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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 ARGUMENT BRIEF**

LCSC Enterprises LLC ("LCSC" or "Applicant"), by and through its counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submits *Applicant's Argument Brief*.

LCSC filed application for transfer nos. 84488 and 84490 (collectively the "Transfers") to move WR 35-14041 to properties owned by LCSC. The Transfers were protested by the Idaho Power Company ("IPC"), as well as the 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, a collective group of large canal companies and irrigation districts self-referred to as the Surface Water Coalition (the "Coalition"). As a result of these protests, the above-entitled matter is now a contested case before the Idaho Department of Water Resources ("IDWR" or "Department"). Department employee James Cefalo is the designated hearing officer (the "Hearing Officer").

WR 35-7448 is the parent right for WR 35-14041. WR 35-7448 received the following partial decree in the SRBA:

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA  
Case No. 39576

PARTIAL DECREE PURSUANT TO  
I.R.C.P. 54(b) FOR  
Water Right 35-07448

2002 JAN 31 PM 3:46  
DISTRICT COURT-SRBA  
TWIN FALLS CO., IDAHO  
FILED

NAME AND ADDRESS: LYNN GELLES  
PAUL GELLES  
184 S 900 W  
BLACKFOOT, ID 83201

SOURCE: GROUNDWATER

QUANTITY: 4.58 CFS  
1856.00 APY

PRIORITY DATE: 10/16/1974

POINT OF DIVERSION: T01S R32E S12 NWSE Within Bingham County

PURPOSE AND PERIOD OF USE	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	04-01 TO 11-01	4.58 CFS 1856.00 APY

PLACE OF USE: Irrigation T01S R32E S12

	Within Bingham County
NWSE 29.0	SWNE 12.0
SENE 25.0	NENW 19.0
NWNW 19.0	SWNW 40.0
SENEW 40.0	NESW 30.0
SWSEW 40.0	SESW 40.0
NESE 20.0	NWSE 35.0
SWSE 40.0	SESE 5.0

464.0 Acres Total

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

*Roger Burdick*  
Roger Burdick  
Presiding Judge of the  
Snake River Basin Adjudication

There is no scanned water right backfile for WR 35-7448 available on IDWR's website. However, documents associated with the development of WR 35-7448 is contained in microfiche at IDWR's Eastern Regional Office. Unfortunately, these documents are not capable of being printed. The Hearing Officer can take judicial notice of these documents. The microfiche information confirms that the original application for permit for WR 35-7448 was filed by John Beus on October 16, 1974 (the priority date). Proof was due on November 1, 1979. The statement of completion was

received on September 17, 1979, and field exam was performed on August 14, 1980. Eventually a license was issued by IDWR on July 29, 1982.

IDAPA 37.01.01 “contains the rules of procedure that govern the contested case proceedings before the Department of Water Resources and Water Resource Board of the state of Idaho.” Rule 001.02.<sup>1</sup> Rule 564 permits the Hearing Officer to request briefs from the parties to a contested case setting forth arguments and positions on any questions of law in the contested case. The Hearing Officer has requested briefs on the following question of law, a question that relates to IPC’s protest:

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?

The portion of Idaho Code § 42-203B that references trust water provides:

42-203B. AUTHORITY TO SUBORDINATE RIGHTS — NATURE OF SUBORDINATED WATER RIGHT AND AUTHORITY TO ESTABLISH A SUBORDINATION CONDITION — AUTHORITY TO LIMIT TERM OF PERMIT OR LICENSE. (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

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<sup>1</sup> Citations to rules in IDAPA 37.01.01 hereafter only include the specific subsections for these rules and do not include IDAPA 37.01.01 before the subsection citation.

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, in its entirety, provides:

42-203C. HYDROPOWER WATER RIGHT — CRITERIA FOR REALLOCATION — WEIGHT — BURDEN OF PROOF. (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.

Both Idaho Code §§ 42-203B and 42-203C were added as a component of the resolution of the Swan Falls Controversy.

As set forth below, it is evident from the Swan Falls Controversy and its associated agreements, subsequent proceedings associated with the Swan Falls Controversy, and other provisions of Idaho law, that IPC fully subordinated its hydropower water rights to existing water uses, including WR 35-7884 (the parent right to 35-14041). The scope of that full subordination includes the pumping impacts from this right, even if the impacts are redistributed as a result of a transfer application. Additionally, redistribution of pumping impacts because of a transfer that show an increased impact to flows in the Snake River below Milner Dam is not an “appropriation” of trust water under Idaho law. Accordingly, even if there is a reduction in flows in the Snake River below Milner Dam as a result of the Transfer, that *does not* constitute an appropriation of

trust water, and as a result, *does not* require a review of the transfer under the criteria set forth in Idaho Code § 42-203C. In the alternative to these arguments, the Transfers propose to divert water from a location outside of the Trust Water Area, and as a result, do not implicate any trust water issues even if WR 35-7448 diverts trust water.

To understand the scope of IPC's subordination of its hydropower water rights to other water rights, including WR 35-7448, it is important to generally understand the Swan Falls Controversy, as well as certain agreements that arose out of that controversy, associated statutory changes to Idaho law that arose out of that controversy, and decisions issued later in time to when these agreements were entered. The scope of IPC's subordination provides necessary context to answer the Hearing Officer's question. While this brief is not intended to be a comprehensive treatise on the Swan Falls Controversy, there are important points that merit understanding and consideration. And, while the Hearing Officer's question has arisen in this contested case proceeding concerning the Transfers, the answer to this question of law has much broader implications and will affect future transfers as it is likely to serve a precedent in other water-related legal proceedings.

