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

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| IN THE MATTER OF APPLICATION FOR PERMIT NOS. 37-22682 & 37-22852 in the name of David R. Tuthill, Jr. (formerly in the name of Innovative Mitigation Solutions, LLC) | **POST-HEARING REBUTTAL BRIEF** |

COME NOW, Protestants, the HEART ROCK RANCH, GOLDEN EAGLE HOA, RINKER CO., SPENCER ECCLES, LOWER SNAKE RIVER AQUIFER RECHARGE DISTRICT and THE THOMAS M. O'GARA FAMILY TRUST, by and through counsel of record, and submit this Post-Hearing Rebuttal Brief pursuant to the order and schedule set forth by the Hearing Officer.

## INTRODUCTION

The Applicant has failed to provide any evidence that would warrant approval of this application. Notwithstanding the fact that the applicable laws and regulations plainly require submission of information supporting the proposed diversion and use of water the Applicant has routinely asserted that no such information should be required because the Legislature had determined that "recharge shall constitute a beneficial use of water." *Tuthill Br.* at 1 (quoting I.C. § 42-234(2)). This argument is untenable. Indeed, the Legislature has mandated that recharge may only be authorized "pursuant to the provisions of this chapter and in compliance

with other applicable Idaho Law and the state water plan." I.C. § 42-234(2). Merely identifying "recharge" as the intended use of water does not allow an applicant to circumvent the legal and regulatory requirements applicable to new water right applications.

For example, the regulations require evidence that there is a sufficient water supply and mandate the denial of an application, "if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible." IDAPA 37.03.08.045.b. Yet, the Applicant has provided no evidence that water will be available to meet the proposed beneficial use. Indeed, the only evidence on record is the report completed by Dr. Erick Powell, which concluded that there is no water available for this permit. BRS Ex. 1. The Applicant's only rebuttal to this argument is to point to photos from the year 2006 showing water flowing below Magic Reservoir. *Tuthill Br.* at 4.[1] Yet, those photos, which were only submitted for illustrative purposes, provide no information about the available water supply and whether or not water would have been available for recharge that year. Indeed, the Applicant admits that he conducted no analysis about the availability of water for recharge.[2]

The Applicant argues that the law does not require technical information – arguing that the State "encourage[s] ground water recharge without first identifying the ultimate use of all recharged water." *Id.* at 2. He even asserts that he "does not see how a model helps to inform the approvability of the present application for permit." *Id.* at 10. Applicant then argues technical information is not required until mitigation credits are sought. *Id.* This argument

[1] The Applicant challenged the conclusions of Dr. Powell on this matter as being "suspect." *Tuthill Br.* at 4. Yet, the Applicant failed to provide any expert report or testimony to rebut Dr. Powell's conclusions. *See* BRS Ex. 1. Absent any such evidence, the belief that Dr. Powell's conclusions are "suspect" carries little weight.

[2] Attempting to support his refusal to provide any information, the Applicant points to "53 approved water rights for ground water recharge in Idaho" and states that he "believes that only a few of these approvals were accompanied by modeling of any kind." *Tuthill Br.* at 1. Yet, no evidence was ever submitted about the extent of analysis conducted on any other recharge applications. A mere "belief" that additional information may not have been provided in some instances is not sufficient to meet the Applicant's standards under the laws and regulations. No evidence that availability of water supply was raised in those other applications.

misses the point. Technical information at the application stage, including modeling, is not about who will receive credits under some future, undefined mitigation credit program. It is about identifying the impacts of the new diversion on an already stressed water supply.[3] It is about identifying the risk to the City of Hailey and of developments on the Hiawatha Canal that may be impacted by any rise in the water table. It is about determining whether any "use" will actually occur, or whether the "recharged" water will simply return back to the river in a very short period of time. All of these issues are relevant to the application process and must be analyzed. Yet, the Applicant refused to prepare any such analysis.[4]

The Protestants provided a thorough discussion of the failings of the Application in the Post-Hearing Brief, filed on June 30, 2015. There is very little in the Applicant's post-hearing brief that warrants further discussion here and the Protestants will rely on, and incorporate their Post-Hearing Brief in response.

