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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 David R. Tuthill, Jr. (formerly in the name of Innovative Mitigation Solutions, LLC)	**POST-HEARING BRIEF**

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 Post-Hearing Memorandum pursuant to the order and scheduled set forth by the Hearing Officer.

INTRODUCTION

For over 25 years, the Department has considered both the surface and ground water supplies of the Wood River Valley to be fully appropriated and has rejected new consumptive use appropriations. ICL Ex. 8 & 9; BRS Ex. 9. That notwithstanding, the water supplies of the Wood River valley continue to become more and more stressed. Indeed, in early 2015, water

users from both the Big Wood[1] and Little Wood[2] River drainages entered calls for priority administration of their senior surface water rights.

In 2012, Innovative Mitigation Solutions, LLC ("IMS") filed multiple applications for permit seeking to divert surface water for groundwater recharge in the Big Wood River basin. Following concerns raised by the Protestants as to the unauthorized practice of law, IMS assigned Application for Permit No. 37-22862 to David R. Tuthill, Jr. – a managing member of IMS. The stated purpose of the application is to divert water into the Hiawatha Canal and gravel pits owned by Walker Sand and Gravel for the purpose of recharge, which will then be measured, recorded and documented "to use this recharge as part of mitigation plans under current Idaho Water Law." ICL Ex. 1 at 2; *see also* BRS Ex. 13 (letter from Idaho Water Engineering to Wood River Valley water users promoting mitigation credit system relating to proposed recharge under this, and other, applications). In other words, the Applicant hopes that mitigation credits resulting from the recharge may someday be available and may then be sold to unidentified water users in the Wood River Valley to offset depletions from new and existing groundwater diversions.

Idaho law places a burden on an applicant to demonstrate that an application is not filed in bad faith or for speculative purposes. To meet this burden, an Applicant must have "legal access to the property necessary to construct and operate the proposed project." In this case, there are only 2 leases – one for the Hiawatha Canal and one for the gravel pits. Importantly, however, the Applicant has not identified any locations intended to be used for recharge off of the Hiawatha Canal. No agreements have been reached with the landowners of any potential

[1] Information on the Big Wood River Delivery Call is available at this link: http://www.idwr.idaho.gov/News/WaterCalls/Big_Wood_River_Delivery_Call/.
[2] Information on the Little Wood River Delivery Call is available at this link: http://www.idwr.idaho.gov/News/WaterCalls/Little_Wood_River_Delivery_Call/.

recharge location. As for the gravel pits, the Applicant admitted that he has no authority to divert water from the river to the proposed recharge site – indeed, the Applicant testified that he will attempt to acquire permission to divert the water to the gravel pits if a permit is issued and that, if he is unable to acquire such authority, the permit would go away. Tuthill Testimony. This is speculation under the statutes and regulations and demands dismissal of the application.

Further adding to the speculation of this application is the Applicant's confessed intent is to acquire "recharge credits." ICL Ex. 1 at 2; *see also* BRS Ex. 13 (letter from Idaho Water Engineering to Wood River Valley water users promoting mitigation credit system relating to proposed recharge under this, and other, applications). Yet, Idaho does not have a system in place for acquiring recharge credits – and it is unknown whether such a system will ever exist. Furthermore, if such a credit system is ever created, there is no way to know whether the activities contemplated under the Applications will be eligible for credits under that future, undefined program. To assume applicability of such a credit system at this time is pure speculation.

According to the Applicant, all that must be shown here is that the water will be diverted from the river with the intent of putting the water to use as recharge. Further, any discussion of the fate of that water, including the timing of its return to the river, are not relevant to the application process. To this extent, the Applicant provided no evidence – technical or otherwise – that the water diverted under this application would actually accomplish any beneficial use. At the hearing, evidence and testimony was submitted discussing the fate of recharged water – much of which would return to the river in a very short period of time – impacts to the local water table, potential injury to development along the Hiawatha Canal, and impacts to the Local

Public Interest. This testimony was unrefuted. Absent any information supporting the application – technical or otherwise – the Applicant has failed to meet his burden.

Finally, existing moratorium and policy decisions of the Department prohibit new consumptive uses in the Wood River valley without mitigation. At hearing, the Applicant conceded that the use of water under this application will be partially consumptive. Yet, no mitigation has been provided. Rather, the Applicant argues that, so long as this water right diverts in priority – which will only be during high flows – it cannot injure other existing water rights and, therefore, the moratorium does not prevent this new use. In other words, the Applicant asserts that high flows will mitigate any injury associated with the diversion. There is no "high flow" exception to the moratorium order – new consumptive uses must be mitigated. Since the Applicant has failed to provide any mitigation, the Application should be denied.

Make no mistake, through these Applications, the Applicant seeks to hoard an already stressed water resource and increase the consumptive use of groundwater in the Wood River Valley to the detriment of existing water users. *See AFRD #2 v. IDWR*, 143 Idaho 862, 880 (2007). The Applicant then intends to use credits received from the recharge to allow further consumptive uses under new and/or existing water rights. Since the Applicant failed to meet his burden, the law demands that the Hearing Officer deny the Application.