## **I. BACKGROUND.**

### **A. The Swan Falls Controversy.**

Concerning water use in Idaho, Judge Wildman stated “[t]he inevitable conflict between those who use the water of the Snake River for power generation and those who use it for irrigation and other consumptive uses was foreseen prior to Idaho’s statehood.” *Memorandum Decision and Order on Cross-Motions for Summary Judgment, In re SRBA*, Case No. 39756, Consolidated Subcase No. 00-92023 (92-23), at 5 (April 18, 2008) (hereinafter “*Memorandum Decision*”). In 1928, after the development of hydropower projects on the Snake River and its tributaries began,

Article XV, § 3 of the Idaho Constitution was amended to include “except that the state may regulate and limit the use therefore for power purposes.” *Id.* at 5. Approximately 50 years later, these issues “came to a head,” *Id.* at 6, in what came to be known as the Swan Falls Controversy.

Although it certainly involved much larger issues relating to water use and management in Idaho, the narrow legal issue presented in the Swan Falls Controversy was the question of the subordination of IPC’s hydropower water rights. Clive J. Strong & Michael C. Orr, *Understanding the 1984 Swan Falls Settlement*, 52 IDAHO L. REV. 223, 226 (2016) (hereinafter “*Understanding*”). “Subordination” in this context is an exception to the general rule of priority water administration, which is the right of a senior priority water right holder to seek administrative regulation or curtailment of diversions under junior priority water rights “when in times of scarcity of water it is necessary so to do in order to supply the prior rights.” Idaho Code § 42-607. Subordination “essentially nullifies priority.” *Understanding* at 226.

Idaho has a policy of subordinating hydropower water rights to other uses of water because of the “inevitable conflict” referred to by Judge Wildman. This is because hydropower generally depends on water remaining in the river or stream, while most other water uses (certainly irrigation) require that water is diverted out of the river or stream. Accordingly, without subordination, a senior hydropower water right could be asserted to curtail or even prevent future irrigation uses where such uses could affect flows at the power plant(s) in the river or stream. Accordingly, Idaho’s development policy has generally favored irrigation. *Id.* at 229.

The issue of subordination of IPC’s hydropower rights was an issue as far back as the 1940s and early 1950s when IPC and federal agencies submitted competing hydropower development proposals for Hells Canyon. *Id.* at 229. IPC ultimately prevailed, but IPC needed the support of Idaho irrigators and then Governor Jordan to prevail. To garner that support:

IPC reaffirmed that its use of water for power generation was subordinate to future upstream uses by agreeing to the inclusion of a subordination clause in its the state water right license for its C.J. Strike project, and also “proposed that the FPC license for the Hells Canyon project contain a clause subordinating its rights to future upstream depletion without condition.” At the time, this resolution was seen as effectively subordinating all of IPC’s Snake River projects to future irrigation development.

*Understanding* at 229. (citing to Patrick D. Costello & Patrick J. Kole, *Commentary On Swan Falls Resolution*, W. NAT. RESERVOIR LITIG. DIG. COMMENT 11, 13 (Summer 1985) (“it was **generally assumed** that the other water rights of the company in the Snake River system above Hells Canyon were subordinated through the [Hells Canyon] agreement. . . . Public pronouncements of state policies and company practices . . . were consistent with this understanding.” (emphasis added))); *see also Idaho Power Co. v. State*, 661 P.2d 741, 756, 104 Idaho 575, 590 (1983) (“To obtain the influence of Jordan and the irrigators, then as now a powerful political force in the state, for its Hells Canyon three-dam project, Idaho Power proposed that the FPC license for the Hells Canyon project contain a clause subordinating its rights to future upstream depletion without condition.”).<sup>2</sup> Unexpectedly, the general assumption of full subordination of IPC’s hydropower water rights proved to be incorrect when the Idaho Supreme Court eventually held that the subordination of its hydropower water rights was limited and applied “only to the Hells Canyon project water rights, and not to those at Swan Falls or any other dams upriver.” *Idaho Power Co. v. State*, 661 P.2d 741, 756, 104 Idaho 575, 590 (1983).

What led to the dispute that eventually made its way to the Idaho Supreme Court in 1983? In the 1950s and 1960s, new pumping technology and relatively inexpensive electricity aided the development of ground water irrigation projects on the Eastern Snake Plain Aquifer (the “ESPA”).

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<sup>2</sup> *See also* SUSAN M. STACY, LEGACY OF LIGHT: A HISTORY OF THE IDAHO POWER COMPANY, 81 (Idaho Power Co. 1991) (referring to IPC’s “rules of thumb,” one of which was to subordinate its hydropower water rights “to present and future irrigators.”).

IPC provided power to satisfy these market demands: “Idaho Power celebrated the revolution and encouraged more.” *Understanding* at 230 (quoting SUSAN M. STACY, LEGACY OF LIGHT: A HISTORY OF THE IDAHO POWER COMPANY, 81 (Idaho Power Co. 1991)). This increased ground water pumping led to reduced reach gains to the Snake River below Milner Dam, which reduced flows in the Snake River and reduced power production at IPC’s hydropower plants.

In 1977, “Matthew Mullaney on behalf of himself and other ratepayers alleging that Idaho Power had failed to protect and preserve its Swan Falls water rights and that, by so doing, Idaho Power had wasted its assets and overstated its capital investment, thus resulting in overcharges to its ratepayers.” *Idaho Power Co.*, 661 P.2d at 748, 104 Idaho at 582. Rather than address the ratepayers’ allegations directly, IPC’s strategy was instead to sue the Idaho Public Utilities Commission, IDWR, numerous canal and irrigation companies, individuals involved with irrigation, and the ratepayers. *Id.*

Contrary to the historic understanding that IPC’s hydropower water rights were all subordinated to upstream development, in its lawsuit, IPC “sought a decree that its Swan Falls rights were not subject to upstream depletion and that the state water plan was a taking of those rights. Idaho Power also sought to have the court identify those areas where its water rights were protected.” *Id.* Despite the widely held belief that IPC agreed to subordinate all its other Snake River hydropower water rights to existing and future irrigation development in agreeing to the subordination provisions for its Hells Canyon and C.J. Strike projects, the result of this litigation was the Idaho Supreme Court holding that the subordination “applies only to the Hells Canyon project water rights, and not to those at Swan Falls or any other dams upriver.” *Id.* at 756, 104 Idaho at 590.

