

The Idaho Department of Water Resources (“Department”) has asked the parties who participate in the Swan Falls Implementation Group to submit “framing questions” for the administration and term review of Trust Water. Idaho Power Company (“Idaho Power”) submits the following questions along with a proposed framework for each question to assist the Department in its analysis.

Idaho Power believes that these initial questions are threshold questions, and depending on the analysis of each question, there may be follow up issues relevant to administration and Trust Water review. Idaho Power looks forward to continuing to work with the Swan Falls Implementation Group to identify and resolve any follow up issues that arise from this initial issue identification exercise.

1. What does it mean that the State holds Trust Water in Trust?

Generally, a trust is a relationship in which one party, the trustee, holds title to property subject to an obligation, often defined by the document creating the trust, to keep, use or manage the property for the benefit of another, the beneficiary. In the context of Swan Falls there is no single unified document creating the trust. Nonetheless, various documents indicate that the intent of the parties to the Swan Falls Agreement was to pattern the Swan Falls trust relationship in the form of a traditional trustee/beneficiary relationship.¹

2. What is Trust Water? Does a water right need to be conditioned to be recognized as Trust Water?

Trust Water is any water above the 3900/5600 cfs minimum flow (measured at the Murphy Gage) that is tributary to the Snake River below Milner and above the Murphy Gage. If a water right falls within this area, it is considered a Trust Water right. This position is evidenced in the Departments administrative rules, where Trust Water is defined as:

Trust Water. That 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 by Section 42-203B(3), Idaho Code.

IDAPA 37.03.08.010(17). Further, the administrative rules describe the nature and location of Trust Water as:

030.01 Snake River Water Rights Agreement. The legislation ratifying the Snake River water rights agreement between the state of Idaho and Idaho Power Company places in trust a part of the flows available to Idaho Power Company under its hydropower water rights in the Snake River Basin between Swan Falls Dam and Milner Dam. The flows subject to the trust water provisions and reallocation under Section 42-203C(2), Idaho Code, are as follows:

a. Trust water flows under the Snake River water rights agreement are located in the Snake River between Swan Falls Dam located in Section 18, Township 2 South, Range 1 East, Boise Meridian (B.M.) and Milner Dam located in Sections 28 and 29, Township 10

¹ See, Swan Falls Agreement, Exhibit 7B; See also Snake River Basin Adjudication, Summary Judgement Order (April 18, 2008) at p. 31. Corollary questions might be – what are the obligations of the trustee (the state through the Governor) under the trust and the reasonable expectations of the beneficiaries (the People of the State of Idaho and Idaho Power)?

South, Range 21 East, Boise Meridian (B.M.) and all surface and groundwater sources tributary to the Snake River in that reach.

b. Surface water and groundwater tributary to the Snake River upstream from Milner Dam is not trust water. After giving notice and considering public comment, the Director will designate the area in which groundwater is presumed to be tributary to the Snake River upstream from Milner Dam. Modification or changes in the designated boundary may be made only after providing notice and considering public comment. The area presently designated as tributary to the Snake River in the Milner Dam to Swan Falls Dam reach is appended to these rules (See Attachment A in APPENDIX A located at the end of this chapter), for information purposes only.²

c. Trust water flows under the Snake River water rights agreement are those occurring in the Snake River and tributaries in the geographic area designated in Subsection 030.01.a. which exceed the established minimum stream flows but are less than the water rights for hydropower generating facilities in the Swan Falls Dam to Milner Dam reach of Snake River, to the extent such rights were unsubordinated prior to the Snake River water rights agreement...

The Department's own rules make clear that Trust Water does not require a condition to be recognized as Trust Water, rather Trust Water is defined by geographic location and time. The Snake River Basin Adjudication ("SRBA") Court ultimately ratified this position in its Partial Summary Judgement Order issued on April 18, 2008³, and the position is carried forward in the SRBA water right decrees for the hydro projects subject to the Swan Falls Agreement.

3. Is administration different from the Trust Water Review? What authorities does the Department have to conduct a Trust Water Review?

