

Recommendation Memo

State of Idaho

Department of Water Resources

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Date: February 15, 2024

To: Mathew Weaver, Director, Idaho Department of Water Resources (“IDWR”)

Thru: Angela Hansen, Water Allocation Bureau Chief, IDWR

From: Craig Saxton, Adjudication Section Manager

Subject: Memorandum re: IDWR’s Adjudication Rules (IDAPA 37.03.01) Retrospective Analysis and Recommendation

Executive Order 2020-01 Zero-based Regulation

State of Idaho Executive Order No. 2020-01 Zero-Based Regulation (the “EO”) requires the Idaho Department of Water Resources (“IDWR”) to review all IDWR rule chapters by 2026. EO at 2. The EO instructs IDWR to start the new rulemaking from a zero-base and complete a critical and comprehensive review. *Id.* at 3.

Following the Division of Financial Management and IDWR schedule, IDWR must address IDWR’s Adjudication Rules, IDAPA 37.03.01 (“Rule”) in 2024, the fourth year of the review process.

The EO requires IDWR to perform a retrospective analysis of the Rule to decide whether the Rule should be repealed altogether or re-promulgated. *Id.* at 3. This memorandum includes the retrospective analysis to support IDWR’s recommendation to re-promulgate the Rule.

Retrospective Analysis

1. What are the benefits of the current rule?

The Rule implements the adjudication statutes codified in Idaho Code §§ 42-1409, 42-1409A, and 42-1415 in general adjudications. The Rule also implements collection of the filing fees required in Idaho Code § 42-1414.

Other benefits of the current rule include:

- Sets forth minimum requirements for completing and accepting a notice of claim.
- Establishes clear criteria for the calculation of claim filing fees.
- Establishes exemptions to filing fees.
- Establishes criteria for if and when claim fees should be refunded.
- Establishes criteria for rejecting claims.

2. Do the benefits of the rule justify the costs of the rule?

Adjudication claims are accepted and processed throughout the state of Idaho in connection with five separate general stream adjudications. The Rule would also apply to adjudications commenced in the future. The costs of the Rule are the identified costs associated with filing fees dependent on the type of water use claimed and the extent of use claimed as well as the time and money required to gather the information needed to complete the claim form. Completing the claim includes describing the elements of the water use claimed and supplying the documentation and evidence needed to meet the burden of proof for supporting elements of the claim. The costs vary with the complexity of the claimed water use. For some claims, the cost is little more than the time required to fill out the claim form and pay the associated filing fees. For large, complex water systems, the costs sometimes include hiring attorneys or consultants to prepare detailed technical reports explaining the existing system or to research historic documents to support the claimed historic priority date.

The Rule is beneficial and justified for multiple reasons. First, as the technical expert for the Court administering a general stream adjudication, the State of Idaho must have sufficient, reliable, detailed information, to evaluate the claimed elements of a water right and the historical development of the claimed water system. The Rule communicates the minimum information needed for the State to conduct its evaluation. Second, the rule sets forth clear criteria for calculating claim fees which provide partial funding to support the State of Idaho's water rights adjudication program. Third, the Rule benefits water users, the public, and the State of Idaho by explaining under what circumstances a claim should be rejected if it doesn't include the minimum requirements described in the Rule. Commencement of a general stream adjudication results in a high volume of claim filings in a relatively short period of time. Clear guidance for accepting or rejecting claims is necessary to maintain an orderly and uniform process which increases efficiency and ultimately saves taxpayer money.

An efficient claim taking process is important because delayed processing and decision-making slow the State of Idaho's ability to review claims and prepare recommendations for the Idaho Water Adjudications Court which will ultimately issue decrees for each claim filed. Defining water rights through the adjudication process protects private property rights so that those rights can be defended and administered by priority in a time of shortage.

3. Are there less restrictive alternatives to accomplish the benefits of the rule?

The current Rule sets the minimum requirement for accepting an adjudication claim and a uniform process for calculating filing fees. Statutes address some of the claim requirements and the fee schedule, but the Rule includes key details not found in statute, including criteria for rejecting incomplete claims. Those details should be preserved to promote uniformity and certainty.

4. Recommendation

Idaho Code § 42-1805(8) authorizes IDWR's Director to promulgate rules to implement IDWR's powers and duties. Based on the above retrospective analysis, staff recommend the Rule be repealed and replaced through the rulemaking process. The rulemaking process will enable IDWR's collaboration with stakeholders to promote uniformity and certainty in processing and evaluating water right claims. IDWR will propose some minor rule changes or updates for purposes of clarification and consistency with current statutes.