STATEMENT OF FACTS

On June 28, 1991, Keith Higginson, then Director of the Idaho Department of Water Resources, issued a final order *In the Matter of Designating the Big Wood River Ground Water Management Area*. BRS Ex. 9. Through that Order, the Director reaffirmed the Department's longstanding determination that the surface water supplies in the Big Wood River were "fully

appropriated" and "changed" its policy as it relates to groundwater – determining that groundwater resources were also fully appropriated:

> In 1980, the Director of the Department of Water Resources issued a policy memorandum by which he declared that the surface water of the Big Wood River upstream from Magic Reservoir was fully appropriated. Since that date, ***no new permits for consumptive purposes have been issued for the use of the river or any of its tributaries***. The department has continued, however, to issue permits for the use of ground water within the watershed. ***It now appears that this policy must be changed with respect to new consumptive uses of ground water***.

Id. at Management Policy pp.2-3 (emphasis added); *see also* ICL Ex. 8. Accordingly, since 1980 for surface water, and 1991 for groundwater, the Department has considered the water resources in the Wood River Valley to be fully appropriated and has rejected any new consumptive development of the water resources.

On April 30, 1993, the Director entered the *Amended Moratorium Order*, providing that "a moratorium is established on the process and approval of presently pending and new applications for permits to appropriate water from all surface and ground water sources within the Eastern Snake Plain Area." ICL Ex. 9 at 4. The Wood River Valley is included within the moratorium area. *Id.* at Ex. A.

Notwithstanding these determinations, the Applicant seeks to divert a total of 154 cfs[3] for recharge through the Hiawatha Canal and Walker Sand & Gravel pits. The Applicant admits that the use will be consumptive, Tuthill Test., but has provided no mitigation for that new consumptive use.

[3] The original application sought authority to divert up to 63 cfs into the Hiawatha Canal and 91 cfs into the Baseline Canal. The amended application seeks to divert the water previously identified for the Baseline Canal into the Walker Sand and Gravel property.

STANDARD OF REVIEW

The Hearing Officer's review of the Application is guided by Idaho Code § 42-203A(5), which provides:

> 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, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; 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.

ARGUMENT

I. Absent Mitigation, The Application Violates the 1993 *Amended Moratorium Order.*

At hearing, the Applicant conceded that the recharge activities contemplated by the application would increase the consumptive use of water in the valley. Tuthill Test. Issued on April 30, 1993, the *Amended Moratorium Order* prohibits the "processing and approval of presently pending and new applications for permits to appropriate water from all surface and ground water sources within the Easter Snake Plain Area and all tributaries thereto." ICL Ex. 9 at 4. This includes the Wood River Valley. *Id.* at Ex. A. There are only limited exceptions to the Moratorium Order. As relevant here, the order provides:

> 9. The moratorium does not prevent the Director from reviewing for approval on a case-by-case basis an application which otherwise would not be approved under terms of this moratorium if,

> a) Protection and furtherance of the public interest as determined by the Director, requires consideration and approval of the application irrespective of the general drought related moratorium; or
>
> b) The Director determines that the development and use of the water pursuant to an application will have no effect on prior surface and ground water rights because of its location, insignificant consumption of water or mitigation provided by the applicant to offset injury to other rights.

Id. at 5.

The Applicant has not provided any evidence or testimony that the "protection and furtherance of the public interest … ***requires*** consideration and approval of the application." *Id.* (emphasis added). Indeed, when questioned about this exception at hearing, the Applicant did not identify any public interest that "requires" approval of the application and did not contend that any such public interest existed. Tuthill Test. As such, the Hearing Officer has nothing to consider on this exception.

The Order further allows approval of water rights under any of three conditions: (1) "use of the water … will have no effect on prior surface and ground water rights because of its location;" (2) "insignificant consumption of water;" or (3) "mitigation provided by the applicant to offset injury to other rights." ICL Ex. 9 at 5. In this case, the Applicant has not provided any evidence that the use of the water under these applications will have no effect on existing water rights "because of its location." In fact, the Applicant provided no analysis of any impacts to existing water rights relative to the location of the recharge activities. To the contrary. Dr. Powell provided technical analysis of the water availability and determined that there has been no water available for recharge at the location identified in the Application for nearly 20 years. BRS Ex. 1 at 11-14.

Although the Applicant concedes that the recharge activities are consumptive, he made no effort to quantify that consumptive use. Tuthill Test. As such, the Hearing Office has no

ability to consider whether there is "insignificant consumptive of water" and this exception cannot apply.

Finally, the Applicant has not provided any mitigation relative to the new consumptive use of water under this Application. Rather, the Applicant believes that, since the water will be diverted in priority, and only at high flow periods, there will be no impacts to mitigate. Tuthill Test. There is no "high flow" exception to the Moratorium Order. Pabich Test. Rather, the Moratorium Order provides that no new consumptive uses may be permitted unless the new use falls within one of the limited exceptions.

Apparently believing that "high flows = no injury," the Applicant failed to provide any support for the application of any of the exceptions to the Moratorium Order. Since the Moratorium Order does not allow new, unmitigated consumptive uses, and since no mitigation has been provided, the Application should be dismissed.

II. The Hearing Officer Should Dismiss the Applications Because They are Not Made in Good Faith and are Speculative.

The Director may reject any application "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." I.C. § 42-203A(5)(c). Department regulations further discuss this requirement.

An application will be found to have been made in good faith if:

> i. 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***. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry; and

ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and

iii. There are no obvious impediments that prevent the successful completion of the project.

IDAPA 37.03.08.045.01.c (emphasis added). Further,

> Information relative to good faith, delay, or speculative purposes of the applicant, Section 42- 203A(5)(c), Idaho Code, shall be submitted as follows:
>
> i. The applicant shall submit copies of deeds, leases, easements or applications for rights-of-way from federal or state agencies documenting a possessory interest in the lands necessary for all project facilities and the place of use or if such interest can be obtained by eminent domain proceedings the applicant must show that appropriate actions are being taken to obtain the interest. Applicants for hydropower uses shall also submit information required to demonstrate compliance with Sections 42-205 and 42-206, Idaho Code.
>
> ii. The applicant shall submit copies of applications for other needed permits, licenses and approvals, and must keep the department apprised of the status of the applications and any subsequent approvals or denials

IDAPA 37.03.08.040.05.e.

