

DEC 27 1994

**CITY OF PRESTON'S PROTEST TO PETITION
TO EXTEND WATERMASTER'S TERM OF SERVICE - 1**

The following numbered paragraphs are the allegations in the Preston-Whitney Irrigation Company's petition. The City of Preston's answers appear below each numbered paragraph:

1. Petitioner is a duly organized corporation, created and existing under and by virtue of the laws of the state of Idaho, with its principal place of business in Franklin County, Idaho. Petitioner is an operating company, as defined and described in Idaho Code, Section 42-2201, and as such, is the owner and holder of water rights and a diversion and delivery system by means of which water is diverted and conveyed to the lands of the petitioner's shareholders for the irrigation thereof.

ANSWER: The City of Preston admits that the Preston-Whitney Irrigation Company is a corporation in good standing with the State of Idaho. The City of Preston does not have sufficient information and therefore denies any allegations about the water rights and delivery system.

2. The source of water supply under petitioner's water rights is the Cub River and tributaries. There are other water users who also hold rights to divert water from such source and apply the same to beneficial uses, and to accommodate the proper administration of such water rights, a water district, No. 13A, was created many years ago and now exists pursuant to applicable state law.

ANSWER: The City of Preston admits that it has been a member of Water District 13A since the early 1980's, but denies that the Water District, which was created about 1917, was created to administer the City's water rights.

3. One of the other holders of water rights in said water district is the City of Preston, which diverts water year round for municipal and hydropower uses. Petitioner is the holder of right Nos. 13-02108, 13-02291, and 13-02298, all of which are rights to divert water during the non-irrigation season and store the same in its reservoirs for irrigation use during the summer. There is a present need, as well as a need each year, for watermaster services to continue during the non-irrigation season for the proper administration of the above described rights.

ANSWER: The City of Preston admits that it diverts water year round for municipal and hydropower uses. The City does not have sufficient information to confirm which water rights petitioner Preston-Whitney holds to divert water during the non-irrigation season: it appears that right 13-02108 is from Worm Creek and right 13-02298 can only be exercised between April 1 and November 1. The City of Preston does not have sufficient information and therefore denies the allegation that there is a present need, as well as a need each year, for watermaster services to continue during the non-irrigation season.

4. At the annual meeting of Water District 13A held in Preston, Idaho, on March 7, 1994, Mr. Conan Foster was elected watermaster of said water district. The petition for watermaster's services, signed by representatives of petitioner, the City of Preston, and Cub River Irrigation Company, the three main water users within Water District 13A, sought to have said watermaster appointed for the entire year. Historically, it has been common to employ the watermaster year round in order to have administration of the non-irrigation season water diversions as well as the diversions for irrigation. However, at the 1994 annual meeting, the water users inadvertently omitted to adopt a formal resolution to such effect, and petitioner was

recently advised that said watermaster's formal appointment expired at the end of the 1994 irrigation season.

ANSWER: The City of Preston admits that Conan Foster is watermaster of Water District 13-A. The City of Preston admits that Mayor Walter Ross signed the March 1994 petition for watermaster services which is a separate and distinct document from the December 1994 Petition to extend the watermaster term of service which the City of Preston did not sign and which presents different legal and administrative issues from the March petition. The City denies that it has been common to employ the watermaster year round in order to have administration of the non-irrigation season water diversions. The minutes for Water District 13-A for March 6, 1989 appear to be the first and only minutes in which the water district resolved to have the watermaster serve year round.

AFFIRMATIVE DEFENSES

The City of Preston (protestant) asserts the following affirmative defenses against the Preston-Whitney Irrigation Company (petitioner) petition:

1. **Failure to state a claim for relief:** The petition fails to state sufficient facts under Idaho Code 42-608 to support a determination by the director of the department of water resources that it is necessary to extend the watermaster's term of service.
2. **Estoppel:** Petitioner is estopped from requesting that the watermaster's term of service be extended for the sole purpose of regulating the City of Preston. The November 15 letter from the Idaho Department of Water Resources to Conan Foster, watermaster for Water District 13-A, states, "If your term of service is extended, you will be directed to limit the City's municipal diversion from Bergquist Springs to 1 cfs plus the flow of

Birch Springs." The City initiated and continued its water use from Bergquist Springs since 1920 with full knowledge by petitioner, and petitioner's knowing acquiescence estops it from seeking to have the watermaster's term of service extended to prevent the City of Preston's historic, 50-year + diversion level from Bergquist Springs.

(a) Petitioner has knowingly acquiesced in the City of Preston's use and enjoyment of the waters of Bergquist Springs.

(b) The City of Preston has relied upon this acquiescence by the Preston-Whitney Irrigation Company.

(c) The City of Preston has pending transfers to confirm its water right use for 50-years + from Bergquist Springs. Two of those transfers have been approved and a third transfer is unopposed. The approved transfers plus the unopposed transfers total 4.5 cfs for the City of Preston, depending upon the flow from Birch Springs.

(d) The City of Preston has been misled, to its injury, by the failure of Preston-Whitney Irrigation Company to question the City of Preston's water rights prior to the expenditure of substantial time, effort, and funds in developing the City's use of water from Bergquist Springs.

3. **Laches:** The City of Preston's 50-year + history of diversions from Bergquist Springs has occurred without intervention or complaint from the Preston-Whitney Irrigation Company and, as a result, the Preston-Whitney Irrigation Company has lost the ability to seek to limit the City's water use through a request to extend the term of service for the watermaster. The Preston-Whitney Irrigation Company has lost the ability to state this claim for failure to act on it sooner.

4. **Waiver:** The Preston-Whitney Irrigation Company has waived its right to seek to change the historic non-irrigation season diversions of the City of Preston because of the passage of time since the City of Preston began its diversions from Bergquist Springs in 1920.

5. **Abandonment and/or Forfeiture:** The Preston-Whitney Irrigation Company has abandoned and/or forfeited its non-irrigation season water rights (including the point of diversion for those water rights) which are in conflict with the City of Preston's diversion of water during the non-irrigation season.

WHEREFORE, the City of Preston prays that the Director of the Department of Water Resources of the State of Idaho:

1. Deny the relief requested by petitioner and therefore not extend the watermaster's term of service;
2. Stay this petition until the City of Preston's unobjected transfer proceeding is completed before the Department of Water Resources; or
3. In the alternative, to a dismissal or stay, not issue a decision on this petition until after a hearing is held; and
4. Grant such other and further relief as the Director deems just and proper.

DATED this 27th day of December, 1994.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Josephine P. Beeman
Josephine P. Beeman - Of the Firm
Attorneys for the City of Preston

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of December, 1994, I caused to be served a true copy of the foregoing **CITY OF PRESTON'S PROTEST TO PRESTON-WHITNEY IRRIGATION COMPANY'S PETITION TO EXTEND WATERMASTER'S TERM OF SERVICE** by the method indicated below.

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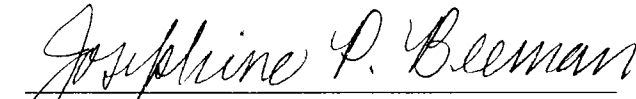
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