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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
OPENING BRIEF**

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

Pursuant to Rule 564 of the Department's Rules of Procedure (IDAPA 37.01.01), the
hearing officer in the instant contested case requested briefing to address the following question
of law:

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?

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The legal issue as framed by the hearing officer, recognizes that Idaho Code § 42-222 and the criteria established by statute, including “no injury to existing water rights” must be satisfied through the hearing process but presumes that those criteria have been satisfied and that the transfer results in the reduction of trust water. Therefore, the legal issue to be addressed is the very narrow issue of whether the Water Appropriation Rules and statutes addressing the reallocation of trust water (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.¹

The trust identified in the hearing officer’s statement was created as a result of the 1984 Swan Falls Settlement. The Idaho State Water Plan (“SWP”), Section 4C – “Reallocation of Snake River Trust Water” explains the background resulting in the creation of the trust. *See also*, Idaho State Water Plan (Idaho Water Res. Bd., Nov. 2012). This background, along with Idaho Code § 42-203B(2), identifies that the water rights held by Idaho Power Company for power purposes were subject to subordination to future depletions down to the minimum flows of 3900 cfs during irrigation season and 5600 cfs during the non-irrigation season. The flows in the river previously appropriated for hydropower purposes were then separated: an unsubordinated Company power right equivalent with the State’s established minimum flows at the Murphy gage; and water right held by the state of Idaho in trust for reallocation to new appropriations for flows in excess of 3900 cfs from April 1 to October 31 and 5600 cfs from November 1 to March

¹ 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.

31.² The flows in the trust, i.e., the portion of the hydropower rights that are subordinatable, are what is commonly referred to as trust water. *See also State Water Plan, Section 4C.*

The purpose of the trust is further clarified in Administrative Memorandum #77, wherein the Department states:

The purposes of the trust established by ... 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... to continue using the water pending approval of depletionary future beneficial uses.

See attached Exhibit A, Administrator's Memorandum re Processing Applications to Appropriate Trust Water, July 18, 2019.

Of particular importance to the legal issue identified by the Hearing officer is the factual assumption that the proposed transfer results in a reduction in the amount of water held in trust by the state of Idaho³. This fact is supported by the development and refinement of the Eastern Snake Plain Aquifer (ESPA) Groundwater Model which has facilitated the Department's ability to model reductions in trustwater. The model provides the Department the ability to assess the impact of actions on the ESPA of any new appropriation or a transfer of an existing water right on reaches of the Snake River below Milner and the corresponding increase in depletions to the trust water reaches below Milner as a result of the proposed diversion and appropriation of water.

I. Idaho Code § 42-203C Clearly Sets Forth the Director's Responsibilities and Criteria for Reallocation of Trust Water.

A transfer that results in a reduction in the amount of trust water available for future appropriations constitutes an "appropriation" consistent with the Idaho Code § 42-203B. To find otherwise would defeat the very intent of the trust. "The rights held in trust shall be subject to

² See Water Right Nos. 02-00100, 02-02032A, 02-04000A, 02-04001A and 02-02032B.

³ An outstanding question in the reallocation of trust water now that said reallocation process is nearly 40 years old, is whether or how much trust water still exists. As with applications to appropriate pursuant to Idaho Code § 42-203A, it must be established that the water supply from the particular source is available and sufficient for the intended beneficial use.

subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.” Idaho Code § 42-203B(2). If not for the presence of the trust and the availability of water rights to subordinate, there wouldn’t be water available for reallocation and appropriation. As the SRBA Court found,

“Next, in order for the State to impose the public interest criteria restrictions on the appropriation of future water rights and avoid the risk of Article XV, § 3 challenges, the river had to be considered a fully appropriated source. Previously, the river was fully (or over) appropriated based upon Idaho Power’s unsubordinated water rights. By placing the portions of Idaho Power’s water rights exceeding the minimum flows in trust, and making the rights “subordinatable” to future uses, the river would still maintain the status of being fully appropriated.....[t]he State was required to apply the public interest criteria in conjunction with approving any new rights. Idaho Power also retained the right to contest any new appropriations.”

In re SRBA, Case No. 39576, Subcase No. 00-92023 (92-23) *Memorandum Decision and Order on Cross-Motions for Summary Judgment*, pp. 40-41 (April 18, 2008).

The SRBA Court clearly defined what constitutes trust water, those flows above the minimum stream flow at the Murphy Gage, which were originally appropriated pursuant to the water rights held by Idaho Power Company.

Stated another way, if the reduction of trust water realized as a result of a transfer is not an appropriation, then what is it? The diversion and use of water must be reflected in a water right to be legally recognized. *See* Idaho Code § 42-201. Appropriations of trust water are governed by Idaho Code § 42-203C and IDAPA 37.03.08. Idaho Code § 42-203C mandates that the Director “shall consider” the criteria set forth in 42-203A and evaluate the public interest. The Department’s water appropriation rules are “applicable to the reallocation of hydropower rights (i.e., Swan Falls trust water) held in trust by the state of Idaho.” IDAPA 37.03.08.025.02 considers applications to appropriate water “from Sources held by State in Trust.” That is the very factual scenario identified in the Hearing officer’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 of the amount of water held in trust by the state of Idaho, it necessarily contributes an appropriation of that trust water and the criteria set forth in Idaho Code § 42-203C must be applied.