As to the use of private property, the Idaho Supreme Court has clarified that all necessary interests must be secured prior to the filing of the application. *Lemmon v. Hardy*, 95 Idaho 778 (1974). That case involved a dispute over the use of water from Box Canyon Creek in Gooding County. *Id.* at 778. On June 19, 1969, Lemmon filed an application for 400 cfs for fish propagation to be used on land Lemmon intended to lease from Idaho Power Company. *Id.* On October 9, 1969, Hardy filed a similar application for 300 cfs, identifying the same land as the place of use. *Id.* However, Hardy had purchased the land from Idaho Power. *Id.* The Lemmon application was subsequently amended, on November 26, 1969, to change the point of diversion and place of use. *Id.* In a consolidated hearing, the Department of Water Administration (i.e. IDWR) approved both applications, amending the priority date of the Lemmon application from

June 19 1969 to November 26, 1969 – the date of the amended application. Hardy protested the Lemmon application – concluding that it was speculative because "at the time of filing … the applicants, Lemmon and Standal, had no interest in any part of the lands where they proposed to use the water." *Id.* at 779-80. As the Court discussed, the Director wrongly held that Lemmon could acquire an interest in the property after the fact:

> In its conclusions of law, the Director held:
>
> > "Applications for Permit Nos. 36-7066,
> >
> > … Amended 36-7066 … are not void for having been filed without the applicants owning or possessing any rights to the lands where the proposed points of diversion are to be located or the proposed use is to be made. The filing of such applications without such land ownership is not, in and of itself, evidence of speculation and delay nor a demonstration of lack of good faith."
>
> ***The Director's conclusion of law is in error.***

Id. at 880 (emphasis added).

The Court discussed the law regarding the necessary authority needed for an application for permit:

> Furthermore in the case of *Bassett v. Swenson* it was held that,
>
> > "It is quite generally held that a water right initiated by trespass is void. That is to say, one who diverts water and puts it to a beneficial use by aid of a trespass does not, pursuant to such trespass, acquire a water right. Any claim of right thus initiated is void."
>
> The Bassett case involved a trespass upon land privately owned. ***The rule as to trespass and water rights in Idaho appears to be that a water right initiated on the unsurveyed public domain is valid, but a water right initiated by trespass on private property is invalid.***

Id. (emphasis added). Applying this law to the Lemmon application, the Court concluded:

> 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.
> ...
>
> The appellants in this action had shown no means of acquiring the land stated in their original application.
>
> The appellant's filing an application for a water permit with no possessory right in the land designated as the place of use amounted to speculation in and of itself. ...
>
> Lack of a possessory interest in the property designated as the place of use is speculation. ***Persons may not file an application for a water right and then seek a place of use thereof.***

Id. at 7808-81 (emphasis added).

The Hearing Officer's recent decisions regarding the Comstock Canal are instructive in this matter. *Order Denying Petition for Reconsideration of Preliminary Order Granting Motion for Summary Judgment with Respect to Application for Permit No. 37-22852* (June 16, 2015) (the "*Reconsideration Order*"). Previously, the Hearing Officer dismissed that application due to the Applicant's failure to provide any evidence of authority to conduct recharge activities in that canal. *Id.* at 2. The Applicant sought reconsideration and, for the first time, submitted a lease purporting to authorize recharge in that canal. *Id.* That lease, however, only spoke to a portion of the Comstock canal and did not address the diversion works of the canal. *Id.* at 5 (showing aerial photo of Comstock Canal). The Hearing Office denied reconsideration. First, "the Hearing Officer concludes that the Place of Use Lease filed by the Applicant for the first time as an attachment to the Request for Reconsideration is untimely." *Id.* at 4. Furthermore,

> 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."). Therefore, the Hearing Officer will deny the Request for Reconsideration.

Id. at 6 (emphasis added).

A. The Applicant Has Not Provided Proper Authority for Recharge Activities on the Hiawatha Canal.

The only evidence of authority to use water near the Hiawatha Canal is the *Hiawatha Canal Lease*, dated February 1, 2012. ICL Ex. 1 (attached to Amended Application for Permit).[4] The Hiawatha Lease provides that the "agreement is subject to approval at the 2012 annual meeting of the Hiawatha Canal Water Users Association of Lateral or Laterals." ICL Ex. 1 (Hiawatha Lease at 3, ¶ 9.5). On summary judgment, the Protestants asserted that the Applicant had failed to show any evidence that the agreement had been approved by the Hiawatha Water Users and, therefore, the agreement was invalid. The Protestants argued:

> That agreement has been signed by three individuals, one identified as the "Chairman" of the Hiawatha Canal Water Users' Association of Lateral or Laterals. IMS has provided no evidence that the Hiawatha Canal water users provided any authority to enter into such an agreement. The bylaws of the Hiawatha Canal Water Users' Association provide the board with the authority to "manage the property, business and affairs of the Association." *Arrington Aff.* Ex. F at 5. However, the use of the Hiawatha canal to divert and deliver "recharge" water including at times outside of the normal irrigation season, cannot be considered the "property, business and affairs of the Association." Any such agreements that fall outside of the normal business of the

[4] At hearing the Applicant provided a document entitled "First Amendment to Canal Improvements Lease," dated June 7, 2015. Hailey Ex. 4. According to the testimony of the applicant, this amendment purposes to amend the "Hiawatha Canal Lease." Tuthill Test. However, there is no evidence that the Hiawatha Water Users ever approved any amendment to the original lease. Absent such approval, as was required for the original lease, this amendment is not valid.

