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DEPARTMENT OF
WATER RESOURCES

Scott N. Pugrud, ISB No. 8883
IDAHO POWER COMPANY
1221 W. Idaho Street
P.O. Box 70
Boise, Idaho 83707
Telephone: (208) 388-6454
Facsimile: (208) 388-6935
spugrud2@idahopower.com

John K. Simpson, ISB No. 4242
MARTEN LAW LLP
101 S. Capitol Blvd., Ste. 305
P.O. Box 2139
Boise, Idaho 83701-2139
Telephone: (208) 336-0700
Facsimile: (206) 237-6069
jsimpson@martenlaw.com
jwitt@martenlaw.com

Attorneys for Idaho Power Company

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

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. T87701

In the name of Gardner Farms

**IDAHO POWER COMPANY'S
PETITION FOR
RECONSIDERATION**

IDAHO POWER COMPANY (the "Petitioner"), by and through its attorneys of record, and in conformance with Idaho Code § 67-5243(3), respectfully files this *Petition for Reconsideration* requesting reconsideration of the March 27, 2024, Preliminary Order ("Order") Approving Transfer in this matter issuing a license for transfer no. T87701. Petitioner respectfully requests that the Department reconsider the following:

1. Whether the completion of the proposed transfer would in fact result in the "new" or additional diversion and depletion of Trust Water and if so, should such proposed transfer consider the rules and criteria associated with new appropriations of Trust Water identified under IDAPA 37.03.08?

The Preliminary Order identified that this transfer is not a “new appropriation” but simply a modification of an existing appropriation. To support this conclusion, the Order finds that the proposed application did not constitute a change in the source of water. The Hearing Officer reasons that the source identified in the application for Transfer remains ground water and does not constitute a new appropriation of Trust Water. Using this line of reasoning, the Hearing Officer finds that a public interest review is not necessary under I.C. §42-203C. The Hearing Officer reasons that because that particular element (i.e., groundwater) of the water right would not change a change in the source of water used for the transfer was not appropriate. This finding is partially true. The source element listed on the water right would remain ground water.

However, the Hearing Officer’s findings fail to account for how the statute, I.C. § 42-222, and the Department has examined transfers and appropriations of groundwater. Historically, when water right transfers are filed, the elements of the water right are then subject to review. Historic use is reviewed, and the original decreed/licensed discharge rate or volume may be adjusted. In an irrigation right the number of acres maybe adjusted based upon the change and historic use. *See* I.C. § 42-222, granting the director of the department discretion to “approve the change in whole, *or in part, or upon conditions...*” emphasis added. Clearly, the elements of a water right are subject to modification. The director should review each individual transfer application and nothing in statute would prohibit the clarification of the source element of the original appropriation.

Further, what is critical here is that the conditions impacting the use of this ground water and in this case the applicant’s ability to transfer the water may be limited due to State or legislative action. When an applicant desires to move an existing ground water right to a new

point of diversion (“POD”), and the new POD changes the character of the ground water being withdrawn or the rules considered in the use of such ground water, the rules in place for the new POD and place of use must be considered prior to the approval of the application. Otherwise, the intent of the statutory limitation embodied in the administrative rules would be frustrated.

1.A Failure to consider the characteristics of the Water Source in Appropriation and use of the Resource would Violate State Policy and Idaho law.

For example, as articulated in the Protestant’s briefing, the State has identified the public benefit of low temperature geothermal water, see I.C. § 42-233, and ensured that the temperature benefits would be realized prior to use for other beneficial uses. Such designation is consistent with other State proclamations through legislation or agreement, where the use of a particular or designated water source is optimally used as described in legislation. While the source of the water right is ground water, the legislature has deemed the proposed use restricted by the character of the water. Water rights diverting low temperature geothermal groundwater, simply list the source as groundwater. Limitations on the use of such groundwater are typically noted in “Conditions” section of the right or multiple uses including heating. These conditions clearly distinguish such groundwater to be diverted from other groundwater. As pointed out in the Protestant’s briefing, conditions or limitations on the use of geothermal water, i.e., first use for heating purposes, would effectively limit the transferability of a water right into a temperature sensitive area of a hydraulically connected source. If the Applicant didn’t intend to utilize the diversion first for heating purposes, wouldn’t the absence of such use frustrate the intent of the statute and result in waste of the resource?

