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DEPARTMENT OF  
WATER RESOURCES

CONFIDENTIAL SETTLEMENT DOCUMENT PER IDAPA 37.01.01.610.

## SETTLEMENT AGREEMENT

This Agreement is entered into between Innovative Mitigation Solutions, LLC (IMS), the Idaho Department of Fish and Game (IDFG), Trout Unlimited, Inc. and its Hemingway Chapter (TU), and Idaho Rivers United (IRU) (collectively the "Parties").

### A. RECITALS

1. On February 10, 2012, Wood River Mitigation Solution LLC filed Application for Permit No. 37-22682 with the Idaho Department of Water Resources ("Department"). The application proposed to divert water from the Big Wood River for ground water recharge. Wood River Mitigation Solution LLC filed a name change with the Department on June 6, 2013, changing the applicant's name to Innovative Mitigation Solutions LLC. An Amended Application for Permit No. 37-22682 ("Application 37-22682") was filed on September 4, 2013 with revised points of diversion and places of use.
2. IRU filed a protest to Application 37-22682 on April 20, 2012, describing its concerns about impacts to Wood River riverine resources and fisheries.
3. IDFG and TU filed their protests to Application 37-22682 on April 23, 2012, describing their concerns about impacts to Wood River riverine resources, flows and fisheries.
4. On October 21, 2013, IMS filed Application for Permit No. 37-22852 ("Application 37-22852") with the Department. Application 37-22852 also proposed to divert water from the Big Wood River for ground water recharge.
5. IDFG filed a protest to Application 37-22852 on March 11, 2014, describing its concerns about impacts to Wood River riverine resources, flows and fisheries.
6. On April 15, 2014, the Hearing Officer consolidated the protests to Application 37-22682 and with the protests to Application 37-22852.
7. IDFG, TU, and IRU now believe that the conditions contained in this Settlement Agreement and contained in Attachment A sufficiently mitigate or avoid impacts on Wood River flows and fisheries should the Department decide to grant either Application 37-22682 or 37-22852.

### B. AGREEMENT

In consideration of the mutual covenants set forth below, the Parties agree to fully resolve the protests filed by TU, IRU, and IDFG, as follows:

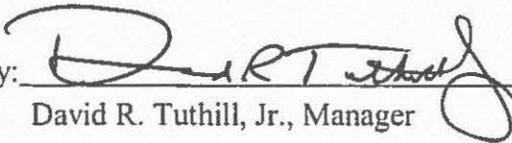
1. **Fish Screens.** Innovative Mitigation Solutions, LLC shall make all reasonable efforts to obtain permission to install fish screening or other fish deterrent systems at the points of diversion for the water use contemplated by Applications 37-22682 and 37-22852.

2. **Conditions.** If Application 37-22682 or 37-22852 is granted by the Department IMS shall request that the Department condition the permit with the provisions in Attachment A to this Settlement Agreement. If the permit issued by the Department, either initially or following conclusion of appeals, incorporates fewer than all of the conditions included in Attachment A, or modifies them in such manner that they are less protective of fish, wildlife, and riverine resources the Parties agree that they shall be bound by the Settlement Agreement including the conditions set forth in Attachment A.
3. **Withdrawal of Protests.** Within five (5) business days after this Agreement is signed by the Parties, TU and IRU will withdraw their protests against Applications 37-2268 and 37-22852 by providing written notice of withdrawal to the Department. TU and IRU will take no position whether Applications 37-22682 or 37-22852 should be granted or denied by the Department. IDFG will withdraw its protest of Application 37-22682 on the record to the Department at the hearing on Application 37-22682 following the submission of its expert witness report to the Department. IDFG will withdraw its protest of Application 37-22852 on the record to the Department at the hearing on Application 37-22852 following the submission of its expert witness report to the Department.
4. **Notice and Communication.**
  - 4.1 **Formal Notices.** Written notice given to any party pursuant to this Agreement shall be mailed by first class mail, or overnight express service, postage pre-paid, to the address listed below or such subsequent address as a party shall identify. Notices shall be deemed delivered five (5) business days after the date of mailing or, if overnight express or other receipt-notification service is used, on the date of receipt.
    - A. Innovative Mitigation Services, LLC: Dave Tuthill, 2918 N. El Rancho Place, Boise, ID 83704.
    - B. TU: Peter Anderson, Idaho Water Project, Trout Unlimited, Inc., 910 W. Main St. Ste. 342, Boise, ID 83702.
    - C. IDFG: Walt Poole, Idaho Department of Fish and Game, P.O. Box 25, Boise, Idaho 83707
    - D. IRU: Kevin Lewis, Conservation Director, P.O. Box 633 Boise, ID 83701
5. **Dispute Resolution.** Any substantial dispute between the Parties related to this Settlement Agreement will be resolved in accordance with the following provisions:

- 5.1 **Good Faith Negotiation.** Upon written notice from one party to the others, the Parties will promptly attempt in good faith to resolve the dispute by negotiation.
- 5.2 **Litigation.** Litigation is allowed between the Parties only if the dispute is not resolved by negotiation. In the event of litigation regarding a breach of this Agreement, the parties agree that specific performance is the preferred remedy, provided that such remedy is deemed by a court to meet the standards for an award of specific performance under Idaho law. No waiver of any breach by a party of the terms of this Agreement shall be deemed a waiver of any subsequent breach of the Agreement. The prevailing party in any litigation is entitled to recover reasonable attorney fees and costs.
- 5.3 **Governing Law, Jurisdiction, and Venue.** This Agreement will be construed and interpreted in accordance with the laws of the State of Idaho. The Parties agree that the courts of Idaho shall have exclusive jurisdiction, and agree that Blaine County is the proper venue.
6. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof.
7. **Amendment.** This Agreement may not be amended except by a written agreement signed by all Parties.
8. **Binding Effect.** This Agreement shall inure to the benefit of, and is binding upon, the Parties and their respective successors and assigns.
9. **Counterparts.** This Agreement may be executed by the parties in separate counterparts, which shall together constitute one and the same instrument. A faxed or scanned copy of a party's signature shall have the same effect as an original signature.

(Signatures on the following page)