> Association must be brought to the water users for approval by a vote of all members. ***By failing to bring this matter to the members, there is no enforceable agreement to use the Hiawatha Canal.*** Consequently, the Hearing Officer should dismiss the Application as to the Hiawatha Canal.

Protestants Memo at 8 (emphasis added).

Notwithstanding the requirement in the lease, the repeated requests for any agreements with landowners and the arguments on summary judgment, the Applicant failed to provide any evidence that the water users approved of the Hiawatha lease. Indeed, it was not until the *second day of hearing* that any information was provided. *See* Applicant Ex. 3. This submission is untimely and should be rejected by the Hearing Officer. *See Reconsideration Order*. As with the untimely Comstock Lease, the Protestants have long requested information demonstrating that there was a valid possessory interest in the lands identified for the recharge activities on the Hiawatha Canal. The Hiawatha Lease specifically provides that it was not valid until authorized by the Hiawatha water users. *Supra*. Any authorization from the Hiawatha Water Users "should have been filed with Application" 37-22682. *Reconsideration Order* at 4. As such, the "Hearing Officer should not consider" Applicant's Exhibit 3 and the Application should be dismissed. *Id.*

Even if the lease is valid, however, the Applicant has failed to provide sufficient evidence of any authority to conduct recharge activities along the Hiawatha. At hearing, Dr. Tuthill testified that he intended to divert water out of the Hiawatha canal and recharge at certain, unidentified locations along the canal and within the 40-acre parcels identified on the Place of Use of the Application. Tuthill Test.; *see also* ICL Ex. 1 (Amended application identifying place of use); BRS Ex. 2 (aerial photo of identified place of use along Hiawatha canal);[5] Applicant Ex. 1 at 8 ("The application identifies many 40 acre tracts where out-of-canal uses can be made with ground water recharge water"). Yet, the Applicant failed to provide any evidence of authority

[5] At hearing, the Applicant testified that the place of use identified on the aerial photo (BRS Ex. 2) is an accurate representation of the place of use along the Hiawatha Canal. Tuthill Test.

from any private landowners authorizing the recharge activities on their property – either within the Hiawatha Canal or at other unidentified off-canal locations. Indeed, Applicant testified that he has not even identified any off-canal recharge locations. Tuthill Test.; *see also* Applicant Ex. 1 at 7 ("Other Easements will be obtained throughout the water right development process as required"); BRS Exs. 6 & 7 (landowners along the Hiawatha Canal). The Hiawatha Canal cannot unilaterally increase the burden on the underlying properties. *Abbott v. Nampa School Dist. No. 131*, 119 Idaho 544, 548 (1991) ("It is well established in this jurisdiction that an easement is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner. ... [T]he general rule concerning easements is that the right of an easement holder may not be enlarged and may not encompass more than is necessary to fulfill the easement.""") An "easement does not include the right to enlarge the use to the injury of the servient land." *Id.* Any recharge on private property will require the express permission of the landowner. Absent such authority, the Application is speculative and should be dismissed. *Lemmon, supra.*

Further, the City of Hailey provided testimony that it had not been contacted to authorize any use of the canal within City limits or divert water from the canal onto City property for recharge. *See also* Hailey Exs 1 & 3 (showing portions of the property underlying the Hiawatha Canal are owned by the City). Absent any agreement, the Applicant does not "have legal access to the property necessary to construct and operate the proposed project." IDAPA 37.03.08.045.01.c.[6] Therefore, the Application should be denied.

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[6] Allowing additional water to run through a canal will increase the burden to the underlying properties and servient landowners and will result in additional risks to the underlying landowners – including icing problems, breaches and/or overrunning of the banks. These concerns are particularly acute in the Hiawatha Canal, which does not return water to the Big Wood River. Any extra water will either run over the banks or seep into the ground if it is not diverted out of the canal under existing water rights. Erick Powell provided a report on behalf of the Protestants. BRS Ex. 1. In his report, he explained that recharge along the Hiawatha canal can result in significant rise in the water table around the City and other developments along the canal. *Id.* at 19-22. Based on the analysis, in some

B. The Applicant Has Not Provided Proper Authority for Recharge Activities at the Walker Gravel Pits.

The sole authority provided by the Applicant relating to the gravel pits is a "Place of Use Lease Between Walker Sand & Gravel, Landlord (Lessor) and Innovative Mitigation Solutions, LLC, Lessee (Tennant)." ICL Ex. 1 (attached to the amended application). That document evidences a lease of the "Place of use" to the Applicant "for the purpose of conducting ground water recharge operations." *Id.* (Lease Page 2). The lease includes the following additional provisions:

1. "Nothing in this lease shall be deemed to require either party to perform any labor or furnish any materials for any construction, rebuilding, alteration or repair of the Place of Use or any part thereof," *Id.* at ¶ 5.2;

2. "Tenant shall not make any alterations in or additions to the Place of Use," *Id.* at ¶ 6.1;

3. "Landlord shall not be required to make any alterations in or additions to the Place of Use by reason of this Lease or Tenant's Use," *id.* at ¶ 6.2.

