



IDAHO WATER RESOURCE BOARD

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May 11, 2023

DEPARTMENT OF
WATER RESOURCES

Brad Little
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May 11, 2023

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Director Gary Spackman
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Submitted via email: rulesinfo@idwr.idaho.gov

Jo Ann Cole-Hansen
Vice Chair
Lewiston
At Large

Dear Director Spackman,

Please find attached comments from the Idaho Water Resource Board on the proposed Water Appropriation Rules. Please let me know if you have any questions.

Dean Stevenson
Secretary
Paul
District 3

Sincerely,

Dale Van Stone
Hope
District 1

Jeff Raybould, Chairman
Idaho Water Resource Board

Albert Barker
Boise
District 2

Brian Olmstead
Twin Falls
At Large

Marcus Gibbs
Grace
District 4

CC: Idaho Water Resource Board members

Patrick McMahon
Sun Valley
At Large

The IWRB provides the following comments on the April 10, 2023 Preliminary Draft Rule (Strawman v1.0). Per the scheduling email dates April 26, 2023, these comments will address rules IDAPA 37.03.08.10, 25, 35, 40.01–05.g, 45.01, 50, and 55. The IWRB further provides comments on Rule 37.03.08.001. The IWRB may provide additional comments on IDAPA 37.03.08.30, .40.05.h, 45.02–.03 during the next round of comments due May 30, 2023.

RULE	COMMENT
37.03.08.001.02	<p>As drafted, the scope of this rule is too narrow. The rule states they are only “the procedures for obtaining the right to divert and use unappropriated public water and sources <i>within the Swan Falls trust water area.</i>” The water appropriation rules should apply everywhere within the State of Idaho, not just within the Swan Falls trust area. In addition, these rules provide the procedures for obtaining a “permit” to divert water; the rules for licensing a water right are found in other sections of IDAPA. Note also that a water right appropriates “water,” not a “source.” The “source” element of a water right is a term of art with a specific meaning, and a water right does not confer any interest in the “source” other than the right to divert water from it for the authorized beneficial use. Finally, the waters in the Swan Falls trust area that are available for diversion and use are not limited to “unappropriated” flows—these waters also include flows that are appropriated under the hydropower water rights held in trust by the State. This is the very reason “trust water” applications can be evaluated under the additional criteria of I.C. § 42-203C without violating Art XV s 3 of the Idaho Constitution. See comments below with regard to the definition of “Trust Water.”</p> <p>Suggest editing the rule as follows:</p> <p>“These rules set the procedures for obtaining a permit the right to divert and use unappropriated public water and sources within the State of Idaho and for the relocation of Trust Water within the Swan Falls trust water area.”</p>
37.03.08.010	Recommend adding the term “public interest” or “public interest criteria” to the list of defined terms, and define it with reference to I.C. § 42-203C(2). It is important to distinguish the “public interest” under I.C. § 42-203C(2) from the “local public interest” as defined in I.C. § 42-202B(3).
37.03.08.010.07	Recommend changing the citation to “Section 42-1701(3).”
37.03.08.010.09	<p>See comments above for Rule 01.02. Suggest the following changes:</p> <p>“The water right document issued by the Director authorizing the diversion and use of <u>unappropriated</u> public waters of the state or</p>

