

**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)**

**ORDER DENYING PETITION
FOR RECONSIDERATION**

On March 23, 2023, Gardner Farms (“Gardner”) filed Application for Transfer 87701 (“Application 87701”) with the Idaho Department of Water Resources (“Department”). The Department published notice of Application 87701 on April 19 and 26, 2023. Idaho Power Company (“IPC”) filed a protest to the application on May 8, 2023.

On September 26, 2023, the parties filed Stipulated Findings of Fact and asked the hearing officer for the Department to adopt the stipulated facts in lieu of conducting an evidentiary hearing. The hearing officer issued an *Order Adopting Stipulated Findings of Fact and Establishing Schedule for Briefing* on September 27, 2023, pursuant to Rules 556 and 562 of the Department’s Rules of Procedure (IDAPA 37.01.01).

On October 31, 2023, Gardner filed *Applicant’s Argument Brief* and IPC filed *Idaho Power Company’s Initial Brief* (“IPC Brief”). On November 29, 2023, Gardner filed *Applicant’s Response to Idaho Power Company’s Initial Brief* and IPC filed *Idaho Power Company’s Response Brief* (“IPC Response”).

On March 27, 2024, the hearing officer issued a *Preliminary Order Approving Transfer* (“Preliminary Order”). On April 20, 2024, IPC filed a timely *Petition for Reconsideration* (“Petition”). See IDAPA 37.01.01.730. The Petition does not present information or raise arguments that were not already considered in the evaluation of Application 87701 and could be denied without additional discussion. The Petition, however, mischaracterizes some of the analysis from the Preliminary Order. This order addresses some of the arguments raised in the Petition and confirms the analysis set forth in the Preliminary Order.

Swan Falls Agreement

In its original briefing and Petition, IPC asks the hearing officer to interpret and consider the intent of the 1984 Swan Falls Agreement and the expectations of the parties to that agreement. *IPC Brief* at 3-5; *IPC Response* at 2-4, 6-7; *Petition* at 4, 6. As shown in the Preliminary Order, Application 87701 can and should be evaluated using the plain language of relevant statutes. It is not necessary to conduct a historical analysis of the Swan Falls Agreement or to derive the intent of the parties to that agreement.

Transferring Trust Water Rights Out of the Trust Water Area

IPC asserts that the Preliminary Order states that applications for transfer proposing to the move trust water rights out of the Trust Water Area are “theoretical.” *Petition* at 4-5. The Preliminary Order does not state that such transfers are theoretical. In fact, the Department has approved several transfers moving trust water rights out of the Trust Water Area.¹ What is theoretical, however, is how such rights would be administered if the Department issued an order curtailing trust water rights based on a violation of the Swan Falls minimum stream flow. IPC acknowledges that such curtailment has never occurred. *Id.* at 8. Because Application 87701 does not propose to move a trust water right out of the Trust Water Area, the Preliminary Order recognized that there is no need to speculate about the administration of trust water rights outside the Trust Water Area and declined to entertain IPC’s arguments on that topic.

Swan Falls Minimum Stream Flow

IPC correctly notes that the flow in the Snake River between Milner Dam and Swan Falls Dam dropped below the Swan Falls minimum stream flow on March 28 and 29, 2015. *Petition* at 8. This single event, which occurred over eight years ago, represents two days of the twenty-year period that has elapsed since the trust water framework was adopted. Further, even though the minimum stream flow was not satisfied for those two days, the shortfall was offset with storage water from the Upper Snake River system, which is held by the Idaho Water Resource Board for that purpose. Trust water rights were not curtailed in March 2015. The record does not contain evidence that curtailment of trust water rights to satisfy the Swan Falls minimum stream flow is imminent.

Transfer Memo

In contrast to the IPC Response, where IPC asked the hearing officer to apply certain presumptions from the Transfer Memo, IPC has returned to its original position, arguing that the 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.” *Petition* at 7. The Preliminary Order recognized the limitations of the Transfer Memo:

The Transfer Memo is an internal guidance document and does not have the same force or effect of statute or rule. Establishing presumptions to be used in evaluating transfer applications may be beyond the proper scope of an internal guidance memo. The hearing officer is not persuaded that the presumptions in the Transfer

¹ Transfer 77958 (approved in June 2012) moved a 130-acre portion of trust water right 35-13856 from inside the Trust Water Area to outside the Trust Water Area. The split portion was assigned water right no. 35-14269. Transfer 76375 (approved in November 2010) added points of diversion outside the Trust Water Area to trust water right 22-7754. Transfer 81726 (approved in March 2018) moved a 67-acre portion of trust water right 35-7837D from inside the Trust Water Area to outside the Trust Water Area. The split portion was assigned water right no. 35-14541. These are just a few examples of transfers moving trust water rights out of the Trust Water Area. In these transfers, the Department retained trust water conditions on the transferred rights.

Memo should be considered. IPC asserts, however, that the presumptions in the Transfer Memo are applicable.

Preliminary Order at 21.

The hearing officer did not rely on the Transfer Memo, or any presumptions or thresholds contained therein, to conclude that Application 87701 should be approved. Instead, the Transfer Memo was quoted only to show that even if the Transfer Memo presumptions were used, as requested by IPC, the Transfer would still be considered approvable. Because the Preliminary Order does not rely on the Transfer Memo, this order does not need to address IPC's arguments against the Transfer Memo.

Application for Permit or Application for Transfer

IPC seeks to blur the line between an application for permit (used to appropriate a new water right) and an application for transfer (used to change elements of an existing water right). For example, IPC asserts: "A new appropriation can be accomplished through the permitting process or through a proposed transfer." *Petition* at 6. Further, IPC asserts: "Whether [an application] is a new water right or a transfer, is a difference without distinction as to Trust Water." *Id.* at 7.

There are significant differences between applications for permit and applications for transfer under Idaho law. Contrary to IPC's assertion, Chapter 2, Title 42, Idaho Code, does not allow a person to appropriate new water rights through the transfer application process. Further, applicants seeking a new water right are subject to review criteria that are not applicable to transfer applicants. See Idaho Code § 42-203A(5)(b)-(d). Most importantly, Idaho Code § 42-203C, which sets forth additional criteria for applications proposing to appropriate water held in trust, does not apply to transfer applications as described in detail in the Preliminary Order.

ORDER

IT IS HEREBY ORDERED that IPC's Petition for Reconsideration is DENIED.

Dated this 25th day of April 2024.



James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of April 2024, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the following:

Documents: Order Denying Petition for Reconsideration

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