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DEPARTMENT OF  
WATER RESOURCES

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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  
PERMIT NO. 02-10535

In the name of Elmore County, Board of County  
Commissioners.

**IDAHO POWER COMPANY'S MOTION  
FOR STAFF MEMORANDUM AND  
MOTION TO STAY PROCEEDINGS**

COMES NOW, Idaho Power Company (the "Company"), by and through its counsel, the law firm of Barker Rosholt & Simpson LLP, and hereby requests the completion of a staff memorandum regarding the current status of trust water appropriation and impact on uses pursuant to Rules 600 and 602 of the Idaho Department of Water Resources (the "Department") Rules of Procedure (IDAPA 37.01.01.600); (IDAPA 37.01.01.602) by order of the Director. Idaho Power Company additionally moves to stay proceedings in the above-captioned matter pending the completion of a full trust water analysis.

**I. PROCEDURAL BACKGROUND**

On March 03, 2017, Elmore County, Board of County Commissioners ("Applicant") filed Application for Permit No. 2-10535 which seeks to divert 20 cfs from trust water sources for the purposes of irrigation, ground water recharge, and municipal use. Idaho Power Company, Idaho

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Conservation League, Idaho Department of Lands, Idaho Water Resource Board and the Bureau of Land Management each filed protests to the Application. Because the Application seeks appropriation of trust water, pursuant to IDWR rules, the Applicant has provided preliminary information regarding the proposed use of trust water. IDAPA Rule 37.03.08.40.05. The matter is currently set for hearing in May 2019.

## II. INTRODUCTION

The concept of trust water as applied here arose from the Swan Falls Agreement in which the Company agreed to subordinate that portion of its hydropower rights in excess of established minimum stream flows at Murphy Gage. The Idaho legislature enacted Idaho Code § 42-203B to implement and codify the Swan Falls Agreement providing that: “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.” Idaho Code § 42-203B(3).

Because those Company water rights in excess of the minimum flows had already been appropriated, the re-appropriation of those rights would not be subject to the Idaho constitutional requirements that the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. I.D. CONST. art. XV, § 3. Thus, the re-appropriation of trust water allows for stricter criteria to be met before an application to divert trust water was approved and provided for a subsequent term review.

Idaho Code § 42-203C sets forth more stringent parameters for the analysis of trust water applications to protect trust water and Swan Falls flows, and the Department further developed regulations for processing trust water applications.

The State, as trustee of the trust waters held for the benefit of Idaho Power Company and the people of Idaho, has a duty to assess the impact of requested trust water appropriations not

only on the availability of trust water, but also to consider impacts on flows downstream of the trust water area which bear upon the public interest criteria enumerated in the Department's Appropriation Rules. To make such a determination, a complete accounting of existing trust water appropriations is necessary.

### **III. ARGUMENT**

#### **A. A Trust Water Accounting is Necessary to Meet Statutory Requirements for the Reallocation of Trust Water.**

Idaho Code § 42-203C provides that:

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 ... 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.

I.C. §42-203C; affirmed by IDWR Rule 37.03.08.25.02.

If there is a finding of significant reduction, the proposed use must be evaluated under the public interest analysis set forth in Idaho Code § 42-203C. This determination falls upon the Director, or in this case the Hearing Officer, regardless of whether the application for trust water is protested or not. A determination of significant reduction cannot be made without a trust water accounting.

#### **i. The Department should compile a complete trust water accounting.**

As discussed above, the Department is required to make a determination of whether a proposed application would significantly reduce available trust water. Rule 600 of the Department's Rules of Procedure authorizes the hearing officer to use the Department's "experience, technical competence and specialized knowledge" in the evaluation of evidence. Rule

602 additionally allows a hearing officer to take notice of technical or scientific facts within the Department's specialized knowledge, including agency staff memoranda and data.

In addition to the Department's statutory requirement to determine the extent of an application's impact to trust water, the Department has both the data of its prior trust water appropriations and the access to that data necessary to undertake a complete accounting. Prior to Elmore County's current application, and since the legislative enactment of statutes which codified the Swan Falls Agreement, the Department has issued numerous permits for the appropriation of trust water. In 2011, the Director recognized a need to assess then-current appropriations of trust water in order to make a finding of whether Permit No. 35-8359 for trust water should or should not be approved. However, since that time, the Company is not aware of any current accounting of the cumulative magnitude of these trust water appropriations. Such an accounting is within the Department's specialized knowledge, of which a hearing officer may take note and use to evaluate evidence.

