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DISTRICT COURT  
FIFTH JUDICIAL DISTRICT

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*Michelle Emerson*

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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME**

|   |   |                                     |
|---|---|-------------------------------------|
| <b>NORTH SIDE CANAL COMPANY and</b>             | ) |                                     |
| <b>TWIN FALLS CANAL COMPANY,</b>                | ) | CASE NO. <u><i>CV 2007-1093</i></u> |
|   | ) |                                     |
| Petitioners,                                    | ) | <b>PETITION FOR PEREMPTORY</b>      |
|   | ) | <b>WRIT OF MANDATE</b>              |
| vs.   | ) |                                     |
|   | ) | Fee Category A: \$88.00             |
| <b>DAVID R. TUTHILL, JR.,</b> in his official   | ) |                                     |
| capacity as director of the Idaho Department of | ) |                                     |
| Water Resources, and <b>THE IDAHO</b>           | ) |                                     |
| <b>DEPARTMENT OF WATER RESOURCES,</b>           | ) |                                     |
|   | ) |                                     |
| Respondents.                                    | ) |                                     |
| _____   | ) |                                     |

COME NOW, the Petitioners, North Side Canal Company and Twin Falls Canal Company (hereinafter collectively referred to as the "Petitioners"), by and through their attorneys of record, Barker Rosholt & Simpson LLP, and hereby petitions the Court to issue a writ of mandate compelling the Idaho Department of Water Resources and its Director, David R. Tuthill, Jr. (collectively referred to as the "Respondents"), to void the Director's order dated

September 5, 2007, to close any protest or comment period, and, without delay, to issue a license to the Petitioners, in accordance with the Respondents' statutory duties under Idaho Code § 42-219.

## GENERAL ALLEGATIONS

### PARTIES

1. Petitioner, North Side Canal Company ("NSCC"), is a non-profit corporation organized and existing pursuant to the Carey Act (43 USC 641, *et seq.*) and the laws of the state of Idaho, with its principal place of business in Jerome, Idaho. NSCC delivers water to its shareholders in Jerome, Gooding, and Elmore Counties.

2. Petitioner, Twin Falls Canal Company ("TFCC"), is a non-profit corporation organized and existing pursuant to the Carey Act (43 USC §§ 641, *et seq.*) and the laws of the state of Idaho, with its principal place of business in Twin Falls County. TFCC delivers water to its shareholders in Twin Falls County.

3. Respondent, David R. Tuthill, Jr., is the Director of the Idaho Department of Water Resources, and a resident of Ada County.

4. Respondent, Idaho Department of Water Resources ("Department"), is the executive department existing under the laws of the state of Idaho pursuant to Idaho Code § 42-1701, *et seq.*, with its state office located at 322 E. Front St., Boise, Ada County, Idaho.

### JURISDICTION & VENUE

5. Jurisdiction is proper in this Court pursuant to Idaho Code §§ 1-705 and 7-301, *et seq.* (Writs of Mandate).

6. This Court, sitting in Jerome County, is the proper venue for this matter pursuant to Idaho Code § 5-402, because the Respondents' failure to issue Petitioners' water right license

in accordance with state law affects the property interests of the Petitioners in their respective counties, including Jerome County.

### STATEMENT OF FACTS

7. On March 30, 1977, the Petitioners filed an Application for Permit with the Department to appropriate water from the Snake River for year-round power production purposes, at a rate of up to 12,000 cfs, at the Milner power plant. **Attachment A.** The Respondents published notice of the Petitioners' application on May 19<sup>th</sup> and 26<sup>th</sup>, 1977. *Id.* The published notice, as provided by Idaho Code § 42-201, stated that "Protests against the granting of the permit must be filed with the Idaho Department of Water Resources on or before June 6, 1977." *Id.* No protests were filed to the application for permit within the statutory timeframe. The Respondents then issued water right permit no. 01-07011 (the "Milner Permit") to the Petitioners on June 29, 1977. **Attachment B.**

8. The Milner Permit was developed pursuant to an agreement between the Petitioners and Idaho Power Company, dated November 9, 1984. **Attachment C.** While proof of beneficial use was originally due on June 1, 1982, delays in the FERC licensing process postponed the Petitioners' ability to submit proof of beneficial use. Therefore, in accordance with the statutory provisions in Idaho Code § 42-204, the Petitioners sought and received extensions of the deadline for submitting proof of beneficial use in 1982, 1987, 1990, and 1992.

