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DEPARTMENT OF
WATER RESOURCES

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VIA EMAIL

IDWR Rules Review Officer
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Re: Docket No. 37-0308-2301 (ZBR Chapter Rewrite)
IDAPA 37.03.08 – Water Appropriation Rules
Comments on Rules 10, 25, 35, 40.01-.05.g, 45.01, 50, and 55

Dear Sir or Madam:

I hereby submit the following written comments in the above-referenced matter, in advance of the public meeting scheduled for May 22, 2023. Thank you for the opportunity to provide these comments. If you have any questions or need anything else from me, just let me know.

At the outset, I think it is helpful to recognize that water permit proceedings before IDWR often involve *pro se* parties unrepresented by attorneys or technical experts. While I recognize the purpose of the Zero-Based Regulation process is to reduce unnecessary regulation, I do not believe the focus should simply be on word count. For a *pro se* participant in IDWR proceedings, it could be confusing to have to constantly cross-reference both the Water Appropriation Rules ("Rules") and Idaho Code. To the extent IDWR is able to reduce the most important legal standards to one document, *i.e.*, the Rules, that would likely be helpful for *pro se* participants, even if it requires more frequent updates to the Rules to remain consistent with changes to Idaho Code over time.

This is also why some of the comments below may appear to present points that are relatively obvious to those who regularly participate in these types of proceedings. As I prepared these comments, I tried to put myself "in the shoes" of someone for whom this material may be unfamiliar.

Finally, for the sake of convenience, I have presented these comments in numerical order according to the Rule to which they pertain, and not in order based on significance. To the contrary, even though my comments regarding Rule 55 appear last in this letter, I have the most concern about that Rule.

Also, to clarify, unless otherwise indicated, references to individual Rules below are references to the Rules as re-numbered in IDWR's proposed amended Rules (*i.e.*, the "strawman"), not to the existing Rules as currently numbered.

Rule 10.02 (Definition of "Applicant")

Rule 10.02 defines "Applicant" to include a "governmental agency." Often times, the term "agency" is used specifically to refer to entities within the executive branch of the state government. *See, e.g.*, IDAHO CONST. art. IV, sec. 20. This narrow interpretation would exclude local governmental entities and other quasi-public entities and districts. Perhaps this phrase could be expanded to refer to a "governmental entity or agency."

Rule 35.02 ("Effect of an Application")

I have two unrelated comments regarding this Rule. First, Rule 35.02(b) states that, "An application is not a water right and does not authorize diversion or use of water until approved by the Director in accordance with the *laws in effect at the time the application is approved*." (Emphasis added). I question whether the highlighted language is correct in all circumstances. It seems to me that there could be situations in which the laws that apply to an application are established by reference to the date of advertisement, instead of approval. For example, if the legislature adopted a new statutory criterion in Section 42-203A(5) after advertisement of an application, would IDWR apply that new criterion, even though the public did not have notice of it at the time the application was advertised?

To be clear, I do not believe it is necessary to resolve this issue in the context of this rulemaking. Rule 35.02(a) concludes with the phrase, "in accordance with applicable law." In my opinion, the phrase "applicable law" should replace "the laws in effect at the time the application is approved" in Rule 35.02(b).

In addition, Rule 35.02(c) purports to require assignments of water permits to be reported to IDWR within 30 days of the assignment. However, Idaho Code Section 42-248 applies to changes in ownership of water rights—specifically including those represented "by permit"—and allows for notice to be provided to IDWR up to 120 days after the ownership change. I do not believe IDWR has the authority to modify a legislatively-established deadline.

Rule 35.03 ("Requirements for Applications to Be Acceptable for Filing")

As drafted, Rule 350.03(j) could be read to preclude the ability to obtain extensions of the permit development period. For the sake of clarity, perhaps the second sentence of that item could read, "While extensions are possible pursuant to Idaho Code Section 42-204, for the purposes of an Application, this~~This~~ period of time may not exceed five (5) years."

Rule 35.03(*l*)(ii) discusses signature requirements specifically for applicants that are "municipalities." Where Section 10.02 defines "Applicant" broadly to include a "government agency" (and I have suggested it include any "governmental entity or agency"), it does not then make sense to only list one type of governmental entity to the exclusion of others.