Additionally, the state as trustee<sup>1</sup> carries a heightened level of responsibility and obligation to undergo certain analyses of trust water reallocations for the benefit of the Company and the people of Idaho. These analyses require a full accounting of trust water and the completion of the analysis contemplated under I.C. §42-203C(1). For example, the Department appropriately undertook a full trust water/significant reduction analysis when contemplating Permit No. 47-7170, providing several conclusions of law based upon significant modeling of existing and probable trust water appropriations, the timing those reductions would be seen in the Snake River

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<sup>1</sup> The following stipulated remarks (in pertinent part) are placed on Idaho Power Company's subordinated water rights held in trust by the State of Idaho: "1. Legal title is held in trust by the State of Idaho, by and through the Governor, for the benefit of Idaho Power Company as the user of the water for power purposes and for the benefit of the people of the State of Idaho." "3. Idaho Power Company, as user of the water for power purposes and a beneficiary of the trust referenced above is entitled to use the water available at the facility identified herein to the extent of its actual beneficial use but not to exceed the 'quantity' set forth above, and to protect its rights to such use of the water as provided by state law against depletions or claims not in accordance with state law."

and its tributaries, and the impact those reductions in flow would have on hydropower production. *Memorandum Decision and Order*. Permit No. 47-7170, June 1990. The Department cannot accurately determine an application's individual impact or additive cumulative impact on trust water sources when there has not been an accurate accounting of the cumulative appropriations from the past two decades.

Additionally, existing trust water rights are conditioned with a term of years provision for the Department to re-evaluate at the end of that term whether there remains sufficient trust water to allow the continued recognition of that right and whether the right's use is in the public interest. That term of years provision for many existing trust water rights either has expired or will expire soon. These re-evaluations will also require a full accounting of all current trust water appropriations which bears not only upon their continued recognition, but also upon the availability of trust water for future and current applications, such as Elmore County's filing.

Clearly the Department is in the best position to compile the data required to determine the cumulative status of current trust water appropriations and the Director of the Department is statutorily mandated to consider whether Elmore County's proposed appropriation would create a significant reduction of trust water when viewed cumulatively.

Thus, the Company respectfully requests that the Department provide a staff memorandum to encompass an accounting of all current trust water appropriations and to evaluate the extent of reduction in trust water available at the Company's facilities. The Company also requests that the Department require attendance of the staff who participate in composing this staff memoranda for examination before and at any hearing set in this matter pursuant to IDAPA 37.01.01.201 and Rule 602.

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**ii. The requirement to compile a trust water accounting and analyze significant reduction does not fall on the Company.**

In contested cases, Rule 37.03.08.40.04.b.iii and I.C. § 42-203C shift the burden of proof with respect to the significant reduction of trust water from the applicant to the protestant. The burden stays with the applicant when an application seeks to divert trust water for irrigation purposes as that proposed use is presumed a significant reduction. Rule 37.03.08.45.02.d. However, neither section shifts the initial and ultimate significant reduction decision away from the Department. Thus, the Department is required to undergo its own full significant reduction analysis regardless of which entity, applicant or protestant, bears the burden against the other in a contested case. Further, neither applicant nor protestant is able to provide evidence regarding significant impact of an application if there has not been a full accounting of trust water provided by the Department. Ultimately, it falls upon the Department to undertake a trust water accounting as the State is the trustee of trust water and responsible for the final decision regarding significant reduction.

**B. Application No. 2-10535 Should be Stayed Pending Completion of a Full Trust Water Accounting.**

The Director, or Hearing Officer, is required to consider whether the cumulative impact of an application to appropriate trust water will significantly reduce the amount of trust water available. Idaho Code § 42-203C. As discussed above, the Department has not yet compiled a full accounting of current trust water appropriations upon which to properly base a finding regarding a new appropriation's potential impact on trust water. An accurate assessment of existing trust water appropriations is necessary for all parties to respond to the current application and for the State to consider in its statutorily required analysis. Thus, the Company requests that Application No. 02-10535 be stayed until a full accounting of existing trust water appropriations has been

provided by the Department.

### CONCLUSION

As trustee of trust water held for the benefit of the citizens of Idaho and Idaho Power Company, the Department should provide a full accounting of current trust water appropriations to meet its statutory obligation for review and analysis of Elmore County's Application.

The Department should additionally stay proceedings in the current Application as the Hearing Officer and parties cannot adequately assess whether the Application would significantly reduce trust water until a full assessment of existing trust water appropriations has been completed.

DATED this 8<sup>th</sup> day of March, 2019.

**BARKER ROSHOLT & SIMPSON LLP**



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John K. Simpson  
Nicole L. Swafford  
*Attorneys for Idaho Power Company*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 8<sup>th</sup> day of March, 2019, I served the original of the foregoing **IDAHO POWER COMPANY’S MOTION FOR STAFF MEMORANDUM AND MOTION TO STAY PROCEEDINGS**, by hand-delivering or depositing same in the U.S. Mail, postage prepaid, as indicated, addressed to the following:

Idaho Department of Water Resources \_\_\_\_\_ U.S. Mail, Postage Prepaid  
Idaho Water Center   x   Hand Delivery  
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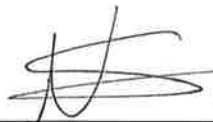
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