

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS)
FOR PERMIT NO. 37-22682 AND)
37-22852 IN THE NAME OF:)
INNOVATIVE MITIGATION)
SOLUTIONS LLC)

PRILIMINARY ORDER
REJECTING PERMIT NO. 37-22682

BACKGROUND

1. On February 10, 2012, Wood River Mitigation Solution LLC filed Application for Permit No. 37-22682 with the Idaho Department of Water Resources ("IDWR"). The application proposes diversion from the Big Wood River for ground water recharge.
2. Application for Permit No. 37-22682 was advertised in April 2012, in the appropriate local and statewide newspapers. Twenty-four parties either protested the application or intervened.
3. Wood River Mitigation Solution LLC filed a name change with the IDWR on June 6, 2013, changing the name to Innovative Mitigation Solutions LLC.
4. An Amended Application for Permit No. 37-22682 was filed with the IDWR on September 4, 2013 ("Application 37-22682").
5. Application 37-22682 was advertised in October 2013, in the appropriate local and statewide newspapers. Two new parties protested Application 37-22682 and one new party intervened.
6. On October 21, 2013, Innovative Mitigation Solutions LLC filed Application for Permit No. 37-22852 ("Application 37-22852") with the IDWR. Application 37-22852 proposed diversion from the Big Wood River for ground water recharge.
7. Application 37-22852 was advertised in February 2014, in the appropriate local and statewide newspapers. Fifteen parties either protested Application 37-22852 or intervened. Some of the protestants were also protestants to Application 37-22682.
8. An initial Pre-hearing Conference was held for Application 37-22682 on February 27, 2014. During the Pre-hearing Conference Application 37-22852 was discussed and the possibility of consolidation was considered.

9. On April 15, 2014, the Hearing Officer issued an Order consolidating Applications 37-22682 and 37-22852. The Consolidating Order noted it was most efficient to consolidate the matter for the following reasons: both applications have a common applicant, issues identified by the protestants for each application are similar if not the same, and protestants to the separate applications were common but not exactly the same.
10. Three consolidated Pre-hearing Conferences were held on the following dates: September 8, 2014; December 15, 2014; and February 4, 2015.
11. On March 13, 2015, the Hearing Officer issued a Scheduling Order and Notice of Hearing, which established timelines for expert reports and depositions. In addition, the Scheduling Order and Notice of Hearing established May 28, 2015, as the date for the fifth Pre-hearing Conference, and established a formal hearing date for June 8 – 12, 2015.
12. On April 16, 2015, protestants Thomas M. O’Gara Family Trust and the Lower Snake River Aquifer Recharge District (“protestants”), by and through their counsel of record, filed a *Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment* in the Matter of Application for Permit Nos. 37-22682 and 27-22852 in the name of Innovative Mitigation Solutions, LLC (“Motion for Summary Judgment”).
13. The protestants’ Motion for Summary Judgment sought dismissal of both Applications 37-22682 and 37-22852. Because the facts surrounding each application are separate and unique, the Motion for Summary Judgment was considered and ruled upon separately for each application.
14. The Motion for Summary Judgment for Application 37-22682 was denied on May 22, 2015.
15. The Motion for Summary Judgment for Application 37-22852 was granted on May 26, 2015.¹
16. On May 28, 2014, a pre-hearing conference was conducted for Application 37-22682. After the conference the Applicant stipulated to the participation of all protestants to Application 37-22852 at the hearing for Application 37-22682.
17. On June 7, 2015, Innovative Mitigation Solutions, LLC assigned Application 37-22682 to David R. Tuthill, Jr. (“Applicant”).
18. The Hearing Officer conducted an administrative hearing for Application 37-22682 on June 8 – 9 at the Blaine County School District’s Community Campus at 118 W. Bullion Street, in Conference Room 200, Hailey, ID.