**Innovative Mitigation Solutions, LLC**

By:   
David R. Tuthill, Jr., Manager

June 8, 2015  
Date

**Idaho Department of Fish and Game**

By: \_\_\_\_\_  
Virgil Moore, IDFG Director

\_\_\_\_\_  
Date

**Trout Unlimited, Inc.**

By:   
Peter R. Anderson

June 5, 2015  
Date

**Idaho Rivers United**

By: \_\_\_\_\_  
Kevin Lewis, its Conservation Director

\_\_\_\_\_  
Date

**Innovative Mitigation Solutions, LLC**

By: \_\_\_\_\_  
David R. Tuthill, Jr., Manager

\_\_\_\_\_  
Date

**Idaho Department of Fish and Game**

By: Sharon W. Kiefer for  
Virgil Moore, IDFG Director

6/5/15  
Date

**Trout Unlimited, Inc.**

By: \_\_\_\_\_  
Peter R. Anderson

\_\_\_\_\_  
Date

**Idaho Rivers United**

By: \_\_\_\_\_  
Kevin Lewis, its Conservation Director

\_\_\_\_\_  
Date

**Innovative Mitigation Solutions, LLC**

By: \_\_\_\_\_  
David R. Tuthill, Jr., Manager Date

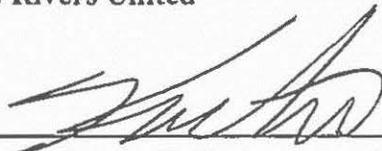
**Idaho Department of Fish and Game**

By: \_\_\_\_\_  
Virgil Moore, IDFG Director Date

**Trout Unlimited, Inc.**

By: \_\_\_\_\_  
Peter R. Anderson Date

**Idaho Rivers United**

By:  \_\_\_\_\_  
Kevin Lewis, its Conservation Director Date 6/4/2015

## ATTACHMENT A

### Proposed Conditions of Approval for Application for Permit No. 37-22682 and 37-22852

1. This water right is subject to all prior rights, including prior minimum stream flow water rights throughout the length of the minimum stream flow reach.
2. Diversion under this right shall not exceed 9,999 acre-feet per year.
3. The flow rate for all water diverted under this water right must be measured using a water measurement technique approved by IDWR. The water right holder is responsible to measure, record, document and compute the volume diverted under this water right, for submittal to the Watermaster.
4. In order to maximize the number of days that bankfull discharge is realized in the Big Wood River, on days when flows exceed the bankfull discharge of 1,709 cfs at the Hailey gage, diversions for recharge are not allowed to reduce discharge any lower than 1,709 cfs.
5. In order to maximize the number of days that stream connectivity occurs between March 1 and April 14, on days when unregulated discharge at Hailey exceeds 125 cfs, diversions under this right are allowed only on days when discharge at Hailey minus all diversions downstream to Magic Reservoir exceeds 125 cfs.
6. Water recharge diversions are not be allowed to reduce flows in the Big Wood River above Magic Reservoir to any lower than 125cfs.
7. The permit holder shall install and operate a streamflow gage to record and report flows in the Big Wood River immediately above the Bellevue Canal so that the minimum flow rights can be managed down to that point throughout the water year.
8. IDWR will enforce the prior minimum stream flow water rights throughout the length of the protected reach by indexing flows in the reach to the flow at either the existing Hailey gage, or such other existing or future gage or gages IDWR determines in its discretion best represent the lowest flows in the reach.
9. Any permanent or temporary diversion structure constructed in the main channel of the Big Wood River to divert water under this right shall be constructed in such a way and in consultation with the Idaho Department of Fish and Game to ensure both upstream and downstream unimpeded fish passage.
10. Any water use mitigation plan dependent upon recharge conducted under this water right shall be subject to separate review and approval by IDWR under the applicable laws and procedures for such review.
11. This water right is subject to a public interest review using all available data, 10 years after issuance of the water right by IDWR.

12. This right does not grant any right-of-way or easement across the land of another.
13. During the development period of this permit, the permit holder agrees to obtain all land use authorizations that are required by the United States Department of the Interior, Bureau of Land Management under Title V of the Federal Land Policy and Management Act of 1976 as amended (43 U.S.C. 1761) and the regulations found in 43 CFR 2800, in order to transport water diverted under this right across BLM land or to conduct recharge activities on BLM land.
14. Proof of application of water to beneficial use shall be submitted on or before \_\_\_\_\_.
15. Use of water under this right will be regulated by a Watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 37.
16. Reporting shall occur in the manner specified by the Department, consistent with Section 42-701, Idaho Code. To facilitate this reporting requirement, the right holder shall install and maintain a totalizing measuring device approved by the Department at each point of diversion and at each point where water is delivered from the conveyance system into a designated recharge site.
17. This right is subject to all applicable provisions of Section 42-234, Idaho Code.
18. Pursuant to Section 42-234(3), Idaho Code, the Director may reduce the amount of water that may be diverted for recharge purposes under this right even though there is sufficient water to supply the entire amount authorized for appropriation under this right.
19. Pursuant to Section 42-234(4), Idaho Code, to ensure that other water rights are not injured by the operation of the recharge project authorized by this right, the Director has authority to approve, disapprove, or require alterations in the methods employed to achieve ground water recharge.
20. Consistent with Section 42-234 (5), Idaho Code, seepage from canals incidental to delivery of irrigation water shall not be considered ground water recharge under this right. Canal seepage will be considered to be ground water recharge only when the canals are not conveying water for irrigation or other beneficial uses.
21. Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality permitting requirements administered by the Department of Environmental Quality or the Department of Agriculture .
22. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.