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DEPARTMENT OF
WATER RESOURCES

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

IN THE MATTER OF APPLICATION
FOR TRANSFER NOS. 84488 AND
84490 IN THE NAME OF LCSC
ENTERPRISES LLC

**APPLICANT’S
PETITION FOR RECONSIDERATION OR
IN THE ALTERNATIVE TO RE-OPEN THE
HEARING**

LCSC Enterprises LLC (collectively “LCSC” or “Applicant”), by and through its attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submits this *Applicant’s Petition for Reconsideration Or In The Alternative To Re-Open The Hearing* (the “Petition”).

This *Petition* is submitted pursuant to the *Explanatory Information to Accompany a Preliminary Order*, the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01), and Rule 11.2(b) of the Idaho Rules of Civil Procedure. LCSC requests reconsideration of the *Amended Preliminary Order Denying Applications* dated February 2, 2026, issued in the above-entitled matter (the “Preliminary Order”).

The *Preliminary Order* was issued as part of the consolidated contested cases pending before the Idaho Department of Water Resources (“IDWR” or “Department”) on LCSC’s transfer applications 84488 (simply “84488”) and 84490 (simply “84490”). Even though they are separate

and distinct transfer applications, for convenience, 84488 and 84490 were combined into a single proceeding and associated contested case—84488 and 84490 are collectively referred to as the “Transfers”). James Cefalo is the designated hearing officer (the “hearing officer”).

The Transfers were protested by A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively the “Coalition”) and Idaho Power Company (“IPC”). *Preliminary Order* at 1. IPC eventually withdrew its protest on May 15, 2025. *Id.* The Coalition submitted a rebuttal expert report in this matter from David Colvin (Exhibit 201), who also testified at the hearing on this matter and was the Coalition’s sole witness.

As stated above, a party in this proceeding has a right to petition the hearing officer for reconsideration within 14 days of the issuance of a preliminary order, which in this case is on or before February 16, 2026. However, February 16, 2026 is President’s Day, a legal holiday in Idaho, and therefore, pursuant to IDAPA 37.01.01.054, the filing date is on or before February 17, 2026.¹ Therefore, LCSC’s *Petition* is timely.

Even though this is not a petition for judicial review to a reviewing court, the applicable standard of review of an IDWR decision before the Idaho Supreme Court was previously well summarized by the Idaho Supreme Court, and the principles and standards described therein are important considerations by the hearing officer in his decision at the agency level:

In an appeal from a district court where the court was acting in its appellate capacity under the Idaho Administrative Procedure Act (“IDAPA”), “we review the decision of the district court to determine whether it correctly decided the issues presented to it.” *Clear Springs Foods v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). However, we review the agency record independently of the district court’s decision. *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 452, 180 P.3d 487, 491 (2008).

¹ This rule, in its entirety, is: 054. COMPUTATION OF TIME. Whenever statute, these or other rules, order, or notice requires an act to be done within a certain number of days of a given day, the given day is not included in the count, but the last day of the period so computed is included in the count. If the day the act must be done is Saturday, Sunday or a legal holiday, the act may be done on the first day following that is not Saturday, Sunday or a legal holiday.

A reviewing court “defers to the agency’s findings of fact unless they are clearly erroneous,” and “the agency’s factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record.” *A & B Irrigation Dist. v. Idaho Dep’t of Water Res.*, 153 Idaho 500, 505–06, 284 P.3d 225, 230–31 (2012). Substantial evidence is “relevant evidence that a reasonable mind might accept to support a conclusion.” *In re Idaho Dep’t of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 212, 220 P.3d 318, 330 (2009) (quoting *Pearl v. Bd. of Prof’l Discipline of Idaho State Bd. of Med.*, 137 Idaho 107, 112, 44 P.3d 1162, 1167 (2002)).

Idaho Code section 67–5279(3) provides that the district court must affirm the agency action unless it finds that the agency’s findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

I.C. § 67–5279(3); *Clear Springs Foods*, 150 Idaho at 796, 252 P.3d at 77. Even if one of these conditions is met, an “agency action shall be affirmed unless substantial rights of the appellant have been prejudiced.” I.C. § 67–5279(4). “If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.” I.C. § 67–5279(3).

N. Snake Ground Water Dist. v. Idaho Dep’t of Water Res., 160 Idaho 518, 522, 376 P.3d 722, 726 (2016). As to legal questions, a reviewing court exercises de novo review. *Eden v. State* (In re SRBA Case No. 39576), 164 Idaho 241, 248, 429 P.3d 129, 136 (2018) (“We exercise de novo review over legal questions.”).

Ultimately, the hearing officer denied the Transfers based on the following findings and conclusions:

- a. “Depletion is a zero-sum exercise.” *Preliminary Order* at 15.
- b. “All the water to be pumped from the proposed points of diversion at the Walcott property must be represented as a depletion to the modeled reaches of the Snake River. Stated differently, the total depletions to all reaches of the Snake River must add up to the total volume of water to be diverted at the proposed points of diversion.” *Id.*

- c. “Therefore, the hearing officer cannot simply ignore the 87 acre-feet per trimester of depletion associated with the N-M Reach.” *Id.*
- d. “The evidence provided by LCSC creates substantial doubt that the 87 acre-feet per trimester should be counted as a depletion to the N-M Reach. Because the deeper aquifer (the proposed source of water) is disconnected from the Snake River at the Walcott property and that disconnection likely continues to Milner, it is logical to infer that much of the 87 acre-feet will appear as depletions to the Snake River reaches below Milner.” *Id.*
- e. “If anything, the evidence suggests that the depletions predicted for the N-M Reach may propagate downstream, increasing the depletions in Snake River reaches below Milner. As noted above, the modeled anticipated depletions for some of the reaches below Milner are already very close to the mitigation threshold limits. Increasing the depletions below Milner by even a small amount will cause the applications to exceed the mitigation thresholds for certain reaches below Milner.” *Id.*
- f. “LCSC has not satisfied its burden of proof to show that the proposed changes will not exceed the mitigation thresholds in reaches below Milner. This is because LCSC has not provided a reliable analysis of how diversions at the proposed points of diversion will translate to depletion impacts to the Snake River.” *Id.*
- g. “Because the ETRAN results are not reliable, and LCSC did not provide any substitute analysis of how pumping from the proposed points of diversion will propagate to the Snake River, LCSC has not satisfied its burden of proof to demonstrate that the changes proposed in Application 84488 and 84490 will not injure existing water rights.” *Id.* at 16.

To be clear, there are many items decided in the *Preliminary Order* that LCSC agrees with and does not challenge with this *Petition*. However, the hearing officer should reverse his overall decision. LCSC presented technically sound and compelling evidence at the hearing to support approval of the Transfers in order to meet the burdens on a transfer applicant and to address the concerns raised by the Coalition and other water use concerns generally. As a tool available to the hearing officer to address specific concerns, LCSC made it clear that, if necessary for approval, it would agree to certain well construction standards as the hearing officer deemed necessary (i.e., to allocate pumping impacts or to isolate pumping impacts). Ultimately the hearing officer mixed

evidence directed at different issues and evidently assumed that any newly constructed wells must be cased down to the lower aquifer in order to justify denial of the Transfers. Upon reconsideration, and for the reasons set forth below, the hearing officer should reverse his decision and approve the Transfers (with conditions, as the hearing officer deems appropriate).

In the alternative to reconsideration, the hearing officer should re-open the hearing to allow for introduction of evidence to address the issues identified by the hearing officer as the basis for denial of the Transfers, as these reasons for denial were not raised by the Coalition (the sole remaining protestant) that would put LCSC on notice of these issues.

