



AGENDA

IDAHO WATER RESOURCE BOARD

Thursday, July 23, 2020

(This meeting will be conducted using guidance in accordance with Governor Little's Stay Healthy Order issued May 30, 2020 in response to the public health emergency caused by the COVID-19 pandemic.)

Brad Little
Governor

Roger W. Chase
Chairman
Pocatello
District 4

Jeff Raybould
Vice-Chairman
St. Anthony
At Large

Vince Alberdi
Secretary
Kimberly
At Large

Peter Van Der Meulen
Hailey
At Large

Albert Barker
Boise
District 2

John "Bert" Stevenson
Rupert
District 3

Dale Van Stone
Hope
District 1

Jo Ann Cole-Hansen
Lewiston
At Large

Board Members & the Public may participate via Go-To Meeting
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You can also dial in using your phone.

United States: [+1 \(571\) 317-3122](tel:+15713173122)

Access Code: 673-626-773

Water Supply Bank & Mitigation Bank Committee Meeting No. 1-20 **10:00 a.m. (MST)**

1. Introductions and Attendance
2. Procedural Guidance on Water Supply Rule 25.02C*
3. Sale of Water Rights through the Board's Bank*
4. Other Items
5. Adjourn

Committee Members: Chair Jo Ann Cole-Hansen, Vince Alberdi, Dale Van Stone, and Roger Chase

* Action Item: A vote regarding this item may be made this meeting. Identifying an item as an action item on the agenda does not require a vote to be taken on the item.

Americans with Disabilities

The meeting will be held telephonically. If you require special accommodations to attend, participate in, or understand the meeting, please make advance arrangements by contacting Department staff by email jennifer.strange@idwr.idaho.gov or by phone at (208) 287-4800.

Memorandum



To: Water Supply Bank and Mitigation Bank Committee

From: Remington Buyer

Date: July 23, 2020

Re: Committee Meeting No. 1-20

The Idaho Water Resource Board (Board) is called upon to consider how it acquires water rights from water right holders, for deposit into its Water Supply Bank (Bank). Under the Bank rules adopted by the Board, water right holders propose a lease or a sale of their water right to the Board and Board-acquired water rights are placed into the Bank. Procedural guidance is requested from the Board regarding: 1) how the Bank should process applications for water rights that may be subject to forfeiture; as well as, 2) how the Bank should process applications which propose to sell or donate water rights to the Board, or through the Bank.

Procedural Guidance on the Acquisition of Water Rights that May be Subject to Forfeiture

The Board can acquire and deposit into the Bank water rights that are subject to forfeiture.¹ However, the acquisition of water rights by the Board, for placement into the Bank, is a voluntary action and the Board may decline to acquire water rights. **Under what circumstances should the Board acquire and deposit into the Bank water rights that are subject to forfeiture? Under what circumstances should the Board decline the acquisition of water rights that are subject to forfeiture? How should the Board be involved in the Water Supply Bank review and acquisition of water rights that are subject to forfeiture?**

Background and Context:

In Idaho, water rights become subject to forfeiture if more than five years of nonuse of water elapses under a water right, and the holder of the water right does not take an action to protect the water right from forfeiture.² Water right forfeiture is not automatic; instead, water right forfeiture is a multi-step process that is initiated following five years of nonuse of water under a water right. Following five years of nonuse, water right holders can protect against water right forfeiture by taking an approved action in a sixth year of nonuse.

There are numerous ways in Idaho to obtain state-sanctioned approval for a nonuse of water under a water right.³ Idaho Code 42-223(5) provides that placement of a water right into the Water Supply Bank is a sanctioned exception to the nonuse-forfeiture provisions of Idaho Code 42-222(2). Additionally, Idaho Code 42-223(6) affirms that, on a case-by-case basis, *"no portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control."*

If a water right holder applies to place a water right into the Water Supply Bank following five years of nonuse under the water right, the Bank will acquire the water right if the application is received before the end of the calendar year in the sixth year of nonuse. Typically, the Bank will not accept an application to place a water right into the Bank if more than six years of nonuse has elapsed under the water right, prior to submission of an application to the Bank, unless an acceptable justification for nonuse is presented. When six years or more of nonuse is evident under a water right proposed to be placed into the Water Supply Bank, and no acceptable justification is presented, the application is considered to be incomplete (under Bank Rule 25.02.C) and it is returned to the applicant (under Bank Rule 25.04).

¹ Water Supply Bank Rule 25.06.C requires that the Board consider forfeiture or abandonment information when determining whether a water right should be leased into the Bank. The rule does not preclude the Board from leasing a water right that might otherwise be subject to forfeiture.

