

Randall C. Budge (ISB #1949)
T.J. Budge (ISB #7465)
RACINE, OLSON, NYE,
BUDGE & BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: (208)232-6101
Fax: (208)232-6109

Attorneys for P4 Production, LLC

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Department of Water Resources
Eastern Region

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 79037 IN THE
NAME OF P4 PRODUCTION, LLC

APPLICANT'S PETITION FOR
RECONSIDERATION

Applicant P4 Production, LLC ("Monsanto"), through counsel, hereby petitions the Idaho Department of Water Resources ("Department") to reconsider the Preliminary Order issued August 4, 2015, by James Cefalo, Water Resources Program Manager, the Hearing Officer at the administrative hearing conducted on May 21, 2015, in Soda Springs, Idaho. Reconsideration is requested with respect to certain findings of fact, evaluation criteria/analysis, and conclusions of law as set forth below.

RECONSIDERATION OF FINDINGS OF FACT

Monsanto requests reconsideration of the following findings of fact:

Finding of Fact 17

17. The "anticipated maximum pumping rate" from the South Wells is 1.80 cfs. EX. 11, page 4. If the proposed transfer is approved, Monsanto plans to test pump the South Wells to determine whether the selenium treatment project is feasible. Banton Testimony.

This finding forms the basis of the conclusion that Monsanto's water right should be limited to 1.8 cfs as opposed to the Application itself which seeks to combine all rights and permit any or all of the combined total to be diverted from

any well. However, Banton's reference to 1.8 cfs pertained to his depletion model which used an assumption that the maximum water pumped from the South Wells would be 1.80 cfs. While Monsanto witness Maughan estimated that the proposed South Wells would pump approximately 1.80 cfs, this was not intended to limit the amount of water Monsanto can divert even if the South Wells prove capable of diverting more than 1.8 cfs. The intent of the Application is to combine all of water rights, enabling the combined quantities to be pumped out of any or all of the wells utilized to provide water to the plant. Accordingly, Finding of Fact 17 should be revised to read as follows:

17. If the proposed transfer is approved, Monsanto plans to test pump the South Wells to determine the quantities and quality of groundwater that would be produced from the aquifer at this location and whether the selenium treatment project is feasible. The initial pumping rate is estimated to be 1.80 cfs. The total pumping rate from South Wells combined will not exceed the authorized rates or volumes on a combined basis. Maughan Testimony.

Finding of Fact 18

18. Application for Transfer 79037 proposed to add authorized points of diversion in the SWSE and SESE of Section 19, T08S, R42E (hereinafter "North Wells"), located approximately one mile north of the current plant site. These points of diversion are proposed for unanticipated, but possible future needs. Veile Testimony. Monsanto has no imminent plans to construct the North Wells. Smith Testimony. Monsanto does not have "a project in sight that identifies the need for those wells right now." Veile Testimony.

Finding of Fact 18 does not accurately reflect the record as a whole. The testimony of Mr. Veile must be read in conjunction with the testimony of Mr. Smith to support the finding that while there is no immediate plans to construct the North Wells, there is an anticipated need to construct the North Wells to replace one or more of the existing wells that are nearly 65 years of age, as well as to provide a secure water supply to meet changing operations at the plant and because of physical or groundwater quality constraints at the existing plant site

that may impair the ability to construct a new well. Mr. Veile and Mr. Maughan also expressed need for flexibility and options to address present and changing groundwater quality issues. All so see the Supporting Affidavit of Mike Veile regarding a recent well failure. Accordingly, it is requested the Finding of Fact 18 to be revised as follows:

18. Application for Transfer 79037 proposed to add authorized points of diversion in the SWSE and SESE of Section 19, T08S, R42E (hereinafter "North Wells"), located approximately one mile north of the current plant site. These points of diversion are proposed for anticipated needs pertaining to expansion of the plant, replacement of existing plant wells which are nearing 65 years of age as well, as physical constraints at the existing plant site and existing and future groundwater quality issues. Veile, Maughan, Smith Testimony, Veile Affidavit.