¹ On May 27, 2015, the Hearing Officer received *Applicant’s Request to Reconsider Preliminary Order Granting Motion for Summary Judgment With Respect to Application for Permit No. 37-22852*. 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*. On August 7, 2015, the Director of the Department issued a *Final Order Denying Exceptions* concluding the Hearing Officer did not err by rejecting Application 37-22852.

19. At hearing the following witnesses testified:
 - David R. Tuthill, Ph.D., P.E., Applicant
 - George Eric Powell, Ph.D., P.E., Brockway Engineering, PLLC
 - Walt Poole, Ph.D., Idaho Department of Fish and Game
 - Len Harlig, Wood River Valley Resident
 - Wendy Pabich, Ph.D., Water Futures, Inc.
 - Justin Hayes, Idaho Conservation League
 - Larry Schoen, Blaine County Board of Commissioners
 - Ned Williamson, City of Hailey City Attorney
 - Mariel Platt, City of Hailey Director of Public Works
20. At hearing the following exhibits were accepted into the administrative record:
 - Applicant's Exhibit 1 – Applicant's Initial Testimony for Hearing Beginning June 8, 2015
 - Applicant's Exhibit 2 – Attachments A – H to the Applicant's Initial Testimony for Hearing Beginning June 8, 2015
 - Applicant's Exhibit 3 – Hiawatha Canal Company Annual Meeting – 03/20/2012 – 2012 Minutes
 - Blaine County Exhibit 1 – Letter from Blaine County Board of Commissioners to the Hearing Officer dated June 4, 2015 regarding "Applications by Innovative Mitigation Solutions, LLC for water right 37-22682
 - City of Hailey Exhibit 1 – Woodside Subdivision Plat Documents
 - City of Hailey Exhibit 2 – Easement Agreement between the City of Hailey and the Hiawatha Canal Water Users Association of Lateral or Laterals
 - City of Hailey Exhibit 3 – Warranty Deed, property conveyed by Sprenger, Grubb and Associates, Inc. to the City of Hailey located in the Woodside Subdivision, Hailey, Idaho
 - City of Hailey Exhibit 4 – First Amendment to Canal Improvement Lease
 - IDFG Exhibit 1 – Rationale for Protest of Permit Applications 37-22682 and 37-22852, prepared by IDFG and Henry's Fork Foundation
 - BRS Exhibit 1 – Expert Report in Protest of Applications for Permit No. 37-22682 and 37-22852
 - BRS Exhibit 2 – I.M.S. LLC Permits 37-22682 NAIP 2013 Aerial of Hiawatha Canal

- BRS Exhibit 3 – I.M.S. LLC Permits 37-22682 NAIP 2013 Aerial of gravel pits
- BRS Exhibit 4 – Amended Application for Permit 37-22682 Map 1 of 2
- BRS Exhibit 5 – Amended Application for Permit 37-22682 Map 2 of 2
- BRS Exhibit 6 – Ogara/Aarington Parcels Intersecting Hiawatha
- BRS Exhibit 6 – Ogara/Aarington Parcels Intersecting 37-22682
- BRS Exhibit 8 – Partial Decree Water Right 37-00577B
- BRS Exhibit 9 – Order in the Matter of Designating the Big Wood River Ground Water Management Area
- BRS Exhibit 10 – Letter from Innovative Mitigation Solutions, LLC to Hearing Officer dated May 27, 2015 regarding Applications for Permit 37-22682 and 37-22852, Information Relative to Financial Resources
- BRS Exhibit 11 – 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
- BRS Exhibit 12 – Certificate of Organization Limited Liability Company for Wood River Mitigation Solutions, LLC
- BRS Exhibit 13 – Invitation to Attend a Meeting on Mitigation Planning in the Wood River Valley – April 15, 2013
- ICL Exhibit 1 – Amended Application for Permit No. 37-22682
- ICL Exhibit 2 – February 8, 2012 Letter to IDWR from Wood River Mitigation Solutions
- ICL Exhibit 3 – Expert Report and Curriculum Vitae of Wendy Pabich, Ph.D.
- ICL Exhibit 4 – Blaine County Local Public Interest Water Policy
- ICL Exhibit 5 – IDFG Rationale for Protest of Permit Applications 37-22682 and 37-22852
- ICL Exhibit 6 – Statement of Purpose: 2003 Amendment of Idaho Code 42-202B(3) definition of Local Public Interest
- ICL Exhibit 7 – State of Legislative Intent: 1993 Amendment of Idaho Code 42-234
- ICL Exhibit 8 – IDWR January 22, 1980 Administrator's Memorandum: Big Wood River Appropriations
- ICL Exhibit 9 – Eastern Snake Plain Area, Amended Moratorium Order, April 30, 1993
- ICL Exhibit 10 – Idaho State Water Plan, adopted 2010