Two issues, however, warrant discussion here. First, the Applicant has repeatedly argued that the approval of applications for recharge on the upper Snake River demand approval of these applications. Those applications, however, involve different basins and were resolved through stipulated agreement. There is no basis to rely on those permits as a means of automatically approving these permits.

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[3] The Applicant concludes that "Approval by IDWR of Permit No. 37-22682 will not use up all available supplies and take away other opportunities for ground water recharge." *Tuthill Br.* at 9. He further states that "it is difficult to image a scenario when all high flows in the Big Wood River can be diverted to ground water recharge." *Id.* There is no basis in the record for these statements. Indeed, the Applicant admitted that he never performed any water availability analysis. Tuthill Test.

[4] Ironically, speaking about the availability of water, the Applicant argues that "the number of days when water is available is not as important as the quantification of how much water should be left in the river to provide for other instream uses when water is diverted for aquifer recharge purposes." *Tuthill Br.* at 4. Yet, the Applicant repeatedly admitted that he did not conduct any analysis as to the water demands on the Big Wood River, including the natural flow and storage rights of the Big Wood Canal Company. Tuthill Test.; *see also* BRS Ex. 1 (Powell report on availability of water supply).

Second, the law is clear. An Applicant must demonstrate that it has "legal access to the property necessary to construct and operate the proposed project" and that "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." IDAPA 37.03.08.045.01.c. Yet, here, the Applicant has ignored this requirement and consistently refused to submit such information – even arguing that such information is not required regardless of the language of the regulation.

Accordingly, the Hearing Officer should deny the application.

## ARGUMENT

### I. The Department's Approval of Recharge Permits in Basin 01 Does Not Support Approval of This Application.

The Applicant continues to argue that the Department's approval of two recharge water rights in Basin 01 demand that the Hearing Office approve this application. *See, e.g.,* Tuthill Test.; *Tuhill Br.* 1-2, 7 & 9. This argument fails for at least the following reasons:

1. Permit Nos. 01-10625 and 01-10626 were granted upon a stipulated agreement between the Applicants and the Protestants. No such stipulation has been reached in these proceedings.

2. The Basin 01 Applicants are irrigation districts and/or canal companies who own the facilities identified for recharge. In this case, the Applicant is a private individual who does not own any other water right and has no authority to use any points of diversion.

3. The Upper Snake River Basin and the Wood River Valley are not the same. As explained by Dr. Powell in his analysis, there is no water available this application. BRS Ex. 1.

In the end, the Department must consider this application based on the testimony and evidence in the record. The Applicant, however, failed to provide any evidence or technical information to support the application. As such, this application should be denied.

## II. The Applicant Must Show A Right to Use the Point of Diversion.

The Applicant continues to argue that there is no obligation to show any right to the point of diversion when an application is filed. Relying on a cherry picked sentence from the Supreme Court's decision in *Lemmon v. Hardy*, 95 Idaho 778 (1974), the Applicant claims that *Lemmon v. Hardy* does not require an applicant to have possessory interest in the point of diversion at the time the application is filed, based on this sentence in the opinion:

> *Lack of a possessory interest in the property designated as the place of use is speculation. Persons may not file an application for a water right and then seek a place of use thereof.*

*Tuthill Br.* at 6 (italics in original). He then contends that the omission of "point of diversion" in this sentence by the Idaho Supreme Court was intentional. *Id.* The Applicant misunderstands the law.

First, although the Applicant argues his interpretation of the law is "consistent with the widely held interpretation" and is a "tenant of the prior appropriation doctrine," he provides no legal support for this theory. *Id.* This is undoubtedly because the law rejects this argument.

Indeed, the *Lemmon* decision could not have been clearer. There, the Court rejected the Director's conclusion, which, just like the Applicant's arguments in this case, asserted that a possessory interest in the point of diversion was not necessary:

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

*Id.* at 880 (emphasis added).

