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DEPARTMENT OF  
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR ) APPLICANT'S REBUTTAL BRIEF  
PERMIT NO. 37-22682 IN THE NAME OF )  
DAVID R. TUTHILL, JR. )

David R. Tuthill, Jr., the Applicant, provides this rebuttal brief. This brief is intended to be in addition to, and not superseding, the Applicant's Post-Hearing Brief.

The Applicant has read the four post-hearing briefs submitted by the Protestants. After considering the issues raised by the Protestants, the Applicant continues to assess this application to be approvable with conditions. Approval of this application is consistent with direction of the Idaho Constitution, Idaho statutes, rules and case law.

The bottom line for this application can be summarized as follows:

- Ground water recharge (managed aquifer recharge) is good for Idaho and would be good for the Wood River basin.
- Unappropriated water is available on occasion to satisfy the request in this application.
- This application was made in good faith and will be implemented in accordance with the issuance of a permit with appropriate conditions of approval.
- The local public interest is in favor of ground water recharge.
- Ground water recharge has beneficial impacts on fish, wildlife and plants, by storing water in the aquifer during times of plenty to be leaked back into the river during times of scarcity.
- This is not the final water right for ground water recharge in the basin. It is not exclusive of others, including those yet-to-be-applied-for applications in the names of the newly forming ground water districts. Approval of this application would be an encouragement for other ground water recharge projects in this basin and around the state. Denial would have a chilling effect and would set a very high bar for other ground water recharge applications.
- All of the concerns identified by the Protestants can be addressed via the addition of appropriate conditions to the permit.

Many of the elements of the Protestants' post-hearing briefs are similar to one another. Thus, this rebuttal brief is organized by selecting the salient issues addressed by the Protestants' post-hearing briefs in the order provided by Rule 45 in the Water Appropriation Rules.

## 1. EVALUATION CRITERIA (RULE 45).

01. *Criteria for Evaluating All Applications to Appropriate Water.* The Director will use the following criteria in evaluating whether an application to appropriate unappropriated water or trust water should be approved, denied, approved for a smaller amount of water or approved with conditions.

a. *Criteria for determining whether the proposed use will reduce the quantity of water under existing water rights. A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:*

i. *The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.*

ii. *The holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right. Protection of existing groundwater rights are subject to reasonable pumping level provisions of Section 42-226, Idaho Code; or*

iii. *The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense.*

iv. *An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director.*

v. *The provisions of Subsection 045.01.a.v. are not intended to require compensation or mitigation for loss of flow to holders of subordinated hydropower rights or those from which trust water is reallocated.*

The Protestants provide considerable analysis regarding how this application might result in injury to upstream minimum stream flow rights as a result of using ground water recharge credits for a mitigation plan as provided by the rules. Potential impacts of such plans are beyond the scope of this application and must be evaluated under a separate process.

The Protestants state: *"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."*

In the case of ground water recharge, IDWR has never required a depletion analysis for its consumptive nature or a mitigation plan, unless the applicant requests approval for some type of credit from the ground water recharge. In this case the Applicant does not seek credit for recharge water. Any request for credit will be part of a separate process. Credit for mitigation as a result of ground water recharge (defined in the rules for Conjunctive Management of Surface and Ground Water as "artificial ground water recharge") is contemplated in the rules as contributing to mitigation plans, but these plans have their own administrative processes. Thus, the concept of consumption of this newly appropriated water is not something that has to be quantified in issuing the permit. With respect to other applications for permit for ground water recharge

around the state, if a depletion analysis for consumptive nature and a mitigation plan to address additional consumptive use are required of applicants for this type of application, the result would be a chilling effect that is totally contrary to legislative guidance.

The Protestants state: *The use of recharge credits to mitigate for new consumptive uses will violate department policies.*

As stated elsewhere in this brief, the Conjunctive Management Rules contemplate the use of ground water recharge in mitigation plans. The Idaho Ground Water Appropriators, Inc. already have an approved plan which recognizes the use of “mitigation credits” created via ground water recharge. Such use of water, under an approved mitigation plan, does not violate IDWR policies. Nevertheless, this application does not seek such approvals. This application merely seeks an opportunity to appropriate the unappropriated water of the State of Idaho, when in priority, and apply the water to the beneficial use of ground water recharge.

