

Randall C. Budge (ISB# 1949)
Thomas J. Budge (ISB# 7465)
RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED
201 E. Center St. / P.O. Box 1391
Pocatello, Idaho 83204
(208) 232-6101 – phone
(208) 232-6109 – fax
rcb@racinelaw.net
tjb@racinelaw.net

Attorneys for IGWA

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 79560

Corrected Petition for Reconsideration

Idaho Ground Water Appropriators, Inc. (IGWA), hereby petitions the Director to reconsider the *Final Order Approving Application for Transfer* (“Final Order”) issued in this matter on February 19, 2015.

IGWA respectfully requests amendment of the Final Order to address the concerns outlined below, each of which relates to the following provision contained in the Final Order:

IT IS FURTHER ORDERED that, as a condition of approval, IGWA and Southwest Irrigation District will continue into the future, aquifer enhancement activities sufficient to offset 10 cfs of depletion of flow in the Snake River between Kimberly and King Hill. Prior to the start of each irrigation season, IGWA must provide documentation of aquifer enhancement activities from the previous year to establish that sufficient mitigation will be provided in the upcoming season. If sufficient mitigation is not provided, the transfer will be void.¹

First, while IGWA and Southwest Irrigation District (SWID) anticipate maintaining aquifer enhancement activities sufficient to offset 10 cfs of depletion to the Snake River below Milner Dam indefinitely, the above provision requires mitigation even when no injury exists. The Final Order

¹ Final Order pp. 9-10.

concludes injury may occur “in the event of a violation of the Swan Falls minimums.”² Accordingly, mitigation should be required only if the Swan Falls minimums are breached. To require IGWA and SWID to provide mitigation to Idaho Power even if the Swan Falls minimums are met is contrary to both the letter and spirit of the Swan Falls Agreement.

Second, during times when mitigation is required, IGWA and SWID should not be required to provide mitigation in excess of the amount of water delivered to Billingsley Creek from Magic Springs. The present mitigation obligation to Rangen is 9.1 cfs. This obligation may increase as a result of Rangen’s 2014 delivery call and/or removal of the Great Rift trim line. On the other hand, not all mitigation water may be delivered from Magic Springs. It is important that the transfer enable variability in the amount of mitigation water delivered from Magic Springs to Billingsley Creek, and that IGWA and SWID mitigation obligations mirror the amount delivered. For example, if 8 cfs is delivered from Magic Springs, IGWA and SWID mitigation activities need only offset 8 cfs.

Third, given the dynamic nature of mitigation obligations, it is important that the delivery of less than 10 cfs from Magic Springs to Billingsley Creek not result in forfeiture of the water right.

Fourth, mitigation to avoid injury to Idaho Power should not be limited to aquifer enhancement activities. For example, if 10 cfs is being delivered from Magic Springs to Billingsley Creek under this transfer and IGWA’s and SWID’s aquifer enhancement activities provide 9.5 cfs of gains to the Snake River between Kimberly and King Hill, IGWA should be permitted to provide the remaining 0.5 cfs of mitigation by other means.

Fifth, in the event mitigation is required but not provided, the transfer should be suspended rather than voided completely. For example, if a prolonged drought or other factors cause the mitigation activities of IGWA and SWID to cause Snake River reach gains that fall 0.1 cfs short of the required amount, the transfer should not be voided, but instead suspended until IGWA and SWID mitigation activities reach the required threshold. Suspension of the transfer will simply result in the transferred water flowing directly from Magic Springs to the Snake River.

To address the concerns outlined above, IGWA requests the ORDER section of the Final Order be amended and restated as follows:

IT IS HEREBY ORDERED that Application for Transfer No. 79560 in the name of North Snake Ground Water District,

² Final Order p. 6, CL 3-4, p. 7 CL 6.

Magic Valley Ground Water District, and Southwest Irrigation District is APPROVED.

IT IS FURTHER ORDERED that the transfer provides the authority, but not the obligation, to deliver up to 10 cfs from Magic Springs to Billingsley Creek for mitigation purposes. Non-use of the mitigation portion of this right shall not result in forfeiture pursuant to Idaho Code § 42-223(10).

IT IS FURTHER ORDERED that the transfer will be suspended in the event and for such time as Snake River flows at the Murphy Gauge fall below the 3,900 cfs or 5,600 cfs minimum established under the Swan Falls Agreement, unless IGWA and Southwest Irrigation District mitigation activities are sufficient to offset depletion of flow in the Snake River at the Murphy Gauge in an amount equal to the amount of water delivered from Magic Springs to Billingsley Creek under this transfer.

To the extent these amendments revive the issue of enlargement, the Director should conclude that the additional consumption that may result once the transferred water enters Billingsley Creek does not prohibit approval of the transfer so long as the minimum flows at the Murphy Gauge are satisfied. As explained in IGWA's post-hearing brief, Idaho Code § 42-222 does not require the Director to deny a transfer any time consumptive use increases; rather, it says the Director "*may* consider consumptive use . . . as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right."³ Additional consumptive use should not prohibit approval of this transfer because it satisfies the criteria for the reallocation of trust water so long as the Swan Falls are met.⁴

DATED this 25th day of February, 2015.

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED

By: 
Thomas J. Budge
Attorney for IGWA

³ Emphasis added.

⁴ See IGWA's Post-Hearing Brief pp. 8-10.

CERTIFICATE OF MAILING

I certify that on this 25th day of February, 2014, the foregoing document was served on the following persons in the manner indicated.



Signature of person mailing form

Original: Director, Gary Spackman Idaho Department of Water Resources P. O. Box 83720 Boise, Idaho 83720-0098 deborah.gibson@idwr.idaho.gov kimi.white@idwr.idaho.gov garrick.baxter@idwr.idaho.gov emmi.blades@idwr.idaho.gov	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-mail
Robyn Brody Brody Law Office, PLLC P. O. Box 554 Rupert, Idaho 83350-0554 robynbrody@hotmail.com	☐ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-Mail
J. Justin May May Browning & May PLLC 1419 W Washington Boise, Idaho 83702-5039 jmay@maybrowning.com	☐ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-Mail
Fritz X. Haemmerle Haemmerle Haemmerle P. O. Box 1800 Hailey, Idaho 83333-1800 fxh@haemlaw.com	☐ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-Mail