As conceded by the Applicant at hearing, the Lease does not provide any authority to construct or operate a point of diversion along the Big Wood River to convey water to the gravel pits. Tuthill Test. Nor does the lease provide any easement to convey water across neighboring properties to the gravel pits. *Id.*; *see also* BRS Ex. 5 (Aerial photo depicting place of use and points of diversion). Indeed, as the Place of Use lease makes clear, no party is obligated to "perform any labor or furnish any materials for any construction." *Supra.*

Notwithstanding the lack of any agreement relating to the points of diversion relative to the gravel pits, the Applicant testified that "Lessor is responsible for construction of works and operation of the system." Applicant Ex. 1 at 8. When questioned about this at hearing, the Applicant conceded that there was no agreement requiring any "construction of works and

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instances the water table will rise above the surface. *Id.* The Applicant did not provide any evidence to refute these findings. Nor did the application provide any discussion as to how he intends to mitigate for these potential affects.

operation of the system" with any "Lessor" – whether that "Lessor" be Walker Sand and Gravel or other landowners on whose property the Points of Diversion are located. BRS Ex. 5 (aerial photo showing points of diversion) & Ex. 7 (property owners). In fact, Dr. Tuthill admitted that if he is unable to acquire a right to construct a point of diversion or deliver water across a neighbor's property, the water will not be appropriated. Tuthill Test.

The law is clear. At the time of application, the Applicant must demonstrate that he has "legal access to the property necessary to construct and operate the proposed project." IDAPA 37.03.08.045.01.c. This was confirmed by the *Lemmon* Court, which held that a possessory interest must be demonstrated in both the point of diversion and place of use. *Lemmon*, 95 Idaho at 780-81. Furthermore, the Hearing Officer dismissed the Comstock Canal application, in part, because the Applicant failed to provide any evidence of "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" that application was filed. *Reconsideration Order* at 6. Without any authority to construct a point of diversion or convey water to the place of use, the Applicant cannot demonstrate that he has "legal access to the property necessary to construct and operate the proposed project." IDAPA 37.03.08.045.01.c.

At the hearing, the Applicant testified that he had not yet applied for, or acquired any right to cross BLM land, as would be required to convey water to the gravel pits. Tuthill Test. The Applicant proposed a condition for the water right, stating, in part, that "During the development period of this permit, the permit holder agrees to obtain all land use authorizations that are required" by the BLM. Applicant Ex. 2 (Proposed Condition 13). This is contrary to the regulations, which mandate that the "in the instance of a project diverting water from or conveying water across land in state or federal ownership," the Applicant must show that he "has

filed all applications for a right-of-way." IDAPA 37.03.08.045.01.c. Having failed to acquire the appropriate authorizations, the Application should be dismissed.

C. The Applicant Will not Construct any "Project" for the Development of the Water Rights.

In a recent decision, the Director addressed the obligation for the Applicant to construct a "project" for the development of a water right. There, certain Ground Water Districts sought to divert water through an existing diversion system for use as mitigation. In denying the application, the Director held:

> The District's Application was filed in bad faith because, for a majority of the quantity of water sought to be appropriated, there is a threshold impediment to "completion of the project." To perfect a project for a water right, there inherently must be completion of works for beneficial use. The testimony of Lynn Carlquist quoted above demonstrates the Districts' intent at the time of filing the Districts' Application was to simply obtain the Permit and assign it to Rangen to perfect by utilizing the water in the Rangen facility the way Rangen has done for the last fifty years. The initial filing by the Districts did not contemplate any construction of works and completion of any project. Furthermore, even at this point, with respect to at least 8.0 cfs of the 12 cfs the Districts propose for appropriation, Rangen will continue to divert through its existing Bridge Diversion. There is no "project" and consequently cannot be a "completion of the project" for the 8.0 cfs, because the 8.0 cfs will be diverted through the existing Bridge Diversion without any construction of a project or any completion of works for beneficial use. The Districts' Application fails the bad faith test based on the threshold question of whether there will be a project, and whether there will be any construction of works for perfection of beneficial use.

Final Order Denying Application No. 36-16976, at 14, In the name of North Snake Ground Water Dist., *et al.* (Feb. 6, 2015).

Similar analysis confirms that the Applications filed in this matter were filed in bad faith. Indeed, as to the Hiawatha Canal, the Applicant intends only to recharge water that is being diverted into the existing canals through their existing headgates. ICL Ex. 1 (Hiawatha lease attached). There is no intent to construct new diversion works or to enhance the existing

diversion works – only to claim water diverted into the canal for recharge. Rather, the diversion works were previously constructed by the owners of the canals. The owners of the canal have not applied for these water rights.

As to the gravel pits, the Applicant asserts he will not construct any diversion works. Rather, the "lessor is responsible for construction of works and operation of the system." Applicant Ex. 1 at 8. Absent the construction of any project, the Applications should be dismissed.

D. There is No Mechanism in the State of Idaho for Recharge Credits.

The essence of the good faith, delay and speculation analysis is that the applicant must have the ability and authority to conduct the intended activities. *See* IDAPA 37.03.08.045.01.c (requiring "legal access to the property" and "other permits needed to construct and operate the project"); IDAPA 37.03.08.040.05.e (Applicant must submit "copies of deeds, leases, easements or applications for rights of way" and "copies of applications for other needed permits, licenses and approvals"); *Lemmon, supra* ("a water right initiated by trespass on private property is invalid … Persons may not file an application for a water right and then seek a place of use thereof."). In reviewing whether an applicant has the ability and authority to conduct the intended activities, the intent of the Application must be considered:

> The criteria requiring the Director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes ***requires an analysis of the intentions of the application with respect to the filing and diligent pursuit of application requirements***. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project (IDAPA 37.03.08.045.01.c).