- ICL Exhibit 11 – Amended Memorandum Decision and Order: Application for Permit No. 37-7919
 - ICL Exhibit 12 – Order Adopting Proposed Memorandum Decision and Order: Application for Permit Nos. 37-8258 and 37-8307
 - ICL Exhibit 13 – IDWR June 1, 2009 Memorandum re: Water Right Transfer within Big Wood River Minimum Stream Flow Reaches
 - ICL Exhibit 14 – IDWR Application Processing Memorandum #72 re: Evaluation of Mitigation Plans for Water Right Permits
 - ICL Exhibit 15 – Illustrative Hydrograph of Big Wood Flow at Hailey
21. At hearing, consistent with the Rules of Procedures of Idaho Department of Water Resource (IDAPA 37.01.01.602) the Hearing Officer gave Official Notice that he may rely on the following resources is preparing a decision:
- IDWR’s file for Application 37-22682.
 - Relevant water district records.
 - Holdings in past decisions and orders of the IDWR as the holdings may apply to the protested application.
 - IDWR’s water right records.
 - Observation well data including ground water quality data.
 - Water measurements and stream flow records in IDWR files or available from responsible agencies such as the U.S. Geological Survey.
 - Pertinent Well Drillers Reports in IDWR files.
22. A public meeting to allow for public witnesses to testify in the matter of Application 37-22682 was conducted on June 9, 2015, at the Blaine County School District’s Community Campus at 118 W. Bullion Street, in Conference Room 200, Hailey, ID. More than a dozen public witnesses testified during the public meeting.
23. At hearing the parties agreed to prepare and submit post hearing briefs on or before July 1, 2015. The parties also agreed to one round of rebuttal briefs to be submitted to the Hearing Officer on or before July 15, 2015.
24. The following post hearing briefs were timely received by the Hearing Officer:
- Big Wood Canal Company – June 29, 2015
 - City of Hailey’s Post Hearing Brief – June 30, 2015
 - Heart Rock Ranch et al Post Hearing Brief – June 30, 2016
 - Applicant’s Post Hearing Brief – July 1, 2015
 - ICL Post Hearing Brief – July 1, 2015

25. The following rebuttal briefs were timely received by the Hearing Officer:
- Applicant’s Rebuttal Brief – July 15, 2015
 - City of Hailey’s Response to Applicant’s Post Hearing Brief – July 15, 2015
 - Heart Rock Ranch et al Post-Hearing Rebuttal Brief – July 15, 2015
 - ICL Post-Hearing Reply Brief – July 15, 2015

FINDINGS OF FACT

1. Application 37-22682 proposes the following:

Flow Rate:	154.00 CFS
Purpose of Use:	Ground Water Recharge
Source of Water:	Big Wood River
Period of Use:	01/01 to 12/31
Point of Diversion:	10 Diversions from the Big Wood River
Place of Use:	Select lands in T3N18E, T2N18E, and T1N18E