This decision was originally issued on November 19, 1982, but upon denial of a petition for rehearing, the opinion was withdrawn and replaced with an amended opinion dated March 31, 1983. For purposes of this brief, it is critical to recognize that the original opinion's date of November 19, 1982 was *after* WR 35-7448 was licensed on July 29, 1982. By the time of this opinion, WR 35-7448 had been fully exercised and developed, as confirmed and evidenced by issuance of the license.

While the Idaho Supreme Court did remand the case for further proceedings to address affirmative defenses that IPC lost all or some of its Swan Falls water rights under various legal and equitable theories, in terms of preserving the Idaho's historic principle of hydropower subordination, the damage was already done. Anything less than a complete win against IPC opened the door for IPC to aggressively seek to elevate hydropower rights out of subordinated status. "The Court's decision provided a legal basis for IPC to use its water rights at Swan Falls and other projects for a purpose previously thought to be beyond reach: "to prevent consumptive uses from depleting the flow of the Snake River above Swan Falls." *Understanding* at 233 (footnote omitted).

IPC's response to the Idaho Supreme Court's 1983 decision was to immediately proceed to file a second lawsuit, only this time against approximately "7500 persons claiming water rights in the Snake River basin." *In re Snake River Basin Water Sys.*, 115 Idaho 1, 3, 764 P.2d 78, 80 (1988). This lawsuit came to be known as the "7500 suit" or "Idaho Power versus the World." *Understanding* at 233. It is not entirely clear how IPC developed the 7500 suit list of water rights and water users, as it included applications, permits, and licenses of varying priority dates. Based upon our review of the list (contained in the certain Notices of Dismissal attached to the *Affidavit of Dana L. Hoffstetter* discussed in further detail below), WR 35-7448 was *not* one of the water

right listed in the 7500 suit, presumably because the statement of completion for this right submitted to IDWR on September 17, 1979, well before instigation of the 7500 suit litigation.

Additionally, and unlike IPC's first lawsuit, the 7500 suit asserted IPC's hydropower water rights against uses *upstream* of Milner Dam. *Understanding* at 233-34. Given the scope of litigation instigated by IPC, this cast a cloud over water use and possible future development in southern Idaho. "Irrigation interests had long assumed IPC's projects downstream from Milner Dam 'had no claim on any flows in the Snake River above Milner Dam.'" *Id.* at 234 (footnote omitted). Targeting above-Milner irrigation interests explains "why various interests, including the Idaho Legislature, responded as they did to the Swan Falls controversy.'" *Id.* (footnote omitted).

Legislative battles between supporters of hydropower and supporters of irrigation interests in 1983 and 1984 did not result in legislative subordination of IPC's hydropower water rights or other resolution of the Swan Falls Controversy. *Id.* at 234-35. However, the Legislature did enact Senate Bill 1180, the only legislation related to the Swan Falls Controversy that year. This bill allowed for the enactment of Idaho Code § 62-540, which authorized Idaho's governor to enter into contacts with IPC on behalf of certain water users subject to the 7500 suit to subordinate IPC's hydropower rights to consumptive uses existing prior to November 19, 1982. As evidenced by this legislation, even in this very controversial time, there never did seem to be any question about subordination of IPC's hydropower water rights to *existing* water uses such as WR 35-7448 (the parent right to WR 35-14041).

While IDWR and IPC negotiated what came to be known as the "1180 Contract" pursuant to Idaho Code § 62-540, the Governor refused to sign it because of constitutional questions and because it was not a full settlement of issues. *Id.* at 235.

**B. Results of Negotiations in the Swan Falls Controversy and Subsequent SRBA Litigation.**

In 1984, after numerous unsuccessful attempts to enact legislation to subordinate IPC's water rights, the State and IPC elected to engage in settlement negotiations. Again, as to the question of subordination of *existing* water uses—which would necessarily include WR 35-14041 (a split of WR 35-7448), the water right at issue in the Transfers—that issue was apparently resolved very quickly:

The parties had little difficulty reaching agreement that IPC would subordinate its claimed hydropower water rights to existing uses. Essentially all of the existing uses had been established without protest or objection by IPC, and it was generally agreed that even under the best litigation outcome IPC could reasonably hope for, it would be deemed to have waived its rights as against existing users.

*Understanding* at 235 (footnotes omitted). The difficult issue to negotiate proved to primarily be the issue of subordinating IPC's hydropower operations to *future* uses and whether the State or IPC would be in the position of controlling that future development. *Id.*

Eventually IPC and the State executed two settlement documents at the same time (on October 25, 1984). The first, more well-known document is simply entitled "AGREEMENT", which has since commonly been referred to as the "Swan Falls Agreement." The second document was the 1180 Contract discussed above, which is entitled "CONTRACT TO IMPLEMENT Chapter 259, Sess. Laws, 1983." The provisions of the Swan Falls Agreement were later described by Judge Wildman as follows: "the Swan Falls Agreement was not a self-executing instrument, but rather proposed a suite of legislative and administrative action that if implemented would resolve the controversy and the legal issues to the mutual satisfaction of the parties." *Memorandum Decision* at 26.

The Swan Falls Agreement document was clear on the full subordination of IPC's

hydropower water rights to *existing* uses of water:

- D. The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.

Swan Falls Agreement ¶7.D. It is undisputed that WR 35-7448 (the parent right to WR 35-14041) was beneficially used prior to October 1, 1984 as the license for it was issued on July 29, 1982. Accordingly, WR 35-14041 enjoys the benefits of having IPC's hydropower rights fully subordinated to it.

Additionally, the 1180 Contract was clear on the full subordination of IPC's hydropower water rights to *existing* uses of water as well:

2. Mutual Covenants

- (a) Notwithstanding the pending district court action in Ada County Civil No. 81375 all water users as

defined in paragraphs 1(a), and 1(b), and all consumptive water users who have beneficially used water prior to November 19, 1982, pursuant to a valid permit, license or decreed right existing prior to November 19, 1982, or valid beneficial use claim, and any persons who have previously made substantial investments in irrigation wells or equipment for use pursuant to a water right application filed prior to November 19, 1982, even though such irrigation wells or irrigation equipment were not in operation prior to November 19, 1982, may continue the perfection of such water right in compliance with Idaho law without protest or interference by the Company.

