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*Attorneys for North Side Canal Company and
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DISTRICT COURT
TWIN FALLS CO., IDAHO
FILED

2010 NOV 12 PM 3:57

BY _____ CLERK

DEPUTY

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

**TWIN FALLS CANAL COMPANY and
NORTH SIDE CANAL COMPANY**

Petitioners,

vs.

GARY SPACKMAN, in his capacity as Interim
Director of the Idaho Department of Water
Resources, and **THE IDAHO DEPARTMENT
OF WATER RESOURCES**,

Respondents.

**IN THE MATTER OF LICENSED WATER
RIGHT NO. 01-7011 IN THE NAME OF
TWIN FALLS CANAL COMPANY AND
NORTH SIDE CANAL COMPANY**

CASE NO. CV -10-5377

Fee Category L.3 - \$88.00

**NOTICE OF APPEAL AND
PETITION FOR JUDICIAL
REVIEW OF FINAL AGENCY
ACTION**

COME NOW, Petitioners, North Side Canal Company and Twin Falls Canal Company
(hereinafter "Petitioners" or "Canal Companies"), by and through their undersigned counsel, and

hereby file this Petition seeking judicial review of a final agency action by the Idaho Department of Water Resources.

STATEMENT OF THE CASE

1. This is a civil action pursuant to Idaho Code §§ 67-5270 and 67-5279 seeking judicial review of a final order issued by the Interim Director of the Idaho Department of Water Resources, Gary Spackman, on October 18, 2010.

2. A hearing before the agency was held in the matter on the Summary Judgment Motions on April 12, 2010.

3. A hearing before the agency on the remaining issues in the action was held on June 2, 2010.

JURISDICTION AND VENUE

4. This petition is authorized by Idaho Code §§ 67-5270 and 67-5279.

5. This Court has jurisdiction over this action pursuant to Idaho Code §§ 42-1701A(4) and 67-5272.

6. Venue lies in this Court pursuant to Idaho Code § 67-5272 because Petitioner Twin Falls Canal Company conducts business in Twin Falls County, Idaho.

7. Pursuant to the Idaho Supreme Court's *Administrative Order* issued on December 9, 2009 "all petitions for judicial review of any decision regarding administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District." The SRBA Court's procedures instruct the clerk of the district court in which the petition is filed to issue a *Notice of Reassignment*. The Petitioners have attached a copy of the SRBA Court's *Notice of Reassignment* form for the convenience of the clerk.

8. The Director's October 18, 2010 *Amended Final Order* is a final agency action subject to judicial review pursuant to Idaho Code § 67-5270(3).

PARTIES

9. Petitioner North Side Canal Company is a non-profit Idaho corporation organized under the laws of the State of Idaho.

10. Petitioner Twin Falls Canal Company is a non-profit Idaho corporation organized under the laws of the State of Idaho and conducting business in Twin Falls County.

11. Respondent, Idaho Department of Water Resources is a state agency with its main office located at 322 E. Front St., Boise, Idaho. Respondent, Gary Spackman, is the Interim Director of the Idaho Department of Water Resources.

12. The Idaho Water Resource Board, a constitutional governing body created by Idaho Code § 42-1732 pursuant to the Idaho Constitution Article XV, Sec. 7, was granted limited intervention in the proceedings before the Department to participate in the action relating only to the subordination condition.

13. The Upper Snake Water Users and certain Ground Water Districts, in a representative capacity for irrigators, businesses and municipalities, were likewise granted limited intervention in the proceedings before the Department to participate in the action relating only to the subordination condition.

STATEMENT OF INITIAL ISSUES

14. The Petitioners intend to assert the following issues on judicial review:

- a. Whether the Director acted arbitrarily and capriciously, or otherwise in contravention of Idaho law, when he held that the subordination condition added to the permit for the Milner hydropower water right by a former Director in 1987 violates the law of the state of Idaho and the policies of the Idaho State Water

Plan, where the law that the present Director alleges is violated was enacted in 1986, one year before insertion of the subordination provision, and where the law remained unchanged when the *Amended Final Order* was issued?

- b. Whether the Director acted arbitrarily and capriciously, or otherwise in contravention of Idaho law, when he held that Milner hydropower water right is subject to revision based on the changing policy statements contained in the Idaho State Water Plan?
- c. Whether the Director acted arbitrarily and capriciously, or otherwise in contravention of Idaho law, when he issued the license for the Milner hydropower water right with a new term limit condition, even though no such condition had ever appeared in the permit as required by Idaho Code §§ 42-203B(6) and (7) and IDAPA 37.03.08.050.03?

15. Pursuant to I.R.C.P. 84(d)(5), the Petitioners reserve the right to assert additional issues and/or clarify or further specify the issues for judicial review stated herein which become later discovered.

AGENCY RECORD

16. Judicial review is sought of the Director's October 18, 2010 *Amended Final Order*.

17. The Department held two hearings in this matter on April 12, 2010, and on June 2, 2010, which were recorded and a transcript created, which transcript should be made a part of the agency record in this matter. The person who may have a copy of such transcript is Victoria Wigle, Director's Administrative Assistant, Idaho Department of Water Resources, 322 E. Front St., P.O. Box 83720, Boise, Idaho 83720-0098, Telephone: (208) 287-4803, Facsimile: (208) 287-6700, email: victoria.wigle@idwr.idaho.gov.

18. The Petitioners anticipate that they can reach a stipulation regarding the agency record with the Respondents and the other parties, and will pay their necessary share of the fee for preparation of the record at such time.

19. Service of this Petition for Judicial Review of Agency Action has been made on the Respondents and other parties at the time of the filing of this Petition.

ATTORNEY'S FEES

20. Petitioners, should they prevail in this Appeal and Petition for Judicial Review, in whole or in part, seek an award of their reasonable attorney's fees and costs pursuant to Idaho Code § 12-117.

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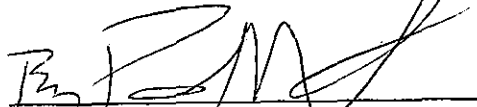
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DATED this 12th day of November, 2010.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to read 'J. K. Simpson', is written over a horizontal line.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of November, 2010, I served true and correct copies of the *Notice of Appeal and Petition for Judicial Review of Final Agency Action* upon the following by the method indicated:

Filed with the District Court via Hand Delivery.

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