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DEPARTMENT OF
WATER RESOURCES

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**IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN**

**PRESTON-WHITNEY IRRIGATION
COMPANY, an Idaho Corporation**

Petitioners,

vs.

**GARY SPACKMAN, in his capacity as
Interim Director of the Idaho Department
of Water Resources, and THE IDAHO
DEPARTMENT OF WATER
RESOURCES,**

Respondents.

Case No. CV- 2011-404

Fee Category L.3.a: \$88.00

**NOTICE OF APPEAL AND PETITION
FOR JUDICIAL REVIEW OF FINAL
AGENCY ACTION**

**IN THE MATTER OF APPLICATION
FOR TRANSFER 75705 IN THE NAME
OF PRESTON-WHITNEY IRRIGATION
CO.**

PRESTON-WHITNEY IRRIGATION COMPANY, (hereinafter "Preston-Whitney" or "Petitioner"), by and through their attorneys of record, HOLDEN, KIDWELL, HAHN & CRAPO, PLLC, hereby file this Petition seeking judicial review of a final agency action by the Idaho Department of Water Resources ("IDWR" or "Department").

COPY

STATEMENT OF THE CASE

1. This is a civil action pursuant to Idaho Code §§ 67-5270 and 67-5279 seeking judicial review of a *Final Order* issued by Interim Director Gary Spackman of the Idaho Department of Water Resources (the hearing officer) on June 21, 2010, as well as an *Order Denying Petition for Reconsideration* issued on July 20, 2011.
2. A hearing before IDWR was held in this matter on March 23-25, 2011, in Franklin County (Preston), Idaho.

JURISDICTION AND VENUE

3. This petition is authorized by Idaho Code §§ 67-5270 and 67-5279.
4. This Court has jurisdiction over this action pursuant to Idaho Code §§ 42-1701A(4) and 67-5272.
5. Venue lies in this Court pursuant to Idaho Code § 67-5272 because (1) the hearing on this matter was held in Franklin County (Preston), Idaho; (2) the final agency action was taken in Franklin County, Idaho; (3) the aggrieved party—Preston-Whitney—operates its principal place of business in Franklin County (Preston), Idaho; and (4) the real property that was the subject of the agency decision—Preston-Whitney's water rights—are appurtenant to lands located in Franklin County, Idaho.
6. Pursuant to the Idaho Supreme Court's *Administrative Order* issued on December 9, 2009, (a copy of which is attached hereto), "all petitions for judicial review of any decision regarding administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District."
7. In response to the Idaho Supreme Court's *Administrative Order*, the Snake River Basin Adjudication ("SRBA") Court has issued an *Administrative Order Adopting Procedures for the Implementation of the Idaho Supreme Court Administrative Order Dated December 9, 2009*, which was issued on July 1, 2010 (a copy of which is attached hereto). These procedures instruct the clerk of the district court in which the petition for judicial review is filed to issue a *Notice of Reassignment*, a copy of which is also attached hereto.

8. The *Final Order* and subsequent *Order Denying Petition for Reconsideration* is a final agency action subject to judicial review pursuant to Idaho Code § 67-5270(3).

PARTIES

9. Petitioner is a non-profit Idaho corporation organized under the laws of the State of Idaho.
10. Respondent IDWR is a state agency with its main office located at 322 E. Front St., Boise, Idaho.
11. Respondent Gary Spackman is the Interim Director of the Idaho Department of Water Resources.
12. The following protestants participated in the hearing on this matter, and were represented by Scott L. Campbell and Andrew Waldera of MOFFAT, THOMAS, BARRETT, ROCK & FIELDS, CHTD.:
- i. Bert and Laura Wheatley;
 - ii. Seth and Beth Wheatley;
 - iii. Wheatley Properties, LLC;
 - iv. Grant Chadwick as Trustee of the Chadwick Trust;
 - v. Eldon and Mary Ann Golightly, individually;
 - vi. Eldon and Mary Ann Golightly, Trustees of the E & M Trust.

