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DEPARTMENT OF
WATER RESOURCES

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Seth and Beth Wheatley, and Wheatley Properties, LLC

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF TRANSFER NO.
75705 IN THE NAME OF PRESTON-
WHITNEY IRRIGATION CO.

RESPONSE IN OPPOSITION TO PRESTON-
WHITNEY IRRIGATION COMPANY'S
PETITION FOR RECONSIDERATION

Protestants Eldon and Mary Ann Golightly, individually and as Trustees of
E & M Trust; Grant Chadwick, Trustee of the Chadwick Trust; Bert and Laura Wheatley, Seth
and Beth Wheatley, and Wheatley Properties, LLC (collectively the "Protestants"), by and
through undersigned counsel of record and pursuant to Rules of Procedure of the Idaho
Department of Water Resources ("Procedure Rules") 270 (IDAPA 37.01.01.270), hereby submit
this Response in Opposition to Preston-Whitney Irrigation Company's Petition for
Reconsideration, dated July 5, 2011.

I. INTRODUCTION

On June 21, 2011, Director Spackman issued his Final Order (“Order”) in the matter of Transfer No. 75705, filed by the Preston-Whitney Irrigation Company (“PWIC”). The Order was the result of a three-day contested case hearing held in Preston, Idaho in March 2011.

On July 5, 2011, PWIC filed a Petition for Reconsideration (“Petition”) challenging the Order’s definition of the place of use of PWIC water rights 13-2 and 13-3. PWIC contends that the correct place of use for water rights 13-2 and 13-3 encompasses 15,919.3 acres, rather than the 12,431 acres found by Director Spackman and authorized by the Order. Protestants oppose PWIC’s Petition on the grounds, and based upon the legal authorities, discussed below.

II. ARGUMENT

PWIC contends that the Director erred in defining the place of use of water rights 13-2 and 13-3 in two respects:

- In the absence of a previously decreed element of a water right (in this case place of use), “a water right holder is entitled to [] define that element for the first time with a transfer application”; and
- Transfer applications are the “functional equivalents” of a water right adjudication, therefore the Director failed to apply Idaho Code Section 42-1427 which requires that the definition of the water right place of use be “based upon [the] conditions existing at the time the transfer application is filed” (*i.e.*, the conditions/place of use existing in 2010).

See Petition, pp. 2 and 4-5, respectively. Protestants disagree. Water right holders are not entitled to unilaterally define the elements of their water rights, and the adjudication statutes contained within Chapter 14, Title 42, Idaho Code do not apply to transfer proceedings.

Moreover, the Director’s findings were supported by substantial and competent evidence, and

were not arbitrary, capricious, or an abuse of discretion. *See, e.g.*, IDAHO CODE §§ 67-5240, 67-5279, and *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219 (2001).

A. The Director's Findings Regarding The Place Of Use Of Water Rights 13-2 And 13-3 Were Well-Reasoned And Supported By The Record

Idaho Code Section 42-222(1) “requires” the Director to “examine all the evidence and available information” when reviewing an application for transfer. *Id.* This “evidence and available information” is to be reviewed in an effort to determine whether the proposed transfer will potentially injure other water rights; constitute an enlargement in the original right; conflict with the conservation of water resources; conflict with the local public interest; or adversely affect the local economy. *Id.*; *see also, Barron, supra*, at 417-18, 421 (citations omitted).

PWIC contends that its proposed transfer could not possibly result in an enlargement of the “original water right[s]” (water rights 13-2 and 13-3) because the underlying decree of those rights (the McEwan Decree) did not define a place of use against which the Director could compare. Petition, pp. 1-3. Consequently, PWIC asserts that its proposed transfer could not exceed the amount of beneficial use authorized under the water rights prior to the transfer because the number of previously authorized irrigated acres had never been determined. Petition, p. 2.

