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DEPARTMENT OF
WATER RESOURCES

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

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

**IDAHO POWER COMPANY'S
INITIAL BRIEF**

COMES NOW, Protestant Idaho Power Company ("Company" or "IPC"), pursuant to Hearing Officer Cefalo's *Order Adopting Stipulated Findings of Fact and Establishing Schedule for Briefing* ("Order"), dated September 27, 2023, and hereby files this initial brief.

BACKGROUND

In this matter, Gardner Farms ("Applicant") filed Transfer No. 87701 for the proposed transfer of water rights 35-14407 and 35-14408, or portions thereof, from points of diversion and places of use outside of an area commonly known as the "Trust Water Area" into said area. *See* Order at 6 and 7. Further, with this Order, the hearing officer deemed the matter ready for final briefing pursuant to the agreed upon schedule.

INTRODUCTION

Application for transfer number 87701, in the name of the Applicant, proposes to change the point of diversion (“POD”) and place of use (“POU”) for a portion of water rights numbers 35-14407 and 35-14408 from a POD and POU outside of the Trust Water Area to locations within the Trust Water Area. For the reasons enumerated herein, such a change should be considered a new appropriation of Trust Water and the application denied without further review.

ARGUMENT

1) The Department should deny Applicant’s Transfer because I.C. § 42-222 does not allow for the change in the source of water.

There are no material facts in dispute in this matter. Rather, the disagreement in this contested case concerns whether the proposed transfer is approvable under the proper interpretation of I.C. § 42-222 or whether other review is required. I.C. § 42-222 allows for changes in POD, POU, period of use or nature of use so long as the statutory requirements of I.C. § 42-222 are satisfied. Specifically, I.C. § 42-222 provides in part:

42-222. CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR NATURE OF USE OF WATER UNDER ESTABLISHED RIGHTS — FORFEITURE AND EXTENSION — APPEALS. (1) Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change.

Initially, it should be noted that the list of water right elements subject to a transfer review does not include a proposed change in the source of the original water right. Hence, if a water right holder desires to change the source of a POD or POU, a transfer is not an option and the change in the source of the water would require the filing of a new appropriation. Looking at the proposed transfer application number 87701, the application proposes the utilization of a new

source of water, Trust Water.

The Department's Transfer Processing memorandum no. 24 provides interested parties and Department staff with some informal guidance regarding the processing of a transfer. With respect to applicability of changing sources and the potential of injury, the memorandum identifies two potential source circumstances and limitations: 1) ground water to surface water (or vice-a-verse); and 2) a change in aquifers. *See* memorandum pgs. 26-27. Nowhere in the memorandum does it state that this list is all inclusive. Critical in these instances is a determination of hydrologic connection. Hydrologic connection is not, however, the only consideration. Rather, a review of Idaho statutes identifies multiple examples where the legislature saw fit to limit use of water, or to condition the use, based upon designation and characteristics associated with the source. Such is the case here where the legislature limited the availability of Trust Water through its designation.

A. Trust Water is a Distinct Designated Source of Water

Trust Water is a legislatively designated source of ground water within the Eastern Snake Plain Aquifer ("ESPA") and other identified tributaries to the Snake River that is classified geographically and temporally. Water subject to diversion at a post-1984 POD within the geographical boundary identified as the Trust Water Area, is legally recognized as Trust Water. *See* I.C. § 42-203B, *et al.* Prior to 1984, the classification of Trust Water and the concept of reallocation of Trust Water, from the state of Idaho to new appropriations did not exist. The Idaho Legislature, in carrying out the intent of the Swan Falls Settlement enacted statutory provisions addressing the existence of Trust Water and the procedures associated with the reallocation and appropriation of Trust Water. *See* I.C. § 42-203C.

