

RECEIVED

OCT 29 2012

DEPARTMENT OF
WATER RESOURCES

Fax received
10-24-12
SR

Josephine P. Beeman (#1806)
Jane M. Newby (#2848)
BEEMAN & ASSOCIATES, P.C.
409 W. Jefferson St.
Boise, ID 83702
Phone: (208) 331-0950
Fax: (208) 331-0954
jo.beeman@beemanlaw.com

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 CITY OF
PRESTON

**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**

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

The City of Preston filed a Petition for Reconsideration on September 21, 2012, as to City of Preston transfers affecting 2.5 cfs during the irrigation and non-irrigation seasons. The Idaho Department of Water Resources (IDWR) responded within 21 days, on October 12, 2012, issuing another preliminary decision stating that its 2001 decision is final. The City of Preston transfers were analyzed by IDWR using a September 14, 2012 decision of the Idaho Supreme Court, *A&B Irrigation District v. Idaho Department of Water Resources*, Docket no. 39196-2011, filed September 14, 2012. This decision affects deadlines under the Idaho Administrative Procedures Act. IDWR is applying the decision retroactively to 2001, asserting that its preliminary order in 2001 became final in 2001. The City of Preston respectfully submits that this retroactive application of the *A & B Irrigation* decision is counter to Idaho law and the interests of justice.

The issues for the City of Preston remain the same. The City's Petition for Reconsideration focuses on removing the volume limitation for the irrigation season. The volume limitation is unnecessary because the water is used for irrigation within the City. The volume limit in the existing IDWR transfer orders *may* protect the City of Preston's municipal diversions that are measured *after* the overflow from the hydropower plant; however, if the volume limit is not removed, this point of measurement needs to be clarified in the transfer orders.

City of Preston filed its Application for Transfer No. 65886, formerly numbered 3223, ("Transfer No. 65886") on January 12, 1984. The purpose of the transfer application was to confirm the change in point of diversion, place of use and nature of use for 2.5 cfs of a year round decreed water right from the Cub River that had been *purchased for year round municipal use* in 1920 by the City of Preston, and used since that time. Later, at the request of IDWR, City of Preston changed Transfer No. 65886 to the irrigation season only, and filed Application for Transfer No. 68302, formerly numbered 4596, ("Transfer No. 68302") on April 14, 1995, for the non-irrigation season. The purpose of the application was to change the point of diversion, place of use and nature of use for a portion of Water Right No. 13-34. Transfer No. 65886 addressed 2.5 cfs of water right 13-26 purchased by the City of Preston; transfer No. 68302 addressed 2.5 cfs of water right 13-34 purchased by the City of Preston.

On November 9, 2001, the IDWR issued an approval of Transfer Nos. 65886 and 68302 as preliminary orders. On November 28, 2001, the Department granted *City of Preston's Petition for Reconsideration* to review the issues raised by City of Preston in the matter of Transfer Nos. 65886 and 68302. On August 13, 2012, the Department issued preliminary orders amending approval of Transfer Nos. 65886 and 68302. On August 28, 2012, City of Preston filed *City of Preston's Petition for Reconsideration* of the amended approvals of Transfer Nos. 65886 and 68302. On August 29, 2012, City of Preston filed *City of Preston's Request for Hearing* in the matter of Transfer Nos. 65886 and 68302. On September 6, 2012, the Department issued an *Order Granting Request For Hearing, Order Denying Petition For Reconsideration, and Order Staying Preliminary Orders* in the matter of Transfer Nos. 65886 and 68302. On September 20, 2012, City of Preston filed *City of Preston's Petition for Reconsideration of IDWR's 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.

In the October 12, 2012 *Preliminary Order Confirming Status of Transfer Approvals as Final Orders of the Department (Preliminary Order)*, 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 Idaho Supreme Court, in *A&B Irr. Dist. v. IDWR*, 2012 Opinion No. 121 at 5-6 (Sept. 14, 2012), did not address the issue of whether its decision that an administrative agency must completely resolve the merits of a petition for reconsideration within 21 days of receipt or the petition for reconsideration is deemed denied by operation of law should be retroactively applied to pending or prior petitions for reconsideration that were not completely resolved within 21 days of their receipt by the administrative agency. Since the issue of retroactivity was not addressed by the Idaho Supreme Court in its decision, the City of Preston submits that IDWR

should not retroactively apply the decision to pending or prior petitions for reconsideration because of the possible far-ranging consequences of doing so.

