

STEVEN R. FULLER -2995  
FULLER & FULLER, PLLC  
24 North State  
P.O. Box 191  
Preston, ID 83263  
Telephone: (208) 852-2680  
Facsimile: (208) 852-2683

RECEIVED  
SEP 16 2019  
Department of Water Resources  
Eastern Region

RECEIVED  
SEP 23 2019  
DEPARTMENT OF  
WATER RESOURCES

**THE IDAHO DEPARTMENT OF WATER RESOURCES**

IN RE:

APPLICATION FOR TRANSFER OF  
WATER RIGHT NO. 13-7453 BY CITY OF  
WESTON, IDAHO

**RESPONSE TO MOTION FOR  
RECONSIDERATION OF  
PRELIMINARY ORDER  
APPROVING TRANSFER NO. 82613**

COMES NOW, **THE CITY OF WESTON, IDAHO, ("City")** by and through its attorney, STEVEN R. FULLER, of Fuller and Fuller, PLLC, and hereby responds to the Motion by Jay N. Fannesbeck for Reconsideration of Preliminary Order Approving Transfer No. 82613 as follows:

1. The Protest filed by Jay N. Fannesbeck raised only one issue which stated: "Unresolved issues regarding existence of East well in Section 8 does not meet min. set back requirements of ADAPA 59.01.08510.02 or 900.01 - Should have never been tied into City system and gets overlooked as illegal public diversion."

2. Set back requirements for a well are governed by the Idaho Department of Environmental Quality ("IDEQ") not the Idaho Department of Water Resources ("IDWR"). Further, evidence was presented that the City obtained a waiver of the setback requirements for the well from IDEQ and that waiver is still in force. Therefore, the only issue raised by the Fannesbeck Protest is frivolous in nature since it is not before the appropriate administrative body and even if it was, proper waivers were obtained with the

IDEQ with regards to the set back requirements for the well. The new well being considered by IDWR is not the well referenced in the Fannesbeck Protest. In essence, the Protest is irrelevant and immaterial to the City's proposed "Application for Transfer" No. 82613.

3. Mr. Fannesbeck references in his Motion two well driller reports to attack the original license granted to the City, Water Right No. 13-7453. The Water Right license was approved for a diversion rate of 2cfs with a priority date of July 11, 1988. It was licensed on April 27, 1998. Mr. Fannesbeck did not protest nor object to the granting of this water license. His reference to two well driller reports is neither conclusive nor relevant since he is attempting to make a collateral attack on a granted water license. Such an objection is not permissible. If an objection was to have been made to the water license, it should have been made at the time it was being processed. Collateral attacks on licensed water rights have, in the past, been barred because such protests create uncertainty and undermine water adjudications. *City of Blackfoot v. Spackman*, 162 Idaho 302, 308, 396 P.3d 1184, 1190 (2017); *Idaho Ground Water v. Idaho Department of Water Resources*, 160 Idaho 119, 128, 369 P.3d 897, 906 (2016); *Rangen Inc.*, 159 Idaho at 805-07, 367 P.3d at 200-02. "Finality in water rights is essential to their very nature." *State v. Nelson*, 131 Idaho 12, 16, 951 p. 2d 943, 947 (1998). Efficient administration and finality of decisions are crucial to "the proper planning for the future use of the state's water resources." See *id.* See also Idaho Code §§42-222, 42-241 and 42-203A. Mr. Fannesbeck's objection with regards to the City's water right is an attempt to rewrite history and was never protested by him in the first place.

As to the references in Mr. Fannesbeck's Motion to the "shallow aquifer", the proposed preliminary order takes into account certain conditions demanded of the City in its drilling of the well requiring the new well to be "constructed and maintained with unperforated casing and sealed into the first significant confining layer (of clay) located one hundred (100) feet or more below ground surface." Mr. Fannesbeck's concerns have therefore been addressed by IDWR even though such concerns are not part of his Protest.

4. Mr. Fannesbeck protests that other water users put water back into the watershed and that a lack of recharge somehow violates his rights as a landowner. This is not the appropriate forum to discuss issues as to whether or not irrigation sprinkler systems such

as those used by Mr. Fonnesebeck actually recharge an aquifer or whether the City must somehow mediate use of its water right since its use is a consumptive use as with most water rights and is, of course, subject to the rights of prior consumptive users under Idaho law.

Mr. Fonnesebeck called no expert witness to substantiate any of his claims. His comments are based on speculation and conjecture without a basis in law or fact. The motion for reconsideration by Mr. Fonnesebeck appears to have been made solely for purposes of delay. Time is a critical factor with regards to the favorable financing the City has obtained to construct its well. The City urges the IDWR to affirm its Preliminary Order as quickly as possible in order to avoid the potential loss of such financing which is pending through the US Army Corp. of Engineers.

Respectfully submitted this 12<sup>th</sup> day of September, 2019.

  
STEVEN R. FULLER  
Attorney for City of Weston

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONSE TO MOTION FOR RECONSIDERATION OF PRELIMINARY ORDER** was served on the 12<sup>th</sup> day of September, 2019,

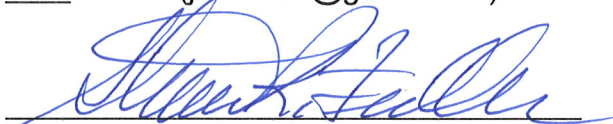
On:

Jay N. Fonnesebeck  
6022 West Hwy 36  
Weston, ID 83286

jnfannes@gmail.com

By:

☒ MAIL, POSTAGE PRE-PAID  
☐ HAND DELIVERY  
☐ TELEPHONE FACSIMILE  
☒ Email (jnfannes@gmail.com)

  
STEVEN R. FULLER

RECEIVED

SEP 23 2019

DEPARTMENT OF  
WATER RESOURCES

RECEIVED

SEP 16 2019

Department of Water Resources  
Eastern Region

**FULLER & FULLER, PLLC**

Attorneys and Counselors at Law  
24 North State ♦ P.O. Box 191 ♦ Preston, Idaho 83263

www.fullerlawonline.com

**STEVEN R. FULLER\***  
**LYLE J. FULLER\***

Telephone: (208) 852-2680  
Fax: (208) 852-2683

\*Also Member of Utah Bar

Steven R. Fuller  
SFuller@fullerlawonline.com

Lyle J. Fuller  
LFuller@fullerlawonline.com

September 12, 2019

**TO: Idaho Dept of Water Resources**  
**c/o Sharla Cox**  
**900 North Skyline Dr. Ste A**  
**Idaho Falls, ID 83402**

**Please Note:**

This form letter is used to expedite communications. You need direct your attention **only** to the items marked.

**RE:** Weston City, Idaho Application for Water Right Transfer and Protest against it.

\_\_\_\_ Enclosed is information/pleadings relating to the above matter.

\_\_\_\_ For your information.

X Please review and file in your records.

\_\_\_\_ Please record in the county records and return.

\_\_\_\_ Please file in the court record of the above case.

\_\_\_\_ Please review and call us to discuss over the telephone.

\_\_\_\_ Please sign and return.

\_\_\_\_ Enclosed is the information you requested.

**Enclosures:** Response to Motion for Reconsideration of Preliminary Order Approving Transfer No. 82613.

**Message:**