The proposed new language for Finding of Fact 18 is consistent with Finding of Fact 19 which reads:

19. Monsanto also proposes to expand its industrial place of use to include the SWSE and SESE of Section 19, T09S, R42E. P4 currently owns the SWSE and SESE of Section 19 at the proposed expanded place of use. Ex. 118.

Finding of Fact 30

30. Golder predicts that pumping 1.8 cfs from the South Wells could deplete Soda Creek by as much as 0.57 cfs. Ex. 11, Table 8.

This finding does not accurately reflect Golder's predication of pumping depletions from the South Wells. Table 8 provides a summary of estimated depletions in Soda Spring after one year of pumping the South Wells only (Reaches B and C above Torgesen) which ranges from 0.05 cfs to 0.57 cfs. Ultimately, the depletive effect of the pumping is on the Bear River, and the amount is too small to measure as testified by Banton. Accordingly, this finding should be revised to read as follows:

30. Golder predicts that pumping 1.8 cfs from the South Wells could deplete Soda Creek (Reaches B and C, above Torgesen diversion) by as little as .05 cfs or as much as 0.57 cfs. Ex. 11, Table 8.

RECONSIDERATION OF EVALUATION CRITERIA/ANALYSIS

Analysis Paragraphs 4 & 5

4. Some of the assumptions used in the Golder depletion model are not consistent with the physical attributes of the hydrologic system. Specifically, Soda Creek is generally not 80 feet wide or 3.3 feet deep. Further, the local aquifer underlying the South Wells is bounded on the east and west by less permeable or non-permeable zones. The Monsanto Fault, for example, acts as a complete aquifer boundary in the area of the plant. Banton Testimony. Finally, the middle well of the South Wells is located approximately 3,000 feet from Soda Creek, rather than 5,500 feet as used in the Golder model.

5. The Golder depletion model should have incorporated better assumptions for the parameters of Soda Creek and the distance between the modeled well and the creek. Golder should have also incorporated no-flow boundaries for the local aquifer where appropriate. Golder's representative, David Banton, could not explain how changing these assumptions would have affected the results of the model. Banton Testimony. Because it is based on poor assumptions, the Golder depletion analysis is of limited value.

Soda Creek, and the associated riparian zone is of variable width along the creek channel and Golder selected a value considered to represent maximum conditions to result in conservatively high depletion effects. This value of 80 feet was from the reach of Soda Creek located in Five Mile Meadows north of Soda Creek Reservoir. In many places, the creek is narrower than 80 feet. Dimensional information from the Soda Creek site sampled by Golder for flow and located upstream of the Monsanto non-contact cooling water outfall and downstream of Soda Reservoir indicates that in this area the creek is approximately 15 to 20 feet wide and about 2 to 3 feet deep.

All models include assumptions. For example, each of the Snake Plain Aquifer Models, which were developed at the expense of millions of dollars involving extensive technical expertise and peer review, makes numerous assumptions that do not mirror the physical realities of the ESPA. For example, it assumes the aquifer is isotropic, when in fact that is not the case. It also fails to reflect actual

hydrologic barriers that control spring discharges in the Thousand Springs area. There are numerous other examples, yet that has not prevented the Department from relying on its predictions as the “best science available.”

The Golder Depletion Model is based on an accepted peer-reviewed scientific methodology and like all models makes assumptions on the hydrogeological and hydrological system to determine the potential stream depletion. Often conservative assumptions are used to model the potential for greater depletion. The model addresses uncertainty in the site conditions by incorporating a range of hydraulic parameters for the aquifer thus resulting in a potential range of stream depletion impacts. Questions concerning Golder’s assumptions are appropriate but should not be used to ignore the model results; rather, they should compel a conserve application of the model’s predictions. In this case, that might mean accepting the higher rather than the lower estimated stream depletions in Soda Creek. As shown by Exhibit 11, Table 8, these estimates are relatively small, ranging from 0.05 cfs up to 0.57 cfs. Analysis paragraphs 4 and 5 should be revised accordingly.

