

May 11, 2023

DEPARTMENT OF
WATER RESOURCES**Preliminary Comments of Veolia Water Idaho, Inc., on IDWR's Strawman v1.0
May 11, 2023****37.03.08 — WATER APPROPRIATION RULES****000. LEGAL AUTHORITY.**

The Director of the Idaho Department of Water Resources adopts these rules under the legal authority of Section 42-1805(8), Idaho Code.

001. TITLE AND SCOPE.

01. Title. These rules are titled IDAPA 37.03.08, "Water Appropriation Rules."

02. Scope. These rules set the procedures for obtaining the right to divert and use unappropriated public water and sources within the Swan Falls trust water area. These rules govern the filing and processing of applications for permit to appropriate water and establish criteria for evaluating such applications pending on or after the adoption of these rules.

002. — 009. (RESERVED)**010. DEFINITIONS.**

The terms "consumptive use," "local public interest," "municipality," "municipal provider," "municipal purposes," "planning horizon," "reasonably anticipated future needs," and "service area" have the meaning given for those terms in Section 42-202B, Idaho Code. The terms "ground water" and "low temperature geothermal resource" have the meaning given for those terms in Section 42-230, Idaho Code. The term "critical ground water area" has the meaning given for that term in Section 42-233a, Idaho Code.

01. Acre-Foot (af). A volume of water sufficient to cover one (1) acre of land one (1) foot deep and is equal to forty-three thousand five hundred sixty (43,560) cubic feet.

02. Applicant. The person, corporation, association, firm, governmental agency, or other entity who applies to divert and beneficially use public waters.

03. Application. An application for permit to appropriate water filed with the Department.

04. Board. The Idaho Water Resource Board.

05. Cubic Foot Per Second (cfs). A rate of flow approximately equal to four hundred forty-eight and eight-tenths (448.8) gallons per minute and equal to fifty (50) Idaho miner's inches.

06. Department. The Idaho Department of Water Resources.

07. Director. The Director of the Idaho Department of Water Resources or a Department employee with authority delegated under Section 42-1701, Idaho Code.

08. Murphy Gage. The United States Geological Survey stream gage station for the Snake River near Murphy, Idaho (site identification number 131725000) the location of which is set forth in remark number two, as amended, of the Snake River Basin Adjudication partial decrees for water right nos. 02-00100, 02-02001A, 02-02001B, 02-02032A, 02-02032B, 02-02036, 02-02056, 02-02057, 02-02059,

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02-02060, 02-02064, 02-02065, 02-04000A, 02-04000B, 02-04001A, 02-4001B, 02-10135, 36-02013, 36-02018, 36-02026, 37-02128, 37-02471, 37-02472, 37-20709, and 37-20710.

09. Permit. The water right document issued by the Director authorizing the diversion and use of public waters of the state, including ~~or~~ sources of water within the Swan Falls trust water area.

10. Priority Date. The date of appropriation established when an application is filed in acceptable form unless a different date is set in accordance with applicable law.

11. Project Works. A general term that includes diversion works, conveyance infrastructure, and any devices used to apply water to the intended use. Improvements made as a result of application of water, such as land preparation for cultivation, are not a part of the project works.

12. Subordinated. Subject to diminishment or depletion without compensation by upstream water rights initiated later in time.

13. Swan Falls Trust Water Area. The reach of the Snake River extending downstream from Milner Dam (located in Sections 28 and 29, Township 10 South, Range 21 East, Boise Meridian) to Swan Falls Dam (located in Section 18, Township 2 South, Range 1 East, Boise Meridian) and all surface and ground water sources tributary to that reach of the Snake River. The Swan Falls trust water area excludes any reach of the Snake River upstream of Milner Dam or any surface or ground water tributary to the Snake River upstream of Milner Dam. The Swan Falls trust water area excludes any reach of the Snake River downstream of Swan Falls Dam or any surface or ground water tributary to the Snake River downstream of Swan Falls Dam. The area within which ground water is presently designated tributary to the reach of the Snake River extending downstream from Milner Dam to Swan Falls Dam is depicted in APPENDIX A.

14. Unappropriated Water. The public waters of the state of Idaho in streams, rivers, lakes, springs, or ground water exceeding the amount necessary to satisfy beneficially used by prior water rights.

15. Water Right Held in Trust. That portion of an unsubordinated water right used for hydropower generation purposes which is in excess of a minimum stream flow established by state action and held in trust by the state of Idaho in accordance with Section 42-203B(5), Idaho Code.

011. — 024. (RESERVED)

025. GENERAL DESCRIPTION OF THE PROCEDURE TO BE USED FOR ALLOCATION.

01. Applications to Appropriate Unappropriated Water. The Director will process applications to appropriate unappropriated water as described in Section 040, and evaluate them as described in Subsection 045.01, using the criteria of Section 42-203A(5), Idaho Code.

02. Applications to Appropriate Water from the Swan Falls Trust Water Area. The Director will process applications to appropriate water from the Swan Falls trust water area as described in Section 040, and evaluated as follows:

a. First, the Director will evaluate the application 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. If the application

Commented [GP1]: Suggest inserting actual text from decree remark rather than referencing decrees

Commented [GP2]: Generally, a subordinated water right also must let water pass to downstream users who are later in time. Perhaps this concept is irrelevant in the context of subordination in these rules (which focus on subordinated hydropower rights).

Commented [GP3]: Revised to more closely match statutory language.