2. Application 37-22682 proposes recharging up to 154 CFS of surface water by using “the Hiawatha Canal and sites near the canal” within T03N18E, T02N18E, and T01N18E, Blaine County, Boise Meridian.
3. Application 37-22682 proposes recharging up to 154 CFS of surface water within the Walker Sand and Gravel operations on lands identified within T01N18E, Blaine County, Boise Meridian.
4. Question 10a of the IDWR’s application for permit form asks, “Who owns the property at the point of diversion? The Applicant responded to question 10a, “*Various parties--easements will be sought*”.
5. Question 10b of the IDWR’s application for permit form asks, “Who owns the land to be irrigated or place of use?” The Applicant responded to question 10b, “*Hiawatha Canal members and Walker Sand and Gravel*”.
6. Question 10c of the IDWR’s application for permit form asks, “If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing:”. The Applicant responded to question 10c, “*Lease Agreements*”.
7. The Applicant included the following table with Application 37-22682 summarizing the legal description for the ten points of diversion described in the Application.

POD No.	Twp	Rge	Sec	¼	¼	County	Source	Local Name
1	3N	18E	20	SW	NW	Blaine	Big Wood R.	Hiawatha Canal
2	1N	18E	12	SE	SW	Blaine	Big Wood R.	n/a
3	1N	18E	13	NE	NW	Blaine	Big Wood R.	n/a
4	1N	18E	13	SW	SW	Blaine	Big Wood R.	n/a
5	1N	18E	24	SW	NW	Blaine	Big Wood R.	n/a
6	1N	18E	23	SE	SE	Blaine	Big Wood R.	n/a
7	1N	18E	26	NE	NE	Blaine	Big Wood R.	n/a
8	1N	18E	26	SW	NE	Blaine	Big Wood R.	n/a
9	1N	18E	26	NW	SE	Blaine	Big Wood R.	n/a
10	1N	18E	26	SW	SE	Blaine	Big Wood R.	n/a

8. Included with Application 37-22682 is a letter titled “Letter to Allen Merritt, re: Permit App. No. 37-22682” dated August 31, 2013 (“August 31 Letter”). The August 31 Letter is the Applicant’s response to an IDWR order dated February 28, 2013, requiring the Applicant to complete and resubmit Application 37-22682 to the IDWR with additional information.
9. On page four of the August 31 Letter, the Applicant responds to the IDWR’s request for additional information regarding design, construction or operation techniques for the project. The August 31 Letter states, “*The design under this application is to divert water from existing or to-be-constructed ditches from the Big Wood River, conveying flows to aquifers via the ditches and via off-ditch sites that will be identified during the permit period.*”

Hiawatha Canal

10. Application 37-22682 includes a lease agreement (“Hiawatha Lease”) for use of the Hiawatha Canal between the Applicant as Tenant and the Hiawatha Canal Company as Landlord “*for the purpose of conducting ground water recharge operations and related activities, including but not limited to, the acquisition of ground water recharge credits (“Credits”) issued by the Idaho Department of Water Resources (“Tenant’s Use”)...*”.
11. Item 5.1 of the Hiawatha Lease states, “*Landlord covenants that Landlord is the owner of the Hiawatha Canal and has full right and authority to enter into this Lease.*”
12. At hearing the Applicant submitted meeting minutes from a Hiawatha Canal Company annual meeting held on March 20, 2012 (Applicant’s Exhibit 3). The following excerpt is taken from the March 20 meeting minutes.

[Applicant] has filed for a new water right for recharge of 154 cfs in their name...

The [Hiawatha Lease] needed approval of the water owners on the [Hiawatha Canal Company] so a motion was made by Kathy Lynn and seconded by Nick Purdy to approve the agreement the Board had entered into with [Applicant]. The motion carried unanimously.