The Court concluded that "a water right initiated by trespass on private property is invalid." *Id.* Further the Court held:

> In the case at bar the land designated as ***the point of diversion and place of use*** in appellants' original application was private property not owned by the appellants and ***therefore no valid water right could be developed on it.*** Since no valid water right was possible, it can be concluded that the application was filed for speculative purposes, not for development of a water right.
> ...
>
> The appellants in this action had shown no means of acquiring the land stated in their original application.
>
> The appellant's filing an application for a water permit with no possessory right in the land designated as the place of use amounted to speculation in and of itself. ...
>
> Lack of a possessory interest in the property designated as the place of use is speculation. ***Persons may not file an application for a water right and then seek a place of use thereof.***

*Id.* at 7808-81 (emphasis added).

Rather than read the entire decision, the Application would have the Hearing Officer ignore all discussion about the point of diversion and focus on 2 sentences. *Tuthill Br.* at 6. The Hearing Officer, however, cannot ignore the law. This decision makes clear that authority for use of the point of diversion must also be obtained prior to filing an application.

The regulations support this conclusion. Speaking of evidence relative to the "good faith" consideration, the regulations require:

> i. The ***applicant shall have legal access to the property necessary to construct and operate the proposed project***, has the authority to exercise eminent domain authority to obtain such access, ***or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way***. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of

> Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry; and
>
> ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and
>
> iii. There are no obvious impediments that prevent the successful completion of the project.

IDAPA 37.03.08.045.01.c (emphasis added).

This regulation includes 3 alternatives for demonstrating a possessory interest. First, an applicant must "have legal access to the property necessary to construct and operate the proposed project." *Id.* It goes without saying that, absent authority to divert the water, an applicant cannot "construct and operate the proposed project." The Hearing Officer correctly applied this law in its *Order Denying Petition for Reconsideration of Preliminary Order Granting Motion for Summary Judgment with Respect to Application for Permit No. 37-22852* (June 16, 2015) (the "*Reconsideration Order*").

> The Hearing Officer disagrees with the Applicant's assertions that it did not need to demonstrate a possessory interest in the headgate of the Comstock Canal or the reach of the Comstock Canal necessary to operate the proposed recharge project at the time Application 37-22852 was filed. ***Rule 45.01.c of the Department's Water Appropriation Rules clearly requires that an application will be found to have been made in good faith if the applicant "shall have legal access to the property necessary to construct and operate the proposed project."*** The recharge project proposed by Application 37-22852 proposes use of the headgate of the Comstock Canal as the point of diversion and, as Exhibit A demonstrates, requires use of the Comstock Canal outside of the "Start" and "End" points for Cliffside Homeowners Association, Inc. ***The Place of Use Lease does not provide the Applicant legal access to these properties, which are necessary to construct and operate the recharge project proposed by Application 37-22852.*** To hold otherwise would allow a water right to be initiated by trespass, in violation of principles set forth in *Lemmon v. Hardy*, 95 Idaho 778, 780, 519 P.2d 1168, 1170 (1974) ("a water right initiated by trespass on private property is invalid."). Therefore, the Hearing Officer will deny the Request for Reconsideration.

*Id.* at 6 (emphasis added). There is no basis to hold differently in these proceedings.

Second, without "legal access to the property," the applicant must demonstrate that he "has the authority to exercise eminent domain authority to obtain such access." *Supra*. Idaho Law provides a right to private individuals to condemn a right of way for irrigation. Idaho Code § 42-1102 provides:

> When any such owners or claimants to land have not sufficient length of frontage on a stream to afford the requisite fall for a ditch, canal or other conduit on their own premises ***for the proper irrigation thereof***, or where the land proposed ***to be irrigated*** is back from the banks of such stream, and convenient facilities otherwise for the watering of said lands cannot be had, ***such owners or claimants are entitled to a right-of-way through the lands of others, for the purposes of irrigation***.

(Emphasis added). The case of *Canyon View Irrigation v. Twin Falls Canal Company*, 101 Idaho 604 (1980), is an example of a private company using Idaho Code for the condemnation of a right of way for irrigation.