- (b) As soon as practicable after the effective date of this contract, the Company and Idaho shall dismiss with prejudice its pending case, Ada County Civil. No. 81375, as to those persons who in the opinion of the Company and Idaho, come within the class of users identified in paragraph 2(a) above.
- (c) As to those persons whom the Company and Idaho cannot initially determine, based upon the information available to them, whether or not they come within the class of users identified in paragraph 2(a) above, the Company and Idaho acting through the Idaho Department of Water Resources, shall endeavor to obtain the information necessary to make a decision as to such persons. To the extent it is requested by the Company to provide information, the Idaho Department of Water Resources shall recover its legally authorized costs for researching and producing data including copies. The Company shall subsequently dismiss with prejudice the pending case as to any other persons who are determined by the Company and Idaho based upon the information received to come within the class of users identified in paragraph 2(a) above.

The 1180 Contract did not originally contain a list of the individual water rights that benefitted from the dismissals, which therefore also benefitted from unconditional subordination. Today, we have that list. In the SRBA, because of the 1180 Contract, IPC's hydropower water rights were recommended to include the following condition: "This water right is subordinate to the lawful exercise of water rights of those persons dismissed from Idaho Power Co. v. State of Idaho, Case No. 81735 (Fourth Judicial Dist. Feb. 16, 1990)." *Order on Motion for Approval of Settlement* at 18, *In re* SRBA, Case No. 39576, Consolidated Subcase No. 00-92023 (Jan 4, 2010). Judge Wildman agreed to include the original Notices of Dismissal filed by IPC to be part of the record, as these notices described the water rights that benefitted from the above condition, but with an important point—"that it is made clear the list is not static **and includes subsequent changes to the original rights resulting from ongoing transfers, splits, and water right renumbering.**" *Id.* (emphasis added). Those Notices of Dismissal were attached to an affidavit submitted in the matter. *Affidavit of Dana L. Hofstetter, In re* SRBA, Case No. 39576, Consolidated Subcase No. 00-92023 (October 5, 2010). Based upon our review of the Notices of Dismissal, WR 35-7448 (the parent right to WR 35-14041) was *not* included on the list. This is likely because WR 35-7448 had already been developed and exercised (the statement of completion was received on September 17, 1979, and after a field exam on August 14, 1980, a license for WR 35-7448 was issued on July 29, 1982).

Some of the other key measures under the Swan Falls Agreement included (1) a general adjudication of the Snake River basin; (2) collection of hydrologic data to predict the effects of new water development; (3) a statue water resource development policy encouraging the most efficient uses of the remaining supply; and (4) giving IDWR sufficient regulatory authority this development policy through the permitting process. *Understanding* at 236-37.

The Swan Falls Agreement also increased the Murphy minimum flow of 3,300 cfs to 3,900 cfs during the summer, and to 5,600 during the winter, but the settlement discussions were almost derailed over the question of the subordination of IPC's claimed water rights for flows in excess of the 3900/5600 cfs at Murphy:

The question was whether the hydropower water rights in excess of 3900/5600 at Murphy would be immediately "subordinated" to future uses, or would only be "subordinatable." The State favored immediate subordination (or full State ownership) of the rights, while IPC favored unsubordinated but "subordinatable" hydropower water rights that IPC would subordinate only when a new water right was approved, and only to the extent of the new water right.

*Understanding* at 239. Eventually the parties agreed to a trust concept for the water in excess of the Murphy minimum flows, and the trust concept was included in Exhibit 7A and Exhibit 7B of the Swan Falls Agreement, which described the subordination legislation (as called for under paragraph 13(a)(vii) of the Swan Falls Agreement). IPC's attorney at this time, Tom Nelson, later described the trust as follows:

The state then takes that water and places it in trust, subject to reallocation. This does two things, it makes clear the state's control of the allocation of the water, and it left the water unsubordinated.

*Memorandum Decision* at 13. As far as ownership of the water in excess of the Murphy minimum flows, the Exhibit 7B legislation provided that the State would obtain legal ownership of this water by operation of law rather than through a conveyance or transfer. *Id.* (quoting testimony of Pat Costello, attorney for Governor Evans). Through this trust, Idaho gained control over the hydropower water rights and could thereby, as a matter of state law, subordinate the hydropower water rights to future water rights granted in accordance with state law. Accordingly, "trust water" is that flow of the Snake River that is greater than the Murphy minimum flow but less than the decreed water rights at each of the Idaho Power Company's facilities. *See, e.g.,* IDAPA 37.03.08.010.17. A trust water right is a water right that appropriates trust water. This definition

is critically important, as the SRBA Final Unified Decree was even amended to include this definition:

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. Trust water rights are subordinate to all water rights that enjoy the benefit of the unqualified subordination of hydropower water rights nos. 02-00100, 02-04000A, 02-04001A, 02-02032A, 02-04000B, 02-04001B, 02-02032B, 02-02036, 02-02056, 02-02065, 02-02064, 02-10135, 02-02060, 02-02059, 02-02001B, 02-02001A, 02-02057, 37-02128, 37-02472, 37-02471, 37-20710, 37-20709, 36-02013, 36-02018 and 36-02026 pursuant to the Swan Falls Settlement.

*Order Amending Final Unified Decree at 1-2, In re SRBA*, (June 25, 2015). It is important to note certain terms in this definition because it makes it clear that trust water rights are those water rights obtained through Idaho’s water right permitting process and not for water rights that existed at the time and were diverting prior to the Swan Falls Agreement. These terms are “acquired” and “first appropriated.” There is no component of trust water or trust water rights that included *existing* water rights—trust water only implicates future uses of water and trust water rights only involve water rights acquired through Idaho’s water right permitting process.