Likewise, in the instant factual circumstance, arguably in 1984 the State recognized the Snake River and tributaries sources below Milner were fully appropriated at times of the year. Through the Swan Falls Settlement, Trust Water has been legislatively reserved for re-allocation

for use in compliance with the water appropriation rules of IDAPA 37.08. The proposed transfer is a new diversion and new depletion of groundwater within the Trust Water Area that is tributary to the Snake River below Milner dam. The failure to consider and abide by these rules would frustrate the intent of the 1984 Swan Falls Settlement.

1.B Approval of Transfer No 87701 would violate Idaho Statue and Appropriation Rules.

I.C. § 42-203B(2) states “For the purposes of 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 waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.” Hence, water tributary to the Snake River above Milner cannot be curtailed to deliver water to rights below Milner. Water that is tributary to the Snake River above Milner Dam is non-Trust Water. Water tributary below Milner is defined as Trust Water. Historically, the Department has issued moratorium orders which address water availability in these distinct ground water areas and further delineate Trust and non-Trust boundaries. In fact, the hearing officer confirms this concept several times in the Order. See e.g., *Preliminary Order Approving Transfer, Section IV, pg. 18-21*.

In briefing, the Protestant raised the argument that if a trust water right were transferred outside of the trust area, such transfer would frustrate the intent of the Swan Falls Agreement, which includes the Two River concept and the Trust/non-Trust boundaries and moratoriums. The Order observed that such applications are “theoretical arguments”, non-sensical and the Order ignored such factual scenario. Such is not the case as transfer nos. T87984 and 87987 (“Heyburn”) are reflective of that exact situation.

Transfer no. T87984 involves a situation where the City of Heyburn purchased a non-trust water right and desires to transfer said rights from Basin 35 to a point of diversion within

the City boundaries, presently irrigated with a Trust Water Right. Concurrently, the City, through transfer no. 87987 is requesting the move of the Trust Water Right, nos. 36-8550 and 36-8738 to the original place of use of the non-trust water right. These transfers are presumably to protect the Trust Water Rights from administration.

Under the Hearing Officer's Order, the movement of the Trust Water Right to a POD outside of the Trust Water Area would not necessitate a change or review in the source or conditions of the water right. Apparently, once originally approved, the source or conditions on the source are not subject to review in a transfer proceeding. However, under the Heyburn actions, a trust water right would now exist outside of the Trust Water Area and tributary above Milner. Under the Department's proposed Order, in the event of a violation of the Swan Falls minimums, the state would be responsible for administering a trust water right that was transferred outside the Trust Water Area (i.e., above Milner Dam) in violation of I.C. § 203B(2). It is unclear how such administration would address the violation. Likewise, moving water rights into the Trust Water Area further depletes Trust Water without consideration of the purpose of the Trust and protection of the beneficiaries of the Trust, the citizens of the State and Idaho Power Company.

Further, such approval, exercise and administration of water as proposed in the subject transfer would clearly be in violation of the local public interest as it relates to Trust Water. Trust Water was a source of water with clear boundaries and limitations intended to allow further development of the Snake River below Milner for a limited period of time. In fact, there was and is an intended review process to identify whether Trust Water is still available and whether it is in the best interests of the beneficiaries of the Trust for continued use of the resource as licensed. Failure to consider additional appropriations of Trust Water as described in the IDWR

appropriation rules as well as Idaho statutes, would clearly frustrate the expectations the State and Idaho Power Company put in place in 1984.

