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Department of Water Resources
Eastern Region

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Attorneys for Idaho Power Company

**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

**IDAHO POWER COMPANY'S
RESPONSE BRIEF**

COMES NOW, Protestant Idaho Power Company ("Company" or "IPC"), and, pursuant to Hearing Officer Cefalo's *Request for Briefs*, dated October 12, 2021, files this brief in response to Applicant's *Argument Brief* dated November 5, 2021.

BACKGROUND

In this matter, the Hearing Officer requested the submission of proposed legal issues for his consideration as a part of the prehearing discovery. Upon submittal of proposed legal issues by the parties, the hearing officer held a status conference on October 6, 2021. At the status conference, the Hearing Officer discussed at length the proposals by the various parties for

inclusion as a legal issue. The Applicant's proposed legal issues included a vague concept of "full subordination" contemplated by the Swan Falls Agreement. This issue was fully discussed at the status conference by the Hearing Officer and the parties. After substantial discussion with the parties, the Hearing Officer declined to request briefing on all issues submitted by the parties, with the exception of the following very narrow issue:

If a transfer of water rights filed pursuant to Idaho Code § 42-222 results in a reduction of 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?

RESPONSE

I. The Hearing Officer should strike briefing which argues legal issues beyond the very narrow legal issue presented.

Idaho Power Company would request that the portions, if not the entirety of the Applicant's brief, which directly or indirectly raise or rely upon briefing of legal issues and argument that are outside of the narrow scope of the hearing officer's legal issue be stricken from the record. The Applicant spends considerable briefing on the issue of "full subordination," a matter which was brought before the Hearing Officer in October and dismissed as an issue outside of the scope of legal issues for consideration during this prehearing discovery process. As such, the Hearing Officer should strike this briefing from the record and further, should not consider it as a part of the consideration of the very narrow legal issue identified. Pursuant to Rule 37.01.01.413, the Hearing Officer has the authority and discretion to take such action. Allowing the material to be included in the record and/or considering these issues in the context of this limited proceeding would be contrary to the Hearing Officer's decision at the status conference. In addition, the other parties who either briefed the narrow issue presented by the hearing officer or, due to the absence of notice that these additional issues were to be considered

in this limited proceeding, chose not to participate, are also prejudiced by Applicant's brief.

Further, as support for excluding the portions of Applicant's brief that goes beyond the identified legal issue, the Company has identified numerous mischaracterizations of the Company's position or motive(s) relative to the Swan Falls litigation and ultimate settlement.¹ Misrepresentations of litigation positions or arguments made during the Swan Falls litigation prior to settlement, have no relevance on the issue of how the trust water depletions should be considered by the IDWR. The hearing officer should disregard these assertions in order to move this matter closer to resolution without providing a forum for Applicant's efforts to re-write history.

II. A transfer which depletes trustwater is an appropriation.

¹ By way of example of the mischaracterizations, on page 9 of the Applicant's brief, the Applicant in reference to the 1977 PUC action states, "Rather than address[ing] 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." *Idaho Power Co. v. State, By & Through Dep't of Water Res.*, 104 Idaho 575, 661 P.2d 741 (1983). This is not what happened, nor is it what the case says. Here is the relevant passage from the case:

Idaho Power sought to have that complaint dismissed for lack of jurisdiction. Idaho Power's motion to dismiss was denied, and Idaho Power answered the complaint indicating it would file an action in district court to protect those Swan Falls water rights. A large number of applications for water permits were then pending before the Idaho Department of Water Resources and Idaho Power filed protests against a large number of those applications. In the interim, and pending the outcome of this case, the Public Utilities Commission has retained jurisdiction over the Matthew Mullaney complaint. *Id.*

Also, on page 17 of the Applicant's brief in referencing the 2007 lawsuit, the Applicant fails to fully describe the circumstances surrounding the IPC 2007 filing. *Applicant's Brief* (Nov. 5, 2021) p. 17. The Applicant leaves the impression that it was an assertive move by IPC when actually it was in reaction to the State's filing of Notices of change of ownership in 2006 on the majority of IPC's water rights. (See attached Exhibit A). The state, in over 20 years since the Swan Falls Agreement, had never asserted that it owned IPC's water rights. IPC filed the referenced action in response to the State's claims of ownership, taking the position that it was the "water" not the water rights that were the res of the trust, and that there were questions if the trust held anything as there may not have been any water available for the trust.