There is no authority in the code to exercise eminent domain for private recharge. Yet, notwithstanding the plain language of section, the Applicant asserts that "this is not limited to irrigation," but that "the first cases of prior appropriation in the West were based on mining uses." *Tuthill Br*. at 6. What the Applicant does not realize is that there is a separate statute granting mining right holders the right to exercise eminent domain for access to mines, including for water conveyances. Idaho Code § 47-902 specifically authorizes rights of way for canals and ditches associated with mines. *See also* I.C. § 7-701(4) (authorizing condemnation for Roads, tunnels, ditches, flumes, pipes and dumping places for working mines"). Neither the plain language of Idaho Code 42-1102 nor 47-902, authorize any private party to condemn a right of way for private recharge.

Finally, where any part of the proposed project falls on federal land, the applicant must show that it "has filed all applications for a right-of-way." *Supra.*[5] Yet, here, the Applicant admits that he has not submitted any such applications for use of BLM lands. Rather, the Applicant argues that the Department should issue a water right permit with the following standard condition:

> *This right does not grant ay right-of-way or easement across the land of another.*

*Tuthill Br.* at 7. The Applicant concludes that following the law would require a major change in the processing of new applications for permit to appropriate the waters of the state and would "have a chilling effect on new applications for any potential water users other than riparian owners." *Id.*

Even if historic permits have been approved without evidence of authority to access the point of diversion, that is not a basis to authorize such unlawful actions here – particularly when the issue is raised in the protest, as it has been here, and where the law on this point is so clear. Indeed, the courts have already rejected such actions and would undoubtedly do it again. *See Lemmon, supra* (rejecting the Director's holding that an application is "not void for having been filed without the applicants owning or possessing any rights to the lands where the proposed points of diversion are to be located").

Likewise, there is no support for the contention that requiring evidence of authority to use the point of diversion would have a chilling effect on new applications. No testimony or evidence was ever provided on this point. In truth, however, following the law – by requiring evidence of authority to utilize the point of diversion – will avoid wasting significant resources by the Department and other interested parties on future applications. This case is a prime

[5] This is distinct from "other permits needed to construct and operate the project," which may be obtained after the application is filed. *Supra.*

example. This application was filed 3 years ago. Since that time, the parties have participated in several meetings. Summary judgment motions have been filed and discovery has been propounded. Expert reports have been prepared. Finally, a hearing was held and post-hearing briefing has been submitted. This process has utilized a significant amount of time and resources by the Department and parties. Yet, at hearing, the Applicant testified that if he is not able to secure authority for the point of diversion then he will not be able to divert water under this permit. In short, the right would go away. In such an instance, all the time and resources spent on this matter – particularly addressing technical issues – will have been wasted. By requiring that an applicant demonstrate that he has "legal access to the property necessary to construct and operate the proposed project," as required by the regulations, the parties will not be forced to waste resources defending their interests on future applications.

## CONCLUSIONS

The Applicant has failed to meet his burden as identified in Idaho statues and regulations. The record in this matter shows that there is no water available for the proposed recharge diversions. Further, the application has failed to secure proper authority to conduct recharge activities. As such, the Hearing Officer should dismiss the Application.

DATED this 15th day of July, 2015.

**BARKER ROSHOLT & SIMPSON LLP**

Travis L. Thompson
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## CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2015, I served a true and correct copy of the foregoing, via email to the following:

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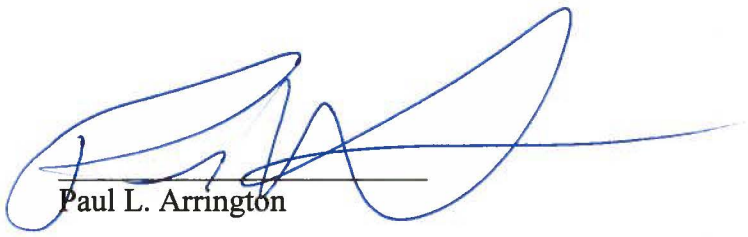

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