Rule 35.04 ("Amended Applications")

Idaho Code Section 42-211 governs the standards for amending both permit applications and permits that have been issued. Rule 35.04 only addresses amended applications. It seems potentially confusing for a single statute to address two items and the implementing rule to address only one of them. Perhaps a short subsection (g) could be added to Rule 35.04, reading something to the effect of, "Amendments of already issued permits shall be governed by Idaho Code Section 42-211."

Rule 40 ("Processing Applications")

Under Idaho law, IDWR is tasked with evaluation of a myriad of different types of applications. IDWR should clarify that this rule only applies to the processing of permit applications, to the exclusion of other types of applications. Because Rule 10.03 defines "Application" as "[a]n application for permit to appropriate water….," this can be done simply by capitalizing "Application" throughout Rule 40. Otherwise, references to "applications" should be replaced with the phrase, "applications for permit."

In addition, Rule 40.01 speaks only in terms of protested and unprotested applications. It is not unusual for an application to be protested but then to have all protests resolved prior to a hearing. I suggest revising Rule 40.01(e)(i) to read, "If unprotested, or if all protests are resolved prior to a hearing, the Director may hold a fact-finding hearing…."

I also question whether the reference to Idaho Code Section 42-1701A should be deleted as IDWR has suggested. Section 42-1701A(3) provides a valuable "catch all" hearing requirement to anyone "who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter…..," specifically including in an "action upon any application for a permit…." For an unprotested application or an application for which protests are resolved prior to a hearing, Section 42-1701A may be the only way for the applicant to create a record that is capable of being reviewed by courts in a judicial review action under the Idaho Administrative Procedure Act. I suggest including the following where the deleted reference used to be: "If the applicant has not already been afforded an opportunity for a hearing on the application, the applicant may request a hearing pursuant to Section 42-1701A."

Finally, Rule 40.01(g) states that, "Applicant may challenge or appeal the decision in accordance with IDAPA 37.01.01, 'Rules of Procedure of the Idaho Department of Water Resources.'" I am not sure that is entirely accurate or complete. For example, the Rules of Procedure 770 and 780 allow parties to seek relief (clarification and stay of orders, respectively) that may not necessarily constitute a "challenge." Perhaps that provision could be reworded to read, "Applicant or other formally recognized party may pursue~~challenge or appeal the~~ post-decision relief in accordance with Idaho Code tit. 67, ch. 52 and IDAPA 37.01.01, 'Rules of Procedure of the Idaho Department of Water Resources.'"

Rule 40.04 ("Burdens of Proof")

I believe it is already apparent from the context, but it may be helpful to clarify that burdens of proof only apply in contested case proceedings involving protested applications. Perhaps IDWR should consider revising Rule 40.04(a) to read, "Burden of proof for protested applications is divided into two (2) parts….," and revising Rule 40.04(d) to read, "For an unprotested application or an application for which all protests have been resolved, there is no burden of proof. Instead, the Director will evaluate the application, information filed pursuant to Subsection 40.05 and information in the files and records of the Department to determine compliance…."

Rule 40.05 ("Additional Information Requirements")

As revised, this rule would require an applicant to "submit evidence that the applicant is taking appropriate actions to obtain" possessory interests that can be obtained by eminent domain proceedings. This seems to suggest that the applicant should have already initiated eminent domain proceedings at the time it submits a water permit application. This seems backwards and inconsistent with Rule 45.01(c)(i), which states that mere "authority to exercise eminent domain" is sufficient proof of access for the purposes of the "good faith" criterion.

Particularly for governmental entities, eminent domain proceedings are often a last resort that they prefer to avoid if at all possible. As a practical matter, initiating eminent domain proceedings against members of the public seems much more tolerable and justified when a permit has already been issued. As a legal matter, Idaho Code Section 7-704(1) requires the use of land acquired by eminent domain to be "a use authorized by law." Under Idaho Code Section 42-202, construction of a water project prior to having a permit is prohibited. Therefore, arguably, the use is not "authorized by law" until the permit has been issued.

Rule 45.01 ("Evaluation Criteria")

IDWR's proposed revisions to Rule 45.01 include a reference stating that the content to implement Idaho Code Section 42-203A(5)(g) will be negotiated during the rule-making process. This is the statutory provision requiring IDWR to evaluate whether certain diversions "will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates…."

