



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

August 17, 2010

Preston-Whitney Irrigation Company
PO Box 311
Preston ID 83263

RE: Application for Temporary Change Water Right Nos. 13-2, 13-3, and 13-2104
Withdrawal of Temporary Change Application

Dear Applicant(s):

The Department of Water Resources acknowledges receipt of your withdrawal of the Temporary Change Application received June 24, 2010 referenced above. The withdrawal removes your application from any further consideration or action by the Department.

Please feel free to contact this office if you have any questions regarding this matter.

Sincerely,

Danni M. Smith
Office Services Supervisor

Cc: Robert L Harris
Holden Kidwell Hahn & Crapo PLLC
PO Box 50130
Idaho Falls ID 83405-0130

SCANNED
AUG 16 2010

Peppersack, Jeff

From: Rob Harris [rharris@holdenlegal.com]
Sent: Thursday, July 22, 2010 10:44 AM
To: Spackman, Gary; Wigle, Victoria; 'Scott Campbell'; ajw@moffat.com; Cefalo, James; 'Lyle W. Porter'; 'T. J. Budge'; 'Randy Budge'
Cc: Peppersack, Jeff; Luke, Tim
Subject: Withdrawal of Preston-Whitney Temporary Transfer Withdrawal
Attachments: TT.Withdrawal.pdf

Director Spackman and/or Hearing Officer Cefalo:

Attached is an executed *Withdrawal of Application for Temporary Transfer of Water Rights* regarding the Preston-Whitney Irrigation Company's *Temporary Change Application* filed on June 24, 2010. As noted in the withdrawal, since the application was filed in June, the supplies in Cub River have dropped such that the temporary change will have no practical effect on Preston-Whitney's supplies. Regular copies of this withdrawal will not be sent to those on the email. We presume with the withdrawal of this application, the various motions/petitions associated with this change are now moot.

Jeff and Tim, I understand that the Director is out of the office, so I wanted to ensure that one of IDWR's agents in Boise became aware of the withdrawal. I have also copied Victoria Wigle, and presume the withdrawal will make it to the Director's desk.

Thank you for your attention to this matter.

Robert L. Harris
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1000 Riverwalk Drive, Suite 200
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Phone: (208) 523-0620
Fax: (208) 523-9518
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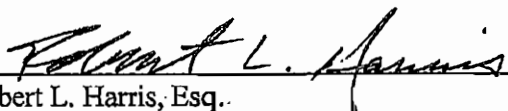
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**WITHDRAWAL
OF
APPLICATION FOR TEMPORARY TRANSFER OF WATER RIGHT(S)**

We, Preston-Whitney Irrigation Company, hereby withdraw our Temporary Change Application dated June 24, 2010, because the water supplies in Cub River dropped such that the temporary change application will no longer be of any practical effect.

Signed this 20th day of July, 2010.



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

RECEIVED

JUL 19 2010

DEPARTMENT OF
WATER RESOURCES

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Luke H. Marchant, Esq. (ISB # 7944)
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Attorneys for Preston-Whitney Irrigation Co.

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN RE:

PRESTON-WHITNEY IRRIGATION
CO. TEMPORARY CHANGE
APPLICATION, JUNE 24, 2010

**PRESTON-WHITNEY IRRIGATION
COMPANY'S MOTION TO DISMISS
(1) MOTION FOR DISQUALIFICATION OF
OFFICERS HEARING CONTESTED
CASES;
(2) MOTION FOR STAY; AND
(3) PETITION FOR HEARING**

Preston-Whitney Irrigation Company (hereinafter "Preston-Whitney"), by and through their counsel, Robert L. Harris of Holden, Kidwell, Hahn and Crapo, PLLC, pursuant to I.R.C.P. 12(b)(6) and IDAPA 37.01.01.260 and 37.01.01.270.01, hereby submits this *Motion to Dismiss Petitioners'*

(1) *Motion for Disqualification of Officers Hearing Contested Cases*; (2) *Motion for Stay*; and (3) *Petition for Hearing*.

I. INTRODUCTION

This matter concerns Preston-Whitney's filing of a Temporary Change Application pursuant to Idaho Code § 42-222(a), **not the approval of such an application**. On June 29, 2010, Eldon and Mary Ann Golightly, Grant and Linda Chadwick, Bert and Laura Wheatley, Seth and Beth Wheatley, and Wheatley Properties, LLC, (hereinafter, collectively "Petitioners"), filed a *Motion for Disqualification of Officers Hearing Contested Cases*, asserting a blanket disqualification for cause of all employees of the Idaho Department of Water Resources ("IDWR"), except for the Director. Petitioners also filed a *Motion for Stay* staying all further processing of the Temporary Change Application filed by Preston-Whitney until a hearing before the Director has taken place.

Without a decision on the Temporary Change Application, it is premature to disqualify IDWR staff, stay an unprocessed application, and petition for a hearing on a matter that has yet to be decided. Therefore, Petitioners have failed to state a claim upon which relief can be granted. As further set forth below, the Petitioners' motions must be dismissed.

II. ARGUMENT

A. Temporary change application statute and processing standards.

The standards for processing of a temporary change application are set forth in Idaho Code § 42-222A. This statute, in its entirety, provides:

42-222A. Temporary changes during drought conditions.

(1) Upon declaration of a drought emergency for an area designated by the director of the department of water resources and approved by the governor of the state of Idaho, the director of the department of water resources is authorized to allow

temporary changes to the use of water rights consisting of temporary transfers to change point of diversion, place and purpose of use of valid existing water rights or temporary exchanges of water authorized to be diverted under water rights, as provided in section 42-240, Idaho Code, when the director of the department of water resources determines that such change(s) can be accomplished in accordance with the provisions of this section.

(2) Application for a temporary change shall be made upon forms provided by the department of water resources and shall be accompanied by an application fee of fifty dollars (\$50.00) per application.

(3) The director of the department of water resources is not required to publish notice of the proposed change pursuant to the provisions of section 42-211, 42-222(1) or 42-240, Idaho Code, and is not required to make findings as provided in said sections. A temporary change may be approved upon completion of the application form, payment of the filing fee and a determination by the director of the department of water resources that the proposed change can be properly administered and there is no information that the change will injure any other water right. If the water right to be changed is administered by a watermaster within a water district, the director of the department of water resources shall obtain and consider the recommendations of the watermaster before approving the temporary change application.

(4) All temporary changes approved pursuant to the provisions of this section shall expire on the date shown in the approval which shall not be later than December 31 of the year in which the emergency transfer approval is made and thereafter the water right shall revert to the point of diversion and place of use existing prior to the temporary change. Nothing herein shall be construed as approval to authorize the construction of a new well as a new point of diversion.

(5) The recipient of an approved temporary change issued pursuant to this section shall assume all risk that the diversion and use of the water may cause injury to other water rights, that the change constitutes an enlargement in use of the original right, that the use is not consistent with the conservation of water resources within the state of Idaho and that such use is not in the local public interest. Any applicant for a temporary change who is aggrieved by a denial by the director of the department of water resources of a temporary change pursuant to this section may request a hearing pursuant to the provisions of section 42-1701A (3), Idaho Code, and may seek judicial review of the final order of the director pursuant to the provisions of section 42-1701A(4), Idaho Code.

(6) Temporary changes shall only be approved for the purpose of providing a replacement water supply to lands or other uses which normally have a full water supply except for a drought condition. Temporary changes may not be approved to

provide water for new projects or to allow expansion of the use of water under existing water rights. If the right to use the water, the diversion works or the water delivery system is represented by shares of stock in a corporation or if such right, diversion works or delivery system is owned or managed by an irrigation district, no change in point of diversion or place or nature of use of such water shall be made or allowed without the written consent of such corporation or irrigation district.

B. The Petitioners' motions must be denied because they have no right to file such motions under Idaho statute or administrative rule.

Idaho Code § 42-222A(3) does not require IDWR to publish notice of a temporary change application to allow for protests as is provided under a regular transfer pursuant to Idaho Code § 42-222. It is self-evident that the policy consideration of providing water users with a replacement water source weighs in favor of the water user as the regular process is short-circuited to ensure quick action under drought conditions. Thus, the Petitioners are not entitled to protest a Temporary Change Application under the plain language of Idaho Code § 42-222A **prior to** the issuance of an order of approval of the application.¹ Therefore, Petitioners are only entitled to relief under the provisions of Idaho Code § 42-1701A(3), which requires issuance of a decision on the Temporary Change Application. Indeed, Petitioners acknowledge this in their brief, and bring their motion under this statute. Idaho Code § 42-1701A(3) provides the following:

(3) Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, **any person aggrieved by any action of the director, including any decision, determination, order or other action**, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an

¹ Of course, in a regular transfer, protests are allowed to be filed **before** a final order or decision on the transfer application is made, and do entitle a protestant to a hearing prior to the issuance of an order.

opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. The director shall give such notice of the petition as is necessary to provide other affected persons an opportunity to participate in the proceeding. The hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section. Judicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section.²

The language of this statute is clear that a person is entitled to a hearing before the director only when they have been “aggrieved by any action of the director, including any decision, determination, order or other action.” To date, there has been no action, decision, determination, or order on the Temporary Change Application. As such, Petitioners’ motions are premature and must be dismissed. No hearing officer has been designated due to a petition filed after issuance of an order, and therefore, there is no hearing officer to disqualify. There is no proceeding to stay because no IDWR action has occurred. And finally, there is no right to a hearing under Idaho Code § 42-1701A(3) because there has been no order issued regarding the Temporary Change Application. Indeed, it is entirely possible that the Temporary Change Application may be denied.

Yet, instead of waiting for the Department to act, Petitioners argue that “any action approving the Temporary Change Application is invalid because the statute is constitutionally defective” because it “does not afford Petitioners with notice of an opportunity for a hearing *before* actions are taken.”³ On the one hand, Petitioners argue that a hearing before the Director is necessary even

² Emphasis added.

³ *Petition for Hearing* at 5.

though no action, decision or order has taken place as required by Idaho Code § 42-1701A(3). On the other hand, they argue that any action approving the Temporary Change Application is invalid and constitutionally defective. Ironically, Petitioners accuse Preston-Whitney of making “a blatant attempt to circumvent the procedures of the Department and state law”⁴ with their Temporary Change Application. However, it is Petitioners, who, despite the clear language of Idaho Code § 42-222A, are arguing that they are entitled to an immediate hearing before the Director. Such arguments are unpersuasive, and Petitioners’ motions must be denied.

Regarding the factual assertions of Petitioners that Preston-Whitney is *per se* violating the prior appropriation doctrine, these are matters that will be addressed in the water rights administration proceeding recently commenced by Petitioners. Preliminarily, it is remarkable that the Petitioners can assert injury under this Temporary Change Application to water rights Petitioners own that divert from Spring Creek, when Preston-Whitney’s water rights are diverted from Cub River, which is a river that Worm Creek (to which Spring Creek is tributary) runs in to. Arguing injury to water rights in a separate surface water drainage which Cub River does not flow into is novel indeed.

Lastly, Plaintiffs constitutional arguments can be raised at a future district court hearing after the administrative proceedings regarding the Temporary Change Application proceeding have concluded. They cannot be raised now. Administrative remedies must first be exhausted before a court can determine if statutory provisions are unconstitutional “as applied.” It would be contrary to Idaho law for IDWR to make a determination of constitutionality during their administrative

⁴ *Id.* at 4.

process, as clearly established in *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 870, 154 P.3d 433, 441 (Idaho 2007). In this case, which the Department and Petitioners are no doubt familiar with, the constitutionality of the Department's conjunctive management rules was challenged. The Idaho Supreme Court clearly articulated Idaho law regarding the requirements to challenge the constitutionality of a statute as follows:

A district court should not rule that a statute is unconstitutional "as applied" to a particular case until administrative proceedings have concluded and a complete record has been developed. I.C. § 67-5277 (judicial review of disputed issues of fact must be confined to the agency record for judicial review). . . . Although a district court has jurisdiction to decide constitutional issues, administrative remedies generally must be exhausted before constitutional claims are raised. *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 134, 106 P.3d 455, 460 (2005). Other jurisdictions have also refused to excuse a party from exhausting administrative remedies merely because the party raises a constitutional issue that no official in the proceeding is authorized to decide, reasoning that "to hold otherwise would mean that a party whose grievance presents issues of fact or misapplication of rules or policies could nonetheless bypass his administrative remedies and go straight to the courthouse by the simple expedient of raising a constitutional issue." *Foremost Ins. Co. v. Public Serv. Comm'n*, 985 S.W.2d 793, 795 (Mo.Ct.App.1998). Thus, raising a constitutional challenge does not alleviate the necessity of establishing a complete administrative record. . . . "Important policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body." *White v. Bannock County Comm'rs*, 139 Idaho 396, 401-02, 80 P.3d 332, 337-38 (2003). Additionally, a district court cannot properly engage in an "as applied" constitutional analysis until a complete factual record has been developed. I.C. § 67-5277; *Lindstrom v. Dist. Bd. Of Health Panhandle Dist. I*, 109 Idaho 956, 712 P.2d 657 (1985).

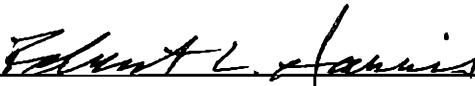
American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources, 143 Idaho 862, 870, 154 P.3d 433, 441-43 (Idaho 2007). Petitioners therefore clearly cannot raise constitutional issues at this

stage, as the parties are not yet even in the administrative process because no order has been issued on the Temporary Change Application.

III. CONCLUSION

Because Preston-Whitney's Temporary Change Application has not been processed, and because there is no statutory provision allowing for a protest to an application for such temporary changes, any objection to the approval of such an application must be brought pursuant to Idaho Code § 42-1701A(3), which requires the issuance of a decision, determination, or action by the Director of IDWR before a right to hearing exists. No such action has been taken, and therefore, under the plain language of the above statutes, Petitioners' motions are certainly premature and legally deficient. Therefore, the motions must be dismissed. Any allegation of the unconstitutionality of Idaho Code § 42-222A cannot be raised until the matter is before a district court after Petitioners have exhausted their administrative remedies.

DATED this 16th day of July, 2010.


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 parties listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, on this 16th day of July, 2010.

DOCUMENT SERVED: PRESTON-WHITNEY IRRIGATION COMPANY'S MOTION TO DISMISS (1) MOTION FOR DISQUALIFICATION OF OFFICERS HEARING CONTESTED CASES; (2) MOTION FOR STAY; AND (3) PETITION FOR HEARING

ATTORNEYS AND/OR INDIVIDUALS SERVED:

Director
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720

(☒) *First Class Mail*
(☐) *Hand Delivery*
(☐) *Facsimile*
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Idaho Falls, ID 83402-1718

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Preston-Whitney Irrigation Company
PO Box 311
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(☐) *Facsimile*
(☐) *Overnight Mail*
(☐) *Email*

9 - PRESTON-WHITNEY IRRIGATION CO.'S MOTION TO DISMISS (1) MOTION FOR DISQUALIFICATION OF OFFICERS HEARING CONTESTED CASES; (2) MOTION FOR STAY; AND (3) PETITION FOR HEARING

Scott L. Campbell
Moffatt Thomas Barrett Rock & Fields, Chtd.
PO Box 829
Boise, ID 83701

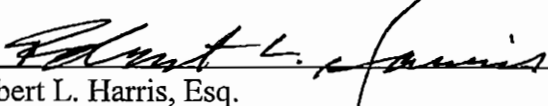
(☒) *First Class Mail*
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Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

G:\WPDATA\RLH\7206-04\Response to Mot. to DQ Hearing Officer.wpd

Gibson, Deborah

From: Wigle, Victoria
Sent: Friday, July 16, 2010 2:37 PM
To: Gibson, Deborah
Subject: FW: Preston-Whitney Responses to Various Motions
Attachments: Petition to Intervene.pdf; Response to Mot. to DQ Hearing officer.Transfer.pdf; Response to Mot. to DQ Hearing Officer.Mot.Dismiss.pdf

From: Rob Harris [mailto:rharris@holdenlegal.com]
Sent: Friday, July 16, 2010 2:39 PM
To: Spackman, Gary; Wigle, Victoria; 'Lyle W. Porter'; 'Scott Campbell'; 'Randy Budge'; Fredric_Price@blm.gov; Cefalo, James
Subject: Preston-Whitney Responses to Various Motions

All:

Attached are responses to the motions submitted by Moffatt Thomas on behalf of their clients. Regular copies are also being sent today by mail.

Robert L. Harris
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7/16/10
Rec'd by
Email

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Facsimile: (208) 523-9518

Attorneys for Preston-Whitney Irrigation Co.

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN RE:

PRESTON-WHITNEY IRRIGATION
CO. TEMPORARY CHANGE
APPLICATION, JUNE 24, 2010

**PRESTON-WHITNEY IRRIGATION
COMPANY'S MOTION TO DISMISS
(1) MOTION FOR DISQUALIFICATION OF
OFFICERS HEARING CONTESTED
CASES;
(2) MOTION FOR STAY; AND
(3) PETITION FOR HEARING**

Preston-Whitney Irrigation Company (hereinafter "Preston-Whitney"), by and through their counsel, Robert L. Harris of Holden, Kidwell, Hahn and Crapo, PLLC, pursuant to I.R.C.P. 12(b)(6) and IDAPA 37.01.01.260 and 37.01.01.270.01, hereby submits this *Motion to Dismiss Petitioners'*

(1) *Motion for Disqualification of Officers Hearing Contested Cases*; (2) *Motion for Stay*; and (3) *Petition for Hearing*.

I. INTRODUCTION

This matter concerns Preston-Whitney's filing of a Temporary Change Application pursuant to Idaho Code § 42-222(a), **not the approval of such an application**. On June 29, 2010, Eldon and Mary Ann Golightly, Grant and Linda Chadwick, Bert and Laura Wheatley, Seth and Beth Wheatley, and Wheatley Properties, LLC, (hereinafter, collectively "Petitioners"), filed a *Motion for Disqualification of Officers Hearing Contested Cases*, asserting a blanket disqualification for cause of all employees of the Idaho Department of Water Resources ("IDWR"), except for the Director. Petitioners also filed a *Motion for Stay* staying all further processing of the Temporary Change Application filed by Preston-Whitney until a hearing before the Director has taken place.

Without a decision on the Temporary Change Application, it is premature to disqualify IDWR staff, stay an unprocessed application, and petition for a hearing on a matter that has yet to be decided. Therefore, Petitioners have failed to state a claim upon which relief can be granted. As further set forth below, the Petitioners' motions must be dismissed.

II. ARGUMENT

A. Temporary change application statute and processing standards.

The standards for processing of a temporary change application are set forth in Idaho Code § 42-222A. This statute, in its entirety, provides:

42-222A. Temporary changes during drought conditions.

(1) Upon declaration of a drought emergency for an area designated by the director of the department of water resources and approved by the governor of the state of Idaho, the director of the department of water resources is authorized to allow

temporary changes to the use of water rights consisting of temporary transfers to change point of diversion, place and purpose of use of valid existing water rights or temporary exchanges of water authorized to be diverted under water rights, as provided in section 42-240, Idaho Code, when the director of the department of water resources determines that such change(s) can be accomplished in accordance with the provisions of this section.

(2) Application for a temporary change shall be made upon forms provided by the department of water resources and shall be accompanied by an application fee of fifty dollars (\$50.00) per application.

(3) The director of the department of water resources is not required to publish notice of the proposed change pursuant to the provisions of section 42-211, 42-222(1) or 42-240, Idaho Code, and is not required to make findings as provided in said sections. A temporary change may be approved upon completion of the application form, payment of the filing fee and a determination by the director of the department of water resources that the proposed change can be properly administered and there is no information that the change will injure any other water right. If the water right to be changed is administered by a watermaster within a water district, the director of the department of water resources shall obtain and consider the recommendations of the watermaster before approving the temporary change application.

