

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

IN THE MATTER OF APPLICATION FOR)
PERMIT NO. 51-13106 IN THE NAME OF)
HALF MOON LLC)
_____)

**ORDER DENYING PETITION
FOR RECONSIDERATION**

This matter having come before the Idaho Department of Water Resources (“Department”) as a petition to reconsider the issuance of a permit to appropriate water, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On October 21, 2015, the Department issued¹ a Preliminary Order approving permit 51-13106 (“permit”) authorizing Half Moon LLC (“Half Moon”) to develop a right to divert 4.0 cubic feet per second (“cfs”) from a ground water source for irrigation of 490 acres.

2. The Swan Falls Agreement and associated legislation subordinated portions of hydropower water rights held by Idaho Power to upstream development. The subordinated portions of the hydropower water rights are held in trust by the State of Idaho, and can be reallocated to new upstream beneficial uses upon satisfaction of certain criteria. The water subject to reallocation is commonly referred to as trust water. Ground water is trust water if it is tributary to the Snake River downstream from Milner Dam and upstream from Swan Falls Dam. The source of water for the permit is trust water.

3. The Idaho legislature established a summer minimum flow on the Snake River at Murphy Gage of 3,900 cfs and a winter minimum flow of 5,600 cfs in response to the Swan Falls Agreement. Murphy Gage is located below Swan Falls Dam, and the minimum flows protect the unsubordinated portion of the Idaho Power water rights to generate hydropower at Swan Falls Dam.

4. The permit was issued with a condition (Condition No. 10) stating:

This right is for the use of trust water, and it is subject to review 5 years after its initial approval (date of permit approval) to re-evaluate the availability of trust water for the authorized use and to re-evaluate the public interest criteria for reallocating trust water.

5. The permit provides a five-year development period and requires the permit holder to submit a statement of proof of beneficial use on or before November 1, 2020.

6. On November 3, 2015, the Department received Petition for Reconsideration and Request for Hearing in the Matter of Permit to Appropriate Water No. 51-13106 (petition). The

¹ The permit was approved on 10/20/2015 and issued on 10/21/2015.

petition requested the Department remove Condition No. 10 from the permit and requested a hearing on the matter.

7. On November 20, 2015, the Department received Withdrawal of Request for Hearing in the Matter of Permit to Appropriate Water No. 51-13106.

8. The Department has a responsibility to determine whether trust water provides the greater benefit to the people of Idaho as a source of flow for hydropower and other instream uses, or for upstream consumptive economic development. The Department has approved applications to reallocate trust water with a provision to review, after a specific term, the availability of trust water and whether the reallocation of trust water remains in the public interest. The term review condition was adopted in 1988 to actively manage trust water.²

9. In some recent years, after adjusting for water being delivered through the Murphy Gage reach to lower reaches of the Snake River (below Swan Falls Dam), Snake River flows measured at Murphy Gage have approached the established minimum flows. If future Snake River flow rates at Murphy Gage are less than the minimum flows, some water right permits licenses, and decreed water rights authorizing diversion and beneficial use of trust water would be curtailed.

10. Until 2010, permits for appropriations of trust water issued by IDWR's Western Regional office included a condition similar to Condition 10 that listed a 20-year term review. After 2010 a condition with a 5-year term review became standard. A query of the Department's water rights database returned 25 permit records in Western Region with a 5-year term review. All 25 were approved during 2010 or later.

11. The change from a 20-year term to a 5-year term will allow the Department to review junior trust water appropriations prior to or concurrently with senior trust water appropriations.

ANALYSIS

The basis for Half Moon's petition to remove Condition 10 is three-fold. First, it asserts that because the development period and the term review period end at approximately the same time, Half Moon would find itself investing time and financial resources in development of the project during the five-year period between 2015 and 2020, only to risk having IDWR invoke Condition No. 10 during the same development period, thereby terminating the Permit." Second, Half Moon questions whether the change from a 20-year term to a 5-year term treats Half Moon unfairly relative to other applicants. Third, Half Moon asserts that Condition 10 is unnecessary since the prior appropriation doctrine and other conditions on the permit protect the minimum flows at Swan Falls.

IDWR has conditioned appropriations reallocating trust water with a term review condition since it began reallocating trust water pursuant to the 1984 Swan Falls Agreement. The term reviews were incorporated to allow IDWR to actively manage the trust water resource in response to uncertainties in the amount of development and use under existing appropriations, changes in water supply, and possible changes in public interest. The condition allows the Department to

² "Policy and Implementation Plan for Processing Water Right Filings in the Swan Falls Area", November 3, 1988, IDWR.

review whether there is sufficient trust water to allow continued recognition of the water right and, if so, whether continued use of the trust water is in the public interest.

The Department recently changed from the historic 20-year term to a five-year term to more closely align the term review for new permits with that of older permits. The Department can conduct a more efficient and informed review of availability of trust water and public interest by conducting a single review in the near future for all trust water rights rather than conducting multiple reviews over a long period of time.

Half Moon's permit is conditioned consistently with other similar permits issued since 2010. The petition to remove Condition 10 would, if granted, limit the Department's ability to actively manage the resource and would privilege Half Moon above other appropriators. In particular, removing Condition 10 and relying only on the prior appropriation doctrine as Half Moon suggests would exclude that water right from ongoing public interest reviews that other users of trust water are subject to.

CONCLUSIONS OF LAW

1. The request for hearing was withdrawn by Half Moon.
2. The petition for reconsideration was received timely.
3. The Department is authorized to issue permits with conditions pursuant to Rule 50.01 of the Department's Water Appropriation Rules (IDAPA 37.03.08.050.01), which provides in pertinent part as follows:

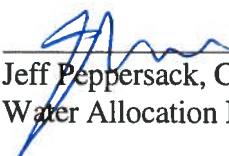
The Director may issue permits with conditions to insure compliance with the provisions of Title 42, Chapter 2, Idaho Code, other statutory duties, the public interest, and specifically to meet the criteria of Section 42-203A, Idaho Code, and to meet the requirements of Section 42-203C, Idaho Code, to the fullest extent possible including conditions to promote efficient use and conservation of energy and water.

4. Condition 10 of Permit No. 51-13106 is necessary to ensure compliance with provisions of Title 42, Chapter 2, Idaho Code and the requirements of Section 42-203C.
5. The Department should deny the petition for reconsideration.

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration of the preliminary order issuing Water Right License No. 51-13106 is **DENIED**.

Dated this 24 day of November, 2015.



Jeff Peppersack, Chief
Water Allocation Bureau

CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2015, I mailed a true and correct copy, postage prepaid, of the foregoing Order Denying Petition for Reconsideration and Explanatory Information to the persons listed below:

RE: Permit No. 51-13106

HALF MOON LLC
911 E WINDING CREEK DR STE 150
EAGLE ID 83616

LORI GRAVES
SPF WATER ENGINEERING
300 E MALLARD DR STE 350
BOISE ID 83706

CHRIS BROMLEY
MCHUGH BROMLEY PLLC
380 S 4TH ST STE 103
BOISE ID 83702



Emalee Rushing
Administrative Assistant

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.