Analysis Paragraph 6

6. In the absence of reliable information about depletion, the Department must assume that 100% of the pumping from the South Wells could appear as depletion to Soda Creek. Even if pumping from the South Wells causes 1.80 cfs of depletion to Soda Creek, the evidence in the administrative record still shows that any possible injury to downstream rights will be fully mitigated.

There is no evidence in the record to support a finding of 100% depletion to Soda Creek. The testimony from Banton is that the effects of pumping a well radiate out in all directions, and that depletions from the proposed wells currently radiates in all directions, including primarily south to the Bear River. This evidence is uncontroverted. It is not physically possible for 100% of the pumping from the South Wells to appear as depletions in Soda Creek above the Torgesen point of diversion. Analysis paragraph 6 should therefore be replaced with the following:

6. The pumping from the South Wells could appear as depletion to Soda Creek. The Golder Report Exhibit 11 and testimony of Banton provide a scientifically-based assessment of the potential depletion to Soda Creek (Reaches B and C). The estimated stream depletion in Soda Creek (Reaches B and C) from pumping 1.8 cfs from the South Wells ranges from 0.05 cfs to 0.57 cfs. Because of uncertainty in the actual hydrogeological conditions, it is reasonable to accept the higher estimated depletion level or a 0.57 cfs depletion to Soda Creek above the Toresgen point of diversion resulting from pumping the South Wells.

Analysis paragraph 14

14. If a condition is added to the transfer approval, requiring Monsanto to discharge the same amount of water into Soda Creek as is diverted from the South Wells, all injury concerns related to Soda Creek and the Bear River will be satisfied.

Depletion does not automatically produce injury under Idaho law. In this case, the risk of injury exists only during the irrigation season. Therefore, analysis paragraph 14 should be revised as follows:

14. If a condition is added to the transfer approval, requiring Monsanto to discharge into Soda Creek during the irrigation season the estimated maximum depletion from the South Wells as contained in the Golder Report, all injury concerns will be satisfied. Accordingly, if Monsanto pumped 1.8 cfs from the South Wells the depletion amount would be 0.57 cfs. If the amount pumped is more or less the depletion amount to be mitigated would be proportionately increased or decreased. Presently Monsanto discharges 2,000 gpm (4.46 cfs) of non-contact cooling water into Soda Creek on a continuous basis, which more than offsets the impact to Soda Creek caused by pumping from the South Wells up to 4.46 if the assumption is made that pumping causes 100% depletion to Soda Creek.

Analysis Paragraph 22

22. Neither the application nor any other documents provided by Monsanto explain how the “mining” portion of water right 11-2144 should be reduced to accommodate the added beneficial use of “industrial.”

This finding misapprehends the Transfer Application. Monsanto does not seek to add an “industrial” beneficial use to the quarry water right 11-2144;

rather, Monsanto simply seeks to combine this water right with the four industrial water rights at the plant. The combined rights will retain the maximum diversion rate of 3.68 cfs and maximum volume of 1,778 acre-feet for the mining use. If the Hearing Officer intended to limit the quarry well to 2.0 cfs, then it must be made clear that the remaining 1.68 cfs under that right can be combined and pumped from the other wells. Accordingly, paragraph 22 should be revised as follows:

22. There would be no enlargement of water right 11-2144 by combining it with the industrial rights, provided the total beneficial use remains limited to a diversion rate of 3.68 cfs and a volume of 1,778 acre-feet.

This revision is consistent with the analysis paragraphs 25, 26, and 27:

Analysis Paragraph 30

30. If the volume limit described above is maintained on water right 11-2144, then Monsanto has satisfied its burden of proof with regards to demonstrating no enlargement of the water rights.

Consistent with analysis paragraphs 22, 25, 26, 27, and 28, analysis paragraph 30 should be revised to read as follows:

30. Because the volume limit described above is maintained on water right 11-2144, Monsanto has satisfied its burden of proof with regard to demonstrating no enlargement of the water right.

