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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

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

**PRESTON-WHITNEY IRRIGATION
COMPANY'S PETITION FOR
RECONSIDERATION**

PRESTON-WHITNEY IRRIGATION COMPANY, (hereinafter "Preston-Whitney"), by and through their attorneys of record, Holden, Kidwell, Hahn & Crapo, PLLC, submit this *Petition for Reconsideration* of the *Final Order* issued in this matter on June 21, 2011.

I. ARGUMENT

- A. The Director erred in the *Final Order* by limiting Water Right Nos. 13-2 and 13-3 to a place of use of 12,431 acres because these water rights were not decreed with a place of use limitation in the McEwan Decree.**

As contained in the *Final Order*, the McEwan Decree was the court order that decreed Water Right Nos. 13-2 and 13-3. *Final Order* at 2-3, ¶¶ 1, 3). Water Right No. 13-2 was decreed to the Cub River Middle Ditch Company with a priority date of April 1, 1882 for a total of 30 cfs of "primary" water right, plus an additional diversion of 30% of the flow exceeding what is necessary to satisfy the primary water rights, up to a total of 69.9 cfs. *Final Order* at 4, ¶ 5. Water Right No. 13-3 was decreed to the Cub River and Worm Creek Canal Company with a priority date of April 1, 1882 for a total of 25 cfs of "primary", plus an additional diversion of 25% of the flow exceeding

what is necessary to satisfy the primary water rights, up to a total of 85 cfs. *Final Order* at 4, ¶ 6-7 (Eventually, the Cub River Middle Ditch Company and the Cub River and Worm Creek Canal Company merged. *Final Order* at 4, ¶ 8). Notably, however, neither Water Right No. 13-2 nor 13-3 had a defined place of use. This is not mentioned in the *Final Order*, but is a critical fact for purposes of this *Petition for Reconsideration*.

Idaho Code § 42-222 provides that water right holders who are “entitled to the use of water represented by . . . decree of the court, who shall desire to change the point of diversion, **place of use**, period of use, or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change.” Idaho Code § 42-222(1) (emphasis added). This statute therefore allows the holder of a water right with an undefined place of use to define that place of use with the filing and processing of a transfer application.

In its review of a transfer application, 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 enlargement analysis must first be based upon a baseline of the water right’s elements, which cannot then be enlarged. For example, the diversion rate cannot be increased in a transfer proceeding. However, without a defined baseline element, a water right holder is entitled to then define that element for the first time with a transfer application. In other words, there cannot be enlargement without a baseline to measure the change against. That baseline must first be defined, a principle recognized in IDWR’s transfer processing memoranda: “Enlargement will occur if the total diversion rate, annual diversion volume, or extent of beneficial use (except nonconsumptive water rights), exceeds the amounts or beneficial use **authorized under the water right(s) prior to the proposed transfer**. Administrator’s Memorandum, Transfer Processing No. 24, December 21, 2009, at 28 (emphasis added).

Preston-Whitney’s transfer application sought to, among other things, define the place of use elements of Water Right Nos. 13-2 and 13-3 for the first time. As to the water rights’ place of use, Preston-Whitney did not divert those rights in violation of that element because the element had never been previously defined, and therefore, there can be no exceedance of the “amounts or beneficial use authorized under the water rights(s) prior to the proposed transfer.” *Id.* This does not mean that the water right was unrestrained, however. It was still limited by its diversion rate, priority date, and period of use, and those elements could not be exceeded.

Nevertheless, the *Final Order* purports to limit these rights to the irrigation of 12,431 acres. How could Preston-Whitney have enlarged the place of use element of Water Right Nos. 13-2 and 13-3 when the place of use was not previously defined? The answer is that Preston-Whitney could not have enlarged upon the places of use of its prior water rights because the rights did not have a defined place of use. It was therefore incorrect for the Director to have found a historical development of 12,431 acres, and thereafter limited the place of use of Water Right Nos. 13-2 and 13-3 to this acreage. Of course, if these water rights were instead defined with the 15,919.3 acres presented at the hearing, any future transfer of these water rights would not allow this acreage to be increased. There would be a baseline of 15,919.3 acres that has now been defined and therefore, a basis upon which to base the enlargement review.

As a practical matter, particularly with the overlapping service area of the Preston Riverdale and Mink Creek Canal Company (with a water right that provides for the irrigation of approximately 3,600 acres under Water Right No. 13-7747), as well as the overlapping area of the Cub River Irrigation Company, it appears that Preston-Whitney can still likely cover its entire service area of approximately 16,000 acres with sufficient water rights. However, additional analysis needs to be done by Preston-Whitney, and it remains to be seen what impact the 12,431 acre limitation could have on Preston-Whitney's operations. Given the strict dates for reconsideration petitions and appeals, Preston-Whitney is left with no choice but to pursue these avenues and assert the legal positions contained herein.

At a minimum, the Director should 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. Based upon our review of Idaho Code § 42-222, the director should reconsider its *Final Order* and amend it to remove the acreage limitation on Water Right Nos. 13-2 and 13-3 because the place of use of 15,919.3 acres requested by Preston-Whitney for these rights is not an enlargement.