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does not satisfy the criteria of Section 42-203A(5) b 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), Idaho Code, except Section 42-203A(5)(a), Idaho Code, the Director will review the application under ~~Paragraph-Subsection~~ 0245.02.c.

b. 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-Subsection~~ 0245.02.c.

c. 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.

026. — 034. (RESERVED)

35. APPLICATION REQUIREMENTS.

01. General Provisions.

a. An application must be filed:

i. On the form, which may include attachments, prescribed by the Department entitled "Application for Permit to Appropriate the Public Waters of the State of Idaho;"

ii. In accordance with IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources," Section 053, either on paper, in PDF format, or through the Department's online filing process;

iii. With the applicable filing fee set forth in Section 42-221A, Idaho Code; and

iv. With all necessary information as described in Subsection 035.03.

b. The filing fees in Section 42-221A, Idaho Code, are based on the total rate (in cfs) or the total storage volume (in af) to be appropriated. Whenever the application diversion rate and storage volume elements lead to different filing fees, the higher amount is the applicable filing fee.

c. The Department will determine whether an application is acceptable for filing under Subsection 035.03 or requires clarification or corrections.

d. When an application is not acceptable for filing, as described in Subsection 035.03, the Department will not accept the application and will proceed as directed in Section 42-204(1), Idaho Code. Filing fees for an unacceptable application will be refunded to the applicant if the application is not timely clarified or corrected. An unaccepted application does not establish a priority date.

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e. When an application is accepted for filing but requires clarification or correction of the information required by Subsection 035.03, the Department will proceed as directed in Section 42-204(1), Idaho Code.

02. Effect of an Application.

a. The priority date of an application is established as of the time and date the Department receives^{ed} the application in a form acceptable for filing with the statutory filing fee. The priority date of the application remains fixed unless changed by an action of the Director in accordance with applicable law.

b. 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.

c. An applicant's interest in an application is personal property. An applicant may convey (assign) their interest in an application to another person or entity. The person or entity to whom the application is conveyed ~~the application~~ must notify the Department of the assignment, in writing, within thirty (30) days after the assignment.

Commented [GP4]: What happens if no notification to Department within 30 days?

03. Requirements for Applications Acceptable for Filing. An application is acceptable for filing if it is filed in a manner stated in Sub~~section~~~~paragraphs~~ 035.01.a.-~~through iii~~. and includes the following information:

a. Name and mailing address of the applicant.

i. If the applicant is a corporation, also include the names of all directors and officers.

ii. If the applicant is a partnership, limited liability company, or joint venture, also include the names and addresses of all members or partners and the name of the managing member or partner, if any.

b. Source of water to be appropriated~~ing~~.

i. Identify only one water source unless the application is for a single interconnected system that will divert water from more than one source.

Commented [GP5]: Can GW and SW be in a single application?

ii. For a surface water source, include the official geographic name listed on the United States Geological Survey (USFS) Quadrangle map. If the surface water source is not named on the USGS Quadrangle map, describe as "unnamed," but identify the system or river to which the source is tributary.

iii. For a water source under the ground surface, identify the source as "ground water."

iv. For a low temperature geothermal resource, state how the source will be used primarily for its heat value and secondarily for its value as water or how the use qualifies for an exemption consistent with Section 42-233, Idaho Code.

Commented [GP6]: Odd placement for this provision because the application form does not have a place for this information in the "source" section. Suggest moving to another subsection, or say "describe in a narrative how the source will be used primarily for heat value...."

c. Legal description of the point of diversion and place of use.

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i. Describe the location of the point of diversion and place of use to the nearest forty (40) acre subdivision or United States Government Lot of the Public Land Survey System.

ii. Subdivision names, lot and block numbers, and any name in local common usage for the point of diversion or place of use may be included.

iii. If irrigation use is proposed, state the number of acres to be irrigated in each forty (40) acre subdivision of the place of use unless the place of use is a generally described place of use for an existing water right or permit. If the applicant owns an existing water right or permit that authorizes a generally described place of use, state the name of the generally described place of use and include a map depicting the generally described place of use boundary.

Commented [GP7]: Such as "within the Pioneer Irrigation District boundary"?

d. Quantity of water to be diverted.

i. Include the rate of flow in cfs or the volume of water stored in af per year for each beneficial use proposed, using values with a maximum of three significant figures with no more precision than hundredths for rate and tenths for volume.

Commented [GP8]: As we understand it, "three significant figures" would mean, for example, a flow rate of 14.9 cfs not 14.86 cfs. As another example, it would mean a volume of 100 AF not 100.5 AF. Is this what IDWR intends?

ii. For an application to store water, the maximum af per year may not exceed the storage facility capacity unless the application includes a plan of operation for filling the facility more than once per year. The refill plan may include refills for seepage, evaporation, use from storage, and other purposes the applicant intends to replace in the storage facility throughout the year.

iii. For an application to store water in an off-stream storage facility, include a maximum rate of diversion to storage and the total storage volume. Unless the storage facility is the end use of water, the application need not include short-term (24-hour or less) storage that facilitates operation of a water distribution system if the capacity of the storage facility is equal to or less than the volume of water diverted within 24-hours at the requested diversion rate in combination with other water rights for the same purpose.

e. Beneficial use of the water.

i. Describe the proposed use of the water. So long as a narrative describes details of the proposed use is described, the description used in the purpose of use field may be in general terms such as irrigation, industrial, or municipal.

ii. For a municipal purposes application, attach a complete "Municipal Water Right Application Checklist." The "Municipal Water Right Application Checklist" is a form attachment available from the Department.

iii. For a municipal purposes application that proposes to appropriate water for reasonably anticipated future needs, include justification for the service area, planning horizon, population projection, and water demand within the service area at the end of the planning horizon. Also include a gap analysis showing the existing water rights are insufficient to meet the municipal purposes need at the end of the planning horizon.

iv. For a municipal purposes application that does not propose to appropriate water for reasonably anticipated future needs, include a water requirement narrative with a map of the service area, current water needs, water needs after five years, and any existing plan for assigning the water right to a subdivision homeowners association or other local entity.

