

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

**IN THE MATTER OF APPLICATION FOR )  
TRANSFER NO. 79037 IN THE NAME OF )      **PRELIMINARY ORDER**  
P4 PRODUCTION, LLC )      **APPROVING TRANSFER****

**PROCEDURAL HISTORY**

On December 31, 2013, P4 Production, LLC (“P4” or “Monsanto”) filed Application for Transfer No. 79037 with the Idaho Department of Water Resources (“Department”). The Department published notice of the application on February 6 and 13, 2014. Protests were filed by Nedra Torgesen, Brian Torgesen, Pat Lozier, John Lau, the City of Soda Springs, and Farmers Land and Irrigation Company.

A pre-hearing conference was conducted on April 24, 2014. The parties discussed the issues of protest and identified measures that could be taken to address the concerns of some of the protestants.

Monsanto filed an amended application on June 18, 2014 (the amended application hereinafter referred to as “application” or “Application for Transfer 79037”). The Department published notice of the application on June 26 and July 3, 2014. No additional protests were filed.

On November 24, 2014, P4, Pat Lozier, John Lau, the City of Soda Springs, and Farmers Land and Irrigation Company entered into a Settlement Agreement (“Agreement”). The Agreement constituted a withdrawal and resolution of the protests filed by Pat Lozier, John Lau, the City of Soda Springs, and Farmers Land and Irrigation Company. The protests filed by Brian Torgesen and Nedra Torgesen were not resolved through the Agreement. P4 and the Torgesens were unable to resolve the issues of protest through informal negotiations and requested that a hearing be held to decide the contested case.

An administrative hearing was conducted on May 21, 2015 in Soda Springs, Idaho. P4 was represented by attorney Randy Budge. Nedra Torgesen and Brian Torgesen were represented by attorney Robert Harris. After carefully considering the evidence in the administrative record, the Department finds, concludes, and orders as follows:

**BRIAN TORGESEN PROTEST**

During the hearing, Randy Budge, attorney for P4, challenged the validity of the protest filed by Brian Torgesen (“Torgesen”). Budge contends that the protest in question was actually filed by Torgesen on behalf of Water District 11-B and that Torgesen was never authorized to file a protest for the water users in Water District 11-B. For this reason, Budge contends the protest is invalid and should be dismissed.

Preliminary Order Approving Transfer

1 **SUPPORT DATA**

**IN FILE #** 11-2102

Robert Harris, attorney for Torgesen, argues that the protest in question was a personal protest and was not filed on behalf of any group. Harris contends the protest is valid and any references to Water District 11-B were only included to explain Torgesen’s familiarity with the Soda Creek system.

The Torgesen protest begins with the phrase “As President of Soda Creek [Water District] 11-B . . .” The signature line also identifies Torgesen as “President of Soda Creek [Water District] 11-B.” However, the body of the protest includes sentences that begin with the words “I feel.” Further, other water users in Water District 11-B (City of Soda Springs, Farmers Land and Irrigation Company) filed their own individual protests.

Disclosure documents prepared by Robert Harris are also inconsistent in their reference to the protestants. Mr. Harris’s amended witness and exhibit list (filed on May 7, 2015) stated that Mr. Harris is the attorney for “Nedra C. Torgesen and Soda Creek 11-B (Brian Torgesen).” The document was titled “Protestants Nedra C. Torgesen and Soda Creek 11-B (Brian Torgesen) Amended Witness and Exhibit List.” However, in the opening sentence of the document, the “Protestants” were identified as Nedra Torgesen and Brian Torgesen.

It is understandable why Mr. Budge would question the validity of the protest. There is a significant amount of ambiguity in the documents filed by or on behalf of Torgesen. The most persuasive evidence, however, and the deciding factor is the fact that the protest was written in the first person singular (“I feel”). Therefore, the Torgesen protest will continue to be recognized by the Department as a valid individual protest.