9. Petitioners filed proof of beneficial use for 5,714.7 cfs on October 29, 1993. **Attachments E** (Proof of Beneficial Use) & **F** (Beneficial Use Field Report performed by Certified Water Right Examiner, Charles E. Brockway of Brockway Engineering).

10. In 1987, when the Petitioners sought another extension on their pending deadline for submitting proof of beneficial use, the Department became concerned regarding the impact of

the then-recently executed Swan Falls Agreement, as well as Idaho Code § 42-203B,<sup>1</sup> on this permit. In a letter dated April 13, 1987, the Chief of the Operations Bureau, L. Glen Saxton, notified the Petitioners that the Respondents would grant the extension, so long as the right was “junior and subordinate to all other rights for the use of water.” **Attachment G.**<sup>2</sup> Accordingly, Mr. Saxton recommended the following language:

The rights for the use of water acquired under this permit shall be junior and subordinate to all other rights for the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of this permit and shall not give rise to any right or claim against any future rights for the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of this permit.

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<sup>1</sup> Idaho Code § 42-203B provides, in part:

(1) The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by subsections (2) and (3) of this section are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes subordinated by a permit issued after July 1, 1985, or by an agreement, to continue using the water pending approval of depletionary future beneficial uses.

(2) A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action shall remain unsubordinated as defined by the agreement. Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the user of the water for power purposes, and of the people of the state of Idaho; ...

(3) Water rights for power purposes not defined by agreement with the state shall not be subject to depletion below any applicable minimum stream flow established by state action. Water rights for power purposes in excess of such minimum stream flow shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the users of water for power purposes and of the people of the state of Idaho. *The rights held in trust shall be subject to subordination to and depletion by future consumptive upstream beneficial users whose rights are acquired pursuant to state law*, excluding compliance with the requirements of section 42-203C, Idaho Code.

...

(6) The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. The director shall also have the authority to limit a permit or license for power purposes to a specific term. Subsection (6) of this section shall not apply to licenses which have already been issued as of the effective date of this act.

(emphasis added).

<sup>2</sup> Attachment G was obtained from the Department's website and is an unsigned copy of the Respondent's April 13, 1987 letter. An executed copy, with interjected comments, is attached to the May 8, 1987 letter from the Petitioners' counsel, attached hereto as **Attachment H**. This copy was also obtained from the Department's website.

*Id.*

11. Counsel for the Petitioners responded in a letter dated May 8, 1987, and addressed concerns with the recommended language:

At the time of the issuance of the Hells Canyon license, the subordination was to irrigation of lands and other beneficial consumptive uses in the Snake River Water Shed. In your proposed language, non-consumptive uses such as groundwater recharge could take the total flows of the upper Snake available to the Milner Power Plant and put them underground eliminating any generation at the project. The language would also facilitate a non-consumptive diversion of water above the project for fish propagation or some other non-consumptive purpose with a return of the water below the project. Finally, the language would facilitate a diversion of surplus flows of the Snake River to the Bear River Basin for any purpose.

**Attachment H.** Included with the May 8, 1987 letter, was a copy of the Respondents' April 13, 1987 letter, with proposed changes to the above-cited recommended language. *Id.*

12. In a letter dated November 18, 1987, the Respondents notified the Petitioners that they "will use the amended language which you suggested in your [May 8, 1987] letter for the subordination condition to be placed as a condition of approval on the extension request."

**Attachment I.** The following language was included in the permit at that time (underlined portions constitute the changes from the original language recommended by the Respondents):

The rights for use of water acquired under this permit shall be junior and subordinate to all other rights for the consumptive beneficial use of water, *other than hydropower and groundwater recharge* within the Snake River Basin of the State of Idaho that are initiated later-in-time than the priority of this permit and shall not give rise to any right or claim against any future rights for the consumptive beneficial use of water, *other than hydropower and groundwater recharge* within the Snake River Basin of the State of Idaho initiated late-in-time than the priority of this permit.

