

RECEIVED

JUL 01 2015

DEPARTMENT OF
WATER RESOURCES

Marie Callaway Kellner, ISB No. 8470
Idaho Conservation League
PO Box 844
Boise, ID 83701
Phone: 208.345.6933 ext. 32
Fax: 208.344.0344
mkellner@idahoconservation.org

Bryan Hurlbutt, ISB No. 8501
Advocates for the West
PO Box 1612
Boise, ID 83701
Phone: 208.342.7024 ext. 206
Fax: 208.342.8286
bhurlbutt@advocateswest.org

Attorneys for Protestant *Idaho Conservation League*

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

CASE NO. 37-22682

IN THE MATTER OF)
APPLICATION FOR PERMIT)
NO. 37-22682, IN THE)
NAME OF INNOVATIVE)
MITIGATION SOLUTIONS LLC)

**IDAHO CONSERVATION
LEAGUE'S POST-HEARING
BRIEF**

Protestant Idaho Conservation League (“ICL”) respectfully submits its post-hearing brief in this matter.

INTRODUCTION

At issue is whether the Idaho Department of Water Resources (“Department”), as guided by Idaho Code 42-203A, should approve this application to appropriate 154 cfs from the Big Wood River as proposed by Innovative Mitigation Solutions, LLC (“IMS”) and its principal, Dr. David R. Tuthill, Jr. (“applicant”). The burden of proof in this matter is divided into two parts: the burden of coming forward with evidence to present a

prima facie case and the ultimate burden of persuasion. IDAPA 37.03.08.040.04.a. The applicant bears both aspects of the burden of proof, except that protestants share the burden to bring forth any factor as to the local public interest of which they are reasonably expected to be more knowledgeable. IDAPA 37.03.08.040.04.b.ii.

The applicant has fallen far short of meeting his burden of proof. The lack of evidence presented by the applicant, in the face of the overwhelming evidence put forth by the many protestants—which included local governments, landowners, ranches, homeowner associations, the Big Wood Canal Company, and ICL—weighs against the approval of this application. Additionally, nearly every local citizen who testified at the Public Meeting asked the Department to deny this application for myriad reasons appropriately considered within the local public interest.

Despite this onslaught of evidence, the applicant failed to provide statutorily required information ensuring that this applied for use of water will not reduce the quantity of water under existing water rights, regarding the sufficiency of the water supply, demonstrating that the application is not speculative, demonstrating requisite financial resources, or affirmatively demonstrating that this use of water would be in the local public interest.

Moreover, a Moratorium has been in place since 1993 on all new consumptive water rights in this basin. The applicant acknowledged the consumptive nature of this application and yet failed to make a showing for why this application should be granted an exception to the Moratorium.

For all of these reasons, ICL respectfully requests the Department to deny this application.

ARGUMENT

I. Standard of Review

Idaho Code § 42-203A(5) instructs the Department to analyze whether an applied for use of water:

(a) ... 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...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, or (e) that it will conflict with the local public interest as defined in section 42-202B, or (f) that it is contrary to the 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.

The Department's Water Appropriation Rules, found at IDAPA 37.03.08, go on to provide the criteria for determining whether an application to appropriate water meets the requirements of I.C. § 42-203A(5)(a)–(g).

As stated previously, the applicant has the burden of coming forward with evidence showing that an application is in compliance with each of the these criteria. The applicant and protestants share the burden of coming forward with evidence regarding whether an application is in the local public interest. The applicant bears the ultimate burden of persuasion as to each of the criteria.

The applicant failed to meet his burdens with respect to each criteria. His unsupported assertions that during some years, there might be some available water that he can use in some undisclosed manner at some yet-to-be determined location to accomplish an unknown amount of aquifer recharge at some unclear financial cost is not enough to show that this application meets the criteria. And the overwhelming evidence

presented by ICL at the hearing, and by fourteen local public witnesses¹—thirteen who opposed the application and one that expressed neither support nor opposition—shows that the application is not in the local public interest. The applicant’s failure to meet his burden on any of these criteria requires the Department to deny the application.

Additionally, the application should be denied because it runs afoul of the 1993 Moratorium on new consumptive uses on the Eastern Snake River Plain.

II. The Application Violates the Moratorium on New Consumptive Uses

In 1993, the Department issued a moratorium on new consumptive uses of water on the Eastern Snake River Plain and its tributaries. *See ICL Exhibit 9, Amended Moratorium Order* (“moratorium”). The moratorium applies to this application as the Big Wood River is a tributary to the Eastern Snake River Plain, and even the applicant admitted that the application is consumptive.