The Department of Water Resources ("IDWR" or "Department") through enactment of

rules provided for the procedures associated with appropriation of Trust Water. *See* IDAPA

37.03.08. The Department utilizes the following explanation to potential appropriators of Trust Water in its initial processing letter:

Trust Water arose from the 1984 Swan Falls Settlement between Idaho Power Company (“IPC”) and the State of Idaho (“State”).¹ Prior to the Swan Falls Settlement, the Idaho Supreme Court determined IPC held water rights for use at Swan Falls Dam that exceeded the entire flow of the Snake River at times. This limited future upstream development of water resources in the Snake River Basin. The Swan Falls Settlement resulted in changes to Idaho Law² and to IPC’s water rights. As a result of the Swan Falls Settlement and subsequent legislation and court decrees, IPC’s hydropower water rights in excess of the minimum flows at Murphy Gage are held in trust by the State. This change allows future development using water that would have previously been delivered to satisfy IPC water rights at Swan Falls Dam and, therefore, would have been unavailable for upstream appropriation. The purpose of this trust is defined in Idaho Code § 42-203B as follows:

The purposes of the trust established by ... this section are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes ... to continue using the water pending approval of depletionary future beneficial uses.

Processing Memo No. 77, pg. 4.

The ESPA within the Trust Water area was considered fully appropriated at the time of the Swan Fall settlement and recently, the Department found that “further reduction of flows available to existing water rights---justifies the expansion of the Eastern Snake River Plain Moratorium. *See* Amended Snake River Basin Moratorium Order (“Moratorium Order”) at 2. That settlement was necessary in order to allow for further development and a recognition that the only water available for new diversions within the Trust Water Area is Trust Water.

The existing POD for water rights 35-14407 and 35-14408 is located outside of the Trust Water area, and the proposed POD and POU are located within the Trust Water area. *See* Order

¹ For more information, including a more complete description of the Swan Falls Settlement and resulting legislation, please see the Department's web page: <https://idwr.idaho.gov/legalactions/settlements/swan-falls/>

² Although several sections of the Idaho Code were affected, the addition of Sections 42-2038 and 42-203C, Idaho Code are the changes most relevant to this discussion.

at 6 and 7. 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. *See* Order at 12 (Application 87701 will decrease depletions to the Snake River in some reaches above Milner Dam and increase depletion in reaches between Milner Dam and Swan Falls Dam; *See Also* Moratorium Order at 21. Findings of Fact No. 82). A new Trust Water depletion would require consideration under the rules for a Trust Water appropriation. *See* IDAPA 37.03.08.

B. The Department has disallowed Transfers between sources before.

Historically, IDWR has prohibited a transfer that proposed to change a POD from outside the ESPA groundwater model boundary or Moratorium to a location within the ESPA model boundary without additional analysis.

“....At some locations, the grid cells extend beyond the model boundary. If the To [or FROM] well location is farther than a distance of two grid cells from the ESPA boundary, the modeler will need to employ additional modeling tools or methods in conjunction with the ESPA modeling tool to calculate the timing and quantity of the impacts to the Snake River....”

See July 12, 2022, IDWR Memorandum re: Ground Water District Concerns in the ESPA.

Additionally, on February 19, 1997, the hearing officer, Gary Spackman, issued a preliminary order on a transfer, denying the transfer. The hearing officer concluded:

6. The purpose of the April 30, 1993 moratorium was to prevent further water withdrawals from the Eastern Snake River Plain Area. Approval of this application for transfer, even though the proposed point of diversion is outside the moratorium area, would authorize withdrawal of some water from the Eastern Snake River Plain Area, and would violate the intent of the moratorium.

7. Approval of the Application for transfer would injure other water rights.

See Recommended Order, Application for Transfer 4729 at 7.

A final order denying the transfer was entered on March 31, 1997, and included nearly identical

language about impacts within the moratorium area. *See* Final Order, Power County District Court. If there are additional depletions as a result of a movement of a POD between identified sources, i.e. modeling boundaries or moratorium boundaries, such proposals should be denied.

Moreover, the legislature has on other occasions limited the use of ground water from a legislatively recognized or defined source to a particular use or subject to a separate set of conditions or procedures. First, with respect to low temperature geothermal ground water, I.C. § 42-4003 requires that such an appropriation be first used for heating purposes, prior to any other beneficial use. Parts or areas of an aquifer system that are subject to identification as geothermal, then are subject to additional conditions as enumerated in statute. Further, I.C. § 42-4003 also has a temporal aspect which is similar to water rights within the Trust Water area (rights with a priority date prior to July 1, 1987 remain valid). Those rights are not subject to the geothermal use condition. Similarly, water rights with a priority date prior to the Swan Falls settlement are not classified as “Trust Water Rights” even though spatially the PODs are within the Trust Water Area.

