

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

|                              |   |                           |
|------------------------------|---|---------------------------|
| IN THE MATTER OF APPLICATION | ) |                           |
| FOR PERMIT NO. 37-22852      | ) |                           |
| IN THE NAME OF               | ) | <b>FINAL ORDER</b>        |
| INNOVATIVE MITIGATION        | ) | <b>DENYING EXCEPTIONS</b> |
| SOLUTIONS, LLC               | ) |                           |
| _____                        | ) |                           |

**BACKGROUND**

On October 21, 2013, Innovative Mitigation Solutions, LLC (“Applicant”), filed Application for Permit No. 37-22852 (“Application 37-22852”) with the Idaho Department of Water Resources (“Department”). Application 37-22852 proposes diversion of 10 cfs from the Big Wood River for ground water recharge.

On April 16, 2015, protestants Thomas M. O’Gara Family Trust and the Lower Snake River Aquifer Recharge District, by and through their counsel of record, filed a *Motion for Summary Judgment* (“Motion for Summary Judgment”) and *Memorandum in Support of Motion for Summary Judgment* (“Memorandum”). The Motion for Summary Judgment sought dismissal of Application 37-22852. The Memorandum stated that Application 37-22852 must be rejected because the Applicant “has not provided any lease evidencing any authority to use the Comstock Canal for recharge . . . [n]or has [the Applicant] provided any evidence that it has sought to exercise eminent domain to use the Comstock Canal for recharge purposes.” *Memorandum* at 9.

On May 26, 2015, the Hearing Officer issued a *Preliminary Order Granting Motion for Summary Judgment With Respect to Application for Permit No. 37-22852* (“Preliminary Order”). The Hearing Officer stated: “There is no information in the record demonstrating the Applicant has legal access to the property necessary to operate the project proposed in Application 37-22852, or authority to exercise eminent domain authority to obtain such access.” *Preliminary Order* at 4. The Hearing Officer concluded “that Application 37-22852 was not filed in good faith” and rejected Application 37-22852. *Id.*

On May 27, 2015, the Department received *Applicant’s Request to Reconsider Preliminary Order Granting Motion for Summary Judgment With Respect to Application for Permit No. 37-22852* (“Request for Reconsideration”). The Applicant explained “Applicant concurs with the analysis of the Hearing Officer . . . regarding the need for the Applicant to have possessory interest in the place of use at the time the application is filed.” *Request for*

*Reconsideration* at 1. “Applicant inadvertently failed to submit a copy” of the “lease information” for Application 37-22852. *Id.* “Accordingly the Applicant now provides a copy of the lease, attached.” *Id.* Attached to the Request for Reconsideration is a document entitled “Place of Use Lease Between Cliffside Homeowners Association, Inc., Landlord and Innovative Mitigation Solutions, LLC, Tenant” (“Place of Use Lease”).

On June 5, 2015, Heart Rock Ranch, Golden Eagle HOA, Rinker Co., Spencer Eccles, Lower Snake River Aquifer Recharge District, and the Thomas M. O’Gara Family Trust (“Protestants”) filed with the Department an *Opposition to Applicant’s Request to Reconsider Preliminary Order Granting Motion for Summary Judgment With Respect to Application for Permit No. 37-22852* (“Opposition”). Protestants complained that the Applicant submitted the Place of Use Lease for the first time as an attachment to the Request for Reconsideration.

*Opposition* at 2. Protestants asserted the Place of Use Lease is “not sufficient to demonstrate a possessory interest in the Comstock Canal” because it “only speaks to the ‘place of use’ for the recharge activities” and “there is no agreement speaking to the diversion of water from the headgate of the Comstock Canal,” which is the point of diversion identified on Application 37-22852. *Id.* Protestants concluded “the Applicant has not demonstrated that it has ‘legal access to the property necessary to construct and operate the proposed project,’ IDAPA 37.03.08.045.01.c.” and requested the Hearing Officer deny the Request for Reconsideration. *Id.* at 3.