*Id.* (emphasis added). This exact language remains a condition on the Milner Permit.

13. On October 29, 1993, the Petitioners submitted proof of beneficial use through an exam by Dr. Charles E. Brockway, a Certified Water Right Examiner. **Attachment F.**

Dr. Brockway reviewed the Petitioners' diversion and water use, and submitted proof of beneficial use for 5,714.7 cfs to the Department. *Id.*

14. The Respondents received Dr. Brockway's beneficial use examination report on November 1, 1993. *Id.* The Respondents acknowledged receipt in a letter dated December 9, 1993. **Attachment J** ("The department acknowledges receipt of the proof of beneficial use form submitted for this permit"). At that time, the Petitioners understood that their right and opportunity to demonstrate beneficial use on the remaining 6,285.3 cfs (12,000 cfs as originally applied for, less the 5,714.7 cfs proven in the beneficial use report) had been foreclosed. Since that time, the Petitioners have been diverting and beneficially using water in accordance with the Milner Permit and the beneficial use examination. On July 27, 2006, then Director Karl J. Dreher indicated in a letter that "the issuance of a license for the water right is pending." **Attachment K.** The Respondents have failed to issue a license as required by Idaho law.

15. In 2006, the Idaho House of Representative attempted to pass House Bill 800 ("HB 800"), to remove language from Idaho Code §§ 42-234 and 42-4201A, which subordinates groundwater recharge to "all prior perfected water rights, including those water rights for power purposes" that were subordinated to future development on the Snake River as a result of the Swan Falls Agreement. **Attachment L.** The Legislature's intent was to subordinate water rights held by Idaho Power Company, and any other rights used for power purposes, including the Petitioners' Milner Permit, to junior priority water rights for groundwater recharge. The bill failed. *Id.*

16. Following the failure of HB 800, a stipulation was entered into between the State and Idaho Power regarding subordination of Idaho Power's water rights relative to two recharge

permits that had previously been assigned to the Idaho Water Resource Board (“Water Board”).

**Attachment M.**

A. Permit 37-7842 authorizes a diversion of 800 cfs for ground water recharge and has a priority date of August 25, 1980. **Attachment N.**

B. Permit 01-7054 authorizes a diversion of 1200 cfs for groundwater recharge and has a priority date of August 25, 1980. (These permits are hereinafter, collectively, referred to as the “Recharge Permits”). *Id.*

17. On July 29, 1992, the Lower Snake River Recharge District, the prior owner of the permits, filed proof of beneficial use on the Recharge Permits for a total of 300 cfs.

**Attachment N.** The Respondents’ subsequent Beneficial Use Field Report, filed on November 29, 1993, confirmed the 300 cfs diversion rate. *Id.*

18. Shortly thereafter, the Attorney General’s office contacted counsel for the Petitioners regarding the priority interface between the Water Board’s Recharge Permits and the Milner Permit. Since the Recharge Permits are junior in priority to the Milner Permit, the Attorney General’s office requested the Petitioners’ permission to subordinate the Milner Permit to allow out-of-priority groundwater recharge diversions from the Snake River above Milner. However, given the concerns raised in 1987 by counsel for the Petitioners, along with the questionable viability of the hydropower project in the absence of the water, such subordination was not possible. The development of the project, and the financing obtained for the project, was based upon generation estimates associated with river flows that would be available under the Milner permit as conditioned by the Respondents in 1987, and as “proved up” by the Petitioners in 1993. Moreover, the Federal Energy Regulatory Commission (FERC) issued a license for the Milner hydropower project in 1988 on that basis as well. **Attachment O.**

Although Respondents agreed to the existing subordination condition for the water right permit in November 1987, they subsequently requested FERC to include a different subordination condition on the hydropower license. FERC rejected Respondents' request and held that "inclusion in the license of the unsupported open-ended water subordination clause requested by IDWR would in essence vest in IDWR, rather than the Commission, ultimate control over the operation and continued viability of the project. In other words, the subordination clause, which would reserve to IDWR the right to permit unlimited diversion upstream of the project, could nullify the balance struck by us under the comprehensive planning provisions of Section 10(a)(1) of the FPA in issuing in the license." *Id.* 45 FERC at 62,315.

