

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. 1200
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
EXCEPTIONS TO PRELIMINARY
ORDER APPROVING TRANSFER
AND BRIEF IN SUPPORT OF
EXCEPTIONS**

IDAHO POWER COMPANY (the “Petitioner”, “Company”), by and through its attorneys of record, hereby submits *Idaho Power Company’s Exceptions to Preliminary Order Approving Transfer*. These exceptions are being submitted to the Director Mathew Weaver (hereinafter the “Director”) of the Idaho Department of Water Resources (“IDWR” or “Department”) pursuant to Idaho Code § 67-5245(3) and IDAPA 37.01.01.730.02.b.

These exceptions are submitted in response to the *Preliminary Order Approving Transfer* in the above-entitled matter dated and served March 27, 2024 (hereinafter “Preliminary Order”) by Hearing Officer James Cefalo (hereinafter the “Hearing Officer”) and the Hearing Officer’s

subsequent denial of the Petition for Reconsideration, date April 25, 2024 (“April 25, 2024 Order”). The Company would note that service of the April 25, 2024 Order was by certified mail only. The recognized practice in this contested transfer was service by mail and e-mail given the postal service time delay. The Company’s outside counsel’s firm received and signed for the certified mail on May 6, 2024. The Company’s in-house counsel who was also on the service list has yet to receive the Order. Given these circumstances, the Company would request additional time to further brief the exceptions to the Director. If such an accommodation is made, it should also delay the respondent’s filing if any.

For the reasons set forth below, the *Preliminary Order* should be denied upon review by the Director.

I. STANDARD OF REVIEW FOR EXCEPTIONS

The Preliminary Order is a preliminary order as defined in IDAPA 37.01.01.730.01 because it was “issued by a person other than the agency head ...,” which will become a final order of the agency “unless reviewed by the agency head (or the agency’s head's designee) pursuant to §67-5245, Idaho Code.” The Hearing Officer is a person other than the agency head, and therefore, because it is a preliminary order, it is subject to an appeal within the agency to the agency head. The petition must be filed with the agency head of the Department within fourteen days (14) after the service date of the Preliminary Order (Idaho Code § 67- 5245(3) and IDAPA 37.01.01.730.01.c), which, in this case, is May 9, 2024. Opposing parties “shall have fourteen (14) days to respond to any party’s appeal within the agency.” IDAPA 37.01.01.730.02.c.

II. INTRODUCTION

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

The Company has historically raised protests with the Department regarding the approval of transfers which increased depletions in reaches of the Snake River, arguing that such increases and any approvals were inconsistent with moratorium orders issued by the Department and Idaho law. While the moratoriums issued typically examined the Snake River basin or portions of the basin (Trust or non-Trust), the basis for said moratoriums were consistently based upon recognition that the water supply wasn’t sufficient to satisfy existing rights, much less new or additional appropriations in reaches of the Snake River.

Additionally, depletions in reaches of the Snake River below Milner resulting from proposed transfers result in reductions of Trust Water, water previously appropriated under hydropower rights, which by the Swan Falls Agreement was made available for reallocation only after specific analysis was completed by the Department to ensure that the citizens of the state of Idaho and the Company continued to benefit. The Swan Falls Settlement came about through the recognition by the parties that the resource could not sustain further development without compromise. Arguing about semantics, i.e. whether the source is fully appropriated wasn’t going to make water available for continued development. The reallocation of water subject to the Company’s hydropower rights did through the trust relationship with the State consistent with Idaho law and IDAPA 37.03.08.

In the instant contested case, modeling and the Department’s review of the factual circumstances associated with the proposed transfer confirmed “new” depletions of Trust Water,

water tributary to the Snake River below Milner dam, would occur if Transfer 87701 were approved. If Transfer 87701 is approved, said approval would frustrate the intent of the Settlement.

The facts surrounding the proposed transfers are adequately laid out in the Hearing Officer's Preliminary Order. Again, relevant to the Director's de novo review is the acknowledgement of finding of facts nos. 8, 12 and 14. Further, the Hearing Officer correctly found that: (1) the Department's Transfer Memo (Administrator's Memorandum - Transfer Processing No. 24 (December 21, 2009) ("Transfer Memo")) which addresses mitigation requirements is limited as "an internal guidance document and does not have the same force or effect of statute or rule" *see* Preliminary Order p. 21; (2) the Preliminary Order further acknowledges the following, "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; and (3) the Company's assertion that the Trust Water Area boundary has legal significance is correct. The Trust Water Area is the administrative boundary that dictates which proposed diversions/applications are subject to the review criteria in Idaho Code § 42-203C.

