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Attorneys for the City of Preston

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

IN THE MATTER OF APPLICATION
FOR TRANSFER NOS. 68302 AND
65886 IN THE NAME OF THE CITY
OF PRESTON

**CITY OF PRESTON'S EXCEPTIONS
AND BRIEF FOLLOWING DENIAL OF
CITY'S PETITION FOR
RECONSIDERATION OF IDWR'S
OCTOBER 12, 2012 PRELIMINARY
ORDER CONFIRMING STATUS OF
TRANSFER APPROVALS AS FINAL
ORDERS OF THE DEPARTMENT**

The City of Preston, by and through its attorneys, Beeman & Associates, P.C., respectfully submits the following Exceptions and Brief regarding the Idaho Department of Water Resources (IDWR) October 12, 2012 *Preliminary Order Confirming Status of Transfer Approvals as Final Orders of the Department* ("October 12, 2012 IDWR Order").

The City of Preston filed a Petition for Reconsideration on October 26, 2012, as to the October 12, 2012 IDWR Order regarding the City of Preston transfers 658302 and 65886.

IDWR did not respond within 21 days (November 16, 2012), so the City's Petition for Reconsideration is deemed denied by operation of law. The City files these exceptions and brief under the provision that within 14 days (November 30, 2012), "any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the Party's position on any issue in the proceeding with the Director. Otherwise the preliminary order will become a final order of the agency."

**IDWR DOES NOT ARTICULATE A BASIS TO APPLY THE SEPTEMBER 14, 2012
A&B DECISION RETROACTIVELY TO TRANSFERS 68302 AND 65886 WHEN IDWR
DID NOT APPLY THE A&B DECISION RETROACTIVELY TO TRANSFER 65416.**

The record in transfers 68302/65886 includes the October 12, 2012 *Preliminary Order Confirming Status of Transfer Approvals as Final Orders of the Department (Preliminary Order)*, in which IDWR found that “[t]he Idaho Supreme Court recently held that an administrative agency must completely resolve the merits of a petition for reconsideration within 21 days of receipt, otherwise the petition for reconsideration is deemed denied by operation of law. *A&B Irr. Dist. v. IDWR*, 2012 Opinion No. 121 at 5-6 (Sept. 14, 2012). The Court held that an agency cannot grant a petition for reconsideration for the purpose of gaining additional time to consider the merits of the petition. *Id.* The Court also held that an order issued by an administrative agency after an order becomes final is a ‘nullity.’ *Id.* at 7.” *Preliminary Order* at 3.

IDWR thus concluded that it “did not timely dispose of *City of Preston's Petition for Reconsideration* of the preliminary orders approving Transfer Nos. 65886 and 68302 filed by City of Preston on November 27, 2001. Therefore, *City of Preston's Petition for Reconsideration* was deemed denied by operation of law.” *Id.* Thus, “Idaho Code § 67-5246 provides that ‘[i]f the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code.’ Since this matter was not reviewed by the Director pursuant to Idaho Code §67-5245, the Department's November 9, 2001 preliminary orders approving Transfer Nos. 65886 and 68302 are final orders of the agency.” *Id.* “Because the November 9, 2001 orders are final orders, the Department lacked authority to issue its August 13, 2012 preliminary orders amending Transfer Nos. 65886 and 68302 and its September 6, 2012 *Order Granting Request for Hearing, Order Denying Petition for Reconsideration, and Order Staying Preliminary Orders* in the matter of Transfer Nos. 65886 and 68302. The Department must give effect to the November 9, 2001 final orders” *Id.* Consequently, IDWR ordered that the November 9, 2001 preliminary orders approving Transfer Nos. 65886 and 68302 were confirmed and would be implemented as final orders.

The October 12 Order does not articulate a standard for retroactive application of the A&B decision other than as quoted above, “an administrative agency must completely resolve

the merits of a petition for reconsideration within 21 days of receipt, otherwise the petition for reconsideration is deemed denied by operation of law;” “an agency cannot grant a petition for reconsideration for the purpose of gaining additional time to consider the merits of the petition”; and “an order issued by an administrative agency after an order becomes final is a ‘nullity.’”