According to PWIC, its transfer application was, in part, defining the place of use elements of water rights 13-2 and 13-3 “for the first time.” Petition, p. 2. Absent any prior decree defining the place of use of a water right, it is then the prerogative of the water right holder (PWIC) under Idaho Code Section 42-222 to define the underlying place of use of its water rights during the transfer process. *Id.*

Not surprisingly, PWIC fails to cite any legal authority in support of this proposition. To the contrary, the laws of gravity and the contour of the land defined the place of use for the above-referenced water rights.

When faced with the need to evaluate whether PWIC's proposed transfer would constitute an enlargement in light of the fact that the McEwan Decree did not define the place of use of either water rights 13-2 or 13-3, the Director relied upon the expert analysis of Protestant's expert Scott King, and the historic Department records available. As expressly (and correctly) acknowledged within the Order's Findings of Fact ("FOF"):

- Water rights 13-2 and 13-3 are 1882 priority water rights (FOF 3);
- Water right 13-2 (30 cfs of "primary right") was decreed to the Cub River Middle Ditch Company for diversion from the Cub River through the Middle Ditch (FOF 4-5);
- Water right 13-3 (25 cfs of "primary right") was decreed to the Cub River and Worm Creek Canal Company for diversion from the Cub River through the Glendale Canal (FOF 6-7);
- The Cub River Middle Ditch Company and the Cub River and Worm Creek Canal Company merged and formed the PWIC in 1926 (FOF 8);
- Glendale Dam and Reservoir were completed in 1929 (FOF 11);
- Lamont Reservoir was constructed and completed in or about 1947 (FOF 14);
- Foster Reservoir was constructed and completed in or about 1957 (FOF 16);
- In the 1960s and 1970s, PWIC began converting its gravity-based flood irrigation systems to gravity-based pressurized sprinkler systems (FOF 17);
- Use of the Middle Ditch diminished over time because the ditch offered less elevation (and corresponding gravity pressure/elevation head) to drive the sprinkler conversion (FOF 17);

- Conversely, use of the Glendale Canal increased due to its higher elevation (FOF 17);
- Beginning in the 2000s, PWIC began piping water instead of delivering water through open ditches (FOF 24);
- The installation of the pipelines served a dual purpose: (1) recapture of seepage losses; and (2) conservation/concentration of head pressure to drive the gravity-pressure sprinkler systems (FOF 25); and
- Historically, however (*i.e.*, before the advent of reservoir storage, sprinkler irrigation application, and pipeline distribution), the method of delivering and using water within the PWIC service area was gravity-based flood irrigation through the use of gravity canals and ditches (FOF 13).

Given the 1882 priority of both rights, flood irrigation was the available irrigation method of the era. Consequently, the contours of the ground, the elevations of the canals and ditches, and other geographic features (such as creeks, washes, rivers, and other canals) determined water distribution capabilities (*i.e.*, the number of irrigable acres) of such a system. At the time water rights 13-2 and 13-3 were developed, neither the Cub River Middle Ditch Company, nor the Cub River and Worm Creek Canal Company had constructed a single reservoir; sprinkler irrigation was unheard of at the time; and there is no evidence suggesting that either company used pipelines for water distribution.

The historical development of water right 13-2 was restricted by the lower elevation of the Middle Ditch heading, the higher elevations of surrounding lands, the Cub River, Spring Creek, and the Cub River Irrigation Company's Upper Canal (a separate and distinct entity from the Cub River Middle Ditch Company). Because the Cub River Middle Ditch Company was its own separate irrigation entity, it possessed its own discrete service area that did not overlap with either the Cub River and Worm Creek Canal Company to the north and east, or with the Cub River Irrigation Company to the south. Consequently, the laws of gravity, the contour of the land, and other applicable geographic features necessarily restricted the number of

acres that diversions from the Middle Ditch could ultimately reach and irrigate. The Director's review of these parameters, in conjunction with the expert analysis/opinion of Scott King, logically led to the conclusion that water right 13-2 could only irrigate 3,100 acres under the applicable historic development conditions. FOF 40-43.