	sources of <u>the relocation of Trust Water</u> within the Swan Falls trust water area.”
37.03.08.010.12	<p>Subordination may apply to water rights both upstream and downstream from the subject right. Recommend the following changes:</p> <p>“Subject to diminishment or depletion without compensation by upstream water rights initiated later in time.”</p>
New Section	<p>Recommend adding a definition for the term “Trust Water” immediately after the definition of “Swan Falls Trust Water Area.” Adding a new definition for “Trust Water” will prevent confusion. The term “Trust Water” is firmly established in general usage so that to leave it out of the rules could raise confusion with how it is the same or different from “Water Right Held in Trust.” “Trust Water” is a statutory term; it appears in I.C. § 42-203C(1). Both I.C. § 42-203C and 42-203B(2) also contain references to “water” held in trust.</p> <p>Recommend adopting the following definition which is based on the language of I.C. § 42-203B(2) and § 42-203C and the discussion of the discussions of the term “trust water” in pages 48–51 of the State Water Plan and pages 39–41 of the SRBA District Court’s Memorandum Decision and Order on Cross-Motions for Summary Judgment, SRBA Subcase 00-92023 (Apr. 18, 2008).</p> <p><u>“Trust Water. Flows of water appropriated for power purposes by the Water Rights Held in Trust listed below in Rule 10.15. Trust water is reallocated to uses other than power generation to the extent the Water Rights Held in Trust are subordinated to permits issued for such other uses pursuant to Section 42-203C, Idaho Code.”</u></p>
37.03.08.010.015	<p>Rule 10.15’s proposed definition of “Water Rights Held in Trust” is both incorrect and difficult to understand because it relies on I.C. § 42-203B(5). Idaho Code § 42-203B(5) did not create the trust (the trust was created by I.C. § 42-203B(2) and (3), as expressly stated in subsection (1)), and I.C. § 42-203B(5) also does not define the Water Rights Held in Trust. Idaho Code § 42-203B(5) simply 1. authorizes the Governor to enter into the type of agreements contemplated by I.C. § 203B(2), and 2. ratified the Governor’s execution of the Swan Falls Agreement (which also does not define the Water Rights Held in Trust). Water Rights Held in Trust are defined, rather, by the partial decrees issued in the SRBA.</p> <p>The Rules’ definition of the Water Rights Held in Trust, therefore, should refer to two authorities: 1. the statutory subsections that actually</p>

	<p>establish the trust—I.C. § 42-203B(2) and (3); and 2. the partial decrees issued in the SRBA. This avoids the legal error of referring to I.C. § 42-203B(5) as if it created the trust or defines the water rights held in trust and is clearer.</p> <p>Providing a list of the water right numbers also avoids the need to grapple with statutory language that was already interpreted and implemented in the SRBA, and removes any confusion or ambiguity as to which specific water rights are the “Water Rights Held in Trust.” Note that referring to the water rights themselves also eliminates any need to discuss subordination or the Murphy Flows. The conditions in the partial decrees already explain subordination and the relationship between the Murphy Flows and the Water Rights Held in Trust. This removes the need to discuss these matters in the Rules’ definition of “Water Rights Held in Trust”: the partial decrees speak for themselves on these points.</p> <p>Recommend that the definition of “Water Right Held in Trust” be entirely re-written, as follows:</p> <p><u>“Water Right Held in Trust. A water right for power purposes held in trust by the State of Idaho pursuant to subsection (2) or subsection (3) of Section 42-203B, Idaho Code. The Water Rights Held in Trust for the Swan Falls trust water area were decreed in the Snake River Basin: 02-02001A, 02-02001B, 02-02032B, 02-02036, 02-02056, 02-02057, 02-02059, 02-02060, 02-0264, 02-02065, 02-04000B, 02-04001B, 02-10135, 36-02013, 36-02018, 36-02026, 37-02128, 37-02471, 37-02472, 37-20709, and 37-20710.”</u></p>
37.03.08.025.02	<p><u>Introductory Paragraph</u></p> <p>Recommend changing the title of this section to:</p> <p><u>“Applications for Reallocation of Trust Water within the Swan Falls Trust Water Area under I.C. § 42-203C”</u></p> <p>This language more closely follows the language of I.C. § 42-203C and better describes the fact that the water is being reallocated because it has already been appropriated by the Water Rights Held in Trust.</p> <p>Recommend further amending this section to make clear the statutes that apply to evaluation of the reallocation of Trust Water and to more explicitly follow the requirements of I.C. § 42-203C that require the Director first evaluate the application under the criteria of I.C. § 42-203A. Recommend amending the introductory paragraph as follows:</p>

“The Director will process applications to reallocate Trust Water ~~appropriate water~~ from the Swan Falls trust water area as described in I.C. § 42-203C, I.C. § 42-203A, Section 040 and 045”

Subsection a.