Final Order Denying Application No. 36-16976, at 14, In the name of North Snake Ground Water Dist., *et al.* (Feb. 6, 2015) ("36-16976 Order") (emphasis added).

In this case, the Applicant admits that the true intent of this application is to acquire mitigation credits that may then be sold to water users to mitigate for new and existing water users. ICL Ex. 1 (amended application states that applicant "will model this recharge and will seek to use this recharge as part of mitigation plans"); *see also* BRS Ex. 13 (letter to Wood River water users promoting the mitigation credit scheme); ICL Ex. 1 (Hiawatha lease and Walker Lease both provide that landlord will be paid in "credits" for the use of their property).

Presently, Idaho law does not authority the development and use of credits for recharge activities as contemplated by the Applicant. If such a system is ever created, there is no way to know whether or not the activities proposed by the Applicant under this Application would even qualify for such recharge credits. In essence, the Applicant seeks to acquire a water right – hoping that he will be able to make money, someday, selling mitigation credits. The *Merriam-Webster Dictionary* defines "speculation" as "ideas or guesses about something that is not known" and an "activity in which someone buys and sells things (such as stocks or pieces of property) in the hope of making a large profit but with the risk of a large loss."[7] Hoarding the Wood River Valley's already stressed water resources, in the hopes that, perhaps, someday a mitigation credit system may be available is the very definition of speculation.

Since there is no credit system, and there is no certainty that the action proposed by the Applicant would even qualify for credits under a future credit system, the Application is not filed in good faith, is speculative, and should be dismissed.

III. The Application should be dismissed for Failure to Provide Any Technical Information Supporting the Proposed Use.

The only experts reports submitted in these proceedings were prepared by Erick Powell, BRS Ex. 1, and Wendy Pabich, ICL Ex. 3. These reports discuss various technical questions and

[7] http://www.merriam-webster.com/dictionary/speculation (viewed June 19, 2015).

concerns about the intended recharge under the Application. The Applicant, however, did not respond to any of the questions or concerns identified in the expert reports. Rather, he testified that such technical analysis is not appropriate at the application stage and that any modeling or other technical analysis is appropriate only during the mitigation credit process. Tuthill Test. Indeed, the Applicant failed to identify any expert witness(es) or provide any expert report.

The Applicant is wrong. For example, the Department's Water Appropriation Regulations require the following information:

> d. Information relative to sufficiency of water supply, Section 42-203A(5)(b), Idaho Code, shall be submitted as follows:
>
> > i. Information shall be submitted on the water requirements of the proposed project, including, but not limited to, the ***required diversion rate during the peak use period*** and the ***average use period***, the ***volume to be diverted per year***, the ***period of year that water is required***, and the ***volume of water that will be consumptively used per year***.
> >
> > ii. Information shall be submitted on the ***quantity of water available from the source applied for***, including, but not limited to, information concerning ***flow rates*** for surface water sources available during periods of peak and ***average project water demand***, information concerning the properties of the aquifers that water is to be taken from for groundwater sources, and information on other sources of supply that may be used to supplement the applied for water source.

IDAPA 37.03.08.040.05 (emphasis added). The Application should be dismissed because of the Applicant's failure to provide any information to support the use of water for recharge.

A. The Only Information Provided by Applicant Does not Show that Water is Available for Diversion for Recharge.

The Applicant refused to provide any technical information. Rather, the Applicant only provided 3 plots showing river gauge measurements at (1) Big Wood River in Hailey (1916-2012); (2) Big Wood River at Magic Dam; and (3) Malad River near Gooding (1917-2012). Application Ex. 2 (attachment). The Applicant apparently relies on these plots to show that there

is water available for recharge. However, the Applicant admitted that these gauge measurements do not factor in any water demand or use downstream of the Hailey Gauge or whether Magic Reservoir was full. Tuthill Test.

In his report, Dr. Powell did analyze the gauge measurements and included water rights below the Hailey Gauge. BRS Ex. 1 at 11-14. Dr. Powell concluded that the plots "contained no analysis of the [stream gauge] data and is inadequate to illustrate water supply availability, as it ignores the demand on the resource." *Id.* at 11-12. Further, "Magic Reservoir and downstream senior water rights must be filed before additional water would be available." *Id.* at 12.

Dr. Powell "performed an analysis of daily supply and demand of the Big Wood River by analyzing historical data." *Id.*; *see also id.* at 12 (describing analysis process). All water rights on the Big Wood River below the Hailey Gauge, including the Big Wood Canal Company's natural flow and storage rights, were considered. *Id.* at Apps. C & D. A number of assumptions were built into the analysis – including a limitation that "if Magic Reservoir is not full, then the available water for recharge is zero because all available water is allotted to fill Magic Reservoir." *Id.* at 13. Based on this analysis, Dr. Powell concluded that "only 3 years out of the past 31 years" had a sufficient water supply to allow recharge. *Id.* at 13-14. Importantly, no water has been available for recharge since 1997 – nearly 20 years. *Id.* Furthermore, any water that was available was only available during the irrigation season. *Id.* This analysis confirms "the determination that IDWR made in 1980 that the Big Wood River is fully appropriated." *Id.* at 14; BRS Ex. 9; ICL Ex. 8.

The Applicant did not provide technical evidence, testimony or any other information to dispute Dr. Powell's conclusions. Rather, he only pointed the Hearing Office to two permits for recharge on the Upper Snake River that were recently approved by the Director. Application Ex.