DATED this 5th day of November, 2021.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to be 'J. K. Simpson', is written over a horizontal line.

John K. Simpson
Attorneys for Idaho Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 2021, I served the original of the foregoing **IDAHO POWER COMPANY'S OPENING 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

ADMINISTRATOR'S MEMORANDUM

TO: Regional Offices
Water Allocation Bureau

Application Processing No. 77

FROM: Shelley Keen *SK*

RE: Processing Applications to Appropriate Trust Water

DATE: July 18, 2019

This memorandum establishes IDWR's practices for processing applications to appropriate trust water flows as defined in Water Appropriation Rule 30.01 ("Trust Water").¹ These practices include:

- Notifying applicants of the special nature of Trust Water appropriations.
- Identifying applications to appropriate Trust Water in legal notices.
- Placing identifying conditions on permits to appropriate Trust Water.

This memorandum supersedes the guidance in Shelley Keen's October 16, 2015, memorandum *Update to IDWR's Trust Water Conditions*.

Notifying Applicants

For all applications to appropriate Trust Water, IDWR will notify the applicant in writing before advertising that the proposed appropriation is for Trust Water. The notice will explain that:

1. The application process may involve additional evaluation and submittal of information compared to applications that do not propose the use of Trust Water.
2. If approved, the water right will be subject to future public interest review that could affect the future use of the right.
3. If approved, the water right will be curtailed when necessary to satisfy senior minimum stream flow water rights.
4. If approved, the water right will be subject to a periodic term review that may impact the future use of the right.

The intent of the notification letter is to inform the applicant of the nature of Trust Water and to afford the applicant the option of withdrawing the application and receiving a refund of the filing fee prior to publication of the required legal notice. When sending

¹ For more on the nature and location of Trust Water, see Idaho Code § 42-203B and Water Appropriation Rules 17 and 30.

the notification letter to the applicant, IDWR should also scan the copy of the letter in the application file so it is available for public review when the legal notice is published.

A letter template is attached to this memorandum. The template will also be made available in electronic form in IDWR's Workflow software applications.

Identifying Applications in Legal Notices

IDWR will include the following remark in the legal notice for all Trust Water applications:

This application proposes to appropriate trust water and will be evaluated in compliance with Section 42-203C, Idaho Code, and IDWR's Water Appropriation Rules, IDAPA 37.03.08.

This remark is available as a standard remark in IDWR's Workflow software applications.

Applications proposing mitigation will also include IDWR's standard mitigation remark in the legal notice:

Mitigation is proposed for consumptive use.

Placing Identifying Conditions on Trust Water Appropriations

Conditions specific to appropriations of Trust Water serve several objectives, including:

1. Identifying the right as diverting Trust Water.
2. Communicating and establishing the opportunity for a periodic (term) review of the right to re-evaluate the availability of water and the public interest.
3. Communicating to the right holder the potential for curtailment when the minimum stream flow water rights in the Snake River at Murphy Gage are not being satisfied. The curtailment obligation depends on whether the uses under the right are consumptive or non-consumptive and whether consumptive uses are mitigated in accordance with an approved mitigation plan.

To meet the objectives identified above, each new appropriation of Trust Water will have one condition addressing Objectives 1 and 2. In addition, each non-de minimis² appropriation of Trust water will have another condition addressing Objective 3.³

² This memo does not address administration of de minimis appropriations by priority. IDWR will address administration of de minimis appropriations separately.

³ Some rights that appropriate Trust Water have been issued without conditions meeting these objectives or with similar (but not identical) conditions. When staff encounter these situations during licensing or amending a permit, staff should update the conditions to the standard conditions established by this memo. When processing proposed transfers or exchanges of rights with non-conforming conditions or rights lacking conditions identifying them as Trust Water,

- **For Objectives 1 and 2** – IDWR will place the following condition on all new appropriations of Trust Water, including consumptive uses, non-consumptive uses, and mitigated consumptive uses.

This right is for the use of trust water, and it is subject to review <5> years after its initial approval (date of permit approval) to re-evaluate the availability of trust water for the authorized use and to re-evaluate the public interest criteria for reallocating trust water.

- **For Objective 3 (Use is Consumptive)** – IDWR will place the following condition on all new appropriations of Trust Water with consumptive uses, or mixes of consumptive and non-consumptive uses, not subject to moratorium-related mitigation requirements.

When the minimum stream flow water rights in the Snake River at Murphy Gage are not being satisfied, the right holder shall cease diverting water for the consumptive uses authorized by this right. The minimum stream flow water rights are for 3,900 cfs from April 1 through October 31 and 5,600 cfs from November 1 through March 31. See IDAPA 37.03.08.030.

