

**BEFORE THE 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)**

**INTERLOCUTORY ORDER
DECIDING QUESTION OF LAW**

On October 13, 2020, LCSC Enterprises LLC ("LCSC") filed Applications for Transfer 84488 and 84490 with the Idaho Department of Water Resources ("Department"). A protest against each application was filed by Idaho Power Company ("IPC") and a joint protest against each application was filed by A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, American Falls Reservoir District #2 and Minidoka Irrigation District (collectively "Coalition").

The Department conducted a consolidated pre-hearing conference on February 16, 2021, and status conferences on April 20, July 22, September 15 and October 6, 2021. During the conferences, the parties identified various legal questions that might be addressed through legal briefing prior to conducting an administrative hearing for the consolidated contested cases. After lengthy discussion with the parties, the hearing officer determined that one of the legal questions could be addressed prior to conducting an administrative hearing. Pursuant to Rule 564 of the Department's Rules of Procedure (IDAPA 37.01.01), the hearing officer requested argument briefs from the parties addressing the following question of law:

If a transfer of water rights filed pursuant to Idaho Code § 42-222 results in a reduction in the amount of water held in trust by the state of Idaho, as defined in Idaho Code § 42-203B, does that reduction constitute an appropriation of trust water and require a review of the transfer application under the criteria set forth in Idaho Code § 42-203C?

On November 5, 2021, LCSC filed *Applicant's Argument Brief* ("LCSC Brief"). Also on November 5, 2021, IPC filed *Idaho Power Company's Opening Brief* ("IPC Brief"). On November 19, 2021, LCSC filed *Applicant's Response to Idaho Power Company's Opening Brief*. Also on November 19, 2021, IPC filed *Idaho Power Company's Response Brief* ("IPC Response"). The Coalition did not participate in the legal briefing.

RELEVANT LEGAL PROVISIONS

Idaho Code § 42-201(1) states

All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise. And after the passage of this title, all the waters of this state shall be controlled and administered in the manner herein provided. Such appropriation

shall be perfected only by means of the application, permit and license procedure as provided in this title; provided, however, that in the event an appropriation has been commenced by diversion and application to beneficial use prior to the effective date of this act, it may be perfected under such method of appropriation.

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

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

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

Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change.

• • •

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

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

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

(2) A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action shall remain unsubordinated as defined by the agreement. Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the user of the water for power purposes, and of the people of the state of Idaho; provided, however, that application of the provisions of this section to water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner dam shall not place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam. For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law, including compliance with the requirements of section 42-203C, Idaho Code.

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

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

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

Idaho Code § 42-203C states:

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

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

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

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

(iii) The promotion of the family farming tradition;

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

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

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

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

ANALYSIS

This contested case arises from two protested applications for transfer filed pursuant to Idaho Code § 42-222(1). The legal question raised by IPC and addressed through this interlocutory order is whether an application for transfer that results in a reduction of flows in the trust water reaches of the Snake River¹ is subject to the review criteria in Idaho Code § 42-203C. The legal question presented to the parties was framed in general terms, not specific to the facts of this contested case. The hearing officer must determine, however, how the overarching legal principles apply to the facts of this contested case. Stated differently, the hearing officer must determine whether the changes proposed in Applications 84488 and 84490 constitute an appropriation of trust water and are therefore subject to the review criteria set forth in Idaho Code § 42-203C.

IPC argues: “A transfer that results in a reduction in the amount of trust water available for future appropriations constitutes an ‘appropriation’ consistent with [] Idaho Code § 42-203B.” *IPC Brief* at 3. Further, “if the approval of a transfer application would result in a reduction of the amount of water held in trust by the state of Idaho, it necessarily [constitutes] an appropriation of that trust water and the criteria set forth in Idaho Code § 42-203C must be applied.” *Id.* at 5.