² Idaho Code 42-222(2) states a water right *"shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated."*

³ Idaho Code 42-223 provides a number of exceptions to the forfeiture through nonuse provision of Idaho Code 42-222(2), including acceptance of a water right into the Water Supply Bank, and acceptance that circumstances of nonuse were beyond a water right owner's control.

When five years of nonuse elapses under a water right, and the water right holder can place the water right into the Water Supply Bank (and thereby obtain protection against forfeiture through any further nonuse), and they elect to not place the water right into the Water Supply Bank, under what circumstances can it be accepted that the water right is not forfeited because nonuse conditions were beyond the water right holder's control? Conversely, under what circumstances, if any, would the Board find that a water right holder's failure to timely place a water right into the Water Supply Bank precludes them from asserting that circumstances of nonuse specific to their water right were beyond their control? This is a question that the Bank routinely considers, and with which it recently struggled.

Recently, an application to place a water right into the Bank was received, where approximately ten years of nonuse had elapsed under the right prior to it being proposed for lease, but where the water right owner claimed that circumstances of nonuse were beyond their control. Because it was necessary to evaluate for water right validity, and the applicability of the defense against forfeiture claimed under IC 42-223(6), it was not possible to expedite review and processing of the lease application. Moreover, although staff initially moved to return the lease application, based on standard operating procedures, after much pleading by the applicant, through their legal counsel, the Bank ultimately did place the water right into the Water Supply Bank. The placement was based on a finding that the water right was not definitively forfeited, and therefore the Board could place the water right into the Bank under the provisions of Rule 25.06.C.⁴

As such, the Bank is now coming before the WSB Committee to obtain procedural guidance on whether:

- The decision taken to lease the water right, based on Bank Rule 25.06.C, was appropriate?
- When six years of non-use has elapsed under a water right, prior to it being submitted to the Bank for lease or sale, and a defense against forfeiture is claimed under IC 42-223(6), would the Board like the Bank to continue considering such applications to be incomplete, and to return such applications, under the provisions of Rule 25.02.C?

Or,

- Under the provisions of Rule 25.06.C, should the validity of such water rights, and their eligibility for placement into the Water Supply Bank, be considered on a case by case basis? If so, under what circumstances should the Bank consider that defenses against forfeiture argued under IC 42-223(6) are acceptable? Under what circumstances should the Bank consider that defenses against forfeiture argued under IC 42-223(6) are not acceptable?
- Would the Board itself like to review Bank applications where information indicates a water right may have become subject to forfeiture or abandonment through non-use? If so, how would the Board like to be engaged in the active review of such applications?

⁴ In 1997, the Board by resolution authorized the Director of IDWR to issue approvals of lease applications, on behalf of the Board, for up to five years. A copy of the resolution is provided as an attachment to this memo.

Procedural Guidance Regarding Applications to Sell Water Rights to the Bank

The laws and rules of the Water Supply Bank allow for water right holders to sell their water rights to the Board, through the Water Supply Bank. No procedures have been developed to facilitate water rights sales. **Should the Water Supply Bank function to accommodate water right sales? Or water right donations?**

Two mechanisms by which the Bank might facilitate water right sales are: 1) by direct acquisition of water rights by the Board (and then subsequent leasing of acquired water rights to the Bank); or, 2) by providing information about water rights leased to the Bank that are also available for purchase from the Bank (similar to a bulletin board system). A small number of water users might exercise either option and set a sale price of \$0.00, nominally proposing to donate their water rights to/through the Bank.

In recent years, water right holders have proposed to both sell and lease their water rights to the Bank, however Bank staff have only approved water right leases. The Committee is called upon to consider whether the Bank should facilitate water right sales and donations. The Committee is further called upon to provide direction to the Bank on how the Bank should address future water right sale or donation proposals.

Appendix A

BEFORE THE IDAHO WATER RESOURCE BOARD

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATIONS)
TO LEASE WATER TO THE WATER)
SUPPLY BANK)

RESOLUTION

WHEREAS, the Director of the Department of Water Resources (Director) periodically receives applications to lease water to the Water Supply Bank (bank) managed by the Idaho Water Resource Board (Board); and


WHEREAS, IDAPA Rules 37.02.03 (Water Supply Bank rules) require the Director to review applications to lease water to the bank for completeness and for compliance with specific evaluation criteria before acceptance into the bank; and

WHEREAS, the timing of regularly scheduled Board meetings may not provide for timely acceptance of offered rights into the bank;

NOW, THEREFORE, BE IT RESOLVED that the Board authorizes the Director to accept applications into the bank without a specific resolution from the Board for each application as conditioned below:

- a) Applications shall comply with the statutes and Water Supply Bank rules of the Board;
- b) Applications shall not be contrary to the State Water Plan;
- c) The Director shall bring potentially controversial lease applications to the attention of the Board for Board review and consideration before accepting an application; and
- d) The Director shall bring all applications to gift or sell water to the Board for Board review and consideration before accepting an application.

