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ADMINISTRATOR'S MEMORANDUM

Transfer Processing No. 31

To: Water Allocation Bureau and Regional Offices

From: James R. Cefalo JRC

RE: Evaluating Injury in Transfer Applications Proposing to Change Ground Water Points of Diversion in the ESPA

Date: January 3, 2025

This memo provides guidance to Department staff evaluating applications for transfer proposing to change points of diversion for ground water rights in the Eastern Snake Plain Aquifer (“ESPA”).¹ This is an internal guidance memo and is not intended to establish presumptions or create new burdens of proof for applicants or protestants. Further, this memo is not intended to determine the outcome of any specific case. Department staff should use their technical expertise and judgment to evaluate each transfer application on its merits.

Background

The Department and Idaho courts have consistently recognized that the diversion of ground water from the ESPA affects stream flow in the Snake River. Water in the Snake River and in other sources hydraulically connected to the ESPA is considered fully appropriated during all or much of the year.² Consistent with Idaho Code § 42-222(1), a transfer applicant bears the burden of demonstrating that the changes proposed in a transfer application will not injure existing water rights. For a transfer application proposing to change a point of diversion for a ground water right within the ESPA, this burden includes demonstrating that the proposed change in point of diversion will not injure water rights diverted from the Snake River or other sources of water hydraulically connected to the ESPA.

In cooperation with water user groups across the ESPA, the Department has developed an Eastern Snake Plain Aquifer Model (“ESPAM”) to simulate changes to the aquifer resulting from precipitation, recharge incidental to surface water irrigation, and ground

¹ For purposes of this memo, the terms Eastern Snake Plain Aquifer or ESPA mean the aquifer underlying the geographic area depicted by the active cells of the Department’s Eastern Snake Plain Aquifer Model, Version 2.2. A map depicting this area is attached.

² See *Amended Snake River Basin Moratorium Order*, at 27–30 (July 16, 2024).

water diversions, and to analyze the extent of hydraulic communication between the ESPA and the Snake River. The Department has also developed an ESPA Transfer Tool to help water users quantify the effects of a proposed change to a ground water right on flows in the Snake River. The Transfer Tool is an Excel spreadsheet interface that applies data from the latest version of the ESPAM. The Transfer Tool estimates the effects of a proposed change at transient (short-term) and steady-state (long-term) time steps.

The Department must not approve water right changes which will result in injury to existing water rights. Transfer applications that would otherwise cause injury may be approved when the injury is mitigated. In 2002, the Department adopted certain thresholds (“transfer thresholds”) for determining when an applicant must provide mitigation for a proposed change to a ground water right in the ESPA.³ In 2009, the Department modified the transfer thresholds.⁴ The 2009 memorandum was recently revised.⁵ The transfer thresholds were removed from the general transfer processing memorandum and are now being addressed in this memorandum. Although challenges to the transfer thresholds have previously been raised in contested cases before the Department, the transfer thresholds have never been considered by a District Court or by the Idaho Supreme Court.

Since 2019, the Department has conducted an annual analysis of all transfers of ground water rights in the ESPA.⁶ The analysis evaluates the cumulative effects of the movement of ground water rights in the ESPA on flows in the Snake River for transfers from 2012 forward. The Department recently conducted the 2024 annual cumulative analysis.⁷ The 2024 analysis shows that the overall cumulative effect on the Snake River is an increase in reach gains of 596 acre-feet per year.⁸ In other words, the transfers have resulted in a small overall increase in groundwater discharge to the Snake River. Looking at the Kimberly-King Hill Reach, the Department’s 2024 cumulative analysis shows that the cumulative effect of transfers in the Kimberly-King Hill Reach between 2012 and 2022 resulted in a very small positive change in reach gain.⁹ While the analysis also shows that the cumulative effect on gains in this reach dipped slightly below zero after 2022, this quantity is also very small, and the

³ See Department Policy Memorandum, *Transfer Processing No. 24, Transfer Processing Policies & Procedures* (Oct. 30, 2002).

⁴ See Department Policy Memorandum, *Transfer Processing No. 24, Transfer Processing Policies & Procedures* (Dec. 21, 2009).

⁵ See Department Policy Memorandum, *Transfer Processing No. 24, Transfer Processing Policies & Procedures* (Oct. 1, 2024).

⁶ Annual reports are available on the Department’s website: <https://idwr.idaho.gov/water-rights/transfers/resources/>.