LCSC argues that Applications 84488 and 84490, which propose to move portions of water right 35-14041 to new locations within the Eastern Snake Plain Aquifer (“ESPA”), could never constitute an appropriation of trust water and are therefore not subject to Idaho Code § 42-203C. After providing a comprehensive history of the Swan Falls controversy, LCSC argues (1) IPC’s water rights are fully subordinated to water right 35-14041 regardless of how the right may be changed in the future, (2) a redistribution of impacts because of a transfer is not an appropriation of trust water under Idaho law, (3) a transfer application does not constitute an appropriation of water, and (4) the proposed points of diversion for the portion of water right 35-14041 involved in Applications 84488 and 84490 are outside of the trust water area and cannot support an argument of trust water impacts. Arguments (2) and (3) advanced by LCSC are persuasive and are addressed in this order. This order does not address arguments (1)² and (4).

Transfer Applications 84488 and 84490 are not an Appropriation of Water

Any analysis to determine whether Idaho Code § 42-203C applies to transfer applications should start with the language of that statute. Section 42-203C begins with the conditional phrase: “If an applicant intends to appropriate water” If this condition is met, Section 42-

¹ The area between Milner Dam and Swan Falls Sam on the Snake River.

² During the October 6, 2021, status conference, the parties and the hearing officer discussed briefing the question of whether water rights held by IPC are fully subordinated to water right 35-14041. After some deliberation on the subject, the hearing officer decided not to request briefs on that question of law at this time. The question of subordination may be argued and decided in some future briefing, before or after the hearing. Consequently, LCSC’s arguments related to subordination are not considered as part of this interlocutory order.

203C states that “the Director shall consider . . . the criteria established in section 42-203A, Idaho Code, and whether the proposed use . . . would significantly reduce the amount of trust water . . . , and, if so, whether the proposed reduction is in the public interest.” Section 42-203C sets forth a list of factors for the Department to consider as part of its public interest review. The critical question, therefore, is whether LCSC “intends to appropriate water.”

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

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

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

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

In Applications 84488 and 84490, LCSC proposes to change the point of diversion and place of use for a portion of existing water right 35-14041. This right is a split portion of water right 35-7448. John Beus filed Application for Permit 35-7448 on October 16, 1974, proposing to divert 6.24 cfs from ground water to irrigate 560 acres. The Department issued Permit 35-7448 on November 23, 1974. Beus filed a statement of completion on September 7, 1979. The Department conducted a beneficial use field exam on August 14, 1980, confirming the extent of beneficial use accomplished under Permit 35-7448. The Department issued a license for water right 35-7448 on July 29, 1982, confirming the diversion of 4.58 cfs for the irrigation of 464 acres. The Snake River Basin Adjudication (“SRBA”) Court issued a partial decree for water right 35-7448 on January 31, 2002. The

priority date, diversion rate and irrigated acre elements listed on the partial decree matched those listed on the license (10/16/1974, 4.58 cfs, 464 acres).

Any “appropriation” of water under water right 35-7448 (and any split portions therefrom) has already occurred. The appropriation of water under water right 35-7448 occurred when the water right was acquired by the original right holder and confirmed by the Department through the issuance of a water right license. The right holder cannot continue to appropriate the public water resource under water right 35-14041. Any additional appropriation under water right 35-14041 would be inconsistent the way the terms “appropriation” and “appropriate” are used throughout Title 42, *Idaho Code*.

Idaho Code § 42-222(1) does not authorize water users to change the source of a water right. IPC correctly states that a transfer application that proposes to move a water right to a separate, hydraulically disconnected source should be considered a new appropriation. *IPC Response* at 6. A transfer application proposing to change the source of a water right to a separate, hydraulically disconnected source should not be evaluated under the permit application review criteria. Chapter 2, Title 42, *Idaho Code*, does not allow for the evaluation of a transfer application under the permit application review criteria. Rather, such a transfer application should be denied because it exceeds the limits of Idaho Code § 42-222(1) and the water user should be instructed to file an application for permit to appropriate water from the separate, hydraulically disconnected source.