- **For Objective 3 (Use is Non-Consumptive or Mitigated)** – IDWR will place the following condition on all new Trust Water appropriations for non-consumptive uses of water and consumptive uses subject to mitigation.⁴

Administration of this right to satisfy the minimum stream flow water rights in the Snake River at Murphy Gage shall not be required because use of water pursuant to this right is either non-consumptive or the right holder is required to provide ongoing mitigation to offset the depletion of water resulting from the use of this right.

Monitoring and Reporting

IDWR is developing a general water right policy for measurement, monitoring, and reporting to ensure mitigation and other required actions are accomplished efficiently. IDWR will implement measurement, monitoring, and reporting for Trust Water appropriations consistent with the general policy.

staff members should consult their supervisors, who may also consult legal staff regarding whether to update or add the conditions.

⁴ Mitigation may be moratorium-related or may be implemented to avoid curtailment when the minimum Snake River flows at Murphy Gage are not satisfied.

Notification Letter to Applicants Proposing to Appropriate Trust Water

<<< Applicant Name >>

<< Address >>

RE: Application for Permit to Appropriate Trust Water – No. X-XXX

Dear Applicant:

The Department of Water Resources ("Department") has received your application for permit to appropriate water and has accepted it for filing. Your application has been assigned the identification number referenced in the subject line of this letter. Please refer to that number in all future correspondence regarding this application.

Your application proposes to appropriate Trust Water as described in this letter. The special nature of the trust affects how the Department will process your application as well as some aspects of the water right that may result. The purpose of this letter is to inform you of three items specific to applications proposing to appropriate Trust Water:

1. Your application will be subject to additional evaluation compared to applications that do not propose the use of Trust Water. This may require you to submit additional information and to demonstrate that your application meets the statutory evaluation criteria for appropriating Trust Water.
2. If a water right is issued to you, it could be subject to curtailment to satisfy senior minimum stream flow water rights on the Snake River at the Murphy Gage.
3. If a water right is issued to you, it will be subject to a periodic term review that may impact the future use of the right.

To understand better these three items and why they apply to your application, it helps to understand what Trust Water is and how it came about.

Trust Water arose from the 1984 Swan Falls Settlement between Idaho Power Company ("IPC") and the State of Idaho ("State").¹ Prior to the Swan Falls Settlement, the Idaho Supreme Court determined IPC held water rights for use at Swan Falls Dam that exceeded the entire flow of the Snake River at times. This limited future upstream development of water resources in the Snake River Basin. The Swan Falls Settlement resulted in changes to Idaho Law² and to IPC's water rights. As a result of the Swan Falls Settlement and subsequent legislation and court decrees, IPC's hydropower water rights in excess of the minimum flows at Murphy Gage are held in trust by the State. This change allows future development using water that would have previously been delivered to satisfy IPC water rights at Swan Falls Dam and, therefore, would have been

¹ For more information, including a more complete description of the Swan Falls Settlement and resulting legislation, please see the Department's web page: <https://idwr.idaho.gov/legal-actions/settlements/swan-falls/>.

² Although several sections of the Idaho Code were affected, the addition of Sections 42-203B and 42-203C, Idaho Code are the changes most relevant to this discussion.

Exhibit A

unavailable for upstream appropriation. The purpose of this trust is defined in Idaho Code § 42-203B as follows:

The purposes of the trust established by ... 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 ... to continue using the water pending approval of depletionary future beneficial uses.

Your application proposes a use of water that could deplete the rights placed in trust, so the State, through the Department must evaluate your proposal under the laws and rules that came after the Swan Falls Settlement.³ In addition to the usual statutory process and evaluation criteria, the Department must also evaluate whether your application will deplete Trust Water and, if so, whether your depletion of Trust Water is in the public interest.

In addition, the availability of Trust Water and the public's interest in the use of Trust Water could change over time. The Department will periodically review rights to use Trust Water to determine if Trust Water remains available for use and if the continued use of Trust Water is in the public interest. The periodic review will occur for any right that issues from your application. A future review by the Department could terminate or limit your ability to use the right in the future.

An important aspect of the Swan Falls Settlement is that the State agreed to protect the minimum stream flows in the Snake River at the Murphy Gage. Should the flows at the Murphy Gage fall below these minimums, the water rights that use Trust Water could be curtailed to restore flow to meet those minimums.

The Department will hold your application for 14 days to allow you time to contact us if you have further questions on this topic or if you choose to withdraw your application. If the Department does not hear from you within 14 days, the Department will process your application and prepare it for publication. If you choose to withdraw your application before it is submitted for publication, you will receive a full refund of your filing fee. Refunds are not available if an application is withdrawn after advertising.

Please contact this office if you have questions regarding this matter.

Sincerely,

IDWR Water Rights Staff.

Enclosure: Withdrawal of Application form

³ See Sections 42-203C and the Department's Water Appropriation Rules (IDAPA 37.03.08).