

Protestant  
Jeff Salt  
Executive Director  
**GREAT SALT LAKEKEEPER**  
P.O. Box 522220  
Salt Lake City, UT 84152  
Email: jeffsalt@greatsaltlakekeeper.org  
Telephone: (801) 485-2550

ORIGINAL

RECEIVED  
AUG 27 2012  
DEPARTMENT OF  
WATER RESOURCES  
*Rec'd by email*  
*8/23/12*

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

---

)  
IN THE MATTER OF APPLICATION ) **GREAT SALT LAKEKEEPER'S RESPONSE**  
FOR PERMIT NO. 13-7697 IN THE ) **TO TWIN LAKE CANAL COMPANY'S**  
NAME OF TWIN LAKES CANAL CO.) **EXCEPTIONS TO PRELIMINARY ORDER**  
) **DENYING APPLICATION FOR PERMIT**

---

GREAT SALT LAKEKEEPER, (hereafter referred to as "Lakekeeper") hereby submits *Great Salt Lakekeeper's Response To Twin Lakes Canal Company's Exceptions To Preliminary Order Denying Application For Permit*. Lakekeeper's response is offered in opposition to exceptions filed by the Twin Lakes Canal Company (hereinafter "TLCC").

**I. INTRODUCTION**

Great Salt Lakekeeper is a nonprofit environmental organization, whose mission is to defend, protect and preserve the watershed resources of the Great Salt Lake drainage basin, which includes the entire Bear River and its tributaries. Great Salt Lakekeeper has constituents

that live in Idaho and in Franklin County, as well as constituents that live in various parts of Utah that travel to Idaho to utilize the Oneida Narrows and that portion of the Bear River under consideration for this permit. Our primary purposes for participating in this case and contesting TLCC's water right application were to help defend the public interests associated with the Bear River, and to advocate for the interests of Utah entities. Because of the strict and plain provisions of the Bear River Compact, Utah interests must be considered as part of the decision to grant or deny the water right permit application. Our presentation and remarks at the March 2012 hearing for this water right application were protested by the applicant, but admitted into the Administrative Record by the Hearing Officer.

Lakekeeper agrees with the Hearing Officer's Analysis and his Conclusions In Law presented in the Preliminary Order denying the water right application in this contested matter. Lakekeeper opposes the Exceptions filed by TLCC, and offers the following responses in argument against having the Preliminary Order denying the water right application overturned by the Director of the Idaho Department of Water Resources (the Director).

## **II. ARGUMENTS AGAINST OVERTURNING THE DENIAL OF THE WATER RIGHT APPLICATION.**

### **A. The Hearing Officer's Analysis That The Proposed Project Conflicts With Local Public Interest Was Reasonable And His Conclusion In Law Was Appropriate And Correct.**

The Idaho Administrative Procedures Act requires that agency orders contain reasoned explanations of decisions and that factual findings shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings (Idaho Statutes, §67-5248(1)(a)). Accordingly, the Hearing Officer in this contested case was obligated to state facts

based exclusively on evidence admitted into the Administrative Record, and develop reasoned arguments (or analysis) based on those facts to support his Conclusions In Law. In support of his Conclusion In Law regarding conflicts with local public interest, the Hearing Officer clearly identified supporting facts from the administrative record and provided a reasoned argument using those facts to support his finding that TLCC's water right application conflicted with local public interest and should be denied (*See* Preliminary Order, pgs. 15 – 17, para. #102 – #115, *Findings Of Fact*, and pgs. 26 – 28, para. #32 - #49, *Analysis*). In its Memorandum, *Exceptions To Preliminary Order Denying Application For Permit*, TLCC correctly points out that the Hearing Officer was required to provide a reasoned explanation of his decision, but incorrectly argues that the Hearing Officer's explanation should also address 'unpersuasive evidence', and that by not discussing some of Twin Lakes' evidence or including that particular evidence in his Findings Of Fact, TLCC was unfairly denied their water right permit (*See* pgs. 10, 30, and section B.2, TLCC's Memorandum). The Idaho Administrative Procedures Act only requires the agency to provide a concise and explicit statement of the underlying facts of record supporting the findings, and does not require the agency to provide a complete statement of all of the underlying facts of the contested case, and does not require the agency to provide statements of facts that it does not believe support its findings. Therefore, TLCC's position that much of its evidence regarding local public interest was not considered or given equal weight by the Hearing Officer is not supported by any evidence or proof.

In issuing his Preliminary Order, the Hearing Officer correctly identified and presented Findings Of Fact from the Administrative Record, and a reasoned Analysis based on those particular facts that he felt supported his Conclusion, which was, that the proposed project conflicted with local public interest and that TLCC failed to establish the appropriate element of

the statute to qualify for a water right permit.

