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Department of Water Resources
Eastern Region

Robert L. Harris (ISB No. 7018)
rharris@holdenlegal.com
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

Attorneys for LCSC Enterprises LLC

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 RESPONSE TO IDAHO
POWER COMPANY'S OPENING 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 Response to Idaho Power Company's Opening 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”). 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?

LCSC timely submitted *Applicant’s Argument Brief* on November 5, 2021. IPC timely submitted *Idaho Power Company’s Opening Brief* on the same date. Both parties are permitted (but not required) to submit response briefs. *Request for Briefs* at 1. LCSC has elected to submit this *Applicant’s Response to Idaho Power Company’s Opening Brief*.

As set forth below, none of IPC’s arguments change the legal authority and conclusions contained in *Applicant’s Argument Brief* that (1) IPC fully subordinated its hydropower water rights to existing water uses, including WR 35-7884 (the parent right to 35-14041); (2) 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; and (3) 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 Transfers, that *does not* constitute an appropriation of trust water, and as a result, *does not* require a review of the Transfers under the criteria set forth in Idaho Code § 42-203C. Further, 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* the exercise of WR 35-14041 diverts water considered to be trust water (and LCSC maintains that WR 35-14041 does not divert trust water).

I. ARGUMENT.

IPC primarily relies upon the Water Appropriation Rules (IDAPA 37.03.08) to assert that redistribution of pumping impacts from an existing water right is an appropriation of trust water and frames the issue as follows:

Therefore, the legal issue to be addressed is the very narrow issue of whether the Water Appropriation Rules (IDAPA 37.03.08 and Idaho Code § 42-203C) must be satisfied in addition to other legal and factual findings in order to approve said transfer.

Idaho Power Company's Opening Brief at 2. This quote also contains the following footnote:

The legal question as framed raises a number of issues not necessarily presented for resolution in the present briefing. For instance, an unresolved question is whether the transfer is an authorized or the type of appropriation intended for the potential reallocation of trustwater consistent with Idaho Code § 42-203B. Resolution of this issue would necessarily involve the perspective of the state of Idaho as trustee and the citizens of Idaho and Idaho Power Company as beneficiaries. Hence, this issue is left for discussion and possibly future interpretation by either this hearing officer or by the state of Idaho as trustee of the trust held for the benefit of the citizens of the state of Idaho and Idaho Power Company.

Id. at fn. 1.

These arguments are somewhat unclear to the Applicant and appear contradictory. On one hand, IPC is saying that a transfer application is an appropriation, and on the other (in the footnote) it is saying that whether a transfer is an appropriation is “an unresolved question” and that resolution of that question would necessarily require the perspective of the State of Idaho. Later in their brief, 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.” *Id.* at 3. Accordingly, despite the contents of footnote 1, we understand IPC’s position to clearly be that a transfer that results in a reduction of water below Milner Dam is an

“appropriation” of trust water. IPC asks that “if the reduction of trust water realized as a result of a transfer is not an appropriation, then what is it?” *Id.* at 4.

First, in response to this question, as described in *Applicant’s Argument Brief*, the water diverted by WR 35-7448 is not trust water. It is undisputed that WR 35-7448 was exercised prior to October 24, 1984, and is in a class of water rights where IPC’s hydropower water rights are fully subordinated to it:

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.

Clive J. Strong & Michael C. Orr, *Understanding the 1984 Swan Falls Settlement*, 52 IDAHO L. REV. 223, 235 (2016) (hereinafter “*Understanding*”).

The pumping impacts associated with WR 35-7448 (the parent right to 35-14041) 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 discussed in *Applicant’s Argument Brief* (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.

As a result of this full subordination, 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 this, 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.

Additionally, as described in *Applicant's Argument Brief*, trust water is only that water that is subject to future appropriation accomplished through obtaining a new water right through Idaho's water right permitting process. It does not include a change in the location of those impacts

through 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 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” new water. It amends certain elements of a water right that already authorizes use of water.

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. 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, *In re* SRBA, Case No. 39576, Consolidated Subcase No. 00-92023 (Jan 4, 2010). Even the SRBA *Final Unified Decree* was amended to include a specific definition that uses the terms “acquired” and “first appropriated,” terms that only apply to newly-obtained water rights:

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 being accomplished 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 existing prior to that date. 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.

In support of its arguments, IPC quotes from the new information sheet at the beginning of the Water Appropriation Rules under the question "What is the purpose of this rule?" This page repeats the term "reallocation" contained in the Water Appropriations Rules, a term that IPC utilizes throughout its brief. IPC asserts that the Transfers present:

the very factual scenario identified in the Hearing [O]fficer's legal issue. The State of Idaho holds Idaho Power's water rights in trust for reallocation. Hence, if the approval of a transfer application would result in a reduction in the amount of water held in trust by the state of Idaho, it necessarily contributes an appropriation of that trust water . . .

Idaho Power Company's Opening Brief at 4-5. However, IPC seeks to enlarge this term to mean something it does not—that the "reallocation" language from these rules includes impacts transfer applications—by using it out of context.

Turning to the Water Appropriation Rules, the scope provision provides:

02. Scope.

(7-1-21)T

a. Background and Purpose. The 1985 Idaho Legislature authorized reallocation of certain hydropower water rights to new upstream beneficial uses. The reallocation is to be accomplished using statutes designed to provide for the appropriation of unappropriated public water supplemented by a public interest review of those reallocations which significantly reduce existing hydropower generation. These rules provide the procedures for obtaining the right to divert and use unappropriated public water as well as water previously appropriated for hydropower use which has been placed in trust with the State of Idaho and is subject to reallocation. Guidelines are provided for the filing and processing of applications, and criteria are established for determining the actions to be taken by the Director.