19. Respondents responded by threatening to impose additional conditions on the Milner Permit, pursuant to Idaho Code § 42-203B, thereby subordinating the Milner Permit to the Water Board's junior priority Recharge Permits, or simply taking the water that would otherwise be available for use under the Milner Permit.

20. In April, 2006, the Water Board's Recharge Permits were placed in the state water supply bank for use at diversion points on the Snake River above Milner Dam. **Attachment N.** Notwithstanding the fact that beneficial use had only been proven for 300 cfs, Respondents approved the placement of a total of 1,700 cfs (800 cfs for permit 37-7842 and 900 cfs for permit 1-7054) into the water bank. *Id.*<sup>3</sup> The Recharge Permits were then apparently leased out of the water bank by the Water Board in the spring of 2006. To the best of Petitioners' knowledge, no Department investigation or order determined whether or not such use would cause injury to other existing water rights, including the Milner Permit. During this time period early season storage and subsequent flood control releases resulted in additional storage in the reservoir

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<sup>3</sup> Petitioners are aware of no basis, both as a matter of fact and law, how the Water Board was able to place 1700 cfs into the water bank, where the proof of beneficial use was only filed on a combined total of 300 cfs. (**Attachment N**). Further, it is not apparent under what authority a permit can be placed in the State Water Bank.

system above Milner Dam. In addition, during this time, the Director or his employees ordered the out-of-priority diversion of natural flow under the Water Board's Recharge Permits – to the detriment of reservoir storage fill and lawful diversion and use pursuant to the Milner Permit.

**Attachment K.** No notice of this event was provided to the Petitioners, the permit holders who were injured by the Respondents' actions.

21. At a July 12, 2006 meeting of the Legislature's Natural Resources Interim Committee, the Water Board provided an update on their recharge efforts above Milner Dam. At that meeting, Senator Chuck Coiner sought an accounting of any deprivation caused to the senior priority Milner Permit as a result of these recharge activities pursuant to the Water Board's junior priority Recharge Permits.

22. The Respondents' answer to Senator Coiner's request (**Attachment K**) indicates an intent on behalf of the Respondents to apply different conditions on the Milner Permit than those under which the Petitioners had been operating since 1993, different than those conditions which had been agreed to in 1987 and subsequently included on the permit. In particular, **Attachment K** evidences intent on behalf of the Respondents to unilaterally subordinate the Petitioners' Milner Permit to the Water Board's junior priority Recharge Permits. *Id.*

23. The Respondents *admitted that there was a reduction in flows to fill the Milner permit* while water was being diverted above Milner Dam pursuant to the Water Board's junior priority Recharge Permits. *Id.* However, the Respondents attempted to justify this reduction and attribute it to other conditions:

Water was diverted through the Milner Power Plant under permit no. 01-07011 in calendar year 2006 through May 16. Although preliminary flow records from Idaho Power Company indicate that there was sufficient water available to divert 5,714.7 cfs through the Milner Power Plant and provide a bypass flow of 200 cfs from April 12 through May 12, 2006, preliminary records of diversions through the power plant from the U.S. Bureau of Reclamation

indicate that approximately 350+/- cfs less than 5,714.7 cfs was diverted for power generation.

On May 16, 2006, the U.S. Bureau of Reclamation determined that it was no longer necessary to allow spills past Milner Dam because water from the Snake River could be fully utilized above Milner Dam for the purposes of: (1) supplying all water rights to natural flow above Milner Dam for consumptive demands; (2) continuing to fill reservoir storage space that had not yet filled (e.g., Henry's Lake and Ririe Reservoir); and (3) refill reservoir storage space that had filled but been subsequently evacuated due to flood control releases (e.g., Jackson Lake and Palisades Reservoir). Because permit no. 01-07011 is subordinated to these upstream consumptive uses pursuant to the subordination condition cited on the previous page, the water right for the Milner Power Plant was curtailed until June 27, 2006, when storage releases for uses below Milner Dam began.

