

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR) ORDER GRANTING PETITION FOR
TRANSFER NO. 79037 IN THE NAME OF) RECONSIDERATION, IN PART,
P4 PRODUCTION, LLC) AND DENYING APPLICANT'S
_____) MOTION TO AUGMENT RECORD

On May 21, 2015, the Idaho Department of Water Resources ("Department") conducted an administrative hearing for contested Application for Transfer 79037. The Applicant, P4 Production, LLC ("P4" or "Monsanto") and the Protestants, Nedra Torgesen and Brian Torgesen, were present at the hearing. P4 was represented by attorney Randy Budge. The Torgesens were represented by attorney Robert Harris.

The Hearing Officer issued a *Preliminary Order Approving Transfer 79037* ("Preliminary Order") on August 4, 2015. Mr. Budge filed a *Petition for Reconsideration* ("Petition") and a *Motion to Augment the Record* on behalf of Monsanto on August 18, 2015.

Pursuant to Rule 730.02.a of the Department's Rules of Procedure (IDAPA 37.01.01), a petition for reconsideration must be filed within 14 days of the service date of the preliminary order. Monsanto filed its *Petition* exactly 14 days after the service date of the *Preliminary Order* and, therefore, the *Petition* was filed in a timely manner.

On September 1, 2015, Mr. Harris filed *Protestants' Opposition to Applicant's Motion to Augment the Record and Applicant's Petition for Reconsideration* ("Opposition") on behalf of the Torgesens.

Monsanto's *Petition* contends that certain Findings of Fact, Analyses and Conclusions of Law included in the *Preliminary Order* are incorrect or not consistent with the evidence in the administrative record. The contentions raised by Monsanto are addressed below:

Rate Limit on South Wells (Finding of Fact 17)

Finding of Fact 17 states:

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.

The transfer approval added the following condition to water rights 11-2102, 11-2107A, 11-2107B and 11-2141: "The instantaneous rate of diversion from the four ground water wells located in the SE1/4 of Section 31, T08S, R42E [South Wells] shall not exceed 1.80 cfs."

SUPPORT DATA

IN FILE # 11-2102

Monsanto contends the evidence presented at hearing was not intended to limit the South Wells to a maximum diversion rate of 1.80 cfs. Monsanto argues the hearing officer erred by including a condition on the water rights limiting the South Wells to a diversion rate of 1.80 cfs. Monsanto believes the testimony of its employee, Jason Maughan, established that Monsanto intended to pump more than 1.80 cfs from the South Wells.

In preparing this order, the Hearing Officer again reviewed the testimony of Jason Maughan and David Banton. Maughan testified that the pumping rates for the South Wells would be based on the rate needed to operate the proposed selenium treatment plant. When asked specifically about expected pumping rates and volumes, Maughan deferred to Banton.

Banton testified that his injury analysis was based on a diversion rate from the South Wells of 1.80 cfs. Banton also testified that the pumping capacity of the aquifer in the area of the South Wells is approximately 800 gpm (1.80 cfs). Banton's report states that the "anticipated maximum pumping rate" of all of the South Wells combined is 800 gpm (1.80 cfs). Finding of Fact 17 is an accurate statement of the evidence cited. No changes are warranted.

It is appropriate to limit the South Wells to a maximum diversion rate of 1.80 cfs. Monsanto's injury analysis was based on pumping 1.80 cfs from the South Wells. If Monsanto wanted the flexibility to pump its entire authorized rate from the South Wells, its injury analysis should have reflected that intent.

North Wells (Finding of Fact 18, Analysis 36 and 38)

Finding of Fact 18 states:

Application for Transfer 79037 proposes 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.

Analysis Paragraph 36 states:

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.

Analysis Paragraph 38 states:

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.

Monsanto argues that Finding of Fact 18 does not reflect the evidence in the administrative record. In preparing this order, the Hearing Officer again reviewed the testimony of Michael Veile and Jim Smith. Smith testified that there are “no imminent plans” to construct the North Wells. Veile testified that the North Wells are intended to address unanticipated, but possible, future needs. Veile also testified: “I have no plans right now to construct [the North Wells]; we don’t have a project in sight that identifies the need for those wells right now.”