*b. Criteria for determining whether the water supply is insufficient for the proposed use. The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible (direct benefits to applicant must exceed direct costs to applicant), unless there are noneconomic factors that justify application approval. In assessing such noneconomic factors, the Director will also consider the impact on other water rights if the project is abandoned during construction or after completion, the impact on public resource values, and the cost to local, state and federal governments of such an abandonment.*

The Protestants state the Applicant “*never testified as to the amount of water available to meet the Application's purpose.*”

This is a fundamental issue regarding this application. The purpose of this application is ground water recharge. There is no minimum or maximum amount or frequency of availability required for this purpose. As with other water rights approved for this purpose around the state, the rate of flow for this use is typically the rate of flow that can be accommodated by the diversion system prior to the use of water for irrigation.

Water for this type of use does not have to be available every year. Nor does it have to be available every two years or every three. When asked about how often a supplemental supply would need to be used to be considered to be beneficial, former Director of IDWR Keith Higginson opined that even one year out of a hundred would constitute a beneficial use. (This statement is in the writings of IDWR and the source document is not immediately available to the Applicant.) In this sense, ground water recharge is similar to a supplemental source of water.

The fact that unappropriated water is sometimes available in the Big Wood River is undisputed. Dr. Powell identified some times when such water is available. In addition to the times he found, there is also the day on April 17, 2006, when the spillway outfall over Magic Dam was shown in IDWR Safety of Dam records to have been 5,526 cfs. This day was not included in Dr. Powell's list of days when water was available, leading to the conclusion that his analysis missed days when water would have been available for a new appropriation. Thus, water is available for appropriation from the Big Wood River on some days, but the number of days is unimportant for a water right application of this type, where water is proposed to be

recharged to the aquifer, in priority as designated by the Watermaster for whom such a determination is his duty.

The records of the department and the USGS provide ample evidence of high flow availability, and these records were properly made part of the record by the Hearing Officer. The Applicant relies on this information to support the application.

*The Protestants state: 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. Department analysis has concluded that the Hiawatha Canal losses [sic] approximately 7.55 cfs over the distance of the canal. There is no capacity in the Canal for any additional seepage/recharge.*

The technique used in Idaho for establishing a rate of flow for a ground water recharge in an existing canal is to use approximately the full flow of the canal, to enable recharge of large flows prior to the irrigation season.

*The Protestants state: 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, 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).*

Water was available for recharge on April 17, 2006. In some years mid-April this could be earlier than the canal is open for irrigation. Condition No. 20 is a standard condition that has been used for other ground water recharge rights in Idaho.

*The protestants state: 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. That notwithstanding, the water supplies of the Wood River valley continue to become more and more stressed. Indeed, in early 2015, waterusers from both the Big Wood and Little Wood River drainages entered calls for priority administration of their senior surface water rights.*

This is an excellent statement of need for this application. The Applicant agrees with this premise (although in fact water rights for consumptive uses within municipalities and subdivisions have been approved throughout the past 25 years.) This shortage of water is what gives rise to the need to recharge ground water supplies to the extent they can be diverted when in priority, such as on April 17, 2006. Experience throughout the western United States has shown that recharging ground water during times of plenty provides additional water during times of scarcity.

