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

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

**PROTESTANT'S RESPONSE TO
EXCEPTIONS 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 response to the *Applicant's Response to Order Denying Petition for Reconsideration of Preliminary Order Granting Motion for Summary Judgment with Respect to Application for Permit No. 37-22852*, dated June 26, 2015. Pursuant to an email dated July 9, 2015 from the Hearing Officer, Mathew Weaver, the Applicant's filing is being treated as "timely filed exceptions" to the order dismissing application no. 37-22852. This response is filed within 14-days of that email, pursuant to Department Rule of Procedure 730.02.c.

INTRODUCTION

There is no reason for the Director to consider the Applicant's exception from the Hearing Officer's order dismissing application no. 37-22852. Indeed, the Applicant accepts the dismissal. In the exceptions brief, the Applicant states that it "accepts the denial of the petition

for reconsideration due to not timely providing a copy of the Lease for the place of use.” *IMS Br.* at 1.

Furthermore, the only issues addressed in the exceptions brief – whether an applicant must show evidence of authority to use the point of diversion – is currently pending before the Hearing Officer in separate proceedings relative to application no. 37-22682, for which a hearing was held and post-hearing briefing has been submitted. Given the acceptance of the dismissal by the Applicant, and the fact that the same issue is pending before the Hearing Officer in a separate proceeding, there is no reason to address any issues in the exceptions brief.

Should the Director determine that it is appropriate to consider this matter, then the law supports the Hearing Officer’s decision, which should be upheld.

STATEMENT OF FACTS

On May 26, 2015, the Hearing Officer issued an order dismissing Application for Permit No. 37-22852 due to the Applicant’s failure to provide any lease evidencing authority to use the Comstock Canal for recharge. Although such evidence was to have been submitted with the Application, the Applicant failed to provide any lease or other evidence of authority to use the Comstock Canal. In addition, the Protestants submitted discovery requests to the Applicant in December, 2014, seeking information regarding any lease or other possessory interest in the Comstock Canal. *Arrington Aff.* at Ex. B. Again, the Applicant failed to provide any evidence of any authority to use the canal for purposes of his application for permit. For this reason, the Hearing Officer dismissed application no. 37-22852.

On May 27, 2015, the Applicant submitted a request for reconsideration of the dismissal. In doing so, the Applicant, for the first time, submitted a document entitled “Place of Use Lease Between Cliffside Homeowners Association, Inc., Landlord and Innovative Mitigation Solutions,

LLC, Tenant.” According to the Applicant, this lease, dated October 19, 2013, evidences authority to divert water for recharge into the Comstock Canal.

On June 16, 2015, the Hearing Officer denied the Applicant’s request for reconsideration for two reasons. First, the Hearing Officer concluded that the Applicant’s submission was untimely and would not be considered. *Reconsideration Order* at 4. Second, the Hearing Officer held:

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).

The Applicant’s exceptions brief “accepts” the dismissal of application no. 37-22852 due to the untimely filing of the lease, but challenges the above-quoted portion of the Hearing Officer’s decision.

ARGUMENT

I. The Director Should Dismiss the Exceptions Since the Applicant Has Already Accepted the Dismissal and Because the Issue Will be Addressed in Another Proceeding Pending Before the Hearing Officer.

Although the Applicant has filed an exception to the Hearing Officer's decision, it "accepts the denial of the petition for reconsideration." *IMS Br.* at 1. The Applicant admits that it failed to timely provide a copy of the lease and admits that such untimely actions warrant the dismissal of the application. *Id.* As such, there is nothing left for the Director to decide.

Furthermore, the Hearing Officer recently completed a hearing on application no. 37-22682 – a similar application that was consolidated with application no. 37-22852 – and the parties have submitted post-hearing briefs. Importantly, the issue of the authority necessary for use of land in an application is directly before the Hearing Officer in those proceedings.