(4) All temporary changes approved pursuant to the provisions of this section shall expire on the date shown in the approval which shall not be later than December 31 of the year in which the emergency transfer approval is made and thereafter the water right shall revert to the point of diversion and place of use existing prior to the temporary change. Nothing herein shall be construed as approval to authorize the construction of a new well as a new point of diversion.

(5) The recipient of an approved temporary change issued pursuant to this section shall assume all risk that the diversion and use of the water may cause injury to other water rights, that the change constitutes an enlargement in use of the original right, that the use is not consistent with the conservation of water resources within the state of Idaho and that such use is not in the local public interest. Any applicant for a temporary change who is aggrieved by a denial by the director of the department of water resources of a temporary change pursuant to this section may request a hearing pursuant to the provisions of section 42-1701A (3), Idaho Code, and may seek judicial review of the final order of the director pursuant to the provisions of section 42-1701A(4), Idaho Code.

(6) Temporary changes shall only be approved for the purpose of providing a replacement water supply to lands or other uses which normally have a full water supply except for a drought condition. Temporary changes may not be approved to

provide water for new projects or to allow expansion of the use of water under existing water rights. If the right to use the water, the diversion works or the water delivery system is represented by shares of stock in a corporation or if such right, diversion works or delivery system is owned or managed by an irrigation district, no change in point of diversion or place or nature of use of such water shall be made or allowed without the written consent of such corporation or irrigation district.

B. The Petitioners' motions must be denied because they have no right to file such motions under Idaho statute or administrative rule.

Idaho Code § 42-222A(3) does not require IDWR to publish notice of a temporary change application to allow for protests as is provided under a regular transfer pursuant to Idaho Code § 42-222. It is self-evident that the policy consideration of providing water users with a replacement water source weighs in favor of the water user as the regular process is short-circuited to ensure quick action under drought conditions. Thus, the Petitioners are not entitled to protest a Temporary Change Application under the plain language of Idaho Code § 42-222A **prior to** the issuance of an order of approval of the application.¹ Therefore, Petitioners are only entitled to relief under the provisions of Idaho Code § 42-1701A(3), which requires issuance of a decision on the Temporary Change Application. Indeed, Petitioners acknowledge this in their brief, and bring their motion under this statute. Idaho Code § 42-1701A(3) provides the following:

(3) Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, **any person aggrieved by any action of the director, including any decision, determination, order or other action**, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an

¹ Of course, in a regular transfer, protests are allowed to be filed before a final order or decision on the transfer application is made, and do entitle a protestant to a hearing prior to the issuance of an order.

opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. The director shall give such notice of the petition as is necessary to provide other affected persons an opportunity to participate in the proceeding. The hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section. Judicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section.²

The language of this statute is clear that a person is entitled to a hearing before the director only when they have been "aggrieved by any action of the director, including any decision, determination, order or other action." To date, there has been no action, decision, determination, or order on the Temporary Change Application. As such, Petitioners' motions are premature and must be dismissed. No hearing officer has been designated due to a petition filed after issuance of an order, and therefore, there is no hearing officer to disqualify. There is no proceeding to stay because no IDWR action has occurred. And finally, there is no right to a hearing under Idaho Code § 42-1701A(3) because there has been no order issued regarding the Temporary Change Application. Indeed, it is entirely possible that the Temporary Change Application may be denied.

Yet, instead of waiting for the Department to act, Petitioners argue that "any action approving the Temporary Change Application is invalid because the statute is constitutionally defective" because it "does not afford Petitioners with notice of an opportunity for a hearing *before* actions are taken."³ On the one hand, Petitioners argue that a hearing before the Director is necessary even

² Emphasis added.

³ *Petition for Hearing* at 5.

though no action, decision or order has taken place as required by Idaho Code § 42-1701A(3). On the other hand, they argue that any action approving the Temporary Change Application is invalid and constitutionally defective. Ironically, Petitioners accuse Preston-Whitney of making "a blatant attempt to circumvent the procedures of the Department and state law"⁴ with their Temporary Change Application. However, it is Petitioners, who, despite the clear language of Idaho Code § 42-222A, are arguing that they are entitled to an immediate hearing before the Director. Such arguments are unpersuasive, and Petitioners' motions must be denied.

Regarding the factual assertions of Petitioners that Preston-Whitney is *per se* violating the prior appropriation doctrine, these are matters that will be addressed in the water rights administration proceeding recently commenced by Petitioners. Preliminarily, it is remarkable that the Petitioners can assert injury under this Temporary Change Application to water rights Petitioners own that divert from Spring Creek, when Preston-Whitney's water rights are diverted from Cub River, which is a river that Worm Creek (to which Spring Creek is tributary) runs in to. Arguing injury to water rights in a separate surface water drainage which Cub River does not flow into is novel indeed.

Lastly, Plaintiffs constitutional arguments can be raised at a future district court hearing after the administrative proceedings regarding the Temporary Change Application proceeding have concluded. They cannot be raised now. Administrative remedies must first be exhausted before a court can determine if statutory provisions are unconstitutional "as applied." It would be contrary to Idaho law for IDWR to make a determination of constitutionality during their administrative

⁴ *Id.* at 4.

process, as clearly established in *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 870, 154 P.3d 433, 441 (Idaho 2007). In this case, which the Department and Petitioners are no doubt familiar with, the constitutionality of the Department's conjunctive management rules was challenged. The Idaho Supreme Court clearly articulated Idaho law regarding the requirements to challenge the constitutionality of a statute as follows:

A district court should not rule that a statute is unconstitutional "as applied" to a particular case until administrative proceedings have concluded and a complete record has been developed. I.C. § 67-5277 (judicial review of disputed issues of fact must be confined to the agency record for judicial review). . . . Although a district court has jurisdiction to decide constitutional issues, administrative remedies generally must be exhausted before constitutional claims are raised. *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 134, 106 P.3d 455, 460 (2005). Other jurisdictions have also refused to excuse a party from exhausting administrative remedies merely because the party raises a constitutional issue that no official in the proceeding is authorized to decide, reasoning that "to hold otherwise would mean that a party whose grievance presents issues of fact or misapplication of rules or policies could nonetheless bypass his administrative remedies and go straight to the courthouse by the simple expedient of raising a constitutional issue." *Foremost Ins. Co. v. Public Serv. Comm'n*, 985 S.W.2d 793, 795 (Mo.Ct.App.1998). Thus, raising a constitutional challenge does not alleviate the necessity of establishing a complete administrative record. . . . "Important policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body." *White v. Bannock County Comm'rs*, 139 Idaho 396, 401-02, 80 P.3d 332, 337-38 (2003). Additionally, a district court cannot properly engage in an "as applied" constitutional analysis until a complete factual record has been developed. I.C. § 67-5277; *Lindstrom v. Dist. Bd. Of Health Panhandle Dist. I*, 109 Idaho 956, 712 P.2d 657 (1985).

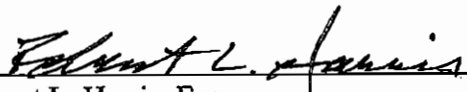
American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources, 143 Idaho 862, 870, 154 P.3d 433, 441-43 (Idaho 2007). Petitioners therefore clearly cannot raise constitutional issues at this

stage, as the parties are not yet even in the administrative process because no order has been issued on the Temporary Change Application.

III. CONCLUSION

Because Preston-Whitney's Temporary Change Application has not been processed, and because there is no statutory provision allowing for a protest to an application for such temporary changes, any objection to the approval of such an application must be brought pursuant to Idaho Code § 42-1701A(3), which requires the issuance of a decision, determination, or action by the Director of IDWR before a right to hearing exists. No such action has been taken, and therefore, under the plain language of the above statutes, Petitioners' motions are certainly premature and legally deficient. Therefore, the motions must be dismissed. Any allegation of the unconstitutionality of Idaho Code § 42-222A cannot be raised until the matter is before a district court after Petitioners have exhausted their administrative remedies.

DATED this 16th day of July, 2010.


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 parties listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, on this 16th day of July, 2010.

DOCUMENT SERVED: PRESTON-WHITNEY IRRIGATION COMPANY'S MOTION TO DISMISS (1) MOTION FOR DISQUALIFICATION OF OFFICERS HEARING CONTESTED CASES; (2) MOTION FOR STAY; AND (3) PETITION FOR HEARING

ATTORNEYS AND/OR INDIVIDUALS SERVED:

Director
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720

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

Idaho Department of Water Resources
Eastern Region Office
900 N. Skyline Dr., Ste. A
Idaho Falls, ID 83402-1718

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

Preston-Whitney Irrigation Company
PO Box 311
Preston, ID 83263

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

Preston Whitney Reservoir Company
1127 S. 2400 E.
Preston, ID 83263

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

Cub River Irrigation Company
Box 215
Lewiston, UT 84320

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

Scott L. Campbell
Moffatt Thomas Barrett Rock & Fields, Chtd.
PO Box 829
Boise, ID 83701

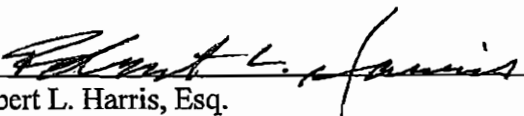
(☒) First Class Mail
() Hand Delivery
() Facsimile
() Overnight Mail
(☒) Email

Randall C. Budge
Racine Olson Nye Budge & Bailey, Chtd.
PO Box 1391
Pocatello, ID 83204-1391

(☒) First Class Mail
() Hand Delivery
() Facsimile
() Overnight Mail
(☒) Email

United States Department of the Interior
Bureau of Land Management
ATTN: Fredric W. Price
1387 S. Vinnell Way
Boise, ID 83709

(☒) First Class Mail
() Hand Delivery
() Facsimile
() Overnight Mail
(☒) Email


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

G:\WPDATA\RLH\7206-04\Response to Mot. to DQ Hearing Officer.wpd

RECEIVED

JUL 16 2010

DEPARTMENT OF
WATER RESOURCES

Attorneys for Petitioners
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

Scott L. Campbell, ISB No. 2251
Andrew J. Waldera, ISB No. 6608
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
23868.0000

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN RE: PRESTON-WHITNEY IRRIGATION
COMPANY'S TEMPORARY CHANGE
APPLICATION OF JUNE 24, 2010

NOTICE OF APPEARANCE AND AMENDED
NOTICE OF PARTY REPRESENTATION

NOTICE IS HEREBY GIVEN that Scott L. Campbell and Andrew J. Waldera of
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED, hereby enter their appearance on
behalf of Petitioners. Request is also made that notice of all hearings, pleadings, and other
papers in this matter be given to the undersigned counsel by mailing such to Scott L. Campbell
and Andrew J. Waldera of MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED, P.O.
Box 829, Boise, Idaho 83701-0829.

NOTICE OF APPEARANCE AND AMENDED
NOTICE OF PARTY REPRESENTATION - 1

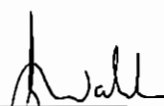
Client:1699977.1

ORIGINAL

Further notice is hereby given that the named Petitioners in this matter should be listed as: Eldon and Mary Ann Golightly, individually and as Trustees of the E & M Trust; Grant Chadwick, Trustee of the Chadwick Trust; Bert and Laura Wheatley; Seth and Beth Wheatley; and Wheatley Properties, LLC in the above-captioned matter.

DATED this 14th day of July, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Andrew J. Waldera – Of the Firm
Attorneys for 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, Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of July, 2010, I caused a true and correct copy of the foregoing **NOTICE OF APPEARANCE AND AMENDED NOTICE OF PARTY REPRESENTATION** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

IDAHO DEPARTMENT OF WATER RESOURCES
Eastern Region Office
900 N. Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Robert Harris
HOLDEN KIDWELL HAHN & CRAPO
P.O. Box 50130
Idaho Falls, ID 83405

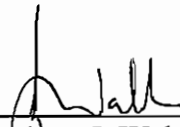
☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

PRESTON-WHITNEY IRRIGATION CO.
P.O. Box 311
Preston, ID 83263

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Land Management
ATTN: Fredric W. Price
1387 S. Vinnell Way
Boise, ID 83709

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile



Andrew J. Waldera

Moffatt Thomas

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

RECEIVED

JUL 20 2010

DEPARTMENT OF
WATER RESOURCES

Boise
Idaho Falls
Pocatello
Twin Falls

US Bank Plaza Building
101 S Capitol Blvd 10th Fl
PO Box 829
Boise Idaho 83701 0829

July 19, 2010

208 345 2000
800 422 2889
208 385 5384 Fax
www.moffatt.com

Eugene C. Thomas	Patricia M. Olsson	Jason G. Murray
John W. Barrett	Christine E. Nicholas	Rebecca A. Rainey
Richard C. Fields	Bradley J. Williams	Paul D. McFarlane
John S. Simko	Lee Radford	Tyler J. Henderson
John C. Ward	Michael O. Roe	C. Edward Cather III
D. James Manning	Nancy J. Garrett	Andrew J. Waldera
David B. Lincoln	David S. Jensen	Dylan B. Lawrence
Gary T. Dance	James L. Martin	Benjamin C. Ritchie
Larry C. Hunter	C. Clayton Gill	Noah G. Hillen
Randall A. Peterman	Michael W. McGreaham	Matthew J. McGee
Mark S. Prusynski	David P. Gardner	David J. Dance
Stephen R. Thomas	Julian E. Gabiola	Mindy M. Willman
Glenna M. Christensen	Tara Martens	
Gerald T. Husch	Kimberly D. Evans Ross	Robert E. Bakes, <i>of counsel</i>
Scott L. Campbell	Mark C. Peterson	
Robert B. Burns	Tyler J. Anderson	<i>Willis C. Moffatt, 1907-1980</i>
Michael E. Thomas	Jon A. Stenquist	<i>Kirk R. Helvie, 1956-2003</i>

Gary Spackman
Interim Directors
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720

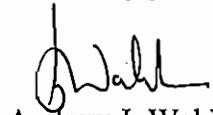
Re: Temporary Change Application Submitted by Preston-Whitney Irrigation Company
MTBR&F File No. 23868.0000

Dear Director Spackman:

Our office received Mr. Harris' July 16, 2010 correspondence providing a Response to Letter Dated July 8, 2010, Regarding Temporary Change Application Submitted on Behalf of Preston-Whitney Irrigation Company. We are reviewing the additional information provided within the same, and anticipate submitting a written response within the next 7 to 10 business days.

Thank you for your attention.

Very truly yours,



Andrew J. Waldera

AJW/dll

cc: Robert L. Harris
Randall C. Budge
United States Department of the Interior - Bureau of Reclamation
Eldon Golightly
Grant Chadwick
Wheatley Properties LLC

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

AMENDED TEMPORARY CHANGE APPLICATION
(To change point of diversion, place of use or purpose of use)

Name of Applicant Preston-Whitney Irrigation Co. Phone _____

Post Office address PO Box 311, Preston, ID 83263

A. PURPOSE OF TRANSFER

1. ☐ Change point of diversion ☒ Add diversion point(s) ☐ Change place of use
☐ Change purpose of use ☐ Other

2. Describe the proposed change(s) and the reason(s) thereof: To allow the Glendale Canal to be used as a POD for Water Right No. 13-2 between July 15th and August 15th, 2010. The use of the Glendale Canal further up Cub River for diversion of this water right better allows the Applicant to distribute water through its current distribution system. The Middle Ditch point of diversion is not capable of delivering water to all of the Applicant's shareholders. While the additional point of diversion is not on a separate stream (both the Glendale Canal and the Middle Ditch are on Cub River), use of Glendale Canal under Water Right 13-2 will allow more efficient water delivery, and allow for Water Right 13-2 to be better utilized. This will provide an additional water supply under Water Right No. 13-2 to replace water that would otherwise remain undiverted and proceed down Cub River and into the Bear River. This water supply is critical to Preston-Whitney during the month of July, especially this year, in drought-stricken Franklin County.

B. DESCRIPTION OF RIGHT(S) OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

1. Right Number Priority Amount (cfs/ac-ft) Nature of Use Period of use
13-2 04/01/1882 30 cfs Irrigation 04/01 To 10/31
To
2. Total amount of water being transferred 30 Cubic feet per second and/or _____ Acre-feet per annum.
3. Source of water Cub River Tributary to Bear River
4. Point(s) of Diversion:

Ident No.	Lot	1/4	1/4	1/4	Sec	Twp	Rge	County	Local name for diversion
		NW	NE	NW	8	15S	41E	FRANKLIN	CUB RIVER/GLENDALE CANAL
		NW	NW	NE	24	15S	40E	FRANKLIN	MIDDLE DITCH

5. Lands irrigated or place of use:

Twp	Rge	Sec	NE 1/4				NW 1/4				SW 1/4				SE 1/4				TOTALS
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
SEE POU DESCRIPTION DEPICTED ON ATTACHED MAP																			

Total Acres: 17857

6. General Information:

- a. Who owns the water right to be changed? Applicant
- b. Describe the arrangement allowing use of the right: Applicant owns the water rights and distributes the water to its stockholders.
- c. Describe the affect on the land now irrigated if the change is approved pursuant to this application:
No change on historically irrigated lands will occur. This temporary change will provide a replacement water supply to currently irrigated lands.
- d. Has the water right sought to be transferred been used this year? Yes If yes, explain. The Applicant has diverted water for irrigation purposes under this water right.
- e. Absent the changes, how would the right be used for the remainder of the year? The rights would be used as ordered by IDWR, which limits the location where they can be diverted. Also, as a practical matter, when supplies diminish in Cub River in early August, the water right sought to be changed by this temporary transfer will be unavailable pursuant to priority administration as other senior water rights will call for deliveries. The temporary change is therefore only sought until August 15th of this year, or until this water right is not in priority.
- f. Describe other water rights used for the same purpose. _____
13-2108, 13-2288, 13-2288A, 13-2291, and 13-2298 are used by the Applicant for irrigation purposes.
- g. Remarks: This temporary transfer will permit the Applicant to better utilize its water supply at its various diversion points.

I hereby assume all risk in accordance with Section 42-222A, Idaho Code, and assert that no one will be injured by such change and that the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge. I understand that any willful misrepresentations made in this application may result in voiding its approval.