As shown in the common procedural history below, the IDWR record does not provide a basis for applying the A&B decision retroactively to transfers 65886/68302 (City of Preston) and not applying the decision retroactively to transfer 65416 (Cub River Irrigation Company)

**PROCEDURAL HISTORY OF CITY OF PRESTON TRANSFERS 68302/65886
AND CUB RIVER IRRIGATION COMPANY TRANSFER 65416**

The following materials, in chronological order, are excerpted from the IDWR files for water rights 13-26 (and progeny) and 13-34 (and progeny), and the IDWR files for transfers 68302, 65886, and 65416 (and their predecessor numbering). *Highlighted material* confirms that the City of Preston was a party to transfers 68302, 65886, and 65416, and that the transfers became a unified proceeding at IDWR because water right 13-26 (and later 13-34) was common to the transfers.

1. Cub River Irrigation Co. (“Cub River”) filed an Application for Transfer No. 65416 (formerly number 2753) (“Cub River 1982 application”) on October 28, 1982. The purpose of the application was to change the point of diversion, place of use, and nature of use for portions of Water Rights 13-26 and 13-34, because “the City of Preston has purchased Cub River shares and wants to use the flow of Bergquist Springs as the source and use the water for municipal purposes.” Further, “the City of Preston has owned shares in Cub River since 1980 and has used the water for municipal use ever since.” The amount of 2.82 cfs in the transfer represented 65.5 shares of Cub River stock owned by the City of Preston.

2. Notice of the Cub River 1982 application was published in the *Preston Citizen* on November 18 and 25, 1982. The Cub River 1982 application was protested by the Idaho Department of Fish & Game and the United States Forest Service. No other protests were received. The notice states, “2.82 cfs of water will be diverted within the NENE Section 10, NWNW Section 11, T15S, R41E, Boise Meridian, Franklin County, and used to irrigate lands within the city limits of Preston, Idaho.”

3. The City of Preston filed an Application for Transfer No. 65886 (formerly number 3223) (“Preston 1984 application”) on January 10, 1984. The Preston 1984 application

was based on a purchase of water in 1920.

4. Notice of the Preston 1984 application was published in the *Preston Citizen* on October 17 and 24, 1985. The Preston 1984 application was protested by the United States Forest Service. The legal notice states, "The City of Preston, Preston, Idaho, has applied to the Department of Water Resources for a change in the point of diversion and period of use of the waters of Cub River . . . evidenced by the decree . . . in the amount of 2.5 cfs for municipal purposes 1/1 to 12/31. . . . The water is used for municipal purposes within the City of Preston."

5. The matter of the protest against the Cub River 1982 application was heard on October 30, 1985, in the Ag Room, Franklin County Courthouse, Preston, Idaho. The hearing on the protest against the Preston 1984 application was heard on December 19, 1985, in the Ag Room, Franklin County Courthouse, Preston, Idaho.

6. *By letter of September 10, 1986, the United States Forest Service withdrew its protest of "Applications for Transfer of Water Right Nos. 13-26 as submitted by Cub River Irrigation Company for the City of Preston, and 13-26 as submitted by the City of Preston." The document entitled "Water Right Resolution Between City of Preston, Idaho, and United States of America – USDA Forest Service" was signed by the Forest Service and the Mayor of the City of Preston. In addition, the resolution states, "Both parties agree to recommend to the State of Idaho, Department of Water Resources, that this Water Right Resolution be attached to the subject applications for transfer of water right."*

7. *By date of February 2, 1995, the Department issued a NOTICE OF PRE-HEARING CONFERENCE for February 24, 1995 in Preston, Idaho, at the Preston City Hall in the Council Chambers IN THE MATTER OF APPLICATION FOR TRANSFER NO. 13-00026 IN THE NAME OF THE CITY OF PRESTON AND CUB RIVER IRRIGATION.*

8. *By date of March 9, 1995, the Department issued a POST PRE-HEARING CONFERENCE ORDER for the Prehearing Conference conducted on FEBRUARY 24, 1995 at the Preston City Hall, Preston, Idaho. The matter was entitled IN THE MATTER OF APPLICATION FOR TRANSFER NO. 2753 (FOR WATER RIGHT NO. 13-00026) IN THE NAME OF CUB RIVER IRRIGATION COMPANY AND APPLICATION FOR TRANSFER NO. 3223 (FOR WATER RIGHT NO. 13-00026) IN THE NAME OF THE CITY OF PRESTON.* The Department ordered the City of Preston to amend Application 3223 on or before April 1, 1995, and Cub River Irrigation Co. to amend Application 2753 prior to April 1, 1995. It was further ordered that if the City of Preston and Cub River failed to amend the applications for transfer, a hearing regarding protest against the applications would be set for hearing as soon as possible.