Additionally, with respect to the concept of “recovery well,” I.C. § 42-228 authorizes:

.... [T]here shall be excepted from the provisions of this act the excavation and opening of wells and withdrawal of water therefrom by canal companies, irrigation districts, and other owners of irrigation works for the sole purpose of recovering ground water resulting from irrigation under such irrigation works for further use on or drainage of lands to which the established water rights of the parties constructing the wells are appurtenant; providing that the drilling of such wells shall be subject to the licensing provisions of section 42-238, Idaho Code.

I. C. § 42-228.

In *Duffin v. IDWR and Intervenor A&B Irrigation District, et al.*, Case No. CV-2014-165 (Application for Transfer No. 83160 in the name of Jeffrey and Chana Duffin), the Court distinguished the sources of ground water available for recovery under the statute:

The term “Ground Water” is defined by the Act to mean “all water under the surface of the ground whatever may be the geological structure in which it is standing or moving.” I.C. § 42-230(a). However, in the plain language of Idaho Code § 42-228, the Legislature expressly identified the source and type of ground water the owner of a recovery well may recover. The statute provides only for “recovering ground water *resulting from irrigation* under such irrigation works.” I.C. § 42-228 (emphasis added by court). It does not allow for the recovery of ground water resulting from other sources.

Order on Motions for Summary Judgment, April 8, 2015.

The Court went on to recognize and find:

The plain language of the statute allows for the *recovery* of ground water resulting from irrigation, not the *replacement* of water lost to seepage. Allowing for the replacement of lost water may result in injury to third parties. ... If ASCC could simply replace surface water lost to seepage with any other ground water, it could arguably pump ground water at the end of its 200 mile canal system in replacement of surface water lost at the beginning of its system. Since the water lost at the beginning of the system may not timely reach the area of the aquifer from which the replacement water was taken, other third party ground water pumpers located near the end of the system may suffer injury as a result of the Plaintiffs’ pumping of replacement water. However, the potential for such injuries are avoided under the plain language of the statute, which only provides for the recovery of ground water identifiable as resulting from irrigation.

Order on Motions for Summary Judgment, April 8, 2015 (emphasis added by Court).

Like water subject to recovery under I.C. § 42-228, Trust Water is defined geographically, where it resides in the aquifer. Further, the concern identified by the Court in Duffin regarding the timing of such diversion or recovery and potential injury, exists as to Trust Water. Clearly, a diversion which commences after 1984 within the Trust Water Area represents the reallocation and diversion of Trust Water subject to the Trust Water Appropriation Rules, IDAPA37.03.08.

Finding of Fact no. 14 identifies that the proposed POU has been subject to irrigation in the past. The old water rights were transferred away. The fact that the land proposed to be irrigated through an approved transfer has been previously irrigated is of no relevance here. 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. *See* Moratorium Order at 2.

For further support of distinct classifications of ground water, one only need to look at the multitude of transfers, applications or management plans which require casing through perched/aquifers in order to reach a regional aquifer or different source of ground water and not constitute a withdraw from a separate or new source. *See generally Lewiston Orchards GWMA; IDAPA 37.03.08.030*. The distinction between the Trust Water area and non-Trust Water area is not hydrologically based but delineates the area that will be subject to administration under various actions. *See* I.C. § 42-203B(2).

Moreover, if a transfer into the Trust Water Area is not then considered a Trust Water appropriation and subject to Trust Water considerations pursuant to IDAPA 37.03.08, under the construct proposed by the Applicant, the same would apply in the event of the opposite transfer; that is a Trust Water transfer to a POD outside of the Trust Water Area. Under this construct, Trust Water right transferred out of the Trust Water Area would still be considered a Trust Water appropriation even though it may be miles from the Trust Water Area. It would still be subject to the Trust Water conditions identified in Application Processing Memorandum #77, including review and administration. Logically, an approved transfer under this scenario should lose the Trust Water conditions given the reasons for the conditions would no longer exist; primarily being the depletion of Trust Water. Moreover, keeping such conditions on a “non-Trust water” right would conflict with I.C. §42-203B administration.

2) A transfer which depletes Trust Water is an appropriation.

