

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

IN THE MATTER OF APPLICATION)	
FOR TRANSFER NO. 87701 IN THE)	PRELIMINARY ORDER
<u>NAME OF GARDNER FARMS)</u>	APPROVING TRANSFER

BACKGROUND

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.

The Department conducted an informal settlement conference on July 19, 2023, a pre-hearing conference on August 22, 2023, and a status conference on September 20, 2023. Attorney Luke Marchant represented Gardner. Attorney John Simpson represented IPC. During the conferences, the parties determined that the issues of protest were primarily legal in nature. On September 26, 2023, the parties filed *Stipulated Findings of Fact* and asked the hearing officer to adopt these 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* (“Gardner 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”).

After carefully considering the evidence in the administrative record and the arguments made by the parties, the hearing officer, finds, concludes and orders as follows:

FINDINGS OF FACT

1. Application for Transfer 87701 proposes to change the point of diversion and place of use for a combined 13-acre portion of water rights 35-14407 and 35-14408.
2. The existing point of diversion for water rights 35-14407 and 35-14408 is in the SWSENE, Section 31, T01N, R36E.

3. The proposed point of diversion for the combined 13-acre portion of water rights 35-14407 and 35-14408 proposed to be changed is in the NWSWSW, Section 1, T01S, R34E.

4. The "Trust Water Area," established through the 1984 Swan Falls Agreement, is a geographic area in the State of Idaho which is intended to represent the area where surface water and ground water are tributary to the Snake River between Milner Dam and Swan Falls Dam. *See Idaho State Water Plan Section 4C.*

5. "Trust Water" refers to "that portion of an unsubordinated water right used for hydropower generation purposes" as defined in IDAPA 37.03.08.010.17 and 37.03.08.030.c and made available for future development as a result of the 1984 Swan Falls Settlement. *See Idaho State Water Plan 4C.*

6. The existing point of diversion for water rights 35-14407 and 35-14408 is located outside of the Trust Water Area.

7. The proposed point of diversion and place of use are located within the Trust Water Area.

8. The proposed diversion would be a new diversion of water within the Trust Water Area.

9. Water right 35-14407 is a split portion of water right 35-2380, which was licensed by the State Reclamation Engineer of Idaho in 1961. The licensed point of diversion for water right 35-2380 was located outside of the Trust Water Area. Water right 35-2380 bore a priority date of June 4, 1954, and was not a reallocation of trust water as described in Idaho Code § 42-203B(3).

10. Water right 35-14408 is a split portion of water right 35-8026, which was licensed by the Idaho Department of Water Resources in 1990. The licensed point of diversion for water right 35-8026 was located outside of the Trust Water Area. Water right 35-8026 bore a priority date of March 5, 1982, and was not a reallocation of trust water as described in Idaho Code § 42-203B(3).

11. Application 87701 included an analysis of the impacts of the proposed changes on the Snake River using the Department's Eastern Snake Plain Aquifer ("ESPA") Transfer Tool. Under the current thresholds utilized by the Department pursuant to an internal Department memorandum for ground water transfers in the Eastern Snake Plain Aquifer, the changes proposed in Application 87701 do not require mitigation for impacts to the Snake River.

12. According to the results of the Department's ESPA Transfer Tool, provided with the application, the changes proposed in Application 87701 will decrease depletions to the Snake River in some reaches above Milner Dam and increase depletions in reaches between Milner Dam and Swan Falls Dam.

13. The proposed point of diversion, which delivers water under other irrigation water rights to separate acres, is regulated by the watermaster for Water District 120, and is already equipped with a flow meter.

14. Although the proposed place of use has been irrigated in the past, the water rights associated with those acres have been transferred to a separate place of use in the past.

15. The applicant will use a center pivot and sprinklers to irrigate the proposed place of use.

RELEVANT STATUTES

Idaho Code § 42-201(1) states:

All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise. And after the passage of this title, all the waters of this state shall be controlled and administered in the manner herein provided. Such appropriation shall be perfected only by means of the application, permit and license procedure as provided in this title; provided, however, that in the event an appropriation has been commenced by diversion and application to beneficial use prior to the effective date of this act, it may be perfected under such method of appropriation.

Idaho Code § 42-202 states, in pertinent part:

APPLICATION TO APPROPRIATE WATER — CONTENTS — FILING FEES — DISPOSITION OF FEES — RECORD OF RECEIPTS. (1) For the purpose of regulating the use of the public waters and of establishing by direct means the priority right to such use, any person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho, shall, before commencing of the construction, enlargement or extension of the ditch, canal, well, or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of water resources for a permit to make such appropriation.

Idaho Code § 42-222(1) sets forth the criteria used to evaluate applications for transfer and states, in pertinent part:

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.

...

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.

Idaho Code § 42-203B states, in pertinent part:

(1) The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by subsections (2) and (3) of 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 subordinated by a permit issued after July 1, 1985, or by an agreement, to continue using the water pending approval of depletionary future beneficial uses.

(2) A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action shall remain unsubordinated as defined by the agreement. Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the user of the water for power purposes, and of the people of the state of Idaho; provided, however, that application of the provisions of this section to water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner dam shall not place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam. 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. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are

acquired pursuant to state law, including compliance with the requirements of section 42-203C, Idaho Code.

(3) Water rights for power purposes not defined by agreement with the state shall not be subject to depletion below any applicable minimum stream flow established by state action. Water rights for power purposes in excess of such minimum stream flow shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the users of water for power purposes and of the people of the state of Idaho. The rights held in trust shall be subject to subordination to and depletion by future consumptive upstream beneficial users whose rights are acquired pursuant to state law, excluding compliance with the requirements of section 42-203C, Idaho Code.

(4) The user of water for power purposes as beneficiary of the trust established in subsections (2) and (3) of this section shall be entitled to use water available at its facilities to the extent of the water right, and to protect its rights to the use of the water as provided by state law against depletions or claims not in accordance with state law.