Finally, as a point of clarity, it was Judge Melanson, not Judge Wildman, as stated in the Applicant's brief, who rendered the 2008 decision which ultimately held that the trust was composed of the water rights. *Memorandum Decision and Order on Cross-Motions for Summary Judgment, In re SRBA*, Case No. 39756, Consolidated Subcase No. 00-92023 (92-23) (April 18, 2008). In summary, if the hearing officer would benefit from a closer review of the circumstances, history and court decisions associated with the Swan Falls settlement and implementation, such analysis should only occur pursuant to the hearing officer's schedule and notice to all parties.

At the core of the Hearing Officer's very narrow legal issue is whether the "depletion in water held in trust" is an appropriation of trust water. Initially, it must be recognized that the water now recognized as trust water was originally appropriated for hydropower purposes. *See* Idaho Code § 42-203B(2). The term trust water refers only to water sources "tributary to the Snake River below Milner Dam." Hence, the reference in Idaho Code § 42-203B(2), "[f]or the purposes 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 water rights of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered," identifies geographically what water sources produce trust water. This statement recognizes that water otherwise diverted from locations along the Eastern Snake River plain could impact flows above and below Milner dam. Trust water is only that portion of water tributary to the Snake River below Milner.

Through the Swan Falls Settlement between the State and the Company, the portion of the Company's water rights in excess of 3900 and 5600 cfs is held in trust for reallocation by the State. This trust water was previously appropriated by the Company for hydropower and can continue to be used for such purpose until reallocated to other uses. There is only one way in which this trust water can be reallocated, that is diverted, consumed, controlled and that is pursuant to Idaho Code § 42-203C. Idaho Code § 42-203C(1) goes on to further describe the appropriation as "the proposed use...." which is consistent with the hearing officer's factual finding of the proposed transfer – reduction in the amount of water held in trust. Logically, for there to be a reduction, there must be a consumptive use.

Further and consistent with subsection 1 of Idaho Code § 42-203C, the reallocation or subsequent appropriation results in a reduction in the amount of trust water available, and either

reduces the amount available for future appropriation or for the holder of the water right used for power production. If another means for reducing trust water that was not contemplated by the agreement referenced in Idaho Code § 42-203B exists, then the purposes of the trust would be frustrated. *See* 2012 Idaho State Water Plan, Section 4C – “REALLOCATION OF SNAKE RIVER TRUST WATER”. New and future development is reliant upon the existence of trust water and this fact was at the core of the Swan Falls Settlement. Reductions of trust water as a result of transfers reduces the opportunity for future development, impedes hydropower generation and may in fact increase the risk of a violation of the established minimum flows from the Swan Falls Agreement. This use of trust water was not contemplated by the Swan Falls Agreement and certainly, it cannot occur without any administrative review.

Additionally, the existence of the Eastern Snake plain moratorium was and is an ongoing acknowledgement that the sole source of available water supply in the reaches below Milner is trust water. *See Amended Moratorium Order dated April 30, 1993*. Even non-trust area proposed uses are subject to IDWR heightened scrutiny in light of the developing ESPA ground water model and corresponding results. The IDWR has acknowledged that the water supply below Milner is fully appropriated and that the depletions such as described in the Hearing Officer’s legal issue should not be approved without consideration of their impacts. *See In the Matter of Application for Transfer No. 83160 (“Duffin”) Amended Preliminary Order Denying Transfer dated August 12, 1990, pp.13-14; Case No. CV 2011-15672 Memorandum Decision and Order on Petition for Judicial Review, dated May 23, 2012, pp. 10-12.*