- B. The Director also failed to apply Idaho Code § 42-1427 in this transfer proceeding to Water Right Nos. 13-2 and 13-3 for undefined elements of these water rights, which was the place of use. A transfer application is the functional equivalent of an adjudication of a water right for those water right elements that have not been previously defined.**

As set forth above, Water Right Nos. 13-2 and 13-3 were not decreed with a defined place of use. Preston-Whitney's transfer application sought to, among other things, define the place of use elements of Water Right Nos. 13-2 and 13-3 for the first time. As to the water rights' place of use, Preston-Whitney did not divert those rights in violation of that element because the element had never been previously defined. Nevertheless, the *Final Order* purports to limit these rights to the irrigation of 12,431 acres.

Idaho Code § 42-1427 is contained in Chapter 14 of Title 42 of the Idaho Code, which addresses adjudication of water rights. This statute contains a legislative finding that all water rights were not uniformly defined in prior adjudications, and that it was necessary to define those elements in a standardized fashion. Idaho Code § 42-1427(1)(a). In doing so, the Department was statutorily instructed to define previously undefined elements of a water right—such as Preston-Whitney's 13-2 and 13-3 place of use—as the element exists as of the commencement of the adjudication, or in this case, the filing of the transfer application:

Because of the passage of time it is not possible to establish with any degree of certainty the undefined elements of a decreed or licensed water right as they existed on the date the right was established, because water delivery has occurred based upon the historic water use patterns and custom, and because attempts to define elements of a water right based upon unknown conditions in existence on the date of the establishment of the water right could result in significant impacts upon the claimant, the local economy and tax base, the legislature finds that it is in the public interest to provide a mechanism to decree previously undefined elements of existing water rights based upon conditions existing on the date of commencement of the adjudication provided the claimant is not exceeding any previously determined and recorded element of the decreed or licensed water right.

Idaho Code § 42-1427(1)(b) (emphasis added).

The above-quoted statute is directly applicable to Preston-Whitney's transfer application. Given the time period that has passed between now and when Water Right Nos. 13-2 and 13-3 were decreed, it is not possible to establish with any degree of certainty what the original places of use of these water rights were. Furthermore, water delivery has evolved in the Preston-Whitney system consistent with historic water use in that area. Attempting to define water right elements—in this case, the place of use—based upon the unknown conditions of the water right in the early 1900s could result in significant impacts upon Preston-Whitney. Therefore, it would be in the public interest to

define “previously undefined elements” of Preston-Whitney’s rights “based upon conditions existing at the time” the transfer application is filed.

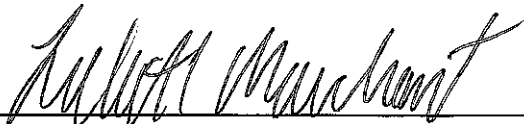
The above statute is contained in the adjudication portion of Title 42, but it should also apply in a transfer proceeding. In order for a water right transfer to be processed, “[t]he department must evaluate the validity of the right (or part thereof) being changed . . .” Administrator’s Memorandum, Transfer Processing No. 24, December 21, 2009, at 1 (emphasis added). A “general adjudication” is defined by statute to be “for the judicial determination of the extent and priority of the rights of all persons to use water from any water system within the state of Idaho that is conclusive as to the nature of all rights to the use of water in the adjudicated water system, . . .” Idaho Code § 42-1401A(5). In other words, an adjudication likewise evaluates the validity of the claimed elements of a water right. 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. Therefore, Preston-Whitney is entitled to the same provisions applicable in an adjudication for undefined elements of a water right in the transfer proceeding at issue in this matter.

To the extent the statute is not applied, this raises due process, takings, and other constitutional issues relative to Preston-Whitney’s water rights, as well as other rights that have not been recently adjudicated in the Bear River Basin of Idaho. As a mere function of timing, water rights in the Snake River Basin and North Idaho Adjudications are entitled to the significant presumptions contained in Idaho Code § 42-1427. For unknown reasons, the Bear River drainage is the last on the state’s list for an adjudication, and yet, Preston-Whitney and others have been asked to file “adjudication-like” transfers to update their service area. Preston-Whitney did just that, and now finds itself in the untenable position of having a request from IDWR to better define their rights, and yet not provide them the same presumptions afforded water right holders just a few miles away in the Snake River Basin. This certainly raises due process questions as it allows for some water users to enjoy presumptions entitled to protect “the public interest” and provide these users with an advantageous position, and yet deprive water users in the same state of the same presumptions. This appears to do more than violate notions of fundamental fairness, but appears to raise constitutional matters.

For the reasons set forth above, the Director should have applied Idaho Code § 42-1427, which would result in a place of use acreage of 15,919.3 acres for Water Right Nos. 13-2 and 13-3.

The Director should therefore reconsider its *Final Order* and apply the provisions of Idaho Code § 42-1427.

DATED this 5th day of July, 2011.


For 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 5 day of July, 2011.

**DOCUMENT SERVED: PRESTON-WHITNEY IRRIGATION COMPANY PETITION
FOR RECONSIDERATION**

ATTORNEYS AND/OR INDIVIDUALS SERVED:

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For 
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