

**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

**FINAL ORDER ADDRESSING
EXCEPTIONS AND DENYING
APPLICATION FOR TRANSFER**

BACKGROUND

On March 23, 2023, Gardner Farms (“Gardner”) filed Application for Transfer No. 87701 (“Transfer 87701”) with the Idaho Department of Water Resources (“Department”). Transfer 87701 proposes to change the point of diversion (“POD”) and the place of use for a combined 13-acre portion of Water Right Nos. 35-14407 and 35-14408 (collectively “Water Rights”). The 1984 Swan Falls Agreement established the “Trust Water Area,” a geographic area in the State of Idaho that represents the area where all surface water and ground water sources are tributary to the Snake River between Milner Dam and Swan Falls Dam. *Idaho State Water Plan* § 4C. The existing POD for the Water Rights is located outside the Trust Water Area, and the proposed POD for the Water Rights is located inside the Trust Water Area.

On May 8, 2023, Idaho Power Company (“Idaho Power”) filed its *Notice of Protest* for Transfer 87701.

On September 26, 2023, Gardner and Idaho Power filed *Stipulated Findings of Fact*, asking Department employee James Cefalo (“Hearing Officer”) to adopt the stipulated facts in lieu of conducting an evidentiary hearing. On September 27, 2023, the Hearing Officer issued an *Order Adopting Stipulated Findings of Fact and Establishing Schedule for Briefing* (“*Order Adopting Findings of Fact*”). Specifically, this order addresses questions about Finding of Fact 12. It states: “According to the results of the Department’s ESPA Transfer Tool, provided with the application, the changes proposed in [Transfer] 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.” *Order Adopting Findings of Fact*, at 2.

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

On March 27, 2024, the Hearing Officer issued a *Preliminary Order Approving Transfer* (“*Preliminary Order*”) concluding Transfer 87701 satisfies the transfer criteria set forth in Idaho Code § 42-222(1) and does not constitute a new appropriation of “Trust Water.” *Preliminary Order*, at 22.

On April 10, 2024, Idaho Power filed *Idaho Power Company’s Petition for Reconsideration*. On April 25, 2024, the Hearing Officer issued an *Order Denying Petition for Reconsideration* (“*Order Denying Reconsideration*”).

On May 9, 2024, Idaho Power filed *Idaho Power Company's Exceptions to Preliminary Order Approving Transfer and Brief in Support of Exceptions* (“*Exceptions*”), asking the Director to deny Transfer 87701. Idaho Power raised several arguments against approval, including the argument that the proposed transfer would injure existing trust water rights. *Exceptions*, at 9–10.

On May 23, 2024, Gardner filed *Applicant's Response to Idaho Power Company's Exceptions to Preliminary Order Approving Transfer and Brief in Support of Exceptions* (“*Gardner Response to Exceptions*”), concluding that the Hearing Officer already addressed Idaho Power’s arguments and that Gardner had nothing further to add. *Gardner Response to Exceptions*, at 2.

The Director reviewed the *Exceptions* to the *Preliminary Order*, as discussed in detail below. The Director concludes the *Preliminary Order* failed to adequately address the injury to other water rights caused by Transfer 87701. Accordingly, the Director rejects the *Preliminary Order* and denies Transfer 87701.

INTRODUCTION

The Director deems it necessary to supplement this order with a brief description of the Swan Falls Settlement to understand its history and define certain specific terms used throughout this order. The Director acknowledges Idaho courts and the legislature have already addressed the intent of the Swan Falls Settlement. The Director will not interpret the intent of the Swan Falls Settlement in this order. This section merely supplies background information to assist a reader with a basic understanding of the Swan Falls Settlement.¹

The Swan Falls Settlement resolved an ongoing controversy by addressing how to balance water uses for irrigation with water needs for hydropower generation in the Snake River Basin. Following a series of lawsuits surrounding the ongoing controversy, the State and Idaho Power entered into the Swan Falls Agreement, which resulted in legislation that codified the subordination and trust water principles. The Agreement created a “two rivers” concept significant to the Snake River Basin and the Eastern Snake Plain Aquifer (“ESPA”). Essentially, the Snake River is broken up into “two rivers”: (1) water upstream from Milner Dam and (2) water between Milner Dam and Swan Falls Dam. Importantly, Idaho Code establishes that the two rivers are to be administered separately. “For the purposes of the determination and administration of rights to the use of the water 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.” I.C. § 42-203B(2). The ESPA discharges spring water into the reach of the Snake River between Milner Dam and Swan Falls Dam. During times of zero flow at Milner Dam, almost all water in the Snake River below Milner Dam is spring discharge from the ESPA.