**FINDINGS OF FACT**

1. Application for Transfer 79037 proposes to list the same twelve points of diversion on ground water rights 11-2102, 11-2107A, 11-2107B, 11-2141 and 11-2144. Six of the twelve points of diversion would be new ground water wells. The other six points of diversion are existing wells and/or authorized points of diversion. The application also proposes to create a combined place of use for the five water rights. The application also proposes to add “industrial” as an authorized beneficial use for water right 11-2144.

2. The existing elements of the water rights included in the application are as follows:

| Right No. | Priority Date | Rate (cfs) | Volume (afa)   | Period of Use  | Beneficial Use |
|-----------|---------------|------------|----------------|----------------|----------------|
| 11-2102   | 10/05/1951    | 2.22       | Not specified. | 1/1 – 12/31    | Industrial     |
| 11-2107A  | 10/06/1952    | 1.00       | Not specified. | Not specified. | Industrial     |
| 11-2107B  | 11/18/1952    | 1.60       | Not specified. | Not specified. | Industrial     |
| 11-2141   | 09/27/1965    | 4.35       | 5,000          | 1/1 – 12/31    | Industrial     |
| 11-2144   | 06/10/1966    | 3.68       | 1,778          | 4/1 – 12/01    | Mining         |

3. Monsanto operates an ore processing plant (“plant”) north of Soda Springs, Idaho. Smith Testimony. The plant has been in operation since 1952. *Id.* P4, a wholly owned subsidiary of Monsanto, owns the property where the plant is located and the water rights associated with the

plant. *Id.* Monsanto is the current owner of record for the water rights included in the transfer application.

4. The primary purpose of the plant is to extract elemental phosphorus from ore mined in the Soda Springs area. Smith Testimony. This extraction is accomplished by running large amounts of electricity through the ore. Veile Testimony. Monsanto uses ground water at the plant to create steam, for cooling, and as a potable water supply for the plant employees. Smith Testimony.

5. Monsanto currently uses three production wells (“Plant Wells”) to divert ground water for industrial purposes at the plant. Veile Testimony. Well #1 is located in the SENE of Section 31, T08S, R42E. Well #2 is also located in the SENE of Section 31. Well #3 is located in the NESE of Section 31. Another well (the “Culinary Well”) is located in the SESE of Section 30, T08S, R42E, and is used to supply potable water to the plant employees. *Id.*

6. Water right 11-2102 currently identifies Well #1 and the Culinary Well as authorized points of diversion. Water rights 11-2107A and 11-2107B currently identify Well #2 as an authorized point of diversion. Water right 11-2141 currently identifies Well #3 as an authorized point of diversion.

7. The Plant Wells (#1, #2 and #3) are all interconnected. Smith Testimony. Water diverted from the Culinary Well is isolated from other water at the plant to maintain drinking water quality standards. Veile Testimony.

8. Some of the ground water diverted at the plant is used for cooling purposes. Cooling water that does not come in contact with ore or waste material is referred to by Monsanto as “non-contact cooling water” and is discharged into Soda Creek at a location directly west of the plant under an approved NPDES permit. Smith Testimony; Maughan Testimony. The average instantaneous discharge into Soda Creek from the plant is approximately 2,000 gallons per minute (4.46 cfs). Maughan Testimony.

9. Water right 11-2141, the most junior water right associated with the plant, includes the following condition: “[This right] shall not exceed 5,000 acre-feet per year, when combined with all other rights appurtenant to the same land.”

10. Soda Creek flows from north to south in the vicinity of the plant. Ex. 116. The creek channel is located less than ½ mile from the southwest corner of the plant. *Id.*

11. Water right 11-2144 was developed to provide ground water for mining purposes at a quarry site located west of the plant. Monsanto mines quartzite at the quarry site for use in the phosphorus extraction process at the plant. Veile Testimony. The ground water well (“Quarry Well”) described in water right 11-2144 is located near the quarry site in the SENW of Section 25, T08S, R41E. Ex. 116.

12. Water right 11-2144 describes two points of diversion in the SENW of Section 25. However, only one well is currently used to supply water at the quarry site. Veile Testimony. The Quarry Well is not connected to the Plant Wells. Smith Testimony. Monsanto does not have any plan to interconnect the Quarry Well and the Plant Wells.