⁷ Memorandum from Jennifer Sukow to Phill Hummer, *Cumulative review of ESPA transfers between 2012 and 2024*, Idaho Dep’t of Water Res., (Dec. 5, 2024). The 2024 cumulative analysis can be found on the Department’s website: <https://idwr.idaho.gov/water-rights/transfers/resources/>.

⁸ *Id.* at 8, Table 1.

⁹ *Id.* at 10, Figure 9.

Department will continue to monitor the cumulative effects of ESPA transfers and will adjust the transfer thresholds as needed to protect river reaches from depletion.

Evaluating Transfers of Ground Water Points of Diversion in the ESPA

When a water user proposes to change a point of diversion for a ground water right in the ESPA, the Department’s transfer application form requires the water user to provide “a technical analysis of the anticipated depletions to reaches of the Snake River that are hydraulically connected to the ESPA using the Department’s current ground water model for the ESPA.”¹⁰ Department staff should encourage transfer applicants to use the latest version of the Transfer Tool to evaluate the impacts of the proposed change on the Snake River.¹¹ Transfer applicants are not required to use the Transfer Tool, but if they choose not to provide a Transfer Tool analysis, they must provide other technical information and analyses with estimates of depletion impacts for transient and steady-state time series for all hydraulically connected reaches of the Snake River, including reaches replenished from tributary springs, as represented in the Transfer Tool.¹² Applicants may also provide additional technical information to supplement a Transfer Tool analysis. Staff may refer the applicant’s technical information and analysis to the Department’s Hydrology Section for review.

The transfer application form requires an applicant to provide a technical analysis of anticipated depletions to the Snake River so that the Department can complete the injury evaluation required by Idaho Code § 42-222(1). If an applicant does not provide a Transfer Tool analysis or other technical information and analysis addressing the impacts of the proposed point of diversion change on the reaches of the Snake River, as required by the transfer application form, the transfer application is not complete, and the Department must reject the transfer application.

When an applicant provides a Transfer Tool analysis or other technical information and analysis, Department staff should continue to use the transfer thresholds below to determine (a) whether a transfer applicant must provide separate mitigation for impacts of a proposed change; or (b) whether the impacts are mitigated through the offsetting, cumulative impacts of all transfer approvals in the ESPA. The transfer thresholds are as follows:

¹⁰ Application for Transfer of Water Right, Part 4.B.6 (Rev. 11/24).

¹¹ The Transfer Tool and instructions for using it to evaluate a transfer proposal are available on the Department’s website at <https://idwr.idaho.gov/water-rights/transfers/resources/>.

¹² There are currently eleven Snake River reaches identified in the Transfer Tool for analysis of ESPA transfers:

| | |
|--|---|
| <ul style="list-style-type: none">• Ashton to Rexburg• Heise to Shelley• Shelley to near Blackfoot• Near Blackfoot to Neeley• Neeley to Minidoka | <ul style="list-style-type: none">• Devils Washbowl to Buhl• Buhl to Thousand Springs• Thousand Springs• Thousand Springs to Malad• Malad• Malad to Bancroft |
|--|---|

If, at the steady state or transient state time steps, a proposed change results in an increase in the depletions in a designated reach of the Snake River greater than ten percent when compared to the pre-transfer depletions in the reach caused by pumping under the ground water right, then the increase in depletions to the reach must be fully mitigated¹³ unless:

(a) the increase in the depletions in the reach (at the steady state and transient state time steps) are two acre-feet or less per trimester,

or

(b) the depletions in the reach after the transfer, at steady state conditions, are ten percent or less of the total depletion impacts to all reaches resulting from the water right, or portion thereof, being transferred.

Where mitigation is necessary for increased transient-state depletions, variance from the requirement for full mitigation during the transient state is allowed to provide for periods of static mitigation within the period of change. Mitigation for increased transient-state depletion to a reach is acceptable if the resultant depletion to a reach is no more than 5% over the simulated pre-transfer depletion to the reach and any deficient mitigation is approximately the same as excess mitigation during the transient state.

Although not clearly stated in 2009, the Department has developed the following additional threshold from experience and has applied this threshold for many years:

If the increase in post-transfer transient state depletions is greater than ten percent when compared to pre-transfer depletions, mitigation is not required if (a) mitigation is not required at the steady state (last) time step, and (b) steady state depletions are greater than the transient state depletions at all time steps.

Consistent with Idaho Code § 42-222(1), the Department “shall examine all the evidence and available information” when reviewing a transfer application. For an application proposing to change a point of diversion of a ground water right in the ESPA, this “evidence and available information” includes, but is not limited to, the transfer thresholds, any technical information or analysis provided by an applicant, the Transfer Tool analysis, and the Department’s latest cumulative analysis of ESPA transfer impacts.