¹ The source of the information used in this simplified historical background of the Swan Falls Settlement is the law review article by Clive J. Strong & Michael C. Orr, *Understanding the 1984 Swan Falls Settlement*, 52 Idaho L. Rev. 223, 226–30 (2016).

The central issue of the Swan Falls Controversy revolved around the subordination of Idaho Power's hydropower water rights on the Snake River for the purposes of priority administration of water rights. The Agreement navigated the subordination issue by increasing the minimum stream flow ("MSF") at the Murphy Gage. The State agreed to new MSF water rights that increased the MSF at Murphy Gage to 3,900 cubic feet per second ("cfs") from March to November and to 5,600 cfs for the rest of the year (collectively "Murphy minimum flows"). The Agreement allotted for future development of water use flows exceeding the Murphy minimum flows. However, the Agreement was unclear as to whether the hydropower rights exceeding the Murphy minimum flows were *subordinated* to future uses or *subordinatable* to future uses. The courts and the legislature established two understandings regarding these water rights. First, Idaho Power hydropower water rights up to the Murphy minimum flows would be unsubordinated to future uses, and any senior unsubordinated hydropower right could seek priority administration to curtail junior users. Second, any flows exceeding the Murphy minimum flows up to 8,400 cfs or the total decreed water rights for the Swan Falls hydropower facility would be held in trust by the State subject to subordination, meaning these senior subordinated hydropower rights could not seek priority administration to curtail junior users from upstream depletion. The State was interested in allowing future appropriation of the hydropower rights held in trust in excess of the Murphy minimum flows. Water Rights appropriating the water held in trust that was previously appropriated under Idaho Power's hydropower water rights are considered "trust water rights."

EXCEPTIONS

The Director acknowledges that Idaho Power raised several issues in its *Exceptions*. However, at its core, the main issue raised by Idaho Power in its *Exceptions* is the question of injury. Specifically, Idaho Power argues that Transfer 87701 will cause an injury to the trust water rights because of the increased depletions in the reaches of the Snake River between Milner Dam and Swan Falls Dam. *Exceptions*, at 9–10. Idaho Power elaborates by claiming that (1) Transfer 87701 increases the likelihood of future curtailment when the minimum flows at Murphy Gage are unmet and (2) an injury exists when mitigation is not required. *Id.* After carefully considering the record, the Director is persuaded by Idaho Power's *Exceptions* on this matter. The Director rejects the *Preliminary Order's* findings and conclusions of law and supplements the analysis from that order with the analysis set forth in this order.

I. Idaho Code § 42-222(1) governs applications for transfer.

Water transfer applications are governed by Idaho Code § 42-222(1). *Barron v. Idaho Dep't of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). Idaho Code § 42-222(1) states, in relevant 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

Idaho Code § 42-222(1) contains two distinct elements. First, a water right holder who proposes to change the POD, place of use, or nature of use of a water right must file a transfer application with the Department. I.C. § 42-222(1). Second, the Director must “examine all the evidence and available information” in evaluating whether the proposed transfer injures other water rights, enlarges an existing use, or violates conservation principles or the local public interest. *Id.* The Director shall deny the transfer application when an applicant fails to meet their burden to show that other water rights will not be injured. *See Barron*, 135 Idaho at 421–22, 18 P.3d at 225–26.

Gardner satisfied the first element of Idaho Code § 42-222(1) by filing a transfer application to change the POD and the place of use for a combined 13-acre portion of the Water Rights. *See* Transfer Application 87701.

II. Gardner failed to meet its burden of supplying sufficient evidence establishing that existing trust water rights would not be injured by Transfer 87701.