9. By date of April 14, 1995, in response to the March 9, 1995 IDWR Post Pre-Hearing Conference Order, the City of Preston submitted the original Transfer Application on Water Right 13-34. In the transmittal letter, the City of Preston states that the only appropriate changes for its pending transfer on Water Right 13-26 is "(1) the season of use should correspond to the irrigation season on the Cub River and not a year round use; and (2) the point of diversion for Bergquist has a typographical error on the second legal description which should

be T41E, not T43E. The map attached to the original application confirms the location in T41E.”

10. Pursuant to the March 9, 1995 Post-Prehearing Conference Order, Cub River Irrigation Co. (“Cub River”) filed its Amended Application for Transfer No. 65416 (formerly number 2753) (“Cub River 1995 amended application”) in May of 1995. The purpose of the application was to change the point of diversion, place of use and nature of use for Water Right No. 13-34A and a portion of Water Right No. 13-26A. The transmittal letter with the Cub River 1995 amended application states, “*The quantity being transferred represents the City of Preston’s proportionate share of the Cub River water rights commonly known as their ‘summer’ and ‘winter’ water rights based upon . . . shares of stock currently owned by the city.*”

11. Notice of the Cub River 1995 amended application was published in the *Preston Citizen* in May and June, 1995. The application was protested by Preston-Whitney Irrigation Company (“Preston-Whitney”). No other protests were received and the Idaho Department of Water Resources (“Department”) did not receive any petitions for intervention in the contested case.

12. The City of Preston’s Transfer Application for Water Right 13-34 was advertised April 26 and May 3, 1995 in the *Preston Citizen*. The notice states that this is a water right for the non-irrigation season (11-1 to 3-31), that 2.5 cfs is owned by the City of Preston and is diverted from Bergquist Springs and used within the City limits.

13. The November 6, 1995 notice of prehearing conference for Transfer 4596 states that it is to replace the City of Preston’s Transfer Application 3223. The prehearing conference was set for December 12, 1995, at the Pocatello Airport, in Pocatello, Idaho.

14. The Department also scheduled the Cub River 1995 amended application for Transfer 65416 (formerly number 2753) for a pre-hearing conference on December 12, 1995, at the Pocatello Airport, in Pocatello, Idaho.

15. By letter of December 8, 1995, the City of Preston fax filed its amended transfers on Water Rights 13-26 and 13-34B. The letter states that the City of Preston will proceed with the December 12 prehearing conference although there would not have been time to accommodate advertising of the amended transfers. (These documents were attached to the City Of Preston’s September 20, 2012 Petition For Reconsideration Of IDWR’s September 6, 2012 Order in 13-26/13-34 Granting Request For Hearing, Order Denying Petition For Reconsideration, And Order Staying Preliminary Orders.)

16. The City of Preston’s Amended Transfer Applications which were filed with IDWR on December 8, 1995, were never advertised.

17. On February 22, 1997, and March 5, 1997, *the following legal advertisement was published in the Preston Citizen at the request of IDWR (excerpted quotes):*

Cub River Irrigation Company . . . has applied the Department of Water Resources to add a point of diversion of the waters of Cub River tributary to Bear River. The right sought to be changed is . . . 13-26 . . . TO BE CHANGED AS FOLLOWS: . . . The total cfs amount that will be diverted at both diversions has been reduced . . . to reflect pending transfers 2753 and 3223 for the City of Preston.