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f. Period of use.

i. A period of use must be listed for each beneficial use proposed in the application.

~~ii.~~ For irrigation use, the period of use must coincide with the annual periods of use shown in Figure 1 in APPENDIX B, unless it can be shown that a different period of use is necessary.

g. All proposed project works for diverting, distributing, and using the water.

h. Any other water right used at the place of use for the same purpose. Include water right number or name of the delivery organization, such as a municipal provider, canal company, or irrigation district, that supplies water for the same use at the same place of use proposed in the application, if any.

i. Ownership or other legal access to the point of diversion, place of use, and conveyance system. If the someone other than the applicant owns the property at the point of diversion, place of use, or conveyance ~~system~~property, include a description of the arrangement (or proposed arrangement) enabling the applicant to access the property for the purposes proposed in file the application.

j. Period of time required for completion of the project works and application of water to beneficial use. This period of time may not exceed five (5) years unless the application is for municipal reasonably anticipated future needs.

k. Map or plat of sufficient scale to show the project proposed. The map or plat must agree with the legal descriptions and other information shown on the application.

l. Applicant signature or evidence to show that the signatory has authority to sign the application.

i. For an application in more than one (1) name, include the signature of each applicant unless "or" connects the names.

ii. For an application by a corporation, company, municipality, or other organization, include the signature and title of an officer of the corporation or company or an elected official of the municipality or an individual authorized by the organization to sign the application.

iii. If the signatory is an authorized representative of the applicant, include a power of attorney or other documentation demonstrating the signatory has legal authority to sign on behalf of the applicant.

04. Amended Applications.

a. An applicant or the applicant's agent-authorized representative must amend an application if the applicant intends to change the nature-purpose of use, period of use, point of diversion, place of use, method or location of water diversion, point of discharge or return flow, ~~amount of diversion or depletion~~, or make other substantial changes. The Department may clarify source or tributary names or the irrigation period of use that do not meet Paragraph 035.03.b. and 035.03.f. requirements by documenting the official record without the applicant amending the application.

b. An applicant or the applicant's agent-authorized representative may amend an application to clarify the name of the source of water but may not amend an application to change the source of water.

Commented [GP9]: These proposed rules (and the existing rules) appear to stop at issuance of permit, and hence do not address amendment of permits (42-211). If that is intentional, so be it. Otherwise, the Department might wish to consider adding a section on amendment of permits. One issue that arises there is whether or not the local public interest test applies. The pre- and post-2023 statutes both make clear that it does not apply to amendments of permit. However, *Hardy v. Higginson* (1993) says it does apply. We are at a loss as to how *Hardy* can be reconciled with the plain language of the statute. The Legislature seemingly was clear that amendment of permit has a more limited scope (injury & enlargement). In any event, the Department may wish to resolve this—one way or the other—in its rules.

Commented [GP10]: "point of discharge or return flow" and "depletion" are not elements of a water right and are not required on the application form

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c. An amendment that increases the rate of diversion, increases the volume of water diverted ~~or depleted~~ per year, lengthens the period of use, or adds an additional beneficial use will result in the Department changing the application priority date to the date the Department received the amended application.

Commented [GP11]: amounts "depleted" is not an element of a water right and is not required on the application form

d. An applicant or the applicant's ~~agent~~ authorized representative may amend an application by:

i. Striking each item to be changed on the original application form and initialing and dating each change;

ii. Filing a new application form designated as an amended application; or

iii. Changing an application electronically via the Department's online filing process.

e. If the amendment increases the total diversion rate or total storage volume requested, the amended application must include the additional filing fee required by Section 42-221A, Idaho Code.

f. If the applicant's name or mailing address changes, the applicant must notify the Department of the change in writing.

036. DELAYED PROCESSING.

An applicant may request in writing that the Department delay commencement or interrupt processing of the applicant's application for a period not to exceed one (1) year. The Department may approve the request unless the delay will injure others, the applicant seeks the delay for speculative purposes, or the delay does not serve the public interest of the people of Idaho. The Department may approve a request for delay for a shorter period or upon conditions and may renew the approval upon written request.

Commented [GP12]: Does this mean there can be processing delays exceeding 1 year if "renewed"?

037. — 039. (RESERVED)

040. PROCESSING APPLICATIONS.

01. General. The Department will process an application using the following general steps:

Commented [GP13]: Are these steps taken in order? Is this a non-exclusive list? For example, on occasion the Department will issue a draft permit to the parties for review/comment prior to issuing the actual permit—does this list still allow for this?

a. Department reviews the application to determine if the application is acceptable for filing under Subsection 035.03. If the application is not accepted for filing or requires clarification, the Department will request application amendment or clarification per Section 035.

b. Director considers whether a moratorium order or critical ground water area designation prohibits processing the application.

c. Director considers whether to request additional information to clarify the application prior to advertisement—under Subsection 040.05. If necessary, the Director will request the additional information.

d. Advertisement and protest period under Subsection 040.02.

