Overview of the Swan Falls Settlement

Brief History:

The Swan Falls Settlement resolved an ongoing controversy over how to balance water uses for agriculture and water needs for hydropower generation in the Snake River Basin. In the late 1970s, a group of Idaho Power Company's ratepayers initiated a lawsuit against the Company, contending that it had failed to adequately protect its water rights for hydropower generation at the Swan Falls Dam. As a result of the Company's alleged failure to protest junior water uses upstream from Swan Falls Dam, the ratepayers claimed, the Company had less water for power generation, resulting in higher electricity rates for its customers. Idaho Power Company, in its initial response, maintained that all of its water rights for hydropower generation were subordinated as a result of the subordination condition on its rights at the Hells Canyon Complex. The Idaho Supreme Court, however, decided the issue in favor of the ratepayers, holding that the subordination at Hells Canyon did not extend upstream to the Swan Falls water rights.

Following the decision, Idaho Power Company initiated a lawsuit against the holders of approximately 7,500 water rights upstream from its Swan Falls facility, seeking curtailment of those rights based on their junior priority relative to the Company's hydropower rights. Given the catastrophic consequences that such curtailment would have had on agriculture in southern Idaho, the State, through the Governor and the Attorney General, entered into negotiations with Idaho Power Company to resolve the litigation.

The State's primary interests were to protect existing water uses, and to ensure that the State would control the allocation of water between hydropower and other uses. The interest of the Idaho Power Company was to maintain adequate water levels in the Snake River for hydropower generation at its Swan Falls facility. The minimum stream flow right held by the State at the Murphy Gage (located approximately 4 miles downstream of the Swan Falls facility) was for 3,300 cfs at the time of the negotiations, while Idaho Power Company's hydropower rights were for 8,400 cfs at the Swan Falls facility. An effort was launched to determine the actual historic low flow in the river, in a way that accounted for all existing upstream water uses. The low flow was estimated to have been approximately 4,500 cfs, providing the parties with a context for negotiations about how to maximize the benefit of the State's water resources for both existing agricultural and hydropower interests, as well as for future water development.

The parties crafted a settlement in 1984 with the following key features:

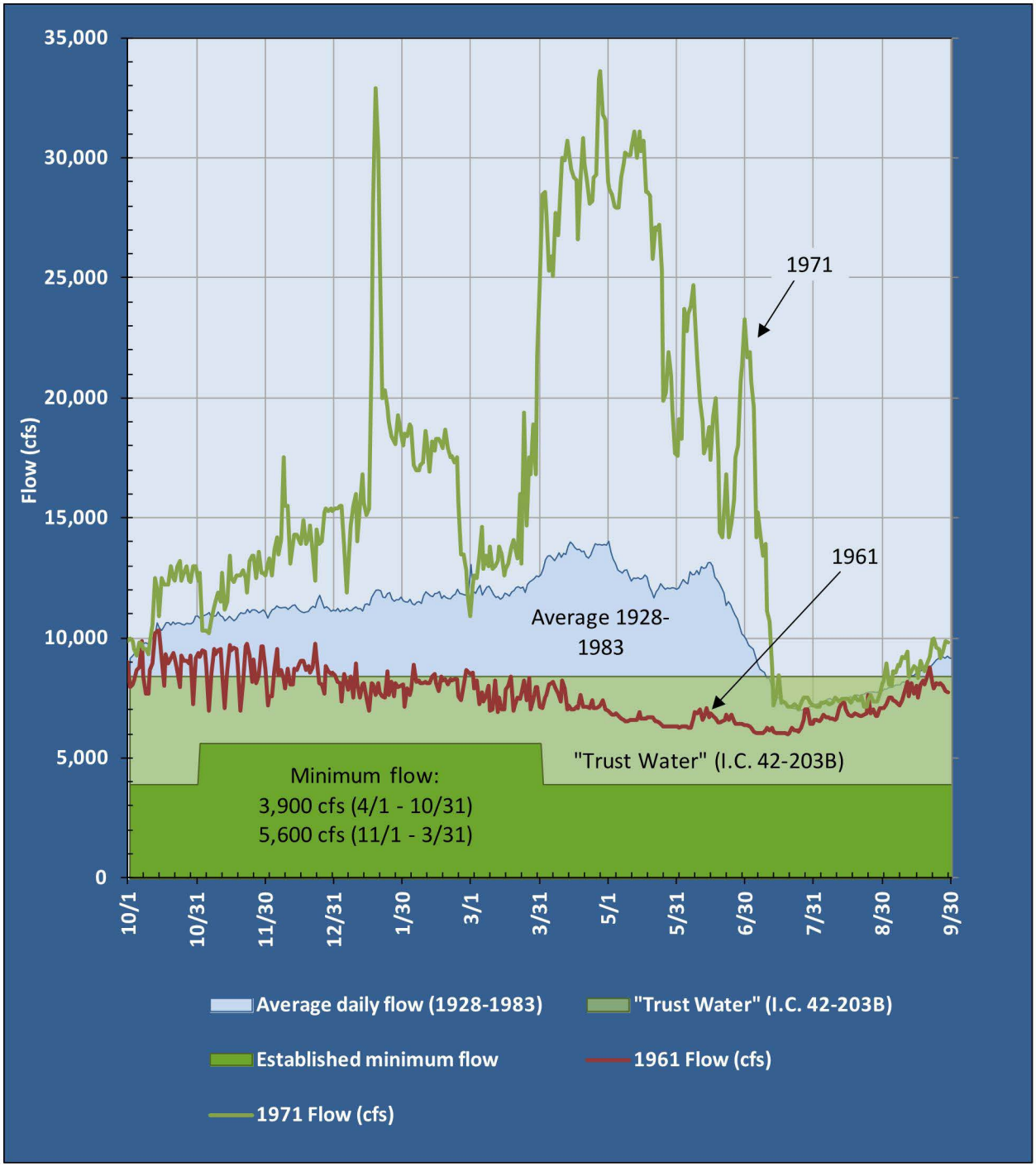
1. Idaho Power Company agreed to subordinate its water rights at Swan Falls and 10 other hydropower facilities to all upstream water uses in existence at the time of the agreement.[1]