I. BACKGROUND

LCSC incorporates by reference the Background section of the *Preliminary Order* as though it was set forth in full here. The information in this section is accurate.

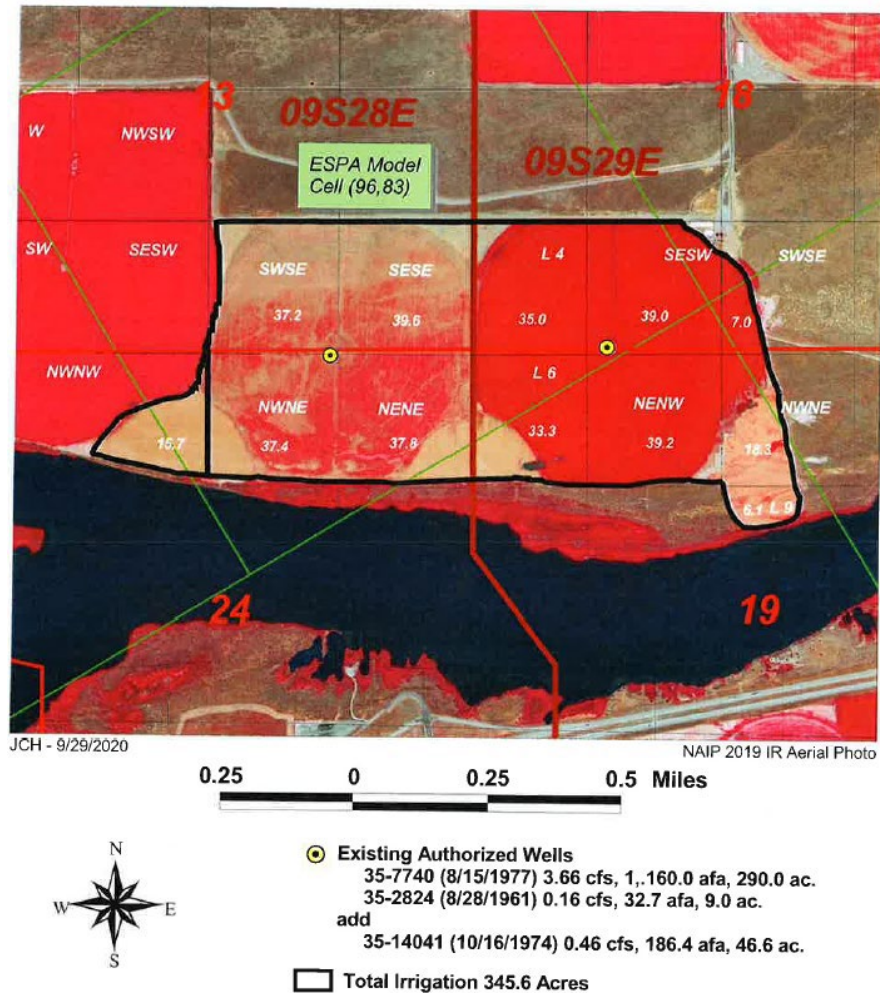
Nevertheless, additional details in the administrative record are important for purposes of this *Petition*. These details concern the motivation for filing each of the Transfers, the construction details of the two existing wells associated with 84488, and certain actions available to the hearing officer proposed under each of the Transfers, all of which is described immediately below.

A. Background for the LCSC Transfers

As explained by LCSC's experts:

84488 proposes to change the POD for a 46.6-acre portion of 35-14041 to be diverted out of two existing wells located on LCSC property (the NWNWNE, Sec. 24, Township 09S., Range 28E. (Power County) and the SWSESW, Sec. 18, Township 09S., Range 29E. (Power County)). These existing wells are already authorized to divert two existing water rights (water right nos. 35-7740 and 35-2824).

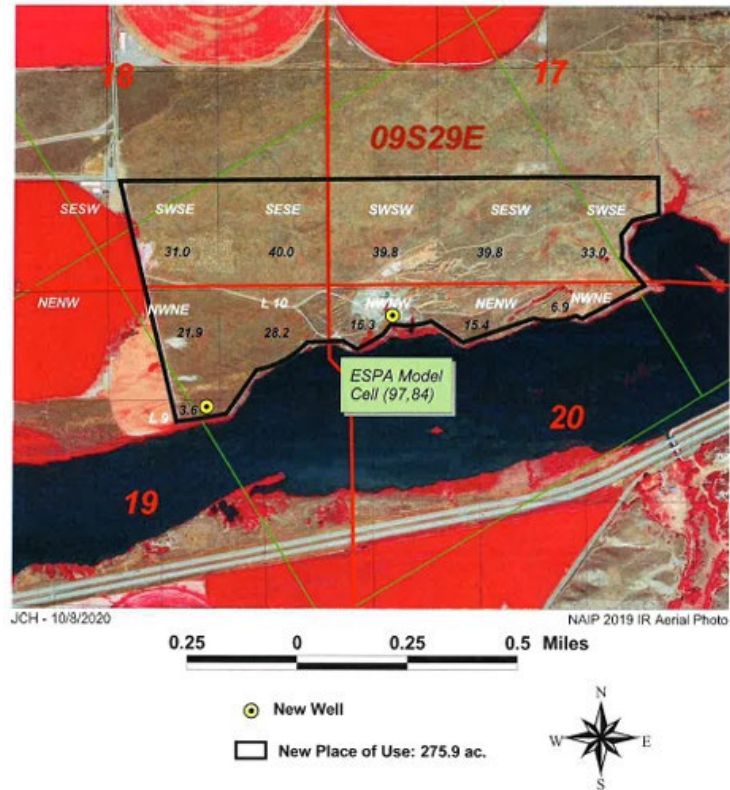
84488 also proposes to change the POU of the 46.6-acre portion of 35-14041 to be combined with the current POU of water right nos. 35-7740 and 35-2824 for a total POU of 345.6 acres. The locations of the PODs and POU proposed by 84488 are depicted on the following map submitted in the application for 84488:



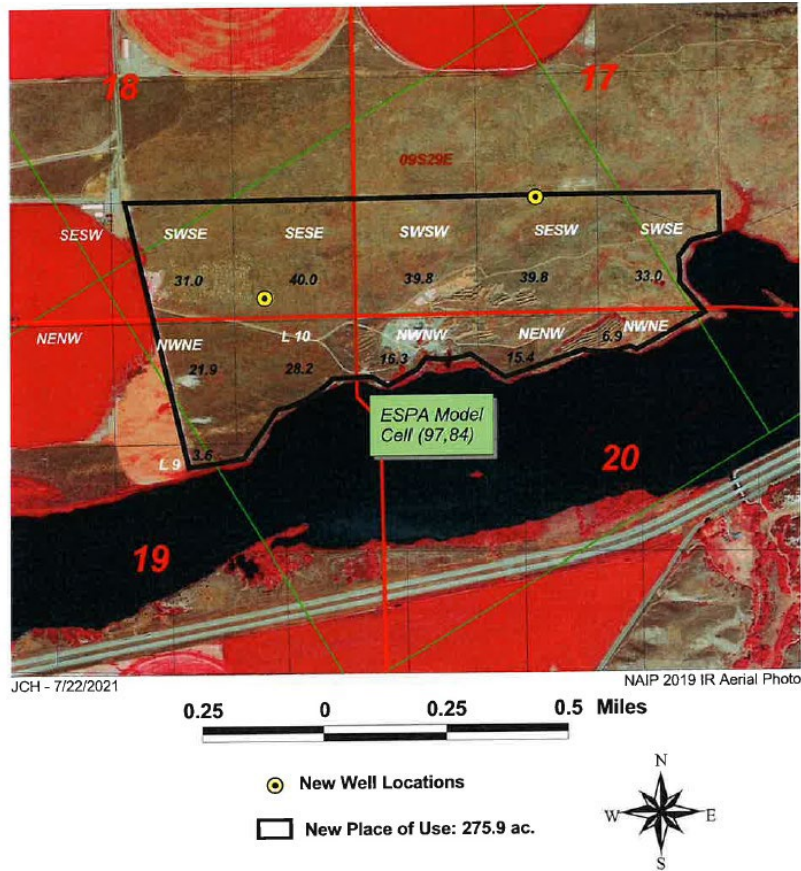
Ex. 13 at 2-3. LCSC filed 84488 because acres originally contained in the existing water rights at this location (35-7740 and 35-2824) were removed during the Snake River Basin Adjudication process. Testimony of Blair Dance.