Robert L. Lansing Attorney for
(Signature of Applicant) Applicant

FOR DEPARTMENT USE ONLY

Received by: _____ Date _____ Fee _____

Received _____ # _____ Recommend: _____ Approval _____ Deny _____

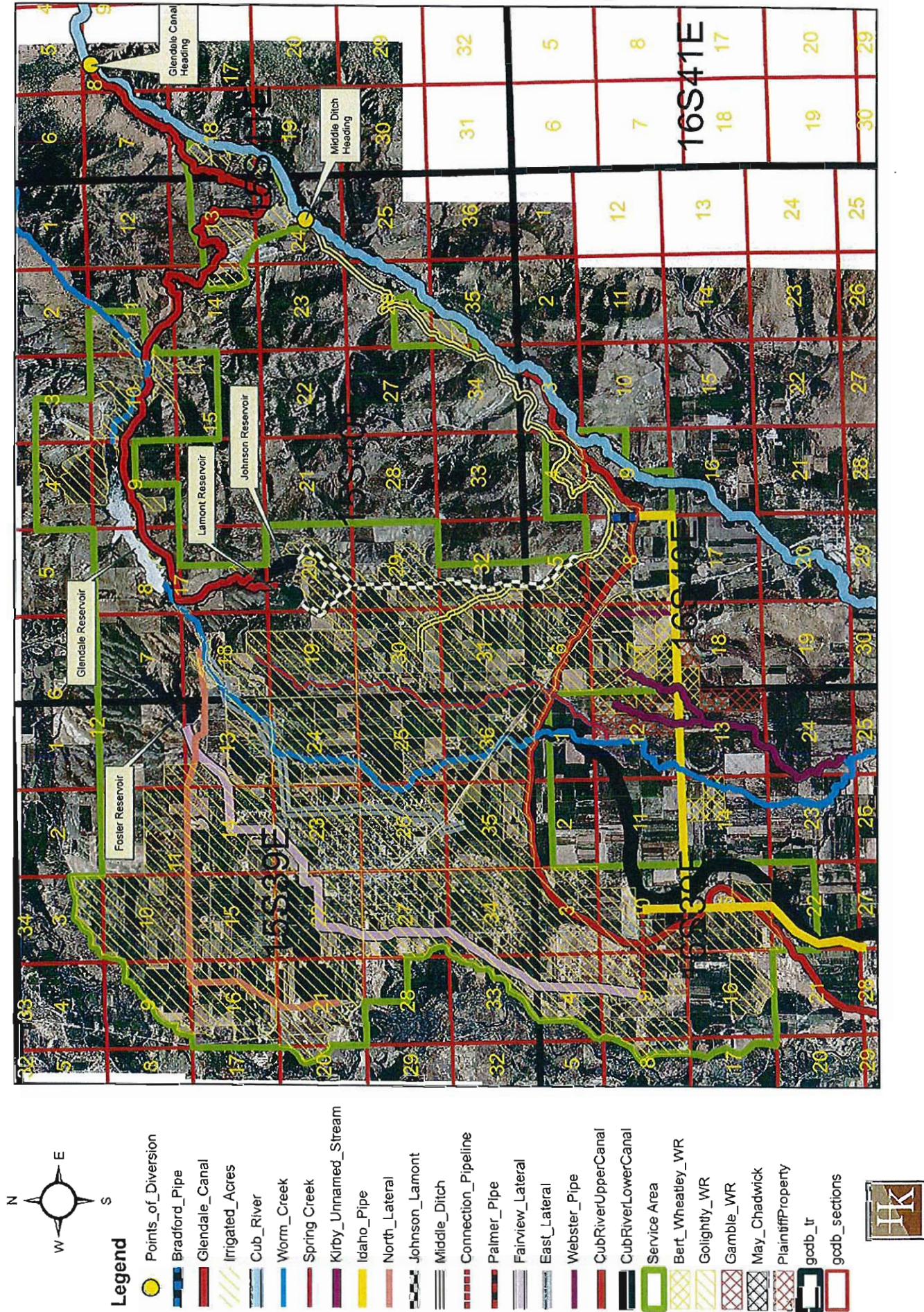
Watermaster recommendation _____

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Temporary Change Application No. _____
and said application is hereby _____, subject to the following limitations and conditions:

Witness my hand this _____ day of _____, _____:

PRESTON-WHITNEY TEMPORARY TRANSFER



Gibson, Deborah

From: Wigle, Victoria
Sent: Friday, July 16, 2010 2:39 PM
To: Gibson, Deborah
Subject: FW: Amended Temporary Change Application and Letter to Director Spackman
Attachments: Gary Spackman ltr 071610.pdf

From: Rob Harris [mailto:rharris@holdenlegal.com]
Sent: Friday, July 16, 2010 2:41 PM
To: Spackman, Gary; Wigle, Victoria; 'Lyle W. Porter'; 'Scott Campbell'; 'Randy Budge'; Fredric_Price@blm.gov; Cefalo, James
Subject: Amended Temporary Change Application and Letter to Director Spackman

All:

Attached is an **Amended Temporary Change Application** and associated letter in response to the Director's July 8, 2010 letter. Regular copies are also being sent out today.

Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405-0130
Phone: (208) 523-0620
Fax: (208) 523-9518
E-Mail: rharris@holdenlegal.com

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Internal Revenue Service Circular 230 Disclosure: Please note that any discussion of or advice regarding United States tax matters contained herein (including any attachments hereto) does not meet the requirements necessary to be a "covered opinion" as defined in Internal Revenue Service Circular 230, and therefore, is not intended or written to be relied upon or used and can not be relied upon or used for the purpose of avoiding federal tax penalties that may be imposed or for the purpose of promoting, marketing, or recommending any tax-related matters or advice to another party.

From: Rob Harris [mailto:rharris@holdenlegal.com]
Sent: Friday, July 16, 2010 2:39 PM
To: 'Spackman, Gary'; 'Wigle, Victoria'; 'Lyle W. Porter'; 'Scott Campbell'; 'Randy Budge'; 'Fredric_Price@blm.gov'; 'Cefalo, James'
Subject: Preston-Whitney Responses to Various Motions

All:

Attached are responses to the motions submitted by Moffatt Thomas on behalf of their clients. Regular copies are also being sent today by mail.

Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC

1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405-0130
Phone: (208) 523-0620
Fax: (208) 523-9518
E-Mail: rharris@holdenlegal.com

Confidentiality Notice: The information contained in this electronic e-mail and any accompanying attachments, all of which may be confidential and/or privileged, is intended only for use by the person or entity to whom it is addressed. If you are not the intended recipient, any unauthorized use, disclosure or copying of this e-mail and its contents is strictly prohibited and may be unlawful. If you are not the intended recipient, please immediately notify the sender by return e-mail and delete the original message and all copies from your system. Thank you.

Internal Revenue Service Circular 230 Disclosure: Please note that any discussion of or advice regarding United States tax matters contained herein (including any attachments hereto) does not meet the requirements necessary to be a "covered opinion" as defined in Internal Revenue Service Circular 230, and therefore, is not intended or written to be relied upon or used and can not be relied upon or used for the purpose of avoiding federal tax penalties that may be imposed or for the purpose of promoting, marketing, or recommending any tax-related matters or advice to another party.



Holden Kidwell
Hahn & Crapo P.L.L.C.
L A W O F F I C E S

1000 Riverwalk Drive, Suite 200
PO Box 50130
Idaho Falls, Idaho 83405

Tel: (208) 523-0620
Fax: (208) 523-9518
www.holdenlegal.com
E-mail: rharris@holdenlegal.com

July 16, 2010

Gary Spackman
Interim Director
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720-0098

RE: Response to Letter Dated July 8, 2010, Regarding Temporary Change Application
Submitted on Behalf of Preston-Whitney Irrigation Company.

Dear Director Spackman:

Thank you for your letter dated July 8, 2010, regarding the Temporary Change Application I submitted on behalf of my clients, Preston-Whitney Irrigation Company. We received the letter on July 12, 2010. Your letter provided an additional fourteen (14) days within which I could provide additional facts that would support the Temporary Change Application.

After reviewing your letter, and the initial Temporary Change Application we submitted, we believe the application should have provided greater detail and should have clarified that for all practical purposes, the only water right proposed to be temporarily changed under the application is Water Right No. 13-2. On that end, we wish to submit an Amended Temporary Change Application for the Department's consideration to clarify the matters requested in your letter, and to better explain what was contemplated under the Temporary Change Application.

We note at the outset that the Amended Temporary Change Application contains more specificity and factual information to assist you and the Department in its processing. Of particular importance to my clients is that with the current dwindling water supply, and the drought conditions that exist in Franklin County, the temporary transfer will likely not be of any affect after August 15th at the latest of this year, and will likely be diminished by August 1st. We therefore request that the application be addressed immediately.

As cited in your letter, Idaho Code § 42-222A sets for the standards for submission of Temporary Change Applications. An order designating Franklin County as a drought declaration county was executed on May 20, 2010, by yourself, and May 24th by Governor Butch Otter. As you well understand, drought conditions present unique circumstances to water users, and the statutory provisions providing some flexibility and leeway in assisting those water users as provided in Idaho Code § 42-222A. As I review this statute, I understand that there are four limitations placed upon an applicant for a Temporary Change Application. They are:

1. There is no information that the Change Application will injure other water rights;
2. Replacement water supply must be to lands that normally have a full water supply except for drought conditions;
3. The Temporary Change Application does not authorize use for a new project; and
4. The Temporary Change Application is not an expansion of the water rights.

Given the issues raised by water users from Spring Creek, which is not a direct tributary to Cub River, I will address each of these in turn to ensure you have adequate information relative to this Temporary Change Application.

I. There Will Be No Injury to Other Water Rights, Particularly Those Users on Spring Creek, Who Recently Filed a Petition for Water Rights Administration.

On behalf of individuals that have water rights out of Spring Creek and Worm Creek, Scott Campbell filed a number of recent petitions with the Department. In terms of the Amended Temporary Change Application and any allegation of injury, it may prove useful to provide some background information regarding Preston-Whitney's system with the attached Maps 1-4.

Map 1 shows the four (4) major reservoirs in the Preston area, and the headings to the Middle Ditch (which is the currently authorized point of diversion for Water Right No. 13-2), and the Glendale Canal, which is the proposed location to divert Water Right No. 13-2 under the Temporary Change Application. The green line shows the proposed service area for Preston-Whitney under this Transfer Application. Also shown on Map 1 is the location of the places of use for the Spring Creek users represented by Mr. Campbell. Lastly, natural watercourses are depicted on the map, including Cub River, Worm Creek, the Kirby Drainage, and Spring Creek.

Map 2 contains the same information as Map 1, except it depicts the water drainages mapped by federal agencies for Spring Creek (outlined in red) and Worm Creek (outlined in blue). You can see that the headings for Preston-Whitney's water rights are out of Cub River, and are not within these drainages. Spring Creek flows into Worm Creek above where the Kirby Drainage flows in to Spring Creek. Thereafter, Worm Creek flows into the Cub River just south of the Idaho-Utah border in Utah.

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As stated above, Spring Creek is a tributary to Worm Creek, which in turn is a tributary to the Cub River. While not directly involved in the Temporary Change Application, based on the Petitioners recently submitted briefing to stay the processing of the Temporary Change Application, it appears the arguments made in support of their *Petition for Administration* overlap with their allegations regarding why the Temporary Change Application should not be approved. Therefore, we will briefly address the allegations that their water rights will allegedly be injured. As explained below, their water rights allow for diversion from water sources that are not a part of the Cub River drainage, which is the drainage that is the source of the water right sought to be temporarily changed by Preston-Whitney Irrigation Company.

As you are well aware, in 1983, the District Court in Franklin County issued what is commonly called the "Worm Creek Decree". In the findings of fact of this Decree, there is an acknowledgment of fact that the lower reaches of Worm Creek are augmented by return flows from other stream systems. In the course of separate litigation now on appeal to the Idaho Supreme Court between the Petitioners and Preston-Whitney et al, and other information provided to Preston-Whitney, the protestants allege that this finding of fact mandates augmentation of Spring Creek flows by importation of water from other drainages.

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Additionally, the Protestants allege that when the Johnson and LaMont Reservoirs were constructed, they interfered with a natural spring located up in that general area. Without any written documentation, the Protestants allege that there was a *defacto* exchange between the reservoir operators and those water users in Spring Creek to continue to waste water into the Spring Creek drainage.

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II. The Replacement Water Supply Sought by Preston-Whitney Will be Supplied to Lands that Normally Have a Full Water Supply, Except for the Drought Conditions that Currently Exist.

If the Amended Temporary Change Application is approved, Preston-Whitney estimates that it will have an additional 60 acre feet per day until the first few weeks of August to provide to its shareholders through its distribution system. As noted on the Amended Temporary Change Application, the Preston-Whitney system is best operated when water is diverted further up the Cub River system into their delivery system, which consists of a number of canals and reservoirs. Because of stockholders' decisions to change their method of irrigation, it is critical for Preston-Whitney to deliver its supplies from higher up the system, which provides gravity flow pressure into other pipe laterals owned by stockholders within the Preston-Whitney system. Therefore, delivery through the open Middle Ditch, which was done many, many years ago on a larger scale basis, will not provide sufficient supplies to those individuals that rely on the pressure pipelines that have been installed. Therefore, allowing Preston-Whitney to divert further up the system will provide a replacement water supply contemplated under Idaho Code § 42-222A.. Otherwise, undiverted water making its way past the Middle Ditch will continue down Cub River to be diverted by other individuals whose water rights are located on Cub River.

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As you are aware, the Bear River drainage has not been subject to a general adjudication for nearly a century. As a result, methodologies of describing water rights in the early 1900s in comparison to how IDWR currently describes water rights are significantly different. Preston-Whitney's water rights do not have a limited acreage amount, nor do they generally describe the authorized place of use. When the issue regarding the use of the upper diversion point came about a few years ago, Preston-Whitney initially asked to simply file a transfer application to add another point of diversion to its water rights. At that time, the Department requested that the transfer essentially document an adjudication-type inventorying of how the water right have historically been used by Preston-Whitney. This is what has been done in the Transfer Application that is currently protested. The Temporary Change Application proposes use in the same service area for the same acres as Preston-Whitney has historically done. Therefore, the temporary change is not for a new project, and Preston-Whitney has no intention of irrigating any new lands other than those it has historically delivered water to.

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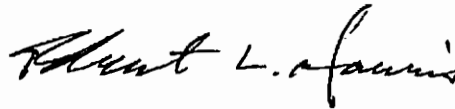
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We hope the above information provides you the information that you need to process the Amended Temporary Change Application. With the drought declaration, and instruction to the Watermaster not to deliver water until a Transfer Application is approved, it will have a significant impact on Preston-Whitney's historical use and diversion of water. Otherwise, without this replacement water, supplies will be cut, crop yields will suffer, and nearly 17,000 acres will be impacted.

If you have any additional questions or concerns, please let me know. As stated in the opening paragraph, due to the fast receding water supply, we request the Department expedite processing of this particular application. We anticipate that if approved, the Temporary Change Application will be of no practical effect after approximately August 1st of this year.

Best Regards,

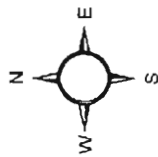


Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

Enclosures

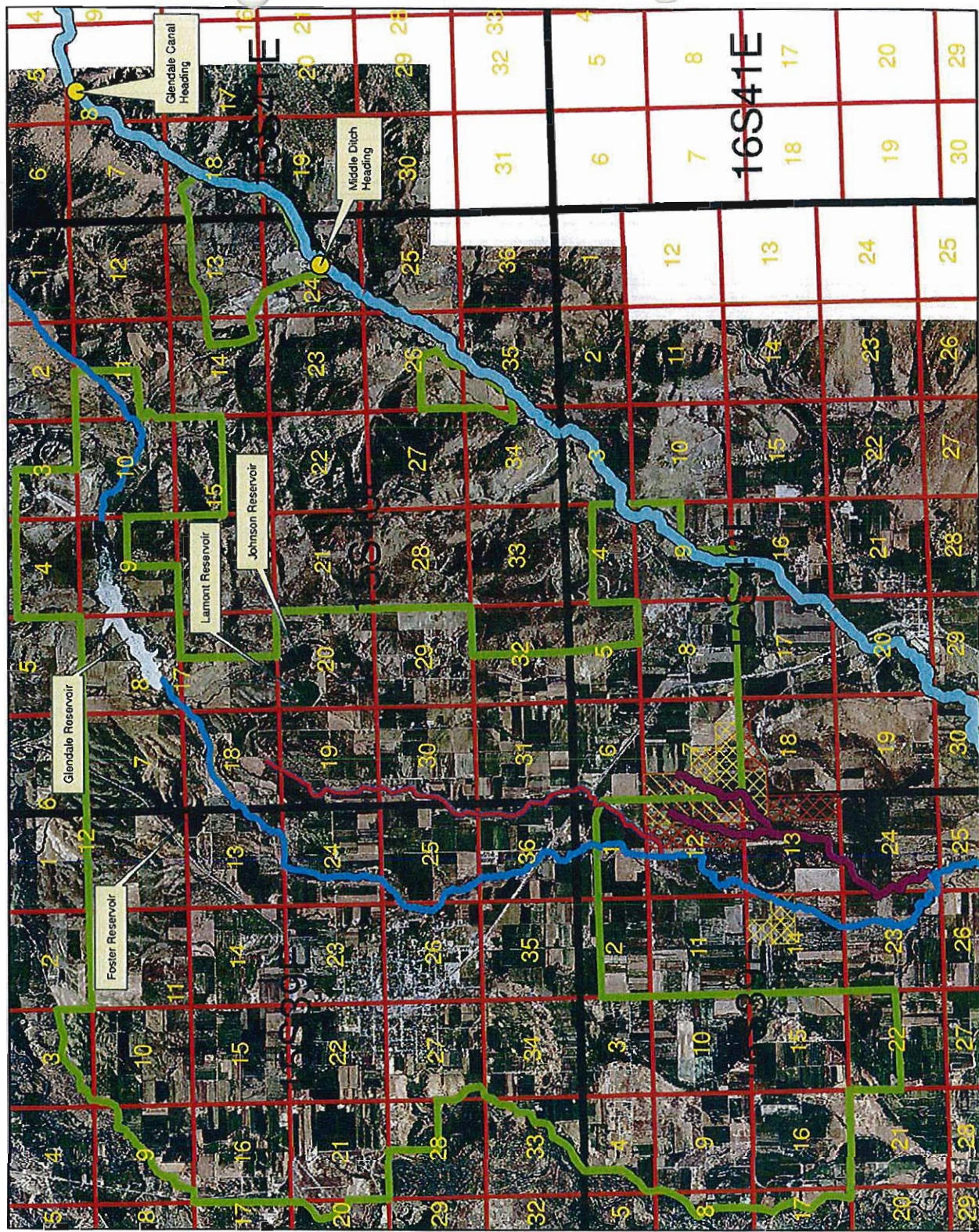
- c: Idaho Department of Water Resources
Preston-Whitney Irrigation Company
Preston Whitney Reservoir Company
Cub River Irrigation Company
Scott L. Campbell
Randall C. Budge
United States Department of the Interior - Bureau of Land Management