Idaho Code § 42-203C simply states that the Director must first evaluate the reallocation of Trust Water first using the criteria of I.C. § 42-203A. The rule should more clearly express that all criteria of I.C. § 42-203A(5) must be met and should more clearly state that the criteria of 42-203A(5)(a) does not include an evaluation of effect on Water Rights Held in Trust. Further, if the application meets the requirements of I.C. § 42-203A(5), the next step is to consider whether it causes a significant reduction under IDAPA 37.03.08.025.02.b. Recommend amending the subsection a. as follows:

- a. First, the Director will evaluate the application using the criteria of Section 42-203A(5) , Idaho Code , as described in Subsection 045.01, ~~using the criteria of Section 42-203A(5), Idaho Code.~~ ~~If the application satisfies all criteria of Section 42-203A(5), Idaho Code, the Director will approve the application for unappropriated water.~~ except that evaluation of criteria I.C. § 42-203A(5)(a) will not include an evaluation of effects on Water Rights Held in Trust. If the application does not satisfy the criteria of Section 42-203A(5) ~~b-(a)~~ through (g), Idaho Code, ~~or is found to reduce the water to existing water rights other than a water right held in trust,~~ the Director will deny the application. If the application satisfies all criteria of section 42-203A(5) (a) through (g), Idaho Code, ~~except Section 42-203A(5)(a), Idaho Code,~~ the Director will review the application under Paragraph 025.02.~~e~~b.

Subsection b.

There are no statutory “criteria” in I.C. § 42-203C for making a “significant reduction” determination. The “criteria” in IC 42-203C(2) apply to making a “public interest” determination *after it has already been determined there will be a “significant reduction.”* In other words, while I.C. § 42-203C calls for determining whether the proposed use will “significantly reduce” the water available for hydropower production under the water rights held in trust by the state, there are no statutory “criteria” for making this “significant reduction” determination. The statutory “criteria” apply only *after* it has already been determined the proposed use will cause a “significant reduction.”

	<p>In that case, the “criteria” in I.C. § 42-203C(2) apply in determining whether the proposed use will be approved <i>despite</i> the fact that it will “significantly reduce” the water available for hydropower. Recommend amending subsection b. as follows:</p> <p>“Second, the Director will evaluate the application as described in Subsection 045.02, to determine whether it would cause a significant reduction under criteria in Section 42-203C(1), Idaho Code. If the application will not cause a significant reduction, the Director will approve the application without additional evaluation. If the application will cause a significant reduction, the Director will review the application under Paragraph 025.02.c.</p> <p><u>Subsection c.</u></p> <p>This provision should address the “public interest” requirement of I.C. § 42-203C(2). However, it refers to the “local public interest” which was defined in IDAPA 37.03.08.010 with a reference to I.C. § 42-202B. The definition of “local public interest” in I.C. § 42-202B should not be applied to the analysis under I.C. § 42-203C. I.C. § 42-203C sets forth additional/different criteria for making a “public interest” determination. Therefore, it is recommended that subsection c. be amended to delete the word “local” as follows:</p> <p>“Third, if the application will cause a significant reduction, the Director will evaluate the application as described in Subsection 045.03, to determine if the proposed reduction is in the public interest under the criteria of Section 42-203C(2), Idaho Code. If the application is in the local public interest, the Director will approve the application. If the application is not in the local public interest, the Director will deny the application.”</p>
37.03.08.035.03.i	<p>It may be necessary to further describe the amount or type of information that is needed to demonstrate ownership or other legal access to the point of diversion, place of use, and conveyance for the purpose of accepting an application as complete. A water right may not be initiated in trespass. However, there may be certain circumstances when access to the property necessary to complete the project cannot be demonstrated at the time the application is filed. This is especially true for large water projects, such as those initiated by the IWRB. Holding an application as incomplete because demonstration of legal access cannot be shown at the time of filing may affect an applicant’s ability to secure a priority date and could delay or impede some water projects, especially large and complicated ones.</p>
37.08.03.035.04.a and c.	<p>The term “depletion” is not defined with the rules and is vague. As written, an amendment to an application that results in an increase in</p>