During March and April of 2006, canal companies along the Snake River began to divert natural flow pursuant to their various water rights for irrigation. Once those systems were charged for irrigation deliveries, then diversions for recharge were allowed under permit no. 01-07054 at the heading of the North Side Canal and other points of diversion for canals added through the water Board's lease of the water right permit through the water bank. Diversions for recharge through a canal under permit no. 01-07054 were only allowed to the extent there were no deliveries of water for irrigation along the canal. Based on our analysis of preliminary diversion records, no water was diverted for recharge under permit no. 01-07054 until there was at least 5,714.7 cfs available for diversion through the Milner Power Plant pursuant to permit no. 01-07011. Diversions for recharge at Jensen Grove did not begin until April 18, 2006, when there was a combined flow at the Milner Power Plant of 12,700 cfs, based on the preliminary flow records of Idaho Power.

When diversions for power production under permit no. 01-07011 were curtailed on May 16, 2006, pursuant to the previously described subordination condition, diversions for recharge under permit no. 01-07054 were allowed to continue because that permit is not subordinated to any upstream consumptive beneficial uses. Had diversions of water for recharge not occurred after May 16, no additional water would have been available for diversion through the Milner Power Plant because of the subordination provision. Had diversions of water for recharge not occurred after May 16, some additional water would have accrued to storage space that had filled but subsequently evacuated for flood control and filled again. However, permit no. 01-07054 is not subordinated to that second fill of storage.

**Attachment K** at 3-4. Further, without any factual or technical verification, the Respondents indicated that any above-Milner diversions made pursuant to the Recharge Permits had no

impact on the water supply at the Milner Power Project. *Id.* at 4 (indicating that “Had diversions of water for recharge not occurred after May 16, no additional water would have been available for diversion through the Milner Power Plant”).

24. The Director concluded by determining that “Based on the analysis described above, there is presently no information indicating that the diversions to recharge were not in accordance with the water right permit held by the Water Resource Board and the water and the water right permit for power production held by” the Petitioners. *Id.*

25. Recognizing that they had been diverting and beneficially using water pursuant to the Milner Permit and the beneficial use examination, since 1993, and that all that remained was for the Respondents to issue a license, the Petitioners verbally requested that the Respondents complete the final ministerial step of issuing a license in 2006 and again in the spring of 2007. The Respondents did not issue the license. Rather several months later, in response to the Petitioner’s request, the Respondents issued a *Notice of Intent to Issue License*, on September 5, 2007. **Attachment P.** In that *Notice*, the Respondents indicate that “Proof of beneficial use having been submitted under the permit, *the Department is prepared to issue a license* for the water right pursuant to Idaho Code § 42-219. Counsel for the Permit Holders has orally requested that the Department issue a license for the water right.” *Id.* at 1 (emphasis added).

26. In the *Notice*, the Respondents cited to three communications, which were never served on the Petitioners, each requesting the opportunity to participate and protest the Milner Permit, should the Respondents decide to issue a license consistent with the Milner Permit and the beneficial use examination. In particular, the entities objected to the 1987 subordination language in the Milner Permit. These communications are as follows:

A. January 9, 2007, letter from Bingham Groundwater District indicating that the Milner Permit should be licensed “only if fully subordinated. We also request that we be included as a protestant if there is any action taken by the Idaho Department of Water Resources on this right other than full subordination.” **Attachment Q.**

B. February 5, 2007, letter from Randall C. Budge, representing the Idaho Ground Water Appropriators (“IGWA”), asserting IGWA’s intent to protest the water right unless it is fully subordinated to all uses, including groundwater recharge.

**Attachment R.**

C. April 13, 2007, letter from Robert L. Harris, representation various water delivery entities, concurring with the content of the February 5, 2007, IGWA letter.

**Attachment S.**

27. The Petitioners, as the permit holder in this matter, were specifically and intentionally left off of any service list for these letters. As a result, Petitioners only became aware of these letters approximately eight months later, when the Director referenced them in its September 5, 2007 *Notice*.