PRESTON-WHITNEY TEMPORARY TRANSFER - MAP 1

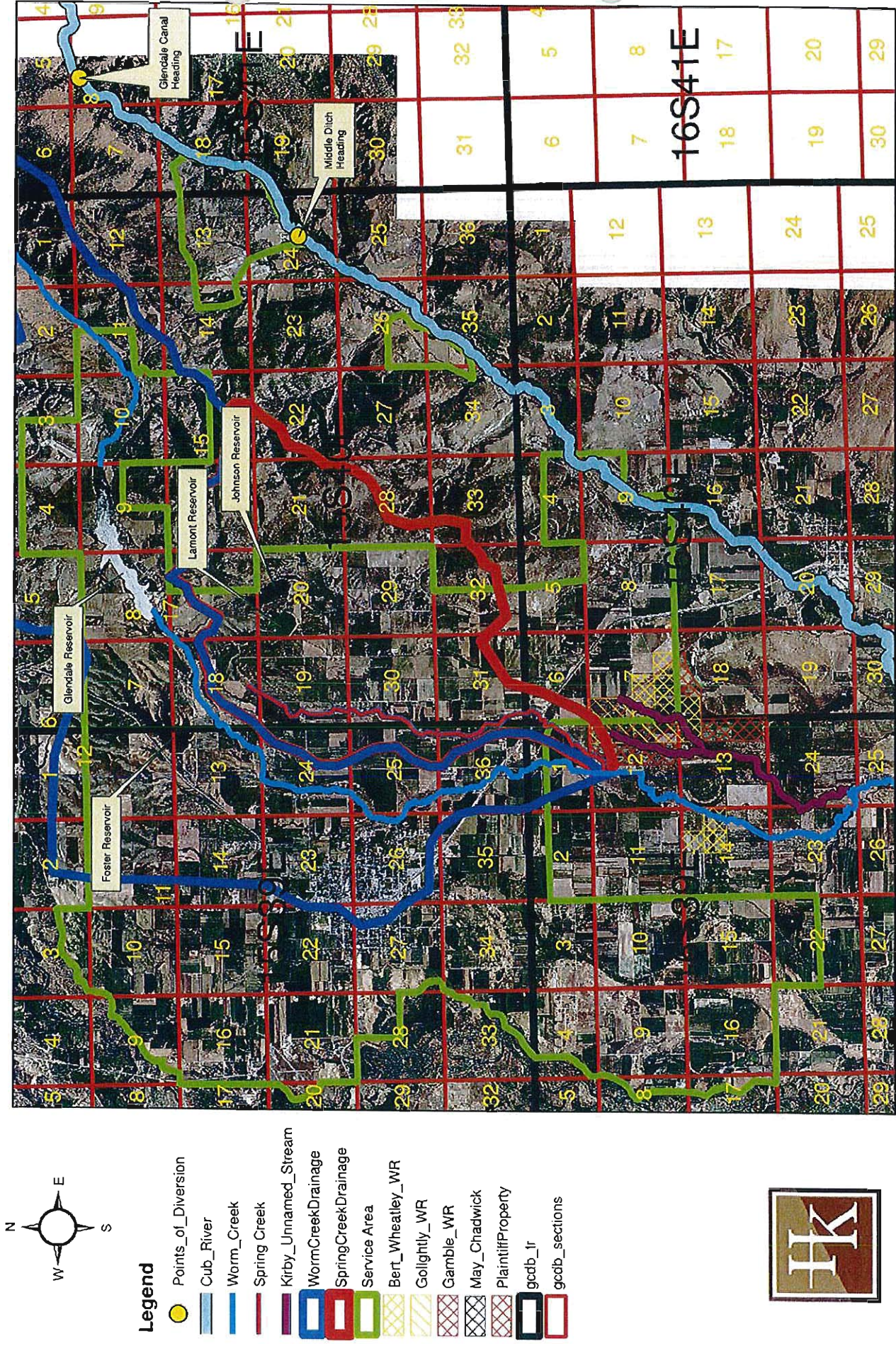


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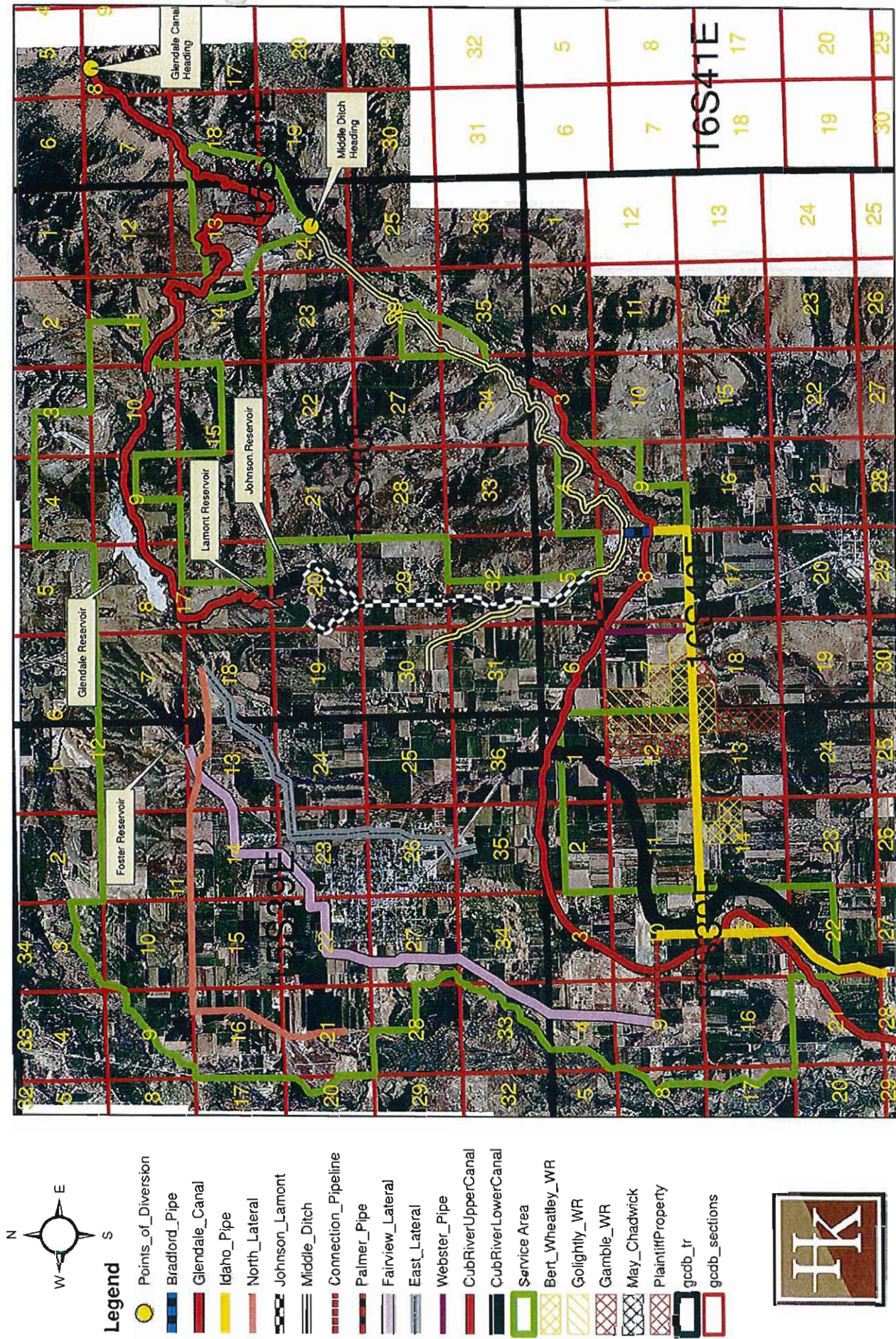
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- Worm_Creek
- Spring_Creek
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- May_Chadwick
- Plaintiff_Property
- gcdb_tr
- gcdb_sections



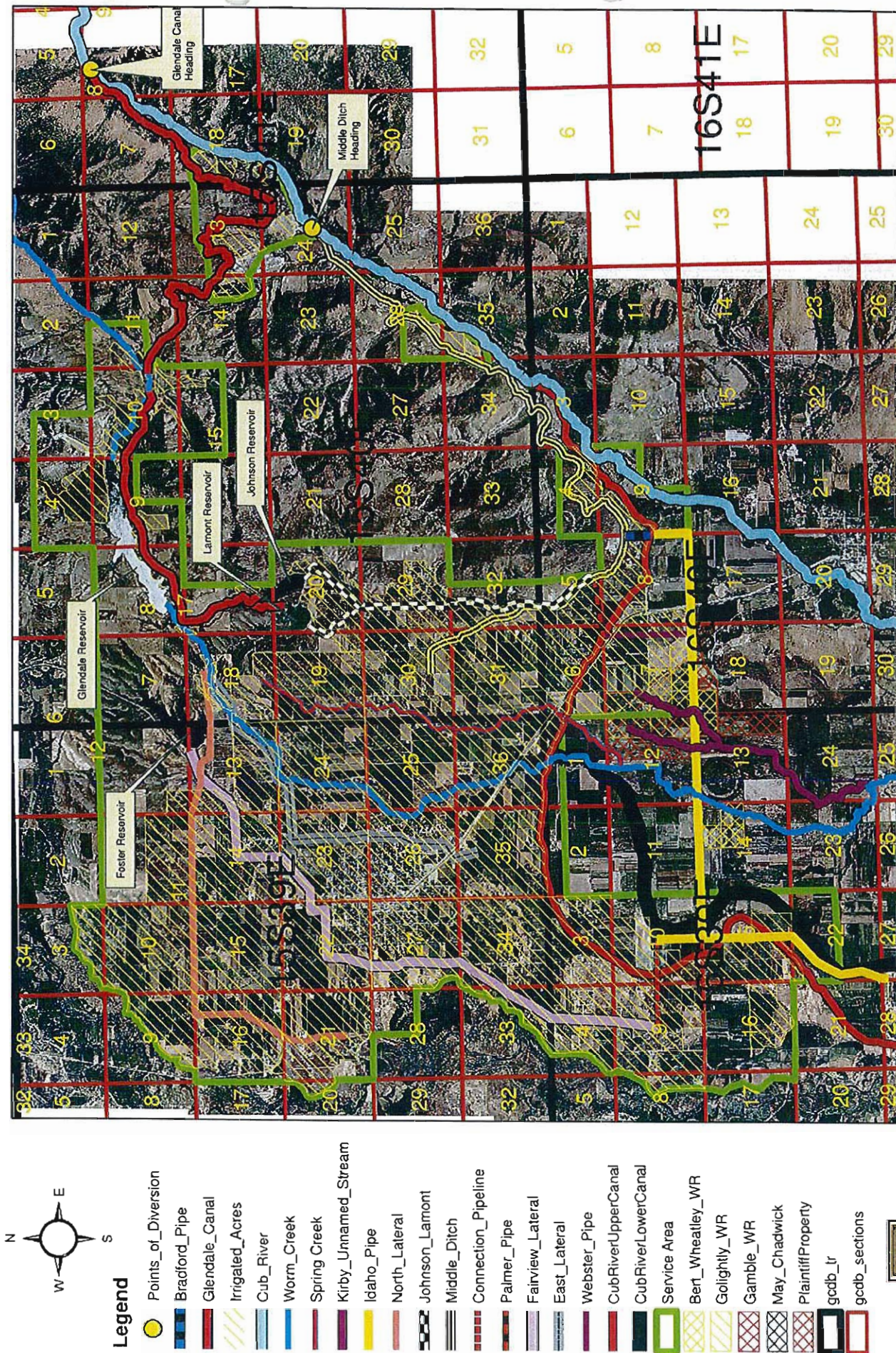
PRESTON-WHITNEY TEMPORARY TRANSFER - MAP 2



PRESTON-WHITNEY TEMPORARY TRANSFER - MAP 3



PRESTON-WHITNEY TEMPORARY TRANSFER - MAP 4





Holden Kidwell
Hahn & Crapo P.L.L.C.
L A W O F F I C E S

RECEIVED

JUL 19 2010

DEPARTMENT OF
WATER RESOURCES

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July 16, 2010

Gary Spackman
Interim Director
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720-0098

RE: Response to Letter Dated July 8, 2010, Regarding Temporary Change Application
Submitted on Behalf of Preston-Whitney Irrigation Company.

Dear Director Spackman:

Thank you for your letter dated July 8, 2010, regarding the Temporary Change Application I submitted on behalf of my clients, Preston-Whitney Irrigation Company. We received the letter on July 12, 2010. Your letter provided an additional fourteen (14) days within which I could provide additional facts that would support the Temporary Change Application.

After reviewing your letter, and the initial Temporary Change Application we submitted, we believe the application should have provided greater detail and should have clarified that for all practical purposes, the only water right proposed to be temporarily changed under the application is Water Right No. 13-2. On that end, we wish to submit an Amended Temporary Change Application for the Department's consideration to clarify the matters requested in your letter, and to better explain what was contemplated under the Temporary Change Application.

We note at the outset that the Amended Temporary Change Application contains more specificity and factual information to assist you and the Department in its processing. Of particular importance to my clients is that with the current dwindling water supply, and the drought conditions that exist in Franklin County, the temporary transfer will likely not be of any affect after August 15th at the latest of this year, and will likely be diminished by August 1st. We therefore request that the application be addressed immediately.

As cited in your letter, Idaho Code § 42-222A sets for the standards for submission of Temporary Change Applications. An order designating Franklin County as a drought declaration county was executed on May 20, 2010, by yourself, and May 24th by Governor Butch Otter. As you well understand, drought conditions present unique circumstances to water users, and the statutory provisions providing some flexibility and leeway in assisting those water users as provided in Idaho Code § 42-222A. As I review this statute, I understand that there are four limitations placed upon an applicant for a Temporary Change Application. They are:

1. There is no information that the Change Application will injure other water rights;
2. Replacement water supply must be to lands that normally have a full water supply except for drought conditions;
3. The Temporary Change Application does not authorize use for a new project; and
4. The Temporary Change Application is not an expansion of the water rights.

Given the issues raised by water users from Spring Creek, which is not a direct tributary to Cub River, I will address each of these in turn to ensure you have adequate information relative to this Temporary Change Application.

I. There Will Be No Injury to Other Water Rights, Particularly Those Users on Spring Creek, Who Recently Filed a Petition for Water Rights Administration.

On behalf of individuals that have water rights out of Spring Creek and Worm Creek, Scott Campbell filed a number of recent petitions with the Department. In terms of the Amended Temporary Change Application and any allegation of injury, it may prove useful to provide some background information regarding Preston-Whitney's system with the attached Maps 1-4.

Map 1 shows the four (4) major reservoirs in the Preston area, and the headings to the Middle Ditch (which is the currently authorized point of diversion for Water Right No. 13-2), and the Glendale Canal, which is the proposed location to divert Water Right No. 13-2 under the Temporary Change Application. The green line shows the proposed service area for Preston-Whitney under this Transfer Application. Also shown on Map 1 is the location of the places of use for the Spring Creek users represented by Mr. Campbell. Lastly, natural watercourses are depicted on the map, including Cub River, Worm Creek, the Kirby Drainage, and Spring Creek.

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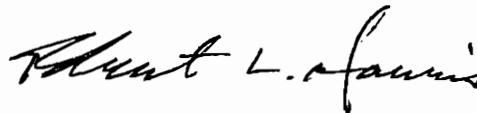
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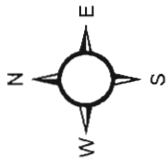


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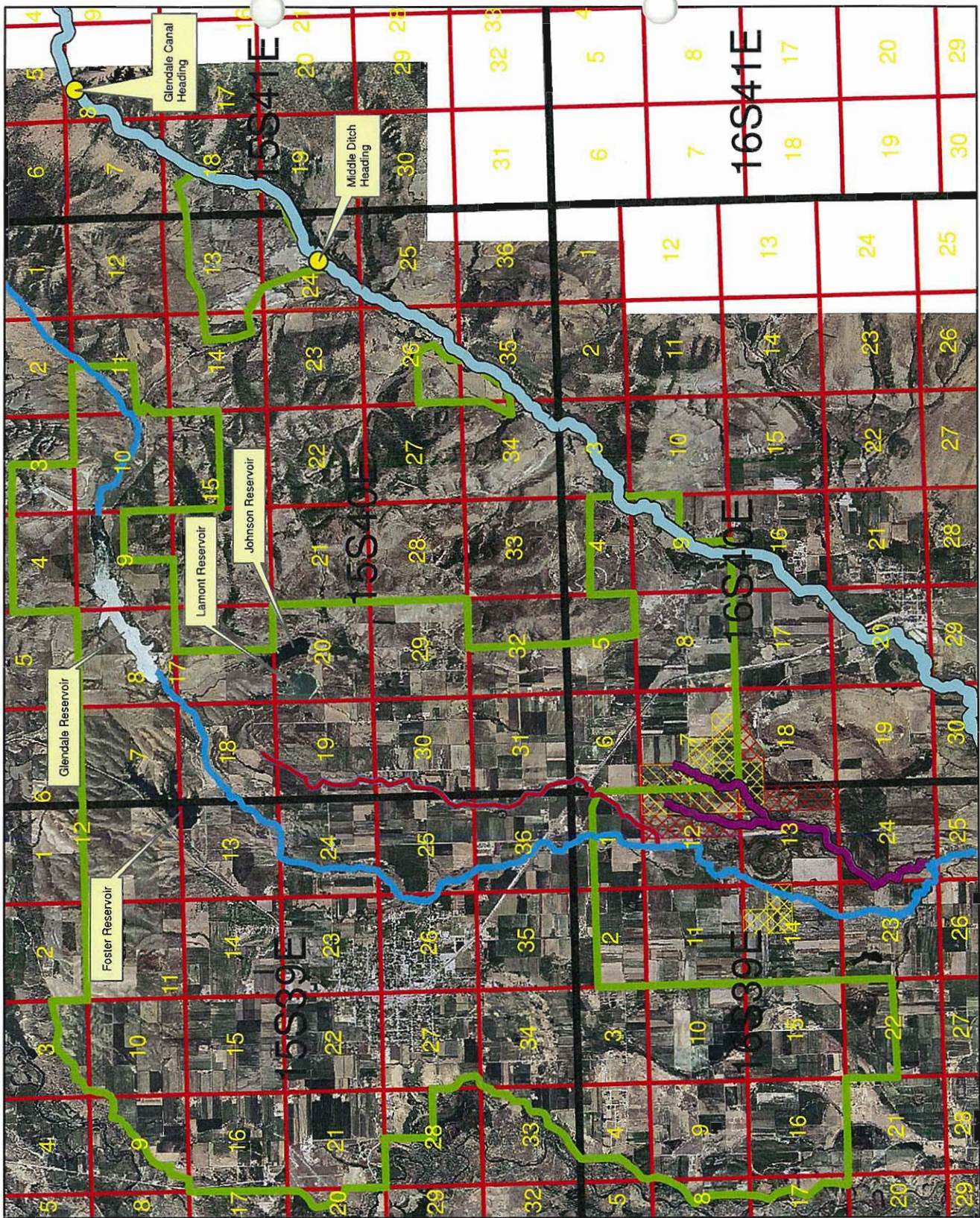
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United States Department of the Interior - Bureau of Land Management

PRESTON-WHITNEY TEMPORARY TRANSFER - MAP 1

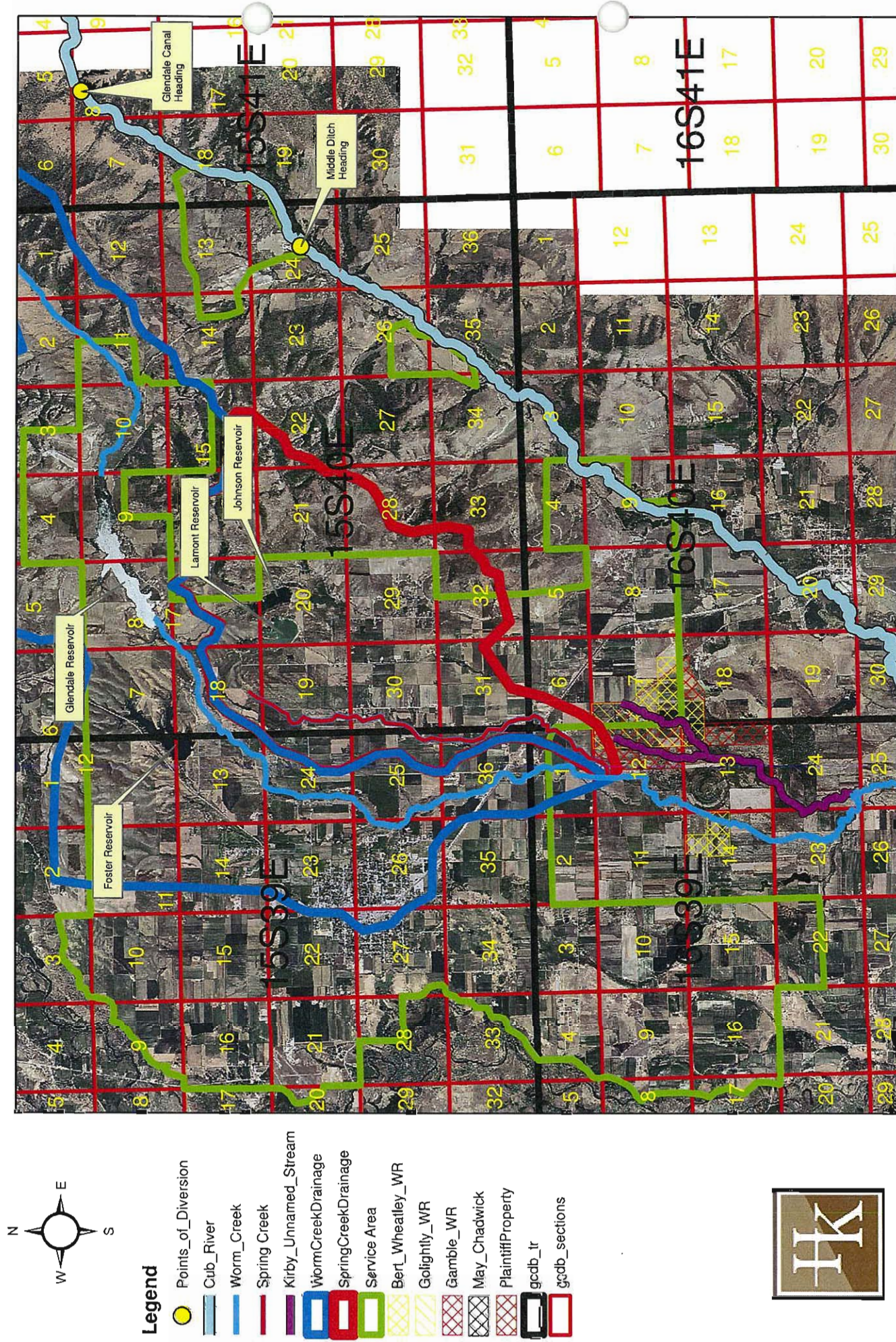


Legend

- Points_of_Diversion
- Cub_River
- Worm_Creek
- Spring_Creek
- Kirby_Unnamed_Stream
- Service Area
- Bert_Wheatley_WR
- Golightly_WR
- Gamble_WR
- May_Chadwick
- PlaintiffProperty
- gcdb_tr
- gcdb_sections