(5) The governor or his designee is hereby authorized and empowered to enter into agreements with holders of water rights for power purposes to define that portion of their water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions, and to define such rights in excess thereof as being held in trust by the state under subsection (2) of this section. Such agreements shall be subject to ratification by law. The contract entered into by the governor and the Idaho power company on October 25, 1984, is hereby found and declared to be such an agreement, and the legislature hereby ratifies the governor's authority and power to enter into this agreement.

Idaho Code § 42-203C states:

(1) If an applicant intends to appropriate water which is held in trust by the state of Idaho pursuant to subsection (5) of section 42-203B, Idaho Code, the director shall consider, prior to approving the application, the criteria established in section 42-203A, Idaho Code, and whether the proposed use, individually or cumulatively with other existing uses, or uses reasonably likely to exist within twelve (12) months of the proposed use, would significantly reduce the amount of trust water available to the holder of the water right used for power production that is defined by agreement pursuant to subsection (5) of section 42-203B, Idaho Code, and, if so, whether the proposed reduction is in the public interest.

(2)(a) The director in making such public interest determinations for purposes of this section shall consider:

(i) The potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy;

(ii) The economic impact the proposed use would have upon electric utility rates in the state of Idaho, and the availability, foreseeability and cost of alternative energy sources to ameliorate such impact;

(iii) The promotion of the family farming tradition;

(iv) The promotion of full economic and multiple use development of the water resources of the state of Idaho;

(v) In the Snake River Basin above the Murphy gauge whether the proposed development conforms to a staged development policy of up to twenty thousand (20,000) acres per year or eighty thousand (80,000) acres in any four (4) year period.

No single factor enumerated above shall be entitled to greater weight by the director in arriving at this determination.

(b) The burden of proof under the provisions of this section shall be on the protestant.

ANALYSIS

Idaho Code § 42-222(1) states that the Department “shall approve the change [proposed in an application for transfer] 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” Based on the facts set forth above, Application 87701 satisfies the review criteria in Idaho Code § 42-222(1). The changes proposed in Application 87701 will not injure other water rights. The proposed changes will not increase the total depletions to the Snake River upstream of Milner Dam. Although the proposed changes will increase depletions to the Snake River between Milner Dam and Swan Falls Dam, the increase will not injure existing water rights, as explained below. The water rights proposed to be changed have been used for irrigation and will continue to be used for irrigation, without an enlargement of authorized rate, volume, or acres. Gardner will employ sprinkler irrigation at the proposed place of use, which is consistent with the conservation of water resources within the state of Idaho. Finally, diversion of water for irrigation use and agricultural production are in the local public interest. Therefore, Application 87701 should be approved.

IPC raises six primary arguments in opposition to Application 87701:

1. The changes proposed in Application 87701 will change the source of water for water rights 35-14407 and 35-14408, which is not allowed under Idaho Code §

42-222(1). IPC contends that ground water in the Trust Water Area of the ESPA is a separate source from ground water in other parts of the ESPA.

2. The changes proposed in Application 87701 violate the intent of the Amended Snake River Basin Moratorium Order issued on October 21, 2022.

3. “[Any] 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, IDAPA 37.03.08.” *IPC Brief* at 7. “The [proposed change] constitutes a new diversion of Trust Water subject to the Trust Water analysis,” described in Idaho Code §§ 42-203B and 42-203C. *Id.*

4. The thresholds established by the Department to determine when mitigation is required for impacts to the Snake River resulting from the transfer of ground water rights in the ESPA are contrary to the plain language and intent of Idaho Code § 42-222(1) because the Department allows unmitigated impacts to the Snake River provided the impacts fall below the mitigation thresholds.

5. The Department evaluates injury to Snake River water rights resulting from the transfer of ground water rights in the ESPA through a cumulative analysis which is not authorized under Idaho Code § 42-222(1).

6. The changes proposed in Application 87701 are not in the local public interest and are contrary to the conservation of water resources within the state of Idaho.

Each of the arguments raised by IPC are addressed below. Many of these same arguments were raised by IPC in argument briefs filed in a contested case for consolidated Applications for Transfer 84488 and 84490, filed in the name of LCSC Enterprises. The hearing officer for the LCSC case issued an *Interlocutory Order Deciding Questions of Law* (“LCSC Interlocutory Order”) on December 1, 2021. The Department has not yet conducted an administrative hearing in the LCSC case. Because many of the issues and arguments raised by IPC in this case are similar to those raised by IPC in the LCSC case, this order incorporates some language and analysis from the LCSC Interlocutory Order, without citation.

I. The Changes Proposed in Application 87701 do not Constitute a Change in Water Right Source

IPC argues that the changes proposed in Application 87701, moving ground water rights from a location outside the Trust Water Area to a location inside the Trust Water Area, constitutes a change in source, which is not allowed under Idaho Code § 42-222(1). *IPC Brief* at 3-8. According to IPC, “Trust Water is a legislatively designated source of ground water within the [ESPA]” and is distinct and separate from all other ground water in the ESPA. *Id.* at 3.

Idaho Code § 42-222(1) does not authorize a water right holder to change the source of a water right. A transfer application proposing to change the source of a water right from the

original source to a separate, hydraulically disconnected source should be denied because it exceeds the changes allowed under Idaho Code § 42-222(1).

A water user may change the point of diversion for a water right from one location on a source to another location on the same source, as long as the two locations are hydraulically connected throughout the relevant season of use. A water user may also change the authorized point of diversion for a water right from one source to another source as long as the two sources are hydraulically connected. The authorized source of the water right, however, would remain unchanged. 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 existing source of water for water rights 35-14407 and 35-14408 is ground water from the ESPA. *Gardner Brief* at 3. The proposed point of diversion is a ground water well that diverts ground water from the ESPA. *Id.* Therefore, Application 87701 does not propose to change the source of water rights 35-14407 or 35-14408.

IPC argues that, although the existing and proposed points of diversion for water rights 35-14407 and 35-14408 may divert from the same physical body of water (the ESPA), the ground water molecules at each location are legally distinct and separate sources as a result of the 1984 Swan Falls Settlement and the creation of the Trust Water Area. To support its argument, IPC identified five¹ examples where, according to IPC, different types of ground water might be physically connected (located in the same aquifer) but could be considered distinct and separate sources as a matter of law.

