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

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

|                                  |   |                                  |
|----------------------------------|---|----------------------------------|
| IN THE MATTER OF                 | ) |                                  |
| APPLICATION FOR PERMIT & LICENSE | ) |                                  |
| NO. 01-07011                     | ) | <b>TWIN FALLS AND NORTH SIDE</b> |
|                                  | ) | <b>CANAL COMPANIES' MOTION</b>   |
| APPLICANT:                       | ) | <b>FOR CLARIFICATION</b>         |
| Twin Falls Canal Company &       | ) | <b>REGARDING PROCEDURAL</b>      |
| North Side Canal Company         | ) | <b>STANDING OF PROTEST AND</b>   |
|                                  | ) | <b>REQUEST FOR STATUS</b>        |
| _____                            | ) | <b>CONFERENCE</b>                |

COME NOW, the North Side Canal Company and Twin Falls Canal Company, (hereinafter "Petitioners" or "Canal Companies"), by and through their undersigned attorneys, the law firm Barker Rosholt & Simpson, LLP, and hereby file this Motion for Clarification Regarding Procedural Standing of Protest and Request for Status Conference in the above entitled action. The Motion is brought pursuant to the Idaho Administrative Code governing actions before the Idaho Department of Water Resources, sections 37.01.01.711 Review of Interlocutory Orders, and 37.01.01.770 Clarification of Orders.

## **I. PROCEDURAL HISTORY**

On October 20, 2008, the Department of Water Resources issued a Final Order issuing the Milner License No. 01-7011. The license contained a new subordination condition, an additional condition not contained in the permit relating to a limitation on the term of the license, and a volumetric limitation that was not included in the permit. The Canal Companies filed their Protest and Petition for Hearing on November 4, 2008. The Idaho Water Resource Board and certain ground water user entities sought intervention which was granted by the Hearing Officer. A number of scheduling orders were issued, the last on December 10, 2009, setting the matter for a four-day hearing to commence May 4, 2010.

The Idaho Water Resource Board, Upper Snake Ground Water Users' and Ground Water Districts' (hereinafter "Intervenors") filed Motions for Summary Judgment regarding the subordination condition only. The Canal Companies did not file a Motion for Summary Judgment on the subordination condition, or the other two conditions inserted in the license issued October 2008 that were not present in the permit. The briefing schedule on the Intervenors' summary judgment motions was modified, and a hearing on the motion was just held on April 12, 2010, by agreement among the parties. On Thursday, April 29, 2010, the Hearing Officer issued an Opinion and Order Granting Motions for Summary Judgment and Recommendation via electronic mail through IDWR staff. The transmission was accompanied by a document entitled *Explanatory Information to Accompany a Recommended Order* and an email message from IDWR staff indicating: "In light of Justice Schroeder's recommended order, and unless there are objections from the parties, the hearing in this matter scheduled to begin May 4<sup>th</sup> will be vacated."

## **II. REQUEST FOR CLARIFICATION AND STATUS CONFERENCE**

The Canal Companies, having had sufficient time to review the Recommended Order and discuss the matter with their counsel, have determined that the recommended summary judgment opinion on the Intervenor's summary judgment motions does not dispose of all of the issues raised by the Canal Companies in their petition for hearing regarding the license issued for water right 01-7011. Therefore, the decision constitutes an interlocutory order as defined by IDAPA 37.01.710 ("Interlocutory orders are orders that do not decide all previously undecided issues presented in a proceeding."). Hence, the Hearing Officer's decision on the summary judgment motions is not a "Recommended Order" as defined by Idaho Code § 67-5243 and IDAPA 37.01.720 since there are still outstanding issues to resolve for purposes of final recommendation to issue for the Director's consideration. Accordingly, the accompanying explanatory information sheet was inaccurate and there is no basis to vacate the hearing in this case.

For this reason, the Canal Companies request that a one to two-day hearing be scheduled in this matter in order resolve the outstanding protests to the term limit and volumetric limitations inserted by the former Director at the time of licensing.

To encourage administrative efficiency, the Canal Companies also request that the Hearing Officer clarify that the recommended summary judgment opinion is an "interlocutory order" as defined by Rule 710, and that the time for filing petitions for reconsideration or exceptions to the Director does not apply at this stage in the proceedings.

### **CONCLUSION**

THEREFORE, the Canal Companies request that the Hearing Officer schedule a status conference in this matter, prior to May 12, 2010, to clarify the interlocutory nature of the Hearing Officer's Opinion and Order Granting Motions for Summary Judgment and

Recommendation, and to address the Canal Companies request for a new hearing on the remaining protests to the term limit condition and volumetric limitation inserted in the license.

Dated this 5<sup>th</sup> day of May, 2010.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5<sup>th</sup> day of May, 2010, I served a true and correct copy of the foregoing **TWIN FALLS AND NORTH SIDE CANAL COMPANIES' MOTION FOR CLARIFICATION REGARDING PROCEDURAL STANDING OF PROTEST AND REQUEST FOR STATUS CONFERENCE** upon the following persons via the method indication below:

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