Initially, it must be recognized that the water now recognized as Trust Water was originally appropriated for hydropower purposes. *See* Idaho Code § 42-203B(2). The term Trust

Water refers only to water sources “tributary to the Snake River below Milner Dam.” Hence, the reference in Idaho Code § 42-203B(2), “[f]or the purposes the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the water rights of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered,” identifies geographically what water sources produce trust water. This statement recognizes that water otherwise diverted from locations along the Eastern Snake River plain could impact flows above and below Milner dam. Trust water is only that portion of water tributary to the Snake River below Milner. The legislature recognized that there was a tributary aspect of water to reaches above Milner, but chose to distinguish administration pursuant to the language of I.C. § 42-2203B.

Through the Swan Falls Settlement between the State and the Company, the portion of the Company’s water rights in excess of 3900 and 5600 cfs is held in Trust for the benefit of Idaho Power Company and the citizens of Idaho. This Trust Water was previously appropriated by the Company for hydropower and can continue to be used for such purpose until reallocated to other uses. Idaho Code § 42-203C is the only legislatively recognized way in which Trust Water can be reallocated, diverted, consumed, or controlled. Idaho Code § 42-203C(1) goes on to further describe the appropriation as “the proposed use....” which is consistent with the hearing officer’s factual finding of the proposed transfer – reduction in the amount of water held in Trust. Logically, for there to be a reduction, there must be a consumptive use, and therefore an analysis under Idaho Code § 42-203C.

Further and consistent with subsection 1 of Idaho Code § 42-203C, the reallocation or subsequent appropriation results in a reduction in the amount of Trust Water available, and either reduces the amount available for future appropriation or for the holder of the water right used for

power production. If another means for reducing Trust Water that was not contemplated by the agreement referenced in Idaho Code § 42-203B exists, then the purposes of the Trust would be frustrated. *See* 2012 Idaho State Water Plan, Section 4C – “REALLOCATION OF SNAKE RIVER TRUST WATER”. New and future development is reliant upon the existence of Trust Water and this fact was at the core of the Swan Falls Settlement. Reductions of Trust Water as a result of transfers reduces the opportunity for future development, impedes hydropower generation and may in fact increase the risk of a violation of the established minimum flows from the Swan Falls Agreement. This use of Trust Water was not contemplated by the Swan Falls Agreement and certainly, it cannot occur without any administrative review.

Additionally, the existence of the 1993 Eastern Snake Plain Moratorium (“1993 Moratorium” and Moratorium Order) was and is an on-going acknowledgement that the sole source of available water supply in the reaches below Milner is Trust Water. *See Amended Moratorium Order dated April 30, 1993; See* November 2, 2016, *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area; See* Moratorium Order. Even non-Trust Area proposed uses are subject to heightened IDWR scrutiny in light of the developing ESPA ground water model and corresponding results. The IDWR has acknowledged that the water supply below Milner is fully appropriated and that the depletions, including those described in the Hearing Officer’s Order, should not be approved without consideration of their impacts. *See* In the Matter of Application for Transfer No. 83160 (“Duffin”) *Amended Preliminary Order Denying Transfer* dated August 12, 1990, pp.13-14; Case No. CV 2011-15672 *Memorandum Decision and Order on Petition for Judicial Review*, dated May 23, 2012, pp. 10-12.

Any argument that this transfer is not an appropriation of Trust Water fails. The identified Transfer by the very legal questions posed, results in accessing and depleting a new

source, the Trust Water. The typical transfer involves a change in the POD. While the legal issue posed factually describes the depletion of Trust Water as the source of depletion, or consumptive use, this question and reasoning is equally applicable to situations which do not involve Trust Water. Where a proposed transfer accesses and depletes a second, separate source, that appropriation of the separate source should trigger the IDWR appropriation rules review. IDWR cannot authorize a depletion from a separate source without consideration of the impacts of that appropriation would have on the source and other water rights. Likewise, there is no basis to treat Trust Water separately.

To reach any other conclusion would be to ignore the legal issue and the factual premise embedded in the legal issues presented, a reduction in Trust Water. Recall that the creation of the Trust was based upon the recognition that the resource was fully appropriated. *Memorandum Decision and Order on Cross-Motions for Summary Judgment, In re SRBA*, Case No. 39756, Consolidated Subcase No. 00-92023 (92-23) (April 18, 2008). A transfer, in a fully appropriated system, that results in a reduction of the amount of Trust Water constitutes a reallocation or appropriation of Trust Water and reduces the availability of Trust Water for new development and existing water rights. This type of application should be considered a new appropriation.

