

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

IN THE MATTER OF APPLICATION	)	ORDER WITHDRAWING ORDER
FOR TRANSFER NO. 65416	)	GRANTING PETITION FOR
IN THE NAME OF	)	RECONSIDERATION,
CUB RIVER IRRIGATION CO.	)	WITHDRAWING AMENDED
	)	TRANSFER APPROVAL AND
	)	DENYING PETITION FOR
	)	RECONSIDERATION AND
	)	REQUEST FOR HEARING

FINDINGS OF FACT

1. Cub River Irrigation Co. ("Cub River") filed its Amended Application for Transfer No. 65416 (formerly numbered 2753) ("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.

2. Notice of the 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.

3. The Department scheduled the matter for a pre-hearing conference on December 12, 1995.

4. 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.

5. On November 9, 2001, the Department issued an approval of the application as a preliminary order ("preliminary order").

6. The preliminary order was served by mail to Cub River on November 13, 2001.

7. On November 27, 2001, the City of Preston filed *City of Preston's Petition for Reconsideration* of the preliminary order. Cub River did not file a petition for reconsideration, exceptions or a request for hearing to review the preliminary order.

8. On November 28, 2001, the Department granted *City of Preston's Petition for Reconsideration* to review the issues raised by City of Preston.

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

10. On February 6, 2001, Cub River filed a response to *City of Preston's Petition for Reconsideration*.

11. 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.

12. 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.

CONCLUSIONS OF LAW

1. 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).

2. The requirement to be a party is jurisdictional. See *Laughy v. Idaho Dept. of Transp.*, 149 Idaho 867, 874, 243 P.3d 1055, 1062 (2010).

3. 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.

4. 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.

5. 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.

ANALYSIS

The Department erred by granting the *City of Preston's Petition for Reconsideration* because the City of Preston was not a party. City of Preston was not the applicant, did not protest the application, and did not seek intervention in the proceeding.

The preliminary order became a final order of the Department 14 days after it was issued in 2001. The Department erred by issuing the amended preliminary order on August 13, 2012 after the preliminary order became a final order of the agency. The Department should withdraw the amended preliminary order. The Department should deny the August 28, 2012 petition for reconsideration and the request for hearing filed by City of Preston.

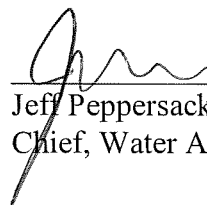
ORDER

IT IS HEREBY ORDERED that the order granting *City of Preston's Petition for Reconsideration* issued by the Department on November 28, 2001 and the amended preliminary order issued by the Department on August 13, 2012 are **WITHDRAWN**. The November 9, 2001 preliminary order is final and will be implemented as approved.

IT IS FURTHER ORDERED that the August 28, 2012 petition for reconsideration filed by City of Preston is **DENIED**.

IT IS FURTHER ORDERED that the request for hearing filed by City of Preston on August 29, 2012 is **DENIED**.

Dated this 6th day of September, 2012.



Jeff Peppersack
Chief, Water Allocation Bureau

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 2012, I mailed a true and correct copy, postage prepaid, of the foregoing ORDER WITHDRAWING ORDER GRANTING PETITION FOR RECONSIDERATION, WITHDRAWING AMENDED TRANSFER APPROVAL AND DENYING PETITION FOR RECONSIDERATION AND REQUEST FOR HEARING and explanatory information to accompany a preliminary order to the persons listed below:

RE: Transfer Nos. 65416

MERVIN J BODILY
CUB RIVER IRRIGATION CO
PO BOX 215
LEWISTON UT 84320

RANDALL BUDGE
RACINE OLSON NYE BUDGE & BAILEY CHTD
PO BOX 1391
POCATELLO ID 83204-1391

CITY OF PRESTON
70 W ONEIDA
PRESTON ID 83263

JOSEPHINE P BEEMAN
BEEMAN & ASSOCIATES PC
409 W JEFFERSON
BOISE ID 83702

KIRK IVERSON
WATERMASTER
2724 S 1400 W
PRESTON ID 83263

CLYDE G NELSON
PO BOX 797
SODA SPRINGS ID 83276-0797

ROBERT L HARRIS
HOLDEN KIDWELL HAHN & CRAPO PLLC
1000 RIVERWALK DR STE 200
PO BOX 50130
IDAHO FALLS ID 83402-3304



Emalee Rushing
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, 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, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.