28. In response to these letters, the Respondents decided to reopen a new protest or comment period on the Milner Permit and begin an unprecedented process not provided for by statute or administrative rule, specifically as it relates to the 1987 subordination language:

NOW THEREFORE NOTICE IS HEREBY GIVEN that the Department will accept and consider written Comments from the Permit Holders and other interested persons or entities *addressing the form of the subordination condition that should be included on the license* for Water Right No. 01-7011. Any Comments submitted should be addressed to [the] Director ... and [be] received by the Department or post marked on or before October 10, 2007.

**Attachment P** at 2 (emphasis added). In other words, after failing to take any action on the Milner Permit for over twelve years, the Respondents were now prepared to “accept and

consider” comments from any “interested persons or entities,” thus forcing the Petitioners to re-justify and re-defend the Milner Permit, even though the permit conditions were complied with, proof of beneficial use was submitted in 1993, and the statutory protest period had expired decades earlier.

29. Chapter 2, Title 42, Idaho Code, along with the Department’s Water Appropriation Rules, IDAPA 37.03.08 (**Attachment T**), provide the procedures for acquiring a new water right permit and license, as well as any applicable protest periods. See I.C. § 42-205(1) (“No permit shall be issued ... for power purposes ... except in accordance with the provisions of this act”).

30. Once an applicant has complied with the provisions of chapter 2, Title 42, Idaho Code, the Department must issue a license to the applicant:

(1) Upon receipt by the department of water resources of all the evidence in relation to such final proof [of beneficial use], *it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use.*

I.C. § 42-219 (emphasis added). According to the Beneficial Use Examination Rules, promulgated by the Respondents, a license is “issued by the director ... confirming the extent of diversion and beneficial use of the water that has been made *in conformance with the permit conditions.*” IDAPA 37.03.02.010.15 (emphasis added).

31. Chapter 2, Title 42, Idaho Code requires the filing of an application. I.C. § 42-202 (setting forth the contents of the application). Next, the Department will review the application and, if approved, will issue a permit to the applicant, at which time, the applicant will be given five years to complete the diversion works and put the water to a beneficial use. I.C. §

42-204. By the end of the five years, the applicant must provide the Department with proof that water has been applied to a beneficial use as well as the extent of that beneficial use. *Id.*; I.C. § 42-217. However, as happened in this case, an applicant may request an extension of the five year deadline under certain conditions. I.C. § 42-204. Before the end of the five year period, or the extended period if applicable, the applicant must provide proof of beneficial use to the Respondents to verify the point of diversion, the capacity of the diversion works, and the quantity of water actually diverted and put to beneficial use. I.C. § 42-217. This analysis may be performed by an employee of the Department, or, as happened in this case, by a Certified Water Right Examiner. I.C. § 42-217a. After the applicant has complied with all legal requirements, it becomes the Respondents' ministerial duty to issue a license. *See* I.C. § 42-219.

32. The applicant and other interested parties may protest an application for permit. I.C. § 42-203A(4); Appropriation Rule 40.03. However, such protests "will only be considered if received by the department after receipt of the application by the department and prior to the expiration of the protest period announced in the advertisement." I.C. § 42-203A(4); Appropriation Rule 40.03.a.ii. The Department will not accept late or general statements of protest (i.e. blanket protests) against appropriations. Rule 40.03.a.iii.

33. According to the letters sent by IGWA (February 5, 2007) and Mr. Harris (April 13, 2007), both IGWA and Mr. Harris' clients were aware of the Milner Permit application in 1977, when statutory notice of the application was originally published. However, they failed to either protest the application or move to intervene in the administrative action within the statutory prescribed deadline. (**Attachments R & S**) (While Mr. Harris' letter does not specifically state that his clients were aware of the Milner permit proceedings, he does state that he has read the IGWA letter and "concur[s] with its contents").

34. Since 1993, when the Respondents received the Petitioners' proof of beneficial use, the Petitioners have diverted and beneficially used water, in accordance with the Milner Permit and the beneficial use examination performed by Dr. Brockway. In the fourteen years since 1993 the Respondents have never notified Petitioners that their diversion or use of water failed, in any way, to comply with the law.