The thrust of the Applicant’s argument is that a transfer is not an appropriation of water.² This argument fails on two accounts: First, the identified transfer by the very legal question

² The Hearing Officer’s legal issue is not specific to any transfer and again only relies on one fact; a reduction in water held in trust.

posed, results in accessing and depleting a new source, the trust water. The typical transfer involves a change in the point of diversion. While the legal issue posed factually describes the depletion of trust water as the source of depletive, or consumptive use, this question and reasoning is equally applicable to situations which do not involve trust water. That is where a proposed transfer accesses and depletes a second, separate source. In such an instance, this appropriation of the separate source would trigger the IDWR appropriation rules review. There is no authority to authorize such depletion without consideration of the impacts of said appropriation on the source and other water rights. Likewise, there is no basis to treat trust water separately.

Second, if as the Applicant suggests the depletion of trust water isn't an appropriation, a consumptive use, then what under what statutory authority can the transfer be approved? Would such transfer then be considered under the criteria of Idaho Code § 42-222 and consideration of whether the source is fully appropriated?

To reach any other conclusion would be to ignore the legal issue and the factual premise embedded in the legal issue presented, that is, a reduction in trust water. Recall that the creation of the trust was based upon the recognition that the resource was fully appropriated.

Memorandum Decision and Order on Cross-Motions for Summary Judgment, In re SRBA, Case No. 39756, Consolidated Subcase No. 00-92023 (92-23) (April 18, 2008). If a transfer, in a fully appropriated system, that results in a reduction of the amount of trust water does not constitute a reallocation or appropriation of trust water and reduce the availability of trust water for new development, what water is left for depletion from the transfer. Arguably only that water which has already been appropriated by other existing water rights and said rights would be injured, which triggers the obligation of the proposed transfer to mitigate.

CONCLUSION

Clearly, under the precise wording of the legal issue presented, if a transfer results in a reallocation or appropriation of trust water it would require a review under Idaho Code §42-203C. There is no legal basis to ignore this fact. Simply because, in the legal issue raised, the separate source is trust water doesn't excuse the analysis under the IDWR appropriation rules.

DATED this 19th day of November, 2021.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to be "JS", is written over a horizontal line.

John K. Simpson

Attorneys for Idaho Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2021, I served the original of the foregoing **IDAHO POWER COMPANY'S RESPONSE BRIEF**, by hand-delivering or depositing same in the U.S. Mail, postage prepaid, as indicated, addressed to the following:

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/s/ John K. Simpson
John K. Simpson

EXHIBIT A

RECEIVED BY
DEC 22 2006
OFFICE OF THE
ATTORNEY GENERAL



SRBA



42188

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WARDEN

December 22, 2006

Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

Re: Notices of Change in Water Right Ownership Under Swan Falls
Agreement and Implementing Legislation.

Dear Sir/Madam:

Please find attached two Notices of Change In Water Right Ownership for water rights nos. 02-2001A, 02-2001B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-10135, 36-2013, 36-2018, 36-2026, 37-20709, 37-20710, 02-4000, 02-4001, and 02-2032. These notices and the supporting documentation are submitted in accordance with and pursuant to the terms of the Swan Falls Agreement. This submission is ministerial in character and required under the agreement and the implementing legislation.

As you know, the Swan Falls Agreement was executed on October 25, 1984, to resolve a lawsuit between the State of Idaho and Idaho Power Company regarding the nature and extent of Idaho Power's hydropower water rights at Swan Falls dam on the Snake River. At issue was whether Idaho Power had subordinated its hydropower rights to junior upstream water rights. The lawsuit and the underlying controversy raised questions of the utmost importance to the State and water users throughout the Snake River basin.

The Swan Falls Agreement and the legislation enacted to implement it settled many of these questions by recognizing unsubordinated water rights for seasonal minimum flows measured at the Murphy gauge for Idaho Power Company, and by vesting the State with legal title to the remainder of the hydropower water rights for projects covered by the agreement. The State holds these water rights in trust for the

benefit of both Idaho Power and people of the State of Idaho, as the Swan Falls Agreement itself, the implementing legislation and the legislative history make quite clear.

