

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

**RECEIVED**  
**JUL 15 2015**  
**DEPARTMENT OF**  
**WATER RESOURCES**

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	)	<b>IDAHO CONSERVATION</b>
NO. 37-22682, IN THE	)	<b>LEAGUE'S POST-HEARING</b>
NAME OF INNOVATIVE	)	<b>REPLY BRIEF</b>
MITIGATION SOLUTIONS LLC	)	

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

**INTRODUCTION**

A Hearing was held in this matter June 8-9, 2015 in Hailey, Idaho. The applicant and protestants filed post-hearing briefs on July 1, 2015.

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.

Despite having multiple opportunities to meet his statutorily required burdens in this matter, the applicant has failed to do so. Conversely, ICL, fellow protestants and public witnesses in this matter met their burden and demonstrated that this application is not in the local public interest.

Therefore, ICL respectfully requests the Department to deny this application.

## **REPLY**

### **I. This Application is not in the Local Public Interest and Should Be Denied**

In his post-hearing brief, the applicant attempts to discount the concerns raised by the Blaine County Commission and thirteen public witnesses, all of whom oppose the granting of this application. Apparently, the applicant believes that his opinion of what is in the local public interest is to be valued over the thoughtful and detailed letters and testimony provided by the County and a diverse group of local residents raising a variety of serious concerns with the application. These concerns, however, are appropriately considered by the Department in its local public interest evaluation, and they show that this application is not in the local public interest.

Public witness testimony is not simply “popular endorsement” as posited by the applicant. *Applicant’s Post-Hearing Brief* at 11. It is evidence to be considered in the

Department's local public interest evaluation, as is the County's position expressed through its letter and hearing testimony. As explained by Idaho's legislature:

Water Resources role under the local public interest is to ensure that proposed water uses are consistent with securing the greatest possible benefit from [the public waters] for the public. Thus, within the confines of this legislation, Water Resources should consider all locally important factors affecting the public water resources, including but not limited to fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality and the effect of such use on the availability of water for alternative uses of water that might be made within a reasonable time. This legislation contemplates that "[t]he relevant impacts and their relative weights will vary with local needs, circumstances, and interests." [sic] "The determination of what elements of the public interest are impacted, and what the public interest requires, is committee[sic] to Water Resources' sound discretion.

ICL Exhibit 6: *Statement of Purpose: 2003 Amendment of Idaho Code 42-202B(3) definition of Local Public Interest.*

The Blaine County Commission specifically asked the Department to deny this application: "We ask the Director to deny Application 37-22682." *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") at 3. Thirteen public witnesses specifically asked the Department to deny this application. Yet in his post-hearing brief, Dr. Tuthill summarizes their concerns in part by writing: "...then this use of the water has been endorsed by the County Commissioners and by several of the local individuals who testified." *Applicant's Post-Hearing Brief* at 11.

Dr. Tuthill's mischaracterization of the positions taken by the Blaine County Commission and the public witnesses is egregious and not supported by the record. The BCC has consistently expressed concerns about this application for the three years it has been at issue; the public witnesses stated that they had read the application and

understood it, and not a single person asked the Department to grant it. *In no way did the BCC or any of the public witnesses endorse this application.* Dr. Tuthill's assertion that the public witnesses endorse his application is both patently false and disrespectful to each of those people, who have no opportunity to file post-hearing briefs. It is also disrespectful to the Blaine County Commission, which has diplomatically engaged in this process in efforts to ensure the Department heard its concerns.

Importantly, the opportunity to provide public witness testimony at the hearing was available to anyone. However, not a single person showed up to testify in favor of the application. Instead, thirteen public witnesses asked the Department to deny the application based on a variety of relevant concerns held by local people.

The applicant tries to further downplay the concerns of the public witnesses by implying that "some or all of the speakers were not aware of the fact that (1) Idaho Fish and Game, (2) Idaho Rivers United, and (3) Trout Unlimited had withdrawn their protests to the application based on settlement." *Applicant's Post-Hearing Brief* at 10. First, the applicant has no basis for making this claim, and has pointed to no evidence in the record that this is true with respect to any of the thirteen public witnesses who testified in opposition to the application. Notably, the rules allowed Dr. Tuthill the opportunity to examine the public witnesses. He could have asked them if they were aware of the settlement and, if so, whether it addressed their concerns, but he did not do so.

Second, there is no reason to think the settlement would address the majority—if any—of the concerns raised by the thirteen public witnesses. ICL's post-hearing brief laid out overarching public witness testimony themes that are relevant to the Department's evaluation of this application. *See ICL Post-Hearing Brief* at 17-18. As to

fishery and flow regime concerns, multiple public witnesses stated that they had read the IDFG Report and were aware of the conditions it imposed on the application, and yet their concerns were not assuaged. Similarly, Commissioner Schoen's Hearing testimony specifically stated that the BCC maintained fishery and river management concerns despite the IDFG conditions.

The conditions in the IDFG Report constitute the majority of the IDFG, TU and IRU settlement, but they do not address all relevant fisheries concerns. As explained in ICL's Post-Hearing Brief,<sup>1</sup> the IDFG Report only analyzes the diversion of water from the Big Wood River at two locations. It does not analyze return flows or movement of water across the groundwater divide and the related impacts to the Big Wood River and Silver Creek. Nor does it analyze the impacts of the recharge mitigation scheme on either.

Numerous public witnesses raised concern about the IDFG Report's lack of information, with a specific focus on Silver Creek. As has been stated, Silver Creek and the Big Wood River are blue ribbon fisheries; their ecological attributes are unique and they sustain a significant portion of the local tourism and recreation economy. The settlement does nothing to address these concerns.