2 (attachments). According to the Applicant, the Director did not conduct any water availability analysis prior to granting the permits. Tuthill Test. "In order to be consistent," the Applicant testified, the Department must also approve this Application. This argument fails. The Upper Snake River recharge applications were subject to a stipulated resolution of protests. They did not go to hearing. As such, arguments about the sufficiency of the water supply were not expressly addressed by the parties. In this case, analysis has been provided that demonstrates there is not a sufficient water supply for the intended use. This information is undisputed.[8]

Furthermore, the Applicant provided no information about the analysis that may or may not have been conducted by the Department in approving the Upper Snake applications. As stated, the record in this case clearly demonstrates a lack of sufficient water supply. As such, the applications should be dismissed.

B. Additional Undisputed Technical Information Provided by the Parties Demands Dismissal of the Application.

In addition to the water availability analysis, Dr. Powell provided the following additional analysis that was *not disputed by the applicant*:[9]

> 1. Any seepage in the Hiawatha Canal is already accounted for through 5 water right decrees for "mitigation" in the Hiawatha Canal totaling 8.54 cfs. BRS Ex. 1 at 6; BRS Ex. 8 (decrees). Department analysis has concluded that the Hiawatha Canal losses approximately 7.55 cfs over the distance of the canal. BRS Ex. 1 at 19 & App. H. There is no capacity in the Canal for any additional seepage/recharge. *Id.*; Applicant Ex. 2 (Proposed Condition No. 20 – "Canal seepage will be considered to be ground water recharge only when the canals are not conveying water for irrigation or other beneficial uses"). Considering that the available analysis shows recharge water has only been available during the irrigation season, BRS Ex. 1 at 13-14, there is no ability to recharge in or along the Hiawatha Canal. *See also Supra* Part II.A (lack of any authority to divert water into off-canal recharge location is speculation).

[8] The Applicant did provide some pictures showing high flows at the spillway of Magic Dam on April 17, 2006. Applicant Ex. 2 (attachment). However, those photos do not refute the analysis provided by Dr. Powell and do not speak to available water supply at the Hailey Gauge for recharge.

[9] Indeed, at the hearing, the Applicant admitted that no expert testimony or analysis was provided to support the Application.

2. The groundwater "divide" will cause recharge water to be removed from the Big Wood drainage to the Little Wood/Silver Creek drainage – thus causing a consumptive depletion of water to the Big Wood drainage. BRS Ex. 1 at 9.

3. Much of the recharged water will return to the river in a very short period of time. *Id.* at 10. For much of the gravel pit location, 50% of the recharged water will return to the river within 24 hours. *Id.* at 10 & Figure 5 (aerial photo with overlay of 50% in 24 hours recharge bands). Such recharge will provide no benefit to the river or aquifer.

4. To the extent that recharge is used to mitigate for new consumptive uses, those new consumptive uses will result in an increase of consumptive use in the valley, contrary to the 1980 policy decision and 1993 moratorium order. *Id.* at 11.

5. Recharge along the Hiawatha Canal will result in a potentially dramatic increase of water levels in the City of Hailey and other developments along the canal. *Id.* at 20-22. In some cases, "the result would be a significant increase in the local groundwater table, possibly to the ground surface and excess water would increase return flow to the Big Wood River." *Id.* at 20-21. The increased water table "may cause inundation of residential basements." *Id.* at 21. "Other potential adverse effects would be foundation drainage issues and septic drainfield failures." *Id.*

In addition, Dr. Wendy Pabich testified that the recharge activities will result in increased consumptive use of water, contrary to the moratorium order. ICL Ex. 3. Although the Applicant agreed that there will be an increase in consumptive use, Tuthill Test., no analysis was provided to quantify that consumptive use. *See* IDAPA 37.03.08.040.04.d.i ("Information relative to sufficiency of water supply ... shall be submitted as follows ... Information shall be submitted on the water requirements of the proposed project, including ... the volume of water that will be consumptively used per year").

The analysis by Dr. Powell and Dr. Pabich demonstrate that recharge activities involve more than merely getting the ground wet. Analysis must be provided to demonstrate that there is sufficient water and that the proposed activities can actually be accomplished. This analysis demonstrates that serious technical issues remain unaddressed by the Applicant. As such, the application should be dismissed.

IV. The Application Conflicts with the Local Public Interest.

The Director may reject an application where it is determined that it "will conflict with the local public interest as defined in section 42-202B." I.C. § 42-203A(5)(e). Idaho Code further defines the "local public interest" as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." I.C. § 42-202B(3). In this case, approval of the Applications would conflict with the local public interest.

A. Mitigation Rights Already Exist in the Hiawatha Canal.

As discussed above, there are already mitigation water rights accounting for the seepage in the Hiawatha Canal. *Supra.* In other words, seepage that the Applicant seeks to claims as "recharge" is already accounted for under existing water rights. It would be against the local public interest to allow the Applicant to develop a separate water right based on seepage that is already accounted for under existing water rights. *C.f.* I.C. § 42-234(5) ("However, such incidental recharge may not be used as the basis for claim of a separate or expanded water right").

B. The Use of Recharge Credits to Mitigate for New Consumptive Uses will Violate Department Policies.

As discussed above, Idaho presently has no system for the development and marketing of credits associated with recharge activities. It is against the local public interest to approve a water right that contemplates activities that are not authorized under Idaho Law.