More specifically, the Hearing Officer correctly identified and provided a concise statement of the following facts: that the Oneida Narrows is a popular recreation area (Fact #102); and that the Oneida Narrows provides recreation opportunities not found elsewhere on the Bear River due to numerous dams and dewatered areas (Fact #103); and that the local public uses the Oneida Narrows heavily and enjoys the water-based recreation opportunities the canyon provides (Fact #104); and that the Oneida Narrows is a unique resource for teaching kayaking and canoeing because the level of difficulty and the proximity of the road (Fact #107); and that the reach below Oneida Dam is the most heavily fished section of the Bear River in Idaho, and further that the existing fishing opportunities below the proposed dam are not as good as the area to be inundated (Fact #110); and that the Oneida Narrows section of the Bear River is fully accessible to the public because of the public road that parallels the river through the canyon (Fact #113), and that if the proposed reservoir is built, it will replace a preferred and rare river/trout fishing opportunity with a less-preferred reservoir fishing opportunity that is already abundant in Franklin County (Fact #115). Furthermore, the Hearing Officer provided a reasoned explanation and analysis of the facts to support his conclusion when he stated the following:

*“Under §42-203(A)(5)(e), it is the Department’s role to weigh the evidence in the administrative record and to determine whether a proposed project conflicts with the local public interest. Based on the evidence in the record, the proposed project does conflict with the local public interest. The public interests associated with the Bear River in its current state far outweigh the public interests associated with the proposed project. Although the potential benefits to TLCC shareholders would be sizeable, the benefits to local area residents who are not TLCC*

*shareholders would be minimal. The benefits to the state of Idaho would be minimal.” (See p. 28, para. #48, Preliminary Order).*

The Hearing Officer also clearly identified his responsibility to weigh [all] the evidence admitted into the administrative record, which would have included any admissible evidence presented by TLCC during the hearing. Given the Hearing Officer’s statement of his obligation under the statute, we must assume that he did indeed consider and weigh all of the evidence admitted into the administrative record, including any ‘unpersuasive evidence’ submitted by TLCC.

Therefore, Lakekeeper believes that TLCC’s claim that they were unfairly denied a water right permit based on the Hearing Officer’s faulty analysis and conclusion regarding the local public interest is without merit and that the Hearing Officer acted appropriately and within the law in issuing his Preliminary Order denying the permit application. In addition, Lakekeeper concurs with the Hearing Officer that TLCC simply did not meet the burden of persuasion as required under §42-203(A)(5) (*See* IDAPA 37.03.08.40.04.c, *See* also Preliminary Order p. 21, para. 2, p. 30, para. 1). Lakekeeper opposes TLCC’s request for the Director to overturn the Hearing Officer’s denial of their water right application based on faulty analysis of the impacts to local public interest.

**B. The Hearing Officer Was Correct In Concluding That The Proposed Project Would Impact Downstream Water Rights In The State Of Utah, And That Approval Of The Application Is Prohibited By Article XI Of The Bear River Compact.**

Article XI of the Bear River Compact is clear in its prohibition against new development that would injure prior water rights in Idaho or rights with a priority earlier than January 1, 1976 in Utah. The Compact is also clear that no such application shall be approved if the effect thereof will be to deprive any water user in another state to water to which he is entitled. During the March 2012, TLCC emphasized the stipulated agreement

with the Bear River Water Users Association (BRWUA), and made assertions that their mitigation proposals would remedy impacts to downstream water users simply because of the stipulated agreement with the BRWUA. TLCC failed to take into consideration the impact of the proposed project on the water rights of other downstream users in Utah, i.e. Bear River Migratory Bird Refuge, Utah Division Of Wildlife Resources, Jordan Valley Water Conservancy District, etc. In fact, during the hearing, TLCC attempted to protest and prevent Lakekeeper from submitting evidence into the administrative record regarding impacts to downstream interests in Utah. However, the Hearing Officer ruled that Lakekeeper's evidence regarding impacts to downstream interests in Utah was admissible. Lakekeeper believes the Hearing Officer correctly determined from the facts admitted into the administrative record that evaporative losses from the proposed reservoir will reduce the quantity of Bear River natural flow available to fill downstream water rights (*See Preliminary Order p. 22, para. 9,*) and that TLCC's mitigation proposals for water losses were deficient (*See Preliminary Order, p. 23, para. 11 – 15*), and that downstream water rights in Utah would be impacted (*See Preliminary Order, p. 29, para. 56*). Based on these fair and reasonable determinations by the Hearing Officer, he correctly concluded that because the application, as proposed, would impact downstream water rights in the state of Utah, approval of the application is prohibited by Article XI of the Compact (*See Preliminary Order, p. 30, para. 2*).