13. Blaine County taxlot data² describes the owner of land underlying the point of diversion identified in Application 37-22682 in the SW ¼ of the NW ¼ of Section 20 of Township 3 North, Range 18 East, Boise Meridian, Blaine County as Starweather Subdivision Property Owner Association. This point of diversion describes the diversion point of the Hiawatha Canal from the Big Wood River.
14. The Hiawatha Canal and laterals cross at least 110 individual parcels of land, including parcels owned by the City of Hailey (BRS Exhibit 6).
15. The Applicant submitted no evidence of authority from any landowners of parcels underlying the Hiawatha Canal, including the City of Hailey, approving recharge activities.
16. The City of Hailey owns multiple parcels of land underlying the Hiawatha Canal in the Woodside Subdivision (City of Hailey Exhibits 1 and 3). These parcels of land are City of Hailey drainage facilities.
17. At hearing Mr. Ned Williamson (City of Hailey City Attorney) testified "*...if there is any proposed recharge within a [City of Hailey] facility, obviously [the City of Hailey] needs to give its consent for such recharge.*"
18. No evidence was admitted at hearing demonstrating consent from the City of Hailey for the Applicant to recharge in the Hiawatha Canal, or adjacent to the Hiawatha Canal on lands owned by the City of Hailey.

Walker Sand and Gravel

19. Application 37-22682 includes a Place of Use Lease agreement ("WSG Lease") between Walker Sand and Gravel as Landlord and the Applicant as Tenant for the "*the purpose of conducting ground water recharge operations and related activities, including but not limited to, the acquisition of ground water recharge credits ("Credits") issued by the Idaho Department of Water Resources ("Tenant's Use")...".*
20. Page 2 of the WSG Lease states, "*[Walker Sand and Gravel] owns land near the Big Wood River in Blaine County, Idaho commonly known as the ("Place of Use")...".*
21. Item 4 of the WSG Lease states, "*Landlord shall construct, manage, operate, maintain and repair all Place of Use during the Term on this Lease [and] operate the Place of Use as necessary to complete the activities of Tenant's Use . . ."*
22. Item 6.1 of the WSG Lease states, "*Tenant shall not make any alterations in or additions to the Place of Use.*"

² IDWR requests taxlot data from Blaine County on an annual basis where it is incorporated into a statewide parcel layer. Data for Blaine County was updated on February 10, 2015.

23. Applicant’s Exhibit 1 at 8 states, “For Walker Sand and Gravel, the company has heavy equipment that can pioneer ditches from the Big Wood River, conveying the water from the river to its lands, including gravel pits.”Blaine County taxlot data describes the owners of land underlying the nine points of diversion identified in Application 37-22682 associated with the southern place of use and the WSG Lease. The following table summarizes the nine points of diversion.

POD No.	Township Range Section Quarter-Quarter	Meridian	Owner
2	T1N R18E S12 SE SW	Boise	Swiftsure Ranch Therapeutic Equestrian Center, Inc., C/O Cheryl Bennet
3	T1N R18E S13 NE NW	Boise	Lakeside Industries
4	T1N R18E S13 SW SW	Boise	Anderson Larry D, Anderson Lexie M
5	T1N R18E S24 SW NW	Boise	Bureau of Land Management
6	T1N R18E S23 SE SE	Boise	Sluder C.D., Sluder Myra Joan
7	T1N R18E S26 NE NE	Boise	High Track LLC
8	T1N R18E S26 SW NE	Boise	High Track LLC
9	T1N R18E S26 NW SE	Boise	High Track LLC
10	T1N R18E S26 SW SE	Boise	High Track LLC

24. The Applicant submitted no evidence of authority from any landowners, including the Bureau of Reclamation, of parcels underlying the PODs identified to serve the Walker Sand and Gravel recharge location.

APPLICABLE STATUES, RULES, AND CASELAW

1. Idaho Code § 42-203A(5) states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such: (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) 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, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho...the director of the department of water resources may reject such application and refuse issuance of a permit therefore, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. The applicant bears the burden of proof regarding all factors set forth in Idaho Code § 42-203A(5). IDAPA 37.03.08.040.04.
3. Rule 45.01.c states 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.