The moratorium provides a discretionary exception for proposed new consumptive uses if (a) protection and furtherance of the public interest requires consideration and approval of the application, or (b) it is determined that the application will have no effect on prior water rights because of its location, its insignificant consumption of water, or if mitigation provided by the applicant offsets any injury to other rights. *See ICL Exhibit 9 at 5.*

Before this application was advertised, the Department asked the applicant why this application should be considered in light of the moratorium. *See ICL Exhibit 2: February 8, 2012 Letter to Wood River Mitigation Solutions from IDWR.* The applicant

¹ At the beginning of the June 9 Public Meeting, the Hearing Officer noted that 19 people had contacted him to testify as Public Witnesses. As he called their names, three people were not present. While this would indicate that 16 people testified, ICL only noted 14 Public Witnesses who actually testified. Therefore, ICL cites to 14 Public Witnesses throughout this brief.

responded in an August 31, 2013 letter that became part of the Amended Application. *See* ICL Exhibit 1: *Amended Application for Permit No. 37-22682 in the name of Innovative Mitigation Solutions, LLC*, at 20. He responded that he believed he could “demonstrate at the hearing to the satisfaction of the Director that the application is in the public interest and will not injure other water rights, thus making the application approvable.” *Id.* Despite this assertion, the applicant did not address the moratorium in his case-in-chief at the hearing and failed to otherwise present evidence to support a finding that either exception applies.

A. The Application Is for the Consumptive Use of Water

Dr. Wendy Pabich, ICL’s expert witness, opined that it was impossible to precisely evaluate the application’s injury to existing water rights and the extent of its consumptive nature without a hydrologic model and in light of the applicant’s failure to provide much information regarding the location, volume and timing of water delivery, and the location and configuration of recharge sites.² Despite this, she was still able to identify multiple consumptive aspects of the application. *See* ICL Exhibit 3: *Expert Report of Wendy Pabich, Ph.D* (“ICL Report”). Specifically, Dr. Pabich found that the application would cause evaporative losses, would increase the overall consumptive use in the basin, and would be consumptive to the source.

The applicant presented no response or evidence refuting the ICL Report. In fact, at the hearing, the applicant stated that he agreed with Dr. Pabich’s analysis that this application is for a consumptive use of water.

² Dr. Pabich’s opinion on the need for a hydrologic model and need for information relative to the timing, location and amount of recharge is shared by fellow expert witness, Dr. Eric Powell. Additionally, IDFG’s expert report in this matter noted that this information is needed before it can fully analyze the impacts of this application.

1. Evaporation

Dr. Pabich's report explains that diverting water from the shaded, deeper course of the river into exposed, shallower canals and ditches will increase evaporation. *See* ICL Report at 2. The amount of evaporation that would occur if this application is granted is unknown. This amount would depend on basic information including: where, when, and how water will be diverted; in what quantities it will be diverted; and where diverted water will go. However, the application and supporting materials submitted by the applicant fail to answer these basic questions. And at the hearing, it became increasingly apparent that the applicant does not know these basic facts, nor has he fully thought them through.

For example, when pressed on the issue of residency time in the Walker Sand & Gravel pits, the applicant suggested using bentonite to slow down residency in the pits. Dr. Pabich testified, and the applicant agreed, that the use of bentonite would effectively turn the pits into ponds and significantly increase the evaporative nature of the application. ICL underscores this for two reasons: 1) it demonstrates the consumptive nature of the application, and 2) it is an example of the ways in which this application is too unsubstantiated and theoretical to deserve approval by the Department.

2. Extending the Season Instead of Providing Long-term Recharge

Dr. Pabich's report and testimony also illuminate the ways in which this application would increase overall consumptive use in the basin:

The Big Wood system displays a high degree of connectivity between the river and aquifer, relatively short residency times in the aquifer, and a number of gaining stretches of the river....Water recharged under this proposal is likely to migrate back to the river in relatively short periods of time, and may act to extend the tail of the irrigation season. In an over-

allocated system, any groundwater returning to the river will be diverted by downstream users and used consumptively.

ICL Report at 3. While a hydrologic model is needed to fully understand the timing of recharged water return flows, it is known that aquifer residency time in the lower valley is short.³ Should the water return in the same irrigation season as the recharge occurs, it will lengthen the irrigation season and be consumptively used by downstream users.

Thus, overall consumption would be increased. While this might be welcomed by those downstream users, their extended season does not comport with the applicant's intention to sell recharge mitigation credits in exchange for recharging the aquifer, as the use by both downstream and upstream users of the same water means that the recharge mitigation credits the applicant intends to sell are merely water accounting tricks and not *meaningful* mitigation. This is antithetical to the Moratorium and fosters further overconsumption instead of conserving water resources.