IPC Example 1: Moratorium Boundaries

IPC cites a 1997 Final Order, where the Director of the Department denied Application for Transfer 4729 (“Application 4729”) because, among other reasons, the diversion of ground water at the proposed point of diversion would increase depletions in the Trust Water Area. Application 4729 proposed to change the point of diversion and place of use for water rights 29-2426A and 29-7122 from Marsh Valley, which is outside the ESPA, to a location inside the ESPA north of the Snake River near American Falls Reservoir. The proposed point of diversion was located over forty miles north of the existing points of diversion in Marsh Valley. The proposed point of diversion was inside the ESPA, but outside the Trust Water Area.

The Director of the Department at the time, Karl Dreher, denied Application 4729. He determined that there was no hydrologic connection between the existing points of diversion in Marsh Valley and the proposed point of diversion in the ESPA. *1997 Final Order* at 5, ¶ 16 (“None of the surface water or ground water flowing down the Portneuf River drainage contributes to ground water on the north side of the Snake River.”). Director Dreher concluded

¹ IPC provides an additional example of hydraulically disconnected aquifers that may be considered separate ground water sources as a matter of law. In some areas of the state, perched or shallow aquifers may be appropriated and administered separate from the deeper regional aquifers. This example has limited probative value in this case, however, because, unlike ground water in the ESPA, perched and regional aquifers may be hydraulically disconnected.

that “[t]he applicant did not establish that the cessation of pumping water from the old points of diversion would fully mitigate water rights affected by pumping from the new point of diversion.”² *Id.* at 8, ¶ 8. Therefore, “[a]pproval of the application for transfer would injure other water rights.” *Id.* at 7, ¶ 7.

The 1997 Final Order does not support IPC’s proposition that there are separate sources of ground water in the ESPA. If anything, the order confirms that the Trust Water Area and other areas of the ESPA are hydraulically connected. *Id.* at 4, ¶¶ 9-10 (confirming that diversions from the ESPA including diversions outside the Trust Water Area can affect flows in the Snake River above and below Milner Dam).

IPC Example 2: Geothermal Water

IPC notes that hydraulically connected areas of an aquifer may have different water temperatures. Some parts of an aquifer may be considered a low temperature geothermal resource pursuant to Idaho Code § 42-233, while other parts of the same aquifer might not. If water temperatures in part of an aquifer exceed eighty-five degrees, any use of the low temperature geothermal resource would be subject to the provisions of Idaho Code § 42-233. IPC argues that sections of an aquifer with different temperatures may be hydraulically connected but should be considered separate sources of water. This argument is not persuasive.

Cold ground water and ground water exceeding a temperature of eighty-five degrees located in the same aquifer are not considered separate sources of water. If they are hydraulically connected, they are considered the same source of water. A water user who holds a ground water irrigation right in the cold-water area of an aquifer could change the point of diversion for her water right, from the cold-water area to the low temperature geothermal area, without changing the source of the water right. Once the water user encounters temperatures exceeding eighty-five degrees at the bottom of the ground water well, however, she would be subject to Idaho Code § 42-233, which states: “[L]ow temperature geothermal resources shall be utilized primarily for heat value and secondarily for the value as water.” The water user would be required to use the water first for its heat value and may be required to obtain a separate water right for the heating or power use. If the ground water is first used for heat value, the water user could then use the same water for irrigation under her original water right, without changing the source. Idaho Code § 42-233 does not impose any limits on the transfer of water rights under Idaho Code § 42-222(1). Nor does it designate ground water with temperatures exceeding eighty-five degrees as a separate source from other ground water in a common aquifer. Instead, Idaho Code § Section 42-233 only regulates the use of low temperature geothermal resources.

² Director Dreher also concluded that the proposed project would “violate the intent” of the April 30, 1993, Moratorium Order for the Trust Water Area (“1993 Moratorium”). This reference to the 1993 Moratorium is surprising because the proposed point of diversion was outside the Trust Water Area and the 1993 Moratorium states: “The moratorium does not apply to . . . applications for transfer of existing water rights.” Director Dreher could have likely denied Application 4729 without any reference to the 1993 Moratorium.

IPC Example 3: Recovered Water

IPC cites a 2015 Order on Motions for Summary Judgement (“ASCC Order”) in a case from Idaho’s Sixth District Court, *Aberdeen-Springfield Canal Co. et al. v. Idaho Dep’t of Water Resources* (Case No. CV-2014-165), where the court interpreted and applied Idaho Code § 42-228. IPC’s citation states that the case arose from Application for Transfer 83160. IPC’s citation to Transfer 83160 is incorrect and misleading. Application for Transfer 83160 was not filed with the Department until April 2019. The *Aberdeen-Springfield* case did not arise from a transfer application. Rather, the case arose from a Notice of Violation issued by the Department to Aberdeen-Springfield Canal Company and Jeffrey and Chana Duffin for diverting ground water for irrigation use without a water right.

In its order, the Court recognized that the term “ground water” includes “all water under the surface of the ground whatever may be the geological structure in which it is standing or moving.” *ASCC Order* at 8 (citing Idaho Code § 42-230(a)). The Court held that Idaho Code § 42-228, which allows an irrigator to recover ground water resulting from irrigation, “expressly identified the source and type of ground water the owner of a recovery well may recover.” *Id.* The Court recognized a difference between ground water that was still under the control of the original appropriator and ground water that had entered and comingled with the common ground water supply. *Id.* at 9. In its Order, the Court referred to the common ground water supply as the ESPA. A water user can only recover seepage from irrigation pursuant to Idaho Code § 42-228 before it returns to the public ground water supply, which, in *Aberdeen-Springfield*, was the ESPA. *Id.* The Court did not identify multiple sources of ground water in the public ground water supply. Rather, the Court held that irrigation water must be recovered while it is still in control of the original water user. Therefore, the *Aberdeen-Springfield* decision does not support IPC’s proposal to recognize multiple sources of ground water in the ESPA.