18. *On August 31, 1998, a document titled Agreement among the City of Preston, the Cub River Irrigation Company, and Preston-Whitney Irrigation Company Regarding the Municipal Water Rights for the City of Preston (“agreement”) was submitted to the Department. Preston-Whitney withdrew its protest of the application as part of the agreement. The transmittal letter received by IDWR on August 31, 1998, states that the agreement “affects three pending transfers on the Cub River: 2753 (in the name of the Cub River Irrigation Company), 3223 (in the name of the City of Preston), and 4596 (in the name of the City of Preston).” Further, “As part of the agreement, the City of Preston, the Cub River Irrigation Company, and the Preston-Whitney Irrigation Company agree to support approval of these transfers before the Idaho Department of Water Resources. . . .”*

19. *On October 24, 2001, draft transfer approvals for 4596, 2753, and 3223 were sent to counsel for the City of Preston, Cub River Irrigation Company, and Preston-Whitney Irrigation Company “for comment before the transfers are forwarded for approval.” The letter is addressed as “Dear Interested Parties”.*

20. *On November 9, 2001, the Department issued an approval of the application as a preliminary order (“preliminary order”). Orders of the same date were issued for Transfers 4596, 2753, and 3223.*

21. *The preliminary order was served by mail to Cub River on November 13, 2001. Although the parties (City of Preston, Cub River, Preston-Whitney Irrigation Company) were represented by attorneys throughout these proceedings, none of the attorneys were served with any of the November 9, 2001 preliminary orders.*

22. *On November 27, 2001, the City of Preston filed City of Preston’s Petition for Reconsideration of the preliminary orders for Transfers 4596, 2753, and 3223. Cub River did not file a petition for reconsideration, exceptions or a request for hearing to review the preliminary order.*

23. *On November 28, 2001, the Department granted City of Preston’s Petitions for Reconsideration to review the issues raised by City of Preston for all three transfers.*

24. *On January 9, 2002, Preston-Whitney filed Preston-Whitney Irrigation Company’s Response to City of Preston’s Petitions for Reconsideration.*

25. *On February 6, 2001 (sic), Cub River filed a response to City of Preston’s Petition for Reconsideration.*

26. By date of February 12, 2002, the City of Preston (through its counsel Jo Beeman) advised IDWR that it had received the responses of Preston-Whitney Irrigation Company and the Cub River Irrigation Company to the City of Preston's Petitions for Reconsideration. Further, the letter explained that although a formal reply is not required for responses to petitions for reconsideration, the City expected that the responses would be included in the City's continuing work with Jeff Peppersack at the IDWR State Office in Boise.

27. On August 13, 2012, the Department issued a preliminary order amending approval of Transfer No. 65416 ("amended preliminary order"). The amended preliminary order was served by mail to Cub River, City of Preston and Preston-Whitney on August 14, 2012.

28. On August 28, 2012, City of Preston filed *City of Preston's Petition for Reconsideration* ("August 28, 2012 petition for reconsideration") of the amended preliminary order. On August 29, 2012, City of Preston filed *City of Preston's Request for Hearing* ("request for hearing"). Cub River did not file a petition for reconsideration or a request for hearing to review the amended preliminary order.

29. The IDWR personnel involved in 2012 on these transfers are the same individuals that the City of Preston, Cub River, and Preston-Whitney were working with in 2001 and 2002.

30. On September 6, 2012, IDWR filed and served an *Order Withdrawing Order Granting Petition for Reconsideration, Withdrawing Amended Transfer Approval, and Denying Petition for Reconsideration in Request for Hearing* in the Matter of Application for Transfer No. 65416 in the Name of Cub River Irrigation Company (September 6 Order in Cub River Transfer).

31. The September 6 Order in Cub River Transfer found that the City of Preston was not an applicant, claimant, appellant, petitioner, complainant, respondent, or protestant in the Cub River Transfer No. 65416. The Order also found that the City of Preston did not seek to intervene in Transfer No. 65416.

32. The September 6 Order in Cub River Transfer determined that the City of Preston lacked standing to file its November 27, 2001 petition for reconsideration.

- Idaho Code § 67-5243(3) states that "unless otherwise provided by statute or rule, *any party* may file a motion for reconsideration of a recommended order or a preliminary order within fourteen (14) days of the service date of that order." (emphasis added).
- The requirement to be a party is jurisdictional. See *Laughy v. Idaho Dept. of TrallSp.*, 149 Idaho 867, 874,243 P.3d 1055, 1062 (2010).
- Rule 150 of the Department's Rules of Procedure defines parties as "applicants, or claimants or appellants, petitioners, complainants, respondents, protestants, or intervenors." The City of Preston is not an applicant, claimant, appellant, petitioner, complainant, respondent or protestant in this proceeding. The City of Preston did not seek to intervene in this proceeding. Accordingly, the City of Preston lacked standing to file its November 27, 2001 petition for reconsideration.