Concerning 84490, LCSC's experts explained:

84490 proposes to change the POD of the entire remaining 275.9-acre portion of 35-14041 to be diverted out of two proposed new wells located on LCSC property. The original proposed new well locations were depicted on the following map submitted with the original application for 84490:



84490 was later amended to move the PODs further north than the originally proposed well locations further away from the Snake River to locations located in the NWSESW, Sec. 17, Township 09S., Range 29E. (Power County) and the SWSESE, Sec. 18, Township 09S., Range 29E. (Power County). The locations of the updated proposed PODs and the 275.9-acre POU now proposed by 84490 are depicted on the following map submitted with the amendment of 84490:



B. The LCSC Wells and Proposed Well Locations Subject to the Transfers

Based on the information submitted with the applications for the Transfers, and testimony provided at the hearing (including specific questions and discussion elicited from the hearing officer), evidence in the records demonstrates the following:

1. LCSC owns two existing wells and LCSC would like to construct two new wells.
2. The western existing well is located in the NWNE of Section 13, T09S, R28E, is not cased, and diverts water from a shallow aquifer, which oftentimes results in pumping sand (referred to herein as the “Western Well”). Blair Dance Testimony.
3. The eastern existing well is described in the *Preliminary Order* as follows: “. . . an existing well located in the SWSESW of Section 18, T09S, R29E (“Duffin Well”), which is currently used to divert existing water rights 35-7740 and 35-2824. Ex. 2. The Duffin Well diverts water from a deeper ground water aquifer. Ex. 12 at 19.” *Preliminary Order* at 12. For purposes of this *Petition*, we will retain the defined term for this existing well (the “Duffin Well”).

4. “The Duffin Well was constructed in 1979 to a depth of 535 feet. Ex. 12 at 3-4, 19. The well driller reported a brown clay layer, 37 feet thick, extending from 173 feet below land surface to 210 feet below land surface. *Id.* The well driller also reported a shallow aquifer less than forty feet below land surface and a deeper aquifer beginning at 275 feet below land surface. *Id.* The two water bearing zones were separated by 235 feet of clay rich soils.” *Id.* at 13.
5. The Western Well and Duffin Well divert water pursuant to water rights 35-7740 and 35-2824.
6. 84488 only identifies the Western Well and Duffin Well as proposed points of diversion for the 46.6-acre portion of 35-14041 proposed to be transferred.
7. LCSC would like to construct two new wells under 84490 to irrigate 275.9 acres of previously non-irrigated ground, which would be constructed in the NWSESW, Sec. 17, T09S., R29E. and the SWSESE, Sec. 18, T09S., R29E (the “New Wells”).²
8. To provide the hearing officer with the necessary authority to address impact or injury concerns, LCSC—through its representative Blair Dance—testified that he would be willing to accept certain well construction conditions imposed by the hearing officer in approval of the Transfers specifically for each of the above-identified wells as follows:
 - a. If necessary to protect against impact or injury concerns of the Coalition or other water users, LCSC would comply with Tom Wood’s recommendation that the New Wells (constructed under the approval for 84490 for irrigation of previously non-irrigated ground) must be cased down to 256 feet and that LCSC would not perforate the well casings until 256 feet below land surface. Blair Dance Testimony.
 - b. If necessary to protect against impact or injury to the Coalition or other water users, LCSC would agree to a condition of approval for 84488 of (1) installation of irrigation equipment to ensure that the additional water diverted under 84488 would be isolated to only divert from the Duffin Well; (2) construction of a replacement well for the West Well with appropriate conditions (such as the construction conditions for the New Wells); or (3) no conditions on the use of the West Well or Duffin Well.
 - c. The Duffin Well would remain as it is presently constituted.

² LCSC filed 84490 to irrigate previously non-irrigated ground owned by LCSC under existing stood-up (but not fully functioning) irrigation center pivots.

II. ARGUMENT.

A. Under Idaho law and applicable IDWR policies, and holdings in the *Preliminary Order*, the hearing officer should approve the Transfers based solely on LCSC's analysis performed under ETRAN 3.2/ESPAM 2.1.

Under Idaho law and applicable IDWR policies, the hearing officer should approve the Transfers based on LCSC's analysis performed under ETRAN 3.2/ESPAM 2.1 because (1) it was the applicable model interface in place at the time the Transfers were submitted; (2) LCSC met its burden to show that ETRAN 3.2/ESPAM 2.1 was more accurate for purposes of the Transfers over the updated ETRAN 3.4/ESPAM 2.2 model interface (asserted by the Coalition as the authoritative version) and is therefore determinative; and (3) with the burden shifted to the Coalition (as protestants), the Coalition did not meet its burden to show that the updated ETRAN 3.4/ESPAM 2.2 model interface should be determinative.

1. Burdens of Proof

As described in the *Preliminary Order*, the primary burden is on LCSC as the transfer applicant to prove its case as to why the Transfers should be approved. *Preliminary Order* at 3-5. Ultimately the hearing officer determined that LCSC did not meet its burden, which we respectfully disagree with. As set forth below, LCSC did meet its burden, and upon reconsideration, the hearing officer should reverse his decision and approve the Transfers as filed, or upon appropriate conditions (as provided in Idaho Code § 42-222).

Concerning the burdens in an administrative hearing, the hearing officer's summary of the burdens in an IDWR contested transfer case fails to note that the transfer applicant's burden is an "initial" burden that then shifts to any protestants to the application for transfer once the applicant provides sufficient and persuasive evidence for the Department to evaluate the transfer criteria, including injury to other water rights (the only Idaho Code § 42-222 criterion at issue by stipulation

of the Coalition and LCSC). *See, e.g.*, IDAPA 37.03.08.40.04.b.ii (the analogous provision application to new water right applications: “The applicant shall bear the initial burden of coming forward with evidence . . .” (underling added)). Accordingly, while the applicant bears an evidentiary burden, so do the protestants. Protestants cannot simply sit back and say they disagree with the applicant’s evidence—they must provide reasons why or provide alternative analysis to challenge the evidence offered by the applicant.

2. Development of ETRAN

The overall context for addressing injury claims against LCSC is critical to understand, including technical background of ETRAN, as well as LCSC’s submission of ETRAN analysis consistent with applicable IDWR policies and procedures.