IPC Example 4: Water Appropriation Rules (IDAPA 37.03.08)

IPC asserts that Rule 30.03 of the Department’s Water Appropriation Rules (IDAPA 37.03.08) confirms that Trust Water “is distinct from the general classification of ground water in the [ESPA].” *IPC Response* at 2. Rule 30 is the only specific rule in IDAPA 37.03.08 cited by IPC. All other references to the Water Appropriation Rules in the IPC Brief and the IPC Response are general references to IDAPA 37.03.08.

Rule 30, titled “Location and Nature of Trust Water,” contains language that is inconsistent with Idaho Code § 42-203B and decisions from the Snake River Basin Adjudication (“SRBA”) Court interpreting Section 42-203B and defining the terms “Trust Water” and “trust water rights.” In April 2023, the Department initiated rulemaking to update and revise the Water Appropriation Rules to make the rules consistent with existing water right decrees, statutes, and case law. The proposed revisions of IDAPA 37.03.08 were published in the Idaho Administrative Bulletin on October 4, 2023. The proposed Water Appropriation Rules eliminate Rule 30 in its entirety.

Consistent with their title, the current Water Appropriation Rules “provide the procedures for obtaining the right to divert and use unappropriated public water as well as water previously

appropriated for hydropower use which has been placed in trust with the State of Idaho and is subject to reallocation.” IDAPA 37.03.08.001.02. The rules are applicable to “appropriations from all sources of unappropriated public water in the state of Idaho” and “the reallocation of hydropower water rights held in trust by the state of Idaho.” *Id.* The Water Appropriation Rules do not govern applications for transfer filed pursuant to Idaho Code § 42-222(1).

As described in greater detail below, Trust Water is not a source of water. The Trust Water Area is not a source of water. To the extent the current Water Appropriation Rules refer to Trust Water or the Trust Water Area as a source of water, the rules are inconsistent with Idaho Code §§ 42-203B and 42-203C. Ground water in the ESPA within the Trust Water Area is not a separate source of water from other ground water in the ESPA. Rule 35.02.a of the current Water Appropriation Rules states: “Any application that seeks to appropriate water from a source upon which the state holds trust water shall be considered an application for appropriation of unappropriated water.” This language is important because it confirms that the question of source designation is separate from the question of whether an application proposes to diminish the flow of water rights held in trust.³

IPC’s assertion that the Trust Water Area boundary has legal significance is correct. The Trust Water Area is the administrative boundary that dictates which applications for permit are subject to the review criteria in Idaho Code § 42-203C. The Trust Water Area does not, however, create or segregate sources of water. There is no language in Idaho Code §§ 42-203B or 42-203C creating a new or separate source of ground water in the ESPA. To the extent the Water Appropriation Rules identify a new or separate source of ground water in the ESPA, they are inconsistent with statute.

IPC Example 5: Conjunctive Management Rules (IDAPA 37.03.11)

The Department’s Conjunctive Management Rules (“CMR”) “prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply.” IDAPA 37.03.11.001. Therefore, the CMR only apply to existing water rights. Rule 50 of the CMR establishes an area of common ground water supply for the ESPA. IDAPA 37.03.11.050.

The Rule 50 boundary was intended to represent “the aquifer underlying the Eastern Snake River Plain” and the “area having a common ground water supply” tributary to the Snake River. IDAPA 37.03.11.050. Rule 10.01 of the CMR defines an “area having a common ground water supply” as a “ground water source” That is because an area having a common ground water supply, when it is designated, is meant to represent the full extent of a hydraulically connected aquifer. Over time, and with improvements in measurement and technology, the Department’s understanding of the actual extent of a hydraulically connected aquifer may

³ The proposed Water Appropriation Rules also distinguish between the source designation and the question of whether an application intends to appropriate Trust Water. Applicants are first required to designate the source of water to be appropriated. Proposed Rule 37.03.08.035.03.b. For a water source under the ground surface, the source should be designated as “ground water.” *Id.* at b.iii. “For an application within the Swan Falls Trust Water Area, [the applicant must then] state if the application is seeking unappropriated water or a reallocation of trust water.” *Id.* at b.v.

change. *IPC Response* at 3. Until an area having a common ground water supply (such as the one established by Rule 50) is updated, there may be a difference between the previously understood extent of the hydraulically connected aquifer and the currently understood extent of the hydraulically connected aquifer. This does not mean that there are two different sources of water in the aquifer. There is still a single, hydraulically connected aquifer. Rather, an area having a common ground water supply is simply an attempt to define the aquifer boundary at the time it is adopted and acts as an administrative boundary for existing water rights.

Rule 50 does not create a new source of water or designate separate sources of water within the ESPA. A transfer application proposing to move a ground water right into or out of the existing Rule 50 boundary would not constitute an impermissible change in source under Idaho Code § 42-222(1), if the existing and proposed points of diversion were from the same hydraulically connected aquifer. If the Rule 50 boundary were ever expanded, based on new hydrologic data, the ground water users in the expansion area would not be required to file applications for permit for their existing diversions. Under IPC's argument, the ground water inside of the Rule 50 boundary is a legally separate source from the ground water outside of the boundary. Therefore, according to IPC, any change in the Rule 50 boundary would require water users in the expansion area with existing rights to file applications for permit to appropriate the new source of water. Such a result would be nonsensical.

Summary of IPC Examples

In summary, IPC provides five examples to support its argument that the Department should recognize separate sources of ground water in a single, hydraulically connected aquifer. The five examples are not persuasive. The question presented in this case is whether the ground water from the ESPA within the Trust Water Area should be viewed as a different source than ground water from the ESPA outside the Trust Water Area under Idaho Code § 42-222(1). If these hydraulically connected areas of ground water were treated as separate sources, it would create an impenetrable water right barrier down the middle of the ESPA, significantly restricting the transfer of (movement of) existing water rights within the ESPA.⁴ A substantial restriction on the transfer process, such as the one advanced by IPC, would likely be described in clear, unambiguous language in the statutes establishing the Trust Water Area. No such language exists in Idaho Code §§ 42-203B, 42-203C, or 42-222.