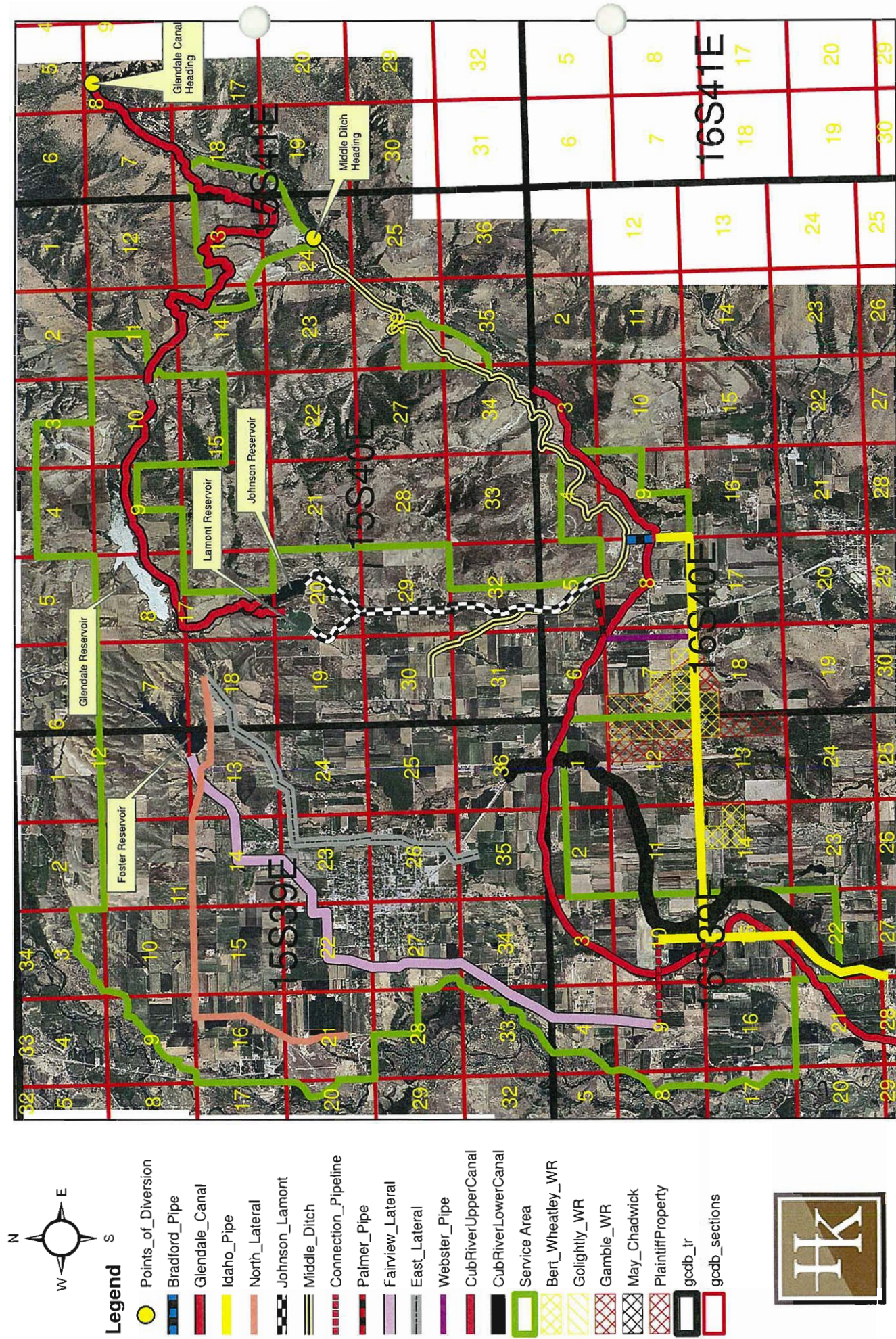


PRESTON-WHITNEY TEMPORARY TRANSFER - MAP 2

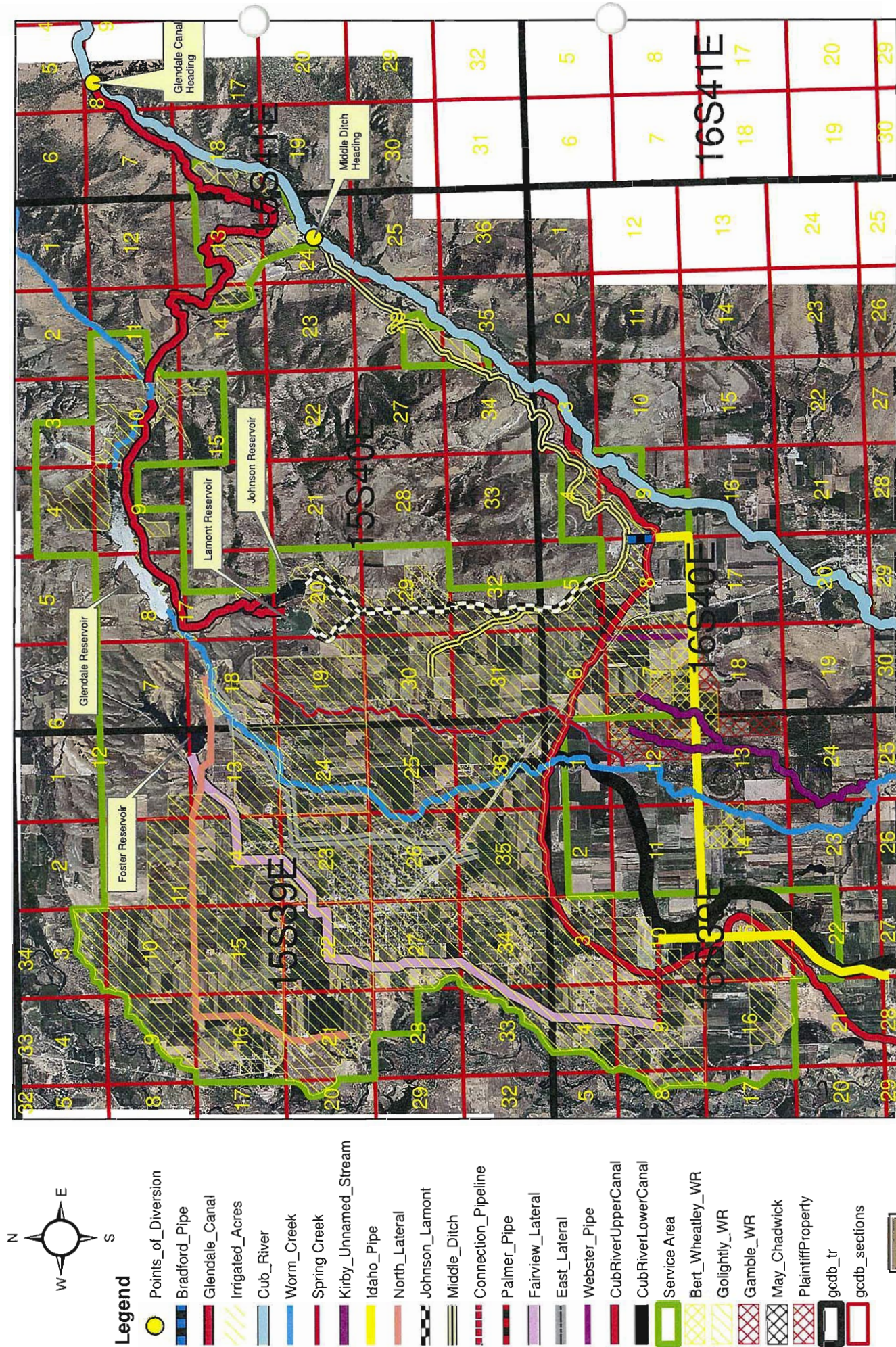


Legend

- Points_of_Diversion
- Bradford_Pipe
- Glendale_Canal
- Idaho_Pipe
- North_Lateral
- Johnson_Lamont
- Middle_Ditch
- Connection_Pipeline
- Palmer_Pipe
- Fairview_Lateral
- East_Lateral
- Webster_Pipe
- CubRiverUpperCanal
- CubRiverLowerCanal
- Service Area
- Bert_Wheatley_WR
- Golightly_WR
- Gamble_WR
- May_Chadwick
- PlaintiffProperty
- gddb_tr
- gddb_sections



PRESTON-WHITNEY TEMPORARY TRANSFER - MAP 4



STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

AMENDED TEMPORARY CHANGE APPLICATION
(To change point of diversion, place of use or purpose of use)

Name of Applicant Preston-Whitney Irrigation Co. Phone _____

Post Office address PO Box 311, Preston, ID 83263

A. PURPOSE OF TRANSFER

1. ☐ Change point of diversion ☒ Add diversion point(s) ☐ Change place of use
☐ Change purpose of use ☐ Other

2. Describe the proposed change(s) and the reason(s) thereof: To allow the Glendale Canal to be used as a POD for Water Right No. 13-2 between July 15th and August 15th, 2010. The use of the Glendale Canal further up Cub River for diversion of this water right better allows the Applicant to distribute water through its current distribution system. The Middle Ditch point of diversion is not capable of delivering water to all of the Applicant's shareholders. While the additional point of diversion is not on a separate stream (both the Glendale Canal and the Middle Ditch are on Cub River), use of Glendale Canal under Water Right 13-2 will allow more efficient water delivery, and allow for Water Right 13-2 to be better utilized. This will provide an additional water supply under Water Right No. 13-2 to replace water that would otherwise remain undiverted and proceed down Cub River and into the Bear River. This water supply is critical to Preston-Whitney during the month of July, especially this year, in drought-stricken Franklin County.

B. DESCRIPTION OF RIGHT(S) OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

1. Right Number Priority Amount (cfs/ac-ft) Nature of Use Period of use
13-2 04/01/1882 30 cfs Irrigation 04/01 To 10/31
To

2. Total amount of water being transferred 30 Cubic feet per second and/or _____ Acre-feet per annum.

3. Source of water Cub River Tributary to Bear River

4. Point(s) of Diversion:

Ident No.	Lot	1/4	1/4	1/4	Sec	Twp	Rge	County	Local name for diversion
		NW	NE	NW	8	15S	41E	FRANKLIN	CUB RIVER/GLENDALE CANAL
		NW	NW	NE	24	15S	40E	FRANKLIN	MIDDLE DITCH

5. Lands irrigated or place of use:

Twp	Rge	Sec	NE 1/4				NW 1/4				SW 1/4				SE 1/4				TOTALS
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
			SEE POU DESCRIPTION DEPICTED ON ATTACHED MAP																

Total Acres: 17857

6. General Information:

- a. Who owns the water right to be changed? Applicant
- b. Describe the arrangement allowing use of the right: Applicant owns the water rights and distributes the water to its stockholders.
- c. Describe the affect on the land now irrigated if the change is approved pursuant to this application:
No change on historically irrigated lands will occur. This temporary change will provide a replacement water supply to currently irrigated lands.
- d. Has the water right sought to be transferred been used this year? Yes If yes, explain. The Applicant has diverted water for irrigation purposes under this water right.
- e. Absent the changes, how would the right be used for the remainder of the year? The rights would be used as ordered by IDWR, which limits the location where they can be diverted. Also, as a practical matter, when supplies diminish in Cub River in early August, the water right sought to be changed by this temporary transfer will be unavailable pursuant to priority administration as other senior water rights will call for deliveries. The temporary change is therefore only sought until August 15th of this year, or until this water right is not in priority.
- f. Describe other water rights used for the same purpose. _____
13-2108, 13-2288, 13-2288A, 13-2291, and 13-2298 are used by the Applicant for irrigation purposes.
- g. Remarks: This temporary transfer will permit the Applicant to better utilize its water supply at its various diversion points.

I hereby assume all risk in accordance with Section 42-222A, Idaho Code, and assert that no one will be injured by such change and that the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge. I understand that any willful misrepresentations made in this application may result in voiding its approval.

Robert L. Jarvis ATTORNEY FOR
(Signature of Applicant) APPLICANT

FOR DEPARTMENT USE ONLY

Received by: _____ Date _____ Fee _____

Received _____ # _____ Recommend: _____ Approval _____ Deny _____

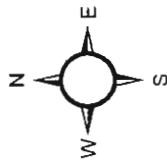
Watermaster recommendation _____

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Temporary Change Application No. _____
and said application is hereby _____, subject to the following limitations and conditions:

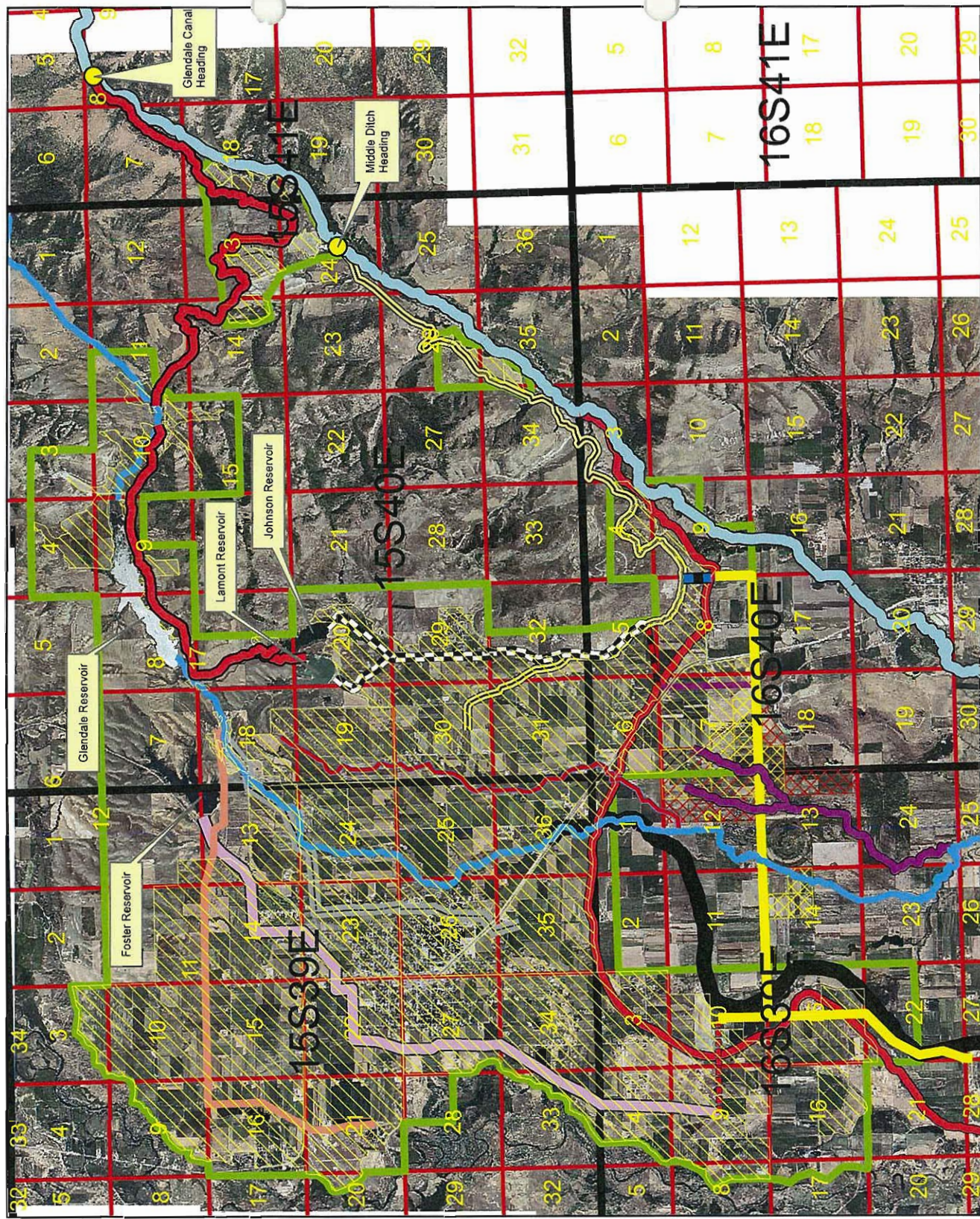
Witness my hand this _____ day of _____, _____:

PRESTON-WHITNEY TEMPORARY TRANSFER



Legend

- Points_of_Diversion
- Bradford_Pipe
- Glendale_Canal
- Irrigated_Acres
- Cub_River
- Worm_Creek
- Spring_Creek
- Kirby_Unnamed_Stream
- Idaho_Pipe
- North_Lateral
- Johnson_Lamont
- Middle_Ditch
- Connection_Pipeline
- Palmer_Pipe
- Fairview_Lateral
- East_Lateral
- Webster_Pipe
- CubRiverUpperCanal
- CubRiverLowerCanal
- Service Area
- Bert_Wheatley_WR
- Golightly_WR
- Gamble_WR
- May_Chadwick
- PlaintiffProperty
- gcdb_tr
- gcdb_sections





State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

July 8, 2010

Rob Harris
HOLDEN KIDWELL
PO Box 50130
Idaho Falls, ID 83405-0130

Re: Application for Temporary Transfer for Preston-Whitney Irrigation Co.

Dear Mr. Harris:

I reviewed an application for temporary transfer filed by the Preston-Whitney Irrigation Company (Preston-Whitney). You signed the application. I also reviewed an application for permanent transfer filed by Preston-Whitney and protested by Eldon Golightly. The application for temporary transfer seeks the addition of points of diversion also proposed by the application for permanent transfer. The application for temporary transfer describes the purpose of the temporary transfer:

. . . To allow the Glendale Canal to be used as a POD for Water Right No. 13-2 and the Middle Ditch as a POD for Water Right NOs. 13-3 and 13-2104. There is a pending formal transfer to accomplish this change in order for the water rights to comport with the Applicant's historical use (Transfer No. 75705) of using multiple PODs.

In other words, the application for temporary transfer seeks partial approval of the change sought by the application for permanent transfer during the pendency of the application and protest resolution.

Idaho Code § 42-222A(6) states:

Temporary transfers shall only be approved for the purpose of providing a replacement water supply to lands or other uses which normally have a full water supply except for a drought conditions.

As I read the application for temporary transfer, it does not propose a "replacement water supply." The application also does not assert that drought conditions have resulted in less than a full water supply. The application for temporary transfer seeks recognition of alleged historical practices. These factual matters are likely the subject of the protest filed against the application for permanent transfer.

Rob Harris
July 8, 2010
Page 2

Without additional facts, the limitations of Idaho Code § 42-222A(6) require that I deny the application for temporary transfer. This letter seeks any additional information you may have to support the application. Any additional facts must be submitted within 14 days of the date of this letter. Please carbon copy all documents sent to the Department to Scott Campbell, counsel for Eldon Golightly.

