



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

July 17, 2012

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

Dana L. Hofstetter
Hofstetter Law Office LLC
608 West Franklin St.
Boise ID 83702

RE: Order Denying Petition for Reconsideration in the Matter of the Appointment of a Lateral Manager for Grays Creek Ditch

Dear Ms. Hofstetter:

The accompanying Order Denying Petition for Reconsideration of the "preliminary order" issued on June 13, 2012 is issued by the department pursuant to section 67-5243, Idaho Code. The preliminary order can and will become a final order without further action of the department unless a party files written exceptions and a brief in support of the party's position with the director within fourteen (14) days after issuance of this Order Denying Petition for Reconsideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jeff Peppersack', is written over a faint, larger version of the signature.

Jeff Peppersack, Chief
Water Allocation Bureau

Enclosures

C: Scott L. Campbell, Moffatt Thomas Barrett Rock & Fields Chartered
Norma J. Ratcliff
IDWR Western Region

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

**IN THE MATTER OF THE)
APPOINTMENT OF A LATERAL)
MANAGER FOR GRAYS CREEK)
DITCH)
_____)**

**ORDER DENYING PETITION
FOR RECONSIDERATION**

This matter comes before the Idaho Department of Water Resources (“Department”, or “IDWR”) as a *Petition for Reconsideration* of a preliminary order appointing a lateral manager (“order appointing lateral manager”). The order appointing lateral manager, issued on June 13 2012, appointed and fixed compensation for a lateral manager for the Water Users Association of Lower Grays Creek Ditch pursuant to Idaho Code § 42-1308. A petition for reconsideration was filed on June 27, 2012 by Dana Hofstetter, attorney, on behalf of Legg Family Trust (“petitioner”).

The petitioner asks the Department to appoint a lateral manager for the entire Grays Creek Ditch and to allow compensation on the same terms and to be paid with assessments, as approved at a March 26, 2012 meeting of the Grays Creek Ditch Lateral.

On July 9, 2012, the Grays Creek Canal Association filed its *Response in Opposition to Petition for Reconsideration and Affidavit of Dean Dunham* requesting the Department to deny the *Petition for Reconsideration* in its entirety.

On July 13, 2012, the petitioner filed its *Reply in Support of Petition for Reconsideration and Motion to Strike Affidavit of Dean Dunham*. In its reply, the petitioner makes several arguments that are addressed below.

On July 17, 2012, the Grays Creek Canal Association filed its *Answer in Opposition to Motion to Strike Affidavit of Dean Dunham and Affidavit of Andrew J. Waldera*.

The petitioner argues that Idaho Code §§ 42-101 and 102 requires the State to distribute water among all users based on water rights. Idaho Code § 42-101 addresses appropriation of water in the state and the nature of property in water. Idaho Code § 42-101 does not impose a duty on the state to oversee the distribution of water after it is diverted from the natural water source into a ditch. The petitioner inserts the word “distribution” in place of “appropriation” and “allotment” in an attempt to make its case that the State is required to appoint a lateral manager. Idaho Code § 42-102 provides a standard of measurement and requires the Department to develop a system for measurement and distribution of water. It is not clear how Idaho Code § 42-102 provides any support for the petitioner’s arguments.

The petitioner also argues that Idaho Code § 42-1308 requires the Department to appoint a single lateral manager, not multiple lateral managers with disparate jurisdiction over portions of a single lateral system. This is incorrect. Idaho Code § 42-1301 provides that “[w]here three (3) or more parties take water from the same canal or reservoir at the same point to be conveyed to their respective premises for any distance through a lateral or distributing ditch or laterals or distributing ditches such parties shall constitute a water users association.” The petitioner mistakenly refers to the Grays Creek Ditch system as a “single lateral system.” The Grays Creek Ditch system has more than one lateral or distributing ditch with three or more users and each one “...shall constitute a water users association.” In a decision to appoint a lateral manager, the Department is not bound by the organization or decisions of any existing association, but instead has discretion to appoint and fix compensation, or may decline to appoint a lateral manager, based upon the following: 1) a written petition of a water user alleging improper distribution of water from the ditch or lateral, 2) responses thereto, 3) the recommendation of a watermaster, if any, and 4) the Department’s own investigation. In its discretion, the Department may appoint a lateral manager for any part of a ditch system that constitutes a water users association as described in Idaho Code § 42-1301.