As a result of the resolution of the Swan Falls Controversy, the legislation described in the Swan Falls Agreement was enacted, which included adoption of Idaho Code §§ 42-203B and 42-203C. Subsequent to this, however, a dispute arose over the interpretation of these statutes as they were based upon the zero minimum flow at Milner Dam policy established by the Idaho State Water Plan, but there was no express language referencing this policy in these statutes. *Understanding at 247*. Corrective legislation was prepared, and in 1986, Idaho Code § 42-203B was amended to include the following language:

[A]pplication 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.

1986 Idaho Sess. Laws 309, ch. 117, sec. 1 (emphasis added); Idaho Code § 42-203B(2). The bolded term “water” eventually became a source of controversy in the SRBA. In 2007, IPC filed a *Complaint and Petition for Declaratory and Injunctive Relief* in the main SRBA case. *Memorandum Decision* at 3. IPC alleged that the SRBA Court could “reform” the Swan Falls Agreement on ground of “mutual mistake” alleging that no “trust water” had been available at the time the Swan Falls Agreement was executed, and as a result, there had been no trust *res* and “no valid “trust had been created.” *Understanding* at 254. Cross-motions for summary judgment were filed, and Judge Wildman rejected IPC’s arguments and agreed with the State, holding that the Swan Falls Agreement was “unambiguous that the *res* of the trust consists of ‘water rights’ as opposed to ‘water.’” *Memorandum Decision* at 31.

However, there is other important language that came out of this litigation that bears on the issues in this contested transfer proceeding. Specifically, because of IPC’s agreement to full subordination of its hydropower water rights, Judge Wildman explained what Idaho Power’s remedy is if the Murphy minimum flows are not met:

Although mutual mistake is normally an issue of fact, in this case the Court holds that as a matter of law under the terms of the Agreement it does not matter whether erroneous assumptions were made regarding the availability of water for future appropriations. This Court holds that pursuant to the Agreement the *res* of the trust is the portions of Idaho Power’s right(s) exceeding the agreed upon minimum flow as opposed to an undefined block of water. The trust arrangement is therefore not defeated for the want of a *res*. The trust *res* consists of water rights, not water. Whether or not sufficient water existed at the time to fulfill the water rights of subsequent appropriators is a separate issue and one that changes over time with the fluctuations in the water supply. However, there are no assurances that there will always be sufficient water available to satisfy a water right.

Further, the Agreement was structured to specifically account for uncertainty in the availability of the excess flows. No guarantees or promises were made to Idaho Power with respect to the availability of the excess flows. Rather,

Idaho Power's right is defined in terms of unsubordinated minimum flows at the Murphy Gauge. Idaho Power can use the subordinated flows up to its licensed amounts at its individual facilities and the State will apply the public interest criteria in conjunction with reallocating the water available, if any, under the right(s) to future appropriators. As discussed above, based on the underlying purpose of the Agreement, Idaho Power did not have an expectation that water above the minimum flows would be available for its use for an indefinite period.

Finally, the Agreement has been in effect since October 25, 1984. Based on the trust arrangement, new water right permit applications have been processed and approved, some limited to twenty-year terms. The State has been meeting the minimum flow obligation at the Murphy Gauge during that time except for the allegation of one day on or about July 12, 2003. **To the extent the State is not meeting the minimum flows or if it is anticipated that the minimum flows will not be met, then under the terms of the Agreement, Idaho Power's water right(s) held in trust are not subordinate to subsequent appropriations. As a result, these subsequent appropriations may be subject to curtailment in order to meet the minimum flows.** However, this is an issue pertaining to the administration of Idaho Power's water rights, as well as the rights of the subsequent appropriators, and needs to be brought before IDWR in the context of an administrative proceeding.

*Memorandum Decision* at 47-48 (emphasis added).

There should be no question about the validity of the Swan Falls Agreement today. As a result of the "trust res" litigation and other subsequent litigation over aquifer recharge and the Milner Dam divide and its effect on the Swan Falls Agreement, the State and IPC executed a *Framework Reaffirming the Swan Falls Settlement* on March 25, 2009.<sup>3</sup> This Framework "endorsed the State's views as to all of the disputed issues in the litigation." *Understanding* at 262. This included resolution of three issues concerning the interpretation of the Swan Falls Agreement, which were (1) recognition of the Milner Divide as described in Idaho Code § 42-203B; (2) that IPC's hydropower water rights would be decreed consistent with Judge Wildman's

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<sup>3</sup> This document is available at <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/swan-falls-settlement/20090325-Framework-Reaffirming-the-Swan-Falls-Settlement.pdf>

Memorandum Decision; and (3) that the Swan Falls Agreement does not preclude use of water for aquifer recharge. *Understanding* at 263-64.

Relative to the nature of IPC's subordination to "future beneficial uses," in the SRBA, that language was clarified in provision 1 of the proposed partial decrees for IPC's water rights. This language originally provided the following:

In addition to the subordination defined in paragraph nos. 4 and 5 below, this water right shall be subject to subordination to and depletion by *future* beneficial uses under water rights acquired pursuant to applicable state law, unless any such water right is unlawfully exercised or such use depletes or will deplete the average daily flow of the Snake River below 3900 CFS from April 1 to October 31 or below 5600 CFS from November 1 to March 31 as measured at the "Murphy Gaging Station" described below in paragraph no. 2.

*Order on Motion for Approval of Settlement* at 18 (italics in original). Judge Wildman concluded that the future should be replaced with the following language:

1. The terms "future" will be deleted from Provision 1 in the *Partial Decrees* for the trust rights and the following language added as underlined below:

**. . . shall be subject to subordination to and depletion by future beneficial uses made after October 25, 1984 under water rights acquired pursuant to applicable state law . . . .**

*Id.* at 20.