Sincerely,



Gary Spackman

Cc: Scott Campbell
Tim Luke
Garrick Baxter ✓
Lyle Swank
James Cefalo
Randy Budge

COPY

Form 42-222A
12/99COPY
Ident. No. _____STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

RECEIVED

JUN 24 2010

Department of Water Resources
Eastern RegionTEMPORARY CHANGE APPLICATION
(To change point of diversion, place of use or purpose of use)Name of Applicant Preston-Whitney Irrigation Co. Phone _____Post Office address PO Box 311, Preston, ID 83263

A. PURPOSE OF TRANSFER

1. ☐ Change point of diversion ☐ Add diversion point(s) ☐ Change place of use
☐ Change purpose of use ☒ Other - Add Point of Diversion
2. Describe the proposed change(s) and the reason(s) thereof: To allow the Glendale Canal to be used as a POD for Water Right No. 13-2 and the Middle Ditch as a POD for Water Right Nos. 13-3 and 13-2104. There is a pending formal transfer to accomplish this change in order for the water rights to comport with the Applicant's historical use (Transfer No. 75705) of using multiple PODs.

B. DESCRIPTION OF RIGHT(S) OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

1.

Right Number	Priority	Amount (cfs/ac-ft)	Nature of Use	Period of use
<u>13-2</u>	<u>04/01/1882</u>	<u>30 cfs</u>	<u>Irrigation</u>	<u>04/01 To 10/31</u>
<u>13-3</u>	<u>04/01/1882</u>	<u>25 cfs</u>	<u>Irrigation</u>	<u>04/01 To 10/31</u>
<u>13-2104</u>	<u>03/14/1924</u>	<u>25 cfs</u>	<u>Irrigation</u>	<u>04/01 To 10/31</u>
2. Total amount of water being transferred 80 Cubic feet per second and/or _____ Acre-feet per annum.
3. Source of water Cub River Tributary to Bear River

4. Point(s) of Diversion:

Ident No.	Lot	1/4	1/4	1/4	Sec	Twp	Rge	County	Local name for diversion
		NW	NE	NW	8	15S	41E	FRANKLIN	CUB RIVER/GLENDALE CANAL
		NW	NW	NE	24	15S	40E	FRANKLIN	MIDDLE DITCH

5. Lands irrigated or place of use:

Twp	Rge	Sec	NE 1/4				NW 1/4				SW 1/4				SE 1/4				TOTALS
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
			SEE POU DESCRIPTION FROM TRANSFER NO. 75705																

Total Acres: _____

6. General Information:

- a. Who owns the water right to be changed? Applicant
- b. Describe the arrangement allowing use of the right: Applicant owns the water rights and distributes the water to its stockholders.
- c. Describe the affect on the land now irrigated if the change is approved pursuant to this application:
No effects on historically irrigated lands.
- d. Has the water right sought to be transferred been used this year? Yes If yes, explain. The Applicant has diverted water for irrigation purposes.
- e. Absent the changes, how would the right be used for the remainder of the year? The rights would be used as ordered by IDWR, which limits the location where they can be diverted.
- f. Describe other water rights used for the same purpose. 13-2108, 13-2288, 13-2288A, 13-2291, 13-2298
- g. Remarks: This temporary transfer will permit the Applicant to better utilize its water supply at its various diversion points.

I hereby assume all risk in accordance with Section 42-222A, Idaho Code, and assert that no one will be injured by such change and that the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge. I understand that any willful misrepresentations made in this application may result in voiding its approval.

Robert L. James, Attorney
(Signature of Applicant)

FOR DEPARTMENT USE ONLY

Received by: _____ Date 6/24/10 Fee _____

Received Se # E035932 Recommend: _____ Approval _____ Deny _____

Watermaster recommendation _____

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Temporary Change Application No. _____ and said application is hereby _____ subject to the following limitations and conditions:

Witness my hand this _____ day of _____, _____:

For the Director

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

RECEIVED

JUN 24 2010

Department of Water Resources
Eastern Region

TEMPORARY CHANGE APPLICATION
(To change point of diversion, place of use or purpose of use)

Name of Applicant Preston-Whitney Irrigation Co. Phone _____

Post Office address PO Box 311, Preston, ID 83263

A. PURPOSE OF TRANSFER

1. ☐ Change point of diversion ☐ Add diversion point(s) ☐ Change place of use
☐ Change purpose of use ☒ Other - Add Point of Diversion

2. Describe the proposed change(s) and the reason(s) thereof: To allow the Glendale Canal to be used as a POD for Water Right No. 13-2 and the Middle Ditch as a POD for Water Right Nos. 13-3 and 13-2104. There is a pending formal transfer to accomplish this change in order for the water rights to comport with the Applicant's historical use (Transfer No. 75705) of using multiple PODs.

B. DESCRIPTION OF RIGHT(S) OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

Right Number	Priority	Amount (cfs/ac-ft)	Nature of Use	Period of use
<u>13-2</u>	<u>04/01/1882</u>	<u>30 cfs</u>	<u>Irrigation</u>	<u>04/01 To 10/31</u>
<u>13-3</u>	<u>04/01/1882</u>	<u>25 cfs</u>	<u>Irrigation</u>	<u>04/01 To 10/31</u>
<u>13-2104</u>	<u>03/14/1924</u>	<u>25 cfs</u>	<u>Irrigation</u>	<u>04/01 To 10/31</u>

2. Total amount of water being transferred 80 Cubic feet per second and/or _____ Acre-feet per annum.

3. Source of water Cub River Tributary to Bear River

4. Point(s) of Diversion:

Ident No.	Lot	1/4	1/4	1/4	Sec	Twp	Rge	County	Local name for diversion
		NW	NE	NW	8	15S	41E	FRANKLIN	CUB RIVER/GLENDALE CANAL
		NW	NW	NE	24	15S	40E	FRANKLIN	MIDDLE DITCH

5. Lands irrigated or place of use:

Twp	Rge	Sec	NE 1/4				NW 1/4				SW 1/4				SE 1/4				TOTALS
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
			SEE POU DESCRIPTION FROM TRANSFER NO. 75705																

Total Acres: _____

6. General Information:

- a. Who owns the water right to be changed? Applicant
- b. Describe the arrangement allowing use of the right: Applicant owns the water rights and distributes the water to its stockholders.
- c. Describe the affect on the land now irrigated if the change is approved pursuant to this application:
No effects on historically irrigated lands.
- d. Has the water right sought to be transferred been used this year? Yes If yes, explain. The Applicant has diverted water for irrigation purposes.
- e. Absent the changes, how would the right be used for the remainder of the year? The rights would be used as ordered by IDWR, which limits the location where they can be diverted.
- f. Describe other water rights used for the same purpose. 13-2108, 13-2288, 13-2288A, 13-2291, 13-2298
- g. Remarks: This temporary transfer will permit the Applicant to better utilize its water supply at its various diversion points.

I hereby assume all risk in accordance with Section 42-222A, Idaho Code, and assert that no one will be injured by such change and that the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge. I understand that any willful misrepresentations made in this application may result in voiding its approval.

Robert L. Jannis, Attorney
(Signature of Applicant)

FOR DEPARTMENT USE ONLY

Received by: _____ Date 6/24/10 Fee _____

Receipted Se # E035932 Recommend: _____ Approval _____ Deny _____

Watermaster recommendation _____

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Temporary Change Application No. _____ and said application is hereby _____, subject to the following limitations and conditions:

Witness my hand this _____ day of _____, _____:

For the Director

Gibson, Deborah

From: Cox, Sharla
Sent: Wednesday, June 30, 2010 9:40 AM
To: Gibson, Deborah
Subject: Temporary Transfer for Preston Whitney

Here you go. The rest of the file will be scanned today. I will get the file in the mail tonight. Keep us informed of the outcome. I am sure James would like to be informed of it.



img-630093437.pdf

Sharla

Sharla Cox
Administrative Assistant
Idaho Department of Water Resources
900 N. Skyline Dr. Ste. A
Idaho Falls ID 83402
208-525-7161 - telephone
208-525-7177 - fax
sharla.cox@idwr.idaho.gov

RECEIVED

JUN 29 2010

Department of Water Resources
Eastern Region

Attorneys for Eldon and Mary Ann Golightly,
Grant and Linda Chadwick, Bert and Laura Wheatley
Seth and Beth Wheatley, and Wheatley Properties, LLC

Scott L. Campbell, ISB No. 2251
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
23868.0000

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN RE:

PRESTON-WHITNEY IRRIGATION CO.
TEMPORARY CHANGE APPLICATION,
JUNE 24, 2010

MOTION FOR DISQUALIFICATION OF
OFFICERS HEARING CONTESTED CASES

Petitioners, Eldon and Mary Ann Golightly, Grant and Linda Chadwick, Bert and Laura Wheatley, Seth and Beth Wheatley, and Wheatley Properties, LLC, (hereinafter, collectively "Petitioners"), hereby assert a blanket disqualification for cause of all employees of the Idaho Department of Water Resources (the "Department"), except for the Director, pursuant to Idaho Code Section 67-5252 and IDAPA 37.01.01.412.

The basis for this request for blanket disqualification of all employees of the agency hearing this contested case is the "substantial prior involvement in the matter by

SCANNED

JUN 30 2010

numerous Department employees, including Tim Luke, James Cefalo, and other employees who have yet to be specifically identified because discovery has not occurred. Due to the status of the employees of the agency in this matter, and their substantial prior involvement, proceeding to a hearing before any of the employees of the Department, except for the Director would be prejudicial to the interests of Petitioners, because of potential for bias and pre-decision by Department employees.

Consequently, Petitioners request that all hearings in this matter be conducted by the Director, Idaho Department of Water Resources.

DATED this 29th day of June, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Scott L. Campbell
Scott L. Campbell – Of the Firm
Attorneys for Eldon and Mary Ann
Golightly, Grant and Linda Chadwick,
Bert and Laura Wheatley, Seth and Beth
Wheatley, and Wheatley Properties, LLC,
Petitioners

SCANNED

JUN 30 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2010, I caused a true and correct copy of the foregoing **MOTION FOR DISQUALIFICATION OF OFFICERS HEARING CONTESTED CASES** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720

() U.S. Mail, Postage Prepaid
(☒) Hand Delivered
() Overnight Mail
() Facsimile

IDAHO DEPARTMENT OF WATER RESOURCES
Eastern Region Office
900 N. Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

() U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
(☒) Facsimile

HOLDEN KIDWELL HAHN & CRAPO
P.O. Box 50130
Idaho Falls, ID 83405

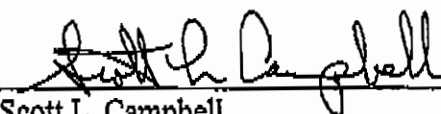
() U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
(☒) Facsimile

PRESTON-WHITNEY IRRIGATION CO.
P.O. Box 311
Preston, ID 83263

(☒) U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
() Facsimile

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Land Management
ATTN: Fredric W. Price
1387 S. Vinnell Way
Boise, ID 83709

(☒) U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
() Facsimile



Scott L. Campbell

SCANNED
JUN 30 2010

RECEIVED

JUN 29 2010

Department of Water Resources
Eastern Region

Attorneys for Eldon and Mary Ann Golightly,
Grant and Linda Chadwick, Bert and Laura Wheatley
Seth and Beth Wheatley, and Wheatley Properties, LLC

Scott L. Campbell, ISB No. 2251
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
23868.0000

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN RE:

PRESTON-WHITNEY IRRIGATION CO.
TEMPORARY CHANGE APPLICATION,
JUNE 24, 2010

MOTION FOR STAY

Eldon and Mary Ann Golightly, Grant and Linda Chadwick, Bert and Laura Wheatley, Seth and Beth Wheatley, and Wheatley Properties, LLC, (hereinafter, collectively "Petitioners"), pursuant to IDAPA 37.01.01.260, hereby move for an order of the Director of the Idaho Department of Water Resources (the "Department"), staying all further processing of the Temporary Change Application filed by Preston-Whitney Irrigation Co. on June 24, 2010 (Exhibit A hereto) until a hearing before the Director has taken place at which time the

SCANNED
JUN 30 2010

allegations of the Petition for Hearing filed in this matter can be heard and be determined by the Director.

If the Temporary Change Application is processed by the Eastern Region of the Idaho Department of Water Resources pending a hearing before the Director, an unfair advantage will be obtained by Preston-Whitney Irrigation Co. as to the allegations of the Petition for Hearing. Additionally, the Petitioners will be prejudiced by such processing because of the pre-determination already communicated by James Cefalo of the Eastern Region Office of the Department at the Second Pre-Hearing Conference in Transfer Proceeding No. 75705 on June 28, 2010. At said pre-hearing conference, James Cefalo indicated that the Temporary Change Application would likely be approved by the Department. Consequently, an immediate stay preventing such unjustified approval, should be issued pending resolution of the legal and factual issues asserted by the Petitioners in the Petition for Hearing.

DATED this 29th day of June, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Scott L. Campbell
Scott L. Campbell – Of the Firm
Attorneys for Eldon and Mary Ann
Golightly, Grant and Linda Chadwick,
Bert and Laura Wheatley, Seth and Beth
Wheatley, and Wheatley Properties, LLC,
Petitioners

SCANNED
JUN 30 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2010, I caused a true and correct copy of the foregoing MOTION FOR STAY to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile

IDAHO DEPARTMENT OF WATER RESOURCES
Eastern Region Office
900 N. Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile

HOLDEN KIDWELL HAHN & CRAPO
P.O. Box 50130
Idaho Falls, ID 83405

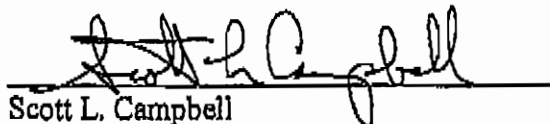
☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile

PRESTON-WHITNEY IRRIGATION CO.
P.O. Box 311
Preston, ID 83263

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Land Management
ATTN: Fredric W. Price
1387 S. Vinnell Way
Boise, ID 83709

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile



Scott L. Campbell

SCANNED
JUN 30 2010

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

RECEIVED

JUN 24 2010

Department of Water Resources
Eastern RegionTEMPORARY CHANGE APPLICATION
(To change point of diversion, place of use or purpose of use)Name of Applicant Preston-Whitney Irrigation Co. Phone _____Post Office address PO Box 311, Preston, ID 83263

A. PURPOSE OF TRANSFER

1. ☐ Change point of diversion ☐ Add diversion point(s) ☐ Change place of use
☐ Change purpose of use ☒ Other - Add Point of Diversion
2. Describe the proposed change(s) and the reason(s) thereof: To allow the Glendale Canal to be used as a POD for Water Right No. 13-2 and the Middle Ditch as a POD for Water Right Nos. 13-3 and 13-2104. There is a pending formal transfer to accomplish this change in order for the water rights to comport with the Applicant's historical use (Transfer No. 75705) of using multiple PODs.

B. DESCRIPTION OF RIGHT(S) OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

1.

Right Number	Priority	Amount (cfs/ac-ft)	Nature of Use	Period of use
<u>13-2</u>	<u>04/01/1882</u>	<u>30 cfs</u>	<u>Irrigation</u>	<u>04/01 To 10/31</u>
<u>13-3</u>	<u>04/01/1882</u>	<u>25 cfs</u>	<u>Irrigation</u>	<u>04/01 To 10/31</u>
<u>13-2104</u>	<u>03/14/1924</u>	<u>25 cfs</u>	<u>Irrigation</u>	<u>04/01 To 10/31</u>
2. Total amount of water being transferred 80 Cubic feet per second and/or _____ Acre-feet per annum.
3. Source of water Cub River Tributary to Bear River
4. Point(s) of Diversion:

Ident No.	Lot	1/4	1/4	1/4	Sec	Twp	Rge	County	Local name for diversion
		NW	NE	NW	8	15S	41E	FRANKLIN	CUB RIVER/GLENDALE CANAL
		NW	NW	NE	24	15S	40E	FRANKLIN	MIDDLE DITCH

5. Lands irrigated or place of use:

Twp	Rge	Sec	NE 1/4				NW 1/4				SW 1/4				SE 1/4				TOTALS
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
																			SCANNED
			SEE POU DESCRIPTION FROM TRANSFER NO. 75705																JUN 30 2010

6. General Information:

- a. Who owns the water right to be changed? Applicant
- b. Describe the arrangement allowing use of the right: Applicant owns the water rights and distributes the water to its stockholders.
- c. Describe the affect on the land now irrigated if the change is approved pursuant to this application: No effects on historically irrigated lands.
- d. Has the water right sought to be transferred been used this year? Yes If yes, explain. The Applicant has diverted water for irrigation purposes.
- e. Absent the changes, how would the right be used for the remainder of the year? The rights would be used as ordered by IDWR, which limits the location where they can be diverted.
- f. Describe other water rights used for the same purpose. 13-2108, 13-2288, 13-2288A, 13-2291, 13-2298
- g. Remarks: This temporary transfer will permit the Applicant to better utilize its water supply at its various diversion points.

I hereby assume all risk in accordance with Section 42-222A, Idaho Code, and assert that no one will be injured by such change and that the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge. I understand that any willful misrepresentations made in this application may result in voiding its approval.

Robert L. James, Attorney
(Signature of Applicant)

FOR DEPARTMENT USE ONLY

Received by: _____ Date _____ Fee _____

Receipted _____ # _____ Recommend: _____ Approval _____ Deny _____

Watermaster recommendation _____

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Temporary Change Application No. _____ and said application is hereby _____, subject to the following limitations and conditions:

Witness my hand this _____ day of _____:

SCANNED

JUN 30 2010

For the Director

RECEIVED

JUN 29 2010

Department of Water Resources
Eastern Region

Attorneys for Eldon and Mary Ann Golightly,
Grant and Linda Chadwick, Bert and Laura Wheatley
Seth and Beth Wheatley, and Wheatley Properties, LLC

Scott L. Campbell, ISB No. 2251
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
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Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
23868.0000

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN RE:

PRESTON-WHITNEY IRRIGATION CO.
TEMPORARY CHANGE APPLICATION,
JUNE 24, 2010

PETITION FOR HEARING

Pursuant to Idaho Code Section 42-1701A(3) and Idaho Department of Water Resources Rules of Procedure, IDAPA 37.01.01.152 and 230, Eldon and Mary Ann Golightly, Grant and Linda Chadwick, Bert and Laura Wheatley, Seth and Beth Wheatley, and Wheatley Properties, LLC, (hereinafter, collectively "Petitioners"), hereby request an immediate hearing by the Director of the Idaho Department of Water Resources (the "Department").

SCANNED

JUN 30 2010

**I.
FACTUAL ALLEGATIONS**

The Petitioners are presently involved as protestants in Transfer No. 75705 involving the Preston-Whitney Irrigation Co. During the initial Pre-Hearing Conference regarding this transfer, conducted on May 3, 2010, Tim Luke of the Department raised issues involving the use of Cub River water through the points of diversion and delivery systems identified in the Temporary Change Application filed before the Department on June 24, 2010 (see Exhibit A hereto). During that Pre-Hearing Conference, the Petitioners herein took the position that no deliveries of Cub River water through the middle ditch (now pipeline) of the Preston-Whitney Irrigation Co. could legally occur until the Transfer Application No. 75705 was approved.

On June 28, 2010, Petitioners attended a Second Pre-Hearing Conference involving Transfer No. 75705. At that time, James Cefalo, of the Eastern Region Office of the Department provided a copy of the Temporary Change Application, dated June 24, 2010 (see Exhibit A). This Temporary Change Application attempts to circumvent the Department's prior determination and seeks approval that adding points of diversion involving Cub River water for the Preston-Whitney Irrigation Co. be accomplished by a temporary change application due to a subsequent drought declaration which the Department's Director has issued.

Based upon these circumstances, Petitioners assert that Idaho Code Section 42-222A, cannot be legally used to allow a temporary change. James Cefalo advised at the June 28, 2010 Second Pre-Hearing Conference that there would be no reason not to approve the temporary change.