Since the Applicant "accepts" the dismissal, and since the issue of authority will be addressed in the other proceedings, there is no reason for the Director to take any action on this exception.

II. The Applicant Must Show Authority to Access the Point of Diversion.

The Applicant's primary argument is that the Hearing Officer erred in holding that an applicant "need[s] to have possessory interest in the point of diversion or other lands in the canal at the time of filing the application." *IMS Br.* at 1. According to the Applicant, a water user can file an application for permit without any access to a point of diversion and hope to acquire such access after the permit has been approved. *Id.* at 1-3. He argues that the inclusion of the following remark solves any concern about access: "This right does not grant any right-of-way or easement across the land of another." *Id.* at 3. Relying on the following cherry picked sentence from the Supreme Court's decision in *Lemmon v. Hardy*, 95 Idaho 778 (1974), the

Applicant claims an applicant does not need to have a possessory interest in the point of diversion at the time the application is filed:

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 2-3 (bold in original). The Applicant contends that the omission of “point of diversion” in this sentence by the Idaho Supreme Court was intentional. *Id.* The Applicant misunderstands the law.

The statutes provide that the Director may reject any application “where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes.” I.C. § 42-203A(5)(c). Department regulations further discuss this requirement. In particular:

- i. The ***applicant shall have legal access to the property necessary to construct and operate the proposed project***, has the authority to exercise eminent domain authority to obtain such access, ***or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way***. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry; and
- ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and
- iii. There are no obvious impediments that prevent the successful completion of the project.

IDAPA 37.03.08.045.01.c (emphasis added). Further,

Information relative to good faith, delay, or speculative purposes of the applicant, Section 42- 203A(5)(c), Idaho Code, shall be submitted as follows:

- i. The applicant shall submit copies of deeds, leases, easements or applications for rights-of-way from federal or state agencies documenting a possessory interest in the lands necessary for all project

facilities and the place of use or if such interest can be obtained by eminent domain proceedings the applicant must show that appropriate actions are being taken to obtain the interest. Applicants for hydropower uses shall also submit information required to demonstrate compliance with Sections 42-205 and 42-206, Idaho Code.

ii. The applicant shall submit copies of applications for other needed permits, licenses and approvals, and must keep the department apprised of the status of the applications and any subsequent approvals or denials

IDAPA 37.03.08.040.05.e.

These regulations speak specifically to an applicant's duty to demonstrate "legal access to the property necessary to construct and operate the proposed project." *Supra*. As the Hearing Officer correctly stated, a "proposed project" cannot be constructed and operated without access to the point of diversion. Absent any authority, therefore, to access the point of diversion is speculation. The language could not be any clearer.

The Idaho Supreme Court agrees with this interpretation. *See Lemmon v. Hardy*, 95 Idaho 778 (1974). The *Lemmon* case involved a dispute over the use of water from Box Canyon Creek in Gooding County. *Id.* at 778. On June 19, 1969, Lemmon filed an application for 400 cfs for fish propagation to be used on land Lemmon intended to lease from Idaho Power Company. *Id.* On October 9, 1969, Hardy filed a similar application for 300 cfs, identifying the same land as the place of use. *Id.* However, Hardy had purchased the land from Idaho Power. *Id.* The Lemmon application was subsequently amended, on November 26, 1969, to change the point of diversion and place of use. *Id.* In a consolidated hearing, the Department of Water Administration (i.e. IDWR) approved both applications, amending the priority date of the Lemmon application from June 19, 1969 to November 26, 1969 – the date of the amended application. Hardy protested the Lemmon application – concluding that it was speculative

because “at the time of filing ... the applicants, Lemmon and Standal, had no interest in any part of the lands where they proposed to use the water.” *Id.* at 779-80.

The *Lemmon* Court rejected the Director’s findings, 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 explained that a water right cannot be initiated in “trespass on private property:”

Furthermore in the case of *Bassett v. Swenson* it was held that,

“It is quite generally held that a water right initiated by trespass is void. That is to say, one who diverts water and puts it to a beneficial use by aid of a trespass does not, pursuant to such trespass, acquire a water right. Any claim of right thus initiated is void.”