IDAPA 37.03.08.45.01.c.i.

4. In *Lemmon v. Hardy*, the Idaho Supreme Court referenced the Director's holding that:

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.

5. In *Canyon View Irrigation v. Twin Falls Canal Company Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 607, 619 P.2d 122, 125 (1980), the Court stated:

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.

6. The statutes permitting private individuals to exercise the power of eminent domain are specific to “purposes of irrigation.” 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.”).

ANALYSIS AND CONCLUSIONS OF LAW

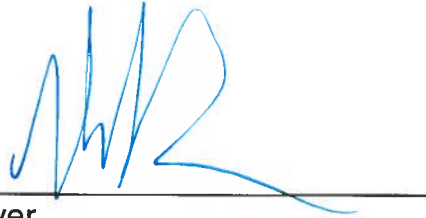
1. As stated in Finding of Fact 4, Question 10a of the IDWR’s application for permit form asks, “Who owns the property at the point of diversion? The Applicant responded to question 10a, “*Various parties--easements will be sought*”. Consistent with that response, the Applicant submitted no evidence demonstrating legal access to the points of diversion described in Application 37-22682 that are necessary to operate the proposed recharge projects. Further, *Canyon View Irrigation* and the plain language of Idaho Code § 42-1102 demonstrate private individuals may only exercise the power of eminent domain for “purposes of irrigation.” The Applicant cannot demonstrate authority to exercise eminent domain authority to obtain access to points of diversion described in Application 37-22682 for purposes of recharge. Therefore, the Hearing Officer concludes Application 37-22682 should be rejected because it was not made in good faith.
2. The Applicant asks the Hearing Officer to conclude the Court’s statement in *Lemmon* 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 37-22682 was filed. *Applicant’s Post-Hearing Brief* at 6. The Hearing Officer 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.
3. In addition to the lack of legal access to the points of diversion described in Application 37-22682, the Applicant has not demonstrated legal access to other properties described in Application 37-22682 necessary to construct and operate the proposed project. As explained in Finding of Fact 2, with respect to the Hiawatha Canal, Application 37-22682 states the Applicant proposes to conduct ground water recharge by using “the Hiawatha Canal *and sites near the canal*.” (emphasis added). However, as explained in Findings of Fact 13 through 18, while the Hiawatha Lease purports to lease the Hiawatha Canal to the Applicant for the purpose of conducting ground water recharge, the Applicant submitted no evidence of authority from any landowners of the at least 110 individual parcels of land underlying the Hiawatha Canal approving recharge activities, including the City of Hailey. Furthermore, the Applicant submitted no evidence of authority from any landowners adjacent to or near the Hiawatha Canal approving off-canal recharge activities. As explained in Findings of Fact 19 through 24, with respect to

the Walker Sand and Gravel proposal, the Applicant testified Walker Sand and Gravel would “pioneer ditches from the Big Wood River, conveying the water from the river to its lands, including gravel pits.” However, the Applicant submitted no evidence demonstrating legal access to the properties over which the Walker Sand and Gravel company would have to “pioneer ditches from the Big Wood River” in order to convey water to the Walker Sand and Gravel lands. For these additional reasons, the Hearing Officer concludes Application 37-22682 should be rejected because it was not made in good faith.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that Application 37-22682 is **REJECTED**.

Dated this 6 day of October, 2015.



Mathew Weaver
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of October 2015, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed to the following:

Documents Served: Preliminary Order Rejecting Permit No. 37-22682
Explanatory Information to

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

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

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

Heart Rock Ranch LLC
PO Box 3724
Hailey, ID 83333

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

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

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

Frank Erwin
711 East Ave N
Hagerman, ID 83332

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

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

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

Harry S Rinker
PO Box 7250
Newport Beach, CA 92658

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

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 Hobbley
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
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



Emalee Rushing
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case 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 this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.