

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
1010 Jefferson St., Ste. 102
P.O. Box 2139
Boise, Idaho 83701-2139
Telephone: (208) 336-0700
Facsimile: (206) 237-6069
jsimpson@martenlaw.com

Attorneys for Idaho Power Company

RECEIVED

Nov 29, 2023

DEPARTMENT OF
WATER RESOURCES

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

IN THE MATTER OF APPLICATION FOR
TRANSFER NOS. T87701 & 87702,

In the name of Gardner Farms

**IDAHO POWER COMPANY'S
RESPONSE BRIEF**

IDAHO POWER COMPANY (the "Protestant"), by and through its attorneys of record, files this *Response Brief* in the above-numbered *Applications for Transfer* filed by GARDNER FARMS, (the "Applicant").

Introduction

On September 27, 2023, the hearing officer in this matter set forth a briefing schedule to address "any of the legal issues raised in this contested case and addressing the question of whether application 87701 satisfies the criteria the review criteria set forth in Idaho Code § 42-222(1)." At the outset, the Applicant's opening brief fails to address the criteria set forth in

Idaho Code § 42-222 and as such, should be dismissed. Instead, the Applicant chose to ignore the hearing officer's instructions and focuses on the legal issues they anticipated the Protestant would raise.

I. I.C. §42-222 Is Inapplicable to changes to the Source of Water Right.

In the Applicants opening brief, the Applicant admits that if the transfer proposes to change the source of water, "the transfer could be denied on this basis alone." Applicant's Brief at 3. The Stipulated Facts further acknowledge that the Applicant is proposing to change the point of diversion (POD) from a location outside of the Trust Water Area to a location inside the Trust Water boundary. Order Adopting Stipulated Finds of Fact and Establishing Schedule for Briefing, dated September 27, 2023, at pg. 1. Any new diversion within the Trust Water Area is deemed to be a diversion of Trust Water subject to the criteria of I.C. § 42-203C. Specifically, the SRBA Court stated:

Simply stated, it was agreed that Idaho Power's hydropower water rights in excess of the Murphy gaging station minimum flows would be held in trust by the State. The Director of the Idaho Department of Water Resources is authorized to reallocate the water which is held in trust by the State to subsequent applicants intending to appropriate the same pursuant to the criteria set forth in Idaho Code § 42-203C. The parties have referred to water rights so appropriated as "trust water rights," because they are deemed to divert the water first appropriated under hydropower rights placed into trust.

Order at 8, *In re SRBA Case No. 39576* (Twin Falls Cnty. Dist. Ct. Idaho Jun. 25, 2015).

As clearly identified by the Court, the water to be reallocated by the Department is Trust Water and the property of the trust held by the State are the hydropower rights in excess of the Murphy minimums. This water is distinct from the general classification of ground water in the Eastern Snake Plain Aquifer. This concept is confirmed in IDAPA 37.03.08.030.03, where the Department defines in detail portions of the Snake River that are hydrologically connected to Trust Water are not considered Trust Water and are not subject to the public interest provisions of I.C. § 42-203C. Trust Water is a source of water – Legislatively created through the 1984

settlement and trust guidelines set forth in IDAPA 37.03.08. The State and the parties to the settlement set forth through legislation and the State Water Plan, articulate the best understanding of geographic and hydrologic boundary of Trust Water in identifying the Trust Water Area. *See* State Water Plan, November 2012. As a result, I.C. § 42-203B(2) identifies an administrative boundary which distinguishes diversions outside of the Trust Water Area, and new diversions of Trust Water.

While in theory a source of an application or existing water right may simply be “ground water,” such identification is qualified by the legislative designation of Trust Water as a defined source of water. Further, IDWR has developed rules creating and designating new water diversions subject to a separate set of rules and source within the Trust Water Area consistent with the legislative determination. Parties to the settlement and stakeholders have come to rely upon the designation both as a benefit, as well as a limitation.

In a similar manner, when the Department created the “Rules for Conjunctive Management of Surface and Ground Water Resources,” IDAPA 37.03.11, and in particular, Rule 50, the Department and the legislature in its approval, identified and designated the area having a common ground water supply for the ESPA and for administration purposes. The Department is bound by this designation even though continued hydrologic evaluation and modeling has developed a refined understanding of ground water and connected sources. Without legislative action, this Rule is binding on the Department. Likewise, the parties and stakeholders to the Swan Falls settlement have over time, a much better understanding of ground water diversions and their impact above and below Milner. However, until or unless the Trust Water Area is modified, that boundary can and does act as either a shield or a sword to new diversions and new depletions impacting flows in the Trust Water Area and the reaches of the Snake River below

Milner dam. Diversions outside of the Trust Water Area are protected by I.C. § 42-203B(2).

Likewise, diversions within the Trust Water Area are statutorily presumed to entirely impact Trust Water and the flows in reaches below Milner.

The Applicant spends a considerable amount of briefing on the subordination of hydropower in the Swan Falls settlement. However, the scope or extent of the IPC subordination doesn't control whether a new diversion within the Trust Water Boundary should be considered a transfer application or a new application of Trust Water pursuant to the Department's Water Appropriation Rules¹. In summary, the Swan Falls settlement came about in part because there was a recognition that the system was fully appropriated given the water rights on the books when considering hydropower. This determination was concerning to the State because of the anticipated growth and increasing water demands. Through the settlement, the reallocation of Trust Water to new uses within the Trust Water Area became available with conditions; one of those conditions being Trust Water Rights were subject to administration if the minimum flows were not met. In other words, if a new proposed use of Trust Water increases depletion of Trust Water, then it must be subject to Trust Water conditions and Idaho statutes. Clearly Transfer 87701 is a new diversion and application of Trust Water to lands within the Trust Water Area subject to the criteria of I.C. § 42-203C.