A water user may file a transfer application to change the authorized point of diversion for a water right from one source to another as long as the sources are hydraulically connected. For example, a water user could change the point of diversion from a tributary stream to a mainstem stream downstream of the confluence of the two streams as long as the streams remain hydraulically connected throughout the relevant season of use. In this case, the current source of water for water right 35-14041 is ground water from the ESPA. The existing point of diversion is hydraulically connected to Snake River reaches above and below Milner Dam. The proposed point of diversion will also divert ground water from the ESPA at a location that is hydraulically connected to Snake River reaches above and below Milner Dam. Applications 84488 and 84490 do not propose to change the source of water right 35-14041. Because the source of water remains the same, any reduction in quantity of water of hydraulically connected streams does not constitute a new appropriation. Rather, a reduction in quantity of water of hydraulically connected streams must be evaluated under the injury criteria of Idaho Code § 42-222(1).

A proposal to change the point of diversion for a ground water right within the ESPA is akin to a proposal to change the point of diversion for a water right on a stream. A water user may propose to move a point of diversion for a water right to a new location on a stream, thereby reducing the flow in the stream at a new location. Other water users who divert water near the proposed point of diversion may experience water shortages that they have never experienced. The proposal to divert an existing water right from a new location on a stream is not considered a new appropriation even if there are new depletion impacts to certain portions of the stream. Rather, any impacts should be evaluated under Idaho Code § 42-222(1) to determine if there would be injury to existing water rights. If the changes

proposed in Application 84488 and 84490 result in increased depletions to the reaches of the Snake River below Milner Dam, such depletions must be evaluated under the injury criteria in Section 42-222(1). As part of this injury review, the hearing officer would determine whether any of the affected water rights are subordinated to water right 35-14041.

Water Right 35-14041 is not a Trust Water Right

The conditional phrase at the beginning of Idaho Code § 42-203C includes a second element of the condition: “If an applicant intends to appropriate water which is held in trust by the state of Idaho pursuant to subsection (5) of section 42-203B, Idaho Code” The review criteria in Idaho Code § 42-203C only applies to trust water applications (appropriations of water held in trust pursuant to Idaho Code § 42-203B(5)). Water right 35-14041 is not currently a trust water right and cannot become one through the transfer application process.

Idaho Code § 42-203B establishes the legal framework for trust water rights and defines the scope of the water rights held in trust by the State of Idaho. Section 42-203B(2) states: “The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law, including compliance with the requirements of section 42-203C, Idaho Code.” As noted above, water right 35-7448 (the parent right of water right 35-14041) was established through acquisition of a permit in 1974, beneficial use prior to September 7, 1979, and issuance of a license in 1982. Water right 35-14041 is diverted from the ESPA at a location upstream of the trust water area. Idaho Code § 42-203B was not adopted until 1985. Therefore, the “future upstream beneficial uses” contemplated by Section 42-203B(2) could not include water right 35-14041. Water right 35-14041 was an existing upstream beneficial use in 1985.

The Final Unified Decree for the SRBA includes the following definition for the term “Trust Water Right”: “A water right acquired pursuant to Idaho Code § 42-203B which diverts water first appropriated under hydropower rights held in trust by the State of Idaho.” *Order Amending Final Unified Decree* at 1 (June 25, 2015). This definition was established for the rights appropriating water from the water rights held in trust. By definition, water right 35-14041 is not a Trust Water Right. It was not acquired pursuant to Idaho Code § 42-203B. IPC has not identified any statute authorizing the Department to convert a water right into a trust water right through the transfer application process.

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

The most compelling reason that Applications 84488 and 84490 are not subject to the review criteria set forth in Idaho Code § 42-203C is simply that Idaho Code § 42-222(1), which governs transfer applications and sets forth the criteria used to evaluate transfer applications, contains no reference to Idaho Code § 42-203C. Section 42-222(1) refers to many other provisions of the Idaho Code (§§ 42-108, 42-221, 42-203A, 42-202B) but contains no reference to Idaho Code § 42-203C or any reference to “trust water” or “trust water rights.”

