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DEPARTMENT OF  
WATER RESOURCES

*Attorneys for Gardner Farms*

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

IN THE MATTER OF APPLICATION  
FOR TRANSFER NO. 87701 IN THE  
NAME OF GARDNER FARMS

**APPLICANT'S RESPONSE TO IDAHO  
POWER COMPANY'S INITIAL BRIEF**

Gardner Farms ("Gardner" or "Applicant"), by and through its counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submits *Applicant's Response to Idaho Power Company's Initial Brief*.

On March 23, 2023, Gardner filed Application for Transfer No. 87701 (the "Transfer") to create a 320-acre permissible place of use on ground owned by Gardner Farms and to move portions of WR Nos. 35-14407 and 35-14408 into the permissible place of use. The Transfer was protested by the Idaho Power Company ("IPC"). As a result of this protest, the above-entitled matter is now a contested case before the Idaho Department of Water Resources ("IDWR" or "Department").

Department employee James Cefalo is the designated hearing officer (the "Hearing Officer"). Gardner timely submitted *Applicant's Argument Brief* on October 31, 2023. IPC timely

submitted *Idaho Power Company's Initial Brief* on the same date. Both parties are permitted (but not required) to submit response briefs. *Order Adopting Stipulated Findings of Fact and Establishing Schedule for Briefing* at 2 (the "Findings of Fact"). Gardner has elected to submit this *Applicant's Response to Idaho Power Company's Initial Brief*.

As set forth below, none of IPC's arguments change the legal authority and conclusions contained in *Applicant's Argument Brief* that (1) IPC fully subordinated its hydropower water rights to existing water uses, including WR Nos. 35-2380 and 35-8026 (the parent rights to 35-14407 and 35-14408); (2) the scope of that full subordination includes the pumping impacts from these rights, even if the impacts are redistributed as a result of a transfer application; (3) Trust Water is not a source of water under Idaho law; and (4) redistribution of pumping impacts because of a transfer that show an increased impact to flows in the Snake River below Milner Dam do not equal injury to IPC's water rights under the injury criteria of Idaho Code § 42-222(1). Accordingly, even if there is a modeled or actual reduction in flows in the Snake River below Milner Dam as a result of the Transfer, there is no injury to IPC's water rights and that *does not* constitute a new appropriation of Trust Water or a change to the source of water authorized to be diverted under WR Nos. 35-14407 and 35-14408.

## **I. ARGUMENT.**

IPC relies primarily and extensively upon the *Amended Snake River Basin Moratorium Order* (the "Moratorium Order") to argue that the Transfer should be denied. "[R]ecently, the Department found that 'further reduction of flows available to existing water rights---justifies the expansion of the Eastern Snake River Plain Moratorium.'" *Idaho Power Company's Initial Brief* at 4. "This transfer, if approved would result in a post 1984 depletionary effect on Trust Water, violate the Moratorium Order and should constitute a new appropriation of trust water under Idaho

Code § 42-201.” *Id.* at 5. “The transfer constitutes a new diversion of Trust Water subject to the Trust Water analysis contemplated by statute and rule. As cited previously, such depletion would conflict with the Moratorium Order.” *Id.* at 7-8. “The recent Moratorium Order cited the depletion in reaches of the Snake River which are further impacted by the proposed transfer.” *Id.* at 13. “Approving this transfer would only serve to increase injury and directly conflicts with the rationale identified in the Moratorium that were the basis for continuing and expanding the Moratorium boundary. Clearly, such approval would be contrary to the local public interest which permeates through the Moratorium Order and violates the ‘Conservation of the Resource standard.’” *Id.* at 14.

The problem with all these arguments is that the plain language of the Moratorium Order expressly provides “[t]he moratorium **does not apply to applications for transfer**, including applications to add points of diversion to valid, existing water rights.” Moratorium Order at 28 (emphasis added). The reason for this is simple. The Moratorium Order deals with new appropriations of water, and despite IPC’s efforts to categorize the Transfer as an appropriation of a new source of water, simply put, it is not.

The current source of water for Water Right Nos. 35-14407 and 35-14408 is ground water. The source of water at the proposed point of diversion less than nine miles away is ground water. In both locations the ground water is from the Eastern Snake Plain Aquifer (the “ESPA”). The Transfer does not propose to change the source of water and “Trust Water” is not a distinct source of water. Attorneys for the Applicant have searched IDWR’s water right database and have not found a single water right that lists Trust Water as the source of a water right. IPC’s argument that “trust water is a distinct designated source of water”, while novel, is flawed and unavailing. This issue was discussed by the Hearing Officer in his *Interlocutory Order Deciding Question of Law*

*in the Matter of Application for Transfer Nos. 84488 and 84490 in the Name of LCSC Enterprises*

LLC (hereinafter "Interlocutory Order"):

