

RECEIVED

AUG 13 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:

WORM CREEK BASIN, WATER DISTRICT
13A, WATER RIGHT ADMINISTRATION
PROCEEDING

**PETITION FOR RECONSIDERATION OR, IN
THE ALTERNATIVE, PETITION FOR
ADMINISTRATIVE HEARING**

COME NOW 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 (collectively the "Petitioners"), by and
through undersigned counsel of record and pursuant to Idaho Department of Water Resources
("Department") Rules of Procedure 730 (IDAPA 37.01.01.730) and 740 (IDAPA 37.01.01.740),

and Idaho Code Section 42-1701A(3), and hereby petition the Director to reconsider the Department's decision denying the Petitioners' Petition for Water Rights Administration, dated July 6, 2010.

I. BACKGROUND

On July 6, 2010, the Petitioners petitioned the Department to initiate a contested case proceeding regarding the administration of water rights within the Worm Creek and Spring Creek drainages located more or less within the greater Preston, Idaho area. On July 30, 2010, the Interim Director issued correspondence to the Petitioners stating, in pertinent part, that: "The Department will not create a contested case and will not schedule a hearing on the broader issue of water rights administration." Said correspondence is attached hereto as Exhibit A. This correspondence effectively denies the Petitioners' underlying petition, and the Petitioners seek reconsideration and further review of that decision.

II. ARGUMENT

A. Petition For Reconsideration

Department Rule of Procedure ("Rule") 5 defines an "Order" as: "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons." *See* Rule 5.15. The Director's correspondence, dated July 30, 2010, effectively denied the Petitioners' Petition for Water Rights Administration by announcing the Department's express decision refusing to initiate the contested case proceeding the Petitioners requested, and the Department's further express refusal to schedule any corresponding hearing on the matter. Though issued in the form of correspondence, the Department's express decision denying the Petitioners' petition is, in

substance, an “Order” as that term is defined within Rule 5.15. This is because the Director’s correspondence constitutes an “agency action” that effectively “determined” (or summarily disposed of) the Petitioners’ legal interests and rights to formally present evidence concerning the matters contained within their July 6, 2010 Petition as was their right to do under Idaho Code Section 42-602, and Rules 152, 200, 210, and 230. Rule 230, in particular, affords the Petitioners the right to initiate the contested case proceeding they sought.

While it is clear that the Director’s correspondence constitutes an “Order” given that it fixes the parties’ legal rights and interests with respect to the petition, it is less clear what type of an “Order” (Preliminary or Final) the correspondence is. Petitioners acknowledge that the correspondence was issued by the Director, rather than a “person other than the agency head.” *See* Rule 730.01. This suggests that the Order is a Final Order under Rule 740 (which includes “orders issued by the agency head”). *See* Rule 740.01. Regardless, Rules 730.02(a) and 740.02(a) both provide for review or reconsideration of Preliminary and Final Orders, respectively, within “fourteen (14) days” of service of the Order in question. Given that the Director’s correspondence issued, or was “served,” on July 30, 2010, this Petition for Reconsideration is timely because it was filed within the “fourteen (14) days” referenced in Rules 730.02(a) and 740.02(a).

With respect to the Director’s correspondence fixing the legal rights of the parties as raised in the petition, the correspondence (or Order) specifically divested the Petitioners the opportunity to formally present evidence to the Department regarding:

- The historic hydrology of the Worm Creek and Spring Creek drainages; the alteration of that historic hydrology by actions undertaken by the Preston-Whitney Irrigation Company, the Preston-Whitney Reservoir Company, and the Cub River Irrigation Company (collectively, the “Companies”); and the negative impacts of that altered hydrology upon the Petitioners’ water rights;

- Illegal water diversions and the utter lack of suitable water diversion measuring devices, lockable diversion works, and appropriate water accounting in derogation of the Worm Creek Decree;
- The Companies' installation and use of various buried pipelines to deliver water to lands lying outside of their recognized service area boundaries;
- The Companies' exceedance of the quantity-based elements of their documented water rights (both with respect to flow rate and annual volume); and
- The Companies' illegal use of natural channels as conveyance facilities given their failure to properly account for evaporative and seepage losses.