(7-1-21)T

b. Scope and Applicability. These rules are applicable to appropriations from all sources of unappropriated public water in the state of Idaho under the authority of Chapter 2, Title 42, Idaho Code. Sources of public water include rivers, streams, springs, lakes and groundwater. The rules are also applicable to the reallocation of hydropower water rights held in trust by the state of Idaho. The rules are applicable to all applications to appropriate water filed with the Department of Water Resources prior to the effective date of these rules upon which an action to approve or deny the application is pending and to all applications filed subsequent to adoption of the rules and regulations. In addition, the rules are applicable to existing permits to appropriate water required to be reviewed under the provisions of Section 42-203D, Idaho Code.

(7-1-21)T

This provision is clear that the “reallocation” of trust water is only accomplished through the appropriation of new water rights. A transfer application does not seek a new appropriation of water. In fact, there is only a single mention of the term “transfer” in the Water Appropriation Rules, and this provision supports Applicant’s arguments. IDAPA 37.03.08.050.11 is titled “Insuring Assignment of Interest” and it provides that 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 . . .” (emphasis added). The “transfer” referred to in this rule is to existing trust water rights developed after October 25, 1984, given the context of this provision both within the provision itself and the Water Appropriation Rules. Further, the “permit for trust water” language is self-evident that it is referring only to trust water appropriated with a new water right. The definition of “Permit or Water Right Permit” contained in these rules is likewise clear: “The water right document issued by the Director authorizing the diversion and use of unappropriated public water of the state or water held in trust by the state.” IDAPA 37.03.08.101.12. The absence of the term “transfer” elsewhere in these rules is further evidence in support of the Applicant’s position.

Additionally, the *Administrator’s Memorandum* included as Exhibit A to *Idaho Power Company’s Opening Brief* supports Applicant’s position in this matter. This memo’s clear focus

is on new applications for new water rights seeking to appropriate trust water. It addresses how to notify applicants who seek to “appropriate” trust water, affording “the applicant the option of withdrawing the application and receiving a refund of the filing fee prior to publication of the required legal notice,” describes the legal notice requirements for applications for permit for trust water, the placement of identifying conditions on trust water appropriations, and monitoring and reporting of trust water appropriations. There is no mention of transfer applications in this memo.

IPC asserts that “the diversion and use of water must be reflected in a water right to be legally recognized.” *Idaho Power Company’s Opening Brief* at 4. But in this case, WR 35-14041 already exists and *is* the water right where the use of water is legally recognized. The ultimate conclusion in response to the Hearing Officer’s question is that 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. The Water Appropriation Rules also support this conclusion. 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 that already has produced pumping impacts. 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 water right 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.

Finally, as described in *Applicant's Argument Brief* as an alternative argument, 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. IPC does not raise or address this in its brief. On this point, the Water Appropriation Rules provide: "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). 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.

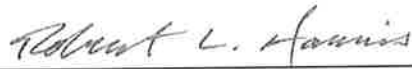
For this additional reason, trust water is not implicated under the Transfers. Because the Transfers do not propose to divert from the Trust Water Area, Idaho Code §§ 42-203B and 42-203C are not implicated in this proceeding and do not trigger a review under the Idaho Code § 42-203C criteria.

II. CONCLUSION.

IPC fully subordinated its hydropower water rights to existing water uses, including WR 35-7884 (the parent right to 35-14041). It should not now be permitted in this contested transfer proceeding to claw back rights it voluntarily agreed to in the Swan Falls Agreement. The scope of that full subordination includes the pumping impacts from WR 35-14041, even if the impacts are redistributed because of the Transfers. Additionally, redistribution of pumping impacts because of a transfer application of a fully protected water right that shows an increased impact to flows in the Snake River below Milner Dam is not an "appropriation" of trust water under Idaho

law. 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 19th day of November, 2021.



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

CERTIFICATE OF SERVICE

I hereby certify that on this 19th 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 RESPONSE TO IDAHO POWER
 COMPANY'S OPENING BRIEF**

ORIGINAL TO: **James Cefalo**
Hearing Officer, Idaho Department of Water Resources
900 North Skyline Dr., Ste. A
Idaho Falls, ID 83402-1718
James.Cefalo@idwr.idaho.gov

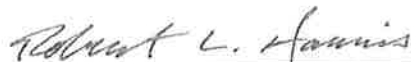
ATTORNEYS AND/OR INDIVIDUALS SERVED:

Travis L. Thompson	☐ Mail
Sarah W. Higer	☐ Hand Delivery
BARKER ROSHOLT & SIMPSON LLP	☐ Facsimile
P O Box 63	☒ Email
Twin Falls, ID 83303-0063	
tlt@idahowaters.com	
swh@idahowaters.com	

W. Kent Fletcher	☐ Mail
FLETCHER LAW OFFICE	☐ Hand Delivery
P. O. Box 248	☐ Facsimile
Burley, ID 83318	☒ Email
wkf@pmt.org	

John K. Simpson	☐ Mail
BARKER ROSHOLT & SIMPSON LLP	☐ Hand Delivery
P O Box 2139	☐ Facsimile
Boise, ID 83701-2139	☒ Email
jks@idahowaters.com	

Scott Pugrud	☐ Mail
IDAHO POWER COMPANY	☐ Hand Delivery
P O Box 70	☐ Facsimile
Boise, ID 83707	☒ Email
spugrud2@idahopower.com	



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

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