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e. Director reviews the application and available information to evaluate applicable criteria under Section 42-203A(5) or 42-203C, Idaho Code.

i. If unprotested, the Director may hold a fact-finding hearing or may request the applicant file additional information under Subsection 040.05, if the Director determines either is necessary.

ii. If protested, the Department initiates informal or formal proceedings to resolve the protest consistent with IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources."

f. Decision on the application in the form of a preliminary order or final order as defined in IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources."

g. Applicant may challenge or appeal the decision in accordance with IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources."

h. Decision affirmed or modified.

02. Public Notice Requirement. (3-18-22)

a. Advertisement of an application will be in accordance with Section 42-203A, Idaho Code.

b. For an application that proposes diversion in excess of ten (10) cfs or one thousand (1,000) af, the Director will accomplish statewide circulation required by Section 42-203A(2), Idaho Code, by publication of a legal notice at least once each week for two (2) successive weeks in a newspaper, as defined in Section 60-106, Idaho Code, of general circulation in the county in which the point of diversion is located and by publication of a legal notice at least once each week for two (2) successive weeks in at least one (1) daily newspaper, as defined in Section 60-107, Idaho Code, published in each of the Department's four (4) administrative regions the Director determines is of general circulation within the Department's region within which it is published. Upon request, the Department will supply the names of newspapers used for statewide publication.

Commented [GP14]: This should be made consistent with 42-203A(2)

c. The Director will make an application accepted for filing available on the Department's website in accordance with Section 42-203A(3), Idaho Code.

d. Advertisement in the newspaper in accordance with Section 42-203A(2), Idaho Code constitutes the official notice of the application.

e. If the Department determines that an application amended after advertisement requires re-advertisement, the applicant must file the amended application with the re-advertising fee prescribed in Section 42-221F, Idaho Code.

Commented [GP15]: How is this determination made?

f. The Director may deny approval of an application filed within a moratorium area or for diversion of ground water in a designated critical ground water area without advertisement of the application.

03. Protests, Intervention, Hearings, and Appeals. (3-18-22)

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a. Section 42-203A, Idaho Code governs protests against approval of an application. The Department will process any protest in accordance with IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources."

a-b. A protest may be filed on a form provided by the Department or in any other format that includes the same information as the Department's form.

b-c. The Director will not accept a protest or petition to intervene unless the protest or petition to intervene is filed with the statutory filing fee prescribed in Section 42-221L, Idaho Code.

e-d. If a single protest names more than one individual protestant and does not identify a representative, the Director will consider the first person listed the spokesperson and primary contact for service of documents for the group of individuals named as protestants on the protest.

d-e. The Director will not consider general statements of protest (blanket protests) against applications for a particular class of use or from a particular source of water valid protests.

04. Burden of Proof. (3-18-22)

a. Burden of proof is divided into two (2) parts: first, the burden of producing evidence to present a prima facie case, and second, the burden of persuasion.

b. The burden of producing evidence is divided between the applicant and the protestant as follows:

i. 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;

ii. The applicant has the initial burden 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. The protestant has the initial burden of producing evidence of which the protestant can reasonably be expected to be more cognizant than the applicant for the evaluation of the criteria in Sections 42-203A(5)(e) through (g), Idaho Code.

iii. The protestant has the initial burden of producing evidence for the evaluation of the public interest criteria of Section 42-203C(2), Idaho Code, and demonstrating a significant reduction, except that the applicant has the burden of producing evidence of the proposed project design, construction, operation, and directly associated operations to allow the Director to evaluate the project impact.

c. The applicant has the burden of persuasion for the criteria of Section 42-203A, Idaho Code, and the protestant has the burden of persuasion for the criteria of Section 42-203C, Idaho Code.

d. For an unprotested application, the Director will evaluate the application, any information filed pursuant to Subsection 040.05, and information in the files and records of the Department to determine compliance with Sections 42-203A(5) and 42-203C(2), Idaho Code criteria, as appropriate.

05. Additional Information Requirements. (3-18-22)

a. The Director may require the applicant to file any of the additional information described in Paragraph 040.05.e. or 040.05.f. if the official record for the application does not contain sufficient

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information to evaluate the applicable criteria in Section 42-203A(5) or 42-203C(2), Idaho Code. The Director will specify the additional information required in the information request to the applicant.

b. Unless the Director determines otherwise, information described in Paragraph 040.05.e. or 040.05.f. is not required for:

i. An application that seeks to appropriate five (5) cfs or less, or store five hundred (500) af or less of unappropriated water.

ii. An application that seeks to use water from a source in the Swan Falls trust water area to irrigate two hundred (200) acres or less or any other use that the Director determines will reduce the flow of the Snake River measured at the Murphy Gage by two (2) af per day or less.

c. Unless the Director determines otherwise, the Director will request information described in Paragraph 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 or any other use that the Director determines will reduce the flow of the Snake River measured at the Murphy Gage by more than two (2) af per day.

d. Unless the Director extends the time for filing additional information, the applicant must file the additional information within thirty (30) days after the Director notifies the applicant of the additional information requirements.

i. The Director will only grant an extension of time to file the required additional information if the applicant files a written request showing good cause.

ii. If the required additional information is not filed within the time allowed, the Director may void the application or advance the application priority date by the number of days that the information submittal is late.

e. For purposes of evaluating the criteria in Section 42-203A(5), Idaho Code, the Director may request additional information, including but not limited to the following:

i. Project design, construction, operation techniques, or mitigation measures that the applicant will employ to eliminate or reduce the impact on other water rights.

ii. The proposed project water requirements including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period when water is required, and the volume of water that will be consumptively used per year.

iii. The quantity of water available from the source applied for, including but not limited to, the flow rates for surface water sources available during periods of peak and average project water demand, the properties of the aquifers from which water is to be taken for ground water sources, and other sources of supply that may be used to supplement the water source proposed in the application.

iv. Evidence documenting a possessory interest in the lands necessary for all project facilities and the place of use. If such interest can be obtained by eminent domain proceedings or other arrangement with the landowner, the applicant must submit evidence that the applicant is taking appropriate actions to obtain the interest.

