

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

IN THE MATTER OF APPLICATION FOR)	
TRANSFER NOS. 79906 AND 79907)	PRELIMINARY ORDER
(WATER RIGHT 29-7006) IN THE NAME)	DENYING APPLICATIONS
<u>OF IDAHO WATER COMPANY, LLC)</u>	

On March 6, 2015, Idaho Water Company, LLC (“Applicant”) filed Application for Transfer 79906 and Application for Transfer 79907 with the Idaho Department of Water Resources (“Department”), proposing to change the point of diversion and place of use for portions of ground water right 29-7006. The applications proposed moving portions of water right 29-7006 almost 50 miles to the northwest, from a point of diversion and place of use located near Downey, Idaho to points of diversion and places of use located north of American Falls Reservoir.

Based upon the evidence available at this time, the Department makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. The water right sought to be transferred is decreed water right 29-7006, and is described as follows:

Priority Date:	January 10, 1968
Diversion rate:	2.53 cfs
Annual volume:	994 ac-ft/yr
Purpose of use:	Irrigation
Period of use:	4/1 – 10/15
Points of diversion:	SWNE and NESE, Section 14, T10S, R36E
Place of use:	345 acres in Sections 13 and 14, T10S, R36E

2. Application for Transfer 79906 was filed on March 6, 2015 and proposed to move a 26-acre portion of water right 29-7006 to a point of diversion located in the NWNE of Section 18, T04S, R33E and a place of use located in the NWNW of Section 17, T04S, R33E.

3. Application for Transfer 79907 was also filed on March 6, 2015 and proposed to move a 119-acre portion of water right 29-7006 to a point of diversion located in the SWSE of Section 31, T04S, R31E and a place of use located in Sections 31 and 32, T04S, R31E.

4. The applications proposed diverting ground water from the Eastern Snake Plain Aquifer ("ESPA"). The diversion of ground water from the ESPA impacts flows in the Snake River and tributary springs both upstream and downstream from Milner Dam.

5. Junior surface water rights diverting water from the Snake River and tributary streams upstream from Milner Dam are curtailed every year and rely on storage water, if available, to maintain adequate supply throughout the year.

6. On April 30, 1993, the Director issued an Amended Moratorium Order ("Snake River Moratorium"). The Snake River Moratorium suspended processing of new applications to appropriate water to protect existing water rights that were being impacted by drought, reduced recharge, and increased demands in the moratorium area. The existing water rights protected by the Snake River Moratorium include water rights in the Snake River and tributary springs downstream from Milner Dam. The Snake River Moratorium is still in effect. The proposed point of diversion for the application is within the Snake River Moratorium area.

7. The transfer applications included an analysis completed by Jason Helms of JCH Engineering and Consulting, P.L.L.C. ("JCH") on behalf of the Applicant. The analysis estimated the water right impacts to reaches of the Snake River before and after the proposed changes. The analysis concluded that impacts to the Snake River from the proposed transfers were within 10% of historical impacts for all reaches comprising more than 10% of the total depletion.

8. The JCH analysis proposed that cessation of ground water pumping at the existing point of diversion would show up as gains to Marsh Creek in 3.85 years, travel about 30 miles down Marsh Creek through the Portneuf gap and down the Portneuf River in 3 days and recharge the ESPA to offset the impacts of pumping at the proposed point of diversion.

9. Marsh Creek is a surface water stream that originates above Downey, Idaho, and flows to the north from Downey for approximately 25 miles where it discharges into the Portneuf River at Inkom. From there, the Portneuf River runs approximately 20 miles west and northwest and finally discharges into the Snake River at American Falls Reservoir.

10. Department staff reviewed the application and JCH analysis and prepared a memo ("July 10 Memo") raising concerns about the proposed transfer and analysis. The July 10 Memo stated:

The Marsh Valley aquifer is not directly connected to the ESPA, but groundwater discharge to Marsh Creek may be conveyed to the ESPA boundary as surface flow via the Portneuf River. The Portneuf River does not have significant interaction with groundwater between Inkom and Batiste Road. At Batiste Road (coincident with ESPA model cell 1095119) the Portneuf River becomes hydraulically connected to the ESPA and begins to gain significant flow from groundwater. If the Portneuf River carries additional water in the connected reach

downstream of Batiste Road, the stage in the river will be higher, and the river will gain less water from the Eastern Snake Plain aquifer.