On June 10, 2015, the Applicant filed *Applicant’s Reply to Protestants’ Opposition to Request to Reconsider Preliminary Order Granting Motion for Summary Judgment With Respect to Application for Permit No. 37-22852* (“Reply”). The Applicant concurred “that lack of a possessory interest in the property designated as the place of use is speculation, and that persons may not file an application for a water right and then seek a place of use thereof.” *Reply* at 1. “However, the Applicant does not concur with the position of the Protestants that possessory interest in the point of diversion is required at the time the application is filed. Nor does the Applicant need possessory interest in the entire reach of the canal when the application is filed.” *Id.*

On June 16, 2015, the Hearing Officer issued the *Order Denying Petition for Reconsideration of Preliminary Order Granting Motion for Summary Judgment With Respect to Application for Permit No. 37-22852* (“Order Denying Reconsideration”). The Hearing Officer concluded the Place of Use Lease was untimely filed and should not be considered. *Order Denying Reconsideration* at 4. Even considering the Place of Use Lease, the Hearing Officer determined the Applicant had not demonstrated it had “‘legal access to the property necessary to construct and operate’ the recharge project proposed by Application 37-22852 as required by Rule 45.01.c of the Department’s Water Appropriation Rules.” *Id.* The Hearing Officer disagreed with Applicant’s contention “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.” *Id.* at 6. The Hearing Officer stated:

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 (footnote omitted).

This matter is now before the Director as a result of the Applicant’s June 26, 2015, filing of *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* (“Exceptions”).<sup>1</sup>

### ANALYSIS

The Hearing Officer properly rejected Application 37-22852. Rule 45.01.c of the Department’s Water Appropriation Rules states that an application is filed in good faith if:

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 37.03.08.45.01.c.i. As the Hearing Officer found, the Place of Use Lease states:

**Whereas** the members of [Cliffside Homeowners Association, Inc.,] are the owners of all of the lots in Cliffside Subdivision in Blaine County, Idaho through which a portion of the Comstock Ditch which portion is hereinafter identified and described as the “**Place of Use**”;

...

1.1 [Cliffside Homeowners Association, Inc.,] hereby leases to [Applicant] and [Applicant] hereby leases from [Cliffside Homeowners Association, Inc.,] the Place of Use, depicted on Exhibit A, for a primary term commencing on the Effective Date and terminating five (5) years thereafter.

*Order Denying Reconsideration* at 4; *Place of Use Lease* at 2. Exhibit A depicts the proposed Place of Use as follows:

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<sup>1</sup> On July 21, 2015, Protestants filed *Protestant’s Response to Exceptions Brief* (“Response”). The Director will not consider this untimely Response. See IDAPA 730.02.c.

Comstock Canal Headgate

Big Wood River

Comstock Canal

Start Point for Cliffside Homeowners Association, Inc.

End Point for Cliffside Homeowners Association, Inc.

Additional Channel

The Applicant takes “issue with the possessory interest discussion in the Hearing Officer’s decision.” *Exceptions* at 3. The Applicant argues *Lemmon v. Hardy* does not require “that an applicant have possessory interest in the point of diversion at the time the application is filed.” *Id.* at 2.

## FINAL ORDER DENYING EXCEPTIONS



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.

*Lemmon*, 95 Idaho at 780, 519 P.2d at 1170 (footnote omitted). The Court determined “[t]he Director’s conclusion of law is in error” and explained “a water right initiated by trespass on private property is invalid.” *Id.* The Court stated:

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.

*Id.* The Court then discussed the Director’s “holding that it was not speculation to file an application for the use of water on designated land without a possessory interest in the land.” *Id.* The Court stated that “[l]ack of 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 for use thereof.” *Id.* at 781, 519 P.2d at 1171.

The Applicant asks the Director to conclude the Court’s statement that “[l]ack of possessory interest in the property designated as the place of use is speculation” means the Applicant did not need possessory interest in the point of diversion at the time Application 37-22852 was filed. *Exceptions* at 2. The Director cannot read this statement in isolation from the rest of the Court’s opinion. The statement does not negate the Court’s additional statements explaining that, to develop a valid water right, applicants must demonstrate possessory interest in *both* the proposed point of diversion and place of use to avoid trespass on private property.

