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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

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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	7/1/1930
13-04130	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

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																

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: _____

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