13. The Quarry Well is located approximately 1/8 mile from Soda Creek. Ex. 116; Veile Testimony. Water diverted from the Quarry Well is used for dust abatement, washing quartzite, and cooling and cleaning mining equipment. Veile Testimony. Water used at the quarry site is fully consumed and is not discharged into Soda Creek. *Id.*

14. Application for Transfer 79037 proposes to add four new points of diversion at the south end of the plant. These four ground water wells (hereinafter "South Wells") have already been constructed. Maughan Testimony. The South Wells have not been used for production purposes at the plant, but are ready to pump if the pending transfer application is approved. *Id.*

15. Three of the South Wells, located in the SWSE of Section 31, T08S, R42E, were constructed in such a way that they can easily be converted into production wells to supply water to the plant. Maughan Testimony. The fourth of the South Wells, located in the NWSE of Section 31, was constructed with a smaller diameter casing and can only be used for testing purposes. *Id.*

16. Monsanto hopes that pumping water from the South Wells will help contain a plume of selenium contamination that exists in the shallow aquifer below the plant. Maughan Testimony; Banton Testimony. The contamination plume is moving from north to south in the shallow aquifer. *Id.* Monsanto plans to capture and treat the contaminated ground water before it leaves the plant site. *Id.* Contaminated water will be captured by pumping production water for use at the plant from the South Wells. *Id.*

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.

18. 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.

19. Monsanto also proposes to expand its industrial place of use to include the SWSE and SESE of Section 19, T08S, R42E. P4 currently owns the SWSE and SESE of Section 19 at the proposed expanded place of use. Ex. 118.

20. A large basalt aquifer exists in the Soda Springs area, extending from the Blackfoot Reservoir on the north to the Bear River on the south. Banton Testimony, Ex. 8, doc. page 4; Ex. 11, page 3. The basalt aquifer consists of less-permeable layers of basalt interspersed with more permeable layers of sediments, fractured basalt and cinders. Ex. 11, page 3.

21. Ground water in the aquifer flows from north to south and ultimately discharges into the Bear River or the alluvium beneath the river. Banton Testimony. The basalt aquifer is recharged by seepage from the Blackfoot Reservoir, precipitation on the land above the aquifer, and snowmelt from the drainages surrounding the aquifer. *Id.* Monsanto pumps production water for the plant from the basalt aquifer.

22. A major fault, known as the “Monsanto Fault,” runs north and south near the western boundary of the plant. Ex. 11, fig. 1. The Monsanto Fault acts as a complete barrier to aquifer flow in the area of the plant. *Id.* at page 3; Banton Testimony.

23. A lesser fault, known as the “Subsidiary Fault,” parallels the Monsanto Fault in the area of the plant and is located between the plant and Soda Creek. Ex. 11, page 3 and fig. 1. The Subsidiary Fault “pinches out” north of the plant site and only acts as a partial barrier to aquifer flow near the site. Banton Testimony. The degree of aquifer communication across the Subsidiary Fault is unknown. *Id.*

24. The South Wells are located between the Monsanto Fault and the Subsidiary Fault (to the west of the Monsanto Fault and to the east of the Subsidiary Fault), except for Well TW-83 which is located west of the Subsidiary Fault. Ex. 11, fig. 1. The Plant Wells and North Wells are located to the east of the Monsanto Fault. *Id.* The Plant Wells and North Wells are separated from Soda Creek by the Monsanto Fault. *Id.* The Plant Wells and North Wells are still hydraulically connected to Soda Creek in a northerly direction. Banton Testimony.

25. Monsanto hired Golder Associates, Inc. (“Golder”) to evaluate the depletion to Soda Creek which may result from pumping 1.80 cfs from the South Wells. Golder prepared a stream depletion model to evaluate the impacts to Soda Creek.

26. Golder’s depletion model incorporated the following assumptions: (1) The local aquifer is uniform and of infinite areal extent; (2) The Soda Creek channel is 80 feet wide and 3.3 feet deep; (3) Soda Creek has a 1-foot thick bed of sedimentary material; (4) The aquifer is 100 feet thick, and (5) The modeled ground water diversion point is located 5,500 feet (1,677 meters) from the creek. Ex. 11, page 7 and figure 4.

