DISTRICT COURT
FIFTH JUDICIAL DIST
JEROME COUNTY IDAHO

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Michelle Emerson
CLERK
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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

NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY, Petitioners, vs. David R. Tuthill, Jr., in his official capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondents.	Case No.: CV 2007-1093 ORDER DENYING PETITION FOR ALTERNATIVE WRIT OF MANDATE

I.
BRIEF PROCEDURE AND FACTS

On September 27, 2007, the Petitioners filed a *Petition for Peremptory Writ of Mandate* along with an *Application for Alternative Writ of Mandate* requesting that this Court order the Respondents to void the *Notice of Intent to Issue License* issued by the Respondents and order the Respondents to issue a license for a water right according to the terms of the permit issued to the Petitioners. Specifically, the Petitioners allege that they filed an application for a permit to divert water for power production and that the Respondents published notice of the application

on May 19th and 26th, 1977. No protests to the application were filed within the statutory time limit which expired on June 6, 1977. Accordingly, Water Right Permit No. 01-07011 was issued to the Petitioners on June 29, 1977. The Permit did not include any subordination conditions pertaining to the use of water for hydropower.

The Petitioners allege that proof of beneficial use was originally due on June 1, 1982. As a result of delays in the FERC licensing process, extensions were sought and approved in 1982, 1987, 1990 and 1992. In 1987, after the execution of the Swan Falls Agreement and the enactment of Idaho Code § 42-203B, the Respondents first indicated that a further extension of time would only be granted if the hydropower right was to be junior and subordinate to all other rights, except hydropower. The Petitioners expressed concern that the proposed condition would, among other things, allow other non-consumptive uses, such as groundwater recharge, to deplete water available under the permit for power generation. Petitioners allege that to address the concern the Respondents agreed to modify the proposed subordination condition as follows:

> 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 later in time than the priority of this permit.

This language was included in the permit issued for Water Right No. 01-07011.

The Petitioners allege that the project was developed and proof of beneficial use submitted on October 29, 1993,

The Petitioners allege that the Respondents have issued permits for groundwater recharge upstream from their project without investigating whether the permits would cause injury to existing water rights and that these junior priority recharge permits have resulted in reduction in flows under their permit.

The Petitioners allege that they requested that the Respondents issue a license in 2006 and again in the spring of 2007 and that the Respondents recently issued a *Notice of Intent to Issue License* indicating that the Respondents had decided to reopen a protest period to address the content of the subordination condition. The Petitioners request that this Court issue a writ of mandate requiring the Respondents to void the newly reopened protest period and to license the project subject to the subordination conditions negotiated between the Petitioners and Respondents in 1987.

II.
STANDARD OF REVIEW

A decision to issue a writ of mandate is committed to the discretion of the court. I.R.C.P. 74(b). An alternative writ of mandate is issued without notice to the adverse party. I.C. §7-305. An alternative writ of mandate is accompanied by an order requiring the adverse party to appear and show cause why the party has not complied with the writ. Whether a party is seeking an alternative writ or a peremptory writ the standard is the same: "[T]he party seeking a writ of mandate must establish a 'clear legal right' to the relief sought. Additionally, the writ of mandate will not issue where the petitioner has 'a plain, speedy and adequate remedy in the ordinary course of law.'" *Ackerman v. Bonneville County*, 140 Idaho 307, 311, 92 P.3d 557, 561 (Ct.App.2004)(citing *Brady v. City of Homedale*, 130 Idaho 569, 571, 944 P.2d 704, 706 (1997)).

III.
DISCUSSION

Following a review of the pleadings, the Court finds that because of the existence of many unresolved issues regarding the appropriateness of the issuance of a writ of mandate, that it

is necessary to allow the Respondents to answer the allegations of the Petition and to present legal argument and /or evidence as may be appropriate prior to the Court deciding whether to issue a writ of mandate. In reaching this decision, the Court has considered the following:

1. Time does not appear to be of the essence. The issuance of the license has been pending since 1993 when proof of beneficial use was made. The Court finds no immediate injury resulting from addressing the merits in this manner.

2. There is the threshold question of whether the Petitioners have an adequate remedy at law. Specifically, if Petitioners wait until the Respondents either issue a license or an order declining to do so, do the usual administrative and judicial review processes provide an adequate remedy at law?

3. The legal question of whether the Respondents have the authority, for any reason (changes in law etc.), to modify or impose a new condition on a permit after beneficial use has been proven but prior to the issuance of a license? If so, what is the appropriate remedy for a permittee who completes the diversion works and related projects in reliance on the terms on which the permit was originally conditioned? Are there legally recognizable exceptions to the operative language of Idaho Code § 42-219?

4. What is the legal significance of the negotiated agreement on which the extension for proof of beneficial use was granted?

5. The legal question of when a water right vests—when the permit is issued or when a license is issued or at some other time—may not be entirely settled. In *River Grove Farms*, S.R.B.A. Subcase No. 36-08099, *Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge*, filed January 11, 2000, Judge B. Wood), the court decided that a water right vests upon issuance of a license. No

appeal was taken from that decision. See also *Caulin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964)(state engineer revoked permit after completion of diversion works).

6. The question of whether it was appropriate for the Respondents to modify the permit in conjunction with granting the extension without re-opening and publishing the matter for comment in order to address the substantive changes. In particular in light of the intervening issues pertaining to hydropower which had emerged since the permit was initially issued. *See Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993)(application to amend to permit offers entire permit up to IDWR review).

By raising these issues, the Court is in no way prejudging the Petitioner's claims for relief but is only explaining the reasons for not issuing a writ of mandate without proper service of process, notice and opportunity for Respondents to respond to the pleadings and otherwise be meaningfully heard. The issue of whether a peremptory writ is an appropriate remedy will only be determined following a full hearing on the merits.

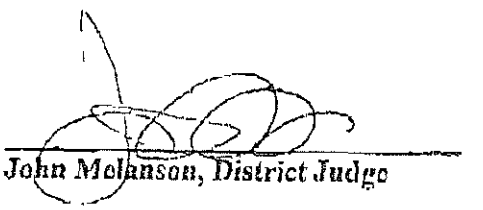
IV.
ORDER

Accordingly, it is hereby **ORDERED** as follows:

1. The *Application for Alternative Writ of Mandate* is **DENIED**.

2. The Petitioner may notice up a hearing on the *Application for Peremptory Writ of Mandate* following proper service and notice to the Respondents.

Dated October 10, 2007



John Melanson, District Judge