In the absence of clear statutory language confirming that the creation of the Trust Water Area was intended to restrict the movement of existing ground water rights in the ESPA, the

⁴ IPC notes that, if there is not a strict prohibition on transferring ground water rights across the Trust Water Area boundary, trust water rights (ground water rights diminishing the flow of water available to satisfy water rights held in trust) could be moved to a location outside the Trust Water Area, to an area with no effect on the flows in the Snake River below Milner Dam, and could still be subject to curtailment if the minimum stream flows at Swan Falls Dam (measured at the Murphy Gaging Station) are not met. *IPC Brief* at 8. One might argue that a trust water right was subject to curtailment at the time it was developed and remains subject to curtailment as a matter of law, regardless of its physical location. It is not necessary to get mired in these theoretical arguments, however. As noted in this order, there is no evidence in the administrative record that trust water rights have been curtailed because of a violation of the minimum stream flows at Swan Falls Dam. Until such curtailment of trust water rights is warranted, the Department need not address how trust water rights moved outside the Trust Water Area boundary will be administered.

Department must evaluate transfer applications using the elements listed on the water rights, without regard to the Trust Water Area boundary. In this case the source of water listed on the water rights is ground water. The existing and proposed points of diversion described in Application 87701 divert ground water from the same source: ground water in the ESPA.⁵

Trust Water is not a Source of Water

IPC's use of the term "Trust Water" in its briefing is inconsistent with Idaho Code § 42-203B and SRBA decisions related to the water rights held in trust under Section 42-203B. For example, IPC uses the term Trust Water as follows:

[Application 87701] proposes the utilization of a new source of water, Trust Water.

Trust Water is a Distinct Designated Source of Water.

Trust Water is a legislatively designated source of ground water within the [ESPA]

Trust Water is defined geographically, where it resides in the aquifer.

IPC Brief at 2-3, 7.

[Trust Water] is distinct from the general classification of ground water in the [ESPA].

Trust Water is a source of water – Legislatively created through the 1984 settlement and trust guidelines set forth in IDAPA 37.03.08.

IPC Response at 2-3.

The trust created through the 1984 Swan Falls Agreement and the enactment of Idaho Code § 42-203B, was confirmed in the SRBA. The SRBA Court held: "It is . . . unambiguous that the *res* of the trust consists of 'water rights' as opposed to 'water.'" *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), pg. 31 (italics in original). IPC's characterization of "Trust Water" as a source of water, a legislatively created source of water, or a subset of the ground water contained in the ESPA is inconsistent with Idaho Code § 42-203B. Admittedly, the term "Trust Water" is a misnomer, and the term is often misused. Trust Water is not a source of water. Trust Water is not ground water stored in an aquifer. The State Water Plan provides a useful summary of the Trust Water framework:

⁵ IPC's proposal to treat ground water inside the Trust Water Area and ground water outside the Trust Water Area as separate sources of water is inconsistent with partial decrees for certain water rights in the SRBA. Consider, for example, the SRBA partial decree for ground water right 43-2319, issued in June 2002, which includes three authorized points of diversion within 1.5 miles of each other. Two of the points of diversion are inside the Trust Water Area. One of the points of diversion is outside the Trust Water Area. Under IPC's argument, the partial decree for water right 43-2319 should have listed two sources: (1) ground water inside the Trust Water Area and (2) ground water outside the Trust Water Area. The SRBA partial decree, however, listed only one source of water: ground water. The SRBA Court considered the ground water diverted from any of the three wells as the same source of water.

A core principle of the Swan Falls Settlement is that flows of the Snake River downstream from Milner Dam in excess of the Murphy minimum average daily flow of 3,900 cfs during the irrigation season and 5,600 cfs during the non-irrigation season are available for future development in accordance with state law. The Settlement, however, recognized development would occur over time and that in the interim it was in the public interest to allow Idaho Power Company to continue to use such flows up to the licensed amount of the hydropower water rights “pending approval of depletionary future beneficial uses.”

Water made available for reallocation to new uses in the Snake River trust water area pursuant to Idaho Code § 42-203B shall be allocated in accordance with criteria established by Idaho Code §§ 42-203A and 42-203C. These dual objectives were implemented through, a trust, established by Idaho Code § 42-203B(2), which operates for the joint benefit of Idaho Power Company and the people of the State of Idaho. The statutory trust consists of twenty-five hydropower water rights originally appropriated by Idaho Power Company for flows in excess of the Murphy minimum flow, and now held by the State, by and through the Governor. Idaho Power Company uses the flows available under the water rights held in trust for hydropower purposes until those flows are appropriated to new uses approved pursuant to state law, including Idaho Code §§ 42-203A and 42-203C. The “reallocation” is accomplished through subordination of the hydropower water rights held in trust to the new uses, pursuant to Idaho Code § 42-203B(2).

While the water made available for future development as a result of the trust is often referred to as “trust water,” this term is a misnomer. The trust consists of “water rights” as opposed to “water.” Trust Water is simply a shorthand term referring to flows above the minimum stream flow at the Murphy Gage, which were originally appropriated under water rights for hydropower generation at Idaho Power Company’s facilities located between Milner Dam and the Murphy Gage. Additionally, the term refers only to water sources tributary to the Snake River below Milner Dam, as shown on Figure 2 (the “Trust Water Area”).

Idaho State Water Plan, Part 4C (citations, footnotes, and figures omitted).

If Trust Water is limited to the definition set forth in the State Water Plan and used by the SRBA Court, then IPC’s argument that Application 87701 would change the source of water for water rights 35-14407 and 35-14408 to Trust Water must be rejected. If the trust created under the Swan Falls Agreement is comprised of water rights rather than water, Trust Water cannot be a source. Therefore, it is not possible for Application 87701 to change the source of water rights 35-14407 and 35-14408 to Trust Water.