Petitioners assert that Idaho Code Section 42-222A does not allow the temporary change requested by Preston-Whitney Irrigation Co. under these circumstances.

A. Idaho Code Section 42-222A

Under this provision of the Idaho Code, "the director of the Department of Water Resources is authorized to allow temporary changes to the use of water rights consisting of temporary transfers to change point of diversion, place and purpose of use of valid existing water rights or temporary exchanges of water authorized to be diverted under water right, as provided in Section 42-240, Idaho Code, when the director of the Department of Water Resources determines that such changes as can be accomplished in accordance with provisions of this section."

Based upon subsection (3) of Idaho Code Section 42-222A, approval of this temporary change is inappropriate. Subsection (3) states in pertinent part:

A temporary change may be approved upon completion of the application form, payment of the filing fee and a determination by the director of the Department of Water Resources that the proposed change can be properly administered and there is no information that the change will injure any other water right.

Under the Idaho Supreme Court decision of *Jenkins v. State of Idaho Department of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982) to undermine the priority date of a water right constitutes "an undeniable injury to that water right holder." *Id.* at 388, 1260.

Petitioners have water rights to utilization of water in Spring Creek:

<u>Water Right No.</u>	<u>Priority Date</u>
13-00062	5/15/1902
13-00216	8/31/1903
13-00218	4/1/1872
13-00221	4/1/1872
13-00224	4/1/1959
13-00225	4/1/1959
13-00256	4/1/1948
13-00258	8/31/1903
13-00127	4/1/1872
13-00286	8/1/1960
13-00287	8/1/1960

SCANNED
JUN 30 2010

13-00288
13-04130

7/1/1930
4/1/1910

The attempt by Preston-Whitney Irrigation Co. to add the point of diversion for Cub River rights 13-00002, 13-00003, will insert senior priority water rights (1882) into the Worm Creek Drainage, thereby "undermining the priority dates" of the water rights of Petitioners in Spring Creek. Those Spring Creek water rights have priority dates which are junior to the 1882 priority dates of Preston-Whitney if the Temporary Change Application of Cub River water rights is approved. This constitutes a *per se* injury under the *Jenkins* case. Consequently, the Temporary Change Application cannot be approved under the requirements of Idaho Code Section 42-222A(3).

Additionally, Idaho Code Section 42-222A(6) provides as follows:

Temporary changes shall only be approved for the purpose of providing a replacement water supply to lands or other uses which normally have a full water supply except for a drought condition. Temporary changes may not be approved to provide water for new projects or to allow expansion of the use of water under existing water rights.

Petitioners assert, and the record before the Department in Transfer No. 75705, demonstrates that this temporary change does not constitute providing "a replacement water supply to lands or other uses which normally have a full water supply except for a drought condition." In fact, this temporary change application is a blatant attempt to circumvent the procedures of the Department and state law which requires compliance with the requirements of Idaho Code Section 42-222, present pending before the Department in Transfer No. 75705. There is no demonstration, nor can there be, that this Temporary Change Application is to "provide a replacement water supply to lands or other uses which normally have a full water supply except for a drought condition." IDAHO CODE § 42-222A(6).

SCANNED
JUN 30 2010

Because Idaho Code Section 42-222A does not provide for the opportunity of a protest to be filed in that statute, Petitioners seek a hearing before the Department pursuant to Idaho Code Section 42-1701A(3).

As an additional basis for denial of the Temporary Change Application, Petitioners assert that Idaho Code Section 42-222A violates the procedural and substantive due process rights of Petitioners under the Idaho and United States Constitutions because the statute does not afford Petitioners with notice of an opportunity for a hearing *before* actions are taken by a state agency which will potentially injure Petitioners' water rights, which are property rights under Idaho law. Therefore, any action approving the Temporary Change Application is invalid because the statute is constitutionally defective.

Petitioners received written notice of the action of the Director when James Cefalo provided a copy of the Temporary Change Application (Exhibit A hereto) on June 28, 2010. Additionally, James Cefalo's oral communication that the Department will review the application and likely approve the application constitutes notice of the action of the Director to grant the Temporary Change Application in apparent violation of Idaho Code Section 42-222A. Under these circumstances, a hearing before the Director of the Department is necessary under Idaho Code Section 42-1701A.

II. RELIEF REQUESTED

Petitioner request an immediate hearing before the Director of the Department to provide them with the opportunity of presenting additional evidence and legal argument concerning the apparent attempt by Preston-Whitney Irrigation Co. to circumvent the clear language of Idaho Code Section 42-222A(3) and (6) and circumvent the requirements of Idaho Code Section 42-222 and the procedures of the Department in Transfer No. 75705.

SCANNED
JUN 30 2010

DATED this 21st day of June, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Scott L. Campbell
Scott L. Campbell – Of the Firm
Attorneys for Eldon and Mary Ann
Golightly, Grant and Linda Chadwick,
Bert and Laura Wheatley, Seth and Beth
Wheatley, and Wheatley Properties, LLC,
Petitioners

SCANNED
JUN 30 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2010, I caused a true and correct copy of the foregoing PETITION FOR HEARING to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile

IDAHO DEPARTMENT OF WATER RESOURCES
Eastern Region Office
900 N. Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile

HOLDEN KIDWELL HAHN & CRAPO
P.O. Box 50130
Idaho Falls, ID 83405

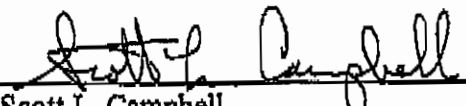
☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile

PRESTON-WHITNEY IRRIGATION CO.
P.O. Box 311
Preston, ID 83263

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Land Management
ATTN: Fredric W. Price
1387 S. Vinnell Way
Boise, ID 83709

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile



Scott L. Campbell

SCANNED
JUN 30 2010

COPY

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

RECEIVED

JUN 24 2010

Department of Water Resources
Eastern Region

TEMPORARY CHANGE APPLICATION
(To change point of diversion, place of use or purpose of use)

Name of Applicant Preston-Whitney Irrigation Co. Phone _____

Post Office address PO Box 311, Preston, ID 83263

COPY

A. PURPOSE OF TRANSFER

1. ☐ Change point of diversion ☐ Add diversion point(s) ☐ Change place of use
☐ Change purpose of use ☒ Other - Add Point of Diversion
2. Describe the proposed change(s) and the reason(s) thereof: To allow the Glendale Canal to be used as a POD for Water Right No. 13-2 and the Middle Ditch as a POD for Water Right Nos. 13-3 and 13-2104. There is a pending formal transfer to accomplish this change in order for the water rights to comport with the Applicant's historical use (Transfer No. 75705) of using multiple PODs.

B. DESCRIPTION OF RIGHT(S) OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

1.

Right Number	Priority	Amount (cfs/ac-ft)	Nature of Use	Period of use
<u>13-2</u>	<u>04/01/1882</u>	<u>30 cfs</u>	<u>Irrigation</u>	<u>04/01 To 10/31</u>
<u>13-3</u>	<u>04/01/1882</u>	<u>25 cfs</u>	<u>Irrigation</u>	<u>04/01 To 10/31</u>
<u>13-2104</u>	<u>03/14/1924</u>	<u>25 cfs</u>	<u>Irrigation</u>	<u>04/01 To 10/31</u>
2. Total amount of water being transferred 80 Cubic feet per second and/or _____ Acre-feet per annum.
3. Source of water Cub River Tributary to Bear River
4. Point(s) of Diversion:

Ident No.	Lot	1/4	1/4	1/4	Sec	Twp	Rge	County	Local name for diversion
		NW	NE	NW	8	15S	41E	FRANKLIN	CUB RIVER/GLENDALE CANAL
		NW	NW	NE	24	15S	40E	FRANKLIN	MIDDLE DITCH

5. Lands irrigated or place of use:

Twp	Rge	Sec	NE 1/4				NW 1/4				SW 1/4				SE 1/4				TOTALS
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
			SEE POU DESCRIPTION FROM TRANSFER NO. 75705																

SCANNED

JUN 30 2010

6. General Information:

- a. Who owns the water right to be changed? Applicant
- b. Describe the arrangement allowing use of the right: Applicant owns the water rights and distributes the water to its stockholders.
- c. Describe the affect on the land now irrigated if the change is approved pursuant to this application:
No effects on historically irrigated lands.
- d. Has the water right sought to be transferred been used this year? Yes If yes, explain. The Applicant has diverted water for irrigation purposes.
- e. Absent the changes, how would the right be used for the remainder of the year? The rights would be used as ordered by IDWR, which limits the location where they can be diverted.
- f. Describe other water rights used for the same purpose. 13-2108, 13-2288, 13-2288A, 13-2291, 13-2298
- g. Remarks: This temporary transfer will permit the Applicant to better utilize its water supply at its various diversion points.

I hereby assume all risk in accordance with Section 42-222A, Idaho Code, and assert that no one will be injured by such change and that the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge. I understand that any willful misrepresentations made in this application may result in voiding its approval.

Robert L. Jannas, Attorney
(Signature of Applicant)

FOR DEPARTMENT USE ONLY

Received by: _____ Date _____ Fee _____

Received _____ # _____ Recommend: _____ Approval _____ Deny _____

Watermaster recommendation _____

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Temporary Change Application No. _____ and said application is hereby _____, subject to the following limitations and conditions:

Witness my hand this _____ day of _____:

For the Director

SCANNED
JUN 30 2010

RECEIVED

JUN 29 2010

Department of Water Resources
Eastern Region

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN RE:

PRESTON-WHITNEY IRRIGATION CO.
TEMPORARY CHANGE APPLICATION,
JUNE 24, 2010

[PROPOSED] ORDER ON MOTION FOR STAY

The Director of the Idaho Department of Water Resources, Gary Spackman, based upon the assertions of the Petition for Hearing and the Motion for Stay filed by Petitioners on June 29, 2010, hereby orders that further processing of Preston-Whitney Irrigation Co.'s Temporary Change Application shall be stayed, pending a hearing on the allegations of the Petition for Hearing filed on June 29, 2010, in this matter.

DATED this _____ day of June, 2010.

By _____
Gary Spackman, Director
Idaho Department of Water Resources

SCANNED

JUN 30 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of June, 2010, I caused a true and correct copy of the foregoing ORDER ON MOTION FOR STAY to be served by the method indicated below, and addressed to the following:

Scott L. Campbell
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Boulevard, 10th Floor
Post Office Box 829
Boise, Idaho 83701-0829

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

IDAHO DEPARTMENT OF WATER RESOURCES
Eastern Region Office
900 N. Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

HOLDEN KIDWELL HAHN & CRAPO
P.O. Box 50130
Idaho Falls, ID 83405

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

PRESTON-WHITNEY IRRIGATION CO.
P.O. Box 311
Preston, ID 83263

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Land Management
ATTN: Fredric W. Price
1387 S. Vinnell Way
Boise, ID 83709

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

SCANNED
JUN 30 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of June, 2010, I caused a true and correct copy of the foregoing [PROPOSED] ORDER ON MOTION FOR STAY to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720

() U.S. Mail, Postage Prepaid
(X) Hand Delivered
() Overnight Mail
() Facsimile

IDAHO DEPARTMENT OF WATER RESOURCES
Eastern Region Office
900 N. Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

() U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
(X) Facsimile

HOLDEN KIDWELL HAHN & CRAPO
P.O. Box 50130
Idaho Falls, ID 83405

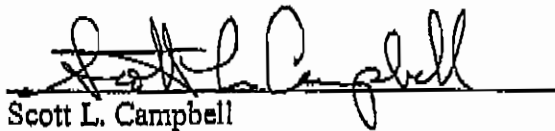
() U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
(X) Facsimile

PRESTON-WHITNEY IRRIGATION CO.
P.O. Box 311
Preston, ID 83263

(X) U.S. Mail, Postage Prepaid
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Boise, ID 83709

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() Hand Delivered
() Overnight Mail
() Facsimile


Scott L. Campbell

SCANNED

JUN 30 2010

Moffatt Thomas

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

US Bank Plaza Building
101 S Capitol Blvd 10th Fl
PO Box 829
Boise Idaho 83701 0829

208 345 2000
208 385 5384 Fax
208 385 5323 Direct

FACSIMILE

From: Deborah L. Long
Administrative Assistant to Scott L. Campbell
Date: June 29, 2010
Re: In Re: Preston-Whitney Irrigation Co. Temporary
Change Application, June 24, 2010
File No.: 23868.0000

Number of pages being transmitted including the cover page: 21
Please call fax operator at (208) 345-2000 if all pages are not received.

	Name	Organization	Fax No.	Voice No.
To:	Idaho Department of Water Resources- Eastern Region		(208) 525-7177	(208) 525-7161
	Holden Kidwell Hahn & Crapo		(208) 523-9518	(208) 523-0620

Message:

Petition for Hearing;
Motion for Disqualification of Officers Hearing Contested Cases;
Motion for Stay; and
[Proposed] Order on Motion for Stay

PLEASE DELIVER IMMEDIATELY

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If you have received this communication in error, please immediately notify us by telephone to arrange for return of the original document to us. Thank you.

SCANNED
JUN 30 2010

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JUN 29 2010

DEPARTMENT OF
WATER RESOURCES

Attorneys for Eldon and Mary Ann Golightly,
Grant and Linda Chadwick, Bert and Laura Wheatley
Seth and Beth Wheatley, and Wheatley Properties, LLC

Scott L. Campbell, ISB No. 2251
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
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Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
23868.0000

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN RE:

PRESTON-WHITNEY IRRIGATION CO.
TEMPORARY CHANGE APPLICATION,
JUNE 24, 2010

MOTION FOR STAY

Eldon and Mary Ann Golightly, Grant and Linda Chadwick, Bert and Laura Wheatley, Seth and Beth Wheatley, and Wheatley Properties, LLC, (hereinafter, collectively "Petitioners"), pursuant to IDAPA 37.01.01.260, hereby move for an order of the Director of the Idaho Department of Water Resources (the "Department"), staying all further processing of the Temporary Change Application filed by Preston-Whitney Irrigation Co. on June 24, 2010 (Exhibit A hereto) until a hearing before the Director has taken place at which time the

allegations of the Petition for Hearing filed in this matter can be heard and be determined by the Director.

If the Temporary Change Application is processed by the Eastern Region of the Idaho Department of Water Resources pending a hearing before the Director, an unfair advantage will be obtained by Preston-Whitney Irrigation Co. as to the allegations of the Petition for Hearing. Additionally, the Petitioners will be prejudiced by such processing because of the pre-determination already communicated by James Cefalo of the Eastern Region Office of the Department at the Second Pre-Hearing Conference in Transfer Proceeding No. 75705 on June 28, 2010. At said pre-hearing conference, James Cefalo indicated that the Temporary Change Application would likely be approved by the Department. Consequently, an immediate stay preventing such unjustified approval, should be issued pending resolution of the legal and factual issues asserted by the Petitioners in the Petition for Hearing.

DATED this 29th day of June, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Scott L. Campbell
Scott L. Campbell – Of the Firm
Attorneys for Eldon and Mary Ann
Golightly, Grant and Linda Chadwick,
Bert and Laura Wheatley, Seth and Beth
Wheatley, and Wheatley Properties, LLC,
Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2010, I caused a true and correct copy of the foregoing **MOTION FOR STAY** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
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IDAHO DEPARTMENT OF WATER RESOURCES
Eastern Region Office
900 N. Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile

HOLDEN KIDWELL HAHN & CRAPO
P.O. Box 50130
Idaho Falls, ID 83405

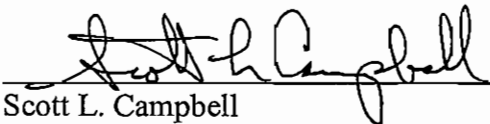
☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile

PRESTON-WHITNEY IRRIGATION CO.
P.O. Box 311
Preston, ID 83263

☒ U.S. Mail, Postage Prepaid
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☐ Facsimile

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Land Management
ATTN: Fredric W. Price
1387 S. Vinnell Way
Boise, ID 83709

☒ U.S. Mail, Postage Prepaid
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☐ Overnight Mail
☐ Facsimile



Scott L. Campbell

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

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JUN 24 2010

Department of Water Resources
Eastern Region

TEMPORARY CHANGE APPLICATION

(To change point of diversion, place of use or purpose of use)

Name of Applicant Preston-Whitney Irrigation Co. Phone _____Post Office address PO Box 311, Preston, ID 83263**A. PURPOSE OF TRANSFER**

1. ☐ Change point of diversion ☐ Add diversion point(s) ☐ Change place of use
☐ Change purpose of use ☒ Other - Add Point of Diversion

2. Describe the proposed change(s) and the reason(s) thereof: To allow the Glendale Canal to be used as a POD for Water Right No. 13-2 and the Middle Ditch as a POD for Water Right Nos. 13-3 and 13-2104. There is a pending formal transfer to accomplish this change in order for the water rights to comport with the Applicant's historical use (Transfer No. 75705) of using multiple PODs.

B. DESCRIPTION OF RIGHT(S) OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

- | 1. Right Number | Priority | Amount (cfs/ac-ft) | Nature of Use | Period of use |
|-----------------|-------------------|--------------------|-------------------|-----------------------|
| <u>13-2</u> | <u>04/01/1882</u> | <u>30 cfs</u> | <u>Irrigation</u> | <u>04/01 To 10/31</u> |
| <u>13-3</u> | <u>04/01/1882</u> | <u>25 cfs</u> | <u>Irrigation</u> | <u>04/01 To 10/31</u> |
| <u>13-2104</u> | <u>03/14/1924</u> | <u>25 cfs</u> | <u>Irrigation</u> | <u>04/01 To 10/31</u> |
| | | | | <u>To</u> |

2. Total amount of water being transferred 80 Cubic feet per second and/or _____ Acre-feet per annum.

3. Source of water Cub River Tributary to Bear River

4. Point(s) of Diversion:

Ident No.	Lot	1/4	1/4	1/4	Sec	Twp	Rge	County	Local name for diversion
		NW	NE	NW	8	15S	41E	FRANKLIN	CUB RIVER/GLENDALE CANAL
		NW	NW	NE	24	15S	40E	FRANKLIN	MIDDLE DITCH

5. Lands irrigated or place of use:

Twp	Rge	Sec	NE 1/4				NW 1/4				SW 1/4				SE 1/4				TOTALS
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
			SEE POU DESCRIPTION FROM TRANSFER NO. 75705																

6. General Information:

- a. Who owns the water right to be changed? Applicant
- b. Describe the arrangement allowing use of the right: Applicant owns the water rights and distributes the water to its stockholders.
- c. Describe the affect on the land now irrigated if the change is approved pursuant to this application:
No effects on historically irrigated lands.
- d. Has the water right sought to be transferred been used this year? Yes If yes, explain. The Applicant has diverted water for irrigation purposes.
- e. Absent the changes, how would the right be used for the remainder of the year? The rights would be used as ordered by IDWR, which limits the location where they can be diverted.
- f. Describe other water rights used for the same purpose. 13-2108, 13-2288, 13-2288A, 13-2291, 13-2298
- g. Remarks: This temporary transfer will permit the Applicant to better utilize its water supply at its various diversion points.

I hereby assume all risk in accordance with Section 42-222A, Idaho Code, and assert that no one will be injured by such change and that the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge. I understand that any willful misrepresentations made in this application may result in voiding its approval.