2. The State agreed to increase the minimum stream flow rights at Murphy Gage by 600 cfs in the summer months and 2,300 cfs in the winter. The result was a minimum stream flow of 3,900 cfs from March to November, and a 5600 cfs minimum stream flow for the rest of the year. This provided the Company with some assurance that the State would work to preserve the water levels in the Snake River on the basis of its own right.

3. Idaho Power Company agreed to not contest the State's authority to place the Company's hydropower water rights in excess of the minimum flow in a State controlled trust. The trust resolved a conflict between the State and Idaho Power Company about how to ensure that water would be available for future development. The State sought immediate subordination of Idaho Power's rights to futures uses down to the new minimum stream flows, while Idaho Power preferred to leave those rights unsubordinated until new uses were approved. This impasse was resolved by legislation that placed the Company's water rights for flows in excess of the minimum stream flows in a State administered trust. 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. These future water rights licensed by IDWR, became known as "Trust Water Rights."

   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. As shown on the attached graph, for example, trust water at the Murphy Gage is that flow of the Snake River in excess of the Murphy minimum flow but less than 8,400 cfs, the total of the decreed water rights for the Swan Falls facility.

[1] The subordination also included those water rights for which substantial investment was made pursuant to a valid application or permit by the target date, even if actual use had not yet occurred.



4. The parties reaffirmed that the flow at Milner Dam may be reduced to zero, and that for purposes of the administration of surface and groundwater rights tributary to the Snake River below Milner Dam, no water above Milner is to be considered.

Frequent Questions:

1. **What is "Trust Water"?**

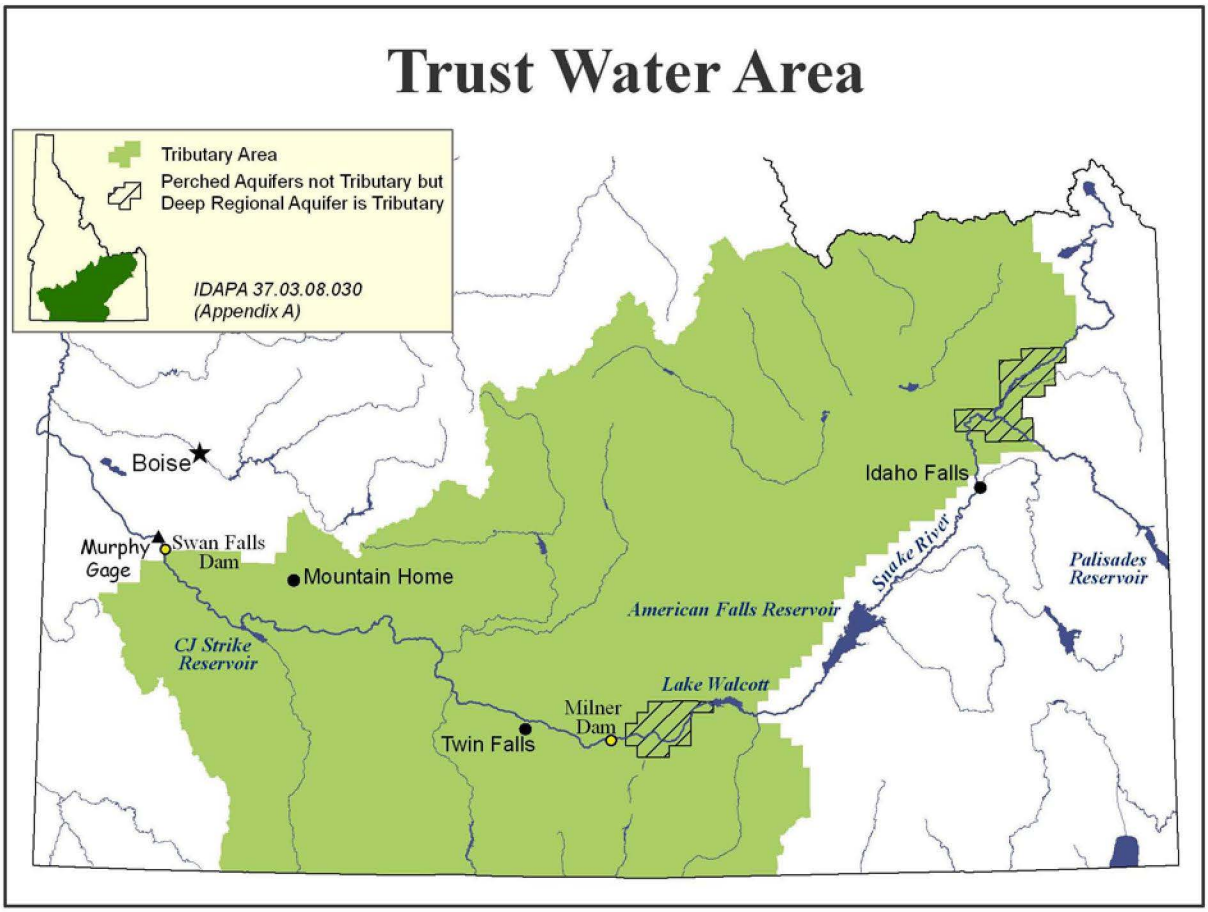
    a. The term "Trust Water" is a misnomer. The trust consists of water rights, not actual water. Trust Water is a shorthand term referring to flows above the minimum stream flow at the Murphy Gage, which were originally appropriated under water rights for hydropower generation.

2. **What is a "Trust Water right"?**

    a. Trust Water rights are surface and ground water rights in the Trust Water Area for which actual use occurred after October 25, 1984, that divert water previously appropriated under the hydropower rights held in trust by the State (these rights were already subordinate to existing uses). These rights may be curtailed if the water level in the Snake River drops below the minimum stream flows of 3,900/5,600 cfs at the Murphy Gage. Because trust water rights authorize the diversion of water that was first appropriated under Idaho Power Company's Swan Falls hydropower rights, they are likewise subordinated to the water uses that existed at the time of the Swan Falls Agreement. Some trust water rights were established with a 20 year term condition, which provides that Idaho Department of Water Resources (IDWR) can revisit those water rights after the term expires to determine whether the authorized use remains in the public interest as expressed in Idaho Code § 42-203C.

3. **What is the "Trust Water Area"?**

    a. The trust water area is pictured in the map below. It shows the area 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. This trust water boundary is not a hydrologic boundary, but rather, permanently delineates the area that will be subject to administration under the Swan Falls trust.



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4. What about enlargement and expansion water rights?

a. Enlargement water rights are water rights issued pursuant to Idaho Code § 42-1426 for enlargements of the place of use of previously acquired water rights (so long as there in no increase to the rate of diversion). These enlargement water rights, despite having a priority date based on the date of enlargement, are subordinate to all water rights senior to April 12, 1994, including the Swan Falls hydropower water rights. Expansion water rights are water rights issued pursuant to Idaho Code § 42-1416B for expanded uses in critical ground water areas. Expansion water rights have a priority date of June 30, 1985. Both enlargement and expansion water rights are trust water rights, and may be

subject to curtailment if the minimum stream flows at Murphy gage drop below 3,900/5,600 cfs.