II. The Changes Proposed in Application 87701 do not Violate the 2022 Moratorium

On October 21, 2022, the Director of the Department issued an Amended Snake River Basin Moratorium Order (“2022 Moratorium”), which superseded the 1993 Moratorium for the Trust Water Area. IPC argues that the proposed changes would “violate the Moratorium Order” and “directly conflict[] with the rationale identified in the Moratorium that were the basis for continuing and expanding the Moratorium boundary.” *IPC Brief* at 5, 14.

The Order section of the 2022 Moratorium includes the following provisions:

[T]his Moratorium Order suspends further action on the processing and approval of presently pending and new applications for permits to appropriate water from the Snake River upstream from Swan Falls Dam and all surface and ground water sources in the trust water area and the non-trust water area, subject to the following provisions:

...

The moratorium does not apply to applications for transfer, including applications to add points of diversion to valid, existing water rights.

2022 Moratorium at 27-28 (emphasis added).

The 2022 Moratorium is unambiguous. It does not apply to applications for transfer. IPC asks the hearing officer to analyze the rationale and intent of the 2022 Moratorium. It is not necessary to derive or analyze the intent of the 2022 Moratorium in this case because the plain language of the moratorium states that it does not apply to applications for transfer.

III. Application 87701 is not an Appropriation of Water and is Not Subject to the Review Criteria in Idaho Code § 42-203C

IPC argues the changes proposed in Application 87701 “should be considered a new appropriation of Trust Water.” *IPC Brief* at 2. IPC also argues the application requires consideration under the Department’s Water Appropriation Rules (IDAPA 37.03.08) and Idaho Code § 42-203C. *Id.* at 5, 7, 9. Further, IPC argues “Idaho Code § 42-203C is the only legislatively recognized way in which Trust Water can be reallocated, diverted, consumed, or controlled.” *Id.* at 9

Application 87701 is not an Appropriation of Water

Any analysis to determine whether Idaho Code § 42-203C applies to the water use described in Application 87701 should start with the language of that statute. Section 42-203C begins with the conditional phrase: “If an applicant intends to appropriate water” If this condition is met, Section 42-203C states that “the director shall consider . . . the criteria established in section 42-203A, Idaho Code, and whether the proposed use . . . would

significantly reduce the amount of trust water . . . and, if so, whether the proposed reduction is in the public interest.” Section 42-203C sets forth a list of factors for the Department to consider as part of its public interest review. The critical question, therefore, is whether Gardner “intends to appropriate water” through Application 87701.

The terms “appropriation” and “appropriate” are not defined in the water rights section (Title 42) of the Idaho Code. Nor are the terms defined in rules of the Department. By reviewing usage of the terms in various statutes and rules, however, it is possible to create a logical definition for the terms “appropriation” and “appropriate.”

Rule 1.02.a of the Department’s Water Appropriation Rules (IDAPA 37.03.08) includes the following phrases: “provide for the appropriation of unappropriated public water” and “provide the procedures for obtaining the right to divert and use unappropriated public water.” It seems, therefore, that the term “appropriation,” as it is used in Rule 1.02.a, is synonymous with the phrase “obtain[] the right to divert and use.”

Section 42-202, Idaho Code, which includes the phrase “APPLICATION TO APPROPRIATE WATER” in its title, is also helpful in understanding the term “appropriate” in a water rights setting. The section includes the following sentence: “[A]ny person . . . intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho, shall . . . make an application to the department of water resources for a permit to make such appropriation.” Idaho Code § 42-202(1) (emphasis added). In Section 42-202, the term “appropriate” means to acquire a water right through an application for permit.

Section 42-201, Idaho Code, also provides some clarity to the meaning of the terms “appropriate” and “appropriation” in a water rights setting. It states: “All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise. . . . Such appropriation shall be perfected only by means of the application, permit and license procedure as provided in this title” Idaho Code § 42-201(1) (emphasis added). According to Section 42-201, “appropriation” is the process of acquiring and confirming a right for the beneficial use of water. Further, Section 42-201 states that appropriation can only occur by means of the application, permit, license procedure. Section 42-201 does not refer to transfer applications.

In Application 87701, Gardner proposes to change the point of diversion and place of use for a portion of existing water rights 35-14407 and 35-14408. Water right 35-14407 is a split portion of water right 35-2380, which was licensed in 1961. Water right 35-14408 is a split portion of water right 35-8026, which was licensed in 1990.

Any “appropriation” of water under water rights 35-2380 and 35-8026 (and any split portions therefrom) has already occurred. The appropriation of water under water rights 35-2380 and 35-8026 occurred when the water rights were acquired by the original right holder(s) and confirmed by the Department through the issuance of water right licenses. Gardner cannot continue to appropriate the public water resource under water rights 35-14407 or 35-14408. Any additional appropriation under water rights 35-14407 and 35-14408

would be inconsistent the way the terms “appropriation” and “appropriate” are used throughout Title 42, Idaho Code. Gardner does not intend to appropriate water through Application 87701.

Water Rights 35-14407 and 35-14408 are not Trust Water Rights

Idaho Code § 42-203B establishes the legal framework for Trust Water and defines the scope of the water rights held in trust by the State of Idaho. Section 42-203B(2) states: “The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law, including compliance with the requirements of section 42-203C, Idaho Code.” These future upstream rights are often referred to as trust water rights. As noted above, water rights 35-2380 (the parent right of water right 35-14407) and 35-8026 (the parent right of water right 35-14408) were developed outside of the Trust Water Area prior to 1985. Idaho Code § 42-203B was not adopted until 1985. Therefore, the “future upstream beneficial uses” contemplated by Idaho Code § 42-203B(2) could not include water rights 35-2380 or 35-8026.

The Final Unified Decree for the SRBA includes the following definition for the term “Trust Water Right”: “A water right acquired pursuant to Idaho Code § 42-203B which diverts water first appropriated under hydropower rights held in trust by the State of Idaho.” *Order Amending Final Unified Decree* at 1 (June 25, 2015). This definition was established for the rights appropriating water used to satisfy the water rights held in trust. Water rights 35-14407 and 35-14408 are not trust water rights. They were not acquired pursuant to Idaho Code § 42-203B. IPC has not identified any statute authorizing the Department to convert a water right into a trust water right through the transfer application process.