Indeed, the Swan Falls Agreement requires the State to "assert the existence of water rights held in trust by the State,"¹ and was expressly conditioned on the passage of legislation providing that flows exceeding the unsubordinated minimums "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."² This proposed legislation was enacted and codified as Idaho Code § 42-203B(2).

The legislative history of the legislation implementing the Swan Fall Agreement confirms the State's ownership of these hydropower water rights. The Senate unanimously adopted the "Statement of Legislative Intent" for the centerpiece of the Swan Falls legislation, which was read into the record in the Senate on February 6, 1985. In reference to the provision of the legislation that ultimately became Idaho Code § 42-203B, the Statement of Legislative Intent states that:

this section establishes a trust in which title to certain specified water rights will be held. The trust pertains to water rights for power purposes which are in excess of minimum stream flows established by state action. . . . Any portion of such water rights above the established minimum flows will be held in trust by the State of Idaho, by and through the Governor of the State of Idaho. This trust will hold these water rights for the benefit of the power user so long as they are not appropriated as provided by law by future upstream beneficial users. The trust also operates, however, for the use and benefit of the people of the State of Idaho, to assure that water is made available for appropriation by future upstream users who satisfy the criteria of Idaho law for reallocation of the water rights held in trust. . . .

Hydropower rights in excess of such flows will be held in trust by the State and are subject to subordination to, and to depletion by lawful beneficial uses. . . .³

The Statement of Legislative Intent goes on to state that:

¹ Swan Falls Agreement of October 25, 1984 ("Swan Falls Agreement") at 1 ¶ 4. A copy of the Swan Falls Agreement is included in the "Attachments to Notices of Change of Water Right Ownership" ("Attachments") at Tab 1.

² Swan Falls Agreement at Exhibit 7B ¶ 4; Attachments at Tab 1.

³ Journal of the State Senate, 1st Reg. Sess., 48th Leg., 1985 at 59 (Feb. 6, 1985). A copy of the portion of the Senate Journal containing the Statement of Legislative Intent is included in the Attachments at Tab 4.a.

As applied to the agreement between Idaho Power Company, the Governor and the Attorney General, this trust arrangement results in the State of Idaho possessing legal title to all water rights previously claimed by Idaho Power Company above the agreed minimum stream flows and Idaho Power Company holds equitable title to those water rights subject to the trust.⁴

The parties' statements before various legislative committees likewise confirm the State's ownership of the hydropower water rights referenced in the agreement. They demonstrate that the parties viewed the agreement and the legislation as creating a trust in which legal title to the water rights for flows exceeding the minimums was held by the State, for the benefit of Idaho Power and the people of the State of Idaho. As Idaho Power's attorney stated before the Senate Resources and Environment Committee on January 18, 1985:

In the course of the negotiations, in the final stages, we were "laugerheaded" on the question of whether the Company's water rights above the minimum flow, would be immediately subordinated by implementation of the agreement or remain in place unsubordinated until such time as the state permitted that water to someone elses use. . . . The trust concept was adopted to get around it so that water was placed in trust. The agreement clearly says it is unsubordinated, so far as the agreement goes, it is an unsubordinated block of water. **The state then takes that water and places it in the 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. . . . The state then does not have to allow the water to go to the first guy who comes down the pike. The trust got around that problem and I think tied it together to a point where it is a little more effective mechanism to accomplish the purchase⁵ of the agreement.⁶

At the same hearing, the Governor's attorney observed that the trust "simply was a mechanism to cut the legal and equitable title to the water immediately so there is some immediate change in position of the parties. Soon as this agreement becomes binding this statute takes effect. Legal title to the water will go to the state and the Company maintains the beneficial use of the

⁴ Journal of the State Senate, 1st Reg. Sess., 48th Leg., 1985 at 60 (Feb. 6, 1985); Attachments at Tab 4.a.

⁵ So in original. Presumably, this word was intended to be "purpose."