Disproving or proving injury to surface water users for ground water rights that divert from the ESPA is largely a function of evaluating anticipated depletions to the Snake River resulting from the proposed change to the subject water right(s) (most commonly through a change in the point of diversion). Over time, the Department has developed (with stakeholder involvement, including from the Coalition) and deployed for use by the water user community the “Transfer Tool” (referred to simply as “ETRAN”) as described in the *Preliminary Order* at 4-5. There have been various iterations of ETRAN over the years. We agree with the hearing officer that the description of the Transfer Tool provided by LCSC’s experts is a good one:

ETRAN was designed for individuals with little or no experience using ground water modeling software. The ETRAN 3.4 spreadsheet acts as a user interface for a [super]position model, i.e., the computational engine of ETRAN, which is a simplified version of the fully populated ESPAM 2.2. The fully populated version of the model represents all components of aquifer stress, including recharge on irrigated and non-irrigated lands, ground water pumping for agricultural and municipal purposes, tributary underflow, perched river/canal seepage, spring discharges, river gains from and/or losses to the ESPA, etc. The superposition version of the model is a simplified version that can be used to predict the response of a single component of the water stress. This approach simplifies analysis and

presentation of results for simulations involving managed recharge, curtailment of ground water pumping, transfer of water right diversion locations, and mitigation activities. Essentially, the ETRAN Excel workbook allows the user to quickly review the calculated effects of the transfer proposal on reach gains and losses along the Snake River.

Ex. 13 at 9 (citations omitted). Further, as explained by one of LCSC’s other experts, “[ETRAN] utilizes a calibrated ground water model of the regional aquifer and includes a certain level of complexity recognizing not only the connectedness but also the dis-connectedness of the Snake River and the aquifer system.” Exhibit 11, p. 2.

In a nutshell, ETRAN simulates ground water pumping impacts to the reaches of the Snake River under current pumping conditions, simulates ground water pumping impacts to reaches of the Snake River under proposed conditions sought in a transfer application, and then compares the results of both to quantify the change in ground water pumping impacts to the Snake River reaches. Under the Department’s prior and current versions of the “Transfer Memo” and associated guidance documents, a transfer applicant must submit either ETRAN modeling or alternative technical information to address depletion impacts to the Snake River. *See* Exhibits 21, 22, and 25.

3. ETRAN Snake River Reaches

There are five (5) reaches of the Snake River above Milner Dam identified by IDWR where ground water interacts with Snake River flows. They are (1) Ashton to Rexburg; (2) Heise to Shelley; (3) Shelley to Near Blackfoot; (4) Near Blackfoot to Neeley; and (5) Neeley to Minidoka.

There are six (6) reaches below Milner Dam identified by IDWR. They are (1) Devil’s Washbowl to Buhl; (2) Buhl to Thousand Springs (Kspr); (3) Thousand Springs (Kspr); (4) Thousand Springs (Kspr to Malad); (5) Malad; and (6) Malad to Bancroft.

A map depicting the above Milner and below Milner reaches is set forth here:

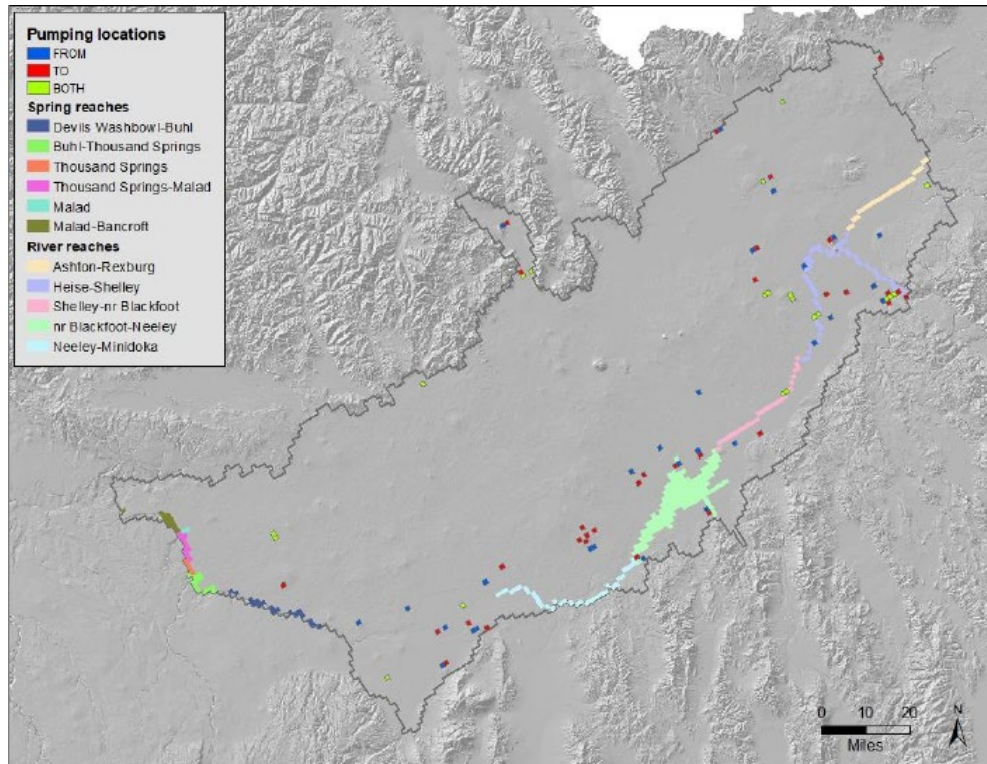


Exhibit 24, p. 2.

4. Combined Near Blackfoot to Minidoka River Reaches

A critical location-specific Department policy has developed over time with two of the Snake River reaches—the Near Blackfoot to Neeley and Neeley to Minidoka reaches. IDWR has allowed transfer applicants to combine the modeled impacts from these two reaches which generally allows a transfer applicant to sum the positive pumping depletion impacts (which are bad) from one of the reaches and the negative pumping depletion impacts (which are good) from the other reach. Exhibit 25, p. 5 (“In other words, gains in one reach offset losses in the other reach”). This policy—and the basis behind it—is specifically explained in the *Preliminary Order*, which LCSC agrees with and incorporates by reference here. See *Preliminary Order* at 8 (“This combination of reaches is based on the administration of surface water rights between Blackfoot and Minidoka Dam.”).

5. Mitigation Thresholds and IDWR Cumulative Transfer Analysis

Recognizing that any change in pumping location proposed in a transfer application will redistribute pumping impacts to different river reaches, and that approved unrelated transfers may result in offsetting impacts, IDWR has, over time, (1) developed certain mitigation thresholds; and (2) since January 1, 2012, has annually prepared a cumulative review of all approved transfers to ensure the mitigation thresholds do not result in an unacceptable impacts to any particular reach.

The mitigation thresholds are well explained by the hearing officer:

These mitigation thresholds can also be framed as three mitigation checks to be used for each designated reach of the Snake River:

- 1) Does the proposed change increase the depletions in the reach by more than 10%?
- 2) Does the proposed change increase the depletions in the reach by more than two acre-feet per trimester?
- 3) Will the depletions in the reach after the transfer is approved represent more than 10% of the total depletion impacts to all reaches?

Each of the reaches of the Snake River identified in the Transfer Tool are evaluated separately using the three mitigation checks. If the answer to any of these three mitigation checks is "no," then the applicant does not need to mitigate for the increased depletion in the affected river reach. If the answer to all three mitigation checks is "yes," then the applicant must fully mitigate the increased depletion in the affected river reach.

Preliminary Order at 6-7. The Department developed these mitigation thresholds because of these reasons:

In the absence of the mitigation thresholds, supported by the Department's regular confirmation that the mitigation thresholds are working, very few transfers of ESPA ground water rights could be approved. This is because most transfers involving ground water rights in the ESPA result in some increase in depletions to one or more reaches of the Snake River.