This is a relatively open-ended criterion that is outside IDWR's traditional expertise in water resources. In addition, it has received little if any judicial treatment. Under these circumstances, IDWR should be reluctant to adopt formal rules implementing this criterion. Instead, it seems more prudent to allow this criterion to be developed in the context of future water right and judicial review proceedings, rather than in a "vacuum."

Rule 55 ("Moratorium")

IDWR's proposed amendments to Rule 55 would purport to provide the Director with authority to "cancel or modify undeveloped permits for which the permit holder has not submitted proof of beneficial use…." In support of this proposed amendment, IDWR circulated the district court opinion in *Kugler v. IDWR*, Case No. CV 2011-15672 (5th Dist., May 23, 2012). After reading that opinion, I do not believe it justifies hard-coding the ability to cancel permits into the Rules.

At the outset, the *Kugler* opinion should be construed narrowly, for multiple reasons. First, it is not an opinion of the Idaho Supreme Court. When presented with this issue, it is certainly possible the Idaho Supreme Court would come to a different conclusion or employ a different analysis. Second, the Kuglers were *pro se* litigants. While it is certainly the case that courts are required to hold *pro se* litigants to the same standards that they hold represented parties within the course of a proceeding, that is a different question than the precedential weight the case should be given after-the-fact. In general, I would not expect *pro se* litigants to raise the same nuanced arguments that experienced water rights counsel would.

And, reading the *Kugler* opinion bears that out. For example, the Kuglers argued, among other things, that their water permit was issued on the day their permit application was submitted, and that the actual approved permit in the record was a "fabrication." *Kugler*, at pp. 7-8. On its face, that argument approaches frivolity and does not provide much confidence that the Kuglers were capable of identifying stronger but more nuanced arguments.

Ultimately, the issue turns on the primary statute discussed in *Kugler*—Idaho Code Section 42-1805(7), which reads:

> In addition to other duties prescribed by law, the director of the department of water resources shall have the following powers and duties:…After notice, to ***suspend the issuance or further action on permits or applications*** as necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of minimum flow provisions of the state water plan.

(Emphasis added).

While worded somewhat awkwardly, the most natural reading of the highlighted language above is that two things can be suspended: "issuance" of "permits," and "further action on…applications." The word "cancel" does not appear anywhere in this statute, and the Department should not go out of its way to read the ability to cancel permits into that language.

As the Department knows, Idaho law prohibits an applicant from beginning construction of a water project prior to obtaining an approved permit. *See, e.g.,* IDAHO CODE §§ 42-202. Once the permit has been issued, the applicant has a certain amount of time to construct the project and put the water to beneficial use in order to obtain a fully perfected license. *See, e.g*., IDAHO CODE §§ 42-204, 42-217, 42-219. During this time, substantial sums of money may need to be spent on construction.

For example, the Regional Water Sustainability Priority List recently adopted by the Idaho Water Resource Board identifies several water projects with estimated construction costs in the tens of millions of dollars. And, many of those projects, such as the raising of Anderson Ranch Dam, require construction of the entire project before a single drop of water can be put to beneficial use. The concept that the Department can simply "cancel" a permit could seriously harm the ability to finance large water projects.

When the Department evaluates a permit application, it is required to evaluate several statutory criteria, including that the proposed diversion will not "reduce the quantity of water under existing water rights…." IDAHO CODE § 42-203A(5)(a). As a legal matter, according to the Idaho Supreme Court, these determinations have precedential value that cannot be collaterally attacked later. *See, e.g., McInturff v. Shippy*, Dkt. No. 45418 (Ida. Sup. Ct. Aug. 27, 2019). As a practical matter, what is the purpose of the Section 42-203A(5) evaluations if they cannot be relied upon by a permittee?

The existing version of Rule 50.07 authorizes the Director to void an issued permit specifically because "the applicant submitted false or misleading information on the application or supporting documents." It seems reasonable to retain that authority. However, to the extent the standards in Section 42-1805(7) are duplicative of the standards in Section 42-203A(5), they cannot be the basis

to "cancel" an issued permit. That is clearly an impermissible collateral attack on the determinations made by IDWR in issuing the permit in the first place.

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Thank you again for the opportunity to provide these comments.

Sincerely,

VARIN THOMAS

Dylan B. Lawrence

cc: Angie Hansen (*via email*)
Jean Hersley (*via email*)
Mat Weaver (*via email*)