In conjunction with its *Petition*, Monsanto filed a *Motion to Augment the Record*, seeking the admission into the record of an affidavit from Michael Veile (dated August 17, 2015). Monsanto argues that the record is incomplete and that the Veile Affidavit provides “new evidence not known or presented at the hearing that is relevant” to the proceeding.

The testimonial record shows that Smith and Veile were asked multiple questions by Mr. Budge, Mr. Harris and the Hearing Officer about the present condition of the Plant Wells, the recent failure of one of Monsanto’s pumps, and the present intent (or lack thereof) to construct the North Wells. Smith and Veile had ample opportunity to explain the purpose for including the proposed North Wells on the transfer application. Mr. Budge also had ample opportunity to ask additional questions of Monsanto’s witnesses to clarify any ambiguities in their testimony.

The Veile Affidavit does not provide any information that would change the outcome of this contested case or the decision to exclude the North Wells from the Transfer Approval. The Veile Affidavit describes a pump failure that occurred at the Monsanto plant in May 2015. Veile testified about the pump failure during the hearing. The Veile Affidavit states that the development of the North Wells “is being considered” by Monsanto. Veile Affidavit, ¶ 5. This statement is vague and does not justify any change to Finding of Fact 18.

To accept the Veile Affidavit into the record at this point would prejudice the Protestants or would unnecessarily delay the proceeding. Monsanto’s Motion to Augment the Record with the Veile Affidavit should be denied. No change is warranted for Finding of Fact 18.

Monsanto also contends that the North Wells should not have been excluded from the transfer approval. The *Petition* states that adding the North Wells to the water right will not injure any other water rights. However, the *Preliminary Order* did not exclude the North Wells on the basis of injury. Rather the North Wells were excluded from the transfer approval under the local public interest review.

Monsanto contends that it was improper to exclude the North Wells for local public interest concerns. Monsanto believes that maintenance of accurate water right records exceeds the scope of the local public interest review.

“Local public interest” is defined as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” Idaho Code § 42-202B(3).

Maintenance of accurate water right records falls squarely within the local public interest review. When a water user proposes to make changes to a water right, the changes should reflect how the public water resource will actually be used. Stated differently, water right records which do not accurately reflect actual water use make it difficult to manage and protect the public water resource. In this particular case, individuals who live near the Monsanto facility have an interest in understanding how the public water resource is being used. The primary mechanism for the public to obtain information about water use is through reviewing water right records. Allowing Monsanto to make changes to its water rights without any present intent by Monsanto to implement those changes is not in the local public interest.

To allow points of diversion to be added to a water right simply as a hedge against possible, but unanticipated, future needs could lead to absurd outcomes. For example, if the Department accepted Monsanto's proposal in this case, what would prevent a farmer who owned an 800-acre ground water irrigation right from seeking an authorized point of diversion within every single 40-acre tract on his farm, just in case his existing well collapsed and needed to be replaced? The farmer would argue that he needs the flexibility to guard against future operational issues and needs to be able to locate the replacement well anywhere on his property.

Adding points of diversion to water rights with no immediate plan to actually develop those diversions could result in water right records that are of no value to watermasters, the Department, or the public. As stated in the *Preliminary Order*, it is in the local public interest to have water right records that accurately reflect the current water usage under a water right.

In their *Opposition*, the Protestants identify another reason adding points of diversion to a water right (with no intent to develop those points in the immediate future) is not in the local public interest. "In this case, much can change between now and the time when Monsanto decides to drill the North Wells, and including an open-ended approval of wells that may not be drilled for decades deprives other water users of the ability to raise concerns for the proposed water use" *Opposition*, page 5. Stated differently, allowing Monsanto to add the North Wells in the pending transfer application, when the North Wells may not be developed for many years (if at all), deprives individuals in the local community of the right to protest on issues that may not even be apparent at this time. There are fairness and due process concerns that arise when transfer approvals become temporally disconnected from the implementation of the proposed changes.

