

From: [Hansen, Angela](#)
To: [Hersley, Jean](#)
Subject: FW: Water Rules
Date: Thursday, January 26, 2023 10:00:39 AM
Attachments: [image001.png](#)

From: Hansen, Angela
Sent: Wednesday, January 25, 2023 2:36 PM
To: clivejstrong@gmail.com
Subject: RE: Water Rules

Clive,

I appreciate your comments. The focus of the Water Appropriation Rules is on application for permit processing rather than licensing. That will need to be considered in phrasing of the requirement, but I see the point of your suggestion. To get there though, the Department would have to land somewhere that we aren't just yet, which is of the opinion that we do not need to consider right-of-way in good faith/speculation review if the project involves federal land. However, its too early in the rule drafting process to know where the requirement will end up. I will however add you to our list of stakeholders for the Water Appropriation Rules rulemaking effort so we can continue to consider your comments in subsequent drafts.

Thanks,
Angie

 IDAHO DEPARTMENT OF
WATER RESOURCES
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From: clivejstrong@gmail.com <clivejstrong@gmail.com>
Sent: Wednesday, January 25, 2023 2:26 PM
To: Hansen, Angela <Angela.Hansen@idwr.idaho.gov>
Subject: RE: Water Rules

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Thanks Angie. The second sentence is the one that causes problems in the Lemhi. What about the following language: In the instance of a project diverting water from or conveying water across land in federal ownership, there the applicant must have evidence at the time of licensing that the applicant has legal access to cross federal lands.

I don't see the need for including the state in second sentence in light of Idaho Code Section 42-1104, which provides that: "The right of way over and upon any and all lands owned or controlled by the state of Idaho is hereby granted to any and all persons for the purpose of constructing and maintaining any ditch, canal, conduit or other works for the diversion or carrying of water for any beneficial use: provided, that no property shall be taken under the provisions of this section until a just compensation shall be paid therefor, to be ascertained in the manner prescribed by law for the taking of private property for a public use."

My redraft would take the Department out of the role of forcing an applicant to file an application with the federal government prior to obtaining a permit. Under existing law, many water users have a right of way under RS2339 and/or the Ditch Bill, but because of the federal backlog in confirming these easements an applicant may be unable to obtain a statement from the federal government. As presently drafted the language could be interpreted as requiring these individuals to file for a special use permit, which would undercut arguments they may have for an existing vested easement. By redrafting to require evidence at licensing you put the ball in the court of the applicant and the federal government to resolve this issue.

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From: Hansen, Angela <Angela.Hansen@idwr.idaho.gov>
Sent: Wednesday, January 25, 2023 1:03 PM
To: clivejstrong@gmail.com
Subject: RE: Water Rules

Clive,

Just to follow up with your question with a little more insight/detail... The current draft language for what Rule 045.01.c.i is:

The applicant has legal access to the property necessary to construct and operate the proposed project or the authority to exercise eminent domain authority to obtain such access. In the instance of a project diverting water from or conveying water across land in state or federal ownership, there must be evidence that the applicant is in the process of obtaining a right-of-way.

So, this draft language is moving in the direction of a less stringent requirement than the current rule, but this is still DRAFT language that hasn't been vetted by others outside the agency. I imagine this language will change through the negotiated rulemaking meetings and the rest of the rulemaking process.

Regards,
Angie

From: clivejstrong@gmail.com <clivejstrong@gmail.com>
Sent: Tuesday, January 24, 2023 4:22 PM
To: Hansen, Angela <Angela.Hansen@idwr.idaho.gov>
Subject: RE: Water Rules

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Thanks for the update.

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From: Hansen, Angela <Angela.Hansen@idwr.idaho.gov>
Sent: Tuesday, January 24, 2023 3:11 PM
To: clivejstrong@gmail.com
Subject: RE: Water Rules

Clive,

The current strawman still has the requirement, but we've still go the negotiated rulemaking process to go through and it's far from decided. Unfortunately, do to time constraints, I did not get a chance to talk to the group further about this specific issue at the last internal rulemaking team meeting I had, like I'd hoped I would.

Regards,
Angie

From: clivejstrong@gmail.com <clivejstrong@gmail.com>
Sent: Tuesday, January 24, 2023 3:03 PM
To: Hansen, Angela <Angela.Hansen@idwr.idaho.gov>
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Angie did your group reach any consensus on whether to retain the rule requiring an applicant to

have filed an application for a federal right of way as part of the permit process?

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