5. **Does the trust water area include the Snake River and surface and groundwater tributary to the Snake River upstream from Milner dam?**

    a. No. Pursuant to Idaho Code 42-203B, the Snake River and tributary surface water or ground water above Milner Dam is administered separately from the Snake River and tributary surface water or ground water below Milner Dam. That means that in the event that the minimum stream flows at the Murphy Gage are not met, uses of the waters of the Snake River or surface and ground water sources tributary to the Snake River above Milner Dam are not subject to curtailment based upon senior water rights downstream from Milner Dam.

6. **What does zero minimum flow at Milner mean?**

    a. The zero minimum stream flow at Milner Dam was adopted by the Idaho Water Resource Board in 1976 as a means of formalizing the management of the Snake River as "two rivers." This policy provides for the optimum development of the surface and ground water resources tributary above Milner Dam, and protects water users above Milner Dam from administration stemming from surface and ground water uses from sources tributary to the Snake River below Milner Dam.[2]

7. **What would happen if the Snake River drops below the 3,900/5,600 cfs Murphy minimum stream flow?**

    a. In the event that the water level of the Snake River drops below the minimum stream flows at Murphy Gage, upstream trust water rights (water rights in the trust water area with priority junior to 10/25/1984[3]) are subject to curtailment. The sufficiency of the flows at Murphy Gage is determined by the "actual flow conditions"[4] at the gage.

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[2] *See* Idaho Code 42-203B(2).

[3] There are some exceptions to this characterization, notably, water rights where actual use was determined to have begun prior to 10/25/1984, despite a more junior priority date. These rights have been identified in SRBA proceedings.

[4] "Actual flow conditions" means the flow measured at the Murphy Gage after adjustments to account for any fluctuations resulting from the operation of Idaho Power Company's hydropower facilities. Acquisitions of water

8. **Are water rights with a priority date earlier than October 25, 1984 subject to curtailment if the flow of the Snake River falls below the Murphy minimum stream flow?**

    a. No. Water rights with a priority date senior to October 25, 1984 are not subject to curtailment by either the State's 1985 minimum stream flow rights or hydropower water rights, unless it is expressly noted on the face of the water right. In the event, however, that actual flow conditions in the Snake River drop below 3,300 cfs, water rights junior to the State's 1976 Murphy minimum stream flow right are subject to curtailment.

9. **If the actual flow conditions of the Snake River at the Murphy Gage fall below the minimum flow, are surface water rights below Milner Dam subject to curtailment before ground water rights?**

    a. No. Surface water rights are not subject to curtailment before ground water rights. Surface and ground water rights are subject to curtailment on the basis of the prior appropriation doctrine as established by Idaho law and will be conjunctively administered.

10. **What is the State doing to prevent actual flow conditions from dropping below the minimum stream flows?**

    a. In the near-term, the Idaho Water Resource Board has acquired 5,000 acre-feet of storage space in Palisades Reservoir to be used to sustain the Murphy minimum stream flow in the event of a short-term drop in flows. In the long-term, IDWR, in conjunction with other entities, is actively developing a measurement protocol designed to provide accurate information about the flow in the Snake River. With more accurate data, and greater understanding of factors influencing the flow of the Snake River, comes greater ability to manage the Snake River flow at the Murphy Gage. This information will be used by the Idaho Water Resource Board in the implementation of the Eastern Snake Plain Aquifer Management Plan to provide strategies for stabilizing spring flow discharge from the aquifer and or managing other sources contributing to Snake River flow. Finally, the creation of water districts within the trust water area,

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by the Company from above Milner dam are defined as a fluctuation resulting from the operation of Idaho Power Company's hydropower facilities, and therefore, are not counted in the calculation of the actual flow conditions.

and coordination between those districts, will aid IDWR in administering the resource to sustain the Murphy minimum flow.

11. Does flow augmentation water count toward the minimum flow for purposes of the Swan Falls Agreement?

a. Flow augmentation water refers to water rented by the U.S. Bureau of Reclamation for use below Hells Canyon dam to supplement flows for salmon and steelhead listed under the Endangered Species Act. Flow augmentation water is not a fluctuation caused by Idaho Power Company operations, and therefore is included in determining the "actual flow conditions" at the Murphy Gage for purposes of the Swan Falls Settlement. The accounting for flow augmentation deliveries is a separate matter governed by the 2004 Snake River Water Rights Agreement.

12. Why do some trust water rights have term limits?

a. In implementing the Swan Falls Settlement, IDWR recognized the need to revisit allocations of Trust Water to ensure that, after a certain period, such rights remain in the public interest, as defined by criteria found in Idaho Code § 42-203C. As a result, many Trust Water rights were approved with a condition stating that they will be subject to review under the public interest criteria after a term of 20 years.