35. By complying with the statutory provisions and proving up beneficial use in 1993, the Petitioners' Milner Permit represents a valid, enforceable and vested water right under Idaho law. The Respondents' attempt to modify or add conditions that would now restrict the use of the water right at this point in time constitutes an unconstitutional and prohibited taking of Petitioners' property without just compensation.

#### COUNT ONE (WRIT OF MANDATE)

36. Petitioners repeat and re-allege the allegations set forth in paragraphs 1-35 of their *Petition for Peremptory Writ of Mandate*.

37. As a direct and proximate result of Respondents' failure and refusal to issue a license for the Milner Permit pursuant to Idaho Code § 42-219, Petitioners have and will continue to suffer irreparable damage, in that the Respondents have subordinated Petitioners' Milner Permit to junior priority groundwater recharge permits upstream of Milner Dam, contrary to the express terms of the Milner Permit. Moreover, the Respondents have indicated that they intend to force the subordination of the Milner Permit by altering or amending the express language of the Milner Permit – even though that language was negotiated and agreed to between Respondents and counsel for Petitioners almost twenty years ago. As a direct and proximate result of the refusal of Respondents to fulfill their statutory duties and responsibilities pursuant to Idaho Code § 42-219, Petitioners have been irreparably damaged, and will have no

plain, adequate or speedy remedy at law. Respondents' failure to respond and fulfill its statutory duties is clearly erroneous as a matter of law.

38. As a direct and proximate result of Respondents' September 5, 2007 *Notice of Intent to Issue License* order, which provides that the Respondents will allow and consider further protests or comments from third parties, even though the Petitioners have diverted and applied water to beneficial use pursuant to the Milner Permit and beneficial use examination since 1993, and even though the law does not allow for such additional protests or comments at this ministerial stage in the licensing process, Petitioners will continue to suffer irreparable damage, in that they will be forced to re-justify and re-defend their application for permit, even though the statutory protest period expired over 25-years ago. As a direct and proximate result of Respondents' decision to allow and consider further protests or comments from third parties, Petitioners will be irreparably damaged, and will have no plain, adequate or speedy remedy at law.

39. Respondents' failure and continued refusal to perform their statutory duties of issuing a license to Petitioners, and their decision to now accept and consider further protests or comments, has deprived Petitioners of the certainty necessary to protect their interests in the Milner Permit. Respondents' failure to act in a timely manner in issuing a license for the Milner Permit does not justify the unlawful process they are undertaking, reopening a protest period that has long been expired.

40. Petitioners are being unlawfully precluded from using and enjoying their property to the full extent based on Respondents' attempts to force the subordination of the Milner Permit, contrary to the express conditions of the Milner Permit. In light of Respondents' subordination

attempts, Petitioners do not have a plain, speedy or adequate remedy in the ordinary course of law.

41. Petitioners are entitled to issuance of a Writ of Mandate pursuant to Idaho Code § 7-302 in order to compel Respondents to perform their duties under Idaho Code § 42-219 to issue a license to Petitioners and to prohibit the unlawful actions Respondents are taking as provided by the September 5, 2007 *Notice of Intent to Issue License* order.

### **TAKINGS CLAIM**

42. Petitioners repeat and re-allege the allegations set forth in paragraphs 1-41 of their *Petition for Peremptory Writ of Mandate*.

43. Respondents' actions and refusal to issue a license to Petitioners in conformance with the permit, and decision to accept protests or comments and subordinate the Milner Permit to junior priority rights for groundwater recharge diminishes and deprives Petitioners of the priority and the water supply of their water right, and are therefore void as an unconstitutional taking of Petitioners' water right.

44. In the event that Respondents actions are confirmed, Petitioners are entitled to just compensation pursuant to the constitutions of the State of Idaho and United States.

### **REQUEST FOR ATTORNEYS FEES**

45. As a further direct and proximate result of the Respondents' refusal to issue a license, and the Respondents' decision to accept and consider new protests comments on the Milner Permit, Petitioners have been required to employ the services of the law firm Barker Rosholt & Simpson LLP, and have also incurred various costs and will continue to incur various court costs and attorney fees. Therefore, under Idaho law, including but not limited to, Idaho

Code §§ 12-117 and 12-121, the Respondents should be required to pay to Petitioners their reasonable costs and attorney fees.