The Applicant also suggests it has authority to exercise eminent domain to gain access to the point of diversion and reach of the Comstock Canal necessary to operate the proposed recharge project and, therefore, did not need to have possessory interest in those properties when filing Application 37-22852. *Exceptions* at 2. Specifically, the Applicant cites the following statement in *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 607, 619 P.2d 122, 125 (1980):

In order to assist owners of water rights whose lands are remote from the water source, the state has partially delegated its powers of eminent domain to private individuals. I.C. §§ 42-1102 and-1106. *See White v. Marty*, 97 Idaho 85, 540 P.2d 270 (1975). These statutes permit landlocked individuals to condemn a right of way through the lands of others for purposes of irrigation.

*Exceptions* at 2. This quote establishes that only private individuals seeking to deliver water for irrigation may exercise the power of eminent domain. *See* I.C. § 42-1102 (“[s]uch owners or

claimants are entitled to a right-of-way through the lands of others, for the purposes of irrigation.”). Neither *Canyon View Irrigation* nor the statutes cited therein establish the Applicant may exercise eminent domain to gain access to the point of diversion and reach of the Comstock Canal necessary to operate the project proposed by Application 37-22852 for the purpose of ground water recharge.

The Applicant also argues that, “[i]f the [Department] now begins to require a showing that an applicant have possessory interest in the point of diversion and in intervening lands when the application is filed, this would require a major change in the processing of new applications for permit to appropriate the waters of the state.” *Exceptions* at 3. The Applicant is incorrect. In 1981, then Director of the Department A. Kenneth Dunn issued a Memorandum to staff regarding appropriation of waters within irrigation district and canal company areas. See Attachment A. The Director stated that “[a] proper and equitable administration of water demands that we adopt guidelines for the appropriation of water within the service area of canal companies and irrigation districts.” Attachment A. The Director imposed the following guideline for “all permits issued in the future”:

1. Constructed conveyances. When an additional use is to be made of water from a manmade canal, ditch or other constructed conveyance, whether for consumptive or nonconsumptive use, the appropriator must obtain the permission of the conveyance owner before he can divert any water. The source of water is the natural stream or river from which the conveyance heads. Therefore, the department will not issue a permit without evidence of a right of way to use the *point of diversion and conveyance system* and/or the written permission of the owner of the conveyance works.

*Id.* (emphasis added). The requirement that the Applicant must demonstrate legal access to the headgate of the Comstock Canal as the point of diversion and the reach of the Comstock Canal necessary to operate the recharge project proposed by Application 37-22852 does not constitute a change in Department policy.

### ORDER

Based upon and consistent with the foregoing, the Exceptions are DENIED.

Date this 7<sup>th</sup> day of August 2015.

  
GARY SPACKMAN  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7<sup>th</sup> day of August 2015, I served a true and correct copy of the above and foregoing document by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Innovative Mitigation Solutions  
2918 N El Rancho Pl  
Boise, ID 83704

Idaho Dept of Fish & Game  
Magic Valley Region  
324 S 417 E, Suite 1  
Jerome, ID 83338

Trout Unlimited Inc.  
Attn: Peter Anderson  
910 W Main St, Suite 342  
Boise, ID 83702

Idaho Conservation League  
C/O Marie Callaway Kellner  
PO Box 844  
Boise, ID 83701

Blaine County Commissioners  
Attn: Larry Schoen  
206 1st Ave South, Suite 300  
Hailey, ID 83333

Western Watersheds Project  
Attn: Jon Marvel  
PO Box 1770  
Hailey, ID 83333

Lane Ranch H.O.A.  
Golden Eagle H.O.A.  
c/o Sun Country Mgmt  
PO Box 1675  
Sun Valley, ID 83353

Walker Sand & Gravel Ltd. Co.  
Attn: Brad Walker  
PO Box 400  
Bellevue, ID 83313

Heart Rock Ranch LLC  
PO Box 3724  
Hailey, ID 83333

Peter Trust LP  
2300 W Sahara Ave, Ste 530  
Las Vegas, NV 89102

Frank Erwin  
711 East Ave N  
Hagerman, ID 83332

Peter Trust LP  
P.O. Box 642  
Sun Valley, ID 83353

Harry S Rinker  
PO Box 7250  
Newport Beach, CA 92658

Idaho Power Company  
c/o Barker Rosholt & Simpson  
Attn: John K Simpson  
PO Box 2139  
Boise, ID 83701-2139