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v. For hydropower use, information that demonstrates compliance with Sections 42-205 and 42-206, Idaho Code.

vi. Applications for other needed permits, licenses, and approvals. The applicant must keep the Department apprised of the status of the applications and any subsequent approvals or denials.

vii. Evidence to show that it is reasonably probable that financing will be available to appropriate the water and apply it to the beneficial use proposed.

viii. Plans, specifications, and estimated construction costs for the project works definite enough to allow for determination of project impacts and implications.

ix. Letters requesting comment, and any responding comments, of comment on the proposed project construction and operation effects from the governing body of the city, county, or tribal reservation within which the point of diversion and place of use are located and any irrigation district, canal company, or similar water delivery entity within which the proposed project is located, and from other people or entities in the local area who may be affected by the proposed water use, as determined by the Director.

x. Design, construction, operation techniques, or mechanical equipment that will be employed to achieve efficiency in conveyance or use of water and to minimize waste.

f. 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:

i. A project design and estimate of development cost that is definite enough to evaluate the project's implications under Subsection 045.03. For an application that proposes appropriating more than twenty-five (25) cfs, or ten thousand (10,000) af of storage, or generating more than five (5) megawatts of power, the information must be prepared and submitted by a qualified engineer licensed under Chapter 12, Title 54, Idaho Code, unless waived by the Director.

ii. For an application that proposes irrigation use, the crop rotation, including acres under each crop type, for newly developed lands.

iii. The number and kinds of jobs created or eliminated as a direct result of project development including both the project construction and operating phases. If jobs are seasonal, include the number of months per year of employment.

iv. For an application that proposes appropriating more than twenty-five (25) cfs, or more than ten thousand (10,000) af of storage, or generating more than five (5) megawatts of power, the changes to community services required during the project construction and operation phases including, but not limited to, changes to schools, roads, housing, public utilities, and public health and safety facilities, if any.

v. The source of energy for diverting and using water for the project, the estimated instantaneous demand and total amount of energy that will be used, the efficiency of use, and energy conservation methods.

vi. The location, amount, and quality of return flow water, and any water conservation features of the project.

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vii. If the project proposes irrigation use: the kinship, if any, of the operator of the land to be irrigated by the project to the applicant; the location and acreage of other irrigated lands owned, leased, or rented by the applicant; a soil survey prepared in accordance with the Natural Resources Conservation Service irrigable land classification system; a schedule for bringing into production the project lands; the name, address, and number of shares held by each shareholder if the applicant is a corporation; and evidence of tax-exempt status if the applicant is a corporation so claiming.

041. — 044. (RESERVED)

045. EVALUATION CRITERIA.

01. Criteria for All Applications to Appropriate Water. The Director will use the following criteria in evaluating whether an application to appropriate water should be approved, denied, approved for a smaller amount of water, or approved with conditions.

a. Reduction of water available under existing water rights (injury) criteria:

i. Whether the amount of water available under an existing water right will be reduced below the amount authorized by permit, license, decree, or valid claim or the historical amount beneficially used by the water right holder of such permit, license, decree, or valid claim, whichever is less.

ii. Whether the holder of an existing water right will be forced to an unreasonable effort or expense to divert water for an existing water right. The reasonable pumping level provisions of Section 42-226, Idaho Code govern protection of existing ground water rights.

iii. Whether the quality of the water available would be made unusable ~~for the by an~~ existing water right and could not be restored to usable quality without unreasonable effort or expense.

iv. Whether the application that would otherwise be denied because of injury to another water right may be approved upon conditions that mitigate losses of water for an existing water right, as determined by the Director. This provision is not intended to require compensation or mitigation for loss of flow to holders of a subordinated hydropower water right or a water right held in trust.

b. Sufficiency of water supply criteria. The water supply will be determined insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to accomplish the proposed beneficial use.

c. Good faith criteria. The evaluation ~~of~~ whether an application is made in good faith or made for delay or speculative purposes requires an analysis of the applicant's intent to follow application requirements and diligently pursue permit development. Speculation for this rule is an intention to obtain a water right permit without the intention of applying the water to beneficial use with reasonable diligence. Speculation does not prevent an applicant from subsequently selling the project for a profit or from making a profit from the use of the water. An application will be found ~~to be~~ made in good faith if it meets the following criteria:

i. 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~~ not in the applicant's

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ownership, there must be evidence that the applicant is in the process of obtaining necessary interests or rights-of-way.

ii. The applicant is in the process of obtaining other permits, licenses, and approvals needed to construct and operate the project.

iii. There are no obvious impediments that prevent the successful completion of the project.

d. Financial resources criteria:

i. The Director will find an applicant has sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction.

ii. The Director will find a governmental entity has sufficient financial resources if it has the taxing, bonding, or contracting authority necessary to raise the funds needed to commence and pursue project construction in accordance with the construction schedule.