⁶ Minutes of the Senate Resources & Environment Comm., Jan. 18, 1985, at 3 (Tom Nelson) (emphasis added). A copy of these minutes is included in the Attachments at Tab 4.b.iii.

water as long as the trusts last."⁷ Idaho Power's attorney concurred in this observation,⁸ and further explained to the committee, on February 1, 1985:

The Company said it didn't want to be watermaster; the state said OK, then take yourself totally out of vestige of any control over the rights that you have defined. We said alright, but if you are going to be the watermaster then you get out and you take care of it . . . The trust provision was an idea I think of the state. I seized upon it because it filled what I saw as a major problem the Company had in this thing throughout, which was we could get the state to sign, but how did we get the state to live up to what they said they would do and that was a major problem from our side. The trust provision could get us around the subordinated versus subordinatable nature of the water above minimum flow. It remains unsubordinated but its held in trust by the state. . . .⁹

In sum, the trust severed legal and equitable title to the rights to flows above the agreed-upon minimums, with legal title vesting in the State. This solved an impasse that had developed: Idaho Power had demanded that the rights to the excess flows should only be subject to subordination at some future time, while the State had demanded that the rights be subordinated immediately. The trust put the State in immediate control of the excess flows while allowing such flows to remain available for power generation until such time as future upstream beneficial uses were approved in accordance with State law.

Although the Swan Falls legislation provides that the rights are held by the State of Idaho "by and through the Governor," the legislative history makes clear that the legislature has the ultimate control over the trust:

This is strictly a passive trust over which the Governor will not exert any active discretions. . . . The Governor is named as trustee just because you need an individual to be sued in the event of some scramble over the trust assets. Beyond that it is automatic that water rights flow out of the trust into private hands in accordance with state law.¹⁰

⁷ Minutes of the Senate Resources & Environment Comm., Jan. 18, 1985, at 11 (Pat Costello); Attachments at Tab 4.b.iii.

⁸ Minutes of the Senate Resources & Environment Comm., Jan. 18, 1985, at 11-12 (Tom Nelson); Attachments at Tab 4.b.iii.

⁹ Minutes of the Senate Resources & Environment Comm., Feb. 1, 1985, at 4-5 (Tom Nelson); Attachments at Tab 4.b.vii.

¹⁰ Minutes of the Senate Resources & Environment Comm., Jan. 18, 1985, at 11 (Pat Costello); Attachments at Tab 4.b.iii.

The Governor of course is a passive trustee. The intent here was that the Director would be the individual who would make the re-allocation determination. . . .

On that trust provision, it should be noted that the ultimate control over those trusts does rest with the Legislature. They created those trusts and of course they can alter them or take whatever steps are necessary.¹¹

As the preceding discussion demonstrates, the attached notices of change in water right ownership do not of themselves affect any change in the water rights that are subject to the Swan Falls Agreement. Rather, the notices simply recognize that the agreement and the implementing legislation vested legal title to the rights for the flows above the agreed-upon minimums in the State, to be held in trust for the benefit of Idaho Power Company and the people of the State of Idaho. Now that the SRBA has reached the portion of the Snake River that includes the Swan Falls dam, filing the notices is necessary to discharge a portion of the State's contractual and statutory obligations, and to protect the interests that the people of the State of Idaho acquired under the agreement and the implementing legislation.

The supporting attachments submitted with the notices include copies of the documents and transcripts quoted herein, as well as additional legislative history and other supporting documentation. In the interests of keeping this package as compact as possible, the attachments do not include survey maps or plats because this matter does not involve a change in ownership of land or any changes in points of diversion or places or purposes of use. Please contact us if you need any further information or have any questions. Thank you.

Very Truly Yours,



LAWRENCE G. WASDEN
Attorney General, State of Idaho

LGW/olv

Enclosures

¹¹ Minutes of the Senate Resources & Environment Comm., Jan. 18, 1985, at 11- 12 (Pat Koley); Attachments at Tab 4.b.iii.