III. EXCEPTIONS AND ARGUMENT

1. The Hearing Officer erred in concluding that a new diversion of Trust Water under the Proposed Transfer would not constitute an appropriation requiring consideration of the Trust Water Criteria identified in the Department's Appropriation Rules. *See generally*, IDAPA 37.03.08.

A. The Hearing Officer erred in finding that Trust Water is not a specific characterization of ESPA groundwater subject to additional scrutiny under 37.03.08 and subject to conditions on the transfer.

No one can argue that water right nos. 35-14407 and 35-14408 did not exist prior to 1984. The original points of diversion are outside of the Trust Area. Additionally, no one can argue that if approved, these transfers will commence pumping within the Trust Area and constitute a new diversion and deplete water within the Trust Area otherwise observed in reaches of the Snake River below Milner dam. If a new application were filed with the Department within the Trust Area, there would be no doubt that the application would be considered as a new depletion of water, whose source is Trust Water with additional review required under IDAPA 37.03.08. To look at these transfers differently from a new appropriation is a distinction without a difference. That is, the resource, Trust Water, sees the same impact. The Company provided the Hearing Officer numerous examples where the court, statute or agency had distinguished ground water based upon certain characteristics either natural or artificial. Based upon this “labeling” additional scrutiny or limits to use was prescribed by the water right, rule or agency. The Hearing Officer dismissed the argument that water originally appropriated under the Company’s hydropower rights, now held in Trust and commonly described as Trust Water, was then subject to additional scrutiny if such use through a transfer would result in a new depletion of Trust Water. For the reasons asserted in the Company’s briefing before the Hearing Officer, the Director should reject the Hearing Officer’s rationale and recognize the intent of the Trust and the protections provide in the Department’s analysis associated with the reallocation of the Trust property.

B. The Hearing Officer Failed to Recognize the existence of Trust Water as defined in the Administrator’s Memorandum, Application Processing no. 77 Dated July 18, 2019.

The Company has repeatedly argued that Trust Water has been recognized as a source of water. It is this source that has been the subject of repeated protests by the Company and

discussion over the years with the Department. The Department recognizes this specific or distinct source of groundwater in the above-mentioned internal memorandum. For the Hearing Officer to continue to assert that Trust water doesn't exist is without merit and if upheld would negate years of collaborative efforts by the State and the Company in managing the resource. This management includes ensuring that the appropriate review of proposed uses of Trust Water coincides with the intent of the Swan Falls Settlement.

C. The Hearing Officer failed to reconcile the inconsistency of allowing transfers in or out of the Trust Water Area and the administrative limitations of I.C. § 42-203B(2)

Idaho Code § 42-203B(2) states, in pertinent part:

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. (Emphasis added)

In briefing, the Company raised the argument that if a trust water right were transferred outside of the trust area, such transfer could frustrate the intent of the Swan Falls Agreement, which includes the Two River concept and the Trust/non-Trust boundaries and moratoriums. The Preliminary Order observed that such applications are “theoretical

arguments,” and the Preliminary Order ignored such factual scenario. Such is not the case as Transfer Mos. 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 Preliminary Order and April 25, 2024 Order (“Orders”), 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. 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 these Orders, in the event of a violation of the Swan Falls minimums, the State would be responsible for curtailing a trust water right that was transferred outside the Trust Water Area (i.e., above Milner Dam) and now tributary above Milner dam in violation of I.C. § 203B(2). Further, it is unclear how such action would remedy the minimum flows 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. All that has been accomplished is the frustration of the Trust’s intent through mischief.

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.

2. Idaho Code § 42-222(1) states that the Department shall approve a transfer application “provided no other water rights are injured thereby.”