e. Local public interest criteria. The Director will consider the following, and any other appropriate factors, in determining whether the project will conflict with the local public interest:

i. The effect the project will have on the economy of the local area affected by the proposed use as determined by short and long term employment opportunities, short and long term revenue changes to various sectors of the economy, and the stability of revenue and employment gains;

ii. The direct effects the project will have on fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality, and the effect of such use on the availability of water for alternative uses of water that might be made within a reasonable time, natural resources, including but not limited to recreation, fish, and wildlife, that are of interest to people in the area directly affected by the proposed water use;

iii. Although the Director has independent responsibility for the overall assessment and balancing of factors weighing on the local public interest, the Director shall give due regard to the expertise of other state and federal regulatory agencies charged with assessing the individual issues identified in subsection ii, recognizing that it is not the primary job of the Department to protect the health and welfare of Idaho's citizens and visitors;

iv. The Director may condition approval of an application on compliance with orders, rules, requirements, and authorizations issued or to be issued by state and federal agencies with jurisdiction over subject matter relevant to the local public interest; and

v. The Director will deny an application that conflicts with the local public interest unless the Director determines that an over-riding state or national need exists for the project or that the project can be approved with conditions to resolve the conflict with the local public interest.

f. Conservation of water resources within the state of Idaho criteria:

i. Whether a diversion rate greater than 0.02 cfs per acre is necessary for irrigation use.

Commented [GP16]: Local public interest review must be limited to effects on the public water resource, as required by the 2003 amendments to I.C. 42-202B(3). The 2003 amendments made clear that there are no "other appropriate factors."

Commented [GP17]: This holdover from the existing rule (dating to 1993) should be removed. It conflicts with the 2003 amendment. Note that there is language in the Statement of Purpose for the 2003 amendment referencing economic impacts, but that is in reference to out-of-basin transfers, not the local public interest.

Commented [GP18]: The 2003 Statement of Purpose explicitly emphasizes that the local public interest evaluation should not stray into secondary effects of projects.

Commented [GP19]: This language is broad, and comes directly from the Statement of Purpose for the 2003 amendments. We have some uncertainty as to whether the statutory language includes weighing other possible uses of the water. But the Statement of Purpose says that is included. And that is what IDWR did in its 2012 Twin Lakes Canal Co. decision.

Commented [GP20]: This language reflects the holding of Director Spackman's 10/18/2012 decision in the Twin Lakes Canal Company application, melding it with the teaching of other cases. The "not the primary job" language is lifted directly out of Shokal v. Dunn (1985) and Eden's Gate (2022) and is quoted verbatim in the 2023 Statement of Purpose. See the latest version of the Idaho Water Law Handbook available online at www.givenspursley.com (publications) for a more detailed discussion.

Commented [GP21]: This is also dictated by the clear teaching of Shokal v. Dunn and Eden's Gate.

Commented [GP22]: This language is from the existing rule and there is no reason to change it; it is consistent with the Department's statutory authority that it "may" reject applications that conflict with the statutory criteria in 42-203A(5). The "may" language in 42-203A(5) was not changed in the 2003 amendments.

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ii. Whether the design, construction, operation techniques, or mechanical equipment will be employed to achieve a water use efficiency consistent with contemporary engineering or industry standards.

iii. Whether a proposed storage facility will exceed a seepage rate of 0.2 feet per day. This criterion does not apply if the proposed storage facility will be used as an infiltration basin for ground water recharge, an excavated pond filled by intercepting ground water, or an impoundment for irrigation use not exceeding five (5) af of stored water per acre of irrigation.

Commented [GP23]: Is this AF or vertical feet?

g. Project effect on the local economy or local area of the watershed in cases where the place of use is outside the watershed or local area where the source of water originates ~~where the water originates~~ criteria:

i. The extent of adverse effect on the local economy of the watershed or local area within which the source of water for the proposed use originates. ~~In the case where the place of use is outside the watershed or local area where the source of water originates, CONTENT TO BE NEGOTIATED IN NEGOTIATED RULEMAKING PROCESS.~~

Commented [GP24]: As an alternative to a further negotiated rulemaking, consider just using the language of the statute. Admittedly, it is very fuzzy. But it may be better to work out the details in a more flexible guidance document than by rulemaking.

02. Criteria for Evaluating Whether an Application in the Swan Falls Trust Water Area Will Cause a Significant Reduction. The Director will find an application to appropriate water from the Swan Falls trust water area will cause a significant reduction when the proposed use, individually or cumulatively with existing uses and other uses reasonably likely to exist within twelve months of the proposed use, would significantly reduce the amount of water available to a water right held in trust. The Director will presume an application to appropriate water from the Swan Falls trust water area will not cause a significant reduction if the Director determines that it meets both the individual and cumulative tests for evaluating significant reduction as provided in Paragraphs 045.02.a. and 045.02.b.

a. Individual test. A proposed use meets the individual test if, when fully developed and its impact is fully felt, the use will individually reduce the flow of the Snake River measured at Murphy Gage by not more than two (2) af per day. The Director will presume an irrigation project of two hundred (200) acres or less diverting from a source located in the Swan Falls trust water area will not reduce the flow at Murphy Gage by more than two (2) af per day. The presumption of this paragraph is not applicable to an application which the Director determines to be part of a larger development.

b. Cumulative test. A proposed use meets the cumulative test if the use, when fully developed and its impact is fully felt and when considered cumulatively with other existing uses and other uses reasonably likely to exist within twelve (12) months of the proposed use, will not deplete the flow of Snake River measured at Murphy Gage by more than:

i. Forty thousand (40,000) af per calendar year when considered with all other appropriations from the Swan Falls trust water area approved during that calendar year;

ii. Forty thousand (40,000) af per calendar year using a four (4) year moving average when considered with all other appropriations from the Swan Falls trust water area approved during that four (4) year period; and

iii. Twenty thousand (20,000) af per calendar year from applications within the Swan Falls trust water area that meet the criteria of Paragraph 045.02.a.