- Idaho Code § 67-5246 provides that "[i]f the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code." Since the City of Preston was not a party and this matter was not reviewed by the Director pursuant to Idaho Code § 67-5245, the Department's November 9, 2001 preliminary order is a final order of the agency.
- Because the November 9, 2001 order is a final order, the Department lacked authority to issue its August 13, 2012 amended preliminary order.' The Department must give effect to the November 9, 2001 final order.

33. September 14, 2012, the Idaho Supreme Court held that an administrative agency must completely resolve the merits of a petition for reconsideration within 21 days of receipt, otherwise the petition for reconsideration is deemed denied by operation of law. *A&B Irrigation District v. IDWR*, 2012, pending No. 121 at 5-6. The Court held that an agency cannot grant a petition for reconsideration for the purpose of gaining additional time to consider the merits of the petition. The Court also held that an order issued by an administrative agency after an order becomes final is a "nullity." *Id* at 7.

34. On September 20, 2012, the City of Preston filed a petition to reconsider the September 6, 2012 preliminary order in Transfer No. 65416.

35. IDWR did not take any action in the Cub River transfer No. 65416 as to the effect of the A&B decision, although the decision was filed six (6) days before the City of Preston's Petition for Reconsideration.

36. On October 12, 2012, IDWR issued a preliminary order in the City of Preston transfers (68302, 65886) applying the A&B decision and stating that IDWR must give effect to the November 9, 2001 final orders.

37. IDWR did not respond to City of Preston's September 20, 2012 Petition for Reconsideration as to the Cub River Transfer No. 65416. The City's petition for reconsideration was deemed denied by operation of law when IDWR did not respond by October 11, 2012, the end of the 21-day period. Within 14 days (October 25, 2012), "any party may in writing support or take or take exceptions to any part of a preliminary order and may file briefs in support of the Party's position on any issue in the proceeding with the Director. Otherwise, the preliminary order will become a final order of the agency."

38. The City of Preston filed exceptions in the Cub River transfer proceeding No 65416 On October 26, 2012, having mistakenly counted the 21 days from October 12, 2012, the date of the preliminary order in the City of Preston proceedings 68302/65886.

39. Had the City of Preston timely filed on October 25, 2012, and ultimately prevailed on its party status, the City understands that IDWR would have applied the A&B decision, giving effect to the November 9, 2001 order for the Cub River and City of Preston transfers.

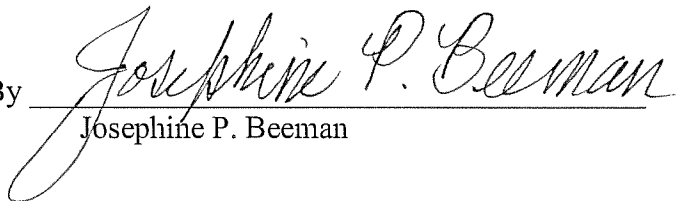
40. The A&B decision in effect mooted the party status issue in the Cub River transfer proceeding 65416 because even if the City of Preston were deemed a party, that determination would be nullified by the application of the A&B decision which would give effect to the November 9, 2001 preliminary order as a final order.

CONCLUSION

IDWR did not respond to the arguments presented in the City of Preston's Petition for Reconsideration Of IDWR's October 12, 2012 Preliminary Order Confirming Status Of Transfer Approvals As Final Orders Of The Department. Those arguments are incorporated here. The City of Preston respectively submits that this retroactive application of the *A & B Irrigation* decision is counter to Idaho law and the interests of justice.

RESPECTFULLY SUBMITTED this 30th day of November 2012.

BEEMAN & ASSOCIATES, P.C.

By 
Josephine P. Beeman

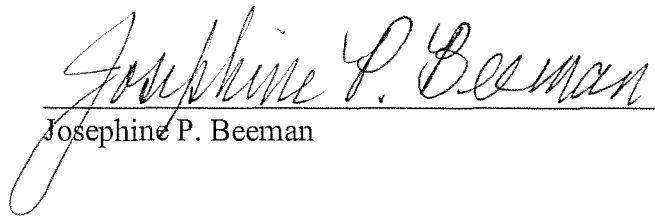
CERTIFICATE OF SERVICE

I certify that this 30th day of November 2012, I caused a true and correct copy of the foregoing document to be served on the following by U.S. Mail.

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