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DEPT OF WATER RESOURCES
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Attorney for Big Wood Canal Company

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

IN THE MATTER OF APPLICATION FOR)	BRIEF IN OPPOSITION
PERMIT NO. 37-22682 in the)	TO GRANTING APPLICATION
name of DAVID R. TUTHILL, JR.)	
_____)	

BACKGROUND

On or about February 10, 2012 Wood River Mitigation Solutions, LLC filed an application to divert 154 cfs from the Big Wood River in Blaine County for groundwater recharge. From February 10, 2012 until to the date of hearing (June 8 and 9, 2015) several pre-hearing conferences took place. David R. Tuthill, Jr. (hereinafter Dave) the current assignee of the application was present in person or via electronic media or telephone for all pre-hearing conferences. At the pre-hearings Dave was advised by most of the Protestants that the application was, (1) Speculative (2) Had an insufficient water supply (3) Would injure senior water right holders. Those concerns were never addressed by the Applicant in any amended Application nor at the hearing. The hearing commenced on June 8, 2015 and the actual hearing was completed on June 9, 2015. After the hearing, there was a period for public comment which took place between the hours of 5:00 and 7 p.m. on the evening of June 9, 2015.

ARGUMENT

At the beginning of the contested hearing Innovative Mitigation Solutions, LLC filed an assignment of the Application to David R. Tuthill, Jr. Dave then gave testimony in support of his

Application. The testimony is almost verbatim to the written "Applicant's Initial Testimony for Hearing Beginning June 8, 2015".

Dave was not qualified as an expert. Therefore his testimony on page four indicating that he was participating as a expert in water resource engineering in Idaho is incorrect. Dave's testimony must be treated as lay testimony and given the appropriate weight.

In his direct testimony, Dave never testified as to the amount of water available to meet the Application's purpose. Paragraph 2 of Dave's testimony beginning on the top of page 6 is pure guesswork. In fact the testimony never answered any of the requirements of IDAPA Rule 37.03.08.040.05D. There was no testimony on the water requirements of the proposed project. There was no testimony as to the required diversion rate during peak use or average use periods. There was no testimony as to the volume to be diverted per year. There was no testimony as to the period of year water was required. And finally, there was no testimony as to the volume of water that would be consumptively used per year. Instead, Dave relied upon speculation. He testified that, " This ground water recharge application is different...". (Page 6 of Tuthill Testimony). It is different all right, it's so different that it doesn't even meet minimum standards.

When questioned on cross-examination Dave testified he had no idea as to how many days in the last ten years water would have been available for recharge. Finally he guessed maybe ten days in the last ten years water may have been available for recharge. That is nothing but pure speculation.

Dave made many comments and comparisons to the recent recharge applications completed by People's Canal Irrigation Company and Snake River Valley Irrigation District, Water Rights No. 1-10625 and 1-10626. These were provided as attachments to Dave's testimony. It is inappropriate to compare Dave's pending application with the application granted to People's Canal Irrigation Company and Snake River Valley Irrigation District. Those two applications were both stipulated to by Protestant's and were applications submitted by owners of irrigation works. In the current instance Dave has no ownership interest in any irrigation works and there has been no stipulation by all Protestants to allow the recharge. Therefore, the comparisons are not realistic.

Dave testified that an agreement with the Bureau of Land Management was part of the

record. The agreement with the Bureau of Land Management is merely an agreement that Dave will apply to the BLM for appropriate easements, if he plans to use BLM land for a place of use, point of diversion or to convey water. This is another indication that Dave is speculating as to place of use, points of diversion and means of conveyance. That is merely an agreement to comply with federal law. That is no agreement and he has no place to currently discharge the water on BLM land or to take water through BLM property. In his testimony Dave states that other approvals will be obtained throughout the water right development process as required. Again pure speculation. He will attempt to obtain other approvals but they are not currently in the Applicant's possession.

In his limited testimony as for place of use, Dave testified "that Walker Sand and Gravel Company has heavy equipment that can pioneer ditches from the Big Wood River conveying water from the river to its lands, including gravel pits." (Page 8 of Tuthill Testimony). There is nothing in the Walker Sand and Gravel Company Lease Agreement indicating that Walker Sand and Gravel would perform any such pioneering of ditches. Once again, this is pure speculation by the Applicant.

Part three of Dave's testimony, beginning on page 11, discusses his response to a Memorandum prepared by Dr. Charles D. Brockway. While concurring that groundwater recharge will alter the hydrology Dave then states that the aquifer will gain not lose water via groundwater recharge. That testimony is simply not supported by any expert testimony.

Dave further testified that "yes, this water would enable more late season consumptive use to the extent that more water is available." (page 12 of Tuthill Testimony). Here Dave readily admits that there is an additional consumptive use of water but earlier on, and pursuant to the Application, he indicated there was no consumptive use. If there were consumptive use he was not sure how much there was. Again, this is pure speculation.

Eric Powell, an engineer with Brockway Engineering, was qualified as an expert. According to Powell's testimony, the number of days in the last forty years that water would have been available for recharge would have been four. Four days in the last forty years is not sufficient water to merit the granting of an Application. There is simply an insufficient supply of water. IDAPA 37.03.08 sets forth the criteria for determining whether the water supply is not sufficient for the project. "The water supply will be determined to be insufficient for the proposed use if water is not

available for an adequate time interval in quantities sufficient to make the project economically feasible.” (ADAPA 37.03.08.045.01.D). Four days in the last forty years cannot be considered an adequate time interval in quantities sufficient to make the project feasible.

Furthermore, Dave testified at the hearing, and commented at many stages of the pre-hearing that his ultimate purpose is to sell credits to users of groundwater to prevent that groundwater from being curtailed in the event of a call. A call would take place in time of scarcity. Dave’s testimony is that recharge would take place in times of plenty. There was absolutely no testimony from Dave that in times of plenty there would any need for mitigation credits. There was no testimony from Dave that in times of plenty, if recharge were to take place, that the recharge water would be in the aquifer in times of scarcity. Again, pure speculation.

Dave even acknowledged on cross-examination that some of the recharge water would leave the Big Wood Basin and travel into the Little Wood/Silver Creek Basin. The transfer of water from one basin to another basin necessarily caused the transferring basin to lose water.

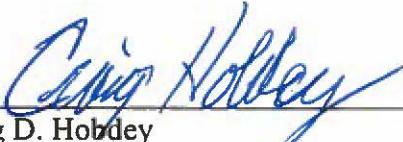
CONCLUSION

Based upon Dave’s testimony, or more succinctly, the lack thereof, the Application should be summarily denied. Dave has failed to meet the qualifications set forth in Idaho Code 42-203(A)(5). In fact, the testimony is that Dave’s Application will reduce the quantity of water available in the Big Wood Basin. The record is clear that the water supply is insufficient for the purpose for which it is sought to be appropriated. Keeping in mind that the purpose is not merely recharge it is ultimately the selling of credits.

It is also clear there will be conflict with the local public interest as the application contemplates transferring water from one basin to another basin.

Finally, the Application must be denied because of its speculative nature. There is speculation in the amount to be diverted annually, the ultimate place of use, the timing of diversions, the amount of water consumptively used, and the method of diversion.

DATED THIS 29 day of June, 2015.



Craig D. Hobdey
Attorney for Big Wood Canal Company

CERTIFICATE OF SERVICE

I hereby certify that on this 29 day of June, 2015, I served a true and correct copy of the foregoing, via U.S. Mail to the following:

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