*The Protestants state: 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.*

Use of the term ‘hoard’ on one hand correctly implies that some water is available for appropriation, but on the other hand incorrectly implies an intent to do something inappropriate once water has been recharged. The purpose of this application is merely to appropriate water for the beneficial use of ground water recharge. If some mitigation (as contemplated by the rules) is to be conducted with the recharged water, then such mitigation determination would be reviewed under a separate proceeding.

c. *Criteria for determining whether the application is made in good faith. The criteria requiring that 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 applicant 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. Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence. Speculation does not prevent an applicant from subsequently selling the developed project for a profit or from making a profit from the use of the water. 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.*

The Protestants state: *It is inappropriate to compare [the Applicant's] pending application with the application granted to People's Canal Irrigation Company and Snake River Valley Irrigation District. Those two applications were both stipulated to by Protestant's [sic] and were applications submitted by owners of irrigation works. In the current instance [the Applicant] has no ownership interest in any irrigation works and there has been no stipulation by all Protestants to allow the recharge. Therefore, the comparisons are not realistic.*

There is no requirement to be the owner of a property to file a water right application. Idaho law provides an opportunity for a lease to be adequate possessory interest. Contrary to the Protestant's statement, the comparison between this application and those of Peoples Canal & Irrigation Company (1-10625) and Snake River Valley Irrigation District (1-10626) is directly on-target and germane. While the protests against 1-10625 and 1-10626 were withdrawn, the Department still has an obligation to ensure the applications were filed consistent with the rules and statutes prior to approval. For these applications, and many other private and public applications for ground water recharge, the rate of flow is at or near the full capacity of the canal and the place of use is throughout the canal system. Conditions of approval applied to these permits are appropriate for Application for Permit 37-22682.



The Protestants state: *[The Applicant] 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.*

To the extent that the Applicant should have applied for a right of way prior to hearing, the remedy of the Hearing Officer can be to exclude from the permit any point of diversion on federal property. This leaves in place (1) the point of diversion for the Hiawatha Canal, (2) the points of diversion on Walker Sand and Gravel land, and (3) the points of diversion on other non-federal land.

The Protestants state: *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.*

In fact the Applicant is a water user in the Wood River Valley. However, this fact has no bearing on this application. The constitution, statutes and rules state nothing about having to be a water user to be able to appropriate water in the state. If they had done so, our first settlers would have had a major impediment to development, and followed to a logical conclusion we would have no water rights in the state if this were a requirement. Indeed, being a lease holder of the place of use provides sufficient possessory interest to become a water right permit holder – regardless of how many local citizens think an outsider should not be allowed to appropriate water.

*d. Criteria for determining whether the applicant has sufficient financial resources to complete the project.*

*i. An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director. This showing is required as described in Subsection 040.05.c. or at the time the hearing provided by Subsection 040.05.c. is conducted.*

*ii. A governmental entity will be determined to have satisfied this requirement if it has the taxing, bonding or contracting authority necessary to raise the funds needed to commence and pursue project construction in accordance with the construction schedule.*

The Protestants state: *After being compelled by the Department to provide a financial statement, [the Applicant] provided information relative to his personal finances, including a personal savings account and PERSI statement. It is unclear whether the financial information provided by [the Applicant] 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. 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.*

The Applicant indicated at the hearing that he is the majority owner in a water engineering company, Idaho Water Engineering, LLC, that performs water measurement work throughout the State of Idaho, for both public and private clients. Thus the technical work associated with the application can be conducted with internal assets. Hiawatha Canal will be continuing to provide its liability insurance. Walker Sand and Gravel will be installing its own low-cost pioneered canals to their land. Financial ability is not a reason for denial of this application.

*e. Criteria for determining whether the project conflicts with the local public interest. The Director will consider the following, along with any other factors he finds to be appropriate, in determining whether the project will conflict with the local public interest:*

*i. The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both short and long term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains;*

*ii. The effect the project will have on recreation, fish and wildlife resources in the local area affected by the proposed use; and*

*iii. Compliance with applicable air, water and hazardous substance standards, and compliance with planning and zoning ordinances of local or state government jurisdictions.*

*iv. An application which the Director determines will conflict with the local public interest will be denied unless the Director determines that an over-riding state or national need exists for the project or that the project can be approved with conditions to resolve the conflict with the local public interest.*

This rule, adopted as of July 1, 1993, has not been updated to reflect the 2003 legislative definition of local public interest in Idaho Code Section 42-202(b)(3), which states as follows:

*"Local public interest" is defined 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.*

The Protestants state: *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.*

However, the legislative action in 2003 intentionally narrowed this broad Shoakal interpretation.