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c. The Director will determine on a case-by-case basis from available information whether an application to appropriate water from the Swan Falls trust water area that does not meet the test in Paragraph 045.02.a. or Paragraph 045.02.b., or one which meets both tests but has been protested, will cause a significant reduction. In making this determination, the Director will consider:

i. The amount of the reduction in hydropower generation that the proposed use will cause individually and cumulatively with other uses expected to be developed within twelve (12) months of the proposed use as compared to the existing hydropower generation output of the affected facility or facilities.

ii. The relative importance of the affected hydropower facility or facilities to other sources of electrical power generation available to the holder of the facility or facilities.

iii. The timing of the reduction in hydropower generation both on an annual basis and on a long-term basis considering the lag time between the beginning of diversion by the proposed use and the resulting reduction in hydropower generation.

iv. The effect of the reduction in hydropower generation on the unit cost of hydropower from the facility or facilities and the average cost of electrical power offered by the facility holder.

v. The terms of contracts, mortgages, or regulatory permits and licenses that require the hydropower generation facility holder to retain the capability to produce hydroelectric power at a specific level.

d. Other provisions of these rules notwithstanding, 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.

e. Other provisions of these rules notwithstanding, 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.

03. Criteria for Evaluating Public Interest under Section 42-203C(2), Idaho Code. If the Director determines that an application for an appropriation from the Swan Falls trust water area will cause a significant reduction, the Director will consider the criteria of Section 42-203C(2), Idaho Code, before approving or denying the application. In evaluating the public interest criteria in Section 42-203C, Idaho Code, the Director will consider the following:

a. The potential benefits, both direct and indirect, the proposed use would provide to the state and local economy. The economic appraisal will be based upon generally accepted economic analysis procedures which uniformly evaluate the following factors within the state of Idaho and the county or counties directly affected by the project:

i. Direct project benefits.

ii. Indirect benefits including net revenues to the processing, transportation, supply, service, and government sectors of the economy.

iii. Direct project costs, to include the opportunity cost of previous land use.

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iv. Indirect project costs, including verifiable costs to government in net lost revenue and increased regulation costs, verifiable reductions in net revenue resulting from losses to other existing instream uses, and the increased cost of replacing reduced hydropower generation from unsubordinated hydropower generating facilities.

b. The proposed use impact upon the electric utility rates in the state of Idaho, and the availability, foreseeability, and cost of alternative energy sources to ameliorate such impact. These evaluations will include the following considerations:

i. Projections of electrical supply and demand for Idaho and the Pacific Northwest made by the Bonneville Power Administration and the Northwest Power Planning Council and information available from the Idaho Public Utilities Commission or from the electric utility from whose water right is held in trust pursuant to Section 42-203B(5), Idaho Code.

ii. The long-term reliability of the substitute source and the cost of alternatives including the resulting impact on electrical rates.

c. Whether the proposed use will promote the family farming tradition in the state of Idaho. For purposes of this evaluation, the Director will presume the application promotes the family farming tradition if the total land to be irrigated by the applicant, including currently owned and leased irrigated land and land proposed to be irrigated in the application and other applications and permits of the applicant, do not exceed nine hundred sixty (960) acres. If the presumption above does not apply, the Director will consider whether the proposed use has the following characteristics:

i. The farming operation developed or expanded as a result of the application is operated by the applicant or a member of the applicant's family (spouse, parents or grandparents, lineal descendants, including those that are adopted, lineal descendants of parents; and spouse of lineal descendants);

ii. In the event the application is filed in the name of a partnership, one or more of the partners operates the farming operation; and

iii. If the application is in the name of a corporation, the number of stockholders does not exceed fifteen (15) persons, and one or more of the stockholders operates the farming operation unless the application is filed by an irrigation district, drainage district, canal company or other entity authorized to appropriate water for landowners within the district or for stockholders of the company all of whom satisfy the family farming criteria.

d. Whether the proposed project will promote full economic and multiple use development of the water resources of the state of Idaho:

i. Promoting and conforming with the adopted Idaho State Water Plan;

ii. Providing for coordination of proposed and existing uses of water to maximize the beneficial use of available water supplies;

iii. Utilizing technology economically available to enhance water and energy use efficiency;

iv. Providing multiple uses of the water, including multipurpose storage;

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- v. Allowing opportunity for reuse of return flows;
- vi. Preserving or enhancing water quality, fish, wildlife, recreation, and aesthetic values; or
- vii. Providing supplemental water supplies for existing uses with inadequate supplies.