A water use may file a transfer application to change the authorized point of diversion for a water right from one source to another as long as the sources are hydraulically connected. For example, a water user could change the point of diversion from a tributary stream to a mainstem stream downstream of the confluence of the two streams as long as the streams remain hydraulically connected throughout the relevant season of use. **In this case, the current source of water for water right 35-14041 is ground water from the ESPA. The existing point of diversion is hydraulically connected to Snake River reaches above and below Milner Dam. The proposed point of diversion will also divert ground water from the ESPA at a location that is hydraulically connected to Snake River reaches above and below Milner Dam. Applications 84488 and 84490 do not propose to change the source of water right 35-14041. Because the source of water remains the same, any reduction in quantity of water of hydraulically connected streams does not constitute a new appropriation. Rather, a reduction in quantity of water of hydraulically connected streams must be evaluated under the injury criteria of Idaho Code § 42-222(1).**

A proposal to change the point of diversion for a ground water right within the ESPA is akin to a proposal to change the point of diversion for a water right on a stream. A water user may propose to move a point of diversion for a water right to a new location on a stream, thereby reducing the flow in the stream at a new location. Other water users who divert water near the proposed point of diversion may experience water shortages that they have never experienced. The proposal to divert an existing water right from a new location on a stream is not considered a new appropriation even if there are new depletion impacts to certain portions of the stream. Rather, any impacts should be evaluated under Idaho Code § 42-222(1) to determine if there would be injury to existing water rights. If the changes proposed in Application 84488 and 84490 result in increased depletions to the reaches of the Snake River below Milner Dam, such depletions must be evaluated under the injury criteria in Section 42-222(1). As part of this injury review, the hearing officer would determine whether any of the affected water rights are subordinated to water right 35-14041.

Interlocutory Order at 7 (emphasis added).

Further, as described in *Applicant's Argument Brief* and stipulated to by the Parties in the Findings of Fact, the water diverted by WR Nos. 35-14407 and 35-14408 is not Trust Water. It is undisputed that WR Nos. 35-2380 and 35-8026 (the parent rights to WR Nos. 35-14407 and 35-

14408) were beneficially used prior to October 1, 1984 and are in a class of water rights where IPC's hydropower water rights are fully subordinated to them:

The parties had little difficulty reaching agreement that IPC would subordinate its claimed hydropower water rights to existing uses. Essentially all of the existing uses had been established without protest or objection by IPC, and it was generally agreed that even under the best litigation outcome IPC could reasonably hope for, it would be deemed to have waived its rights as against existing users.

Clive J. Strong & Michael C. Orr, *Understanding the 1984 Swan Falls Settlement*, 52 IDAHO L. REV. 223, 235 (2016) (hereinafter "*Understanding*").

The pumping impacts associated with WR Nos. 35-2380 and 35-8026 (the parent rights to WR Nos. 35-14407 and 35-14408) were present in the ESPA as of October 1, 1984, and because of the clear provisions of the Swan Falls Agreement protecting these developed water uses, "IPC accepted the risk that the 'existing' uses might reduce flows at Murphy below 3900/5600." *Understanding* at 264-65. It does not make a difference whether these pumping impacts are redistributed to other parts of the ESPA because of a proposed transfer. Even with the 1180 Contract water rights discussed in *Applicant's Argument Brief* (which did not include WR No. 35-2380, but did include WR No. 35-8026), where the inclusion of language in IPC's hydropower water right partial decrees concerning these contracts was litigated, a list of the water rights was included in the SRBA Final Unified Decree with the clarification that "the list is not static and includes subsequent changes to the original rights resulting from ongoing **transfers**, splits, and water right renumbering." *Order on Motion for Approval of Settlement* at 18, *In re* SRBA, Case No. 39576, Consolidated Subcase No. 00-92023 (Jan 4, 2010) (emphasis added).

Given the context of the Swan Falls Agreement relative to full subordination to *then-existing* water uses and this language from the SRBA Court, the subordination of IPC's hydropower water rights included possible subsequent changes accomplished through a transfer

proceeding to water rights like WR Nos. 35-14407 and 35-14408 that could result in a change in the location of these pumping impacts.

As a result of this full subordination, WR Nos. 35-14407 and 35-14408 have never and are not now pumping Trust Water. Trust water is “[t]hat portion of an unsubordinated water right used for hydropower generation purposes which is in excess of a minimum stream flow established by state action either with agreement of the holder of the hydropower right as provided by Section 42-203B(5), Idaho Code or without an agreement as provided in Section 42-203B(3), Idaho Code.” IDAPA 37.03.08.010.17. In other words, WR Nos. 35-14407 and 35-14408 have not and are not diverting any portion “of an unsubordinated water right used for hydropower generation.” Idaho Power Company’s full subordination of its hydropower rights to WR Nos. 35-2380 and 35-8026 (the parent rights to WR Nos. 35-14407 and 35-14408) in the Swan Falls Agreement include all aspects of WR Nos. 35-14407 and 35-14408, including their pumping impacts, and IPC has waived any claim of injury to its hydropower rights from the exercise and/or transfer of WR Nos. 35-14407 and 35-14408.

