Even if the Hearing Officer were to consider the Place of Use Lease, the Request for Reconsideration should be denied because the Place of Use Lease does not demonstrate the Applicant has "legal access to the property necessary to construct and operate" the recharge project proposed by Application 37-22852 as required by Rule 45.01.c of the Department's Water Appropriation Rules. First, the Place of Use Lease states:

Whereas the members of [Cliffside Homeowners Association, Inc.,] are the owners of all of the lots in Cliffside Subdivision in Blaine County, Idaho through which a portion of the Comstock Ditch which portion is hereinafter identified and described as the "**Place of Use**";

The Place of Use Lease also states:

Place of Use Lease at 2. Taken together, these statements imply the Place of Use is intended to be the portion of the Comstock Ditch that runs through lots owned by members of Cliffside Homeowners Association, Inc., and depicted on Exhibit A:

ORDER DENYING PETITION FOR RECONSIDERATION OF PRELIMINARY ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT WITH RESPECT TO APPLICATION FOR PERMIT NO. 37-22852 Pg

assuming the Place of Use Lease supplies the Applicant legal access to the portion of the Comstock Canal that runs through property owned by members of Cliffside Homeowners Association, Inc., the Applicant has submitted no information evidencing any legal access to the headgate of the Comstock Canal (the point of diversion identified on Application 37-22852) or the portion of the Comstock Canal between the headgate and the "Start Point for Cliffside Homeowners Association, Inc." In other words, the Applicant has not provided any information or evidence that it has acquired any authority to divert water at the headgate of the Comstock Canal or to deliver water through the Comstock Canal outside of the "Start" and "End" points for Cliffside Homeowners Association, Inc. as depicted on Exhibit A.

The Hearing Officer disagrees with the Applicant's assertions that it did not need to demonstrate a possessory interest in the headgate of the Comstock Canal or the reach of the Comstock Canal necessary to operate the proposed recharge project at the time Application 37-22852 was filed. Rule 45.01.c of the Department's Water Appropriation Rules clearly requires 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." The recharge project proposed by Application 37-22852 proposes use of the headgate of the Comstock Canal as the point of diversion and, as Exhibit A demonstrates, requires use of the Comstock Canal outside of the "Start" and "End" points for Cliffside Homeowners Association, Inc. The Place of Use Lease does not provide the Applicant legal access to these properties, which are necessary to construct and operate the recharge project proposed by Application 37-22852. To hold otherwise would allow a water right to be initiated by trespass, in violation of principles set forth in *Lemmon v. Hardy*, 95 Idaho 778, 780, 519 P.2d 1168, 1170 (1974) ("a water right initiated by trespass on private property is invalid.").⁴ Therefore, the Hearing Officer will deny the Request for Reconsideration.

ORDER

Based on and consistent with the foregoing, Applicant's Request for Reconsideration is DENIED.

Date this 16 day of June, 2015



Mathew Weaver
Hearing Officer

⁴ The Court also explained: "In the case at bar the land designated as the point of diversion and place of use in appellants' original application was private property not owned by the appellants and therefore no valid water right could be developed on it. Since no valid water right was possible, it can be concluded that the application was filed for speculative purposes, not for development of a water right." *Lemmon v. Hardy*, 95 Idaho at 780, 519 P.2d at 1170.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of June 2015, true and correct copies of the documents 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:

Documents Served: Order Denying Petition for Reconsideration of Preliminary Order Granting Motion for Summary Judgment with Respect to Application for Permit No. 37-22852 and Explanatory Information to Accompany an Order Denying Petition for Reconsideration

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, Michael Orr
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 AN ORDER DENYING PETITION FOR RECONSIDERATION

The accompanying order is an **Order Denying Petition for Reconsideration** of the "preliminary order" issued previously in this proceeding by the department pursuant to section 67-5243, Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after the service date of this denial of petition for reconsideration of the preliminary order, any party may in writing file exceptions to any part of the preliminary order and file a brief in support of the party's position on any issue in the proceeding with the Director. Otherwise, the preliminary order will become a final order of the agency.

If any party files an exception and/or brief, opposing parties shall have fourteen (14) days to respond to the exception and/or brief. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

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 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.