Section 42-222(1) does not refer to Section 42-203C or Trust Water Rights

The most compelling reason that Application 87701 is 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. It is surprising that Idaho Code § 42-222(1) would not contain a single reference to Idaho Code § 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 application proposing to move an existing water right into the Trust Water Area boundary. Such language could have been added to Idaho Code § 42-222 when the section was amended in 1986, 1988, 1990, 1994, 1996, 1997, 2000, 2003, 2004 or 2020.

The terms “transfer” and “transfer application” are not found in Idaho Code § 42-203A (which sets forth the standards used to evaluate applications to appropriate the waters of the state) or in Idaho Code § 42-203C (which sets forth standards used to evaluate applications to appropriate the water used to satisfy water rights held in trust). The term “transfer” is only found once in the Department’s Water Appropriation Rules (IDAPA 37.03.08). Rule 50.12 states:

Insuring Assignment of Interest. The director may condition a permit issued for trust water to require that any amendment (Section 42-211, Idaho Code), transfer (Section 42-222, Idaho Code), or assignment of interest in the permit by any method whatsoever shall not result in the project failing to meet the public interest criteria of Section 42-203C, Idaho Code except, however, lenders obtaining title to the project through default will have a reasonable period of time, as determined by the director, to meet such criteria or to convey the project to a person or entity that does meet the criteria.

IDAPA 37.03.08.50.12.

Rule 50.12 only applies to permits issued for the diversion and use of Trust Water. The rule grants the Department the authority to add conditions to permits diminishing water rights held in trust to ensure that the conditioned rights continue to satisfy the public interest criteria from Idaho Code § 42-203C into the future, even if the rights are changed through a transfer approval. As noted above, water rights 35-14407 and 35-14408 are not trust water rights and, therefore, do not bear any condition requiring adherence to the public interest criteria in Idaho Code § 42-203C. Consequently, Rule 50.12 does not apply to water rights 35-14407 or 35-14408.

In summary, Application 87701 proposes to change elements of existing water rights, not to appropriate additional water rights. Gardner does not intend to appropriate water held in trust under Idaho Code § 42-203B. There is no language in statute or rule supporting the argument that applications for transfer are subject to the review criteria set forth in Idaho Code § 42-203C or the Department’s Water Appropriation Rules (IDAPA 37.03.08). Therefore, Application 87701 should only be reviewed under the criteria set forth in Idaho Code § 42-222(1).

IV. The Changes Proposed in Application 87701 will not Injure Existing Water Rights

The changes proposed in Application 87701 will not increase the total depletions in the Snake River reaches above Milner Dam and, therefore, will not injure water rights diverted from the Snake River above Milner Dam. The proposed changes will, however, increase the depletions in the Snake River reaches between Milner Dam and Swan Falls Dam. Hydropower water rights 2-100, 2-2032A, 2-4000A, and 2-4001A (“IPC Swan Falls Rights”) held by IPC for power generation at Swan Falls Dam, which are all senior to water rights 35-14407 and 35-14408, include the following condition:

This water right is subordinate to all water rights diverting water from the Snake River and surface and groundwater sources tributary to the Snake River, with a priority date senior to October 25, 1984, unless otherwise indicated on the face of individual water rights.

See e.g., 2nd Amended Partial Decree for Water Right 2-100 (issued August 16, 2017).

Water right 35-14407 bears a priority date of June 4, 1954. Water right 35-14408 bears a priority date of March 5, 1982. Both water rights bear priority dates senior to October 25, 1984. Water rights 35-14407 and 35-14408 do not bear any conditions negating the subordination of the IPC Swan Falls Rights. Therefore, the IPC Swan Falls Rights are subordinate to water rights 35-14407 and 35-14408. This subordination is unqualified. There are no exceptions or provisions limiting the subordination only to the existing points of diversion for water rights 35-14407, 35-14408, or any other water rights. The IPC Swan Falls Rights are subordinate to water rights tributary to the Snake River with priority dates senior to October 25, 1984, regardless of where those water rights are diverted, whether they are diverted inside the Trust Water Area or outside the Trust Water Area. *Gardner Brief* at 12 (quoting *Order on Motion for Approval of Settlement, In re SRBA*, Case No. 39576, Consolidated Subcase No. 00-92023 (Jan 4, 2010), which confirms that subordination of IPC Swan Falls Rights includes “subsequent changes to the original rights resulting from ongoing transfers”).

Pursuant to Idaho Code § 42-203B(2), the state of Idaho holds hydropower water rights 2-2032B, 2-4000B and 2-4001B at Swan Falls Dam in trust. The water rights held in trust are satisfied by flows in the Snake River in excess of the minimum stream flows at the Murphy Gaging Station (3,900 cfs between April 1 and October 31 and 5,600 cfs between November 1 and March 31). *See Gardner Brief* at 14. The water rights held in trust are subject to reduction and diminishment by future water rights. These future water rights are often referred to as trust water rights because they can diminish the flow of water used to satisfy the water rights held in trust by the state, as long as the minimum stream flow water rights at the Murphy Gaging Station are satisfied. Trust water rights junior to October 25, 1984, do not receive the protection of the subordination of the IPC Swan Falls Rights. In other words, trust water rights would be subject to curtailment if the flow rates set forth on the IPC Swan Falls Rights are not satisfied. *Gardner Brief* at 16. Many trust water rights are located within the Trust Water Area of the ESPA.

IPC argues that the trust water rights (the rights relying on the trust described in Idaho Code § 42-203B(2)) will be injured if the Department allows any additional depletions to the Snake River between Milner Dam and Swan Falls Dam. In the context of a transfer application, the injury could occur, in theory, as follows: A water user changes the point of diversion for an existing ground water right in the ESPA. The change increases the depletion in the reaches of the Snake River between Milner Dam and Swan Falls Dam. This increase in depletion increases the possibility that the IPC Swan Falls Rights will not be satisfied, thereby increasing the risk that the trust water rights may be curtailed.