3. *Consumptive to the Source*

This application is what the Department terms "consumptive to the source," meaning the water will be impounded for some time in the aquifer and is either not returned to the original source or is returned at a different location. *See* ICL Report at 4. A groundwater model is needed to determine what portion of recharged water will cross the Wood River Valley groundwater divide and flow into Silver Creek, constituting water not returned to the original source, not to mention constituting an unauthorized inter-basin transfer. *Id.* Similarly, a groundwater model is needed to determine the timing and

³ Mean hydraulic conductivity of the unconfined aquifer ranges from 69-100 feet/day and that of the confined aquifer ranges 42-47 feet/day. This is consistent with the hydraulic conductivity of gravels and is considered fast moving. Bartolino, J.R. and Adkins, C.B., (2012), Hydrogeologic framework of the Wood River Valley aquifer system, south-central Idaho: U.S. Geologic Survey Scientific Investigations Report 2012-5053. 46 p. (cited by Dr. Pabich in the ICL Report).

location of return flows to the Big Wood River, all of which will be down gradient—and different—from the point of diversion.

Because this application is consumptive to the source, Department guidance requires this application to provide both a depletion analysis for its consumptive nature and a mitigation plan to address the additional consumptive use. *See* ICL Exhibit 14: *IDWR Application Processing Memo No. 72*. The application included neither, and the applicant did not address either at the hearing.

B. The Application Should Be Denied Under the Moratorium

The Department's authority to grant an exception to the moratorium is discretionary, meaning the Department is not required to consider and grant such exceptions. In this case, the Department should decline to consider granting an exception to the moratorium and should deny the application, particularly since the applicant has consistently failed to provide sufficient information for the Department to evaluate the application, including information necessary to evaluate the timing and amount of consumption that is likely to occur if the application is approved.

Even if the Department does choose to consider granting an exception to the moratorium, neither exception applies here, and the Department must deny the application. In order to take advantage of the moratorium's discretionary exception, the applicant must show either that the application is required in furtherance of the public interest *or* that it will have no effect on existing water rights for one of three reasons. *See* ICL Exhibit 9 at 5. These are strictly limited exceptions, and the applicant has failed to show that either applies here.

As to the *required for the public interest* exception, while the applicant relied on the State Water Plan's reference to aquifer recharge as evidence that recharge proposals

are generally in Idaho's public interest, he did not address why his specific proposal is in the public interest of this basin. Nor did he demonstrate that this recharge proposal will actually "further water conservation and increase water supplies available for beneficial use in a way that does not injure existing water rights," as the State Water Plan contemplates. *See* ICL Exhibit 10: *State Water Plan: Aquifer Recharge*. Moreover, while the applicant makes general claims that the application is in the public interest, he has not asserted that granting this application is somehow required. And ICL and thirteen local residents all provided evidence at the hearing as to why this application is not in the public interest.

As to the "no effect on existing water rights" exception, the applicant failed to demonstrate that this diversion of water will have no effect on prior water rights because of its location, its insignificant consumption of water, or because it plans to mitigate its use in efforts to offset any injury to other rights. The applicant's consistent refrain is that water would only be diverted under this application if it is in priority, so it would not injure existing water rights. However, the applicant failed to provide basic information concerning when and how he would divert water and where that water will end up, all of which is necessary to understand effects to the Big Wood basin and its water users. There is no basis to find that there will be no effect to existing water users in the face of such uncertainty.

Thus, neither exception applies, and the application should be denied for violating the moratorium.

III. The Applicant Failed to Meet His Burdens to Come Forward With Evidence and Prove the Application Satisfies the Criteria in I.C. § 42-203A

A. The Application is not in the Local Public Interest

The Department has an affirmative duty to assess and protect the local public interest when considering water right applications. *See Shoakal v. Dunn*, 109 Idaho 330, 337 (1985); *see also* I.C. § 42-203A(5)(e) and IDAPA 37.03.08.040.05.g. The local public interest includes 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). The local public interest is to be read broadly, and may include any locally important factor impacted by a proposed appropriation. *Shoakal*, 109 Idaho at 338–39. Commonly considered interests include, but are not limited to, fish and wildlife habitat, aesthetics, aquatic life, recreation and water quality.

In 2003, the legislature explained that the Department’s role in determining the local public interest is to “ensure the greatest possible benefit from [the public waters] for the public.” *See* ICL Exhibit 6: *House Bill 284 Statement of Purpose*. In that vein, the Department should consider the effects of a proposed use “on the availability of water for alternative uses of water that might be made within a reasonable time.” *Id.*

In 2012, the Department denied a water right application in the Bear River Basin in large part because the proposal conflicted with the local public interest. *See Preliminary Order Denying Application for Permit, in the Matter of Application for Permit No. 13-17697 in the name of Twin Lakes Canal Co.* In that case, a canal company sought to build a dam on a stretch of river that provides significant recreational opportunities, as well as scenic values and important fish and wildlife habitat. Notably, in its local public interest evaluation, the Department found that while the benefits to TLCC

shareholders could be significant, the benefits to local area residents who were not shareholders would be minimal. *Id.* at ¶ 48.