Similar forces impacted the development of water right 13-3 by the Cub River and Worm Creek Canal Company. However, the Cub River and Worm Creek Canal Company was capable of irrigating many more acres than the Cub River Middle Ditch Company due the significantly higher line (elevation) of the Glendale Canal. Thus, the record evidence logically led the Director to conclude that water right 13-3 could irrigate 9,331 acres. FOF 44-48.

Combined, the record evidence (including the expert analysis of Scott King, coupled with the historic record and the testimony of PWIC witnesses) led to the conclusion that water rights 13-2 and 13-3 could irrigate 12,431 acres under then-existing (late 1800s) conditions. FOF 59. Therefore, the mechanics of flood-based irrigation properly formed the place of use "baseline" upon which the Director logically based his enlargement analysis. In making his place of use determination, the Director properly examined "all the evidence and available information" in accordance with Idaho Code Section 42-222(1)—evidence and available information that PWIC does not refute or otherwise challenge. This is an important point because PWIC's Petition does not challenge or refute the evidentiary record or the expert qualifications of Scott King; rather, PWIC only takes issue with the fact that the Director relied upon the evidentiary record in this matter.

PWIC laments that the Director failed to "explain the rationale behind an imposed acreage limitation, when no such acreage limitation existed on the water rights prior to the submission of the transfer application." Petition, p. 3. This complaint is unfounded. As the

above discussion demonstrates, the Director undertook a detailed discussion of the historic development of water rights 13-2 and 13-3 (including their respective places of use). *See* Order, pp. 10-13 (FOF Nos. 40-59).

By arguing that the Director should have found an overall place of use of 15,919.3 acres for water rights 13-2 and 13-3, PWIC is asking the Director to ignore the available evidence and information in derogation of Idaho Code Section 42-222(1).¹ What PWIC really asks the Director to do is to retroactively approve the evolution of its irrigation distribution system by applying and endorsing a modern and artificial construct that did not and could not exist in the late 1800s. To adopt PWIC's revisionist history would be arbitrary, capricious, and in violation of Idaho Code Section 42-222(1).

B. The Adjudication Statutes (42-1401 *et seq.*) Do Not Govern, Or Otherwise Apply To Transfer Proceedings

PWIC contends that transfers are the "functional equivalents" of adjudications and that as such, the Director failed to apply Idaho Code Section 42-1427 in consideration of Transfer No. 75705. Petition, pp. 3-5. Transfers are not the functional equivalents of adjudications; Idaho Code Title 42, Chapters 2 and 14 are not interchangeable; and

¹ This includes local duty of water evidence established by the Chadwick and Jensen affidavits ("depositions") submitted in connection with the development of water right 13-2104. *See, e.g.*, Order at FOF 47, and the Memorandum (expert report) of Scott King, dated March 11, 2011, p. 9 (identifying the historic local duty of water as "one miner's inch to the acre"). Given the sworn statements of Chadwick and Jensen establishing a local irrigation duty of water 0.02 cfs per acre, PWIC's 15,919.3 acre-place of use would require approximately 318.4 cfs of water to cover. At most, water rights 13-2 (69.9 cfs, including primary and excess/high water) and 13-3 (85 cfs, including primary and excess/high water) yield 154.9 cfs, or enough water to irrigate 7,745 acres at a duty of 0.02 cfs (or one miner's inch) per acre. The burden of satisfying the injury and enlargement criteria is borne by PWIC, not the Protestants or IDWR. Examination of the historical record and of historic consumptive use are well-settled methods of investigating potential injury and enlargement. *See, e.g., Barron, supra*, at 417-21.

Administrator's Memorandum (Transfer Processing No. 24) ("Transfer Memo") does not support PWIC's position.