Id. at 9.

Turning now to the cumulative transfer analysis, IDWR’s most recent cumulative transfer analysis is contained in Exhibit 24, and it contains the following table:

Table 1. Cumulative effect of transfers approved between January 1, 2012 and September 30, 2024 on reach gains in the Snake River

Reach	Transfer Impact		Average Reach Gain ⁴		% change in reach gain
	(AF/yr)	(cfs)	(AF/yr)	(cfs)	
Ashton-Rexburg	295	0.41	-19,756	-27	1.493%
Heise-Shelley	-307	-0.42	-214,459	-296	-0.143%
Shelley-Near Blackfoot	-293	-0.40	-400,694	-553	-0.073%
Subtotal above nr Blackfoot	-305	-0.42	-634,908	-876	-0.048%
Near Blackfoot-Neeley	1,890	2.61	1,720,822	2,375	0.110%
Neeley-Minidoka	-928	-1.28	71,706	99	-1.294%
Subtotal nr Blackfoot-Minidoka	962	1.33	1,792,528	2,474	0.054%
Devil's Washbowl -Buhl	-39	-0.05	787,690	1,087	-0.005%
Buhl-Thousand Springs	-47	-0.07			
Thousand Springs	-6	-0.01			
Thousand Springs-Malad	1	0.00			
Malad	24	0.03			
Malad-Bancroft	6	0.01			
Subtotal Kimberly-King Hill	-61	-0.08	4,248,456	5,864	-0.001%
Total	596	0.82	5,406,075	7,462	0.011%

Exhibit 24, p. 8. As the hearing officer concluded, “[t]hese regular reviews have confirmed that the mitigation thresholds are currently protecting the designated reaches of the Snake River from impact.” *Preliminary Order* at 7; *see also Id.* at 9 (“The Department’s cumulative transfer review confirms that the mitigation thresholds are working to prevent significant increases in any of the modeled reaches of the Snake River.”).

From transfer applicant’s perspective, why do the mitigation thresholds and cumulative analysis matter? As explained by the hearing officer:

If a transfer applicant satisfies the mitigation thresholds for all reaches, then any increased depletions in individual reaches of the Snake River caused by the changes proposed in a transfer application are mitigated through the cumulative effects of all transfer applications, as constrained by the mitigation thresholds.

Id. at 7 (underlining added). This holding by the hearing officer is critical, as further described below, because it provides a technical basis for the mitigation thresholds, and recognizes the offsetting impacts of other transfers as mitigation for the impacts of a new transfer at issue.

6. Applicable Version of ETRAN/ESPAM to the Transfers

Until the *Preliminary Order* was issued, it was an open question under Idaho administrative law as to whether a transfer applicant is subject to the version of ETRAN/ESPAM in place at the time the transfer was submitted, or whether the transfer applicant is automatically subject to subsequent changed iterations of ETRAN, and specifically in this proceeding, it was asserted by the Coalition that LCSC would be bound by the most recent ETRAN version even while 84488 and 84490 were pending. This open question was answered by the hearing officer in the *Preliminary Order*, and we fully agree with his analysis and conclusion:

Fairness demands that an applicant be allowed to rely on the data and tools that were available at the time an application is filed without being required to revise an analysis filed with an application if new data becomes available or tools change. Conducting a technical analysis of anticipated depletions to the Snake River can be expensive, especially if an applicant hires an attorney or consultant to perform the analysis. In the realm of hydrology, very few things are static. Every day, additional data is collected through stream gages and measuring devices. Every day, aquifer levels fluctuate. If applicants were required to constantly incorporate new data into their technical analyses while their applications are pending before the Department, some applicants would be caught in a never-ending loop of amended technical reports. For this reason, the Department should not require an applicant to revise its Transfer Tool analysis when the Department adopts an updated version of the ESPA model.

Preliminary Order at 7.³ As correctly described by the hearing officer, in October 2020, when Applications 84488 and 84490 were originally filed, the then-current version of ETRAN/ESPAM was ETRAN 3.2 and ESPAM 2.1. The current versions are ETRAN 3.4/ESPAM 2.2.

³ The hearing officer's rationale is in line with Idaho law in other contexts. For example, Idaho follows the minority rule with respect to the retroactivity of an ordinance on a land use application. It is well-established law that the law in effect at the time of the application is the law by which an applicant's rights are measured. *S. Fork Coal. v. Bd. of Comm'rs*, 117 Idaho 857, 861, 792 P.2d 882, 886 (1990) (citing *Ready-To-Pour, Inc. v. McCoy*, 95 Idaho 510, 511 P.2d 792 (1973)). To hold otherwise "would mean that a city, merely by withholding action on an application for a permit, could change or enact a zoning law to defeat the application. It could, in substance, give immediate effect to a future or proposed zoning ordinance before that ordinance was enacted by proper procedure." *S. Fork Coal. v. Bd. of Comm'rs*, 117 Idaho 857, 861, 792 P.2d 882, 886 (1990) (citing *Cooper v. Board of County Commrs. of Ada County*, 101 Idaho 407, 614 P.2d 947 (1980)). Most recently, the Idaho Supreme Court upheld this position in *Bracken v. City of Ketchum*, 172 Idaho 803, 814, 537 P.3d 44, 55 (2023). In *Bracken*, an applicant sought to build a gas station on Main Street in the City of Ketchum. After having his first application denied, the applicant submitted a new application. The

7. Application of the Foregoing to the Transfers

Applying the foregoing to the Transfers, the Transfers should be approved solely based upon the ETRAN 3.2/ESPAM 2.1 analysis submitted by Jason Helms. LCSC satisfied its initial burden of proof because (1) LCSC provided in impact analysis through submission of the applicable ETRAN version at the time; (2) it utilized the Near Blackfoot to Neeley combined reach policy; (3) the analysis resulted in modeled impacts that did not exceed all three of the mitigation threshold; and (4) as explained by the hearing officer, if a transfer applicant satisfies the mitigation thresholds for all reaches, then any increased depletions in individual reaches of the Snake River caused by the changes proposed in a transfer application are mitigated through the cumulative effects of all transfer applications, as constrained by the mitigation thresholds. *See Preliminary Order* at 7.

Having met its initial burden, the burden of proving injury shifts to the Coalition. And in attempting to meet its burden, as described by the hearing officer, “[t]he fact that the Department doesn't require an applicant to revise its technical analysis using updated tools or new data does not preclude protestants from providing up-to-date analysis or advancing arguments using the updated tools. . . . the Coalition [is] free to provide analysis and argument using the updated versions of ESPAM and ETRAN.” *Preliminary Order* at 7-8. Through discovery, the Coalition was clear that it intended to argue that it is more appropriate to utilize ETRAN 3.4/ESPAM 2.2 because of various updates to this version. This very opinion was eventually asserted in the Coalition’s expert report submitted at the hearing on this matter. Exhibit 201, p. 14 (Opinion 12). Of course, the Coalition also took this position because modeling under ETRAN 3.4/ESPAM 2.2 provided that the Transfers

City of Ketchum attempted to say the application was incomplete and engage in other delay tactics so they could enact a new land use ordinance prohibiting gas stations on Main Street. The Idaho Supreme Court once again reiterated the rule that the law in effect at the time an application is filed is the benchmark by which the application is evaluated. *Id.*

did not meet all three mitigation thresholds, which in its view, was prima facie modeling evidence that the Transfers should be denied.