Analysis Paragraph 36

36. In this case, Monsanto proposes adding two possible points of diversion (the North Wells) to its water rights for an expansion which may or may not occur at some point in the future. Mr. Smith and Mr. Veile testified that Monsanto has no current plans to construct the North Wells.

Consistent with the recommended change to Finding of Fact No. 18 above, this analysis paragraph should be revised to read as follows:

36. In this case, Monsanto proposes, without expanding the quantity of existing rights, to add two points of diversion (the North Wells) to its water rights which are needed to accommodate reconstruction or new construction at the plant site, replacement of the existing wells,

addressing present and future water quality needs in order to accommodate and provide security to present and future plant operations. Smith, Veile Testimony.

Analysis paragraph 38

38. Monsanto did not provide any persuasive arguments for adding the North Wells as authorized points of diversion when Monsanto has no present intent to develop the wells. It is not in the local public interest to add points of diversion to water rights when the water user has no present intent to use or develop the added points of diversion. The North Wells should be excluded from Transfer approval 79037.

The North Wells should be included in the transfer approval for numerous reasons. First, pursuant to the Stipulated Settlement Agreement, Exhibit 12, all Protestants stipulated to the inclusion of the North Wells, excepting only Protestants Nedra and Brian Torgesen, and the Preliminary Order finds no injury to other water rights from use of the North Wells. *See Findings of Fact 35, Evaluation Criteria/Analysis 8, 12, 14, 18, 30, 42.* Second, pumping from the North Wells will not occur until a mitigation plan is approved, pursuant to paragraph 2 of the Stipulation. Third, Monsanto discharges 4.46 cfs of non-contact cooling water to Soda Creek on a continuous basis throughout the year, which is more than sufficient to offset any impacts caused by pumping the North or South Wells. *See Finding of Fact 12.* Fourth, while Monsanto has no immediate plans to construct the North Wells, witnesses Veile and Smith explained the North Wells are important to provide flexibility, meet operational and water quality concerns and a secure and reliable water supply for the future operation of the plant. This is because the existing plant wells are very old and will likely need to be replaced in the foreseeable future, plant operations are physically constrained in all three other directions, reconstruction of existing facilities and new facilities can only occur to the north and there are present and future water quality issues to be addressed requiring operational flexibility going forward. An example of the recent well failure described in the Affidavit of Mike Veile illustrates this point

and need. To conclude that the North Wells cannot be included simply because they may not be constructed immediately unreasonably impairs the ability of water users to plan for and secure a water supply to meet changing needs.

Further, the finding takes excessive liberty in applying the “local public interest” standard. Under Idaho Code 42-222B(3), “local public interest” is defined as “the interest that the people in the area directly affected by a proposed water use have in the affects of such use on the public water resource.” To find the North Wells are not in the local public interest, the Department must identify an effect on use of the public water resource, and then find that such effect is adverse to the interests of people directly affected by the water use. There is no evidence in the record of adverse interests to locals by allowing Monsanto to utilize the North Wells to secure its water supply. By contrast, an inability to maintain a secure water supply could have a significant adverse impact on Monsanto’s operations, which could be very damaging to the local public interest.

For these reasons, analysis paragraph 38 should be revised as follows:

38. Based on the Stipulated Settlement Agreement, the above finding of no injury to any other water rights, and the need to plan for and provide for the future long term operation and viability of the plant by providing a flexible and secure water supply given the physical constraints of the plant site, it is in the local public interest to include the North Wells in transfer approval 79037.

Analysis Paragraph 41

41. As stated above, the local public interest demands that a water right reflect the actual make-up of a diversion and delivery system. It is not in the local public interest to combine water rights on systems that are not currently interconnected and will not be in the future.