Robert L. Jannis, Attorney
(Signature of Applicant)

FOR DEPARTMENT USE ONLY

Received by: _____ Date _____ Fee _____

Receipted _____ # _____ Recommend: _____ Approval _____ Deny _____

Watermaster recommendation _____

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Temporary Change Application No. _____ and said application is hereby _____, subject to the following limitations and conditions:

Witness my hand this _____ day of _____:

For the Director

RECEIVED

JUN 29 2010

DEPARTMENT OF
WATER RESOURCES

Attorneys for Eldon and Mary Ann Golightly,
Grant and Linda Chadwick, Bert and Laura Wheatley
Seth and Beth Wheatley, and Wheatley Properties, LLC

Scott L. Campbell, ISB No. 2251
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
23868.0000

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN RE:

PRESTON-WHITNEY IRRIGATION CO.
TEMPORARY CHANGE APPLICATION,
JUNE 24, 2010

MOTION FOR DISQUALIFICATION OF
OFFICERS HEARING CONTESTED CASES

Petitioners, Eldon and Mary Ann Golightly, Grant and Linda Chadwick, Bert and Laura Wheatley, Seth and Beth Wheatley, and Wheatley Properties, LLC, (hereinafter, collectively "Petitioners"), hereby assert a blanket disqualification for cause of all employees of the Idaho Department of Water Resources (the "Department"), except for the Director, pursuant to Idaho Code Section 67-5252 and IDAPA 37.01.01.412.

The basis for this request for blanket disqualification of all employees of the agency hearing this contested case is the "substantial prior involvement in the matter by

numerous Department employees, including Tim Luke, James Cefalo, and other employees who have yet to be specifically identified because discovery has not occurred. Due to the status of the employees of the agency in this matter, and their substantial prior involvement, proceeding to a hearing before any of the employees of the Department, except for the Director would be prejudicial to the interests of Petitioners, because of potential for bias and pre-decision by Department employees.

Consequently, Petitioners request that all hearings in this matter be conducted by the Director, Idaho Department of Water Resources.

DATED this 29th day of June, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Scott L. Campbell
Scott L. Campbell – Of the Firm
Attorneys for Eldon and Mary Ann
Golightly, Grant and Linda Chadwick,
Bert and Laura Wheatley, Seth and Beth
Wheatley, and Wheatley Properties, LLC,
Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2010, I caused a true and correct copy of the foregoing **MOTION FOR DISQUALIFICATION OF OFFICERS HEARING CONTESTED CASES** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile

IDAHO DEPARTMENT OF WATER RESOURCES
Eastern Region Office
900 N. Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile

HOLDEN KIDWELL HAHN & CRAPO
P.O. Box 50130
Idaho Falls, ID 83405

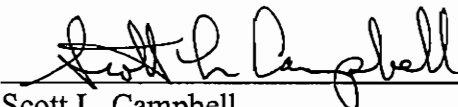
☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile

PRESTON-WHITNEY IRRIGATION CO.
P.O. Box 311
Preston, ID 83263

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Land Management
ATTN: Fredric W. Price
1387 S. Vinnell Way
Boise, ID 83709

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile



Scott L. Campbell

RECEIVED

JUN 29 2010

DEPARTMENT OF
WATER RESOURCES

Attorneys for Eldon and Mary Ann Golightly,
Grant and Linda Chadwick, Bert and Laura Wheatley
Seth and Beth Wheatley, and Wheatley Properties, LLC

Scott L. Campbell, ISB No. 2251
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
23868.0000

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN RE:

PRESTON-WHITNEY IRRIGATION CO.
TEMPORARY CHANGE APPLICATION,
JUNE 24, 2010

PETITION FOR HEARING

Pursuant to Idaho Code Section 42-1701A(3) and Idaho Department of Water Resources Rules of Procedure, IDAPA 37.01.01.152 and 230, Eldon and Mary Ann Golightly, Grant and Linda Chadwick, Bert and Laura Wheatley, Seth and Beth Wheatley, and Wheatley Properties, LLC, (hereinafter, collectively "Petitioners"), hereby request an immediate hearing by the Director of the Idaho Department of Water Resources (the "Department").

**I.
FACTUAL ALLEGATIONS**

The Petitioners are presently involved as protestants in Transfer No. 75705 involving the Preston-Whitney Irrigation Co. During the initial Pre-Hearing Conference regarding this transfer, conducted on May 3, 2010, Tim Luke of the Department raised issues involving the use of Cub River water through the points of diversion and delivery systems identified in the Temporary Change Application filed before the Department on June 24, 2010 (*see* Exhibit A hereto). During that Pre-Hearing Conference, the Petitioners herein took the position that no deliveries of Cub River water through the middle ditch (now pipeline) of the Preston-Whitney Irrigation Co. could legally occur until the Transfer Application No. 75705 was approved.

On June 28, 2010, Petitioners attended a Second Pre-Hearing Conference involving Transfer No. 75705. At that time, James Cefalo, of the Eastern Region Office of the Department provided a copy of the Temporary Change Application, dated June 24, 2010 (*see* Exhibit A). This Temporary Change Application attempts to circumvent the Department's prior determination and seeks approval that adding points of diversion involving Cub River water for the Preston-Whitney Irrigation Co. be accomplished by a temporary change application due to a subsequent drought declaration which the Department's Director has issued.

Based upon these circumstances, Petitioners assert that Idaho Code Section 42-222A, cannot be legally used to allow a temporary change. James Cefalo advised at the June 28, 2010 Second Pre-Hearing Conference that there would be no reason not to approve the temporary change.

Petitioners assert that Idaho Code Section 42-222A does not allow the temporary change requested by Preston-Whitney Irrigation Co. under these circumstances.

A. Idaho Code Section 42-222A

Under this provision of the Idaho Code, “the director of the Department of Water Resources is authorized to allow temporary changes to the use of water rights consisting of temporary transfers to change point of diversion, place and purpose of use of valid existing water rights or temporary exchanges of water authorized to be diverted under water right, as provided in Section 42-240, Idaho Code, when the director of the Department of Water Resources determines that such changes as can be accomplished in accordance with provisions of this section.”

Based upon subsection (3) of Idaho Code Section 42-222A, approval of this temporary change is inappropriate. Subsection (3) states in pertinent part:

A temporary change may be approved upon completion of the application form, payment of the filing fee and a determination by the director of the Department of Water Resources that the proposed change can be properly administered and there is no information that the change will injure any other water right.

Under the Idaho Supreme Court decision of *Jenkins v. State of Idaho Department of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982) to undermine the priority date of a water right constitutes “an undeniable injury to that water right holder.” *Id.* at 388, 1260.

Petitioners have water rights to utilization of water in Spring Creek:

<u>Water Right No.</u>	<u>Priority Date</u>
13-00062	5/15/1902
13-00216	8/31/1903
13-00218	4/1/1872
13-00221	4/1/1872
13-00224	4/1/1959
13-00225	4/1/1959
13-00256	4/1/1948
13-00258	8/31/1903
13-00127	4/1/1872
13-00286	8/1/1960
13-00287	8/1/1960

13-00288
13-04130

7/1/1930
4/1/1910

The attempt by Preston-Whitney Irrigation Co. to add the point of diversion for Cub River rights 13-00002, 13-00003, will insert senior priority water rights (1882) into the Worm Creek Drainage, thereby “undermining the priority dates” of the water rights of Petitioners in Spring Creek. Those Spring Creek water rights have priority dates which are junior to the 1882 priority dates of Preston-Whitney if the Temporary Change Application of Cub River water rights is approved. This constitutes a *per se* injury under the *Jenkins* case. Consequently, the Temporary Change Application cannot be approved under the requirements of Idaho Code Section 42-222A(3).

Additionally, Idaho Code Section 42-222A(6) provides as follows:

Temporary changes shall only be approved for the purpose of providing a replacement water supply to lands or other uses which normally have a full water supply except for a drought condition. Temporary changes may not be approved to provide water for new projects or to allow expansion of the use of water under existing water rights.

Petitioners assert, and the record before the Department in Transfer No. 75705, demonstrates that this temporary change does not constitute providing “a replacement water supply to lands or other uses which normally have a full water supply except for a drought condition.” In fact, this temporary change application is a blatant attempt to circumvent the procedures of the Department and state law which requires compliance with the requirements of Idaho Code Section 42-222, present pending before the Department in Transfer No. 75705. There is no demonstration, nor can there be, that this Temporary Change Application is to “provide a replacement water supply to lands or other uses which normally have a full water supply except for a drought condition.” IDAHO CODE § 42-222A(6).

Because Idaho Code Section 42-222A does not provide for the opportunity of a protest to be filed in that statute, Petitioners seek a hearing before the Department pursuant to Idaho Code Section 42-1701A(3).

As an additional basis for denial of the Temporary Change Application, Petitioners assert that Idaho Code Section 42-222A violates the procedural and substantive due process rights of Petitioners under the Idaho and United States Constitutions because the statute does not afford Petitioners with notice of an opportunity for a hearing *before* actions are taken by a state agency which will potentially injure Petitioners' water rights, which are property rights under Idaho law. Therefore, any action approving the Temporary Change Application is invalid because the statute is constitutionally defective.

Petitioners received written notice of the action of the Director when James Cefalo provided a copy of the Temporary Change Application (Exhibit A hereto) on June 28, 2010. Additionally, James Cefalo's oral communication that the Department will review the application and likely approve the application constitutes notice of the action of the Director to grant the Temporary Change Application in apparent violation of Idaho Code Section 42-222A. Under these circumstances, a hearing before the Director of the Department is necessary under Idaho Code Section 42-1701A.

II. RELIEF REQUESTED

Petitioner request an immediate hearing before the Director of the Department to provide them with the opportunity of presenting additional evidence and legal argument concerning the apparent attempt by Preston-Whitney Irrigation Co. to circumvent the clear language of Idaho Code Section 42-222A(3) and (6) and circumvent the requirements of Idaho Code Section 42-222 and the procedures of the Department in Transfer No. 75705.

DATED this 21st day of June, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Scott L. Campbell
Scott L. Campbell – Of the Firm
Attorneys for Eldon and Mary Ann
Golightly, Grant and Linda Chadwick,
Bert and Laura Wheatley, Seth and Beth
Wheatley, and Wheatley Properties, LLC,
Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of June, 2010, I caused a true and correct copy of the foregoing **PETITION FOR HEARING** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile

IDAHO DEPARTMENT OF WATER RESOURCES
Eastern Region Office
900 N. Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile

HOLDEN KIDWELL HAHN & CRAPO
P.O. Box 50130
Idaho Falls, ID 83405

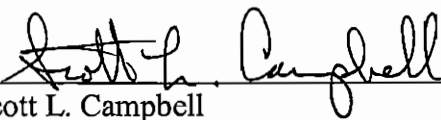
☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile

PRESTON-WHITNEY IRRIGATION CO.
P.O. Box 311
Preston, ID 83263

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Land Management
ATTN: Fredric W. Price
1387 S. Vinnell Way
Boise, ID 83709

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile



Scott L. Campbell

COPY

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

RECEIVED

JUN 24 2010

Department of Water Resources
Eastern Region

TEMPORARY CHANGE APPLICATION
(To change point of diversion, place of use or purpose of use)

Name of Applicant Preston-Whitney Irrigation Co. Phone _____

Post Office address PO Box 311, Preston, ID 83263

COPY

A. PURPOSE OF TRANSFER

1. ☐ Change point of diversion ☐ Add diversion point(s) ☐ Change place of use
☐ Change purpose of use ☒ Other - Add Point of Diversion
2. Describe the proposed change(s) and the reason(s) thereof: To allow the Glendale Canal to be used as a POD for Water Right No. 13-2 and the Middle Ditch as a POD for Water Right Nos. 13-3 and 13-2104. There is a pending formal transfer to accomplish this change in order for the water rights to comport with the Applicant's historical use (Transfer No. 75705) of using multiple PODs.

B. DESCRIPTION OF RIGHT(S) OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

1. <u>Right Number</u>	<u>Priority</u>	<u>Amount (cfs/ac-ft)</u>	<u>Nature of Use</u>	<u>Period of use</u>
<u>13-2</u>	<u>04/01/1882</u>	<u>30 cfs</u>	<u>Irrigation</u>	<u>04/01 To 10/31</u>
<u>13-3</u>	<u>04/01/1882</u>	<u>25 cfs</u>	<u>Irrigation</u>	<u>04/01 To 10/31</u>
<u>13-2104</u>	<u>03/14/1924</u>	<u>25 cfs</u>	<u>Irrigation</u>	<u>04/01 To 10/31</u>
				<u>To</u>

2. Total amount of water being transferred 80 Cubic feet per second and/or _____ Acre-feet per annum.
3. Source of water Cub River Tributary to Bear River
4. Point(s) of Diversion:

Ident No.	Lot	1/4	1/4	1/4	Sec	Twp	Rge	County	Local name for diversion
		NW	NE	NW	8	15S	41E	FRANKLIN	CUB RIVER/GLENDALE CANAL
		NW	NW	NE	24	15S	40E	FRANKLIN	MIDDLE DITCH

5. Lands irrigated or place of use:

Twp	Rge	Sec	NE 1/4				NW 1/4				SW 1/4				SE 1/4				TOTALS
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
			SEE POU DESCRIPTION FROM TRANSFER NO. 75705																

6. General Information:

- a. Who owns the water right to be changed? Applicant
- b. Describe the arrangement allowing use of the right: Applicant owns the water rights and distributes the water to its stockholders.
- c. Describe the affect on the land now irrigated if the change is approved pursuant to this application:
No effects on historically irrigated lands.
- d. Has the water right sought to be transferred been used this year? Yes If yes, explain. The Applicant has diverted water for irrigation purposes.
- e. Absent the changes, how would the right be used for the remainder of the year? The rights would be used as ordered by IDWR, which limits the location where they can be diverted.
- f. Describe other water rights used for the same purpose. 13-2108, 13-2288, 13-2288A, 13-2291, 13-2298
- g. Remarks: This temporary transfer will permit the Applicant to better utilize its water supply at its various diversion points.

I hereby assume all risk in accordance with Section 42-222A, Idaho Code, and assert that no one will be injured by such change and that the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge. I understand that any willful misrepresentations made in this application may result in voiding its approval.

Robert L. Jannis, Attorney
(Signature of Applicant)

FOR DEPARTMENT USE ONLY

Received by: _____ Date _____ Fee _____

Receipted _____ # _____ Recommend: _____ Approval _____ Deny _____

Watermaster recommendation _____

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Temporary Change Application No. _____ and said application is hereby _____, subject to the following limitations and conditions:

Witness my hand this _____ day of _____, _____:

For the Director

RECEIVED

JUN 29 2010

DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN RE:

PRESTON-WHITNEY IRRIGATION CO.
TEMPORARY CHANGE APPLICATION,
JUNE 24, 2010

[PROPOSED] ORDER ON MOTION FOR STAY

The Director of the Idaho Department of Water Resources, Gary Spackman, based upon the assertions of the Petition for Hearing and the Motion for Stay filed by Petitioners on June 29, 2010, hereby orders that further processing of Preston-Whitney Irrigation Co.'s Temporary Change Application shall be stayed, pending a hearing on the allegations of the Petition for Hearing filed on June 29, 2010, in this matter.

DATED this ____ day of June, 2010.

By _____
Gary Spackman, Director
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of June, 2010, I caused a true and correct copy of the foregoing **ORDER ON MOTION FOR STAY** to be served by the method indicated below, and addressed to the following:

Scott L. Campbell
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Boulevard, 10th Floor
Post Office Box 829
Boise, Idaho 83701-0829

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

IDAHO DEPARTMENT OF WATER RESOURCES
Eastern Region Office
900 N. Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

HOLDEN KIDWELL HAHN & CRAPO
P.O. Box 50130
Idaho Falls, ID 83405

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

PRESTON-WHITNEY IRRIGATION CO.
P.O. Box 311
Preston, ID 83263

☐ U.S. Mail, Postage Prepaid
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☐ Overnight Mail
☐ Facsimile

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Land Management
ATTN: Fredric W. Price
1387 S. Vinnell Way
Boise, ID 83709

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of June, 2010, I caused a true and correct copy of the foregoing [PROPOSED] ORDER ON MOTION FOR STAY to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile

IDAHO DEPARTMENT OF WATER RESOURCES
Eastern Region Office
900 N. Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile

HOLDEN KIDWELL HAHN & CRAPO
P.O. Box 50130
Idaho Falls, ID 83405

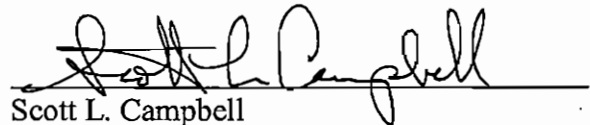
☐ U.S. Mail, Postage Prepaid
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PRESTON-WHITNEY IRRIGATION CO.
P.O. Box 311
Preston, ID 83263

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Boise, ID 83709

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile



Scott L. Campbell

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

RECEIVED

JUN 24 2010

Department of Water Resources
Eastern Region

TEMPORARY CHANGE APPLICATION
(To change point of diversion, place of use or purpose of use)

Name of Applicant Preston-Whitney Irrigation Co. Phone _____

Post Office address PO Box 311, Preston, ID 83263

A. PURPOSE OF TRANSFER

1. ☐ Change point of diversion ☐ Add diversion point(s) ☐ Change place of use
☐ Change purpose of use ☒ Other - Add Point of Diversion
2. Describe the proposed change(s) and the reason(s) thereof: To allow the Glendale Canal to be used as a POD for Water Right No. 13-2 and the Middle Ditch as a POD for Water Right Nos. 13-3 and 13-2104. There is a pending formal transfer to accomplish this change in order for the water rights to comport with the Applicant's historical use (Transfer No. 75705) of using multiple PODs.

B. DESCRIPTION OF RIGHT(S) OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

1. Right Number	Priority	Amount (cfs/ac-ft)	Nature of Use	Period of use
<u>13-2</u>	<u>04/01/1882</u>	<u>30 cfs</u>	<u>Irrigation</u>	<u>04/01 To 10/31</u>
<u>13-3</u>	<u>04/01/1882</u>	<u>25 cfs</u>	<u>Irrigation</u>	<u>04/01 To 10/31</u>
<u>13-2104</u>	<u>03/14/1924</u>	<u>25 cfs</u>	<u>Irrigation</u>	<u>04/01 To 10/31</u>
				<u>To</u>

2. Total amount of water being transferred 80 Cubic feet per second and/or _____ Acre-feet per annum.

3. Source of water Cub River Tributary to Bear River

4. Point(s) of Diversion:

Ident No.	Lot	1/4	1/4	1/4	Sec	Twp	Rge	County	Local name for diversion
		NW	NE	NW	8	15S	41E	FRANKLIN	CUB RIVER/GLENDALE CANAL
		NW	NW	NE	24	15S	40E	FRANKLIN	MIDDLE DITCH

5. Lands irrigated or place of use:

Twp	Rge	Sec	NE 1/4				NW 1/4				SW 1/4				SE 1/4				TOTALS
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
			SEE POU DESCRIPTION FROM TRANSFER NO. 75705																

SCANNER

Total Acres: 2.00
JUN 30 2010

6. General Information:

- a. Who owns the water right to be changed? Applicant
- b. Describe the arrangement allowing use of the right: Applicant owns the water rights and distributes the water to its stockholders.
- c. Describe the affect on the land now irrigated if the change is approved pursuant to this application:
No effects on historically irrigated lands.
- d. Has the water right sought to be transferred been used this year? Yes If yes, explain. The Applicant has diverted water for irrigation purposes.
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- f. Describe other water rights used for the same purpose. _____
13-2108, 13-2288, 13-2288A, 13-2291, 13-2298
- g. Remarks: This temporary transfer will permit the Applicant to better utilize its water supply at its various diversion points.

I hereby assume all risk in accordance with Section 42-222A, Idaho Code, and assert that no one will be injured by such change and that the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge. I understand that any willful misrepresentations made in this application may result in voiding its approval.

Robert L. Jannis, Attorney
(Signature of Applicant)

FOR DEPARTMENT USE ONLY

Received by: _____ Date 6/24/10 Fee _____

Receipted Se # E035932 Recommend: _____ Approval _____ Deny _____

Watermaster recommendation _____

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Temporary Change Application No. _____ and said application is hereby _____, subject to the following limitations and conditions:

Witness my hand this _____ day of _____, _____:

For the Director

SCANNED
JUN 30 2010