The Department's local public interest assessment should also include the project design. *Shoakal*, 109 Idaho at 339. While "blueprint quality" plans are not required at the outset of seeking a permit, "in all cases, the plans should be sufficient to generally apprise the public of the efficacy of the proposed use in the planned facility and of its potential impact." *Id.* at 340.

As an initial matter, this application does not meet the *Shoakal* project design standard. Of particular note on this point is the testimony of the City of Hailey and of the Blaine County Commission. Dr. Tuthill admitted that he does not know where, when or how much water he will be able to divert. Nor does he know where along either the Hiawatha Canal or the Walker Sand & Gravel property he intends to recharge the water, meaning specific places of use are unknown. Dr. Tuthill's lack of due diligence means the City of Hailey doesn't know where it should prepare for public works infrastructure impacts nor which of its residents should prepare for flooding due to this application's proposed use of water. City of Hailey cross-examination of Dr. Tuthill; *See generally* testimony of Mariel Platt. Not even knocking on the door of "blueprint quality" plans, this proposal can hardly be said to "generally apprise" Hailey residents and City managers of any impacts, positive or negative.

Similarly, the Blaine County Commission Comment describes the County's concerns regarding this application. *See* Jun 4, 2015 Comment from Blaine County Commission Comment re: Applications by Innovative Mitigation Solutions, llc, [sic] for Water Rights [sic] 37-22682 ("BCC Comment"). The Commission addresses the

application's unknowns throughout the BCC Comment, summing up many of its concerns about lack of information in the final paragraph:

We think MAR [managed aquifer recharge] will need to be accomplished by other means. In light of the critical, community-wide significance of a stable, clean water supply and of aquifer recharge, these other means will entail change, creativity, sacrifice, funding, cooperative effort, transparency, public engagement and will need to be seen locally as holding the potential for public benefits, at any scale. Unfortunately, regrettably, this particular effort at MAR does not appear to meet these public interest criteria.

If the public felt this application included information sufficient to generally apprise it of the efficacy of this proposal, such that this proposal would be seen as a productive tool in the box of ideas that will help Blaine County residents address their water use and supply problems they, then the BCC Comment would be the place to find that assurance. Instead, the BCC Comment asks the Department to deny the application.

The application should, therefore, be denied for failing the *Shoakal* local public interest design standard alone. Additionally, as set forth below, ICL brought forth an abundance of evidence showing this application is not in the local public interest. This is only confirmed by the concerns raised by Blaine County and the City of Hailey, as well as the thirteen public witnesses who turned out to express their serious concerns about this application.

1. This Application Will Harm the Idaho Conservation League and Its Supporters in the Wood River Valley

Founded in 1973, the Idaho Conservation League is Idaho's oldest and largest state-based conservation organization. ICL strives to protect and maintain clean water, clean air, healthy rivers, wild places, and Idaho's extraordinary quality of life. *See* Testimony of Justin Hayes. Five ICL Board members live in the affected area, and ICL maintains an office in Ketchum with two full-time employees. *Id.* As of the hearing,

2,443 ICL supporters live in the area directly affected by this proposed use of water, including members in Sun Valley, Ketchum, Hailey, Bellevue, Picabo, Gooding and Shoshone. *Id.*

ICL is concerned that this application will negatively impact fishery and wildlife habitat, the floodplain, as well as injure the Big Wood River minimum stream flows. *Id.* ICL is also concerned that this application furthers the status quo of over-allocation instead of equitably helping the community to address the ecological, financial and cultural stresses of over-allocation. *Id.*

The application manipulates the natural flow regime of the river as opposed to allowing the river to act as a river to the extent it can considering the stresses already placed on it. As was underscored by Commissioner Schoen at the hearing and by several public witnesses, ICL fears that this application's manipulation of the river will have negative repercussions for the floodplain, for the plants and animals that rely on healthy riparian areas, and for the fishery itself. *See* Testimony of Justin Hayes.

Despite the protective conditions to the water right set forth in the IDFG Report, much is unknown regarding the full extent of the negative impacts the application would have on fisheries, wildlife habitat, and riparian areas over the entire length of the Big Wood River and on Silver Creek. It is important to note that each condition IDFG agreed to is aimed at addressing impacts from the applicant's diversion of water. These conditions do nothing to address adverse impacts caused by the return of diverted water to the Big Wood or other waters, nor to address adverse impacts caused by the applicant's mitigation scheme, such as diminished flows above the points of diversion caused by selling upstream mitigation credits. In fact, the applicant stated at the hearing that he has

already lined up upstream customers to do just that, and the applicant admitted that under his credit scheme it is possible these users could continue to use water even if doing so would cause water levels to dip below the minimum streamflows set on the Big Wood.