Monsanto is not aware of any rule or policy of the Department that requires interconnection of points of diversion. On the contrary, Monsanto is aware of many water rights that have multiple points of diversion that are not interconnected. Accordingly, analysis paragraph 41 should be revised as follows:

41. Idaho law allows water rights to have multiple points of diversions which may or may not be interconnected. Therefore, it is permissible to combine the point of diversion of the quarry well right no. 11-2144 in the transfer approval 79037.

CONCLUSIONS OF LAW

Monsanto has satisfied its burden of proof for the review criteria set forth in Idaho Code § 42-222 and Transfer 79037 should be approved as long as: (1) Monsanto is required to discharge the same amount of water into Soda Creek as is pumped from the South Wells; (2) The South Wells are limited to a maximum diversion rate of 1.80 cfs; (3) Water right 11-2144 is limited to a maximum annual diversion volume of 1,778 acre-feet; (4) The Quarry Well is limited to an average annual diversion rate of 2.0 cfs; (5) Monsanto is required to install authorized flow meters on all of the existing or new wells described in the transfer approval; (6) The proposed North Wells are excluded from the transfer approval; and (7) The Quarry Well (water right 11-2144) is not combined with the Plant Wells (water rights 11-2102, 11-2107A, 11-2107B and 11-2141).

Monsanto requests reconsideration of conclusions of law (1), (2), (3), (4), (6) for the reasons described above and for the following additional reasons.

Conclusion of Law 1

(1) Monsanto is required to discharge the same amount of water to Soda Creek as is pumped from the South Wells;

As explained above, only a portion of the water pumped from the South Wells will deplete flows in Soda Creek. Further, depletion does not automatically produce injury under Idaho law. Therefore, conclusion of law 1 should be revised as follows:

(1) Monsanto is required to discharge into Soda Creek during the irrigation season sufficient water to offset depletions to Soda Creek from diversions from the South Wells;

Conclusion of Law 2

(2) The South Wells are not limited to a maximum diversion rate so long as the depletion is offset. If Monsanto diverts 1.8 cfs, it will be required to offset depletions in the amount of 0.57 cfs. If the pumping rate is more or less the required offset will be adjusted accordingly. The 4.46 cfs of non-contact cooling water currently added by Monsanto may be used to fully offset depletions to that amount. cfs;

The same arguments for reconsideration of conclusion of law 1 apply to conclusion of law 2. There should be no limit on the pumping of the South Wells as long as Monsanto mitigates the effects by discharging an equivalent amount of water into Soda Creek. Therefore, conclusion of law 2 should be revised as follows:

(2) The South Wells are limited to a maximum diversion rate of 4.46 cfs;

Conclusion of Law 3

(3) Water right 11-2144 is limited to a maximum annual diversion volume of 1,778 acre-feet;

The quarry well water right 11-2144 has a maximum diversion rate of 3.68 cfs and a maximum volume of 1,778 acre-feet. Conclusion of law 3 is unnecessary and should be deleted as it simply recites the elements of this water right.

Conclusion of Law 4

(4) The Quarry Well is limited to an average annual diversion rate of 2.0 cfs;

The flow rate under water right 11-2144 is 3.68 cfs. Restricting this right to 2.0 cfs effectively takes away 1.68 cfs of Monsanto's lawful water right without any basis, unless this water right approved as part of the transfer along with the North Wells. While Monsanto has agreed as a part of the Stipulated Settlement Agreement to restrict its diversions from the Quarry Well to 2.0 cfs, the licensed diversion rate should not be reduced because Monsanto may divert the full right from other wells, including the North Wells. Without the approval of the transfer of the Quarry Well, Monsanto has nowhere to transfer and use the portion of this water right above the 2.0 cfs diversion restriction at the Quarry. Without the

benefit of the Stipulation provided by the approved transfer and use of the North Wells, the Stipulation is of no force or effect and Monsanto is certainly not going to restrict the use of its lawful and valid water right 11-2144 at the Quarry in any way. Therefore, conclusion of law 4 should be deleted.