It is well-settled that statutory interpretation begins with the literal words of the statute, and those words must be given their plain, usual and ordinary meaning. *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003) (citation omitted). If statutes are not ambiguous, courts do not construe them but simply follow the law as written. *Id.* (citation omitted). Further, it is a basic tenet of statutory construction that a more general statute should not be interpreted to encompass an area already covered by a special statute. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 743, 947 P.2d 409, 416 (1997) (citations omitted). Stated differently, the more specific statute controls over the more general one. *Id.*

The plain and unambiguous language of Idaho Code Section 42-222 demonstrates the statute's specific governance of transfers—instances where a water right holder desires to “change the point of diversion, place of use, period of use or nature of use of all or part of [a water right].” *Id.*; *see also, Barron, supra*, at 417 (“Water transfers in Idaho are governed by Idaho Code section 42-222.”). Conversely, the plain and unambiguous language of Idaho Code Title 42, Chapter 14, demonstrates the chapter's specific governance of the “Adjudication of Water Rights.” Idaho Code Sections 42-1401A(5) and (8) provide that “adjudications” are judicial proceedings for the purposes of determining the extent and priority of water rights from water systems within the state of Idaho. *Id.* Whereas the statutory right to “transfer” a water right under present day Idaho Code Section 42-221(1) was enacted in 1903, Idaho Code Section 42-1427 (codifying certain legislative findings concerning “adjudications”) was not enacted until 1994—some 90-plus years later. *Compare* Idaho S.L. 1903, p. 223, § 11, and Idaho S.L. 1994, chs. 454 and 455, §§ 33 and 6, respectively.

PWIC's Application for Transfer No. 75705 did not result in the commencement of a *judicial proceeding* for the purpose of determining the extent and priority of water rights 13-2 and 13-3 as against other water users within any particular water system (*i.e.*, the Worm Creek Basin, the Cub River Basin, or the Bear River Basin). Instead, Application for Transfer No. 75705 commenced an *administrative proceeding*, via application (on form furnished by IDWR as described in Idaho Code Section 42-222(1)) by PWIC, to change (*i.e.*, "transfer") points of diversion, injection, re-diversion, and the places of use of water rights 13-2, 13-3, and 13-2104. According to PWIC President Lyle Porter, the purposes of the transfer application included the desired modernization of the PWIC service area; to streamline the "patchwork of places of use specific to each [of the company's] water right[s]." Protestants' Ex. No. 112 (Deposition Transcript of Lyle Porter, dated November 22, 2010) at 31:2-9; 175:23-177:13.²

In sum, PWIC's Application for Transfer No. 75705 had nothing to do with the determination or proof of water rights of various owners as against one another in a shared water system (as is the case in an adjudication). Instead, PWIC's transfer application only sought the modification and modernization of a closed universe of water rights (a collection of some of

² To be clear, water rights 13-2 and 13-3 did have distinct, historic places of use. According to Mr. Porter, the Cub River Middle Ditch Company (13-2) served the Whitney area (which is now served by the PWIC's Johnson/Lamont pipeline), and the Cub River and Worm Creek Canal Company (13-3) served lands around Worm Creek and west of Worm Creek down to Fairview. Protestants' Ex. No. 112 at 24:3-21. Consequently, PWIC cannot argue that water rights 13-2 and 13-3 did not have defined, historic places of use. PWIC's problem was that the different water right places of use did not comport with PWIC's modern, combined, post-merger water distribution system (including irrigated acres "that were never listed in the original—in the original water rights."). *Id.* at 176:5-11. Regardless, Transfer No. 75705 did not afford PWIC *carte blanche* to define the place of use of the water rights in 2010 to automatically encompass, as Mr. Porter puts it, acres that were never listed in the original water rights.

PWIC's water rights alone) to reflect PWIC's current operations. Therefore, adjudication statutes such as Idaho Code Section 42-1427 do not apply.

PWIC's citation to IDWR's Transfer Memo does nothing to alter this analysis. PWIC's contention that the Transfer Memo's requirement that IDWR evaluate the "validity" of the transfer water rights equates to an adjudication-style examination of the "validity" of the "claimed elements of a water right" finds no such support within the memorandum. Petition, p. 5.