27. Golder’s depletion model used a range of values for other model inputs: (1) Transmissivity of the aquifer = 60,000 to 240,000 ft<sup>2</sup>/day; (2) Storativity =  $4.3 \times 10^{-5}$  to  $4.3 \times 10^{-4}$ ; and (3) Transmissivity of Soda Creek channel sediment = 0.028 to 2.8 ft<sup>2</sup>/day.

28. Golder evaluated depletion to Soda Creek under four pumping scenarios:

- (1) 9 cfs pumped from the North Wells;
- (2) 3 cfs pumped from the North Wells and 6 cfs pumped from the existing Plant Wells;
- (3) 1.2 cfs pumped from the North Wells, 1.8 cfs pumped from the South Wells and 6 cfs pumped from the existing Plant Wells; and
- (4) 1.8 cfs pumped from the South Wells (with no offset for existing diversion).

29. Scenarios 1-3 include an offset intended to represent the existing impacts to Soda Creek from pumping ground water at the plant. Scenario 4 is intended to reflect diversion from the South Wells without any offset for existing water use. Scenario 4 is the most conservative of all of the Golder scenarios and predicts the highest amount of depletion impacts to Soda Creek. Banton Testimony.

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.

31. Some of the assumptions used in the Golder depletion model are not consistent with the physical attributes of the hydrologic system. Soda Creek is generally not 80 feet wide or 3.3 feet deep. *See* Ex. 126, photos 3-5, 29-34. The local aquifer does not extend infinitely in all directions. The South Wells are located less than ½ mile from the Monsanto Fault which acts as a complete barrier to ground water flow at that location. Ex. 11, Figure 1; Banton Testimony. Also, the middle well of the South Wells is located approximately 3,000 feet from Soda Creek. Ex. 11, Figure 1.

32. Brian Torgesen is not listed as the owner of record for any water rights on Soda Creek. Ex. 109. Nedra Torgesen is the owner of record for 14 water rights from Soda Creek, with priority dates ranging from February 10, 1881 to June 17, 1889. *Id.* Excluding hydropower rights, there are approximately 8.7 cfs of water rights from Soda Creek with priority dates senior to June 17, 1889, including the Torgesen rights. *Id.* The 14 water rights held by Nedra Torgesen authorize the diversion of approximately 6.0 cfs from Soda Creek.

33. The authorized point of diversion for the Nedra Torgesen water rights is located on Soda Creek just downstream of the site where Monsanto injects its non-contact cooling water.

34. Measurement records for Soda Creek, collected by Farmers Land and Irrigation Company, show that the flow in Soda Creek upstream of the Torgesen diversion was between 45 and 55 cfs in the months of July and August, 2014. Ex 121. The measurement site is located upstream of the reservoir on Soda Creek, meaning the reported flow rates are not influenced by storage releases. *See* Ex. 116, Ex. 121.

35. The Torgesens have never had to call for water or demand delivery of water by the watermaster. Torgesen Testimony. There has always been sufficient water in Soda Creek to satisfy the Torgesen's water rights. *Id.*

36. Torgesen testified that he recently purchased property associated with other water rights from Soda Creek (water rights 11-493 and 11-494, which are currently in the name of John Corrigan, Minnie Corrigan and Frank Ellis). Torgesen Testimony. However, no documents were offered to support Torgesen's testimony or to indicate what portion of water rights 11-493 and 11-494, if any, are associated with the recently-acquired property.