Furthermore, while IDFG is apparently willing to tolerate this application, the IDFG Report does not endorse the application. Instead, it states it “neither supports nor opposes” managed aquifer recharge projects in the Big Wood River. *See* ICL Exhibit 5: *Rationale for Protest of Permit Applications 37-22682 & 37-22852* (“the IDFG Report”) at 1.

Notably, the IDFG Report repeatedly acknowledges that much is unknown about the impacts of the application. For example, the IDFG Report states that without a groundwater model or specific information on timing, location, and volume of recharge, it does not and cannot evaluate the return flow impacts. *See* ICL Exhibit 5 at 2, 15, 17, 18; Testimony of Dr. Walt Poole. Moreover, as far as realistic implementation of the IDFG proposed application conditions, the IDFG Report specifically states it “did not undertake a thorough analysis of availability of water for diversion under the proposed rights, according to supply and water-rights priority.” ICL Exhibit 5 at 14. This means the conditions the IDFG Report poses as viable ways to mitigate the harms caused by the diversion of water under this application were created in a “scenario [that] ignores senior water rights that would need to be filled ahead of the proposed recharge rights.” *Id.*

Winter is a particularly stressful time for stream-dwelling fish in northern latitudes like Idaho. ICL Exhibit 5 at 9. By seeking water year round, this application proposes to lower flows in the Big Wood River and potentially in Silver Creek, during the time of year they need them most: winter. *Id.* While this would be troubling in any

setting, its particularly troubling because these waterways are “blue ribbon fisheries.” ICL Exhibit 5 at 4; Testimony of Dr. Walt Poole.

Additionally, the Big Wood River supports extensive cottonwood forested riparian wetlands that provide invaluable habitat for many bird and mammal species. ICL Exhibit 5 at 5. These riparian forests stabilize riverbanks and shade the river, providing necessary cooling for numerous fish species. *Id.* Bald eagles and the Yellow-billed Cuckoo (recently named a federally threatened species) nest in the impacted stretch of the Big Wood River. *Id.* at 6. The flow regime manipulation proposed by this application will take away the river’s ability to flood naturally, causing damage to this critical riparian habitat.

Any impacts this application would have on natural values inherent to the fishery and habitat will also negatively harm the world-class fishing, hunting, and other recreation in the Big Wood River Valley and the local tourism industry that depends on them. This industry brings tens of thousands of anglers, and tens of millions of dollars, to the local economy each year. ICL Exhibit 5 at 8.

Despite these significant risks and negative impacts to the local public interest, the applicant has provided hardly any evidence to show why this application would benefit the local public. The applicant hangs his hat on the idea that recharge is a beneficial use and that under this application, it seems that some recharge might occur—even if only a tiny amount and for a very short period of time. This failure to document any real local benefits in the face of the many downsides to diverting more water from the Big Wood is insufficient to show that the application is in the local public interest.

2. *This Application conflicts with the Blaine County Local Public Interest Water Policy*

Recognizing the increasing stresses placed on local water resources, the Blaine County Board of Commissioners adopted the Blaine County Local Public Interest Water Policy (“LPIWP”) in 1998. *See* ICL Exhibit 4 at 1; Testimony of Mr. Len Harlig. The LPIWP is intended to provide the Department with a policy statement reflecting the local public interest in Blaine County when the Department makes decisions about water right permits, diversions, and transfers within Blaine County. *Id.* at 2; Testimony of Mr. Len Harlig. The LPIWP was created through a public process involving input from farmers, ranchers, fishing guides, the tourism industry, other property and business owners, local government, and other water right holders to name a few. *Id.*; Testimony of Mr. Len Harlig.

At the hearing, Mr. Len Harlig, one of the Blaine County Commissioners who enacted the LPIWP, testified that he had read and understood the application at issue in this proceeding. He went on to state that he believed the application was in conflict with the LPIWP. Mr. Harlig acknowledged that aquifer recharge could be a useful water management tool in Blaine County, but that this application intends to conduct aquifer recharge not in order to replenish a declining aquifer, but to further the status quo of overuse. Upon cross-examination by Dr. Tuthill, Mr. Harlig also stated that because it intends to benefit a few at the expense of the many and the river, this application is not the kind of recharge project that the LPIWP contemplates as being beneficial in Blaine County.