11. The July 10 Memo also identified the following concerns:

1. Groundwater discharged to Marsh Creek is natural flow subject to diversion from Marsh Creek or the Portneuf River. If groundwater discharge to Marsh Creek resulting from non-pumping at the current POD is diverted upstream of Batiste Road, the transfer spreadsheet analysis submitted by the applicant is invalid.
2. Even if additional groundwater discharge to Marsh Creek is conveyed to the Portneuf River at Batiste Road, the location of impacts to the ESPA is uncertain. Simulating all of the impact in model cell 1095119 may not be appropriate.

12. Many water users divert water from Marsh Creek and the Portneuf River in the reaches where the Applicant seeks to convey water. If there were a shortage of surface water available for diversion from Marsh Creek or the Portneuf River, either now or in the future, surface water users might divert ground water discharging into Marsh Creek that had been diverted pursuant to water right no. 29-7006, and the proposed diversion at the new point of diversion near American Falls Reservoir would not be fully mitigated with outflows from the Marsh Creek drainage.

13. Diversions from Marsh Creek and the Portneuf River in the reaches where the applicant seeks to convey water are not currently regulated, suggesting that there may not be a shortage of surface water on those sources at this time. The need for regulation has not been confirmed. Additionally, Marsh Creek and the Portneuf River are tributary to the Snake River where junior priority water rights are curtailed each year to satisfy senior water rights. Future regulation of those tributaries to satisfy senior Snake River water rights will result in curtailment of junior water rights on Marsh Creek and the Portneuf River. Ground water discharges to Marsh Creek due to non-pumping of water right no. 29-7006 would become natural flow available for diversion by surface water users and will delay curtailment of those junior surface water rights (i.e. the additional water in the stream will be diverted by the junior surface water rights).

14. The JCH analysis did not provide information demonstrating whether ground water discharged to Marsh Creek and then conveyed downstream to the Portneuf River would recharge the ESPA entirely in model cell 1095119, over a larger reach; or, whether some or all of the discharge would flow downstream into American Falls Reservoir or beyond to be used by other surface water users.

15. On August 19, 2015, JCH submitted a Revised Narrative in Support of Transfers #79844, 79906, 79907 ("Revised Analysis"). The Revised Analysis assumed that pumping at the current points of diversion would impact the ESPA through a more direct connection between the Marsh Valley aquifer, the Portneuf Valley aquifer, and the ESPA.

“[T]he ground water travel time into the Marsh Creek bed aquifer is estimated on the order of 1400 days (3.85 years) between the historical diversion location and equilibrium with the streambed.” And “...an additional travel time of 2,660 days (7.28 years) for the tributary flow to move down the Marsh Creek and Inkorn valley and through the Portneuf gap along an approximately 29 mile path to the first active ESPA model grid cell (102,121).” Revised Analysis, p. 4.

16. Department staff reviewed the Revised Analysis and prepared a memo (“October 14 Memo”) raising concerns about the Revised Analysis.

Welhan (2006) used micro-gravity data to determine the cross-section of permeable gravels in the Portneuf Gap. Because of the bedrock constriction at the Portneuf Gap, underflow is limited and is not expected to vary considerably with hydrologic conditions. Welhan (2006) estimated underflow of 1.06 billion gallons/year (3,250 AF/year or 4.5 cfs) during normal hydrologic conditions and 1.01 billion gallons/year (3,100 AF/year or 4.3 cfs) during drought conditions. This supports IDWR’s conclusion that the majority of the impacts of pumping in the Marsh Creek Valley will accrue to surface flow, not tributary underflow at the Portneuf Gap. October 14 Memo, p. 2.

Modeling the impacts of pumping at the current PODs for water right 29-7006 in ESPA model cell 1102121 is inappropriate. The majority of the impacts of pumping will accrue to surface flow in Marsh Creek and the Portneuf River upstream of Portneuf Gap. Very little of the impacts of pumping will accrue to underflow at the Portneuf Gap. If increased surface flow in Marsh Creek is not diverted from either Marsh Creek or the Portneuf River, any significant impacts to the ESPA will occur downstream of Batiste Road, in or downstream of ESPA model cell 1095119. October 14 Memo, p. 2.

17. The Revised Analysis stated:

While existing data is not conclusive, existing drainage basin hydrogeologic and water budget evaluations support the conclusion that a significant portion of the precipitation recharged to the aquifer in the upper basin, including the Marsh Valley aquifer, does not manifest as surface water at or above the Portneuf-Pocatello gage but rather circulates deeper into the ESPA, perhaps bypassing the LPVA to some extent. In other words, once precipitation in the upper basin percolates into the aquifer, the fate of a majority of this recharge likely is to become tributary underflow to the ESPA.” Revised Analysis, pp. 2 and 3.