STATEMENT OF INITIAL ISSUES

13. The Petitioners assert the following issues for judicial review:
- a. Whether the Director acted arbitrarily and capriciously, or otherwise in contravention of Idaho law, and in particular Idaho Code § 42-222, when he limited the number of acres authorized for irrigation under Water Right Nos. 13-2 and 13-3 to a place of use of 12,431 acres when these water rights were not previously decreed with a place of use limitation in the prior McEwan Decree, and Preston-Whitney sought to define the place of use of these water rights for the first time with a place of use of 15,919.3 acres, which acres are irrigated in combination with other Preston-Whitney storage water rights and water rights with a source of Worm Creek.
 - b. Whether the Director acted arbitrarily and capriciously, or otherwise in contravention of Idaho law, when he failed to apply Idaho Code § 42-1427 to Water Right Nos. 13-

2 and 13-3 in this proceeding in order to define the previously undefined place of use element of these water rights when a water right transfer proceeding is the functional equivalent of a water right adjudication for those water right elements that have not been previously defined or decreed in a prior court decree.

- c. Whether the Director's failure to apply Idaho Code § 42-1427 to this proceeding violates the due process clauses of the Idaho and United States Constitutions because it deprives the Petitioners, who are located in the Bear River Basin, of significant and favorable presumptions for water right holders which are contained in Idaho Code § 42-1427 regarding how water rights with previously undefined elements can be defined in an adjudication proceeding, and thereby allow water right holders in one part of Idaho to enjoy such presumptions in the definition and adjudication of their water rights, while depriving Petitioners of the same favorable presumptions in a transfer proceeding, which is the functional equivalent of an adjudication for water rights with previously undefined water right elements, all because of a mere function of timing of the water right filing.
 - d. Whether the Director's failure to apply Idaho Code § 42-1427 to this proceeding results in a taking of Petitioner's real property—its water rights—in violation of the Idaho and United States Constitutions because the Director's failure to apply this statute results in a diminution of Petitioner's real property rights, without payment of just compensation, because of the acreage limitation placed on Water Rights Nos. 13-2 and 13-3, when no such acreage limitations were previously decreed, the acreage limitation was over 3,000 acres less than the acreage requested by Petitioner, all of which demonstrates that the acreage limitation was not based upon a presumption to define previously undefined elements of existing water rights based upon conditions existing on the date of the filing of a transfer application.
14. Pursuant to I.R.C.P. 84(d)(5), the Petitioner reserves the right to assert additional issues and/or clarify or further specify the issues for judicial review stated herein which become later discovered.

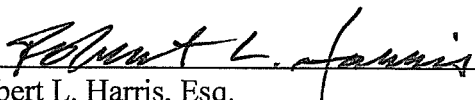
AGENCY RECORD

15. Judicial review is sought of the *Final Order* issued by the Interim Director Gary Spackman of the Idaho Department of Water Resources (the hearing officer) on June 21, 2010, as well as an *Order Denying Petition for Reconsideration* issued on July 20, 2011.
16. IDWR held one hearing on this matter spanning three (3) days—March 23-25, 2011—which hearing was recorded and a transcript created, which transcript should be made a part of the agency record in this matter. The person who may have a copy of such transcript is Victora Wigle or Deborah J. Gibson, both of which are administrative assistants to Director Spackman, and who are located at the Idaho Department of Water Resources, 322 E. Front St., P.O. Box 83720, Boise, Idaho 83720-0098, Telephone: (208) 287-4800; Facsimile: (208) 287-6700.
17. The Petitioners anticipate that they can reach a stipulation regarding the agency record with the Respondents and other parties, and will pay their necessary share of the fee for preparation of the record at such time.
18. Service of this *Notice of Appeal and Petition for Judicial Review* has been made on the Respondents and other parties at the time of the filing of this petition.

ATTORNEY'S FEES

19. Should Petitioner prevail in this matter, in whole or in part, they should be awarded their reasonable attorney's fees and costs pursuant to Idaho Code § 12-117.

DATED this 16th day of August, 2011.


Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, on this 16th day of August, 2011.