The public interest review criteria set forth in Idaho Code § 42-203C(2)(a) are not insignificant. In certain cases, they require the Department to review a substantial amount of data related to the economic benefits of the proposed appropriation of trust water and the economic impacts to hydropower generation and utility rates. In the thirty-six years since Section 42-203C was adopted, transfer applications have never been subject to the review criteria set forth in Section 42-203C. It is surprising that Section 42-222(1) would not contain a single reference to Section 42-203C or trust water rights if the legislature intended for the Department to complete a substantial review under Section 42-203C for every transfer proposing to change a point of diversion within the ESPA. Such language could have been added to Section 42-222 when the section was amended in 1986, 1988, 1990, 1994, 1996, 1997, 2000, 2003, 2004 or 2020.

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

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

IDAPA 37.03.08.50.12. This rule only applies to permits issued for the diversion and use of trust water. Further, the rule grants the Department the authority to add conditions to trust water permits to ensure that the rights continue to satisfy the public interest criteria from Idaho Code § 42-203C into the future, even if the rights are changed through a transfer approval. As noted above, water right 35-14041 is not a trust water right and, therefore, does not bear any condition requiring adherence to the public interest criteria in Section 42-203C.

Summary

The public interest review criteria set forth in Idaho Code § 42-203C only apply to applications proposing to appropriate water rights held in trust. An application for transfer does not constitute an appropriation of water. The actions authorized within a transfer application (changing the point of diversion, place of use, period of use or nature of use of an existing water right) are not within the scope of the terms “appropriate” or “appropriation” as those terms are used in Chapter 2, Title 42, *Idaho Code*. Idaho Code § 42-222(1), which governs transfer applications, make no reference to the review criteria in Idaho Code § 42-203C. Similarly, Idaho Code § 42-203C makes no reference to transfer applications.

The Department's Water Appropriation Rules (37.03.08) describe one scenario where the Department may consider the review criteria in § 42-203C in its review of a transfer application. Rule 50.12 allows the Department to add a condition to a new permit, which appropriates water rights held in trust, requiring the water right holder to continue to satisfy the public interest criteria in Section 42-203C into the future, regardless of any changes to the water right (including changes made through a transfer application). If the trust water permit, or resulting trust water right, bears such a condition and is included in an application for amendment or application for transfer, the Department may evaluate the proposed changes under the criteria in Idaho Code § 42-203C.

Applications 84488 and 84490 propose to make changes to water right 35-14041. This water right is not a trust water right and does not bear any conditions requiring ongoing compliance with the public interest criteria in Idaho Code § 42-203C. Water right 35-14041 cannot be converted into a trust water right through the transfer application process. Therefore, the review criteria in Section 42-203C do not apply to Applications 84488 and 84490.

CONCLUSIONS OF LAW

The changes proposed in Applications 84488 and 84490 are not subject to the public interest review criteria set forth in Idaho Code § 42-203C.

ORDER

The conclusion of law set forth above is hereby adopted in this contested case. The parties shall be restricted from providing additional evidence or argument related to the question of whether Applications 84488 and 84490 are subject to the public interest review criteria set forth in Idaho Code § 42-203C.

Dated this 1st day of December 2021.



James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of December 2021, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed to the following:

Documents Served: Interlocutory Order Deciding Question of Law

LCSC ENTERPRISES LLC
433 LAS COLINAS BLVD E STE 1290
IRVING, TX 75039-5058

ROBERT L HARRIS
HOLDEN KIDWELL HAHN & CRAPO
PO BOX 50130
IDAHO FALLS, ID 83401

SCOTT PUGRUD
IDAHO POWER COMPANY
PO BOX 70
BOISE, ID 83707

JOHN SIMPSON
BARKER ROSHOLT & SIMPSON LLP
PO BOX 2139
BOISE, ID 83701-2139

TRAVIS THOMPSON
BARKER ROSHOLT & SIMPSON LLP
PO BOX 63
TWIN FALLS, ID 83303-0063

KENT FLETCHER
FLETCHER LAW OFFICE
PO BOX 248 BURLEY, ID 83318



Christina Henman
Administrative Assistant