Additionally, as described in the sections below, efforts by either the internal policy of the Department or actions of employees to facilitate transfers which frustrate Idaho law or the intent of the Swan Falls subordination and the availability of Trust Water for new development, was never the intended result of the 1984 Agreement.

2. The proposed transfer fails to satisfy the criteria enumerated in Idaho Code § 42-222(1), specifically, that no other water rights are injured, that the transfer is in the public interest and conservation of the resource.

2.A Transfer No 87701 Results in depletions to unsatisfied Water Rights.

Initially, the stipulated facts acknowledges that depletions below Milner will increase if the transfer is approved. This fact alone dictates that if there are unfulfilled water rights relying upon flows in the Snake River below Milner or upon spring discharges in reaches of the Snake River below Milner, mitigation is required or the transfer must be denied. As recently as 2011, Director Spackman acknowledged: 1) Trust Water is a component of groundwater on the ESPA; 2) water rights developing Trust Water will be reviewed to determine whether there is Trust Water for continued use and whether it is in the public interest to continue the use; and 3) further reductions in flow may jeopardize the maintenance of the minimum flow at Murphy Gage. *See Permit 35-8359 Final Order Suspending Action And Prohibiting Development pg. 7 “Kugler”*

The critical issue associated with Trust Water and its development is that there is a limited amount available; that is, the supply available for use is limited. A new appropriation can be accomplished through the permitting process or through a proposed transfer; both result in new depletions to trust water. This fact cannot be disputed and in order to give meaning to the

Trust created in the Swan Falls Settlement, depletions must be judged against the purpose of the Trust. Moreover, as the Director acknowledged in Kugler, and reaffirmed as a basis for the recent Amended ESPA Moratorium, the basis for these orders was that existing water rights and water supplies were being impacted by increased demands in the Trust Water Area. In Kugler, the proposed new point of diversion and depletion was located within the Trust Water Area. In the instant proposed transfer, the new point of diversion and depletion would also be located within the Trust Water Area. Whether it is a new water right or a transfer, is a difference without distinction as to Trust Water. Both are new depletions of Trust Water which requires additional scrutiny under the Appropriation Rules and potentially, mitigation being imposed.

Further, the internal department transfer memorandum (Administrator's Memorandum – Transfer Processing No. 24)(“Transfer Memo”) violates Idaho statute as it allows unmitigated depletions in the approval of transfers such as the transfer in question or other transfers relying upon a similar basis for approval. The Order suggests that the absence of language identifying the ESPA or Trust Water as being fully appropriated in the Transfer Memo is evidence that depletion doesn't equal injury. However, if that were the case, why is the Transfer Memo even required and the minimum threshold developed. Surely, the Department doesn't go through the internal effort of examining depletions if there wasn't an issue (existing rights being impacted) present. Beginning in 1993, the Department acknowledged the scarcity of the ESPA groundwater through the issuance of Trust and non-Trust moratoriums. These actions followed the Swan Falls Agreement which essentially made additional water supply available through reallocation of water rights. The existing Amended Moratorium is premised upon the fact that existing rights are not being fulfilled. Hence, the findings which were the basis for the moratoriums, support a finding that mitigation or denial is warranted.

The Hearing Officer indicates that injury “must be an actual injury not theoretical injury or merely an increase in the risk of future injury,” and cites “no evidence in the record that trust water rights have ever been curtailed to satisfy the IPC Swan Falls Rights.” This ignores the Department’s own files which enumerate that a violation of Swan Falls minimums that occurred on March 28-29, 2015. The injury that occurred under those circumstances resulted in a total shortfall of 190 acre-feet. The Hearing Officer correctly states that the state did not curtail water users in that instance. However, this is only because the Idaho Water Resource Board delivered 190 acre-feet of the Board’s Palisades storage below Milner as mitigation associated with the injury to Idaho Power’s Swan Falls Water Rights for the shortfall. In other words, curtailing alone is not the definition of injury. If the Board had not stepped in, curtailment would have occurred. Multiple times over the period of record, IDWR has observed circumstances consistent with the basis for then Director Spackman’s acknowledgement that further new diversions of Trust Water was not supportable.

