

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER NO. 66665 (T5243)	)	PRELIMINARY ORDER VOIDING
IN THE NAME OF JAMES AND/OR	)	APPLICATION FOR TRANSFER
<u>PAULA WHITTAKER</u>	)	

This matter having come before the Idaho Department of Water Resources ("Department") as a result of an application to transfer water rights, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On March 30, 1998, James and Paula Whittaker ("Applicants") filed an Application for Transfer (No. 5243, later renumbered as No. 66665) with the Department seeking to rearrange the place of use for two water rights on Purcell Creek, 74-73A and 74-117A. Right 74-73A is for 2.36 cfs and carries a 3/24/1883 priority date. Right 74-117A is for 2.12 cfs and carries a 5/14/1920 priority date. The application stated that the water rights were being moved from poor ground to more productive ground. The application was protested by Beva Lue Clark. The protest stated a concern that the transfer would potentially increase seepage and evaporation losses under the water rights. A pre-hearing conference was scheduled for March 15, 1999, but the protest was not resolved. Since that time, the Applicants have not asked the Department to schedule another pre-hearing conference or administrative hearing, or take any other steps to promote a final resolution of this transfer.

2. Transfer 66665 proposed to move a portion of water rights 74-73A and 74-117A to a 31-acre place of use located in Township 14 N, Range 26E, Section 11, SW1/4NW1/4. In January 2002, the Applicants filed a separate transfer with the department (No. 69639) seeking to move other water rights, 74-96 and 74-106, to the same 31-acre place of use described in Transfer No. 66665. Right 74-96 is for 0.16 cfs and carries a 6/1/1902 priority date. Right 74-106 is for 0.28 cfs and carries a 6/1/1909 priority date. Transfer No. 69639 was approved by the Department on February 6, 2003.

3. The approval of Transfer No. 69639, moving water rights to the same place of use proposed in this pending transfer, No. 66665, suggests that this transfer is no longer needed. Two letters were sent to the Applicants, dated January 11, 2010 and March 30, 2010, asking the Applicants to identify their interest in continuing to pursue this transfer. They were advised that they could withdraw the transfer or move forward with the transfer, likely by requesting a pre-hearing conference to resolve the existing protest. The March 30, 2010 letter gave the Applicants 30 days to respond with their decision. Applicants have not responded to either request.

CONCLUSIONS OF LAW

1. Application for Transfer No. 66665 proposes to move water rights to a place of use that was covered with an adequate supply of water rights through a subsequent transfer. Evidence indicates that this transfer is no longer needed. Applicants have not responded to Department correspondence about their interest in pursuing this transfer.

2. The Department should void Transfer Application No. 66665.

ORDER

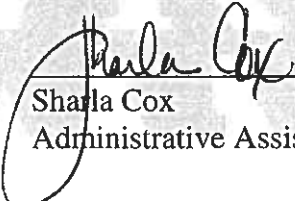
IT IS HEREBY ORDERED that Transfer Application No. 66665 in the name of James and/or Paula Whittaker is VOIDED.

Dated this 29th day of June, 2010.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 30th day of June 2010, I mailed a true and correct copy, postage prepaid, of the foregoing PRELIMINARY ORDER VOIDING APPLICATION FOR TRANSFER to the person(s) listed below:


Sharla Cox
Administrative Assistant

US MAIL

RE: TRANSFER NO. 66665 (T5243)

James or Paula Whittaker
PO Box 240
Leadore ID 83464

Beva Clark
PO Box 8
Leadore ID 83464

Statement of Available Procedures and Applicable Time Limits

RESPONDING TO PRELIMINARY ORDERS ISSUED BY THE IDAHO DEPARTMENT OF WATER RESOURCES

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration within fourteen (14) days after service as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service.

Note: the petition must be received by the Department within this fourteen (14) day period. The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) the petition for reconsideration is disposed of; or
- (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.