As in their argument for reconsideration of the Order based on the Hearing Officer's failure to consider 'unpersuasive evidence' regarding the local public interest, TLCC incorrectly claims that Hearing Officer unfairly denied their application because he failed to adequately consider or weigh the evidence they presented at the March 2012 hearing

regarding water losses, impacts to downstream water rights and mitigation. The Hearing Officer's Findings of Fact and Analysis regarding water losses, impacts to downstream water rights, and mitigation demonstrate that again, TLCC failed to meet its burden of persuasion as required under §42-203(A)(5) (*See* IDAPA 37.03.08.40.04.c, *See* also Preliminary Order p. 21, para. 2, p. 30, para. 1). The fact is that TLCC failed to thoroughly analyze the impacts to water quantities caused by the proposed reservoir or adequately consider the impacts to downstream water rights and interests in Utah. This is because they narrowly focused their attention and efforts at appeasing the BRWUA. TLCC also failed to develop a meaningful mitigation plan that actually mitigated for water losses. That's why the Hearing Officer reached the conclusion that the application would be prohibited under Article XI of the Bear River Compact, and must be denied.

### **III. CONCLUSION**

Lakekeeper believes that the Hearing Officer acted reasonably and within the laws of the State of Idaho when he issued the Preliminary Order denying TLCC's water right application. TLCC failed to meet the burden of persuasion required by Idaho law to obtain approval of their water right application. Despite TLCC's claims, the hearing Officer weighed the evidence, and provided concise statements of the underlying facts to support his findings and also provided a reasoned explanation of his findings. TLCC's claims that the Hearing Officer acted unlawfully and unfairly denied their application are unfounded. The Director should affirm the Order issued by the Hearing Officer and deny TLCC's request to have the Preliminary Order and denial of their application overturned.

Dated this 23<sup>rd</sup> day of August, 2012



---

Jeff Salt, Executive Director  
**GREAT SALT LAKEKEEPER**

## CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the parties listed below by hand delivery, email, mail, or by facsimile, with the correct postage thereon, on this 23rd day of August, 2012.

**DOCUMENT SERVED:** GREAT SALT LAKEKEEPER'S RESPONSE TO TWIN LAKES CANAL COMPANY'S EXCEPTIONS TO PRELIMINARY ORDER DENYING APPLICATION FOR PERMIT

**ORIGINAL TO:** Gary Spackman Director,  
Idaho Department of Water Resources  
P.O. Box 83720  
Boise, ID 83720-0098

### ATTORNEYS AND/OR INDIVIDUALS SERVED:

James Cefalo  
Idaho Department of Water Resources  
900 North Skyline Drive, Suite A  
Idaho Falls, Idaho 83402-1718

Twin Lakes Canal Company  
C/O Holden, Kidwell, Hahn & Crapo  
P.O. Box 50130  
Idaho Falls, Idaho 83405

Bear Lake Watch, Inc.  
Attn: Claudia Cottle  
2629 Hwy 89  
Fish Haven, Idaho 83287

Oneida Narrows Organization  
Attn: Star Coulbrooke  
143 N. 100 W.  
Smithfield, Utah 84335

Idaho Rivers United  
Attn: Kevin Lewis  
P.O. Box 633  
Boise, Idaho 83701

PacifiCorp  
Attn: Claudia Conder  
1407 W. North Temple #110  
Salt Lake City, Utah 84116

Franklin County Fish & Game Assoc.  
Attn: Jeff Seamons  
235 Park Avenue  
Preston, Idaho 83263

Greater Yellowstone Coalition  
Attn: Andrea L. Santarsiere  
Marv Hoyt  
162 N. Woodruff  
Idaho Falls, Idaho 83401

Mabey, Wright & James, PLLC  
Attn: David C. Wright  
175 S. Main, Ste. 1330  
Salt Lake City, Utah 84111

Peter R. Anderson  
Trout Unlimited  
910 W. Main St., Suite 342  
Boise, Idaho 83702

State of Idaho-Office of Attorney General  
Tyson K. Nelson  
Shasta Kilminster-Hadley  
P.O. Box 83720  
Boise, Idaho 83720-0010

Idaho Dept of Fish & Game  
Cindy Robertson  
P.O. Box 25  
Boise, Idaho 83707

State of Idaho-Dept of Fish and Game  
Attn: Jim Mende  
1345 Barton Dr.  
Pocatello, Idaho 83201

DATED this 23rd day of August, 2012.



---

Jeff Salt  
Executive Director

**GREAT SALT LAKEKEEPER**