Depletion to Soda Creek (Finding of Fact 30)

Finding of Fact 30 states: "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." Monsanto argues that this finding of fact should be revised to state: "Golder predicts that pumping 1.8 cfs from the South Wells could deplete Soda Creek . . . by as little as 0.05 cfs or as much as 0.57 cfs."

It is true that the Golder model resulted in a range of possible depletions. However, Finding of Fact 30 is still accurate in its current form. Further, because the Golder analysis was ultimately found to be unreliable because of inaccurate assumptions, the changes to Finding of Fact 30 proposed by Monsanto have no effect on the outcome of this contested case. No change is warranted for Finding of Fact 30.

Golder's Assumptions / Depletion to Soda Creek / Mitigation (Analysis 4, 5, 6 and 14)

The *Preliminary Order* stated that certain assumptions used in the Golder Analysis were “not consistent with the physical attributes of the hydrologic system.” Analysis, ¶ 4. Monsanto argues that the assumptions used by Golder are conservative and lead to greater depletion values. However, when Banton was specifically asked how changing these specific assumptions would affect the model results, he stated that he could not predict how the results would change.

It could be true, as Monsanto contends in its *Petition*, that using a stream channel width of 80 feet and a stream channel depth of 3.3 feet, and an aquifer without boundaries, and a ground water well located farther from the stream would lead to the most conservative model results. However, there is nothing in the record supporting such an argument.

Monsanto is correct that “[a]ll models include assumptions.” *Petition*, page 4. Monsanto is also correct that most models include assumptions that do not reflect reality. *Id.* If, however, a consultant proposes to adopt assumptions that are inconsistent with the physical attributes of a hydrologic system, the consultant must be prepared to explain how those inconsistent assumptions affect the model results. Banton was not able to do this.

Analysis Paragraph 6 states: “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.”

Monsanto argues “[t]here is no evidence in the record to support a finding of 100% depletion to Soda Creek.” *Petition*, page 5. The *Preliminary Order* did not include a finding of fact describing a 100% depletion to Soda Creek. Rather, the *Preliminary Order* stated that there was no reliable evidence about depletion to Soda Creek. Because of the modeling assumption issue described above, the Golder analysis was determined to be of limited value. Therefore, in the absence of reliable evidence, the Department must assume a worst case injury scenario, which would be a 1.80 cfs depletion to Soda Creek. Using any other value would be arbitrary.

Ultimately, the relative amount of depletion to Soda Creek is of no consequence because the pumping from the South Wells is fully mitigated through the injection of non-contact cooling water from the plant into Soda Creek. As part of the transfer approval, the following condition was added to water rights 11-2102, 11-2107A, 11-2107B and 11-2141: “To mitigate for depletion to Soda Creek resulting from ground water diversion, the right holder shall continuously discharge into Soda Creek an amount of water greater than or equal to the total amount of water diverted from the authorized ground water wells located in the NWSE and SWSE of Section 31, T08S, R42E [the South Wells].”

Monsanto argues that this mitigation requirement should be limited to the irrigation season because “the risk of injury exists only during the irrigation season.” *Petition*, page 6. The *Preliminary Order* states that an applicant bears the burden of showing no injury to all water rights, including water rights held by individuals other than the protestants. There are water rights

downstream of Monsanto, on the Bear River, that authorize diversion during the non-irrigation season. Although Monsanto provided evidence (through Banton's testimony) that the ultimate (long-term) effect on the Bear River would be negligible, Monsanto did not provide evidence about how long it would take for the benefits of the reduced diversion from the Plant Wells to reach the Bear River and offset the pumping effects from the South Wells. In the absence of data supporting some other outcome, Monsanto water rights were conditioned to require continuous injection into Soda Creek throughout the entire year.