The Protestants state: *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.*

The plans for the ground water recharge uses are simply (1) the existing Hiawatha ditch and lateral system, and (2) ditches pioneered by Walker Sand and Gravel to their lands. To the extent that restrictions are desired by the Department, they can be added as conditions.

The Protestants state: *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.*

The Protestants have provided no expert testimony to substantiate this concern. On the other hand, noted environmental expert Dr. Rob Van Kirk, who submitted an expert report on behalf of IDFG in this matter, is on record in a variety of forums expressing the benefits of ground water recharge related to fisheries and wildlife. Dr. Van Kirk's expert report was the basis for the stipulated withdrawal of protest signed by IDFG, Idaho Rivers United and Trout Unlimited. During testimony in the hearing, Dr. Walt Poole indicated he had heard Dr. Van Kirk's presentation to the Idaho Water Resource Board on May 21, 2015, which is on record with IDWR and which extols the benefits of ground water recharge related to environmental interests.

Regarding injury to the minimum stream flows, this application has already been proposed to be conditioned to protect these flows. The Protestants have a theory about possible upstream impacts in the future, but these concerns are more properly addressed in a mitigation plan process.

The Protestants state: *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.*

The only expert information submitted in this regard was the report by Dr. Van Kirk, which quantifies instream flow needs for geomorphologic changes. The Applicant endorses these requirements. The Applicant fully agrees with the concept that the Big Wood River needs water to function properly. However, the amount of water needed by the river is not every drop at all times. There are times of plenty when water recharged to the aquifer provides more benefit to the riverine system than detriment. This is the expert conclusion provided by Dr. Van Kirk.

The Applicant states: *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.*

While it is true that much is unknown about the impacts of this ground water recharge, this can be said about almost all ground water recharge projects in Idaho. If IDWR begins to require modeling prior to issuance of a permit like this one, the future of ground water recharge in Idaho will be thwarted.

The Applicant states: *Winter is a particularly stressful time for stream-dwelling fish in northern latitudes like Idaho. 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. While this would be troubling in any setting, it is particularly troubling because these waterways are "blue ribbon fisheries."*



In previous discussions IDFG has indicated that the reason winter is a particularly stressful time for fisheries is due to the low flows. This is why Dr. Van Kirk is supportive of ground water recharge, which increases winter base flows. Water will not be diverted under this application during low flow periods.

The Protestants state: *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.*

The County Commissioners and some of the members of the public have made clear they think ground water recharge is a good idea. However, they disfavor this particular project for a variety of stated reasons:

- *The Applicant does not live in this valley.* This appeared to be a major concern of several members of the public. The concept of “we like recharge but want to do it on our own – not have an outsider do it” is fully understandable but is not a valid basis for rejection of this application.
- *The Applicant should not be allowed to dry up the river.* Quantification of needed instream flows was the assignment for expert Dr. Van Kirk, and the Applicant accepts his findings.
- *We want to see a ground water recharge project – just not this project.* The fact that ground water recharge is in the local public interest was demonstrated throughout the hearing. The disfavor of this application – because the business model is a combination of consultant and land owner – does not mean the project is not in the local public interest. If, as one public witness stated, the favored concept is for a Ground Water District to conduct ground water recharge, that is fine. The Applicant sees enough water in the river during high flows for many recharge projects to be simultaneously satisfied.
- *This project is harmful to the fish and wildlife.* Some or all of the public who testified were not aware that IDFG and others had withdrawn their protests to the application based on the stipulated conditions of approval.

In summary regarding local public interest, this application meets all of the tests of being approvable, even though it does not win a popularity contest with those who testified.

## 2. ITEMS NOT INCLUDED IN RULE 45

### Conservation of Water Resources

The Protestants state: *The applicant failed to show this is in the conservation of water resources.*

Regarding the requirement for a new appropriation to be consistent with the conservation of water resources in Idaho, the Applicant knows of no use of water which is more consistent with this requirement, as the intent of this application is to recharge aquifers with water which would otherwise flow from the state.