Based on the foregoing, it is clear that it is only water rights acquired as a result of beneficial uses made "after October 25, 1984" that are subject to the trust water provisions contained in Idaho law. In all the above-described background and litigation, the question of full subordination to uses of water prior existing prior to October 25, 1984 was answered very early on in the Swan Falls Convroversy and not subsequently challenged. As explained in *Understanding*:

**An element of the Settlement that had not been litigated in the SRBA proceedings was its full subordination of the hydropower water rights to all other water rights and uses existing in 1984.** This agreement was set forth in Paragraphs 7C and 7D of the Agreement and the 1180 Contract. These provisions did not make subordination contingent on Murphy flows of 3900/5600; **rather IPC accepted the risk that the “existing” uses might reduce flows at Murphy below 3900/5600.** In other words, the Agreement did not “guarantee” a flow of 3900/5600 at Murphy, and subordination to the “existing” uses was “unqualified.” The partial decrees proposed by the Reaffirmation Framework included provisions subordinating the hydropower water rights to the “existing” uses that closely tracked the language of Paragraphs 7C and 7D of the Agreement.

*Understanding* at 264-65 (emphasis added).

## **II. ARGUMENT.**

**A. IPC’s hydropower water rights are fully subordinated to WR 35-14041 (which is a portion of WR 35-7448) and the scope of that subordination includes all impacts associated with WR 35-14041, even redistributed pumping impacts that result from a proposed transfer.**

As explained above, the original application for permit for WR 35-7448 (the parent right of WR 35-14041) was filed by John Beus on October 16, 1974 (the priority date). Proof was due on November 1, 1979. The statement of completion was received on September 17, 1979, and the field exam was performed on August 14, 1980. Eventually a license was issued by IDWR on July 29, 1982.

Based on this information, it is undisputed that WR 35-7448 was exercised prior to October 24, 1984. Accordingly, it is in a class of water rights where IPC’s hydropower water rights are fully subordinated to it. As described above:

The parties had little difficulty reaching agreement that IPC would subordinate its claimed hydropower water rights to existing uses. Essentially all of the existing uses had been established without protest or objection by IPC, and it was generally agreed that even under the best litigation outcome IPC could reasonably hope for, it would be deemed to have waived its rights as against existing users.

*Understanding* at 235 (footnotes omitted).

The pumping impacts associated with WR 35-7448 were present in the ESPA as of October

24, 1984, and because of the clear provisions of the Swan Falls Agreement protecting these developed water uses, “IPC accepted the risk that the ‘existing’ uses might reduce flows at Murphy below 3900/5600.” *Understanding* at 264-65. It does not make a difference whether these pumping impacts are redistributed to other parts of the ESPA because of a proposed transfer. Even with the 1180 Contract water rights (which did not include 35-7884), where the inclusion of language in IPC’s hydropower water right partial decrees concerning these contracts was litigated, a list of the water rights was included in the SRBA Final Unified Decree with the clarification that “the list is not static and includes subsequent changes to the original rights resulting from ongoing **transfers**, splits, and water right renumbering.” *Order on Motion for Approval of Settlement* at 18, *In re* SRBA, Case No. 39576, Consolidated Subcase No. 00-92023 (Jan 4, 2010) (emphasis added). Given the context of the Swan Falls Agreement relative to full subordination to *then-existing* water uses and this language from the SRBA Court, the subordination of IPC’s hydropower water rights included possible subsequent changes accomplished through a transfer proceeding to water rights like WR 35-7448 that could result in a change in the location of these pumping impacts.

Additionally, and perhaps more critically, however, WR 35-14041 (a split of WR 35-7448) has never and is not now pumping trust water. Trust water is “[t]hat portion of an unsubordinated water right used for hydropower generation purposes which is in excess of a minimum stream flow established by state action either with agreement of the holder of the hydropower right as provided by Section 42-203B(5), Idaho Code or without an agreement as provided in Section 42-203B(3), Idaho Code.” IDAPA 37.03.08.010.17. In other words, WR 35-14041 has not and is not diverting any portion “of an unsubordinated water right used for hydropower generation.” Based on the foregoing, in direct answer to the Hearing Officer’s question, Idaho Code §§ 42-203B and 42-

203C are not implicated in this proceeding because these sections describe and implement the trust water concepts under the Swan Falls Agreement (which agreement specifically called for enactment of these statutes) and trust water is not involved at all. Accordingly, the Transfers do not trigger a review under the Idaho Code § 42-203C criteria. Idaho Power Company's full subordination of its hydropower rights to WR 35-7448 in the Swan Falls Agreement include all aspects of WR 35-14041, including its pumping impacts, and IPC has waived any claim of injury to its hydropower rights from the exercise and/or transfer of WR 35-14041.

**B. A transfer that changes the timing and location of pumping impacts under an existing water right is not an appropriation of trust water under Idaho Code § 42-203B because only a new water right obtained through the permitting process can be “acquired pursuant to state law.”**

The above summary of the Swan Falls Controversy is clear that trust water is water that is subject to future appropriation through Idaho's water right permitting process. It did not include the movement, or transfer, of existing water rights. In other words, a change in location of the point of diversion of a water right that results in a modeled increase in impacts to reaches of the Snake River below Milner Dam is not an appropriation of water, let alone trust water. This conclusion is supported by the plain language of Idaho Code § 42-203B(3), which provides that “[t]he rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are **acquired pursuant to state law**, including compliance with the requirements of section 42-203C, Idaho Code.” (emphasis added). The term “acquired” in this statute is a reference to the application, development, and perfection of a water right permit obtained only after an application is filed for the water right under Chapter 2 of Title 42 of the Idaho Code. Idaho Code § 42-202 uses the same term “acquire” in its language:

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.**

(emphasis added).

Further Idaho Code § 42-203C clearly contemplates a new application for permit for acquisition of a trust water right as it references Idaho Code § 42-203A, uses the term “appropriate,” and approval from the director:

42-203C. HYDROPOWER WATER RIGHT — CRITERIA FOR REALLOCATION — WEIGHT — BURDEN OF PROOF. (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.

(emphasis added).

