

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

IN THE MATTER OF APPLICATIONS )	<b>PRELIMINARY ORDER</b>
FOR TRANSFER NOS. 68302 AND )	<b>CONFIRMING STATUS OF</b>
65886 IN THE NAME OF CITY OF )	<b>TRANSFER APPROVALS AS FINAL</b>
CITY OF PRESTON )	<b>ORDERS OF THE DEPARTMENT</b>
_____ )	

**FINDINGS OF FACT**

1. City of Preston filed its Application for Transfer No. 65886, formerly numbered 3223, (“Transfer No. 65886”) on January 12, 1984. The purpose of the application was to change the point of diversion, place of use and nature of use for a portion of Water Right No. 13-26.

2. Notice of Transfer No. 65886 was published in the *Preston Citizen* in October, 1985. The application was protested by U.S. Forest Service.

3. In September, 1986, U.S. Forest Service submitted an agreement with the City of Preston to resolve the protest. In the agreement, the U.S. Forest Service withdrew its protest of Transfer No. 65886.

4. The Department held a pre-hearing conference on February 24, 1995 in the matter of Transfer No. 65886. At the conference, Preston-Whitney Irrigation Company (“Preston-Whitney”) filed a petition to intervene to become a party.

5. On March 9, 1995, the Department issued a *Post Pre-hearing Conference Order* in the matter of Transfer No. 65886. The order required City of Preston to amend Transfer No. 65886 on or before April 1, 1995 or a hearing would be set to resolve issues in the matter. It was further ordered that the petition to intervene filed by Preston-Whitney would be held without action until after April 1, 1995.

6. On April 14, 1995, the City of Preston, through its attorney of record, submitted a letter clarifying some corrections to Transfer No. 65886.

7. City of Preston filed its Application for Transfer No. 68302, formerly numbered 4596, (“Transfer No. 68302”) on April 14, 1995. The purpose of the application was to change the point of diversion, place of use and nature of use for a portion of Water Right No. 13-34.

8. Notice of Transfer No. 68302 was published in the *Preston Citizen* in April and May, 1995. The application was protested by Preston-Whitney.

9. On August 31, 1998, a document titled *Agreement among the City of Preston, the Cub River Irrigation Company, and Preston-Whitney Irrigation Company Regarding the Municipal Water Rights for the City of Preston* was submitted to the Department. Preston-Whitney withdrew its protests of Transfer Nos. 65886 and 68302 as part of the agreement.

10. On November 9, 2001, the Department issued an approval of Transfer Nos. 65886 and 68302 as preliminary orders.

11. The preliminary orders approving Transfer Nos. 65886 and 68302 were served by mail to City of Preston on November 13, 2001.

12. On November 27, 2001, City of Preston filed *City of Preston's Petition for Reconsideration* of the preliminary orders approving Transfer Nos. 65886 and 68302.

13. On November 28, 2001, the Department granted *City of Preston's Petition for Reconsideration* to review the issues raised by City of Preston in the matter of Transfer Nos. 65886 and 68302. The order granting the petition stated "the petitions are granted...so that the Department can review the issues raised by the petitioner in the petitions."

14. City of Preston did not file exceptions or request a hearing on the preliminary orders approving Transfer Nos. 65886 and 68302 issued on November 9, 2001.

15. On August 13, 2012, the Department issued preliminary orders amending approval of Transfer Nos. 65886 and 68302. The amended preliminary orders were served by mail to City of Preston on August 14, 2012.

16. On August 28, 2012, City of Preston filed *City of Preston's Petition for Reconsideration* of the amended approvals of Transfer Nos. 65886 and 68302. On August 29, 2012, City of Preston filed *City of Preston's Request for Hearing* in the matter of Transfer Nos. 65886 and 68302.

17. On September 6, 2012, the Department issued an *Order Granting Request for Hearing, Order Denying Petition for Reconsideration, and Order Staying Preliminary Orders* in the matter of Transfer Nos. 65886 and 68302.

18. On September 20, 2012, City of Preston filed *City of Preston's Petition for Reconsideration of IDWR's September 6, 2012 Order Granting Request for Hearing, Order Denying Petition for Reconsideration, and Order Staying Preliminary Orders* in the matter of Transfer Nos. 65886 and 68302.