Additionally, many public witnesses expressed opposition for numerous reasons unrelated to fisheries, including concern that this application could make it difficult for the recently formed groundwater district to address water allocation problems. The applicant characterizes this as residents expressing "concern that the Applicant does not reside locally." *Applicant's Post-Hearing Brief* at 10. While several public witnesses did state that they did not want someone from outside the basin getting a right to local water

---

<sup>1</sup> See pages 13-15.

in order to sell that water back to them as mitigation credit, ICL understands those public witness concerns to be separate and distinct from the groundwater district's concerns.

The groundwater district's concerns were not related to the applicant's residency so much as availability of water. The Department's local public interest analysis includes an application's effect "on the availability of water for alternative uses of water that might be made within a reasonable time." *See supra* at 2. In this instance, the applicant did not analyze the sufficiency of the resource. However, Dr. Erick Powell did, and his is the only sufficiency of the resource analysis in this matter. Dr. Powell found water would rarely, if ever, be available. Dr. Tuthill's assertion that there would be water available for groundwater districts to appropriate is merely conjecture and is unsupported by the evidence in the record. Therefore, the Applicant's assertion that his application will simply open the door for additional recharge projects in the basin is baseless at best and purposely misleading at worst, and the groundwater district related public testimony reflects that reality.

In addition to the BCC Comment and Public Witness testimony, ICL brought forth much testimony and other evidence regarding the local public interest, including the Blaine County Local Public Interest Water Policy, injury to the minimum stream flows, and injury to ICL's interests in the basin. *See ICL Post-Hearing Brief* at 10-17.

For all of these reasons, the Department should deny this application as not in the local public interest.

## **II. Unsupported Assertions Do Not Meet the Required Burdens**

Idaho Code and the Department's Appropriation Rules clearly lay out the information required in order to acquire a water right. In this instance, Dr. Tuthill failed to provide much of the required information and, in its place, he makes unsupported assertions that he should not have to provide the required information. In response, protestants and public witnesses have expressed serious concerns about the lack of information accompanying this application.

Dr. Tuthill closes his post-hearing brief with the idea that opposition in the spirit of “‘we like groundwater recharge but we do not endorse this project’ is not a good basis for denying this application.” *Applicant's Post-Hearing Brief* at 11. Related, he refers to the BCC's statement that “Managed Aquifer Recharge (MAR) will need to be accomplished by other means,” as a slippery slope. *See Id.* at 10 (quoting BCC Comment at 3). Dr. Tuthill goes on to characterize the BCC's position as “neither equitable, nor sustainable, nor optimal for the application of water to beneficial use.” *Id.*

ICL disagrees. Concerns about a specific project are exactly why the application, protest and hearing process exists. Idaho Code and the Department's Appropriation Rules clearly lay out the information required in order to acquire a water right. When an applicant fails to provide that information, impacted parties are secured a right to raise concerns via this very process. It is understandable, and allowable, that the BCC could support MAR but not this MAR proposal based on the numerous uncertainties surrounding this application.

Dr. Tuthill refers to this application as “a crossroads for groundwater recharge in Idaho.” *Id.* at 1. He may be correct. Despite his consistent reference to two water right

applications issued last year,<sup>2</sup> the application at issue here appears to be somewhat novel in Idaho. ICL, public witnesses and others have raised myriad concerns about the lack of sufficiency of the resource; lack of best available science; speculative nature; negative impacts to the fishery, and the recreation and tourism industries; injury to the minimum stream flows; and concerns about whether local water right holders should be subjected to the costs and methods of the recharge mitigation credit scheme that this application ultimately intends to institute. These are important concerns, and the Department appropriately considers them in its evaluation of this application.

Crossroads or not, this is not an opportunity to throw caution to the wind. Just because an application is novel, does not mean the law and rules do not apply. Idaho Code and the Department's Appropriation Rules lay out the information an applicant is required to provide in order to meet its burden. In this instance, the applicant failed to provide that information and did not meet his burden. It can not be emphasized enough that the protestants in this matter have *repeatedly* asked the applicant for information required by the law and rules that govern this matter. The applicant has not provided it.

Moreover, ICL, fellow protestants and public witnesses did provide the information requisite to meeting their burden.

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

---

<sup>2</sup> The applicant consistently refers to Applications for Permit No. 1-10625 and 1-10626. Should consideration of those applications even be relevant, review of those applications indicates notable distinctions from the application at issue here. Among other relevant differences, they are held by irrigation entities already in the business of transporting water; they appear to have had little to no local public interest opposition; and their places of use do not stand to negatively impact a municipality's public works infrastructure and privately held property of local residents.



## CONCLUSION

The applicant failed to meet his burden of showing evidence to make a prima facie case that this application should be granted. ICL, fellow protestants, and public witnesses met their burden of bringing forth factors as to the local public interest of which they are reasonably expected to be more knowledgeable, and those factors indicate that this application is not in the local public interest. Therefore, ICL respectfully asks the Department to deny Application for Permit No. 37-22682.

RESPECTFULLY submitted this 15<sup>th</sup> day of July, 2015.

\_\_\_\_\_/s/\_\_\_\_\_  
Marie Callaway Kellner  
Bryan Hurlbutt  
  
Attorneys for ICL

# CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 15, 2015, I served a true copy of the Idaho Conservation League's Post-Hearing Reply Brief **via email** to the list provided by the Idaho Department of Water Resources, and I served the original copy to the Hearing Officer via U.S. Mail.

DATED: July 15, 2015

\_\_\_\_\_/s/\_\_\_\_\_  
Marie Callaway Kellner  
Attorney for *Idaho Conservation League*