Conclusions of Law 6 & 7

Monsanto is required to install authorized flow meters on all of the existing or new wells described in the transfer approval;

Reconsideration: Monsanto already has portable flow meters on all operating wells at the plant and has recently installed a flow meter at the Quarry Well. Monsanto also plans and agrees to install permanent flow meters on all new wells.

- (6) The proposed North Wells are excluded from the transfer approval; and
- (7) The Quarry Well (water right 11-2144) is not combined with the Plant Wells (water rights 11-2102, 11-2107A, 11-2107B and 11-2141).

For the reasons stated above, the North Wells should be added as additional points of diversion and places of use under the transfer, and the Quarry Well water right should be combined with the plant wells. Conclusions of law 6 and 7 should be deleted.

Based on the foregoing, as well as the terms of the Stipulated Settlement Agreement, the Conclusions of Law should read as follows:

CONCLUSIONS OF LAW

Monsanto has satisfied its burden of proof for the review criteria set forth in Idaho Code § 42-222 and Transfer 79037 as long as: (1) Monsanto discharges into Soda Creek sufficient water to offset modelled depletions to Soda Creek from pumping the South Wells; (2) pursuant to the Stipulated Settlement Agreement, prior to the diversion and use of water from the "North Wells," Monsanto shall obtain approval from the Department of the mitigation plan that provides mitigation for any reduction in water flows causing material injury to senior rights in Soda Creek and the John Lau and License stock water wells; (3) pursuant to the Stipulated

Settlement Agreement, the rate of diversion under water right 11-2144, commonly known as the "Quarry Well," shall be limited to a diversion rate of 2.0 cfs from the point of diversion at the Quarry (the maximum flow rate of 3.68 cfs may be diverted from the combined points of diversion); (4) Monsanto is required to mitigate irrigation season depletions from the South Well based upon the maximum estimated by the Golder Report, e.g. 0.57 cfs if the maximum pumped from the South Well is 1.80 cfs; the South Wells are not limited to a maximum diversion rate so long as the depletion is offset. If Monsanto diverts 1.8 cfs, it will be required to offset depletions in the amount of 0.57 cfs. If the pumping rate is more or less the required offset will be adjusted accordingly; (5) The 4.46 cfs of non-contact cooling water currently added by Monsanto may be used to fully offset depletions to that amount to Soda Creek; and (5) Monsanto is required to install authorized flow meters on new wells and on the Quarry Well.

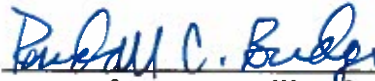
RESPECTFULLY SUBMITTED this 18th day of August, 2015.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: 
RANDALL C. BUDGE

CERTIFICATE OF SERVICE

I certify that on this the 18th day of August, 2015, the foregoing document was served on the following persons in the manner indicated.



Signature of person mailing form

James Cefalo Hearing Officer Idaho Department of Water Resources Eastern Region 900 N. Skyline Drive, Suite A Idaho Falls, Idaho 83402 james.cefalo@idwr.idaho.gov	☐ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☒ Hand Delivery ☒ E-mail
Rob Harris HOLDEN KIDWELL Attorney for Nedra and Brian Torgesen P.O. Box 50130 Idaho Falls, Idaho 83405-0130 rharris@holdenlegal.com	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-mail
P4 Production, LLC P.O. Box 816 Soda Springs, Idaho 83276	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☐ E-mail
City of Soda Springs Allen Skinner Mitch Hart Clyde Nelson 9 W. 200 S. Soda Springs, Idaho 83276 askinner@silverstar.com mjhart57@silverstar.com clydenlsn43@gmail.com	☐ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-mail

Jerry R. Rigby RIGBY, ANDRUS & RIGBY LAW, PLLC 25 North Second East Rexburg, Idaho 83440 jrigby@rex-law.com	☐ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-mail
John Lau P.O. Box 337 Soda Springs, Idaho 83276 jlau@q.com	☐ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-mail
Pat Lozier 1657 Reed Lane Soda Springs, Idaho 83276	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☐ E-mail