DOCUMENT SERVED: NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW

ORIGINAL TO:

Franklin County Courthouse
Clerk of the Court
39 W. Oneida
Preston, ID 83263

(☒) *Overnight Federal Express*

ATTORNEYS AND/OR INDIVIDUALS SERVED:

Idaho Department of Water Resources
Gary Spackman
322 East Front Street
PO Box 83720
Boise, Idaho 83720-0098

(☒) *First Class Mail*
(☐) *Hand Delivery*
(☐) *Facsimile*
(☐) *Email*

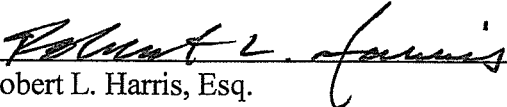
Scott L. Campbell
Andrew J. Waldera
MOFFATT, THOMAS, BARRETT, ROCK
& FIELDS, CHARTERED
101 S. Capitol Ave., 10th Floor
PO Box 829
Boise, Idaho 83701

(☒) *First Class Mail*
(☐) *Hand Delivery*
(☐) *Facsimile*
(☐) *Email*

COURTESY COPY TO:

Snake River Basin Adjudication District Court
Clerk of the Court
PO Box 2707
Twin Falls ID 83303-2707

(☒) *First Class Mail*
(☐) *Hand Delivery*
(☐) *Facsimile*
(☐) *Email*


Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

G:\WPDATA\RLH\7206-04 Preston-Whitney, Transfer\Appeal\Appeal.Notice.wpd:

In the Supreme Court of the State of Idaho

IN THE MATTER OF THE APPOINTMENT OF)
THE SRBA DISTRICT COURT TO HEAR ALL)
PETITIONS FOR JUDICIAL REVIEW FROM THE)
DEPARTMENT OF WATER RESOURCES)
INVOLVING ADMINISTRATION OF WATER)
RIGHTS)

ADMINISTRATIVE ORDER

WHEREAS pursuant to I.C. § 42-1701A any person who is aggrieved by a final decision or order of the Director of the Department of Water Resources is entitled to judicial review, and

WHEREAS there is a need for consistency and uniformity in judicial decisions regarding the administration of water rights, and

WHEREAS the Idaho Supreme Court has a constitutional responsibility to administer and supervise the work of the district courts pursuant to Art. V, § 2 of the Idaho Constitution, and

WHEREAS the Snake River Basin Adjudication District Court of the Fifth Judicial District has particular expertise in the area of water right adjudication,

IT IS HEREBY ORDERED that all petitions for judicial review of any decision regarding the administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District. Review shall be held in accord with Title 67, Chapter 52 of the Idaho Code, except that, once filed, all petitions for judicial review shall be forwarded to the clerk of the Snake River Basin Adjudication District Court of the Fifth Judicial District.

IT IS FURTHER ORDERED that the Snake River Basin Adjudication District Court is authorized to develop the procedural rules necessary to implement this order.

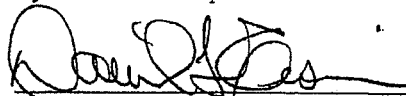
IT IS FURTHER ORDERED that this order shall be effective the 1st day of July, 2010.

DATED this 9 day of December 2009.

ATTEST:

Stephen W. Kenyon
Stephen W. Kenyon, Clerk

By Order of the Supreme Court



Daniel T. Eismann, Chief Justice

I, Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order entered in the above entitled cause and now on record in my office.

WITNESS my hand and the Seal of this Court 12/10/09

STEPHEN W. KENYON Clerk

By: Kimberly G. Graw Deputy

District Court - 589A
 Fifth Judicial District
 In Re: Administrative Appeals
 County of Twin Falls - State of Idaho
 JUL - 1 2010
 Clerk
 By: _____
 Deputy Clerk

ADMINISTRATIVE ORDER
ADOPTING PROCEDURES FOR
THE IMPLEMENTATION OF
THE IDAHO SUPREME COURT
ADMINISTRATIVE ORDER
DATED DECEMBER 9, 2009

THEREFORE THE FOLLOWING ARE HEREBY ORDERED:

- (a) the hearing was held; or
- (b) the final agency action was taken; or
- (c) the aggrieved party resides or operates its principal place of business in Idaho; or
- (d) the real property or personal property that was the subject of the agency decision

The filing party shall also serve a courtesy copy of the petition for judicial review or action for declaratory judgment with the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho 83303-2707. Upon receipt by the Department of Water Resources of a petition for judicial review or action for declaratory

judgment, the Department shall review the certificate of mailing and in the event it does not show that a courtesy copy of the same was filed with the Snake River Basin Adjudication District Court, then the Department shall forthwith forward a copy of the petition or action for declaratory judgment to the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho 83303-2707.