Given this context, it is understandable why the main thrust of IPC’s argument is that the Transfer is somehow a new appropriation of Trust Water. If the Transfer was reclassified as a new appropriation, IPC’s water rights would no longer be fully subordinated to this new appropriation. However, there is absolutely no basis in law for this sort of reclassification proposed by IPC. The Transfer is not a new appropriation and IPC’s water rights are fully subordinated to WR Nos. 35-14407 and 35-14408—even if the pumping impacts from these rights are redistributed because of a transfer application.

IPC has made similar arguments before, and the Hearing Officer has directly addressed these arguments in the Interlocutory Order:

The most compelling reason that Applications 84488 and 84490 are not subject to the review criteria set forth in Idaho Code § 42-203C is simply that Idaho Code § 42-222(1), which governs transfer applications and sets forth the criteria used to evaluate transfer applications, contains no reference to Idaho Code § 42-203C. Section 42-222(1) refers to many other provisions of the Idaho Code (§§ 42-108, 42-221, 42-203A, 42-202B) but contains no reference to Idaho Code § 42-203C or any reference to "trust water" or "trust water rights."

The public interest review criteria set forth in Idaho Code § 42-203C(2)(a) are not insignificant. In certain cases, they require the Department to review a substantial amount of data related to the economic benefits of the proposed appropriation of trust water and the economic impacts to hydropower generation and utility rates. **In the thirty-six years since Section 42-203C was adopted, transfer applications have never been subject to the review criteria set forth in Section 42-203C.** It is surprising that Section 42-222(1) would not contain a single reference to Section 42-203C or trust water rights if the legislature intended for the Department to complete a substantial review under Section 42-203C for every transfer proposing to change a point of diversion within the ESPA. Such language could have been added to Section 42-222 when the section was amended in 1986, 1988, 1990, 1994, 1996, 1997, 2000, 2003, 2004 or 2020.

...

The public interest review criteria set forth in Idaho Code § 42-203C only apply to applications proposing to appropriate water rights held in trust. **An application for transfer does not constitute an appropriation of water.** The actions authorized within a transfer application (changing the point of diversion, place of use, period of use or nature of use of an existing water right) are not within the scope of the terms "appropriate" or "appropriation" as those terms are used in Chapter 2, Title 42, Idaho Code. Idaho Code § 42-222(1), which governs transfer applications, make no reference to the review criteria in Idaho Code § 42-203C. Similarly, Idaho Code § 42-203C makes no reference to transfer applications.

...

Applications 84488 and 84490 propose to make changes to water right 35-14041. This water right is not a trust water right and does not bear any conditions requiring ongoing compliance with the public interest criteria in Idaho Code § 42-203C. **Water right 35-14041 cannot be converted into a trust water right through the transfer application process.** Therefore, the review criteria in Section 42-203C do not apply to Applications 84488 and 84490.

Interlocutory Order at 8-10 (emphasis added).

Similarly, the Transfer proposes to make changes to WR Nos. 35-14407 and 35-14408. These water rights are not Trust Water rights and do not bear any conditions requiring compliance with the public interest criteria in Idaho Code § 42-203C. Furthermore, WR Nos. 35-14407 and 35-14408 cannot be converted into Trust Water rights through the transfer application process.

Finally, IPC has made a brief argument that the Transfer fails the public interest and conservation of resource standards of Idaho Code § 42-222. It is important to note—and perhaps remind the protestant—that the conservation of resources standard was previously discussed in conversations between the parties and the hearing officer. Finding of Fact No. 13 was included for this reason—because the hearing officer did not believe that the transfer was inconsistent with the conservation of water resources within the state. Furthermore, the Transfer is not against the local public interest, particularly in the manner that IPC has argued that it is, because, as discussed above, the plain language of the Moratorium Order expressly provides that it is not applicable to applications for transfer.

## **II. CONCLUSION.**

IPC fully subordinated its hydropower water rights to existing water uses, including WR Nos. 35-2380 and 35-8026 (the parent rights to WR Nos. 35-14407 and 35-14408). The scope of that full subordination includes the pumping impacts from WR Nos. 35-14407 and 35-14408, even if those impacts are redistributed because of the Transfer. Additionally, redistribution of pumping impacts because of a transfer application of a fully protected water right that shows an increased impact to flows in the Snake River below Milner Dam is not an “appropriation” of Trust Water under Idaho law. Furthermore, Trust Water is not a “distinct designated source of water.” Even if there is a reduction in flows in the Snake River below Milner Dam because of a transfer, that *does not* constitute an appropriation of Trust Water, and as a result, *does not* require a review of the transfer under the criteria set forth in Idaho Code § 42-203C. The Hearing Officer should decide as a matter of law that IPC’s protest to Transfer No. 87701 is not valid and that the Transfer satisfies the review criteria set forth in Idaho Code § 42-222(1).

Submitted this 29<sup>th</sup> day of November, 2023.



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Luke H. Marchant  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

## CERTIFICATE OF SERVICE

I hereby certify that on this 29<sup>th</sup> day of November, 2023, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

**DOCUMENT SERVED:    APPLICANT'S    RESPONSE    TO    IDAHO    POWER  
                                         COMPANY'S INITIAL BRIEF**

**ORIGINAL TO:**    **James Cefalo**  
Hearing Officer, Idaho Department of Water Resources  
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