37. On November 24, 2014, P4 and some of the protestants (City of Soda Springs, Farmers Land and Irrigation Company, John Lau and Pat Lozier) entered into an Agreement resolving the concerns raised by those protestants. Ex. 12. The Agreement included certain conditions and limitations proposed to be added to the transfer approval:

- 1) Prior to the diversion and use of water from the North Wells, P4 shall obtain approval from the Department for a mitigation plan that mitigates for any reduction in flows in Soda Creek which cause material injury to senior water rights and mitigates for any reduction in flows from the John Lau "Windmill Well." *Id.*
- 2) P4 is limited to an "annual average diversion rate" of 2.0 cfs from the Quarry Well. In the event that P4 seeks to increase the diversion rate from the Quarry Well, it must first obtain approval from the Department for a mitigation plan that mitigates for any reduction in flows in Soda Creek which cause material injury to senior water rights. *Id.*

- 3) P4 will install and maintain approved measuring devices on the Quarry Well and any other new or reconstructed wells described in water rights 11-2102, 11-2107A, 11-2107B, 11-2141 or 11-2144. *Id.*

## **EVALUATION CRITERIA / ANALYSIS**

1. Idaho Code § 42-222 sets forth the criteria used to evaluate transfer applications:

The director of the department of water resources shall examine all 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, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

2. The applicant bears the burden of proof for all of the criteria listed in Section 42-222.

### **Injury to Other Water Rights**

3. The Golder Report (Ex. 11) and the testimony offered by Monsanto employees suggest that the South Wells will not divert more than 1.80 cfs. Golder prepared a model to estimate how pumping from the South Wells might impact flows in Soda Creek. Golder estimates that pumping 1.80 cfs from the South Wells could result in a depletion of as much as 0.57 cfs in Soda Creek.

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.

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.

7. Monsanto demonstrated that pumping from the South Wells will not injure Nedra Torgesen's recorded water rights. Torgesen testified that his family has never had to call for water or demand delivery of water by the watermaster. In the past, there has always been sufficient water to satisfy Nedra Torgesen's water rights.

8. Flows in Soda Creek above the Nedra Torgesen diversion are greater than 40 cfs during the summer months. Excluding hydropower rights, all of water rights on Soda Creek senior to Torgesen's most junior water right (including Nedra Torgesen's own rights) total less than 10 cfs of diversion rate. Therefore, even if flows in Soda Creek were reduced by 1.80 cfs, there would still be sufficient water to satisfy all of Torgesen's water rights and all other water rights senior to June 17, 1889.

9. An injury analysis does not end with the Nedra Torgesen water rights. An applicant bears the burden of showing that the proposed change will not injure any water rights, even the water rights of individuals who are not party to the contested case. Stated differently, an applicant's burden of proof on the question of injury is not limited to the water rights of the protestants.

10. Excluding hydropower rights, Department records include over 160 cfs of water rights from Soda Creek. Ex. 109. Some of the rights are held by parties to the Agreement, but many are not.

11. Although P4 owns irrigation water rights on Soda Creek which could be used for mitigation purposes, it did not present any defined mitigation plan to use Soda Creek water rights to offset the impacts of the proposed transfer. See Ex. 109.

12. Monsanto employee, Jason Maughan, testified that Monsanto discharges approximately 2,000 gpm (4.46 cfs) of waste water into Soda Creek on a continuous basis throughout the year. This amount is more than sufficient to offset the impact to Soda Creek caused by pumping 1.80 cfs from the South Wells.

13. Because Soda Creek is tributary to the Bear River, any depletion to Soda Creek could reduce the amount of water available to fill water rights on the Bear River. By injecting at least 1.80 cfs into Soda Creek on a continuous basis, Monsanto not only mitigates any possible injury to Soda Creek water rights, but also mitigates any possible injury to Bear River water rights.

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.

15. Torgesen argues that pumping from the South Wells could cause injury to local spring water rights. According to the Department's water right records, there are only two water rights

within a 1-mile radius of the proposed South Wells (and lying west of the Monsanto Fault) which identify springs as a source of water: water rights 11-4252 and 11-496.

16. Water right 11-4252 is a claim filed in 1983 by Denton and Martha Harris pursuant to Idaho Code § 42-243. The claim describes a priority date of May 13, 1943 and the diversion of 0.06 cfs from a spring for stockwater use. The place of use and point of diversion are both located in the NWNE of Section 6, T09S, R42E, on property currently owned by P4. P4 is not required to mitigate for possible injury to its own water rights.