The petitioner also argues that the language of Idaho Code § 42-1308 is properly interpreted to require the Department to appoint a lateral manager and that the use of the word “may” should not be interpreted to afford the Department to leave unaddressed situations where water is not being properly distributed and parties are being injured as a result. The Department disagrees that the use of the word “may” is not discretionary. Moreover, Idaho Code § 42-1308 (6) specifically recognizes this discretion by prescribing that the director shall issue an order either appointing or declining to appoint a lateral manager.

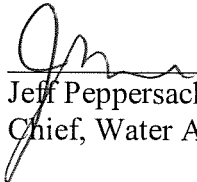
The order appointing lateral manager stated that “...it would not be fair to require all water users on the Grays Creek ditch system to install measurement and control devices and support the costs of a lateral manager, especially when the cause of the alleged injury is not fully understood and the location and extent of the distribution ditches and laterals at the lower end of the system is not fully understood.” The order appointing lateral manager also stated that “[a]ppointment of a lateral manager for the lower part of the Grays Creek Ditch system is necessary to provide someone who can begin to understand the system and the issues and who can assist water users in developing a plan for future measurement and control where needed.” The Department is not convinced that expanding the area of authority of a lateral manager will further the understanding of the alleged injury or the location and extent of the distribution ditches and laterals at the lower end of the Grays Creek Ditch system. The irrigation season is already half over and the Department’s appointment is only effective until October 31 of this year. Further delay will likely make any appointment by the Department ineffective.

Lastly, the petitioner argues that the Affidavit of Dean Dunham should be stricken from the record because it constitutes impermissible hearsay and that the election of a watermaster at the June 20, 2012 meeting of the Grays Creek Canal Association would not affect the Department’s ability to appoint a lateral manager for the entire Grays Creek Ditch system. The Department may consider the affidavit to the extent it is considered reliable and relevant. In this case, it was not used as a basis for the Department’s decision.

ORDER

Based upon the foregoing, it is hereby ORDERED that petitioner's motion to strike is **DENIED** and the petition for reconsideration filed in this matter on June 27, 2012 is **DENIED**.

DATED this 17 day of July, 2012.



Jeff Peppersack
Chief, Water Allocation Bureau

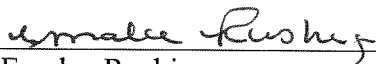
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of July, 2012, I mailed a true and correct copy of the foregoing document to the person(s) listed below:

SCOTT L CAMPBELL
MOFFATT THOMAS BARRETT ROCK & FIELDS CHTD
PO BOX 829
BOISE ID 83701

DANA L HOFSTETTER
HOFSTETTER LAW OFFICE LLC
608 WEST FRANKLIN ST
BOISE ID 83702

NORMA J RATCLIFF
1491 SHAW LN
COUNCIL ID 83612



Emalee Rushing
Administrative Assistant II
Idaho Department of Water Resources

EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER DENYING PETITION FOR RECONSIDERATION

The accompanying order is an **Order Denying Petition for Reconsideration** of the "preliminary order" issued previously in this proceeding by the department pursuant to section 67-5243, Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after the service date of this denial of petition for reconsideration of the preliminary order, any party may in writing file exceptions to any part of the preliminary order and file a brief in support of the party's position on any issue in the proceeding with the Director. Otherwise, the preliminary order will become a final order of the agency.

If any party files an exception and/or brief, opposing parties shall have fourteen (14) days to respond to the exception and/or brief. 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, requests 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 Director 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 service date 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.