Mr. Harlig’s opinion of the application was in addition to the opinion of the current Blaine County Commission, which unequivocally opposes this application for

myriad reasons, many of which fall under the local public interest. *See* BCC Comment. The BCC Comment directs the Department to the LPIWP as a means of underscoring the “intrinsic natural value” of creeks, rivers and riparian areas in Blaine County, as well as their “extraordinary recreational and economic value.” *Id.* at 2.

The applicant has failed to show that his application complies with the Blaine County LPIWP. Therefore, the Department should deny the application.

3. Local Public Witnesses Overwhelmingly Oppose This Application

The large turn out and passionate, thoughtful opposition expressed by diverse local community members at the hearing’s June 9 Public Meeting further confirms that this application is not in the local public interest and must be denied by the Department.

Public witnesses including local ranchers, farmers, fishing guides, recreational business owners, property owners on the Big Wood and Silver Creek, water right holders, the local land trust, and groundwater district representatives all asked the Hearing Officer to deny this application.⁴ They expressed a desire to see the Big Wood River managed as close to its natural flow regime as possible in efforts to sustain a healthy fishery, healthy riparian areas, and property values, all of which are in keeping with the community’s ethic and supportive of local recreation businesses and the tourism industry.⁵ They expressed a desire to see groundwater recharge projects provide a public benefit as opposed to the private benefit that would inure only to the applicant and a select few

⁴ The only Public Witness that did not request a denial of this application was the Idaho Water Resources Board. The IWRB neither supports nor opposes the application, but instead drew the Hearing Officer’s attention to the Department’s duty to protect the IWRB’s minimum stream flows, the potential for this application to cross the 10,000 acre-foot threshold that invokes the IWRB’s further involvement, and the State Water Plan.

⁵ Testimony of Terry Ring, Greg Loomis, Tom Page, Linn Kincannon, John French.

wealthy water right holders.⁶ They expressed concern over the Department's willingness to consider such an ill-supported application, namely the apparent lack of willingness to wait for a hydrologic model that could explain the timing and impacts of return flows on the waterways and fishery; particular concerns were expressed for the Silver Creek fishery.⁷ They also articulated concern that local people and water right holders who are attempting to address water allocation problems by forming their own groundwater districts could be pre-empted by an entity which otherwise does not hold water rights in the basin.⁸

Not a single Public Witness spoke in support of the application.

B. The Application Would Reduce the Quantity of Water Under Existing Water Rights

New water rights should not reduce the quantity of water under existing water rights. I.C. § 42-203A(5)(a). An applicant "shall" submit information "concerning any design, construction, or operation techniques which will be employed to eliminate or reduce the impact on other water rights." IDAPA 37.03.08.040.05.c.iii. In this matter, while the applicant agrees not to divert water out of priority, Dr. Tuthill admitted on cross-examination that the recharge credit scheme associated with his application would enable upstream credit holders to cause water levels to fall below the flow levels established by the minimum stream flow water rights on the Big Wood River.

⁶ Testimony of Keri York/Wood River Land Trust, Pepin Corso-Harris, Tom Page, Linn Kincannon, John French, Stuart Taylor, John Stevenson, Gerry Morrison, Jerry Bashaw, Brett Stevenson.

⁷ Testimony of Terry Ring, Greg Loomis, Linn Kincannon, Gerry Morrison, Nate Rogers.

⁸ Testimony of Pepin Corso-Harris, Tom Page, Linn Kincannon, John French, Stuart Taylor, John Stevenson, Gerry Morrison, Jerry Bashaw, Brett Stevenson.

The Big Wood River enjoys three minimum stream flow water rights (“MSFs”) running from the Sawtooth National Recreation Area boundary north of Ketchum down to Bellevue. *See* ICL Exhibit 11, *Amended Memorandum Decision and Order: Application for Permit No. 37-7919*; ICL Exhibit 12, *Order Adopting Proposed Memorandum Decision and Order: Application for Permit Nos. 37-8258 & 37-8307*.⁹ These rights total 189 cfs and have priority dates in 1981 (37-7919), 1986 (37-8258) and 1987 (37-8307). *Id.* The flow amounts were determined to be necessary to maintain fish and wildlife habitat, water quality, aesthetics and recreational uses. ICL Exhibit 11 at 8; ICL Exhibit 12 at 2. These reasons read like a litany of ICL’s greatest concerns.

Importantly, in their establishing Orders, the flow amounts were repeatedly noted to be the minimum flow required to maintain the benefits they confer, not the optimal or most desirable flow that could be utilized for those purposes. ICL Exhibit 11 at 5, 6 & 8; ICL Exhibit 12 at 6-7; Testimony of Dr. Walt Poole.