e. Whether a proposed irrigation use will conform to a staged development policy of up to twenty thousand (20,000) acres per year or eighty thousand (80,000) acres in any four (4) year period in the Snake River drainage above Murphy Gage. In applying these criteria, the Director will consider the following:

i. For purposes of Paragraph 045.03.e., "above the Murphy Gage" means the reach of the Snake River between Milner Dam and the Murphy Gage, as well as any surface or ground water tributary to that reach of the Snake River;

ii. Twenty thousand (20,000) acres per year or eighty thousand (80,000) acres per four (4) year period is a four (4) year moving average of twenty thousand (20,000) acres per year of permits issued during a calendar year for irrigation development. If permits for development of less than twenty thousand (20,000) acres are issued in a year, additional development in excess of twenty thousand (20,000) acres can be permitted in succeeding years. Likewise, if more than twenty thousand (20,000) acres is permitted in one year (recognizing that a single large project could exceed twenty thousand (20,000) acres) the permitted development in succeeding years must be correspondingly less to maintain no greater than a twenty thousand (20,000) acres per year average for any four (4) year period;

iii. The criteria of Paragraph 045.03.e. applies to multiple-use projects with irrigation as a principal use. Projects for which irrigation is only an incidental use, such as the land treatment of waste, are not included within this policy; and

iv. The Director may approve an application determined to be otherwise approvable but found to exceed the acreage limitations of Paragraph 045.03.e., when considered with other applications approved for development, with conditions prescribing the construction of project works and beneficial use of water commence in a future year.

f. No single public interest criterion will be entitled to greater weight than any other public interest criterion.

g. The Director will presume an application that proposes to store surface water from the Snake River and surface tributaries upstream from the Murphy Gage satisfy the public interest criteria of Section 42-203C(2), Idaho Code, if the proposed project is consistent with the Idaho State Water Plan.

h. The Director will presume an application for an appropriation from the Swan Falls trust water area filed prior to July 1, 1985 with diversion and beneficial use completed prior to October 1, 1984 satisfy the public interest criteria of Section 42-203C(2), Idaho Code.

i. The Director will presume applications proposing a direct diversion of water for irrigation use from the reach of the Snake River between Milner Dam and Swan Falls Dam or from tributary springs in that reach are not in the public interest as defined by Section 42-203C, Idaho Code. Such proposals, are presumed to prevent the full economic and multiple use of water in the Snake River Basin and to adversely affect hydropower availability and electrical energy rates in the state of Idaho.

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j. The Director will presume proposed domestic, commercial, municipal, or industrial uses which individually do not have a maximum consumptive use of more than two (2) of per day meet the public interest criteria of Section 42-203C(2), Idaho Code, unless protested.

046. — 049. (RESERVED)

050. CONDITIONS OF APPROVAL.

01. Issuance of Permit with Conditions. 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, 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.

051. — 054. (RESERVED)

055. MORATORIUM.

01. Applications or Undeveloped Permits.

a. The Director may cease to approve applications or cancel or modify undeveloped permits for which the permit holder has not submitted proof of beneficial use in a designated geographical area upon finding a need to:

- i. Protect existing water rights;
- ii. Ensure compliance with Chapter 2, Title 42, Idaho Code; and
- iii. Prevent reduction of flows below a minimum stream flow established by the Director or the Board pursuant to applicable law.

b. Notice of the Director's action to cease application approval or to cancel or modify undeveloped permits will be by:

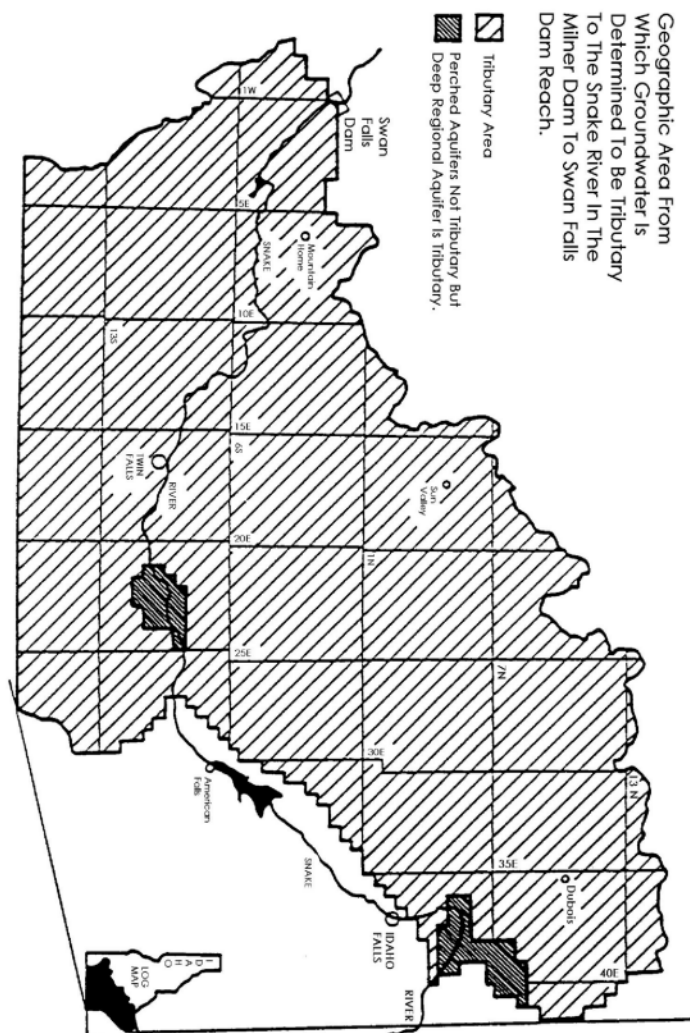
- i. Summary Order served by certified mail upon the then existing affected applicants or permit holders; and
- ii. Publication of the order for three (3) consecutive weeks in a newspaper or newspapers of general circulation in the area affected.

c. Objections to the Director's action will be considered under IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources" and applicable law.

056. — 999. (RESERVED)

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APPENDIX A



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APPENDIX B

