

MEMO



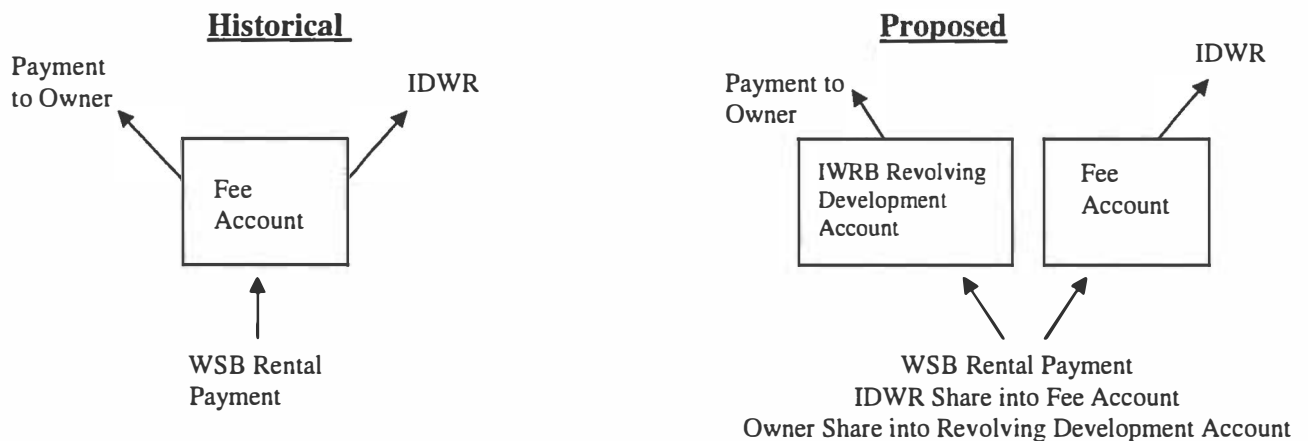
To: IWRB Water Supply Bank Committee
From: Brian W. Patton
Subject: Water Supply Bank Funds Routing
Date: March 12, 2013

Historically, all funds received from Water Supply Bank (WSB) rentals have been deposited into the Department's "Fee Account." This includes both the Department's share and the owner's share, which is held in the Fee Account until payment is made back to the water right owner.

As many of you are aware with the rapid growth of the WSB, the payments back to the water right owners hit a problem this year as the Fee Account "spending authority limit" was reached. This prevented payments to the water right owners until the legislature increased this spending authority. This spending authority is set annually by the Legislature, as the fees deposited into the Fee Account help pay for Department operations.

In researching this situation, it appears there is a better way to route the funds that is allowed by current statute and rules and can be implemented by an IWRB resolution. The Department share would still be deposited into the Fee Account to be used for Department operations, while the owner's share would be deposited into the IWRB's Revolving Development Account until payment to the water right owner is made. Since the IWRB has "continuous spending authority" for the Revolving Development Account (i.e. the IWRB does not need to seek annual spending authority from the legislature), the spending authority limit for the Fee Account would no longer be an issue.

A conceptual diagram of the historical and proposed funds routing is as follows:



A draft resolution implementing the change is attached. If the Committee recommends making this change, this resolution would be presented to the full IWRB for consideration on March 22.

DRAFT

BEFORE THE IDAHO WATER RESOURCE BOARD

IN THE MATTER OF THE)
WATER SUPPLY BANK)
_____)
A RESOLUTION

WHEREAS, the Idaho Water Resource Board (IWRB) had adopted Water Supply Bank Rules, IDAPA 37.02.03, as it is considered necessary to carry out the purposes of Section 42-1762, Idaho Code; and

WHEREAS, the Idaho Department of Water Resources (IDWR) operates the Water Supply Bank for the IWRB; and

WHEREAS, historically all revenues received from Water Supply Bank lease and rentals have been deposited into the IDWR "Fee Account," including both the Department's 10% share and the water right owner's 90% share, which is held in the Fee Account until payment is made to the owner.; and

WHEREAS, in early 2013 payments to the water right owners caused the Fee Account to reach its legislatively-set spending authority limit, preventing further payments to the water right owners until the Legislature increased the spending authority limit; and

WHEREAS, Idaho Code 42-1753 allows "revenues received from the lease of water rights" to be deposited into the Revolving Development Fund; and

WHEREAS, since the IWRB's Revolving Development Fund is "continuously appropriated" and has no spending authority limit.

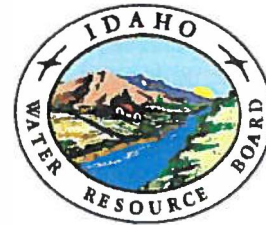
NOW THEREFORE BE IT RESOLVED that the IWRB directs that water right owner's share of the revenues from Water Supply Bank lease and rentals shall be deposited into the IWRB's Revolving Development Fund until payment is made to the owner, while IDWR's share of the revenues from the Water Supply Bank lease and rentals shall still be deposited into IDWR's Fee Account to help pay for IDWR operations.