### IDWR Moratorium on New Consumptive Uses

On April 30, 1993, IDWR Director R. Keith Higginson signed *Amended Moratorium Order In the Matter of Applications for Permits for the Diversion and use of Surface and Ground Water within the Eastern Snake River Plain Area and the Boise River Drainage Area.*"

Item 2 of the order refers to the fact that the Order was signed in part as a result of six years of drought. From 1993 on, IDWR has been cautious about issuing permits in certain areas. However, this application proposes to divert water during times of plenty, to recharge aquifers and retain water in the basin. This is the very type of action encouraged by the Idaho Legislature in its guidance on ground water recharge, and the type of application that is very well qualified to meet the exceptions identified in Item 9, which states as follows:

*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.*

This application proposes to divert flows from the Big Wood River when in priority. Any diversion must recognize the existence of senior water rights, including those for Magic Reservoir. Any impacts to water supplies in the reservoir and other water rights must be mitigated to offset any potential injury. Diversion in priority limits impact to existing water rights. Flows returning to the river as a result of ground water recharge provide mitigation of any negative impacts. This application is in the public interest and will not injure other water rights. Thus the application is approvable under item 9.

The Protestants state: *The application violates the moratorium on new consumptive uses.*

The Applicant agrees with the Protestants that elements of this application are consumptive. However, this application proposes to divert water that otherwise would flow undiverted and unused, above the needs for instream uses, into the Snake River. Thus there is no injury if water is diverted under the condition 9 exemptions provided in the Moratorium Order.

The Protestants refer to an August 31, 2013 letter that became part of the Amended Application, in which the Applicant responded 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.” The Applicant believes this information was provided in an adequate manner by demonstrating that (1) the application is in the public interest in that the County Commissioners and many of the public who testified agree that ground water recharge is in the public interest, and (2) this water right will be diverted only when the Watermaster states the water right is in priority.

The Protestants state: *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.*

The Applicant agrees that some of the water diverted under this right will be used consumptively. The quantification of the amount of water that will be used consumptively is not important, as all of the water diverted under this right will be additional to the Wood River system and if not diverted would have passed through the basin to the Snake River. If at some point in the future mitigation credit is sought, as contemplated by the rules, then modeling and quantification will be required at that time.

The Protestants state: *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.*

As described above, this application is in the public interest because ground water recharge in the Big Wood River Basin is in the public interest, and the reasons for the public to object to this application are not valid. For this reason, and because this water right will have no impact on existing water rights, this application is approvable in light of the Moratorium Order.

### 3. SUMMARY

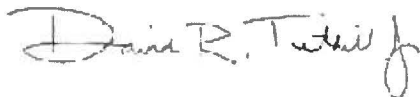
While the Protestants have been critical of several aspects of this application, they have failed to show any injury whatsoever to their water uses or to the Wood River Valley if the application is approved.

This application is very approvable with conditions. Every one of the concerns expressed by the Protestants can be addressed by a legally defensible condition of approval. Such conditions have already been suggested by former Protestants U.S. Bureau of Reclamation, the Idaho Department of Fish and Game, Idaho Rivers United and Trout Unlimited, and were fully endorsed by the Applicant resulting in withdrawal of their protests. The City of Hailey has provided several conditions of approval that address their concerns. These conditions are also acceptable to the Applicant.

This application marks the crossroads where the State of Idaho can either be encouraging to those who might be willing to conduct ground water recharge – or instead implement requirements that discourage ground water recharge. IDWR has a chance to encourage the application of water to beneficial use, allowing citizens to use ingenuity and effort to find ways to enhance aquifer storage, or to look at the requirements of the rules narrowly and impose requirements that never before have been added to applications for ground water recharge.

The Hearing Officer is requested to issue the application with appropriate conditions of approval.

Dated this 15<sup>th</sup> day of July, 2015

A handwritten signature in dark ink, appearing to read "David R. Tuthill, Jr.", with a stylized flourish at the end.

David R. Tuthill, Jr.