## CONCLUSIONS OF LAW

1. Idaho Code § 67-5243(3) provides that:

[A]ny party may file a motion for reconsideration of a recommended order or a preliminary order within fourteen (14) days of the service date of that order. The presiding officer shall render a written order disposing of the petition. The petition is deemed denied if the presiding officer does not dispose of it within twenty-one (21) days after the filing of the petition.

2. The Idaho Supreme Court recently held that an administrative agency must completely resolve the merits of a petition for reconsideration within 21 days of receipt, otherwise the petition for reconsideration is deemed denied by operation of law. *A&B Irr. Dist. v. IDWR*, 2012 Opinion No. 121 at 5-6 (Sept. 14, 2012).<sup>1</sup> The Court held that an agency cannot grant a petition for reconsideration for the purpose of gaining additional time to consider the merits of the petition. *Id.* The Court also held that an order issued by an administrative agency after an order becomes final is a “nullity.” *Id.* at 7.

3. The Department did not timely dispose of *City of Preston’s Petition for Reconsideration* of the preliminary orders approving Transfer Nos. 65886 and 68302 filed by City of Preston on November 27, 2001. Therefore, *City of Preston’s Petition for Reconsideration* was deemed denied by operation of law.

4. Idaho Code § 67-5246 provides that “[i]f the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code.” Since this matter was not reviewed by the Director pursuant to Idaho Code § 67-5245, the Department’s November 9, 2001 preliminary orders approving Transfer Nos. 65886 and 68302 are final orders of the agency.

5. Because the November 9, 2001 orders are final orders, the Department lacked authority to issue its August 13, 2012 preliminary orders amending Transfer Nos. 65886 and 68302 and its September 6, 2012 *Order Granting Request for Hearing, Order Denying Petition for Reconsideration, and Order Staying Preliminary Orders* in the matter of Transfer Nos. 65886 and 68302. The Department must give effect to the November 9, 2001 final orders.

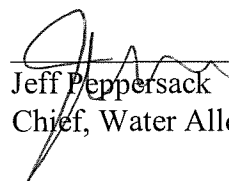
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<sup>1</sup> A copy of the Court’s decision can be found at: <http://www.isc.idaho.gov/opinions/anb39196.pdf>.

**ORDER**

IT IS HEREBY ORDERED that the November 9, 2001 preliminary orders approving Transfer Nos. 65886 and 68302 are confirmed as final orders and will be implemented as approved.

Dated this 12<sup>th</sup> day of October, 2012.

  
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Jeff Peppersack  
Chief, Water Allocation Bureau

## CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2012, I mailed a true and correct copy, postage prepaid, of the foregoing PRELIMINARY ORDER CONFIRMING STATUS OF TRANSFER APPROVALS AS FINAL ORDERS OF THE DEPARTMENT to the persons listed below:

RE: Transfers Nos.: 68302 and 65886

CITY OF PRESTON  
70 W ONEIDA  
PRESTON ID 83263

JOSEPHINE P BEEMAN  
BEEMAN & ASSOCIATES PC  
409 W JEFFERSON  
BOISE ID 83702

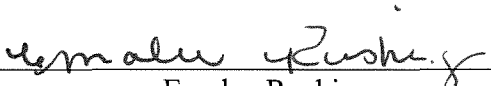
MERVIN J BODILY  
CUB RIVER IRRIGATION CO  
PO BOX 215  
LEWISTON UT 84320

CLYDE G NELSON  
PO BOX 797  
SODA SPRINGS ID 83276-0797

ROBERT L HARRIS  
HOLDEN KIDWELL HAHN & CRAPO PLLC  
1000 RIVERWALK DR STE 200  
PO BOX 50130  
IDAHO FALLS ID 83402-3304

KIRK IVERSON  
WATERMASTER  
2724 S 1400 W  
PRESTON ID 83263

RANDALL BUDGE  
RACINE OLSON NYE BUDGE & BAILEY CHTD  
PO BOX 1391  
POCATELLO ID 83204-1391

  
Emalee Rushing  
Administrative Assistant

## **EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER**

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department 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 with the Director. Otherwise, this preliminary order will become a final order of the agency.

### **REQUEST FOR HEARING**

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

### **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 IDAPA Rules 37.01.01302 and 37.01.01303 (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.