DATED this 22nd day of March 2013.

ROGER CHASE, Chairman
Idaho Water Resource Board

ATTEST _____
BOB GRAHAM, Secretary

Memorandum



To: Idaho Water Resource Board
From: Monica Van Bussum
Date: March 21, 2013
Re: Water Supply Bank improvements

Background

Interest and activity in the Water Supply Bank have grown considerably over the past several years. Rental and lease applications continue to increase in frequency, magnitude, and complexity. In 2010, there were 50 Bank rental contracts, in 2012 there were 103. There are nearly 800 leased water rights to manage, and many rights are rented in multiple contracts each year.

The financial aspect of the Bank has kept pace with the increase in magnitude and complexity of Bank transactions. In 2010, the Bank paid under \$85,000 to lessors whose rights were rented. In 2012, the Bank paid out over \$450,000 to 97 different rightholders. Those numbers will likely grow in 2013.

The Bank is at a crossroads. We must decide how we are going to evolve into handling more transactions that are more comprehensive and difficult than we have seen before. It is time for a broad, public discussion about the role of the Bank and the infrastructure involved in managing it. Ultimately, the Board must decide what the program needs to accomplish.

To decide what the Bank must accomplish, we must first ask the questions:

- What should the Bank be?
- When can it be accessed, and for what purposes? How expansive should it be?
- Should it be used to resolve Notices of Violation (NOVs)?
- Should the Bank give priority to renewing rentals over approving new uses?

How you answer these to yourself is going to guide how you, the Board, respond to the rest of this memo. The issues and current strategies, along with some general ideas for moving forward, are summarized below.

When can the Bank be accessed, and for what purposes?

Most Bank rentals are for irrigation. Due to the number and complexity of recent rentals, along with staffing and software issues, the Department has become slower to respond to rental applications. In the past, applicants could file after the start of the irrigation season and the rental might not have been fully executed until midway through the irrigation season, causing concerns for the renter and the Department. The environment has changed and the Department's policies reflect this change. An applicant cannot expect to apply to the Bank in April and secure all the financing and insurance necessary for the irrigation season at that time.

As a result of the factors above, the Department has changed its handling of rental applications depending on when they are filed. Applicants who file for an irrigation rental prior to February 1 receive a "regular season" acknowledgment letter, which states Bank staff will make every effort to process the application prior to the start of the irrigation season. Applicants filing for an irrigation season rental after

February 1 receive a slightly different letter noting the lateness of the filing and informing the applicant the application may not be considered for the current year. The letter also notes the applicant is not authorized to divert any water until the rental agreement is fully executed.

Should the Bank be used to resolve NOV's?

The Bank has been used to resolve Notices of Violations (NOV's) in the past and this may continue to be necessary in some circumstances. However, there should be certain restrictions placed on when and how the Bank can be used for NOV's.

The Bank should not be the only expected avenue for resolution of NOV's – Idaho Code provides for other avenues, including penalties. The Bank is growing and to divert staff time from processing applications to handle NOV's penalizes those who are trying to properly utilize the Bank system.

For example, Farmer A does not apply to the Bank, commences irrigation, and is served with an NOV. Part of the NOV process is to apply for Bank water. Farmer B applies to the Bank early and does not irrigate. Should Farmer B's application be set aside while IDWR resolves Farmer A's NOV? Bank staff believes Farmer B's application should be resolved first and the NOV process should move forward for Farmer A with penalties as part of the solution.

To what extent should IDWR allow drafts and redrafts of complicated applications take precedence over processing other applications?

To fully understand this question, it is important to understand a little bit more about the complexity of the applications the Bank now gets. Bank applications are more than just a two-page form. If the applicant does not own the point of diversion (POD) or place of use (POU), they must provide the necessary authorizations to utilize the proposed POD or POU. Applications for use within the Eastern Snake Plain Aquifer (ESPA) must be submitted with an ESPA analysis, including a model run. Applications for ground water use in the Big Lost River basin must be submitted with a Theis analysis or image well analysis to predict drawdown in nearby wells. An application is not just the form, but a great deal of analysis, and the application must be complete for Bank staff to appropriately process it. There is a lot of information that must be correct before an application can be processed. This is a burden on the Bank and the applicant and their representative(s).

To that end, if the Department recognizes an error, or the applicant/consultant/attorney recognizes an error, the Department will allow the applicant 14 days to fix the error. The applicant is allowed one such revision. If the revision contains an error or if the Department is unable to accept the revision, the Department will return the application(s) and the applicant can then reapply and will be reviewed at the end of the line, if applicable. This allows processing of other pending applications without undue delay.

How should the Bank operate in concert with applications for transfer? Should the Bank be required to anticipate transfer filings and deny applications where a transfer will be filed?

Department staff are working on a process to allow for Bank and transfer processing to move forward together. When a transfer is filed on a water right that is leased to the Bank, Bank staff and transfer staff will work together to determine the fate of the Bank lease (and, potentially, rental) and the transfer. Ideally, a Bank processing software application for the Bank would reduce labor costs, prevent mistakes, and reduce duplicative work with overlapping processes.

