

Recommendation Memo

State of Idaho

Department of Water Resources

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Date: November 30, 2022

To: Gary Spackman, Director, Idaho Department of Water Resources

Thru: Mat Weaver, Deputy Director, Idaho Department of Water Resources

From: Angie Hansen, Water Rights Section Manager *AH*

Subject: Memorandum re: IDWR's Water Appropriation Rules (IDAPA 37.03.08)
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 Water Appropriation Rules, IDAPA 37.03.08 ("Rule") in 2023, the third 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The EO requires IDWR to perform a retrospective analysis of the Rule to decide whether the Rule should be repealed altogether or re-promulgated.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 water appropriation statutes codified in Idaho Code §§ 42-202, 42-203A, 42-203B, 42-203C, 42-203D, 42-204, 42-205, 42-206, 42-211 and 42-229 for all sources of public water in Idaho and for water held in trust by the State of Idaho. The Rule also gives notice of the fees required in Idaho Code §§ 42-221(A) and 42-221(F).

Other benefits of the current rule include:

- Setting uniform procedures for receiving and processing applications, including public notice requirements.
- Enabling orderly processing of the high number of water appropriation applications submitted.

- Increasing predictability and certainty when applying the statutory criteria for reviewing water appropriation applications.
- Establishing procedures for requesting technical information needed to evaluate water appropriation applications.
- Enabling a uniform approach to establishing the priority dates of new water uses.
- Establishing protest procedures.
- Establishing the burden of proof for water appropriation application criteria.
- Establishing the procedure for notifying the public of IDWR issued moratorium orders.

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

The costs of the Rule are the time and money required to gather and report the information needed to complete the application. Completing the application includes supplying the documentation and evidence needed to meet the burden of proof for the evaluation criteria set in statute. The costs vary with the complexity of the proposed water use. For some applications, the cost is little more than the time required to fill out the application form. For large, complex water development projects, the costs include hiring consultants to prepare detailed technical reports explaining the proposals.

The Rule is beneficial and justified for multiple reasons. First, the State of Idaho must have sufficient, reliable, detailed information, often technical information, to evaluate proposed water appropriations within the context of the water supply, existing water rights, financing options, and the local public interest, as directed by statute. The Rule communicates the extent of the information needed. Second, the public, including water users, must have sufficient information to determine whether to protest water right applications to protect their water rights and other interests in Idaho's public water resources. Third, the Rule benefits prospective water users, existing water users, the public, and the State of Idaho by explaining how IDWR will apply the statutory evaluation criteria to the information submitted. Requiring detailed information and describing how IDWR will use it to evaluate the proposed water use promotes good decision-making, reduces delays resulting from indecision, and results in a more predictable and efficient application process.

An efficient application process is important because delayed application processing and decision-making slow the development of water projects that boost Idaho's prosperity. Idaho law allows water users and other interested parties to protect their interests by formally protesting (opposing in legal proceedings) water appropriation applications. Over the last ten years, protested water right applications have taken an average of 243 days longer to resolve than unprotested applications.¹ Being able to review a complete application and the associated information required by the Rule helps potentially

¹This value is based upon the average number of days it takes to finish processing an approved water appropriation application after the protest deadline date, i.e., the average number of days between the protest deadline date and the approval date in the last ten years. On average (in the last ten years) it takes 39 days from the protest deadline date to approve an unprotested water appropriation application, compared to 282 days for a protested water appropriation application.

interested parties evaluate whether to protest applications to protect their interests. The opportunity to know the details of a proposal often allays public concerns, avoids protests, and allows IDWR's technical and legal review of the application to advance.

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

The current Rule sets procedures for gathering relevant information and applying the statutory criteria for water appropriation in Idaho. Statutes address some of the procedures and review criteria, but the Rule includes key details not found in statute, including information needed for the technical evaluation of applications. Those details should be preserved to promote uniformity and certainty. However, IDWR believes some sub-rules are obsolete and could be removed.

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 appropriation applications by removing obsolete rules, removing rules that duplicate statutes, and simplifying rules. In the rulemaking process, IDWR will evaluate how to implement statutory requirements adopted since 1986. IDWR will also collaborate with stakeholders to decide if IDWR can implement guidance in lieu of certain Rule sub-rules.