

File _____
68302
65886
65416

MEMORANDUM

Date: September 6, 2012
To: Jeff Peppersack
Thru: Pam Skaggs *PS*
From: Nick Van Dyke *NVD*
Re: Analysis of City of Preston's Petition for Reconsideration of Transfer Approvals 68302, 65886 & 65416

This memo addresses points/issues brought forth from a Petition for Reconsideration (petition) regarding three transfer approvals recently issued involving rights 13-34, 13-34A, 13-26A, and 13-26C. The petition was authored by Jo Beeman, City of Preston's attorney. Each point/issue was reviewed and discussed in a recent meeting with Jeff Peppersack, Pam Skaggs, and Nick Van Dyke. Below is a recap of the meeting's discussion/conclusions on each issue in the same order presented in the petition.

- **Transfer 68302, Water Right 13-34B (note petition erroneously lists 65302):**
 1. Petition asks about the exclusion of a condition describing a point of diversion on right 13-34B. Condition "The point of diversion described above is in an unsurveyed area and may fall within the NWNW of Sec. 11, T15S, R41E" should be added to 13-34B
 2. The question was posed on whether a condition related to high water should be included in the transfer. It should not because a condition like that was not part of the original decree the right(s) are derived from.
- **Transfer 65886, Water Right 13-26C:**
 3. Petition requests the volume limitation of 356 AFA be taken off the approval. 356 AFA is based off the historical irrigated acre amount of 101.7 acres ($101.7 * 3.5$). In review, because the transfer changed the nature of use to municipal, the volume limitation should be 254.3 AFA ($101.7 * 2.5$). Recommend adding Condition 205 to note new element limits based on consumptive use volume as intentional.
 4. Petition brings into question the validity of Condition No. 5, which states "Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the watermaster for measuring the flow in the Cub River at the original point of diversion." This point is null because that condition is not on the transfer approval. It should be noted the numbering of the conditions is incorrect. Recommend adding same pod condition as number 1 above.
 5. It's suggested ~~different~~ there be different wording in Condition No. 7. Jo is referencing the wording in the old draft transfer approval, not the recent transfer approval.
 6. See notes below on point no. 13. Transfer 64516 describes Right 13-26C as the unchanged split of Right 13-26A (Transfer 65886 describes Right 13-26C as the transferred right). Right 13-26D is the transferred portion in Transfer 65416, changing nature of use and source from Cub River to spring. High flows in spring not possible in the same manner as the river, but a possible condition to address may be added.

7. Item seven of the petition discusses whether or not hydropower is part of the municipal use 13-26C authorizes. The petition seems to be asking for hydropower, along with irrigation, irrigation storage, and irrigation from storage added as separate elements of the right. In our meeting discussing the petition, some thought was given to perhaps adding a condition adding hydropower with subordinate language and term limits and reducing the other uses proportionately. My notes have the argument to include the irrigation components not allowable since it would create an enlargement. — Uses not listed on application

- **Transfer 65416, Water Right 13-34A and 13-26A:**

8. Three transfers were approved simultaneously in the following order. 1) 68302, 2) 65416, 3) 65886. Right 13-34 split thru Transfer 68302 describing the unchanged portion under 13-34A. Right 13-34A is changed under Transfer 65416 noting the forfeited portion under condition no. 1. Recommend adding condition 205 to both 13-34A and 13-26D to describe new element limits based on forfeiture and consumptive use volumes as intentional.
9. Petition suggest there is no explanation of the origin of 13-26A. Right 13-26A is the unchanged portion of 13-26 split by Transfer 5010 on 11/12/1997. Right 13-26A is split in Transfer 64516 describing the unchanged portion under 13-26C that is subsequently changed under Transfer 65886. ⁶⁵⁴¹⁶
10. Transfer 65416 splits 13-26A as noted in explanation no. 9. Right 13-26C is the unchanged split described as 2.50 cfs for 101.7 acres irrigation; no volume identified in this transfer. Right 13-26D is described under Transfer 65416 with the change in nature of use from irrigation to municipal use. It should be limited to the same irrigation season and consumptive use volume as noted for 13-26C in Transfer 65886. Instead of 589 af ($3.5 * 168.3 \text{ acres} = 589 \text{ af}$), volume should be limited to 420.8 af ($2.5 * 168.3 \text{ acres} = 420.8 \text{ af}$).
11. Here the petition points out the same issue as number 4 above. The condition is not on the 65416 approval (note here the numbering order error found on 65886's conditions isn't a problem).
12. See number 5 above, no action needed.
13. The last item in the petition involves condition no. 1 on 13-26C. Condition states "Right 13-26C is authorized diversion of 7/100ths of stream in excess or high water up to a maximum of 8.90 cfs when combined with primary right of 2.50 cfs." Same as no. 6 above. High flows in spring not possible in the same manner as the river, but a possible condition to address may be added.
- if water available in Cde R.
 - may need meas. device to confirm