In *Thompson v. Hagan*, 96 Idaho 19, 25, 523 P.2d 1365 (1974), the Idaho Supreme Court held that retroactivity of a decision is discretionary with the overruling court and is decided on a case by case basis. The Court identified three different approaches to retroactivity: (1) the traditional rule, which makes a decision applicable to both past and future cases; (2) the prospective rule, which make a decision effective only in future actions; and (3) the modified prospective rule, which makes the new decision apply to future actions and to the parties bringing the action resulting in the new decision. *Id.* In determining which rule to apply, the following factors are to be considered: (1) the purpose of the new decision; (2) reliance on the prior rule of law; and (3) the effect on the administration of justice. *Id.* The holding and the tests enunciated in *Thompson v. Hagan* have been affirmed and applied in numerous cases since 1974. See, for example, *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 108 P.3d 315 (2004).

The City of Preston relied on IDWR's prior interpretation and application of law, an interpretation and application that had been in place for many years. Conceivably, so did other petitioners in the City of Preston's position, as reflected in the following quote from the September 14, 2012 opinion of the Idaho Supreme Court:

IDWR contends that its construction of the statute "is in accord with the leading commentary on Idaho's Administrative Procedure Act, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273 (1993), written by Michael S. Gilmore & Dale D. Goble" and "is also consistent with the written explanatory comments that accompany the Idaho Attorney General's Model Rules of Administrative Procedure." (footnote omitted) Opinion, page 5.

This reliance on IDWR's prior interpretation and application of the law and the effect of the Idaho Supreme Court's new ruling on the administration of justice for the City of Preston and other petitioners in similar situations, in the absence of a ruling by the Idaho Supreme Court on the retroactivity of its decision in *A&B Irr. Dist.*, should compel IDWR not to retroactively apply the decision.

CONCLUSION

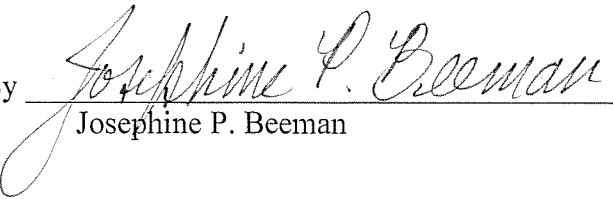
In the interest of justice, the City of Preston respectfully submits that IDWR should not retroactively apply the decision in *A&B Irr. Dist.* to the present case. The City of Preston's Amended Applications transmitted to the parties and IDWR by fax on December 8, 1995 must

be advertised before IDWR can to submit any preliminary or final orders. The City of Preston respectfully incorporates all of its previous petitions for reconsideration and/or hearing related to the transfers arising from parent rights 13-26 and 13-34.

RESPECTFULLY SUBMITTED this 26th day of October 2012.

BEEMAN & ASSOCIATES, P.C.

By


Josephine P. Beeman

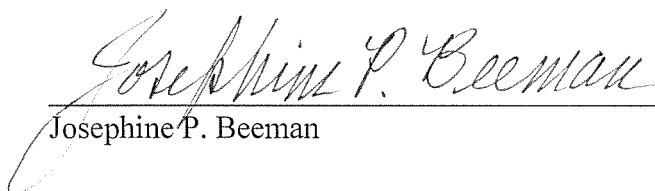
CERTIFICATE OF SERVICE

I certify that this 26th day of October 2012, I caused a true and correct copy of the foregoing document to be served on the following by U.S. Mail.

Robert Harris
Holden Kidwell
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405-0130

Randy Budge
Racine Olson
201 E Center, Suite A2
PO Box 1391
Pocatello, ID 83204

Jeff Peppersack
IDWR
322 E. Front Street
P. O. Box 83720
Boise, ID 83720-0098



Josephine P. Beeman