The Hearing Officer should engage in statutory interpretation of these statutes as described by the Idaho Supreme Court:

The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

*Hayes v. Medioli (In re Name Change of Doe)*, \_\_\_ Idaho \_\_\_, \_\_\_, 484 P.3d 195, 200 (Idaho

2021) (emphasis added) (quoting *Nelson v. Evans*, 166 Idaho 815, 820, 464 P.3d 301, 306 (2020)); see also Idaho Code § 73-113(1) (“The literal words of a statute are the best guide to determining legislative intent.”). Even courts cannot “ignore or re-write the plain language of a statute simply to reach a more desirable result.” *Berrett v. Clark Cnty. Sch. Dist. No. 161*, 165 Idaho 913, 928, 454 P.3d 555, 570 (2019).

Applying these principles, the water rights referred to under Idaho Code § 42-203B are water rights “acquired pursuant to state law,” which means they obtained through Idaho’s water right permitting process described by statute. When a water right is subject to a transfer, it does not “acquire” anything. Rather, a transfer is an administrative process to change one or more of four elements of an existing water right (the (1) point of diversion, (2) the place of use, (3) the period of use, or (4) the nature of use of an established water right). Idaho Code § 42-222.

Further evidence that it is only through the development of a water right through Idaho’s permitting process (where “rights are acquired pursuant to state law” under Idaho Code § 42-203B) is language included in IPC’s water rights in the SRBA, as described above. See, *supra* p. 19. The subordination language for provision 1 was amended by Judge Wildman to include specific reference to “beneficial uses made after October 25, 1984 under water rights **acquired pursuant to applicable state law.**” *Order on Motion for Approval of Settlement* at 20 (emphasis added). Even the SRBA Final Unified Decree was even amended to include this a definition that uses the terms “acquired” and “first appropriated”:

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. Trust water rights are subordinate to all water rights that enjoy the benefit of the unqualified subordination of hydropower water rights nos. 02-00100, 02-04000A, 02-04001A, 02-02032A, 02-04000B, 02-04001B, 02-02032B, 02-02036, 02-02056, 02-02065, 02-02064, 02-10135, 02-02060, 02-02059, 02-02001B, 02-02001A, 02-02057, 37-02128, 37-02472, 37-02471, 37-20710, 37-20709, 36-02013, 36-02018 and 36-02026 pursuant to the Swan Falls Settlement.

*Order Amending Final Unified Decree* at 1-2, *In re* SRBA, (June 25, 2015). And as to development of trust water rights through the permitting process, this was also confirmed by Judge Wildman in the *Memorandum Decision*:

Finally, the Agreement has been in effect since October 25, 1984. Based on the trust arrangement, **new water right permit applications have been processed and approved**, some limited to twenty-year terms.

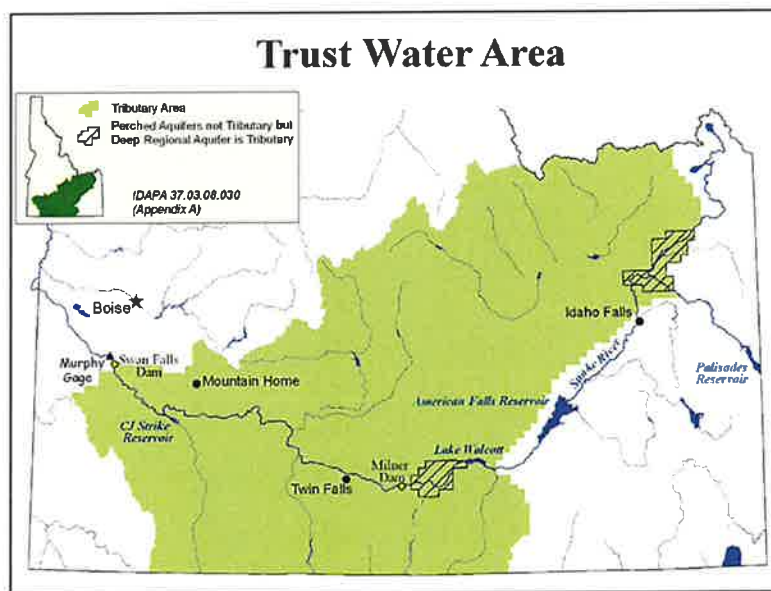
*Memorandum Decision* at 47 (emphasis added).

Based on the foregoing, trust water rights are only those water rights obtained through Idaho's water right permitting process for beneficial uses initiated after October 25, 1984. There is no component of trust water that includes *existing* water rights—trust water only implicates future uses of water and trust water rights only involve water rights acquired through Idaho's water right permitting process for such trust water.

Based on the foregoing, a transfer that changes the timing and location of pumping impacts under an existing water right is not an appropriation of trust water under Idaho Code § 42-203B because only a new water right can be “acquired pursuant to state law” as the statutory language provides. A transfer under Idaho Code § 42-222 does not provide for the ability to acquire a new water right, such as a trust water right under Idaho Code § 42-203B. Rather, a transfer only authorizes amendment of an *existing* right. In direct answer to the Hearing Officer's question, Idaho Code §§ 42-203B and 42-203C are not implicated in this proceeding because these sections describe and implement the trust water concepts under the Swan Falls Agreement (which agreement specifically called for enactment of these statutes) and trust water can only be acquired through the permitting process. This is the case even if modeling of the Transfers shows an increase in impacts to reaches of the Snake River below Milner.