2. Reassignment. Upon the filing of a petition for judicial review pursuant to Idaho Code § 42-1701A, or an action for declaratory judgment, of any decision from the Department of Water Resources, the clerk of the district court where the action is filed shall forthwith issue, file, and concurrently serve upon the Department of Water Resources and all other parties to the proceeding before the Department of Water Resources, an *Notice of Reassignment* (copy attached hereto), assigning the matter to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District for disposition and further proceedings.

Also upon issuance of the *Notice of Reassignment*, the clerk of the district court where the action is filed shall forward a copy of the file to the clerk of the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho 83303-2707.

3. Case Number. All cases assigned to the Snake River Basin Adjudication District Court of the Fifth Judicial District as described herein shall retain the case number and caption assigned to them by the district court where the petition for judicial review or action for declaratory judgment is originally filed.

4. Subsequent Filings. Following the issuance of the *Notice of Reassignment*, all further documents filed or otherwise submitted, and all further filing fees filed or otherwise submitted, shall be filed with the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho 83303-2707, provided that checks representing further filing fees shall be made payable to the county where the original petition for judicial review or action for declaratory judgment was filed.

5. Lodging of Transcript and Record. Following the preparation and settlement of the agency transcript and record, the Department of Water Resources shall transmit the settled transcript and record, in both paper and electronic form on CD ROM, to the clerk of the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin

Falls, Idaho 83303-2707 within forty-two (42) days of the service of the petition for judicial review or action for declaratory judgment.

6. Participation in Hearings by Telephone and Video Teleconferencing (VTC).

Unless otherwise ordered by the Snake River Basin Adjudication District Court of the Fifth Judicial District, telephone participation and/or VTC will be allowed in all hearings, except as follows:

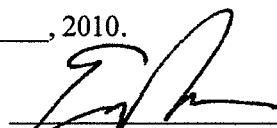
- (a) The court may require in person or VTC attendance as circumstances may require.
- (b) The court's notice setting hearing will specify participation restrictions, telephone conferencing numbers and participant codes and/or location of regional VTC facilities.
- (c) Speakerphones and cell phones often pick up background noise and/or cause interference with sensitive courtroom equipment. Therefore, the use of speakerphones and cell phones are discouraged.
- (d) Place your call to the court a few minutes prior to the scheduled start of your hearing so that the clerk of the court may identify who is participating by telephone.

7. Resolution. This court will notify the clerk of the district court where the petition for judicial review or action for declaratory judgment was originally filed of the completion of the case upon the happening of either:

- (a) the expiration of the time to appeal any decision of this court if no appeal to the Idaho Supreme Court is filed; or
- (b) the filing of the remittitur from the Idaho Supreme Court or Idaho Court of Appeals with this court in the event that an appeal to the Idaho Supreme Court is timely filed following a decision of this court.

8. Other Procedural Rules. Any procedure for judicial review not specified or covered by this Order shall be in accordance with Idaho Rule of Civil Procedure 84 to the extent the same is not contrary to this Order.

DATED this 1 day of July, 2010.



ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF _____.

RE: PETITIONS FOR JUDICIAL
REVIEW OR ACTIONS FOR
DECLARATORY RELIEF OF
DECISIONS FROM THE IDAHO
DEPARTMENT OF WATER
RESOURCES

)
)
)
)
)
)
)

CASE NO. _____

NOTICE OF REASSIGNMENT

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, declares that all petitions for judicial review made pursuant to I.C. § 42-1701A of any decision from the Department of Water Resources be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District, and

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, vests in the Snake River Basin Adjudication District Court the authority to adopt procedural rules necessary to implement said Order, and

WHEREAS on July 1, 2010, the Snake River Basin Adjudication District Court issued an Administrative Order regarding the Rule of Procedure Governing Petitions for Judicial Review or Actions for Declaratory Relief of Decisions from the Idaho Department of Water Resources.

THEREFORE THE FOLLOWING ARE HEREBY ORDERED:

1. The above-matter is hereby assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District for disposition and further proceedings.
2. All further documents filed or otherwise submitted in this matter, and all further filing fees filed or otherwise submitted in this matter, shall be filed with the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho

83303-2707, provided that checks representing further filing fees shall be made payable to the county where the original petition for judicial review or action for declaratory judgment was filed.

DATED this ____ day of _____, 2010.

CLERK OF THE DISTRICT COURT

By: _____
Deputy Clerk