A. The Hearing Officer’s reliance upon a statement in an SRBA order regarding “on-going transfers” is misplaced.

In the Preliminary Order, the Hearing Officer concluded that the subordination of the IPC Swan Falls water right is “unqualified.” Preliminary Order at 19. It appears that this “unqualified” conclusion is based upon a statement made in the SRBA order and cited by Gardner, approving a settlement and the language in certain provisions regarding the meaning and application of the terms of the October 25, 1984, Swan Falls Agreement. *See Order on Motion for Approval of Settlement, In re SRBA*, Case No. 39576, Consolidated Subcase No. 00-92023 (Jan 4, 2010), p. 19. In the Jan 4, 2010 Order, the Court in reviewing some proposed language to record the list of those water right holders dismissed from the “7500 case and to which the subordination provision applies”, refers to changes to original rights “resulting from ongoing transfers, splits and water right renumbering.” Jan. 4 Order at 19. The use of the term “ongoing” clearly means that at the time of the Swan Falls Agreement there could have been, or were, changes being made to water rights which were not necessarily part of the “list of the

original dismissed water right holders.” Idaho Power and the State agreed that those changes should be included. To follow the Hearing Officer’s rationale would be in direct conflict with language referenced in the January 4, 2010 Order and included in the Partial Decrees issued for the Company’s rights and the rights held in trust by the State of Idaho:

3. Idaho Power Company, as user of the water for power purposes and a beneficiary of the trust referenced above, is entitled to use the water available at the facility identified herein to the extent of its actual beneficial use but not to exceed the “QUANTITY” set forth above, and *to protect its rights to such use of the water as provided by state law against depletions or claims not in accordance with state law.*

See, January 4, 2010 Order, Fn3 at 8 (Emphasis added).

The Company retained the right to protest and protect its rights described above against depletions in violation of state law. I.C. § 42-222 clearly identifies that transfers may not be approved if there is injury. Without mitigation, the Company’s hydropower rights will be injured by the depletions in the reaches below Milner resulting from the proposed transfer.

B. The Hearing Officer found “This injury must be an actual injury not theoretical injury or merely an increase in the risk of future injury.”

The Hearing Officer initially found that there is no evidence in the record that trust water rights have ever been curtailed to satisfy the IPC Swan Falls Rights. He further found that 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.

In the Company’s Petition for Reconsideration and Briefing, it was pointed out that there have been occasions where violations of the minimum flows at the Murphy Gage have occurred but the remedy was to bring mitigation over Milner. Hence, curtailment is no longer theoretical. Further, injury simply doesn’t occur when the minimum flows are violated. As argued above, injury can occur where state law is not followed and depletions leave water rights unfulfilled.

C. The Hearing Officer failed to acknowledge the statements in the informal Department Document acknowledging Depletion Equating to Injury.

The Hearing Officer acknowledged that lack of authority for guidance memo from the Department, *Administrator's Memorandum - Transfer Processing No. 24* (December 21, 2009) (“Transfer Memo”). However, he then attempts to foreclose statements in the Transfer Memo from being used as admissions by the Department. In the instant case, the stipulated facts disclose the increased depletions in the reaches below Milner resulting from the proposed Transfer. The Company argues that the Transfer Memo requires the Department to find injury in this case because 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.

IV. CONCLUSION

For the reasons set forth above and in the Company’s briefing in this matter, the Company hereby requests additional time for briefing and ultimately requests the denial of Transfer No. 87701 without additional review by the Department consistent with the Trust Water conditions.

DATED this 9th day of May, 2024.

MARTEN LAW LLP



John K. Simpson
Attorneys for Idaho Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2024, I served the original of the foregoing **IDAHO POWER COMPANY'S EXCEPTIONS TO PRELIMINARY ORDER APPROVING TRANSFER AND BRIEF IN SUPPORT OF EXCEPTIONS**, as indicated, addressed to the following:

Mathew Weaver, Director
Idaho Department of Water Resources
Eastern Regional Office
900 N. Skyline Dr., Ste. A
Idaho Falls, ID 83402-1718
file@idwr.idaho.gov
Mathew.Weaver@idwr.idaho.gov

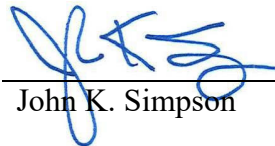
☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile
☐ Overnight Mail
☒ Email

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



John K. Simpson