Under the second element of Idaho Code § 42-222(1), the Director must examine whether the evidence and information presented to him meets the evaluation criteria before deciding whether to approve or deny the transfer application. The applicant “bears the burden of providing the Department with sufficient information to show non-injury to other water rights” in a transfer proceeding. *Barron*, 135 Idaho at 418, 18 P.3d at 223. The applicant bears this burden regardless of the complexity of the requested transfer. *Final Order, In re Appl. for Transfer No. 4729 Water Right Nos. 29-02426B & 29-07122 in the Name of Bradley Peterson*, at 8 (March 31, 1997) (hereinafter “1997 Final Order”). If the applicant does not meet this burden, the Director shall deny a transfer application. I.C. § 42-222(1).

Gardner claims Transfer 87701 will not cause injury to trust water rights for two reasons. First, Gardner argues that “[i]mpacts do not always result in injury” because “there is a legal distinction between impact and injury.” *Gardner Brief*, at 21. Second, Gardner argues that an injury does not exist because Gardner is not required to mitigate according to the Department’s *Transfer Processing No. 24 Administrator’s Memorandum* (“Transfer Memo”). *Id.* at 22.

A. Transfer 87701 injures the trust water rights because it increases the likelihood of future curtailment.

Idaho Power argues that the impact on trust water rights from the increased depletions in the reaches below Milner Dam equates to an injury. *Exceptions*, at 9–10. Conversely, Gardner argues that an impact does not equate to an injury. *Gardner Brief*, at 21.

An injury to other water users must be real and actual. *S. Valley Ground Water Dist. v. Idaho Dep't of Water Res.*, 548 P.3d 734, 761 (Idaho 2024), *as amended* (Jan. 12, 2024). This order recognizes various factors that would result in real and actual injury, such as when the proposed transfer impacts other water users based on reduced water availability and diminishment of another's priority based on future priority administration.

An actual injury can occur when a transfer request increases the likelihood of reduced availability of water. *See Barron*, 135 Idaho at 419, 18 P.3d at 224. For example, the Director denied a transfer application on the Big Wood River after determining the proposed transfer would increase depletions in a reach of that river, which would injure the Idaho Water Resource Board's ("Board") MSF water rights and other water rights. *Order Denying Exceptions, In re Appl. for Transfer No. 73969 in the Name of Robert Rohe*, at 6 (May 12, 2010) (hereinafter "*Rohe Transfer*"). The Director acknowledged that although the depletion in the stream was small, the impact on the stream was "real and determinable." *Id.* The Director concluded that the impact of the proposed transfer established an injury because "[t]he collective impact of many small transfers will have a negative impact on the Board's MSF water rights." *Id.*

A per se injury exists when approving a transfer application diminishes another water right's priority date based on the threat of future priority administration. *City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012) (affirming the district court's reasoning and recognizing both Idaho Code § 42-1425 and Idaho Code § 42-222(1) require a similar injury analysis); *see also Jenkins v. Idaho Dep't of Water Res.*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982) (recognizing that "diminish[ing] one's priority works [as] an undeniable injury to the water right holder"). An injury to other water rights does not require immediate physical interference when a transfer application is approved. *City of Pocatello*, 152 Idaho at 835, 275 P.3d at 850. If approving a transfer application leads to increased surface water depletions on a reach with designated MSF requirements, an injury exists when conditions result in unmet minimum flow requirements that place water rights at risk of future curtailment. *See, e.g., Rohe Transfer*, at 6.

Both parties agree that the transfer will increase depletions in the reaches of the Snake River below Milner Dam. *Stipulated Findings of Fact* ¶ 12. Like *Rohe*, the increased depletions, while not necessarily large, impact the trust water rights by increasing the likelihood of future curtailment when the minimum flows at Murphy Gage are unmet. If the water level of the Snake River drops below the minimum stream flows at Murphy Gage, upstream trust water rights with a priority date junior to October 25, 1984,² are subject to curtailment. Transfer 87701 would cause the trust water rights to be taken out of priority sooner than they would otherwise. Transfer 87701 constitutes a per se injury because it hastens future priority administration. Therefore, Gardner failed to meet its burden in producing sufficient evidence to support its claim that trust water rights will not be injured by Transfer 87701.

² There are some exceptions, notably, water rights where actual use was determined to have begun prior to October 25, 1984, despite a more junior priority date. These rights have been identified in SRBA proceedings.

