

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.**

**) ORDER DENYING
) PETITION FOR
) RECONSIDERATION
)**

On June 15, 2009, Preston-Whitney Irrigation Co. (“Preston-Whitney”) filed Application for Transfer No. 75705 (“application”) with the Idaho Department of Water Resources (“Department” or “IDWR”). On August 17, 2010, Preston-Whitney filed an amended application. Protests to the application were filed by USDI Bureau of Reclamation; Bert and Laura Wheatley, Seth and Beth Wheatley and Wheatley Properties, LLC (“Wheatley”); Grant Chadwick as Trustee of Chadwick Trust (“Chadwick”); and Eldon and Mary Ann Golightly, individually and as Trustees of the E & M Trust (“Golightly”). USDI Bureau of Reclamation subsequently withdrew its protest.

On March 23, 24 and 25, 2011, the Director conducted a hearing for the protests at the Franklin County Courthouse, in Preston, Idaho.

On June 21, 2011, the Director issued a *Final Order* (“final order”) in the above titled matter.

On July 5, 2011, Preston Whitney filed its *Petition for Reconsideration* (“petition”).

ANALYSIS OF PETITION

The Director did not err by limiting water right nos. 13-2 and 13-3 to a place of use of 12,431 acres.

In the final order, the Director found that neither water right no. 13-2 nor water right no. 13-3 had a defined, recorded place of use. *Final Order* at 10. The Director found that water diverted by Preston-Whitney under water right no. 13-2 was historically delivered to 3,100 acres. *Final Order* at 10. The Director also found water diverted by Preston-Whitney under water right no. 13-3 was limited to 9,331 acres. *Final Order* at 13. Preston-Whitney argues that because water right nos. 13-2 and 13-3 were decreed in the *McEwan* Decree without a specific place of use, the Director erred by determining the historical place of use and then limiting the water right to the size of the historical place of use. *Petition* at 2.

In its petition, Preston-Whitney correctly states that the change proposed in the application cannot constitute an enlargement in use of the original right. *Petition* at 2. Preston-Whitney argues that there cannot be an enlargement without a baseline to measure the change against. Preston-Whitney reasons that, because the place of use element was numerically defined for the first time in its transfer application, there can't be an enlargement of the place of use element. *Petition* at 2.

Preston-Whitney is essentially arguing that it should be allowed to enlarge its historical place of use through the transfer application proceeding simply because the *McEwan* Decree did not describe the place of use. This argument is without legal support. A transfer proceeding cannot expand the place of use of a water right beyond its historical place of use. Idaho Code § 42-222; see *Basinger v. Taylor*, 30 Idaho 289, 299, 164 P. 522, 525 (1917) (“Under the law of

1903 [establishing the constitutional method of appropriation], no appropriation is complete until the water has been applied to a beneficial use, and it follows that no appropriation can exceed the amount of water so applied.”); *see also First Security Bank of Blackfoot v. State*, 49 Idaho 740, 744, 291 P. 1064, 1065 (1930) (“[The statutory transfer process] neither add[s] nor detract[s] from a property right which already exist[s].”). An appropriation made under the constitutional method – by diverting water and applying it to beneficial use – is complete upon the application of the water to the beneficial use for which the water is appropriated. *Basinger*, 30 Idaho at 299, 164 P. at 525. The extent of Preston-Whitney’s property rights were established when the water rights were perfected back in 1882 (for water right nos. 13-2 and 13-3) or 1924 (for water right no. 13-2104).

As Preston-Whitney points out, under Idaho Code § 42-222, the Director is to examine the evidence presented, and ensure that the “change does not constitute an enlargement in use of the *original right*,” Idaho Code § 42-222(1) (emphasis added). The term “original right” as used here does not, as suggested by Preston-Whitney, refer to the water right as it was used at the time of the filing of its application for transfer, but instead refers to the water right as it was established under law. In this case, the “original right” is the right as established by the constitutional appropriation method.

The *McEwan* Decree confirms many of the elements of the water rights, but if it is silent on an element, the extent of that element must be determined in the transfer application proceeding so that there is no enlargement from when the right was established. The changes in point of diversion sought by Preston-Whitney in its application would provide for irrigation of lands that were not irrigated under either of the water rights at the time they were established – resulting in possible enlargement of the rights unless limited to the original number of acres.

To adopt Preston-Whitney's interpretation would mean that any historic decree that did not decree all the elements (and there are many decrees like this in Idaho) would allow a water user to freely expand those silent elements in a transfer proceeding. This is not consistent with the prior appropriation doctrine and not consistent with Idaho Code § 42-222. It is the Director's role in a transfer proceeding to try to determine the original extent of beneficial use to ensure that no enlargement occurs.

Idaho Code § 42-1427 is not applicable to this transfer proceeding.

Preston-Whitney asserts that the Department is statutorily instructed, under Idaho Code § 42-1427, to define previously undefined elements of a water right as the element exists at the time a transfer application is filed. *Petition* at 4. Idaho Code § 42-1427 and other sections in Chapter 14 of Title 42, Idaho Code provide procedures to decree previously undefined elements of existing water rights based upon conditions existing on the date of commencement of an adjudication of water rights. Preston-Whitney argues that a transfer application is the functional equivalent of an adjudication of a water right for those elements of a water right that have not been previously defined. *Petition* at 5.

Statutes under Chapter 14 of Title 42, Idaho Code are applicable when a district court has issued an order to commence an adjudication of water rights, resulting in a determination of water rights. The water rights at issue in Preston-Whitney's application are not currently subject to an order commencing an adjudication of water rights. Chapter 14 of Title 42, Idaho Code is not applicable in this circumstance. Preston-Whitney's application is controlled by Idaho Code § 42-222 which prohibits enlargement in use of the original right.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that Preston-Whitney's *Petition for Reconsideration* is **Denied**.

Dated this 20th day of July, 2011.

A handwritten signature in cursive script, reading "Gary Spackman", written over a horizontal line.

Gary Spackman
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of July, 2011, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed to the following:

Documents Served: ORDER DENYING PETITION FOR RECONSIDERATION and Explanatory Information to Accompany an Order Denying Petition for Reconsideration

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A handwritten signature in black ink, reading "Deborah J. Gibson", written over a horizontal line.

Deborah J. Gibson
Administrative Assistant II

EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER DENYING PETITION FOR RECONSIDERATION

(To be used in connection with actions when a hearing was held)

The accompanying order is an **Order Denying Petition for Reconsideration** of the "final order" or "amended final order" issued previously in this proceeding by the Idaho Department of Water Resources ("department") pursuant to section 67-5246, Idaho Code.

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter 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: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.