Quarry Well / Water Right 11-2144 (Analysis 22 and 41)

Monsanto contends that water right 11-2144 should be changed to authorize diversion for two separate water systems (the plant and the quarry). As outlined in the *Preliminary Order* and reiterated above, it is not in the local public interest to create water right records that do not reflect the physical realities of water use. The point of diversion for the Quarry Well should not be included on water rights for the plant because water diverted from the Quarry Well cannot be used at the plant. Monsanto has no plans to connect the Quarry Well to the plant system.

To allow separate, disconnected systems to be included under a single water right could lead to absurd outcomes. For example, if the Department accepted Monsanto's approach in this case, what would prevent an irrigator who owns separate farms in Mud Lake and American Falls (70 miles apart) from including the water use at both farms under a single ground water right?

In its Settlement Agreement ("Agreement") with some of the protestants, Monsanto agreed to limit its diversion from the Quarry Well to 2.00 cfs. At the time it signed the Agreement, Monsanto assumed it would be able to tie the Quarry Well and the Plant Wells together under combined water rights. As stated, the proposed combination will not be approved.

This puts the Hearing Officer in a difficult position. The Hearing Officer cannot combine the water rights as proposed by Monsanto because of local public interest concerns. Ideally, water right 11-2144 would remain in its current form without adding any diversion limits. However, if the Department does not incorporate the 2.0 cfs diversion limit from the Agreement, the protests (filed by Lau, Lozier, Farmers Land & Irrigation Company, and the City of Soda Springs) are not withdrawn and this case must be reopened for additional proceedings.

Monsanto argues that "[r]estricting [water right 11-2144] to 2.0 cfs effectively takes away 1.68 cfs of Monsanto's lawful water right" This argument is correct. In its *Petition*, Monsanto proposes to split water right 11-2144 to preserve the full value of the right. *Petition*, page 7 ("If the Hearing Officer intend[s] 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.")

Monsanto's proposal to split water right 11-2144 is an acceptable way to resolve the issue with the Quarry Well diversion limit. A portion of water right 11-2144 (2.00 cfs and 966 acre-feet) will remain at the quarry site. The other portion of the water right (1.68 cfs and 812 acre-feet) will now be associated with the plant water delivery system. No application amendment is needed because the water use described in the application inherently covered this type of

outcome. The *Preliminary Order* and Transfer Approval should be updated to reflect the split of water right 11-2144.

ORDER

IT IS HEREBY ORDERED that the Applicant's *Petition for Reconsideration* is GRANTED, in part. Water right 11-2144 should be split into two parts: (1) 2.00 cfs and 966 acre-feet associated with the quarry site, and (2) 1.68 cfs and 812 acre-feet associated with the plant. The *Preliminary Order* and Transfer Approval have been revised to reflect this change. All other arguments and proposals made in the Applicant's *Petition* are DENIED. Applicant's *Motion to Augment* the Record is also DENIED.

Dated this 3rd day of September, 2015.



James Cefalo
Water Resources Program Manager

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of September 2015, true and correct copies of the document described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, certified with return receipt requested, to the following:

Document Served: Order Granting Petition, in Part, and Denying Motion

Randy Budge
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PO Box 1391
Pocatello, ID 83204

Robert Harris
Holden, Kidwell, Hahn & Crapo, PLLC
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Idaho Falls, ID 83405

Courtesy copies sent via regular mail to:

P4 Production, LLC
c/o Jim Smith
PO Box 816
Soda Springs, ID 83276

City of Soda Springs
c/o Alan Skinner or Clyde Nelson
9 West 200 South
Soda Springs, ID 83276

Farmers Land & Irrigation Company
1825 Rich Road
Grace, ID 83241

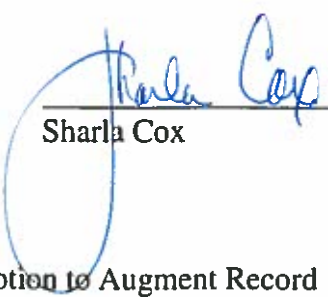
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Sharla Cox

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.