

37.03.08 – WATER APPROPRIATION RULES - STRAWMAN

040. PROCESSING APPLICATIONS FOR PERMIT.

01. Public Notice Requirement. (7-1-24)

- a.** Publication of an application will be pursuant to Section 42-203A, Idaho Code. (7-1-24)
- b.** For an application that proposes diversion in excess of ten (10) cfs or storage of one thousand (1,000) af, the Department will accomplish statewide circulation pursuant to Section 42-203A(2), Idaho Code, by publication of a legal notice at least once each week for two (2) successive weeks in; (7-1-24)
 - i.** A newspaper, as defined in Section 60-106, Idaho Code, of general circulation in the county in which the point of diversion is located; and (7-1-24)
 - ii.** At least one (1) daily newspaper, as defined in Section 60-107, Idaho Code, that the Director determines is of general circulation within each of the Department's four (4) administrative regions. (7-1-24)
- c.** The Department shall make an application accepted for filing available on the Department's website pursuant to Section 42-203A(3), Idaho Code. (7-1-24)
- d.** Publication in the newspaper pursuant to Section 42-203A(2), Idaho Code, constitutes the official notice of the application. (7-1-24)
- e.** An application amended under Paragraph 035.04.a. after publication requires republication. The applicant must file the amended application with the republication fee required by Section 42-221F, Idaho Code. (7-1-24)
- f.** If a moratorium order is amended or repealed allowing the Director to continue processing an application previously held without final action, the Department will republish an application that was published prior to being held for the moratorium. Before republication, the applicant must pay the republication fee required by Section 42-221F, Idaho Code. (7-1-24)
- g.** Failure to pay a required republication fee within thirty (30) days after the applicant is notified to do so is cause for the Director to void the application, unless a processing delay is approved under Section 036. (7-1-24)
- h.** The Director may deny approval of an application filed for diversion of ground water in a designated critical ground water area without publication of the application if the Director believes that there is insufficient water available for the proposed water use. An application that includes a mitigation plan proposing to offset injury to existing water rights will be published prior to the Director's evaluation of the application under Subsection 045.01. (7-1-24)

02. Protests, Intervention, Hearings, and Appeals. (7-1-24)

- a.** Section 42-203A, Idaho Code, governs protests against application approval. The Department will treat a protest as a pleading filed pursuant to IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources." (7-1-24)
- b.** A protest may be filed on a form supplied by the Department or in any other format that includes the same information as the Department's form. (7-1-24)
- c.** If a single protest names more than one (1) individual protestant and does not identify a representative, the Department will consider the first person listed to be the spokesperson and primary contact for

service of documents for the group of individuals named as protestants. (7-1-24)

d. The Department will not consider a general protest (blanket protest) against an application for a particular class of use or from a particular source of water a valid protest. A protest must identify the specific application being protested. (7-1-24)

e. The Department will not accept a protest or petition to intervene unless the protest or petition to intervene is filed with the statutory filing fee required by Section 42-221L, Idaho Code, except any subdivision of the state, as defined in Section 67-2301, Idaho Code, is exempt from paying filing fees. (7-1-24)

f. Petitions to intervene in a protested application matter must comply with IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources." (7-1-24)

g. Hearings will be scheduled and held pursuant to IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources." (7-1-24)

h. A decision of the Department may be appealed pursuant to IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources." (7-1-24)

03. Burden of Proof. (7-1-24)

a. Burden of proof has two (2) parts: first, the burden of producing evidence to present a prima facie case, and second, the ultimate burden of persuasion. (7-1-24)

b. For evaluation of Section 42-203A(5), Idaho Code, criteria for a protested application: (7-1-24)

i. The applicant has the initial burden of producing evidence for the evaluation of Section 42-203A(5)(a) through (d) and (f) through (g), Idaho Code, criteria and of producing evidence of which the applicant is knowledgeable for the evaluation of Section 42-203A(5)(e), Idaho Code, criteria. (7-1-24)

ii. The protestant has the initial burden of producing evidence of which the protestant can reasonably be expected to be more cognizant than the applicant for Section 42-203A(5)(e), Idaho Code criteria. (7-1-24)

iii. The applicant has the ultimate burden of persuasion of Section 42-203A(5)(a) through (g), Idaho Code criteria. (7-1-24)

c. For evaluation of Section 42-203C, Idaho Code, criteria for a protested application: (7-1-24)

i. The protestant has the initial burden of producing evidence under Subsection 045.02, that the application will cause a significant reduction, except that the applicant has the initial burden of producing evidence of the proposed project design, construction, operation, and directly associated operations of which the applicant is knowledgeable or can reasonably be expected to be knowledgeable. (7-1-24)

ii. The protestant has the ultimate burden of persuasion on whether the application causes a significant reduction under Subsection 045.02 and whether it meets the public interest criteria in Section 42-203C(2), Idaho Code, under Subsection 045.03. (7-1-24)

d. For an unprotested application or an application for which all protests have been resolved, the Director will evaluate the application, any information submitted pursuant to Subsections 040.04, 045.01, 045.02, and 045.03, and information in the Department's files and records to determine compliance with Sections 42-203A(5) and 42-203C, Idaho Code. For an unprotested application or an application for which all protests have been resolved, the applicant has the burden of producing evidence and the ultimate burden of persuasion on whether the application satisfies the applicable statutory criteria. (7-1-24)