¹³ To fully mitigate is to offset all increased depletions to the reach of the Snake River. It is not acceptable for the applicant to mitigate only enough to fall below one of the transfer thresholds.

If the Transfer Tool analysis or other credible technical evidence shows that the depletion impacts of a proposed change do not exceed the transfer thresholds described above, Department staff may approve the proposed change without requiring mitigation from the applicant. Mitigation is not required for the individual transfer because the Department's latest cumulative analysis of ESPA transfers shows that during the time when the Department has applied the transfer thresholds, impacts to the Snake River are adequately mitigated by the offsetting, cumulative effects of all transfer approvals across the ESPA.

Evaluating Multiple Transfers of Ground Water Points of Diversion in the ESPA

A transfer application may be filed in combination with one or more other transfer applications to offset impacts to specific reaches of the Snake River. Offsetting transfer applications should include an ESPA Transfer Tool analysis or other technical analysis evaluating the impacts to all designated river reaches of each individual application and the combined impacts to all designated river reaches of the combined changes. For an offsetting transfer package to be approved without mitigation, each Snake River reach that requires mitigation under the single transfer analysis must be fully mitigated through the offsetting transfers, as defined in footnote 13.

Some transfer proposals that exceed the transfer thresholds can be split into multiple, smaller transfer applications that individually do not exceed the transfer thresholds. Evading mitigation requirements in this way could result in injury to existing water rights. When each individual transfer does not exceed the transfer thresholds outlined above, Department staff should not approve multiple transfer applications if (a) the applications could have been filed as a single application, and (b) the combined impacts exceed the transfer thresholds. If the transfer applications are filed at the same time, Department staff should require the applicant to provide an analysis of the combined impacts of all the applications. However, if the transfer applications are filed sequentially and one or more transfers have already been approved, Department staff should require an applicant to fully mitigate for the impacts of the remaining applications.

Additional Considerations

In the past, the Department has allowed applicants to combine the Near Blackfoot to Neeley and Neeley to Minidoka reaches of the Snake River for purposes of evaluating ground water pumping impacts to those reaches of the river. Those reaches of the Snake River are administered as a single reach by the watermaster of Water District 1 for priority administration of Snake River water rights. In other words, gains in one reach offset losses in the other reach. Therefore, Department staff may continue this practice of accepting technical analyses where the Near Blackfoot to Neeley and Neeley to Minidoka reaches are combined.

In the past, the Department has received applications proposing to hold a water right, or a portion of a water right, as unused for a period of years to avoid transient impacts on a