Current understanding, as incorporated into the ESPAM 2.0 ground water flow model, attributes 5.4×10^9 gal/year of underflow from the Portneuf basin to the ESPA but the contribution may in fact be much higher. To better account for this relationship IDWR intends to incorporate the Portneuf River basin into the ESPA

ground water flow model at some point in the future. ESPAM 2.0 places the closest active model cell approximately 5 miles south of the Portneuf Gap and this cell has been used to develop this revised hydrologic analysis supporting these transfers. Revised Analysis, p. 3, footnotes omitted.

18. The October 14 Memo provided the following response:

The 5.4 billion gal/year of underflow modeled in ESPAM2.1 is underflow from the Mink Creek, Gibson Jack, and City-Cusick Creek basins to the Lower Portneuf River Valley (LPRV) aquifer (based on Welhan, 2006). This underflow occurs down-gradient of the Portneuf Gap. Welhan (2006) estimated 1.06 billion gal/year (3,250 AF/yr or 4.5 cfs) of underflow through the Portneuf Gap. This value includes underflow from the upper Portneuf and Marsh Creek Basins. October 14 Memo, pp. 2 and 3, footnote omitted.

19. The Revised Analysis also asserted that USGS StreamStats supports the conclusion that tributary underflow to the ESPA from the upper Portneuf basin may be much higher. The October 14 Memo stated:

USGS StreamStats equations are not applicable for streams affected by irrigation diversions (Hortness and Berenbrock, 2001). The USGS StreamStats program uses regression equations to compute expected streamflow from basin characteristics including drainage area, mean basin elevation, basin relief, slopes greater than 30 percent, mean annual precipitation, forested area, basin slope, and main channel slope. JCH's comparison of USGS StreamStats predicted flows with measured flows ignores the effects of diversions upstream of the gages. Further, the USGS included the Marsh Creek at McCammon gage site (13075000) in the sites used to develop regression equations for Region 7. Hortness and Berenbrock (2001) states that a measured average annual discharge of 87.1 cfs at the McCammon gage site was used in development of the USGS StreamStats equations. This is significantly lower than the predicted average annual discharge of 131 cfs from JCH's analysis. This is a general indication of the magnitude of potential error in applying the regional regression equations to a specific location.

20. The complexity of the application and its proposal to offset injury by cessation of ground water pumping in the Marsh Valley to benefit the ESPA and the Snake River results in uncertainty regarding injury to downstream water rights. The JCH analysis and the Revised Analysis have not adequately addressed that uncertainty.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, sets forth the criteria that the Department can consider in determining whether an application for transfer should be approved:

The director of the department of water resources shall examine all of the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code

2. An applicant bears the burden of proof to show that the application will not injure other water rights, will not result in an enlargement in use, is consistent with conservation of water resources, and is in the local public interest.

3. The purpose of the Snake River Moratorium was to prevent further water withdrawals from the ESPA. Approval of the application would authorize withdrawal of water from the ESPA and, unless fully mitigated, would violate the intent of the moratorium order and injure senior water rights from the Snake River and tributary springs.

4. The Applicant has not met its burden to establish that cessation of pumping ground water from the existing points of diversion would fully mitigate water rights affected by pumping ground water from the proposed point of diversion in time, quantity and location.

5. Applications for Transfer 79906 and 79907 should be denied.

ORDER

IT IS HEREBY ORDERED that Applications for Transfer 79906 and 79907 are DENIED.

Dated this 15th day of December, 2015.



James Cefalo
Water Resources Program Manager

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December 2015, I mailed a true and correct copy of the foregoing PRELIMINARY ORDER DENYING APPLICATIONS, with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the person(s) listed below:

US MAIL - CERTIFIED

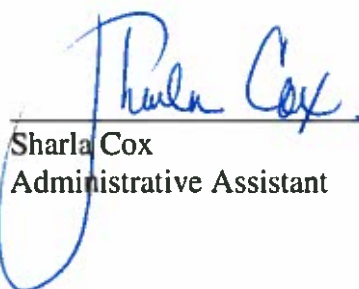
RE: TRANSFER APPLICATIONS 79906 AND 79907

**Idaho Water Company, LLC
1135 Valley Road S.
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**Michael Creamer
Givens Pursley LLP
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Courtesy copy sent via regular mail to:

**Jason Helms
6755 N. Albert Lane
Idaho Falls, ID 83401**



Sharla Cox
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.