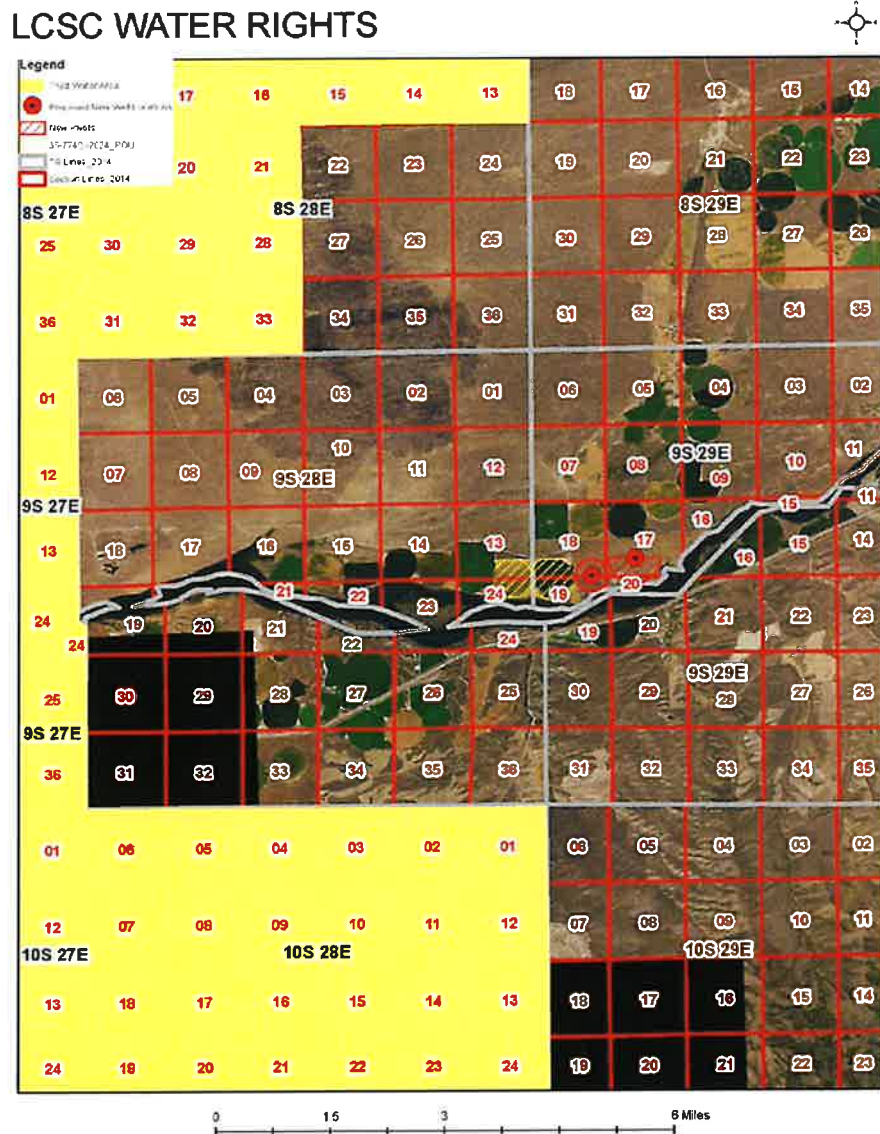
- C. Alternatively, even with modeled increased impacts to reaches of the Snake River below Milner, the Transfers propose diversion and use of water at a location outside the trust water area designated by the State of Idaho, and therefore, do not propose to divert trust water.

In the alternative to the arguments set forth above, the Transfers propose to utilize a point of diversion that is outside the designated “Trust Water Area” as delineated under IDWR’s Water Appropriation Rules. These rules are clear: “Surface water and groundwater tributary to the Snake River upstream from Milner Dam is **not** trust water.” IDAPA 37.03.08.030.01.b. (emphasis added). The IDAPA rules further provide that the Director is authorized to prepare a map of the areas of Idaho “within which surface and ground water is deemed tributary to the Snake River between Milner Dam and the Swan Falls Dam for purposes of the Swan Falls Settlement.” *Overview of the Swan Falls Settlement* at 4, available at <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/swan-falls-settlement/20120715-Overview-of-Swan-Falls-Settlement.pdf>. This map is depicted here:



*Id.* at 5.

WR 35-14041, as currently described, is authorized to divert water from within the designated Trust Water Area shown on the above map, even though it is *not* diverting trust water as described above. The Transfers actually propose to move WR 35-14041 *outside* of the Trust Water Area as evidenced by the following map where the Trust Water Area is projected over a GIS map of the LCSC proposed new place of use:



Accordingly, even with modeled increased impacts to reaches of the Snake River below Milner, the Transfers propose diversion and use of water at a location outside the Trust Water Area designated by the State of Idaho, and therefore, do not propose to divert trust water. As a result, the plain language of Idaho Code § 42-203B(3) applies:

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.

For this additional reason, trust water is not implicated under the Transfers. Because the Transfers do not propose to divert from the Trust Water Area, Idaho Code §§ 42-203B and 42-203C are not implicated in this proceeding because these sections describe and implement the trust water concepts under the Swan Falls Agreement (which agreement specifically called for enactment of these statutes) and trust water is not involved. Accordingly, for this additional reason, the Transfers do not trigger a review under the Idaho Code § 42-203C criteria.

### **III. CONCLUSION.**

As set forth above, it is evident from the background to and language from the Swan Falls Controversy and its associated agreements, subsequent proceedings associated with the Swan Falls Agreement, and other provisions of Idaho law, that IPC fully subordinated its hydropower water rights to existing water uses, including WR 35-7884 (the parent right to 35-14041). The scope of that full subordination includes the pumping impacts from this right, even if the impacts are redistributed as a result of a transfer application. Additionally, redistribution of pumping impacts because of a transfer that show an increased impact to flows in the Snake River below Milner Dam is not an “appropriation” of trust water under Idaho law. Accordingly, even if there is a reduction in flows in the Snake River below Milner Dam as a result of a transfer, that *does not* constitute an appropriation of trust water, and as a result, *does not* require a review of the transfer under the

criteria set forth in Idaho Code § 42-203C. In the alternative to these arguments, the Transfers proposed to divert water from a location outside of the Trust Water Area, and as a result, do not implicate any trust water issues. The Hearing Officer should decide as a matter of law that the portion of IPC's protest on these trust water issues are not valid.

Submitted this 5<sup>th</sup> day of November, 2021.



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

**CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of November, 2021, 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 ARGUMENT BRIEF**

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