However, the Coalition did not meet the burden of proof—shifted to them—to demonstrate that for the specific river reaches at issue, ETRAN 3.4/ESPAM 2.2 should be used over ETRAN 3.2/ESPAM 2.1. Precisely the opposite, the Coalition acknowledged the better calibration quality of ETRAN 3.2/ESPAM 2.1 over ETRAN 3.4/ESPAM 2.2 for the Neely to Minidoka reach. Exhibit 201 at 12 (noting the R^2 values between versions, with ETRAN 3.2/ESPAM 2.1 was higher than ETRAN 3.4/ESPAM 2.2).⁴ The Coalition did not provide any in depth or otherwise compelling analysis as to why ETRAN 3.4/ESPAM 2.2 should be used, only that it is not appropriate for site specific evaluations (addressed by LCSC further below).

Conversely, anticipating the Coalition’s legal position, LCSC engaged Clearwater Geosciences, LLC (Hai Huang and Tom Wood) to compare both versions, and in particular, to compare changes to the versions to understand why the different versions produced wildly different results. LCSC identified detailed and compelling issues with ETRAN 3.4/ESPAM 2.2, specifically explaining the following:

The contradictory predictive results of ETRAN3.2 and ETRAN3.4 motivated us to examine the details of the model input files and changes of model parameters between the fully populated ESPAM2.2 and ESPAM2.1 models. We focused on the Near Neeley to Minidoka Reach because it drives the issue for the transfer applications. The key model parameter that determines the aquifer-river water exchange rate is the parameter labeled as “Riverbed Conductance.” The calibrated Riverbed Conductance of the Near Neeley to Minidoka Reach is **1625.975 ft²/day in ESPAM2.1** (IDWR, 2013) and **5965.499 ft²/day in ESPAM2.2** (see Sukow, 2021b), respectively. Riverbed Conductance in this reach was increased by a factor of nearly **3.7**, implying that for any given amount of ground water level decrease underneath the reach caused by ground water pumping, the simulated depletions for Near Neeley to Minidoka Reach by ESPAM2.2 and

⁴ The Coalition asserted other technical bases of protest, including specific localized impacts, which are addressed *infra*.

ETRAN3.4 will be increased by a factor of ~3.7. This explains why ETRAN3.2 and ETRAN3.4 were producing contradictory results, . . .

Exhibit 13, pg. 10; *see also* pg. 11-12 providing further analysis of why the changes between versions are technically sound.

Further, at the hearing, Jennifer Sukow of IDWR testified of her awareness of the substantial increase in Riverbed Conductance and the lower R^2 values but did not offer technical justification for it other than to note the overall difficulty with modeling in the Minidoka area as it is a transition point between a gaining and losing river reach. Jennifer Sukow Testimony.

Based on the foregoing, LCSC provided compelling and persuasive evidence that ETRAN 3.2/ESPAM 2.1 is the more appropriate model version to utilize: “Of the two versions, it is our expert opinion, based on the lower R^2 value, that ESPAM2.1 represents the potential impacts to this particular river reach more reliably.” Exhibit 13, pg. 10.⁵ Overall, based on the analysis of LCSC’s experts, they offered the following conclusions:

10. Use of ESPAM2.1 for analysis of the transfer applications demonstrates that the transfer applications are below Snake River reach impact limits for approval of permanent water right transfers in the ESPA based on IDWR transfer application policies and procedures under each of three “mitigation checks” for steady state analysis and two “mitigation checks” for transient state analysis.
11. Utilizing ESPAM2.1, the transfer applications do not impact other reaches of the Snake River above the described mitigation thresholds.
12. Pumping from the transfer applications will not injure other water rights under ESPAM2.1 because the modeled outputs are below IDWR-established mitigation thresholds.

Exhibit 13, p. 16.

Under applicable law and IDWR transfer application criteria, as set forth above, LCSC checked all of the necessary boxes for the Transfers to be approved. LCSC satisfied its initial burden of proof—and the Coalition did not overcome the burden shifted to it—because (1) LCSC

⁵ It is further notable what LCSC concluded as to most of the changes in ETRAN/ESPAM: “By comparing results from the various cases (i.e. finding the differences) we were able to arrive at the conclusion that *the results are, in general, comparable to each other for most reaches along the Snake River*, with differences typically less than 1-10%, except for a few extreme outliers, mostly for reaches below Minidoka.” Exhibit 13, p. 9. Specific to the Transfers, it is simply in an area where the changes made to ETRAN 3.4/ESPAM 2.1 were extreme and not justified.

provided in impact analysis through submission of the applicable ETRAN version at the time; (2) it utilized the Near Blackfoot to Neeley combined reach policy; (3) the analysis resulted in modeled impacts that did not exceed all three of the mitigation threshold; (4) as explained by the hearing officer, if a transfer applicant satisfies the mitigation thresholds for all reaches, then any increased depletions in individual reaches of the Snake River caused by the changes proposed in a transfer application are mitigated through the cumulative effects of all transfer applications, as constrained by the mitigation thresholds (*See Preliminary Order* at 7); and (6) the Coalition did not present compelling arguments as to why ETRAN 3.4/ESPAM 2.2 should be used over ETRAN 3.2/ESPAM 2.1 in place at the time the Transfers were submitted.

As for modeled depletions below Milner, which the Hearing Officer primarily based his denial of the Transfers on, none of the modeled impacts for the each specific reach exceeded the mitigation thresholds. And as to the efficacy of the ETRAN and ESPAM relative to these further away reaches, both the Coalition and LCSC agreed that “ESPAM and ETRAN are good tools for evaluating the impacts of ground water diversions on the Snake River on a regional scale.” *Preliminary Order* at 14. Accordingly, as to impacts below Milner Dam, LCSC relies upon the modeled results provided in ETRAN 3.2/ESPAM 2.1 as summarized by Jason Helms:

Modeled impacts of the transfers show an increase in depletions below Milner at steady state. However, the impact changes calculated for all spring reaches are each less than 10% of the total calculated depletion and therefore fall below IDWR thresholds requiring mitigation. As with other reaches, IDWR’s updated Cumulative review of ESPA transfers between 2012 and 2024 memo provides that all reaches below Milner show an increase in reach gains, and, based on the calculated impacts of all prior transfers the overall reach gain below Milner is 0.08 cfs and 61 acre-feet per year. As a result of these transfers, total additional depletions to all spring reaches would constitute less than 12 additional acre-ft per year.

Exhibit 11, p. 5.

Finally, it is further important to recognize that while the Transfers show an increase in depletions in the Neeley to Minidoka reach, this is a transitional reach, and the modeled depletions are offset by decreased depletions in a fully gaining reach (Near Blackfoot to Neeley). Exhibit 11, p. 3 (“River gains and losses related to riverbed seepage are dependent upon the inundation area of Lake Walcott and the elevation of the regional water table which can cause the Snake River in this area to become variably perched during a single season. Measurements of total Neeley to Minidoka reach losses have varied from an implied net loss of over 100 cfs measured in the Spring of 2001 to a net reach gain over 1,000 cfs measured in the spring of 2002.”).

In short, under Idaho law and applicable IDWR policies, the hearing officer should reconsider the *Preliminary Order* and approve the Transfers based on LCSC’s analysis performed under ETRAN 3.2/ESPAM 2.1 and evidence in support of using this version of ETRAN and ESPAM.⁶ The Coalition assertion of site-specific localized impacts were addressed separately by LCSC, as set forth below, which the hearing officer evidently utilized and mixed into the ETRAN/ESPAM analysis to justify denial of the Transfers. Because this is not proper, as set forth below, the hearing officer should reverse the *Preliminary Order* and approve the Transfers accordingly.