17. Water right 11-496 bears a priority date of October 1, 1917 and authorizes the diversion of 4.0 cfs from springs for domestic purposes. Water right 11-496 is currently in the name of the City of Soda Springs. The authorized points of diversion are on property currently owned by P4. The City of Soda Springs signed an Agreement consenting to the approval of the proposed transfer.

18. There is no evidence in the Department's water right records of any other water rights from springs in the vicinity of the proposed South Wells that could be injured by the proposed changes.

19. During the hearing, Torgesen described an unrecorded, beneficial-use domestic water right from a spring located in the NWSE of Section 36, T08S, R42E, approximately 1 mile west of the South Wells. Torgesen's use of water from the spring for domestic purposes is intermittent. He testified that he occasionally drinks from the spring when working on the property. There is no home connected to the spring source. Torgesen's water use has not been verified by the Department or an adjudication court. P4 is not required to evaluate potential injury to an undocumented water right claim that was not identified by Torgesen until during the hearing.

### **Enlargement of Water Rights**

20. Monsanto proposes to add the beneficial use "industrial" to water right 11-2144. In its current state, water right 11-2144 only authorizes diversion of ground water for "mining" purposes at the quarry site.

21. Adding a new beneficial use to a water right without reducing the authorized amounts under existing beneficial uses constitutes an enlargement of the water right. For example, even though "hydropower" is a non-consumptive beneficial use, "hydropower" cannot be added to an irrigation right unless the irrigation portion of the right is reduced proportionately. *See Ex. 107, page 28.*

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."

23. Pursuant to Idaho Code § 42-222(1), the director may consider consumptive use (as defined in Idaho Code § 42-202B) as a factor in determining whether a proposed change in use would constitute an enlargement in use of the original water right.

24. "Consumptive Use" is defined as "that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to

nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state.” Idaho Code §42-202B(1).

25. To prevent an enlargement, when a transfer application proposes to change the nature of use of a water right, the Department may limit the proposed water right to the historic consumptive use of the original right.

26. In this case, water right 11-2144 authorizes a diversion rate of 3.68 cfs and an annual diversion volume of 1,778 acre-feet. An annual diversion volume of 1,778 acre-feet is less than could be produced if the full diversion rate (3.68 cfs) were diverted continuously throughout the year, indicating that the licensed annual diversion volume (1,778 acre-feet) was based on actual use at the quarry site.

27. Water diverted at the quarry site is fully consumed and there is no discharge of waste water into Soda Creek. Veile Testimony. For purposes of this transfer, the evidence indicates that the historic annual consumptive use under water right 11-2144 is 1,778 acre-feet.

28. In the absence of evidence from Monsanto, the Department must determine how to apportion the available volume between the proposed beneficial uses. Some of the historical uses at the quarry site could be characterized as “industrial.” For example, dust abatement, ore processing and equipment maintenance could be identified as an “industrial” use of water. “Industrial” could have likely been included as an authorized beneficial use on the original water right. Therefore, in this case, it is appropriate to structure water right 11-2144 in a way that water may be used for “mining” or “industrial” use without specifically apportioning the available 1,778 acre-feet between the two uses.

29. Monsanto should be authorized to divert 1,778 acre-feet per year for “mining” or for “industrial.” However, Monsanto should still be limited to a total diversion volume under the right of 1,778 acre-feet. The water right volume limit will prevent enlargement. For example, if 1 acre-foot is diverted by Monsanto for “mining” purposes, that 1 acre-foot would no longer be available for “industrial” use during the calendar year.

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.

### **Conservation of Water Resources**

31. There is no evidence in the record that the proposed water use would be inconsistent with the conservation of water resources in the state of Idaho.

### **Effect on the Local Economy**

32. Monsanto is not proposing to move its proposed place of use outside of the local watershed. Therefore, this element of review under Idaho Code § 42-222 is not applicable to the pending contested case.