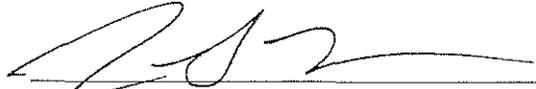
**PRAYER FOR RELIEF**

WHEREFORE, North Side Canal Company and Twin Falls Canal Company pray for the issuance of a Writ of Mandamus and/or order of the Court directed to the Respondents ordering as follows:

1. For a Peremptory Writ of Mandamus and/or order compelling Respondents to close all protest or comment periods pertaining to the Milner Permit, and, without delay, to issue a license to Petitioners as required by Idaho Code § 42-219;
2. For an order compelling Respondents to appear and show cause before the Court why the Respondents issued the September 5, 2007 *Notice*, why Respondents reopened a new protest or comment period applicable to the Milner Permit, why Respondents have not issued a license for the Milner Permit 14 years after proof of beneficial use was filed, and why the Court should not enter its Writ of Mandamus, ordering Respondents to carry out their statutory duties by issuing a license for the Milner Permit.
3. For an order declaring Respondents' actions are unconstitutional, contrary to law, and violate the Petitioners' water right and constitutional rights.
4. In the event the Respondents' action are affirmed, Petitioners are entitled to just compensation in an amount to be determined at trial.
3. For an order awarding Petitioners their damages incurred as result of present and past actions of the Respondents and reasonable costs and attorney fees; and
4. For such other and further relief as the Court deems just and equitable.

DATED THIS 29<sup>th</sup> day of September, 2007.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to be 'J.A. Rosholt', written over a horizontal line.

John A. Rosholt  
John K. Simpson  
Travis L. Thompson  
Paul L. Arrington

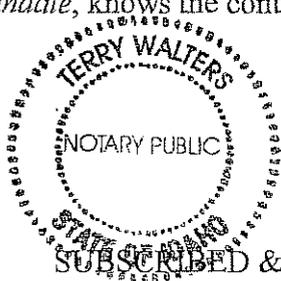
*Attorneys for Petitioners North Side Canal  
Company and Twin Falls Canal Company*

VERIFICATION

STATE OF IDAHO )  
 ) ss.  
County of Jerome )

Ted Diehl, Manager of North Side Canal Company, being first duly sworn on his oath, deposes and states:

That he is the Manager of North Side Canal Company, petitioner in the above-entitled matter, that he has read the above and foregoing *Verified Complaint and Petition for Writ of Mandate*, knows the contents thereof, and the facts stated he believes to be true.



Ted Diehl  
Ted Diehl, Manager  
North Side Canal Company

SUBSCRIBED & SWORN to before me this 27 day of September, 2007.

Terry Walters  
Notary Public for Idaho  
Residing at: Jerome, Idaho  
My Commission Expires: 2-20-2013

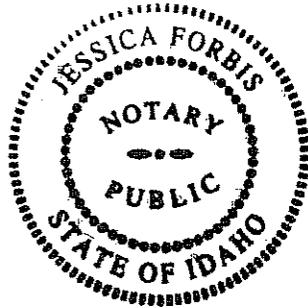
STATE OF IDAHO            )  
  ) ss.  
County of Twin Falls        )

Vince Alberdi, Manager of Twin Falls Canal Company, being first duly sworn on his oath, deposes and states:

That he is the Manager of Twin Falls Canal Company, petitioner in the above-entitled matter, that he has read the above and foregoing *Verified Complaint and Petition for Writ of Mandate*, knows the contents thereof, and the facts stated he believes to be true.

  
\_\_\_\_\_  
Vince Alberdi, Manager  
Twin Falls Canal Company

SUBSCRIBED & SWORN to before me this 28 day of September, 2007.



  
\_\_\_\_\_  
Notary Public for Idaho  
Residing at: Twin Falls  
My Commission Expires: 4/3/12