Adopted this 16th day of May, 1997.


CLARENCE PARR
Chairman

Attest: 
J. DAVID ERICKSON
Secretary

ATTACHMENT NO. 2 MEETING 497
IDAHO WATER RESOURCE BOARD

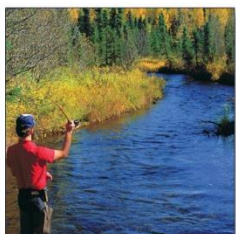
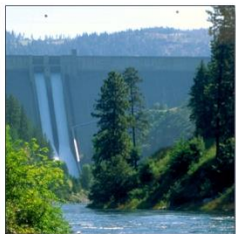
May 16, 1997



Water Supply Bank Committee Meeting 1-20

Remington Buyer
Water Supply Bank Coordinator
July 23, 2020





Today's Meeting

Agenda topics:

The application by the Bank of WSB Rules 25.02.C and 25.06.C

The sale of water rights through the Bank

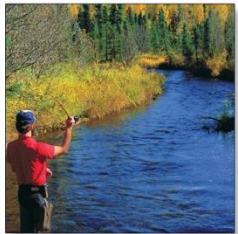
Other Items

Objectives:

1. Convey the value of procedural guidance

- Reducing uncertainties associated with application processing;
- Faster application approvals;
- Greater consistency in applications of policy,
- Less confusion regarding the delivery of Bank services,
- Improvements in stakeholder expectations.

2. Obtain procedural guidance from the Committee on these matters, *procedural guidance provided can be incorporated into a resolution, for adoption at a future IWRB meeting.*



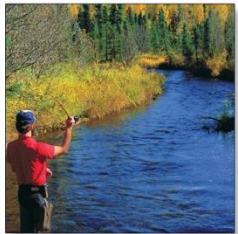
WSB Rules 25.02.C & 25.06.C

Idaho Code 42-223(6)

“No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control. Whether the water right owner has control over nonuse of water shall be determined on a case-by-case basis.”

A Question for Consideration:

If a water right holder can protect a water right from forfeiture through nonuse by submitting to IDWR either an Application for Extension of Time to Avoid Forfeiture of a Water Right or an Application to Lease or Sell a Water Right to the Water Supply Bank, and no action is taken by the water right holder, under what conditions can the right holder claim an exception to forfeiture through nonuse based on conditions having been beyond their control?



WSB Rules 25.02.C & 25.06.C

Typically, the Bank returns applications as “incomplete” when water right forfeiture is a concern. [Water Supply Bank Rule 25.02.C]

However, if forfeiture is only a concern (and not a certainty) then the Board can acquire such water rights and place them into the Bank, provided that forfeiture information is evaluated as part of the application review process. [Water Supply Bank Rule 25.06.C]

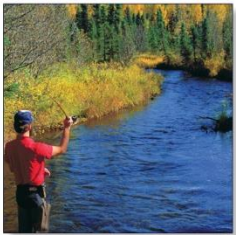
In light of the above, procedural guidance is requested to define:

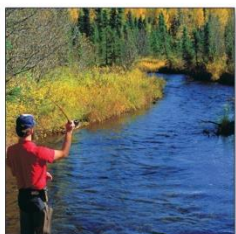
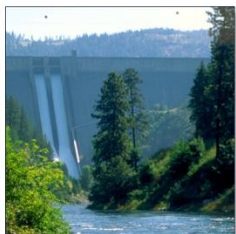
- **Under what circumstances** should water rights to which forfeiture concerns exist, be considered for placement into the Bank?
- **How would the IWRB like to be involved** in the application review process?

The Sale of Water Rights Through the Bank

The Bank has received applications to sell water rights through the Board's Water Supply Bank. Presently, only leases are processed.

Should the Water Supply Bank function to accommodate water right sales? Or water right donations?



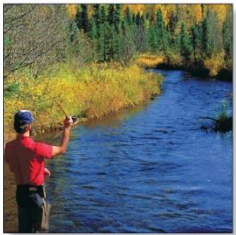


The Sale of Water Rights Through the Bank

Two mechanisms exist by which water right sales may be facilitated:

- 1) By direct acquisition of water rights by the Board, and then placement of acquired water rights into the Bank; and
- 2) By making water right sale information accessible to water users, as water rights are leased to the Bank.

What is the Committee's guidance to the Bank on this matter?



Other Items

Upper Snake Rental Pool Procedures

The possibility of new, natural flow water right rental pools in 2021

Next WSB Committee meeting?