## Local Public Interest

33. The local public interest analysis under Section 42-222 is meant to be separate and distinct from the injury analysis. 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))

34. During the hearing, P4 provided evidence about Monsanto’s employment statistics, salaries, safety programs, community charity work, and taxes. Smith Testimony. These items do not fall within the definition of local public interest. The local public interest inquiry is limited to the effects of the proposed change on the public water resource.

35. Maintenance of accurate water right records does fall within the local public interest review. People who live in Soda Springs benefit from having accurate water right records for the water uses occurring in and around Soda Springs. Accurate water right records make it possible for people in the local community to easily recognize when a water user is operating outside of the limits of her water rights. Accurate water right records assist local watermasters in performing their duties. Water right records should reflect how water is actually being diverted and used. In fact, water users have a statutory duty to update their water rights to reflect current water use. *See* Idaho Code § 42-108.

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.

37. Monsanto acknowledges that, prior to diverting water from the North Wells, it must provide a mitigation plan to address impacts to Soda Creek and the local aquifer resulting from pumping the North Wells. The Department would publish notice of any proposed mitigation plan, which means the plan could be protested. In other words, adding the North Wells as authorized points of diversion at this time does not eliminate any future processing time or diminish any future risk of protest.

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.

39. Monsanto proposes to combine the water rights associated with the plant (11-2102, 11-2107A, 11-2107B and 11-2141) to describe and cross-list the same points of diversion and place of use. According to Monsanto employees, the Plant Wells are already interconnected in a way that water diverted from any of the Plant Wells can be used throughout the plant. Combining the points of diversion and places of use for water rights 11-2102, 11-2107A, 11-2107B and 11-2141 is logical and reflects how water is actually used at the plant. Therefore, this combination of points of diversion and places of use is within the local public interest.

40. Monsanto also proposes to combine the quarry water right (11-2144) with the plant water rights (11-2102, 11-2107A, 11-2107B and 11-2141). Monsanto employees testified that the

Quarry Well and the Plant Wells are not interconnected at this time and there is no plan to connect the wells in the immediate future.

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.

42. The Torgesens raised concerns about contaminants in the discharge from the plant into Soda Creek. Monsanto provided evidence that the discharge is authorized under an NPDES permit and is regulated and monitored in accordance with that permit. There is no evidence in the record that water quality in Soda Creek has been or will be impaired if Monsanto adheres to the requirements of the NPDES permit. There is not sufficient evidence in the record to deny the proposed transfer based on water quality concerns.

### 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).

### ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 79037 in the name of P4 Production, LLC is APPROVED as described in Transfer Approval 79037 issued in conjunction with this order.

Dated this 4<sup>th</sup> day of August, 2015.

  
\_\_\_\_\_  
James Cefalo  
Water Resources Program Manager

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 4<sup>th</sup> day of August 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: Preliminary Order Approving Transfer (79037)**

Randy Budge  
Racine, Olson, Nye, Budge & Bailey, Chtd.  
PO Box 1391  
Pocatello, ID 83204

Robert Harris  
Holden, Kidwell, Hahn & Crapo, PLLC  
PO Box 50130  
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

Pat Lozier  
1657 Reed Lane  
Soda Springs, ID 83276

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

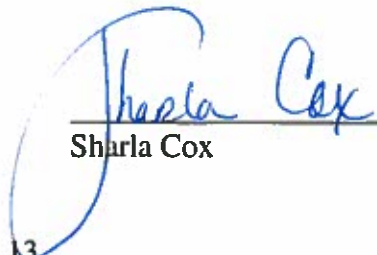
Jerry Rigby  
Rigby, Andrus & Rigby Law, PLLC  
25 North 2<sup>nd</sup> East  
Rexburg, ID 83440

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

Nedra Torgesen  
PO Box 45  
Soda Springs, ID 83276

John Lau  
PO Box 337  
Soda Springs, ID 83276

Brian Torgesen  
260 River Drive  
Soda Springs, ID 83276

  
\_\_\_\_\_  
Sharla Cox

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

**(To be used in connection with actions when a hearing was held)**

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

### **PETITION FOR RECONSIDERATION**

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

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. 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, request 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 Department 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.