B. LCSC’s site-specific data and analysis was generated to address claims of magnified localized impacts to the Snake River and propose possible well construction conditions in response to claims of localized impacts to the Snake River by the Coalition. LCSC’s site-specific data was not intended to override or supersede the ETRAN/ESPAM modeling analysis, but to supplement it.

To be clear, LCSC’s position is that from a regional scale, the pumping depletion analysis submitted by LCSC with the ETRAN 3.2/ESPAM 2.1 model—subject to the applicable mitigation thresholds and IDWR’s continual review of approved transfers—demonstrates that the Transfers

⁶ Even though not specifically noted or discussed, LCSC agrees with the hearing officer’s discussion of data entry for periods of non-use.

should be approved. Any increased impacts to the combined Near Blackfoot to Neeley reaches—including impacts to the Coalition’s water rights—are “mitigated through the cumulative effects of all transfer applications, as constrained by the mitigation thresholds.” *Preliminary Order* at 7. The provided ETRAN/ESPAM⁷ modeling is prima facie evidence of no injury under Idaho Code § 42-222, should end the analysis, and serve as the basis for approval of the Transfers. As Jason Helms explained:

Modeled impacts of the transfers show an increase in depletions below Milner at steady state. However, the impact changes calculated for all spring reaches are each less than 10% of the total calculated depletion and therefore fall below IDWR thresholds requiring mitigation. As with other reaches, IDWR’s updated Cumulative review of ESPA transfers between 2012 and 2024 memo provides that all reaches below Milner show an increase in reach gains, and, based on the calculated impacts of all prior transfers the overall reach gain below Milner is 0.08 cfs and 61 acre-feet per year. As a result of these transfers, total additional depletions to all spring reaches would constitute less than 12 additional acre-ft per year.

Exhibit 11, p. 5. Accordingly, as to impacts below Milner Dam, LCSC relies upon the modeled results provided in ETRAN 3.2/ESPAM 2.1.

Nevertheless, in the interests of efficiency (to avoid another possible hearing to address localized impacts) and thoroughness, LCSC elected to evaluate localized pumping impacts through a site-specific pump test. This was done to fully address any claim of magnified localized pumping impacts (asserted by the Coalition that would occur because of the various wells’ locations within a mile of to the Snake River) through an impacts analysis and, depending on the results of that analysis, to propose possible well construction conditions. Exhibit 12. This information was made available to the hearing officer to balance overall protection of all water users (including non-protestants) and the Coalition members, who are protestants. Clearwater’s ultimate conclusion was:

⁷ ESPAM has repeatedly been characterized through IDWR water proceedings as providing the “best available science and information.” There is no alternative model out there of which we are aware that has been developed and critiqued like ESPAM has. *See, e.g., Rangen, Inc. v. Idaho Dep’t of Water Res.* (In re Distribution of Water to Water Right Nos. 36-02551 & 36-07694), 160 Idaho 119, 369 P.3d 897 (2016).

“The new and existing data demonstrates that new wells to be installed for Transfers 84488 and 84490 can be constructed to not directly impact the Snake River.” Exhibit 12, p. 6.

LCSC indicated that it would agree to well construction casing similar to the Duffin Well if deemed necessary by the hearing officer to address concerns over claims of direct impacts—or specific evidence of such—to flows in the Snake River that may be asserted by the Coalition. But this does not mean that the hearing officer is obligated to impose such conditions. Notably, the Coalition did not provide an alternative analysis, pump test, or other information in response to LCSC’s expert report. Instead, the Coalition’s expert merely questioned depictions of the regional aquifer provided by Clearwater and otherwise negatively critiqued the pump test process employed by Clearwater, none of which persuaded the hearing officer to reject the analysis.

It is further notable that the Coalition did not raise concerns with impacts below Milner Dam. See e.g., Exhibit 201, p. 13-14 (no mention in any of the 12 opinions of below Milner impacts). The hearing officer’s decision to deny the Transfers on this basis was not anticipated, particularly given ETRAN/ESPAM evidence in the record on below Milner impacts.

As described above, the West Well is already in a shallow aquifer where some of 35-14041 was proposed to be moved, the Duffin Well is in the deeper aquifer, and the New Wells could be constructed in either the shallow or deeper aquifer. Yet the Hearing Officer assumed that all new pumping impacts under the Transfers (including from the West Well) would come from the deep aquifer and be fully isolated from the Snake River in the local vicinity:

The evidence provided by LCSC creates substantial doubt that the 87 acre-feet per trimester should be counted as a depletion to the N-M Reach. Because the deeper aquifer (the proposed source of water) is disconnected from the Snake River at the Walcott property and that disconnection likely continues to Milner, it is logical to infer that much of the 87 acre-feet will appear as depletions to the Snake River reaches below Milner.

Preliminary Order at 15.

Based on this assumption, the hearing officer assumed 87 acre-feet per trimester of pumping impacts not revealed in the Neeley to Minidoka reach must be revealed somewhere else under ETRAN/ESPAM, which the hearing officer further assumed would be revealed below Milner where it would exceed the mitigation thresholds:

If anything, the evidence suggests that the depletions predicted for the N-M Reach may propagate downstream, increasing the depletions in Snake River reaches below Milner. As noted above, the modeled anticipated depletions for some of the reaches below Milner are already very close to the mitigation threshold limits. Increasing the depletions below Milner by even a small amount will cause the applications to exceed the mitigation thresholds for certain reaches below Milner.

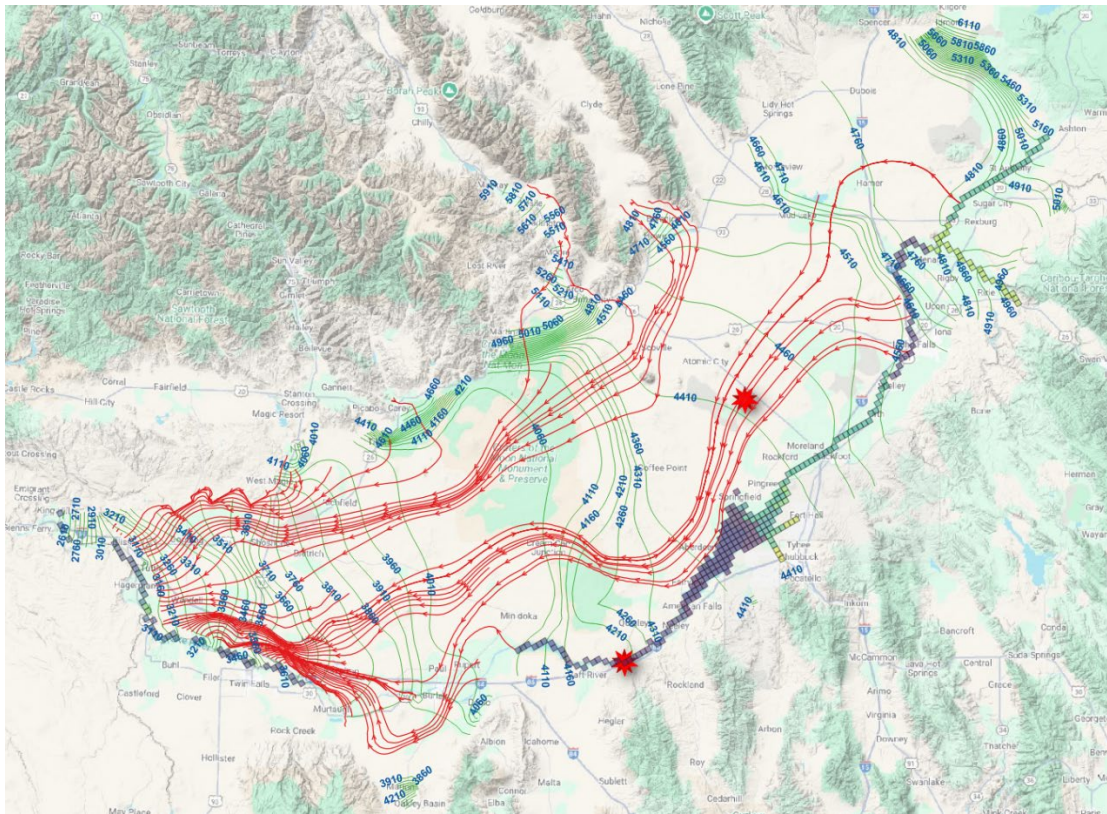
Id. Respectfully, both assumptions are not correct.