	<p>water “depleted per year” will result in IDWR advancing the priority date of the application. Clarification should be given as to when there might be an increase in “depletion” that would not also be an increase in diversion rate or volume.</p>
37.03.08.040.04.b.iii	<p>The conflation of the analyses of unprotests and protested applications and applications under I.C. § 42-203A(5) and 42-203C makes this section difficult to understand. It is only if the application is protested that the opportunity arises to divide the burdens of proof among the different parties. If an application is not protested, the burden is on the applicant to provide the Director with all the information necessary to support its application. In the case of an application for unappropriated water, that burden includes information demonstrating the criteria of I.C. § 42-203A(5) is met. In the case of an application for reallocation of Trust Water, that includes providing information demonstrating: (1) that the criteria of I.C. § 42-203A(5) are met, (2) information demonstrating that the project will not cause a significant reduction (or meets one of the presumptions in IDAPA 37.03.08.045.02), and, if it will cause a significant reduction (3) that it meets the public interest criteria of I.C. § 42-203C(2) (or meets one of the presumptions in IDAPA 37.03.08.045.03).</p> <p>If an application is protested, then the burdens of proof may be divided between the parties. The burdens of proof set forth for the analysis of the criteria of I.C. § 42-203A(5) should apply to both applications to appropriate unappropriated water and applications for reallocation of Trust Water. Once those burdens have been met they may be further divided for the purposes of determining (1) whether there will be a significant reduction under I.C. § 42-203C and IDAPA 37.03.08.045.02 and if there will be a significant reduction (2) whether they meet the public interest criteria of I.C. § 42-203C(2) and IDAPA 37.03.08.045.03.</p> <p>Based on these comments it is recommended the section be amended as follows:</p> <p><u>04. Burden of Proof</u></p> <ol style="list-style-type: none"> a. <u>For an unprotested application, the Director will evaluate, as appropriate the application, information filed by the applicant pursuant to Subsection 040.05, 045.01, 045.02, and 045.03, and information in the files and records of the Department to determine compliance with Sections 42-203A(5) and 42-203C, Idaho Code.</u> b. <u>For protested applications, the burden of proof has two parts: first, the burden of producing evidence to present a prima facie case, and second, the burden of persuasion.</u>

	<p>c. <u>For evaluation of criteria under I.C. § 42-203A(5):</u></p> <ul style="list-style-type: none"> i. <u>The applicant has the initial burden of producing evidence for the evaluation of the criteria in Sections 42-203A(5)(a) through (d), Idaho Code and of producing evidence of which the applicant is knowledgeable or reasonably can be expected to be knowledgeable for the evaluation of the criteria in Sections 42-203A(5)(e) through (g), Idaho Code.</u> ii. <u>The protestant has the initial burden of producing evidence of which the protestant can reasonably be expected to be more cognizant for the evaluation of the criteria in Sections 42-203A(e) through (g), Idaho Code.</u> iii. <u>The applicant has the burden of persuasion of the criteria of Section 42-203A(5) (a) through (g).</u> <p>d. <u>For evaluations under I.C. § 42-203C:</u></p> <ul style="list-style-type: none"> i. <u>The protestant has the initial burden of producing evidence, as outlined in Section 040.02, that the application will cause a significant reduction, except that the applicant has the initial burden of producing evidence of the proposed project design, construction, operation, and directly associated operations of which the applicant is knowledgeable or reasonably can be expected to be knowledgeable.</u> ii. <u>If it is demonstrated the application does cause a significant reduction, the protestant has the initial burden of producing evidence, as outlined in Section 040.03, that it does not meet the public interest criteria of Section 42-203C(2), Idaho Code.</u> iii. <u>The protestant has the ultimate burden of persuasion on both whether the application causes a significant reduction, as outlined in Section 040.02, and whether it meets the public interest criteria of Section 42-203C(2), as outlined in Section 040.03.</u>
37.03.08.040.05.a	Based on the comments above, it is recommended the section be amended to remove the reference to subsection (2) of I.C. § 42-203C. The additional information may be needed to help the Director determine significant reduction, as well as public interest. Therefore, a broader statutory reference to I.C. § 42-203C in total may be more helpful.
37.03.08.040.05.c	This section both gives the Director discretion to request additional information and also tries to take that discretion away. The Director “will request” the information in Section 40.05.f, “unless the Director determines otherwise.”