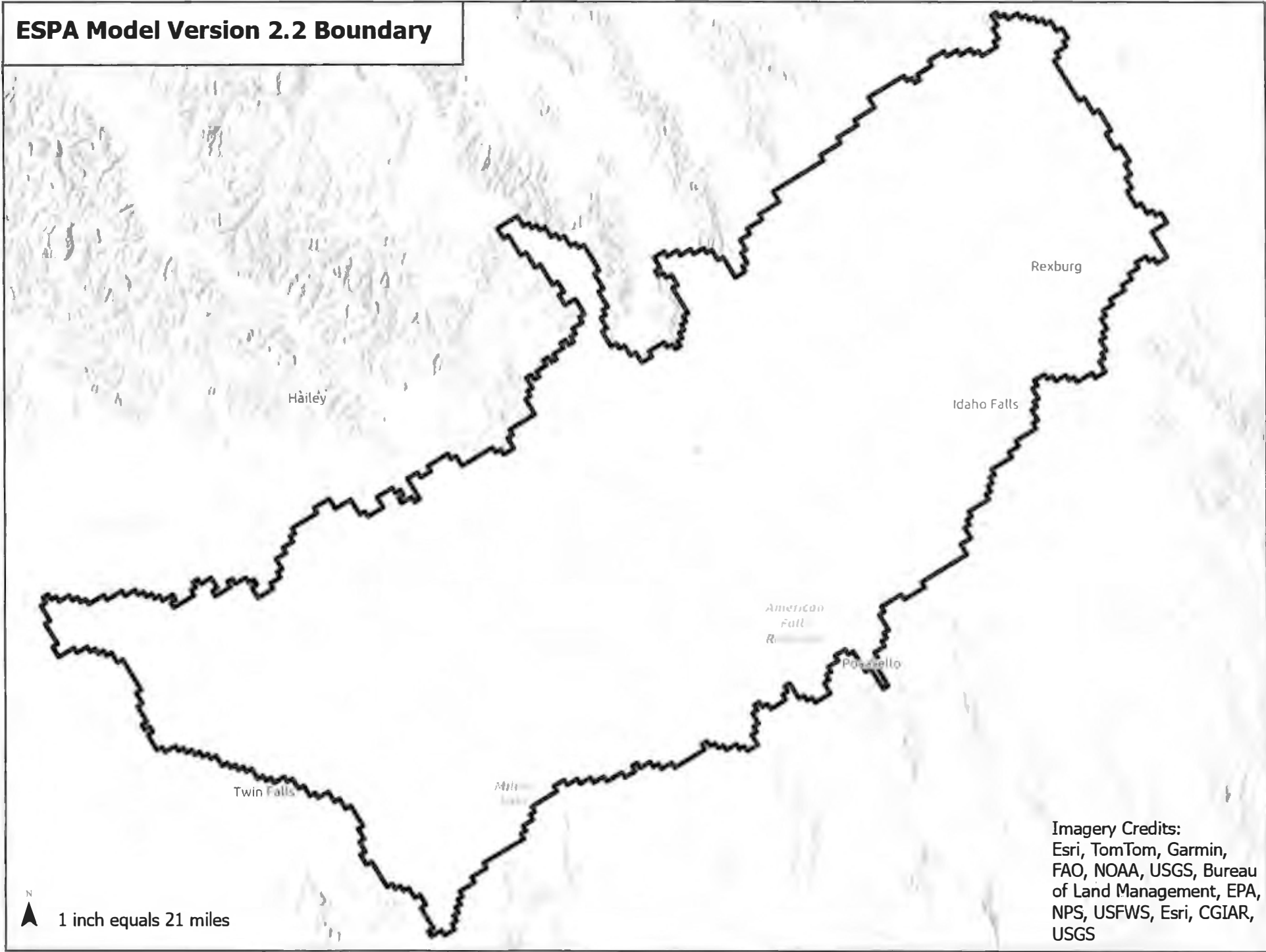
specific river reach. Department staff may accept a Transfer Tool analysis or other technical analysis that incorporates such non-use. Such a proposal is not mitigation for transient impacts, but rather is a method to reduce transient impacts. If an application proposes non-use of all or a portion of a water right for a period of years, that non-use should be clearly stated in any transfer approval.

Consistent with the transfer application form, an applicant is generally not required to provide a Transfer Tool or other ESPA technical analysis if the existing ground water point(s) of diversion and proposed ground water point(s) of diversion are in the same ESPAM cell or an adjacent ESPAM cell. The term "adjacent" includes model cells that are adjacent in the corners, so that each active cell in the ESPAM has eight adjacent cells. Moving a point of diversion to an adjacent ESPAM cell is unlikely to exceed the transfer thresholds in most cases. However, Department staff may ask a transfer applicant to provide a Transfer Tool or other ESPA technical analysis, regardless of model cell adjacency, if there is a concern that the proposed change would exceed the transfer thresholds. Regardless of model cell adjacency, Department staff should not approve a transfer application that does not meet the transfer thresholds, unless mitigation is provided.

The ESPA modeled area includes some areas over tributary aquifers that were added primarily for calibration purposes. The tributary aquifer characteristics may not be represented adequately by the ESPA model but do provide a simple method to estimate effects to the Snake River for transfers moving between the ESPA and modeled tributary aquifers.

Transfers moving from the ESPA modeled area to a location outside the modeled area, or from outside to within the ESPA modeled area, need to be reviewed carefully because a transfer must not be approved to move from one distinct aquifer to a separate aquifer. If a transfer proposes to move a point of diversion from a non-modeled tributary aquifer to the ESPA (or vice versa), the impacts on the designated Snake River reaches may require two separate analyses: one for the segment outside the ESPA, and another for the segment inside the ESPA. The first analysis would employ acceptable technical methods to show the effects between the non-modeled tributary aquifer and the ESPA. The second analysis would use the Transfer Tool or other ESPA technical analysis to show the effects on the transfer segment within the ESPA. The effects of the two separate analyses would then be combined to show the full impact of the transfer proposal on the designated Snake River reaches. For points of diversion between the ESPA and just outside the ESPA modeled area, it may be reasonable to allow use of the closest cell within the ESPA modeled area for analysis using the Transfer Tool and ignore other tributary effects.

ESPA Model Version 2.2 Boundary



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