Though the Department is choosing to take alternative actions that it views are appropriately responsive to the Petitioners' petition, those alternative actions still do not change the fact that the Director's correspondence unilaterally divested the Petitioners the right to formally present their evidence within the auspices of a contested case proceeding. The Director's correspondence denies the Petitioners' their "day in court" so to speak, which the Petitioners find particularly disconcerting because the Director's correspondence expressly concedes that "administration of water rights on Worm Creek has been lacking." *See* Exhibit A at pp. 1-2. As the Petitioners' petition and the Exhibits attached thereto demonstrate, the fact that administration of water rights within the Worm Creek and Spring Creek drainages has been "lacking" puts it mildly. The Petitioners believe it is in the Department's best interests to conduct formal proceedings to better inform its administration within the basins. Denying such a process altogether is perplexing in light of the Director's mandatory statutory duty to "direct and control the distribution of water . . . in accordance with the prior appropriation doctrine." *See, e.g.,* IDAHO CODE § 42-602.

In sum, the Petitioners seek review (or reconsideration) of the Director's express decisions to "not create a contested case" and to "not schedule a hearing on the broader issue of

water rights administration” as requested in their underlying Petition for Water Rights Administration. Petitioners assert that a formal contested case proceeding is warranted given the Department’s admitted “lack” of water rights administration within the Worm Creek and Spring Creek drainages. Failure of the Department to take appropriate action violates its statutory duties, and results in the impermissible taking of the Petitioners’ valuable water (*i.e.*, property) rights. *See, e.g.*, IDAHO CODE §§ 42-601, *et seq.*, 42-1801, *et seq.*, and *State v. Nelson*, 131 Idaho 12, 16 (1998), *quoting Crow v. Carlson*, 107 Idaho 461.

B. Petition For Administrative Hearing

In the alternative, the Petitioners seek the conduct of an administrative hearing regarding the decision contained within the Director’s correspondence dated July 30, 2010, pursuant to Rules 730.02(e) and 740.02(b), and Idaho Code Section 42-1701A(3). Because Rules 730.02(e) and 740.02(b) incorporate Idaho Code Section 42-1701A(3) by reference, each of the Rules and the statute entitle “any person aggrieved by any action of the director, including any decision, determination, order or other action” to a hearing before the director, provided that those aggrieved were not previously afforded a hearing before the director on the matter at issue. Moreover, the entitlement to such a hearing is *mandatory*. *See* Rules 730.02(e) and 740.02(b), and IDAHO CODE § 42-1701A(3) (each stating, in pertinent part, “who has not been previously afforded an opportunity for a hearing on the matter *shall be entitled to a hearing* before the director to contest the [action].”) (emphasis added). This Petition for Administrative Hearing is timely having been filed “within fifteen (15) days after receipt” of the Director’s correspondence dated July 30, 2010. *See* Rules 730.02(e) and 740.02(b), and IDAHO CODE § 42-1701A(3).

The Petitioners were not previously afforded the opportunity for a hearing regarding the issues raised within their Petition for Administration dated July 6, 2010.

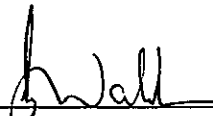
Consequently, they are entitled to a hearing regarding the Department's decision contained within the Director's correspondence dated July 30, 2010, for the reasons discussed above, and because this written petition is timely.

III. CONCLUSION

The Petitioners respectfully submit this Petition for Reconsideration, or in the alternative, Petition for Administrative Hearing for the reasons, and pursuant to the authorities, stated herein. The Petitioners have been aggrieved by decisions contained within the Director's correspondence, and harbor legitimate concerns over the protection of their well-settled, and in many instances, senior water rights. The Department bears the express duty to enforce the rightful distribution of the Petitioners' water rights.

DATED this 13th day of August, 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 13th day of August, 2010, I caused a true and correct copy of the foregoing **PETITION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, PETITION FOR ADMINISTRATIVE 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

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

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

PRESTON RESERVOIR COMPANY
1127 S 2400 E
Preston, ID 83263

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

CUB RIVER IRRIGATION COMPANY
Box 215
Lewiston, UT 84320

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

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

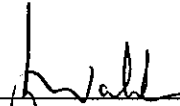
U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile

Randall C. Budge
RACINE OLSON NYE BUDGE & BAILEY,
CHARTERED
201 E. Center
P.O. Box 1391
Pocatello, ID 83204-1391

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