Idaho Rivers United  
Attn: Kevin Lewis  
PO Box 633  
Boise, ID 83701

Redstone Partners LP  
c/o Steve Beevers  
1188 Eagle Vista Ct  
Reno, NV 89511

Peter L Sturdivant  
PO Box 968  
Hailey, ID 83333-0968

Eccles Flying Hat Ranch LLC  
Eccles Window Rock Ranch  
PO Box 3028  
Salt Lake City, UT 84110

Big Wood Canal Company  
c/o Craig Hobdey  
PO Box 176  
Gooding, ID 83330

Brockway Engineering  
2016 N Washington St, Ste 4  
Twin Falls, ID 83301

The Valley Club, Inc.  
City of Hailey  
c/o Givens Pursley LLP  
Attn: Michael Creamer  
PO Box 2720  
Boise, ID 83701-2720

Office of the Attorney General  
Attn: W. Dallas Burkhalter  
PO Box 25  
Boise, ID 83707

Dry Lot, LLC  
Lower Snake River Aquifer  
Recharge District  
Thomas M. O'Gara Family Trust  
c/o Barker Rosholt & Simpson  
Attn: Travis Thompson  
195 River Vista Pl, Ste 204  
Twin Falls, ID 83301


Bureau of Land Management  
Attn: Fred Price  
1387 S Vinnell Way  
Boise, ID 83709-1657

Wood River Land Trust  
Attn: Patti Lousen  
119 E Bullion St  
Hailey, ID 83333

Office of the Attorney General  
Attn: Clive Strong, Michael Orr  
PO Box 83720  
Boise, ID 83720-0010

Steve Spencer  
USDA Forest Service  
1805 Hwy 16 Rm 5  
Emmett, ID 83617

Pepin Corso-Harris  
11 Purple Sage Lane  
Bellevue, ID 83313


  
Deborah Gibson  
Administrative Assistant



# **ATTACHMENT A**

MEMORANDUM

TO: Staff

FROM: A. Kenneth Dunn   
Director

DATE: September 8, 1981

RE: Appropriation of Water Within Irrigation District & Canal Company Areas

Applications to appropriate water within the boundaries of irrigation districts and within the service areas of canal companies cause several uncertainties in administration;

1. Is the water under the control of the district or canal company and not available for appropriation?
2. Is return flow available for appropriation if some water leaves the service area?

A proper and equitable administration of water demands that we adopt guidelines for the appropriation of water within the service area of canal companies and irrigation districts. The following guidelines will be followed in all permits issued in the future:

1. Constructed conveyances. When an additional use is to be made of water from a manmade canal, ditch or other constructed conveyance, whether for consumptive or nonconsumptive use, the appropriator must obtain the permission of the conveyance owner before he can divert any water. The source of water is the natural stream or river from which the conveyance heads. Therefore, the department will not issue a permit without evidence of a right of way to use the point of diversion and conveyance system and/or the written

permission of the owner of the conveyance works.

2. Natural channel conveyances or constructed drains. In many irrigation districts and canal companies, constructed drains and natural channels are used as integral parts of the delivery system. Runoff and seepage water collected in the drains and channels are used to supply water to shareholders lower in the project.

- a. When an appropriation from a natural channel, within which a substantial proportion of the flow is water injected into the channel and diverted from the channel by the irrigation district or canal company, is proposed for consumptive or nonconsumptive use, the potential exists for interference with the operation of the irrigation district or canal company. To insure that this local public interest is protected, any such permit issued will be conditioned as follows:

Water shall not be diverted under this permit until a written agreement with the irrigation district or canal company serving the area containing the point of diversion is filed with the department providing for coordination of the permitted use with the irrigation district or canal company operation.

- b. Usually the canal company either owns the land through which a constructed drain flows or has an easement for the drain. Any permit issued to appropriate water from a constructed drain within a canal company service area or an irrigation district boundary will carry the following condition:

Water shall not be diverted under this permit until

an easement or right of way with the owner of  
the drain providing for access to the drain is  
filed with the department.

The natural channel and drain is no longer considered a part of the  
conveyance system below the last point of diversion from which the canal  
company or irrigation district delivers water.



## **EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER**

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

### **REQUEST FOR HEARING**

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

### **APPEAL OF FINAL ORDER TO DISTRICT COURT**

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.