The Bassett case involved a trespass upon land privately owned. ***The rule as to trespass and water rights in Idaho appears to be that a water right initiated on the unsurveyed public domain is valid, but a water right initiated by trespass on private property is invalid.***

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

In the case at bar the land designated as ***the point of diversion and place of use*** in appellants' original application was private property not owned by the appellants and ***therefore no valid water right could be developed on it.*** Since

no valid water right was possible, it can be concluded that the application was filed for speculative purposes, not for development of a water right.

...

The appellants in this action had shown no means of acquiring the land stated in their original application.

The appellant's filing an application for a water permit with no possessory right in the land designated as the place of use amounted to speculation in and of itself. ...

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

Id. at 7808-81 (emphasis added). This language is clear. It prohibits an application where the application does not have authority to use the point of diversion and/or place of use.

However, rather than read the entire decision, the Applicant would have the Director ignore all discussion about the point of diversion and focus on two sentences in isolation. *IMS Br.* at 2. The Director, 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 include three alternatives for demonstrating a possessory interest, as follows:

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. ...

IDAPA 37.03.08.045.01.c.i.

First, the applicant must "have legal access to the property necessary to construct and operate the proposed project." IDAPA 37.03.08.045.01.c.i. As stated above, absent authority to divert the water, an applicant cannot "construct and operate the proposed project." Furthermore,

Lemon mandates that the applicant have legal access to the point of diversion in addition to the proposed place of use.

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 Applicant points to *Canyon View Irrigation v. Twin Falls Canal Company*, 101 Idaho 604 (1980). However, that case is an example of a private company using Idaho Code for the condemnation of a right of way for irrigation. There is no authority to exercise eminent domain for private recharge purposes.

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*.¹ Here, no applications have been submitted to the BLM or any other federal agency for the use of any federal lands.

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 the Applicant’s arguments and would undoubtedly do it again. *See Lemmon, supra* (rejecting the Director’s holding that an application is “not void for

¹ This is distinct from “other permits needed to construct and operate the project,” which may be obtained after the application is filed. *Supra*.

having been filed without the applicants owning or possessing any rights to the lands where the proposed points of diversion are to be located”).

Finally, 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. These recharge applications provide a prime example. The applications were filed over three 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 and submitted into evidence. As to application no. 37-22682, 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, notwithstanding all of this effort, the Applicant has not acquired any authority to use any point of diversion for application no. 37-22852. If a permit were approved without authority to access the point of diversion, that right would simply go away if the applicant were unable to acquire access to the point of diversion in the future. In such an instance, all the time and resources spent on the matter will have been wasted. Such a result is the very definition of speculation. 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 “accepts” the dismissal of application no. 37-22852. As such, there is no reason for the Director to address this appeal. However, should the Director decide to address this appeal, then the law supports the Hearing Officer’s decision and demands dismissal of

application no. 37-22852 due to the Applicant's failure to provide "legal access to the property necessary to construct and operate the proposed project."

DATED this 21st day of July, 2015.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in blue ink, appearing to be "Travis L. Thompson", is written over a horizontal line.

Travis L. Thompson
Paul L. Arrington

*Attorneys for Lower Snake River Aquifer Recharge
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2015, I served a true and correct copy of the foregoing, via email to the following:

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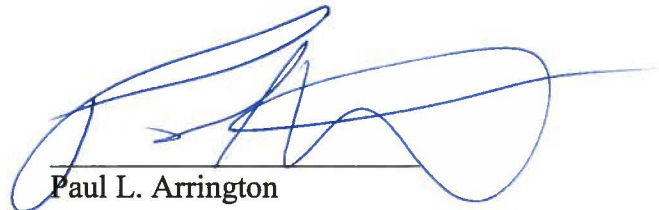
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