04. Additional Information Requirements. (7-1-24)

a. The Department may require the applicant to file any of the additional information under Paragraph 040.04.c. or 040.04.d. if the official record for the application does not contain sufficient information to evaluate the applicable criteria in Section 045 and other statutory criteria. The Department will notify the applicant of the additional information required. (7-1-24)

b. Unless the Department extends the time for filing, the additional information must be filed within thirty (30) days after the Department notifies the applicant of the additional information requirements. (7-1-24)

i. The Department may grant an extension of time to file the required additional information if the applicant files a written request showing good cause. (7-1-24)

ii. If the required additional information is not filed within the time allowed, including any extensions granted, the Department may void the application. (7-1-24)

c. For purposes of evaluating the application under Subsection 045.01, the Department may request additional information, including, but not limited to, the following: (7-1-24)

i. Project design, construction, operation techniques, or mitigation measures that the applicant will employ to eliminate or reduce the impact on other water rights. (7-1-24)

ii. The proposed project water requirements including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that water is required, and the volume of water that will be consumptively used per year. (7-1-24)

iii. The quantity of water available from the source applied for, including, but not limited to, the flow rates for surface water sources available during periods of peak and average project water demand, the properties of the aquifers from which water is to be taken from for ground water sources, and other sources of supply that may be used to supplement the water source proposed in the application. (7-1-24)

iv. Evidence documenting an interest in the lands necessary for all project works and the place of use including, but not limited to, copies of deeds, leases, easements, or well sharing agreements. In the instance the land necessary to construct and operate the proposed project is privately-owned land not in the applicant's ownership, the applicant must submit evidence documenting that the applicant has an interest in the land, has authority to exercise eminent domain to obtain the interest, or has another arrangement with the landowner establishing an interest. In the instance of a project diverting water from or conveying water across federally owned land, the applicant must submit evidence documenting that the applicant filed the appropriate form to request or initiate access and that access is authorized or a decision is pending. (7-1-24)

v. For hydropower use, evidence demonstrating compliance with Sections 42-205 and 42-206, Idaho Code. (7-1-24)

vi. Requests for other needed permits, licenses, and approvals. The applicant must keep the Department apprised of the status of the requests and any subsequent approvals or denials. (7-1-24)

vii. Evidence to show that it is reasonably probable that financing will be available to appropriate the water and put it to the beneficial use proposed. (7-1-24)

viii. If the applicant is a governmental entity proposing to use taxing, bonding, or contracting authority to raise the funds needed to commence and pursue project construction, a proposed project construction schedule and a plan describing how the applicant intends to utilize its taxing, bonding, or contracting authority in connection with the proposed project construction schedule. (7-1-24)

ix. Plans, specifications, and estimated construction costs for the project works definite enough to allow for determination of project impacts and implications. (7-1-24)

x. Letters requesting comment and any responding comment on the proposed project construction

and operation from the governing body of the city, county, or tribal reservation within which the point of diversion and place of use are located; any irrigation district, canal company, or other water delivery entity within which the proposed project is located; and from other people, entities, or agencies with interests in the local area that may be affected by the proposed water use as determined by the Department. (7-1-24)

xi. Design, construction, operation techniques, or mechanical equipment that will be employed to achieve efficiency in conveyance or use of water and to minimize waste. (7-1-24)

xii. Evidence demonstrating compliance with the Idaho State Water Plan. (7-1-24)

d. For purposes of evaluating the application under Subsections 045.02 and 045.03, the Department may request additional information including, but not limited to, the following: (7-1-24)

i. If the project proposes irrigation use, the crop rotation, including acres under each crop type, for newly developed land. Also the kinship, if any, of the operator of the land to be irrigated by the project to the applicant; the location and acreage of other irrigated land owned, leased, or rented by the applicant; a soil survey prepared in accordance with the Natural Resources Conservation Service irrigable land classification system; a schedule for bringing into production the project land; the name, address, and number of shares held by each shareholder if the applicant is a corporation; and evidence of tax-exempt status if the applicant is a corporation so claiming. (7-1-24)

ii. The number and kinds of jobs created or eliminated as a direct result of project development including both the construction and operating phases of the project. If jobs are seasonal, the estimated number of months per year of employment. (7-1-24)

iii. For an application that proposes appropriating more than twenty-five (25) cfs, or more than ten thousand (10,000) af of storage, or generating more than five (5) megawatts of power, the changes to community services required during the construction and operation phases of the project including, but not limited to, changes to schools, roads, housing, public utilities, and public health and safety facilities, if any. (7-1-24)

iv. The source of energy for diverting and using water for the project, the estimated instantaneous demand and total amount of energy that will be used, the efficiency of use, and energy conservation methods. (7-1-24)

v. The location, amount, and quality of return flow water, and any water conservation features of the project. (7-1-24)

vi. The availability, foreseeability, and cost of alternative energy sources to ameliorate the economic impact the proposed use will have on electric utility rates in the state of Idaho. (7-1-24)

e. Unless the Director determines otherwise, information under Paragraph 040.04.c. or 040.04.d. is not required for: (7-1-24)

i. An application that seeks to appropriate five (5) cfs or less, or store five hundred (500) af or less of unappropriated water. (7-1-24)

ii. An application that proposes to use water from a source in the Swan Falls Trust Water Area to irrigate two hundred (200) acres or less or any other use that the Director determines will reduce the flow of the Snake River measured at the Murphy Gage by two (2) af per day or less. (7-1-24)

f. Unless the Director determines otherwise, information under Paragraph 040.04.d. is required for an application that proposes to use water from a source in the Swan Falls Trust Water Area to irrigate more than two hundred (200) acres or any other use that the Director determines will reduce the flow of the Snake River measured at the Murphy Gage by more than two (2) af per day. (7-1-24)