While Idaho Power views the administration of Trust Water and the Trust Water Review as two separate and distinct duties and obligations of the Department, they are necessarily interrelated. Administration of Trust Water is simply an extension of the Director's duty and authority under various statutes and rules to administer water rights and permits, including I.C. §42-1805 which imposes the additional duty with respect to Trust Water to:

(7) After notice, to suspend the issuance or further action on permits or applications as necessary to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of minimum flow provisions of the state water plan.⁴

Idaho Power believes that the authority to administer Trust Water includes the authority to conduct a Trust Water Review. Idaho Power submits that this Trust Water Review necessarily includes an analysis of the overall management of Trust Water and if/how the Department would analyze beneficial use and the public interest (consistent with Idaho Code 42-203C) moving forward. The intent of the Swan Falls Agreement, and the authority of the Director, is generally described in the November 1988 final Plan for processing Trust Water Rights. That Plan contained various provision regarding the ongoing management of Trust Water Rights, including:

² A copy of Appendix A, the TW map, is attached.

³ Docket Subcase No. 00-92023 (92-23).

⁴ The IWRB holds minimum flow water rights at Murphy that mirror the Swan Falls Agreement minimum flows. These IWRB water rights are imbedded in the state water plan.

...IDWR's actions in allocating the water of the Snake River Basin upstream from Swan Falls Dam will advance and be guided by the following policies:... (2) Protect the value, economic and other wise, of the asset (trust water) obtained by the people of Idaho in the Swan Falls Agreement.

Discussion – When the existing hydropower rights are considered, the Upper Snake River Basin is essentially fully appropriated. IPCo's water rights placed in trust and held by the state are a valuable asset in economic and other terms. The state has a responsibility to determine whether this asset provides the greater benefit to the people of Idaho as a source of flow for hydropower and other instream uses, or for upstream consumptive economic development. In either case the trust water resource must be managed on a continuing basis, This continuing management can be assured by issuing permits for the use of the trust water for specific terms long enough to amortize the development investment. The priority of the filing would not be lost at the end of the term, but in reprocessing, the public interest would be re-evaluated and the adequacy of the water supply would be considered. If filings with earlier priority dates are subsequently processed, approved, and developed which require the water which has been used by the filing being re-evaluated or the project no longer meets the public interest criteria, the filing would not be continued.

Permits authorizing development of trust water must give the state the capability to insure that the established minimum stream flows can be maintained and other senior water rights using the Snake River can be protected. Many of the pending applications and undeveloped permits seeking trust water propose to use wells drilled into the eastern Snake Plain Aquifer. The traditional method of stopping or cutting back the use of junior rights during times of scarcity is not adequate to guarantee that senior flow rights or minimum stream flows in the Snake River will be met. Curtailment of junior ground water pumping rights is inadequate to protect senior Snake River flow rights because of the time delay between reduced ground water pumping and the effect reaching the Snake River. Because curtailment of ground water pumping during a given year will not be effective, a source of water is needed in the upper Snake River Basin to supply water to the river during periods of low flow at the Murphy gauging station. Those using trust water for consumptive uses must be responsible for insuring that the replacement water source is available when needed, A fee based upon the volume of trust water depleted is needed to provide funding to purchase or contract for a source of water to maintain the required minimum instream flows.

...The criteria and procedures for determining and implementing term review conditions and an annual fee for use of trust water will be provided in rules and regulations adopted pursuant to the director's authority under Section 42-1805(8), Idaho Code.

...Permits issued may be conditioned to require review after a specific term of years to assure that a source of water will be available to the state to assure that the established instream flows can always be guaranteed.⁵

⁵ November 3, 1988, *Policy and Implementation Plan for Processing Water Right Filings in the Swan Falls Area*, pg. 3-6.

As recognized in the Swan Falls Implementation Group, various Trust Water permits are conditioned to recognize a review after 20 years, and more recently a 5-year review condition. Those conditions include a term review, and a recognition that the review is to “determine availability of water and to reevaluate the public interest”.

4. Is the Department required to wait for a violation of the minimum flows at Swan Falls to initiate a Trust Water Review?

Given the State’s responsibilities as trustee of the Trust and the fact that it is has been long accepted that curtailment of Trust Water Rights "is not adequate to guarantee that senior flow rights or minimum stream flows in the Snake River will be met” (see 1988 Policy, above), the Department should not be required to wait for a Swan Falls minimum flow violation to begin a Trust Water Review. The Department should immediately begin a Trust Water review that includes inquiries about the availability of Trust Water, and a review of the public interest criteria outlined in Idaho Code 42-203C.