Also important, the MSF water rights were established to be enjoyed by members of the public, as opposed to being limited to private use or enjoyment. ICL Exhibit 11 at 5; ICL Exhibit 12 at 6. Like the majority of Idaho water rights, the Big Wood River’s three MSF water rights are administered in priority and are protected from injury from junior water rights.

While proposed conditions would prevent the applicant from diverting water when the diversion itself would injure the MSF, nothing in the application would prevent

⁹ ICL Exhibit 12 is comprised of three documents that together established water rights 37-8258 & 37-8307: an Order Adopting Proposed Memorandum Decision and Order, an Order Issuing Proposed Memorandum Decision, and a Proposed Memorandum Decision and Order. For purposes of this brief, all page number citations to ICL Exhibit 12 start with the third document, the eight-page Proposed Memorandum Decision and Order.

the applicant from violating the MSF through his plans to sell recharge mitigation credits. At the hearing, Dr. Tuthill admitted that he plans to sell recharge mitigation credits upriver from the diversions at issue here. In fact, Dr. Tuthill stated that he already has upstream clients. As was explained by Dr. Pabich at the hearing, the nature of the aquifer does not lend itself to mounding such that downstream recharge would allow for *actual* mitigation upstream of the recharge sites.

In the absence of the applicant's recharge mitigation credit scheme, when water supplies are low, an upriver water user may be required to stop diverting or pumping water so that water instead flows through the river system to downstream, senior water users. Under Dr. Tuthill's proposal, the upriver water users would be able to continue diverting or pumping water because of recharge mitigation credits generated at downstream sites. As a result, downstream senior users might be satisfied thanks to the recharged water, but less water would actually flow down the Big Wood River.

At the hearing, Dr. Tuthill acknowledged that the above scenario could occur under this application, even if it caused water levels to fall below the MSF. He did not deny that upriver recharge credits could cause water levels to fall below the MSF; rather, he claims there would be no actual injury to the MSF water rights, so long as the upriver water users who bought his recharge mitigation credits were senior to the minimum stream flows. He is incorrect. "But for" the recharge mitigation credits, which would be generated by a 2012 priority date water right (junior to all three minimum stream flow water rights), the purchasers of his credits would have to stop diverting or pumping and would let it flow through the minimum stream flow reach and down to senior users.

Thus, the application would reduce the quantity of water under existing water rights in violation of I.C. § 42-203A(5)(a) and should be denied by the Department. However, if it is issued, the water right should be conditioned to specifically protect the MSFs from injury by recharge mitigation credits.

Dr. Tuthill's proposal is analogous to what the Department decided was unacceptable in *In the Matter of Application for Transfer No. 73969 in the name of Robert Rohe* ("Rohe"). In *Rohe*, a water right holder senior to the MSF sought to change a point of diversion through an upstream transfer. If allowed unmitigated, the move could have injured the MSF. Even though the water right holder had senior rights to the MSF, the Department found that this new upstream transfer could injure the junior MSF; therefore, the transfer was conditioned to ensure protection of the MSF.

While the matter at hand is a new application and not a transfer, the same logic applies: even though an upstream water user may have senior rights to the Big Wood MSF, the new mitigation scheme cannot allow the upstream water user to injure the MSF. Therefore, if the Department issues this water right, it must be conditioned to ensure that the three MSF water rights are protected from injury by implementation of this junior recharge scheme. Not only will this protect against injury, it may also save untold number of mitigation plan protests from being filed and argued.

C. The Applicant Has Failed to Satisfy the Remaining Criteria in I.C. § 42-204A(5)

1. *Speculative*

Applications should be made in good faith and not for delay or speculative purposes. I.C. § 42-203A(5)(c). In efforts to support the good faith, non-speculative nature of an application, an 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 or use.” IDAPA 37.03.08.040.05.e.i (emphasis added). This criteria is intended to prevent water grabs and requires an applicant to have some level of certainty before bringing an application forth for approval. Contrary to this intent, the application at hand is rife with unknowns and uncertainties.

For example, both points of diversion and various possible places of use involve BLM property. Yet, Dr. Tuthill has yet to file an application(s) for a right-of-way across BLM land. While he has an agreement with the BLM that he must obtain requisite approvals, he has not yet applied for the rights-of-way as is required by the rules. It is worth noting that BLM would have to ensure compliance with the National Environmental Policy Act, the Endangered Species Act, the Clean Water Act, and other laws which may necessitate a thorough and lengthy review process before BLM could make a decision.

For this reason, the Department should deny the application.

