

From: [TJ Budge](#)
To: [RulesInfo](#)
Subject: Water Appropriation Rules, IDAPA 37.03.08
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Phil,

Thank you for the opportunity to provide comments on the Department's review of IDAPA 37.03.08, Water Appropriation Rules. I appreciate the Department's efforts to modernize and improve the permit application process.

I would like to suggest two revisions to Rule 40 that I believe would improve transparency, fairness, and the quality of the administrative record while preserving the Department's discretion to evaluate applications under Idaho Code § 42-203A.

1. Notice and Opportunity to Respond to Department-Proposed Modifications

In some instances, an application may be approved with modifications, limitations, conditions, or permit elements that were not proposed by the applicant. While the Department has authority to impose conditions necessary to satisfy statutory requirements, applicants may not learn of those changes until the final permit or approval order is issued.

I recommend adding a provision requiring the Department to provide notice of any material modifications it intends to make to the permit before issuing a final approval, together with a brief explanation of the basis for the proposed change and an opportunity for the applicant to respond. The Department would remain free to approve the application with the modification, but the process would allow applicants to provide additional information or explain why a proposed modification may be unnecessary or unsupported.

I would recommend adding a new subsection in Rule 040, immediately before the provisions authorizing issuance of the final permit decision.

050.03. Notice of Proposed Material Modifications.

a. Prior to approval of an application, if the Department proposes to approve the application subject to a modification, limitation, condition, or permit element that was not requested by the applicant, the Department shall provide written notice to the applicant describing the proposed modification and the reasons supporting it.

b. The applicant shall be provided not less than fourteen (14) days to submit written

comments, objections, or additional information concerning the proposed modification.

c. After consideration of any response from the applicant, the Department may approve the application, approve the application with modifications, or deny the application.

I also recommend requiring that the final approval order or permit identify and briefly explain any material departures from the application as filed. This would improve transparency and create a clearer administrative record for applicants, protestants, and future water right holders.

050.04. Final Approval Containing Material Deviations from Application.

Any final written order, notice, permit, or other approval document approving an application that includes a material modification, limitation, condition, or permit element not proposed by the applicant shall identify each such modification and provide a brief statement explaining the legal or factual basis for the modification.

2. Revision to Rule 40.04.b.ii Regarding Requests for Additional Information

I support the Department's authority to request additional information necessary to evaluate the statutory criteria contained in Idaho Code § 42-203A. However, I am concerned that the current rule 40.04.b.ii, which allows the Department to void an application, allows disputes regarding the sufficiency or necessity of requested information to effectively determine the outcome of an application before the application is evaluated under the statutory criteria.

For example, an applicant may believe the requested information is not necessary to satisfy a statutory criterion, may not possess the requested information, or may provide alternative information that addresses the issue. Under the current framework, disagreements regarding the adequacy of a response could result in the application being voided before the Director evaluates the merits of the application under § 42-203A.

I suggest revising Rule 40.04.b.ii as follows:

ii. If the applicant fails to respond to a request for additional information within the time prescribed by the Department, the Department may void the application.

iii. If the applicant responds to the request, but the Department determines that the response does not fully provide the requested information, the Department may identify any remaining information sought and provide the applicant a reasonable opportunity to submit additional information or explanation.

iv. Thereafter, the Director shall evaluate the application based upon the information contained in the record and may consider the absence of requested information when applying the criteria of Section 42-203A, Idaho Code. Failure to provide requested information shall not, by itself, constitute grounds to void the application.

This revision would still allow the Department to void applications that are abandoned or ignored by applicants. However, where the applicant has responded, any dispute concerning the adequacy, relevance, or weight of the information submitted would be resolved through application of the statutory criteria rather than through dismissal of the application. In my view, an application should be approved or denied based on whether the applicant has satisfied the requirements of Idaho Code § 42-203A, with the absence of information affecting the evidentiary weight of the application rather than serving as an independent basis for voiding it.

Thank you for considering these comments. I would be happy to discuss either proposal further if that would be helpful.

Sincerely,

T.J. Budge

RACINE OLSON

201 E. Center St. | P.O. Box 1391 | Pocatello, Idaho 83204

Office: (208) 232-6101 | Direct: (208) 478-3467 | Cell: (208) 705-0826 | racineolson.com

Assistant: Tessa Sparrow | Direct: (208) 478-3444 | tessa@racineolson.com

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