Should the Bank give priority to renewing rentals over approving new uses?

Currently, the Bank makes no distinction between renewing rentals and approving new uses. Bank applications are processed in the order in which they are received. However, with renters competing for water in some areas, the question must be asked whether the Bank should show preference.

Should the Bank consider what is the highest beneficial use? What constitutes the highest beneficial use? Should the Bank consider renewal of rentals before new rentals? Should the Bank allow applications to be filed in January 2013 for the 2014 irrigation season? If an application cannot be satisfied, should Bank staff allow the applicant to “let it ride” and review it each season to see if leased rights can satisfy the application? Should the Bank revisit its existing interpretation – process applications as received without regard to renewal? Should the Bank continue to allow lessors to rent their own water rights?

What should we do when a lessor wants to alter the terms of their lease contract midway through their lease period?

Currently, if a lessor wishes to alter the terms of their lease (reducing acres, etc.), they file a new lease application and the Department will review it. The Department will not redo a lease mid-season. The lessor must wait until the end of the season to have the Department review the terms of the lease. However, the Department will not change the nature of any rentals that had already been contracted on that leased right. That is a risk of leasing to the Bank.

For example, Farmer C has a water right leased to the Bank. Farmer D has a rental contract in place for Farmer C’s water right. Farmer C files to release his water right from the Bank and Farmer D’s rental contract does not expire for 3 more years. In this situation, the Bank will not grant release of the rented portion of Farmer C’s water right. There are many reasons not to reprocess Farmer D’s rental:

- The Board and Farmer D have entered into a contract.
- There may not be available water in the Bank to satisfy Farmer D’s rental
- The available water rights in the Bank may not have a comparable priority date, diversion rate, volume, etc., and the new rental contract would be detrimental Farmer D.
- Bank staff is working on other matters – other rentals, lessor payments, etc.

Under what conditions will the Bank make accommodations for lessors who don’t want their rights tied up in long-term rentals?

The lessor can choose to lease the right for one year at a time or come in with a renter who is willing to meet their terms.

Should the Bank be used as a place to “park” un-rentable rights?

Water Supply Bank Rule 25.06(g) requires the Department assess the possibility of a rental on the leased water right. Sometimes there is little to no chance the right will ever be rented. However, the public has come to see the Bank more as a place to protect water rights from forfeiture and Bank staff must acknowledge that.

An applicant can file an Application for Extension of Time to Avoid Forfeiture. However, each rightholder only gets one extension of time for a maximum of five years. Should there be another option? Should there be a method (other than the Bank) of protecting a right from forfeiture indefinitely there is no possibility of it being used/rented during that time? Should we change the rule about assessing the possibility of rental?

Should the Bank’s technology be updated to reflect increased demand and complexity?

While funding has increased because of increased rental demand, and IDWR is adjusting staffing levels to coincide with the funding, the increase still may not be enough to respond timely to all applications. Compounding this problem is the lack of a comprehensive software system for Bank operations. Software for water rights programs (i.e., permits, licenses, transfers) is vastly more efficient than the software cobbled together when the Bank was smaller.

The Bank is run using multiple interfaces, all of which must be reconciled several times a year, and all of which leave great room for human error. A software application integrated with other Department processes, such as transfers, will decrease human error and make the Bank more efficient. Increased Bank efficiency will result in greater financial accountability, less staff time spent on administrative tasks, and a quicker response time. Users will benefit from increased Bank transparency and efficiency – greater ease of issuing lessor payments, quicker turnaround on applications, less chance for human error, better knowledge by the watermasters of Bank activity, the Bank’s continued ability to grow, etc..

Recommendations

Given the nature and complexity of the above points, the Department recommends a comprehensive, multi-layered approach. As you see, the Department has instituted solutions for many of these questions. However, a few more administrative changes may also help Bank operations and transparency.

- Institute a deadline for filing WSB applications. Irrigation applications must be filed by January 15 to be processed for the coming irrigation season. We must make our best effort to address applications before the start of the irrigation season by setting a deadline for irrigation applications. Other uses could be inserted at any time, and exceptions can be made for processing applications such as those negotiations during compliance conferences. (Policy resolution)
- Extend leases to up to 10-year terms. The current practice of five-year lease terms limits the amount of time a right can be rented. Prospective renters want to secure water so they can realize a return on their investment. One-year rentals do not give prospective renters security in their investments. Ten-year lease terms allow Bank staff to process long-term rentals. (Policy resolution, possibly rulemaking if lease fee is increased)
- Institute a \$50 early release fee for lessors wanting to release unrented, leased rights prior to the end of the lease contract. (Rulemaking)
- Institute a minimum administrative rental fee of 10% of the total rental cost or \$250, whichever is greater. The lowest rental rate in the Bank is currently \$0.70. Many rental fees are in the \$15-50 range. This small amount does not reflect the complexity of the work involved, or the staff time investment. (Rulemaking)
- Allocate funds and the necessary staff to design and implement a Bank processing software application. (Funding and resource issue)