3) The Proposed Transfer is not approvable under the Standard of I.C. § 42-222.

I.C. § 42-222 further states:

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. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area. The transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement in use of the original right even though more acres may be irrigated, if no other water rights are injured thereby. A copy of the approved application for change shall be returned to the applicant and he shall be authorized upon receipt thereof to make the change and the original water right shall be presumed to have been amended by reason of such authorized change. In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter set forth. Provided however, minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code.

A. The Proposed Transfer Injures Existing Water Rights

Stipulated Finding of Fact No. 12 identifies that the proposed transfer will reduce Snake River flows below Milner Dam. The Department's internal transfer memorandum acknowledges that transfers cannot injure existing water rights, i.e., reduce the quantity of water available to other water rights. *See Administrator's Transfer Processing No. 24*, pg. 24. However, the memorandum goes on to allow such injury to occur through the use of a "minimum threshold" through transfer on the ESPA. *Id.* pg. 25.

Presumably, such an exception is the result of the ESPA ground water model uncertainty which over time has been the subject of substantial refinement. However, in other contexts such as the application of the Conjunctive Management rules administration, model uncertainty is not a limiting factor. It is judicially recognized that the model represents the best science and results associated with actions on the ESPA. The utilization of a "minimum threshold" has no legal standing or technical basis. Any transfer which results in a depletion or reduction of water

available to satisfy an existing water right, must be denied without mitigation. There are no circumstances which justify the Department, through an informal and internal policy, injuring an existing water right in contradiction to existing law. The Department's own memo which lays out the policy cites this "no injury" standard, which ultimately it ignored.

The Department cannot create policy contradictory to existing law. *Eden's Gate LLC v. IDWR* (In re Application for Permit No. 63-34832 through 63-34838 and 63-34840 through 63-34846, All in the Name of Eden's Gate LLC). There, the Court found that the Department's attempt to expand the scope of a land use policy under Idaho's Land Use Planning Act, I.C. § 67-6537 to water right appropriations, was an expansion beyond the legislature's intent. Likewise, the Department's memorandum which allows for injury is clearly contradictory to the legislature's acknowledgement that transfers of water rights cannot occur to the detriment of existing water rights.

B. Each Transfer will be considered on its own merits.

Further, I.C. § 42-222 requires the Department to consider proposed transfers individually on their own merits. Nothing in the statute provides the justification for a cumulative analysis of transfers or consideration of the credits.

C. The Proposed Transfer fails the Public Interest and Conservation of Resource Standards.

The recent Moratorium Order cited the depletion in reaches of the Snake River which are further impacted by the proposed transfer. There, the Director stated:

"Preventing the further reduction of flows available to existing water rights-including decreed minimum stream flow water rights and Trust Water Rights-justifies the expansion of the Eastern Snake River Plain Moratorium." Moratorium Order at 2.

Further as to reaches above Milner dam, the Order found:

Declining water supplies in the Snake River Basin above Milner Dam have prompted delivery calls and additional demands for water administration from holders of senior water rights. A variety of administrative activities and judicial decisions have resulted in (a) expanded administration of existing ground water and surface water rights, (b) the enjoinder of new water appropriations for a period of time, and (c) greater scrutiny of new water right applications resulting in near cessation of new appropriations. The need to protect existing water rights justifies the reestablishment of a moratorium upstream from Milner Dam.

Moratorium Order at 2.

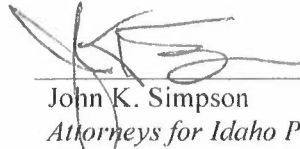
Approving this transfer would only serve to increase injury and directly conflicts with the rationale identified in the Moratorium that were the basis for continuing and expanding the Moratorium boundary. Clearly, such approval would be contrary to the local public interest which permeates through the Moratorium Order and violates the "Conservation of the Resource standard." Such transfers should not be allowed.

CONCLUSION

For the reasons enumerated herein, Application for Transfer No. 87701 should be denied.

DATED this 31st day of October, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2023, I served the original of the foregoing **IDAHO POWER COMPANY'S INITIAL BRIEF**, by hand-delivering or depositing same in the U.S. Mail, postage prepaid, as indicated, addressed to the following:

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