Even if a credit system were established, however, these water rights would still be contrary to public interest. Since 1980 (surface water) and 1991 (ground water), the Department has maintained a policy and practice of preventing any unmitigated new water rights for consumptive uses. BRS Ex. 9; ICL Exs. 8 & 9. As the Department stated:

> In 1980, the Director of the Department of Water Resources issued a policy memorandum by which he declared that the surface water of the Big Wood River upstream from Magic Reservoir was fully appropriated. Since that date, no new permits for consumptive purposes have been issued for the use of the river or any of its tributaries. The department has continued, however, to issue permits for the use of ground water within the watershed. It now appears that this policy must be changed with respect to new consumptive uses of ground water.

BRS Ex. 9 at Ex. A at Management Policy pp.2-3.

Any attempt to use credits to offset the depletive effects of new diversions will violate this policy. Indeed, in such an instance, the use of water recharged pursuant to these Applications would become *fully consumptive*. The authorization of new consumptive uses is against the local public interest.

C. The Applicant Seeks to Hoard Water Resources Even Though There is No Demonstration that the Anticipated Recharge will Benefit the Aquifer or that Aquifer Credits Will Ever Be Available.

The Applicant seeks to hoard water supplies in the hopes that, perhaps, someday a credit system will be developed that will allow the Applicant to receive mitigation credits for its recharge activities and that that system will actually apply to the activities contemplated under the Application. Such speculative stockpiling of the State's water resources is contrary to the local public interest and existing case law. *See AFRD #2*, 143 Idaho at 880.

The Department has developed policies regarding the relationship between surface water and groundwater. For transfers seeking to change the source of a water right – from groundwater to surface water and vice versa – the Department's Transfer Processing Memorandum No. 24, at 20, provides the following:

> An application for transfer proposing such a change in source is not approvable unless the ground water and surface water sources have a direct and immediate hydraulic connection (at least 50 percent depletion in original source from depletion at proposed point of diversion in one day). The existing point of diversion and proposed point of diversion must be proximate such that

> diversion and use of water from the proposed point of diversion would have substantially the same effect on the hydraulically-connected source as diversion and use of water from the original point of diversion.

Similarly, under the *Water Supply Bank Interim Ground Water Rental Policy for the Wood River Valley*, the Idaho Water Resource Board has determined that "due to the ***direct and immediate connection between surface and ground waters within this two hundred foot wide river zone***, all ground water pumping within the river zone will have a direct and ***immediate impact on surface water resources***."[10]

As discussed above, Dr. Powell's analysis determined that much of the water recharged that the gravel pits will return to the river in a very short period of time – much within 24 hours. BRS Ex. 1 at 10 & Figure 5. In such instances, there would be very little, if any, benefit to the aquifer. It is against the public interest to authorize recharge activities that will not benefit the aquifer. In this case, all that the Application will accomplish is a shifting of surface water. Such actions conflict with the local public interest.

It should be noted further, that the Applicant is not a water user. He is only a private individual seeking to hoard the Wood River Valley's water resources for the purpose of profiting off of a potential, future and uncertain recharge credit system. A permit should not be granted for this purpose.

V. The Applications Should be Dismissed Because They Conflict with the Conservation of Water Resources.

Finally, the Department may reject any applications that are found to be "contrary to the conservation of water resources within the state of Idaho." I.C. § 42-203A(5)(f). For the following reasons, discussed in more detail above, the Applications fail to meet this standard and should be dismissed:

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10 https://www.idwr.idaho.gov/files/water_supply_bank/20150129_WRV_Interim_Ground_Water_Rental_Policy.pdf

1. There is no mechanism in Idaho authorizing the development and/or marketing of credits for recharge activities. *Supra* Part II.D. It is contrary to the conservation of water resource to allow the Applicant to hoard water resources in hopes that such a program may be developed.

2. There are existing water rights for seepage loss in the Hiawatha Canal. *Supra*. Parts III.B & IV.A. It is contrary to the conservation of water resources to allow further diversions seeking to recharge in that same canal.

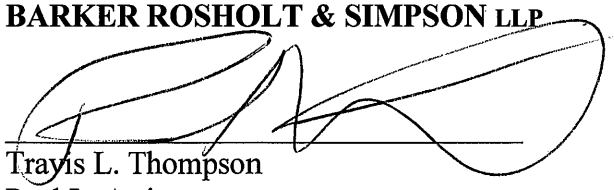
3. The intended use of recharge credits to mitigate for new consumptive uses will effectively make these Applications fully consumptive water rights in violation of long-standing Department policies and practices. *Supra* Parts III.B & IV.B.

CONCLUSIONS

The Applicant has failed to meet his burden as identified in Idaho statues and regulations. Since the Applicant failed to secure proper authority to conduct recharge activities, failed to show the Application was filed in good faith and not for speculative purposes, and failed to show the Application is consistent with the local public interest, the Hearing Officer should dismiss the Application.

DATED this 30th day of June, 2015.

BARKER ROSHOLT & SIMPSON LLP



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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 2015, I served a true and correct copy of the foregoing, via email to the following:

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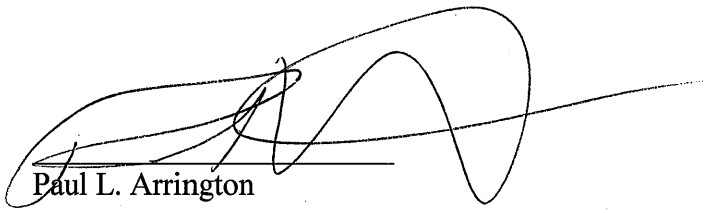

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