B. Gardner cannot rely upon the minimum threshold in Department's *Transfer Memo* to show that Transfer 87701 would not injure the trust water rights.

Gardner claims it is not required to mitigate its impact on the Snake River because the *Transfer Memo* does not require mitigation in this case. *Gardner Brief*, at 21–22. The *Transfer Memo* includes a “minimum threshold” for mitigation and Gardner correctly argues the impacts of its transfer would be below the minimum threshold set in the *Transfer Memo*. Idaho Power responds by challenging the legality of the *Transfer Memo*'s minimum threshold. Idaho Power argues that the minimum threshold has “no legal or technical standing.” *Idaho Power Brief*, at 12. Idaho Power argues, “Any transfer which results in a depletion or reduction of water available to satisfy an existing water right, must be denied without mitigation.” *Id.* at 12–13.

The *Transfer Memo*, as drafted when the Hearing Officer issued his *Order Denying Reconsideration*, lacked legal support for justifying a minimum threshold for mitigation. Accordingly, the *Transfer Memo* cannot be relied upon to support the application. Gardner had the burden of supplying evidence to show that the application will not injure the trust water rights. Because the *Transfer Memo* and its minimum threshold cannot be relied upon, the Director concludes that Gardner has failed to meet its burden.

Importantly, the Director disagrees with Idaho Power's argument that a transfer within the ESPA that increases depletions to the Snake River can never be approved. If technical information were to show that the cumulative impacts of transfers within the ESPA have offsetting depletion effects on the Snake River, that could justify continuing with a minimum threshold standard. However, that analysis is not in the record here.

CONCLUSIONS OF LAW

Gardner did not satisfy its requisite burden of proof for the review criteria set forth in Idaho Code § 42-222(1). Specifically, Gardner did not sufficiently demonstrate that the proposed change would not injure the trust water rights. Because Gardner did not satisfy its burden of proof under the injury element, the Director need not consider whether the proposed use results in an enlargement or violates conservation principles or the local public interest. Therefore, Application for Transfer 87701 should be denied.

ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 87701 in the name of Gardner Farms is DENIED.

DATED this 1st day of November 2024.

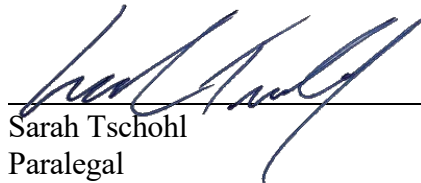


MATHEW WEAVER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of November 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

John Simpson MARTEN LAW LLP 101 S. Capitol Blvd., Ste. 305 Boise, ID 83702 jsimpson@martenlaw.com Scott Pugrud IDAHO POWER COMPANY PO Box 70 Boise, ID 83707 spugrud2@idahopower.com <i>Attorneys for Idaho Power Company</i>	☒ U.S. Mail, postage prepaid ☒ Email ☒ U.S. Mail, postage prepaid ☒ Email
Luke Marchant DARRINGTON LAW, PLLC PO Box 536 Rupert, ID 83350 luke@minicassialaw.com <i>Attorney for Gardner Farms</i>	☒ U.S. Mail, postage prepaid ☒ Email



Sarah Tschohl
Paralegal

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

The accompanying document is a "Final Order" issued by the Idaho Department of Water Resources ("Department") pursuant to Idaho Code § 67-5246. Unless a different date is stated in the final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration as further described below:

PETITION FOR RECONSIDERATION

(See Idaho Code § 67-5246(4))

Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The presiding officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law.

APPEAL TO DISTRICT COURT

(See Idaho Code §§ 67-5270 through 67-5279)

Within twenty-eight (28) days after: (a) the service date of this final order, (b) the service date of a denial of a petition for reconsideration of this final order, or (c) the failure within twenty-one (21) days of the presiding officer to act on a petition for reconsideration of this final order, any party may file a petition for judicial review of this final order with a district court. The filing of an appeal to a district court does not in itself stay the effectiveness or enforcement of the order under appeal.

CERTIFICATE OF SERVICE

(See IDAPA 37.01.01.053, 37.01.01.202; I.R.C.P. 84)

All documents filed with or served on the Department in connection with a petition for reconsideration or an appeal of this final order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 53 and 202, or Idaho Rule of Civil Procedure 84.