///

///

¹ In a prior contested case and interlocutory order, the Protestant argued that subordination was not the issue being addressed. The hearing officer recognized this fact. *See Interlocutory Order Deciding Question of Law in the Matter of Application for Transfer Nos. 84488 and 84490 in the Name of LCSC Enterprises LLC*. The Protestant continues to believe that a full explanation of the subordination is not relevant to reaching a conclusion that Transfer 87701 is a new appropriation of Trust Water subject to the criteria of I.C. § 42-203C. If the hearing officer now believes subordination is an issue needing further briefing, the Protestant would request an opportunity to provide such response.

II. If I.C. § 42-222 is Applicable, The Applicant Has Failed To Satisfy The Statutory Criteria

On a preliminary note, it is the Applicant's burden to prove that the proposed transfer will satisfy the criteria of I.C. § 42-222. The Applicant's opening brief fails to address the criteria other than to vaguely reference the IDWR Administrative Memorandum No. 24 ESPA criteria. Such references do not meet the burden the Applicant carries in a contested action. *See Generally Transfer Processing No. 24, pp. 12-14.* A water right holder cannot change the place or purpose of use of a decreed or licensed water right without obtaining IDWR authorization for that change. I.C. § 42-222. Even so, when a water user applies to make a change, the Department must ensure "no other water rights are injured . . . [and] the change does not constitute an enlargement in use of the original water right." I.C. § 42-222(1); *3G AG LLC v. Idaho Dept. of Water Resources*, 170 Idaho 251, 509 P.3d 1180 (2022); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 18 P.3d 219 (2001). The Director is authorized to approve a transfer "in whole or in part, or upon condition." *See Id.*

A. Transfer 87701 Depletes the water supply available to existing rights, including hydropower.

The Department's Transfer Memorandum acknowledges: 1) that the Snake River Basin above Swan Falls Dam, including the ESPA water supply is fully appropriated; 2) that depletion of this water supply equals injury; and 3) that depletions must be mitigated. *See Processing Memorandum No. 24 p. 13* ("Increases in such depletions are presumed to cause injury to existing water rights because all of the hydraulically-connected reaches of the Snake River (including tributary springs) have water rights that are not fully satisfied at certain times.") Further, with or without a protest the Department is obligated to assess whether a transfer would indeed result in a depletion/injury.

The Amended Snake River Moratorium further supports the conclusion that depletion equals injury given that no new applications which result in depletions are processed without mitigation. Hence, a transfer which increases depletions to a spring like Niagara Springs or to a reach below Milner presumptively results in injury. Depending upon the particular beneficial use, whether it be hydropower or fish propagation, Idaho Power's rights are depleted, impacted and injured by depletions to individual springs and reaches of the Snake River caused by transfers which deplete Trust Water.

B. Transfer 87701 would increase consumptive use of Trust Water

Transfer 87701 would increase consumptive use of water which previously has been designated as Trust Water consistent with the Swan Falls Settlement. One of the purposes and "water use checks" of the Swan Falls Settlement was a contemplated 20-year review of Trust Water Rights (referred to as "term limit review"). Essentially, Trust Water rights issued were to be subject to review after 20 years to determine whether the continued use of Trust Water as permitted to the Trust Water rights remains in the public interest of the beneficiaries of the Trust, the citizens of the state of Idaho and Idaho Power Company.

If transfers and specifically, transfers which increase the depletion of Trust Water and reaches of the Snake River below Milner are not part of the Trust Water review contemplated by the 1984 Settlement, one of the clear purposes of the Swan Falls settlement, the optimum use of the Trust water for the benefit of the beneficiaries will be frustrated. Transfer 87701 and other similar transfers could "use up" all Trust Water even if changes to existing Trust Water rights are limited or canceled. These Transfers could not have been contemplated in 1984 when the Trust was created and should be considered new appropriations of Trust Water. Carrying this issue a step further, should there be a violation of the minimum flows at the Murphy Gage (3900/5600

cfs), it is the State's obligation to administer Trust Water rights to remedy the violation. If transfers into the Trust Water Area, similar to Transfer 87701, are not subject to such initial I.C. § 42-203C review and subsequent administration, the minimum flows established at the Murphy Gage might be violated without any real remedy. Such a result is possible with or without the Trust Water rights continuing. Then, the protection of the minimum flows at Murphy as contemplated by the Swan Falls Settlement would be threatened.

Conclusion

Based upon the legal and factual arguments provided herein, Transfer No. 87701 should be denied.

DATED this 29th of November, 2023.

MARTEN LAW

A handwritten signature in black ink, appearing to read "John K. Simpson", is written over a horizontal line.

John K. Simpson
Attorneys for Idaho Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 2023, I served the original of the foregoing **RESPONSE BRIEF**, by hand-delivering or depositing same in the U.S. Mail, postage prepaid, 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
doug@dc-farms.net

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

Luke Marchant
Holden, Kidwell, Hahn & Crapo
1000 Riverwalk Drive, Suite 200
Idaho Falls, Idaho 83402
lmarchant@holdenlegal.com

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

Greg Sullivan
Brockway Engineering
Greg.sullivan@brockwayeng.com

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

/s/ John K. Simpson
John K. Simpson