3. Even if the Transfer Memo criteria were deemed consistent with State statute, mitigation for depletions is owed and subject to a Trust Water Review.

The Transfer Memo is an internal policy adopted by the Department. The Transfer Memo separates the Snake River below Milner into sub-reaches based on river gages for measurement convenience. Then the analysis sets a minimum depletion threshold for each reach which if modeling shows depletions falling below the identified threshold, no mitigation is required. This minimum threshold was based upon the then understanding of the accuracy of river gages; that is the gages were accurate within a plus or minus 10%. This means that the depletions modeled could be 10% higher but the Transfer Memo fails to protect existing rights from elevated injury. This threshold was set by the Department and to the Protestant’s knowledge, never went through the administrative rulemaking process. Further, the threshold standard fails to protect existing

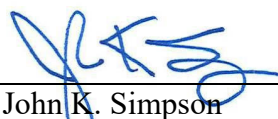
water rights and arbitrarily splits the potential impacts by sub-reaches. All of the reaches of the Snake River above the Murphy gage provide water for IPC's hydro rights at Swan Falls. Collectively, these cumulative depletions can exceed the minimum thresholds as set forth in the Transfer Memo. The cumulative impacts are the impact to the water rights. There is no legal or factual basis for breaking-out reach gains below or above Milner into the reaches identified or limiting a water right holder who relies upon multiple or combined reaches of the River from aggregating reaches/impacts and claiming injury. If the Transfer Memo arbitrarily divided the Snake River into even a larger number of sub-reaches, then no transfer would exceed the thresholds identified. Such logic is similar to the Department suggesting to potential applicants that breaking a transfer into multiple, smaller transfers, will reduce the likelihood of mitigation being owed. Such actions do not reduce or eliminate the injury to existing rights being impacted by such transfers. Further, whether or not a protest to a transfer application is filed, the fact that depletions to reaches are modeled to occur, triggers the Department's responsibility to protect existing uses from further impacts/injury.

Conclusion

For the reasons set forth above and in the Protestant's briefing in this matter, Transfer no. 87701 should be denied without consideration of the impact on Trust Water and without mitigation to protect existing water rights, including Trust Water rights issued and hydro power and other beneficial uses.

DATED this 10th day of April, 2024.

MARTEN LAW LLP



John K. Simpson
Attorneys for Idaho Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 2024, I served the original of the foregoing **IDAHO POWER COMPANY'S PETITION FOR RECONSIDERATION**, as indicated, addressed to the following:

James Cefalo, Hearing Officer
Idaho Department of Water Resources
Eastern Regional Office
900 N. Skyline Dr., Ste. A
Idaho Falls, ID 83402-1718
James.Cefalo@idwr.idaho.gov
file@idwr.idaho.gov

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile
☐ Overnight Mail
☒ Email

Gardner Farms
578 N 100 W
Blackfoot, ID 83221
doug@dc-farms.net

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile
☐ Overnight Mail
☒ Email

Luke Marchant
Darrington law, PLLC
607 7th Street
P.O. Box 536
Rupert, ID 83350
luke@minicassialaw.com

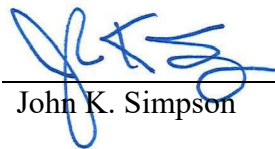
☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile
☐ Overnight Mail
☒ Email

Greg Sullivan
Brockway Engineering
2016 N. Washington St., Ste. 4
Twin Falls, ID 83301
Greg.sullivan@brockwayeng.com

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile
☐ Overnight Mail
☒ Email

Rob Harris
Holden, Kidwell, Hahn & Crapo
1000 Riverwalk Drive, Suite 200
Idaho Falls, Idaho 83402
rharris@holdenlegal.com

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile
☐ Overnight Mail
☒ Email



John K. Simpson