	<p>Beyond this confusion it is unclear what the exact interaction is between this section and the “presumptions” set forth in Section 045.02.e and f. Section 045.02.d provides that the Director will “presume an application proposing a direct diversion of water for irrigation purposes from the Snake River between Milner Dam and Swan Falls Dam or from tributary springs in this reach causes a significant reduction.” This section states that the Director must only request additional information regarding the “public interest” criteria of I.C. § 42-203C(2) and 040.05.f “for an application that seeks the use of water from a source in the Swan Falls trust water area for irrigation of more than two hundred (200) acres.” It is not clear why the 200 acres was added to this section.</p> <p>Section 045.05.e provides “the Director will presume an application for domestic, commercial, municipal, or industrial use does not cause a significant reduction if the total proposed use does not reduce the flow at the Murphy Gage by more than two (2) af per day.” It is unclear why the terms “domestic, commercial, municipal, or industrial” were removed from this section.</p> <p>Recommend that this section be harmonized with Section 045.02.e and f.</p>
37.03.08.040.05.f	<p>The Director may need additional information to determine both whether there is a “significant reduction” and whether the application meetings the criteria of 42-203C(2). Therefore, recommend amending this section to read as follows:</p> <p>“For purposes of evaluating the criteria of Section 42-203C(2), Idaho Code, the Director may request additional information, including but not limited to the following:”</p>
37.03.08.045.01.c.i	<p>The IWRB engages in many large-scale water projects, such as ground water recharge, the Anderson Ranch Dam Raise, and Mountain Home Air Force Base Pipeline project. These water projects are complex and cover large areas of land, often with multiple private, state, or federal lands at issue. The requirement that an applicant provide evidence of access to the point of diversion and/or place of use at the time the water right application is being evaluated often creates a difficult “chicken and egg” scenario in which (1) one must have access to the land, but the grantor doesn’t want to provide access to the land until the project is fully known/developed or (2) the water project hasn’t been developed yet so the place of use designated on the application is far broader than what will actually be developed, but one can’t develop the project and know where the final place of use will be without first obtaining the water right.</p>

	<p>It also provides a forum for entities, often the federal government, to step in to the state water right process via a protest and to use that protest to prevent the completion of the water right process until all federal land use agreements are in place. Federal land access processes can sometimes take years. This scenario can make it extremely difficult to complete the water right process, obtain a water right permit, and to move large water projects to completion.</p> <p>It is recommended that changes be made to this section to take into account the specific needs/complexities of large-scale water projects that are initiated by the IWRB.</p>
37.03.08.050.01	<p>The Director must also issue water right permits that are consistent with the State Water Plan. I.C. § 42-1734B(4). Recommend amending the section as follows:</p> <p>“The Director may issue a permit with conditions to ensure compliance with Title 42, Chapter 2, Idaho Code, other statutory duties, the public interest, efficient administration of water rights by priority dates, to meet the criteria of Section 42-203A, Idaho Code, <u>to ensure the permit is consistent with the State Water Plan as required by 42-1734B(4)</u>, and to meet the requirements of Section 42-203C, Idaho Code to the fullest extent possible, including conditions to promote efficient use and conservation of water.” . . .”</p>
37.03.08.055.01.a.iii	<p>Only the IWRB may hold a minimum streamflow water right. Title 42 Chapter 15. Recommend deleting the word “Director” as follows:</p> <p>“Prevent reduction of flows below a minimum streamflow established <u>held</u> by the Director or the Board pursuant to applicable law.”</p>