First, a portion of the transferred portion will be pumped from the West Well, which pumps from the shallower aquifer, where depletions will be realized in the Neeley to Minidoka reach. Therefore, not all pumping will occur from the deeper aquifer if current well conditions remain. While LCSC did testify that it would reconstruct the West Well with certain casing conditions if imposed by the hearing officer to address injury, that does not mean the hearing officer must impose such a condition. Accordingly, some portion of the 87 acre-feet per trimester of pumping impacts will result in depletions in the Near Blackfoot to Neeley Reach (which are already modeled and accounted for under the ETRAN/ESPAM analysis, mitigation thresholds, and cumulative transfer analysis).

This reality then calls into question the second assumption, which is that all of the pumping impacts will reveal themselves below Milner in volumes that will exceed the mitigation thresholds. That assumption is not based on evidence in the record, which is contrary to the ETRAN 3.2/ESPAM 2.1 analysis discussed above. Further, in response to the assumption, LCSC submits additional information for the hearing officer's consideration from LCSC's expert, Hai Huang,

through the *Declaration of Hai Huang, P.h.d.* New evidence may be submitted with a motion for reconsideration. *See, e.g., Clover v. Crookham Co.*, 561 P.3d 875, 888 (Idaho 2024) (noting the district court’s consideration of new evidence in a motion for reconsideration). Mr. Huang provides the following in response to the below Milner concerns:

14. There is additional analysis that can be provided to address the hearing officer’s conclusions. However, given the short time frame to ask for reconsideration, I provide the following additional information for consideration by the hearing offer.
15. I used reverse-particle tracking to show the source of water for downstream springs/reaches below Milner Dam. The figure below shows the simulation results. The red-colored flowlines are showing that the source water of downstream springs/reaches mainly comes from upstream Snake River leakages, flows from tributary basins (e.g., Big Lost and Little Lost). The location of the “from well” and “to well” locations are depicted with a red star. Aerial recharges due to precipitation/irrigation on the Eastern Snake Plain Aquifer would also contribute to, but would not be showing in reverse-particle tracking simulations. There is very little contribution of groundwater flow from the Neeley-Minidoka area to the downstream reaches and springs:



16. This explains why our previous ETRAN/ESPAM predictions indicate very little impact of transfer on the downstream reaches/springs below Minidoka and that ESPAM is still a good tool for regional-scale impact analysis.

Huang Declaration at 5. Based on this information or reverse-particle tracking, it was incorrect for the hearing officer to assume that the 87 acre-feet of pumping impacts will be revealed on reaches below Milner.

Based on the foregoing, upon reconsideration, the hearing officer should reverse his decision and approve the Transfers with any conditions the hearing officer deems appropriate.

C. In the alternative to the foregoing, the hearing officer could approve 84488, the smaller of the two Transfers.

As set forth above, LCSC's position is that the Transfers (consisting of both 84488 and 84490) should be approved. Alternatively, however, given the well construction of the West Well, well construction of the Duffin Well, and the relatively minor portion of 35-14041 proposed to be moved under 84488 (14.5% of 35-14041), 84488 should be approved, even based upon the hearing

officer's assumptions concerning below Milner impacts. 84488 was filed to simply recover acres originally irrigated at the new place of use that were lost through the SRBA. Testimony of Blair Dance. The contested cases for both Transfers were consolidated for convenience of the parties, but that does not mean they cannot be considered or approved separately. Where the magnitude of impacts from 84488 is substantially lower than the magnitude of impacts under 84490, 84488 could be approved on its own.

D. In the alternative to all of the foregoing, the Hearing Officer should re-open the hearing for the limited purpose of taking evidence on the below Milner issues pursuant to Rule 59(a)(3) of the Idaho Rules of Civil Procedure

In the alternative to the reconsideration sought in this *Petition*, if the hearing officer concludes that he does not have sufficient evidence in the record to reverse his decision on the matters requested by LCSC, LCSC requests a re-opened or new hearing pursuant to Rule 59(a)(3) of the Idaho Rules of Civil Procedure. This rule provides the following:

(3) Further Action After a Non-Jury Trial. On a motion for new trial in an action tried without a jury, the court may open the judgment, if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Idaho Rule of Civil Procedure 59(a)(3). Where the hearing in this matter was tried without a jury, this rule allows the Hearing Officer to “open the judgment ... [and] take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.” *Id.* The Idaho Court of Appeals has concluded “that when a judge is sitting without a jury, he or she may reopen a case to hear additional evidence, prior to final judgment, regardless of the enumerated restrictions in I.R.C.P. 59(a).” *Davison's Air Serv., Inc. v. Montierth*, 119 Idaho 991, 993, 812 P.2d 298, 300 (Ct. App. 1990), *aff'd*, 119 Idaho 967, 812 P.2d 274 (1991). This leaves the matter of re-opening the hearing for the limited purpose requested herein to the hearing officer's discretion. *Id.* See, e.g., *Order Denying Petitions for*

Reconsideration, Withdrawing Preliminary Order, and Granting Request for Additional Hearing, In the Matter of Application for Transfer No. 82640 in the Name of Clinton K. Aston, May 6, 2019 (granting request for re-hearing on the issue of forfeited water right acres to “promote administrative efficiency and will lead to greater certainty for the parties involved in this contested case.”).

To avoid the need for a subsequent transfer filing to address the below Milner issues, LCSC requests that the hearing be re-opened for the narrow purpose of addressing the below Milner issues, including full development of the information described in the *Huang Declaration*. Further, the 14-day reconsideration period does not provide sufficient time for LCSC to, for example, modify and/or design ESPAM to simulate or fully address the location of the 87 acre-feet per trimester depletion issue based on the hearing officer’s assumptions that the depletions would be realized below Milner and result in modeled effects in excess of the mitigation thresholds. Re-opening the hearing for submission of additional evidence will promote administrative efficiency and lead to greater certainty for the parties involved in this contested case.

III. CONCLUSION.

For the reasons set forth above, upon reconsideration, the hearing officer should reverse his decision and approve the Transfers (with conditions, as the hearing officer deems appropriate).

In the alternative to reconsideration, the hearing officer should re-open the hearing to allow for introduction of evidence to address the issues identified by the hearing officer as the basis for denial of the Transfers, as these reasons for denial were not raised by the Coalition (the sole remaining protestant) that would have put LCSC on notice of these issues. Re-opening the

hearing for submission of additional evidence will promote administrative efficiency and lead to greater certainty for the parties involved in this contested case.

DATED this 17th day of February, 2025.



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 2026, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

DOCUMENT SERVED: **APPLICANT'S PETITION FOR RECONSIDERATION OR
IN THE ALTERNATIVE TO RE-OPEN THE HEARING**

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Idaho Falls, ID 83402-1718
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