Idaho Code § 42-222(1) states that the Department shall approve a transfer application “provided no other water rights are injured thereby.” This injury must be an actual injury not theoretical injury or merely an increase in the risk of future injury. There is no evidence in the

record that trust water rights have ever been curtailed to satisfy the IPC Swan Falls Rights. Although it is possible that trust water rights may be curtailed in the future, until such curtailment occurs, any claims of injury to trust water rights because of the depletion effects of a transfer application are largely theoretical.

IPC cites a guidance memo from the Department, *Administrator's Memorandum - Transfer Processing No. 24* (December 21, 2009) ("Transfer Memo") and argues that the Transfer Memo requires the Department to find injury in this case.⁶ *IPC Response* at 5-6. The Transfer Memo states: "Increases in [depletions to hydraulically-connected reaches of the Snake River] 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." *Transfer Memo* at 13. IPC contends that the Transfer Memo "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."⁷ *IPC Response* at 5. According to IPC, a transfer which increases depletions to a reach below Milner Dam "presumptively results in injury." *Id.* at 6.

IPC asks the hearing officer to apply the presumption from the Transfer Memo quoted above. IPC's request to apply a single, isolated presumption from the Transfer Memo is misleading. The section of the Transfer Memo cited by IPC contains multiple presumptions. It is important to consider all the presumptions from the relevant section of the Transfer Memo when evaluating IPC's argument. The Transfer Memo states:

The purpose of the time series of depletion attachment is to provide a basis for evaluating whether the proposed transfer will increase depletions to hydraulically-connected reaches of the Snake River. 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. Increased depletions greater than 10 % for any reach are presumed to cause injury and must be fully mitigated such that there are no increases in depletion to those reaches except as described below.

Increased depletions greater than 10% in any reach are considered insignificant under either of the following conditions and will not require mitigation for the proposed transfer to be approvable:

- a. Increased depletions (transient to steady-state) to the reach are two acre-feet or less per trimester; or

⁶ IPC's request to apply the provisions of the Transfer Memo is inconsistent with IPC's initial arguments in this case. In its opening brief, IPC argued that the Transfer Memo is an "informal and internal policy" that is "clearly contradictory to the legislature's acknowledgement that transfers of water rights cannot occur to the detriment of existing water rights." *IPC Brief* at 13.

⁷ The Transfer Memo does not contain the terms "Swan Falls Dam" or "fully appropriated" as asserted by IPC.

- b. The reach, at steady-state conditions, will not be depleted by an amount greater than 10% of the total depletion to all reaches caused by the diversion under the proposed transfer.

Transfer Memo at 13 (footnotes omitted).

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 Memo should be considered. IPC asserts, however, that the presumptions in the Transfer Memo are applicable. If, as IPC asserts, the Transfer Memo establishes valid presumptions to be used in evaluating transfer applications, all presumptions set forth in the Transfer Memo must be considered. The presumptions, when considered as a whole, confirm that the transfer is approvable. Although the transfer increases depletions to Snake River reaches below Milner Dam, the increase to any single reach is less than two acre-feet per trimester. *See* Application 87701 at 15 (describing the expected impacts to individual reaches of the Snake River). In fact, the cumulative increase for all reaches below Milner Dam is less than two acre-feet per trimester. *Id.* According to the Transfer Memo, these increased depletions are “insignificant . . . and will not require mitigation for the proposed transfer to be approvable.”

V. IPC’s Arguments Related to ESPA Model Thresholds and the Department’s Cumulative Analysis are not Tied to Actual Injury

IPC raises general arguments against the mitigation thresholds established by the Department for evaluating depletions to the Snake River caused by changing the points of diversion for ground water rights in the ESPA. IPC also argues that the Department violates Idaho Code § 42-222(1) by evaluating the efficacy of its mitigation thresholds through a cumulative analysis of all transfers approved in the ESPA on an annual and multi-year basis. IPC, however, does not correlate these general arguments about the Department’s transfer review process to actual injury to any specific water rights. The hearing officer declines to evaluate these arguments in the abstract. In the absence of persuasive evidence of actual injury to specific water rights, arguments about mitigation thresholds and cumulative analyses have no bearing on the outcome of this case.

VI. IPC’s Arguments about Local Public Interest and Conservation of Water Resources are Unsupported

On the last page of its initial brief, IPC provides a general reference to local public interest and conservation of water resources and an allegation that these criteria are not satisfied but provides no substantive argument on those topics. As noted above, Gardner has demonstrated that the changes proposed in Application 87701 are consistent with the conservation of water resources within the state of Idaho and are in the local public interest.

VII. Application 87701 should be Approved

Gardner has demonstrated that the changes proposed in Application 87701 will not injure existing water rights, do not constitute an enlargement in use of the original right, are consistent with the conservation of water resources within the state of Idaho, and are in the local public interest.

The arguments raised by IPC in opposition to Application 87701 are not persuasive. The changes proposed in Application 87701 do not constitute a change in source. Transfer applications are not subject to the 2022 Moratorium. Application 87701 is not an appropriation of water and is therefore not subject to the review criteria set forth in Idaho Code § 42-203C. IPC's arguments about injury to its water rights fail because its water rights are subordinated to water rights 35-14407 and 35-14408. IPC's arguments about injury to trust water rights are based on theoretical injury rather than actual injury. Finally, IPC's arguments about the Department's process for evaluating injury in transfer applications are not related to actual injury to specific water rights and need not be addressed in this order.

CONCLUSIONS OF LAW

The changes proposed in Application 87701 do not constitute an appropriation of Trust Water and are not subject to the public interest review criteria set forth in Idaho Code § 42-203C. Further, the changes proposed in Application 87701 will not injure other water rights, will not result in an enlargement in use of the original rights, are consistent with the conservation of water resources within the state of Idaho and are in the local public interest. Therefore, Application 87701 should be approved.

ORDER

IT IS HEREBY ORDERED that Application for Transfer 87701 filed in the name of Gardner Farms is APPROVED subject to the conditions set forth in Transfer Approval 87701 issued in conjunction with this order.

Dated this 27th day of March 2024.



James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of March 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: Preliminary Order Approving Transfer
Transfer Approval 87701

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