2. Insufficient Financial Resources

Applicants must have sufficient financial resources to complete the work involved with their applications. I.C. § 42-203A(5)(d). Information relative to financial resources shall be submitted as follows:

- i. the applicant shall submit a current financial statement certified to show the accuracy of the information contained therein, or a financial commitment letter along with the financial statement of the lender or other evidence to show that it is reasonably probable that financing will be available to appropriate the water and apply to the beneficial use proposed.
- ii. The applicant shall submit plans and specifications along with estimated construction costs for the project works. The plans shall be definite enough to allow for determination of project impacts and implications. IDAPA 37.03.08.040.05.f.i-ii.

After being compelled by the Department to provide a financial statement, Dr. Tuthill provided information relative to his personal finances, including a personal savings account and PERSI statement. It is unclear whether the financial information provided by Dr. Tuthill is sufficient because he did not also submit plans, specifications and estimated construction costs for the project works.

The following is a list of just some of the unknown costs associated with this application: liability insurance related to Hiawatha Canal use; purchase, installation and operation & maintenance in perpetuity of a streamflow gauge; design, creation, installation, and operation & maintenance in perpetuity of fish screens; measuring, modeling and accounting of recharged water.¹⁰

Without providing plans, specifications and estimated construction costs, as well as ongoing operational costs, the applicant utterly failed to meet the requisite showing of sufficient financial resources, and the application should be denied.

3. Insufficient Water Supply

Applicants must show that the water supply itself is sufficient for the purpose for which it is sought to be appropriated. I.C. § 42-203A(5)(b). Information relative to sufficiency of supply shall be submitted as follows:

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;**

¹⁰ See ICL Exhibit 1 at 10, where the applicant states that “this application is complex” and indicates the agricultural realm will need his expertise in order to measure, model and account for water under this application.

Information shall be submitted on the quantity of water available from the source applied for including, but not not limited to, information concerning flow rates for surface water sources available during periods of peak and average 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.d.i-ii (emphasis added).

The applicant did not provide a sufficiency of the water supply analysis. Instead he referred to several U.S. Geologic Survey streamflow gauge hydrographs showing historic flows on the Big Wood River and a picture of Magic Reservoir spilling water one day in the mid-2000s. Notably, the hydrographs neglected to show the constraints that would limit the volume and timing of water available to fulfill his application, including all downstream water rights plus all of the constraints enumerated in the proposed conditions on the water right:

- Condition 1: All Minimum stream flow rights
- Condition 2: Not to exceed 9,999 af/year
- Condition 4: Bankfull discharge requirement that of 1,709 cfs at Hailey Bridge
- Condition 5: For period of March 1- April 14, only when discharge at Hailey minus diversions downstream to Magic Reservoir exceed 125 cfs
- Condition 6: Flows in the Big Wood River cannot be less than 125 cfs

Among other important missing information is an analysis of the volume of water that will be consumptively used per year.

Relevant here, and as was stated in Section III-A-1 *supra*, the IDFG Report did not include a sufficiency of water supply analysis. Instead, its analysis provided mitigating conditions under the assumption that water would be available.

The only sufficiency of water supply analysis provided in this matter was that of Dr. Eric Powell. He found that the supply would rarely if ever be met based upon Big Wood River flows of the last thirty years. If the water right is granted, Dr. Powell's report

shows that it is likely that years would pass before the applicant would be able to exercise the water right, possibly many years.

The applicant thus failed to show a sufficient water supply for the applied for purpose, and the application should be denied.

4. Conservation of water resources

Applications for the use of water in Idaho should not be contrary to the conservation of water resources. I.C. § 203A(5)(f). In this case, the applicant has filed a partially consumptive use application in a basin closed to new consumptive uses, contrary to the conservation of resources. Moreover, the ultimate intended use of the application is a recharge mitigation credit scheme that will further increase the consumptive use of water in this overallocated basin, contrary to the conservation of water resources. No legal framework exists for such a scheme,¹¹ and it is contrary to the conservation of resources for the applicant to acquire this water right in hopes that such a framework might one day be established.

The applicant failed to show this is in the conservation of water resources, and the application should be denied.

CONCLUSION

For the foregoing reasons, the Department should deny this application.

/s/
Marie Callaway Kellner
Bryan Hurlbutt

Attorneys for ICL

¹¹ Upon cross-examination by ICL, Dr. Tuthill was asked to identify a section of Idaho Code or the IDAPA that allowed and explained the recharge mitigation credit scheme he intends to conduct via this application. He was unable to identify either. This is not because he was unsure in the moment, but because neither exists.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 1, 2015, I served a true copy of the Idaho Conservation League's Post-Hearing Brief **via email** to the list provided by the Idaho Department of Water Resources, and I served an additional copy to the Hearing Officer via U.S. Mail.

DATED: July 1, 2015

_____/s/_____
Marie Callaway Kellner
Attorney for *Idaho Conservation League*