

RECOMMENDATION MEMO

DATE: February 7, 2022

TO: Idaho Water Resource Board

THRU: Gary Spackman, Director, and Mat Weaver, Deputy Director

FROM: Mary Condon, Remington Buyer, Phill Hummer

RE: ZBR Rulemaking analysis of Water Supply Bank Rules, IDAPA 37.02.03 and Staff Recommendations

In January 2020, the Governor passed Executive Order 2020-10 (“Order”), requiring agencies to review all of their administrative rules. In adherence to the Order, the IWRB must review its Water Supply Bank Rules (“WSB Rules”) to determine if they should be repealed, replaced, or replaced through negotiated rulemaking. This memorandum summarizes rulemaking recommendations from the staff responsible for operating the Water Supply Bank Program. Ultimately, staff recommends that the IWRB engage in negotiated rulemaking to re-promulgate the existing WSB Rules.

Analysis of the Rules

In adherence with the Governor’s Order, in reviewing the WSB Rules, staff must analyze and determine (1) “Whether the benefits the WSB Rules are intended to achieve are being realized, (2) whether those benefits justify the costs of the WSB Rule, and (3) whether there are less-restrictive alternatives to accomplish the same benefits.” Order at 2. This memo addresses each review criteria individually.

1. Is the Rule Achieving its Intended Benefits

Idaho Code § 42-1762 requires the IWRB to adopt rules that govern the operation of the Water Supply Bank (“WSB”). The purposes of the WSB, as defined by Idaho Code §§ 42-1761-1766, are to (1) encourage the highest beneficial use of water, (2) provide a source of adequate water supplies to benefit new and supplemental water uses, and (3) provide a source of funding for improving water user facilities and efficiencies. Benefits of the current WSB Rules include establishing review criteria for the purchase, sale, lease, or rental of water rights through the WSB, establishing processes to allocate surplus funds generated from WSB transactions, and establishing minimum criteria for appointing local committees to operate local WSB rental pools.

Staff has determined that negotiated rulemaking could, at a minimum, improve the rule by simplifying and streamlining the criteria under leases and rentals and giving them similar processes. Currently, the two processes have different structures within the rules, which adds unnecessary complexity.

Idaho Code, § 42-1761 identifies three primary purposes for the WSB as outlined above. The WSB is a widely used market in Idaho to temporarily change the location and purpose of a water right and its intended water use with some limitations. Wide use of the WSB is evidenced by the number of processed rental and lease transactions reported in the IWRB’s [2019 WSB Annual Report](#) (“2019 Report”). For the period 2015-2019, 112 rentals and 339 leases were processed

per year on average according to the 2019 Report. Because water users from basins across the state regularly use the WSB year in and year out, staff concludes the current WSB program and rules fulfill the first two statutory purposes of the WSB.

However, the third purpose of the WSB is to “provide a source of funding for improving water user facilities and efficiencies.” Under the current WSB fee structure¹, fee revenue is insufficient to meet this purpose. In the 2019 Report, the IWRB reported that the cost to implement the WSB Program exceeded fee revenue every year from 2013 to 2019. The negative operating balance in that time ranged from approximately \$58K to \$135K, with an average negative operating balance of about \$94K.

Due to the program’s ongoing negative operating balances, the IWRB is required to subsidize the program with general funds and therefore generates no additional funds for “improving water facilities and efficiencies.” As a result, the third statutory purpose of the WSB is unrealized, and the current rule may not be achieving one of its intended benefits. Negotiated rulemaking could result in amended water right lease application filing fees or rental fees that increase WSB revenue sufficient for the IWRB to fund improvements to water facilities and efficiencies, thus realizing all of the WSB statutorily defined purposes.

2. Costs of the Rules

The costs associated with the current WSB Rules are attributed to three types of activities governed by the rules (1) leasing a water right to the Bank (Rule 25), (2) renting a water right from the Bank (Rule 30), and (3) Rental Pool Committees (Rule 40).

The first activity type, leasing a water right, or acquiring a water right by the IWRB, does not impose more costs than normally encountered with state water transactions for evaluating the validity and providing a defense from forfeiture. The fee is adequate for the costs associated with application review and processing and comparable to the fees associated with the filing of similar water rights applications under Idaho Codes §§ 42-201 and 222. Further, under the current rule, the IWRB returns 90% of the rental fee annually to the water right owner. However, there are currently no WSB processing costs to the lessor for changes in ownership or water right transfers even though these activities require administrative action by the WSB. A rulemaking would allow the IWRB to reconsider filing fees associated with processing WSB rentals and leases to reflect changes due to notices of change in ownership or transfers.

The second activity type, renting water rights from the WSB, does result in annual costs. The IWRB adopted the current rental costs via resolution and for the period 2018 to 2022, the rental cost is \$20 per acre-foot. Beginning in 2023, from 2023 to 2030, the IWRB will raise the cost to \$23 per acre-foot. Rule 30 of the WSB Rules established that the IWRB collects 10% of the rental amount as an administrative fee for operating the WSB while paying the remaining 90% to the water right owner. The IWRB does not currently collect application fees associated with submitting a rental application or amending an application or approved agreement, nor does it charge late fees for late annual payments, even though these activities result in administrative review and action by WSB staff. Current rental fees are well below average when compared to private consulting firms who handle water transactions and to IDWR transfer application processing fees involving changes in nature of use, changes in points of diversion, and new appropriations for beneficial uses. The amount of time required by IDWR staff to review an

¹ Water Right lease application filing fees are set forth in Rule 25 of the WSB Rules. Water Right rental rates are established by resolution of the IWRB, with 90% of revenue accruing to the water right owner and 10% accruing to the IWRB to offset WSB program operation costs as set forth in Rule 30. *Id.*

application for rental, actively manage rental transactions, calculate and submit payments to water right owners, and amend rental agreements to reflect permanent changes to water rights made through other water right processes greatly exceeds the 10% of WSB rental amounts collected by the IWRB. This rulemaking would allow the IWRB to reconsider its WSB rental fees.

The last activity type, the appointment of local rental pool committees, describes criteria for forming rental pool committees and reporting schedules, and it establishes minimum requirements for lease and rental considerations for rental pool committees. The costs of the rules appear to be equal to their benefit for local committees, but the rulemaking would allow the IWRB to simplify language and correct statutory references.

3. Alternatives to the Rules

The WSB Rules are adopted under Idaho Code § 42-1762 and provide interpretation of the application of Idaho Codes §§ 42-1761-1766. The WSB is specific to water marketing in Idaho, and similar programs are only recently emerging in other states and countries within the last decade. Further, other states use Idaho's current statutes and rules as references and guidelines when creating their water markets and adopting laws and promulgating rules to govern those markets.

There is an opportunity to improve the clarity of the WSB Rules by simplifying the language, reducing redundancy with WSB related statutes, and fully describing WSB procedures. Additionally, a review of the current fee structure might result in changes to the WSB program that would allow it to generate revenue that exceeds operating costs which the IWRB could use to fund water projects for the benefit of Idaho as envisioned in Idaho Code, § 42-1761.

4. Recommendation for the Rules

Based on our analysis, staff recommends repealing the WSB Rules and replacing them through the zero-based regulation negotiated rulemaking process. According to the negotiated rule process, IDWR staff will seek comment from the public on whether the IWRB can implement any non-regulatory measures in place of or in support of the Water Supply Bank rules. The rulemaking team will propose some minor rule changes and clarifications, as well as the proposal of revised program-related fees.