Section 5(b) of the Transfer Memo (pp. 22-23), entitled *Evaluation of Water Right Validity*, demonstrates that the "validity" analysis called for by the memorandum has nothing to do with testing the validity of the "claimed elements of a water right." Instead, the water right "validity" to be tested in the context of a transfer proceeding is whether the transfer water right, or any part thereof, "has [] been lost by forfeiture or partial forfeiture." Transfer Memo, p. 22. Consequently, the "validity" evaluation provided in the Transfer Memo is concerned with determining continuous use of the subject (transfer) water rights, not a reexamination or proof of the water rights' elements (*i.e.*, quantity, purpose of use, period of use, and place of use, etc.).³ Further support for the proposition that administrative transfer proceedings and judicial

³ Protestants acknowledge that Transfer Memo Section 5(b)(4) does require additional verification/investigation of water right elements for transfers involving statutory or beneficial use-based claims. However, both water rights 13-2 and 13-3 were previously decreed water rights contained within the McEwan Decree. Therefore, water rights 13-2 and 13-3 are not statutory or beneficial use-based claims to which Transfer Memo Section 5(b)(4) would apply. Regardless, the additional investigation provided by Section 5(b)(4) still culminates in "the department's findings regarding the validity of the right," not the Department's blind acceptance of the applicant's definition of the water right elements. Thus, it is up to the Department to investigate water right validity, a process that includes review the available historical record in much the same manner as the Director and Scott King did in this proceeding. *See* IDAHO CODE § 42-222(1); *see also, Barron, supra*, at 421 ("the director makes the determination of whether the proposed transfer should be endorsed," and that determination is based, in part, upon "the Department's investigation and records").

adjudication proceedings are not interchangeable analogs is the fact that the Transfer Memo fails to reference, let alone discuss or incorporate, the legislative findings codified by Idaho Code Section 42-1427.

PWIC's assertion that the "public interest" demands IDWR allow the company to define the place of use of water rights 13-2 and 13-3 as those acres existed in 2010 (at the time of the transfer) yields an absurd result: (1) the use of water on acres not historically susceptible to irrigation under the subject water rights, (2) in a manner not contemplated or available in the 1880s—via the advent of storage in the 1920s-50s; conversion to sprinkler irrigation in the 1960s and 70s; and further supplemented by pipeline recapture and head pressure conservation in the 2000s. Instead, the public interest demands that PWIC have fulfilled its statutory obligations and availed itself of the administrative transfer process as necessary from 1903 to date in order to properly document and record its evolving water distribution system. The public interest further demands that the evolution of PWIC's place of use over time evolve in a manner that does not cause injury to other water users and/or constitute an enlargement. *See, e.g.,* IDAHO CODE § 42-222(1) and *Barron, supra*.

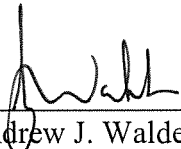
By plain language and express specificity, Idaho Code 42-222(1) governs transfer proceedings and Idaho Code Section 42-1401 *et seq.* governs water right adjudications. The two processes are not the same, and they serve entirely different purposes. PWIC's arguments that it gets to define the place of use of water rights 13-2 and 13-3 during this transfer proceeding finds no support in the law or in logic. If applicants were allowed to define the elements of their water rights at the time of transfer, it would be impossible to undertake any meaningful injury or enlargement analysis. Though creative, PWIC's application of Idaho Code Section 42-1427 in the context of this transfer proceeding is misplaced.

III. CONCLUSION

Protestants respectfully request that the Director deny PWIC's Petition for Reconsideration in its entirety. Protestants find no support in the law for the proposition that transfer applicants are permitted to unilaterally define previously undefined elements of transfer water rights at the time of transfer. Instead, the Department (the Director in this instance) is instructed to "examine all the evidence and available information" when reviewing an application for transfer. IDAHO CODE § 42-222(1). The Director did properly perform such an analysis in this proceeding.

DATED this 19th day of July, 2011.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 

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CERTIFICATE OF SERVICE

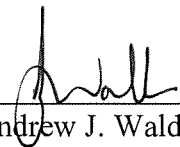
I HEREBY CERTIFY that on this 19th day of July, 2011, I caused a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO PRESTON-WHITNEY IRRIGATION COMPANY'S PETITION FOR RECONSIDERATION** to be served by the method indicated below, and addressed to the following:

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