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May 12, 2023

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DEPARTMENT OF
WATER RESOURCES

Sent via E-mail

May 11, 2023

IDWR Rules Review Officer
rulesinfor@idwr.idaho.gov

RE: Written Comments for Negotiated Rulemaking; IDAPA 37.03.08; Rules 10, 25, 35, 40.01-05(g), 50 & 55

To Whom it May Concern:

Please accept the comments below on behalf of J. R. Simplot Company for the above-referenced matter. We appreciate the opportunity to provide these comments. If you have any questions, please feel free to reach out to me. The comments below are provided in numerical order and relate to the document entitled Preliminary Draft Rule (Strawman v1.0) with Redline – April 10, 2023. Some of the comments are merely questions to begin a discussion or provide clarification.

Rule 10.09; Definitions, Permit.

In regard to the definition of “Permit,” it is limited to water within the Swan Falls Trust Water Area. What would a document be called that is for water outside of the Swan Falls Trust Water Area?

Rule 10.12 and 10.13; Definitions, Subordinated and Swan Falls Trust Water Area.

Both of these definitions reference water upstream from Milner Dam but do not expressly reference the water downstream from Swan Falls. It would be helpful to also reference “and any reach of the Snake River downstream of Swan Falls Dam or groundwater tributary to the Snake River below Swan Falls Dam.”

Rule 25.02; General Description of the Procedure to be Used for Allocation, Applications to Appropriate Water.

Just a nit, but there is one reference to the “Swan Falls Trust Water Area” that is not fully capitalized although it is a defined term.

Additionally, in Subsection (c), please consider removing “local” from the reference to the “*local* public interest.” As used in the statute, it is a “public interest” standard not a “*local* public interest.” However, the “local economy” is referenced in Idaho Code 42-203(C)(2)(a)(i) as one factor to determine the overall public interest.

Rule 35.01; Application Requirements, General Provisions.

As currently written, Subsection (c) provides the directions for the Department to determine whether an application is acceptable for filing or requires clarification. However, there is no timeline on when the Department needs to complete the initial acceptance/rejection/request for clarification. As this directly applies to the priority date (if there is a need for re-filing or request for additional information), we would like to encourage the Department to put timelines on the timeframe to review applications. We would suggest 30 days of receipt of the application together with the applicable filing fee. This aligns with the 30-day time period required for the Applicant to provide additional information after the Departments provides notice that clarification or more information is necessary for the Application.



In addition, in Subsection (e) we would like to see a general statement to the effect that "an application containing discrepancies or typographical errors shall not be cause for rejection and advancement of the priority date from the date the Application is received."

Rule 35.03; Application Requirements, Requirements for Applications Acceptable for Filing.

In the initial sentence to this section there is a reference to "Subparagraphs 035.01.a through iii." I could not follow what this was referring to and believe the subparagraph numbers may be incorrect.

In Subsection (a)(i), are the names of *all* directors and officers necessary for an Application? Is this needed to provide sources of authority and is this covered by Subsection (l)(ii)?

Additionally, in Subsection (c)(iii), could the Department please provide an example of what is meant by "generally described place of use" and when that would apply?

In Subsection (l)(ii and iii) as it relates to the authority documents, we would like to see phrasing that if the applicant is a corporation or other entity, it need only supply *either* a signature of an officer or authorized representative *or* a power of attorney document (if it is a third party, non-employee, acting on behalf of the entity).

Throughout Rule 35.03, there is reference to an "Applicant's representative" but Rule 35.04 uses the term "Applicant's agent." We would suggest that just one of these terms be used to prevent future confusion as to the intent.

Rule 40.01; Processing Applications; General.

In Subsection (a), we would again encourage the Department to place a 30-day time period on the initial review of Applications.

In Subsection (d), we would encourage a time period of 60 days between the receipt of an accepted Application and the advertisement of the Application.

In Subsection (e)(i), could the Department please provide an example of when an untested Application may require a fact-finding hearing? It seems like this could be handled by the request for clarification or additional information.

In Subsection (f), we would encourage a timeline of 1 year to make a decision on the application unless the Applicant otherwise waives the deadline. For instance, an applicant may waive the deadline to prevent the application from being rejected if they are working through a settlement with a party that protested the application.

Rule 45.01; Evaluation Criteria, Criteria for All Applications to Appropriate Water.

In Subsection (f)(iii), there is some questions as to when or how this may apply. Can the Department please provide an example?

In regard to Subsection (i), when will the content be negotiated? Will public interest be considered?



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Rule 55.01; Moratorium, Applications or Undeveloped Permits.

In regard to Subsection (a), we would encourage the Department to consider allowing an Applicant 30 days to file proof of beneficial use for any partially developed portion of the Permit. For instance, if full beneficial use of a permit would require five pivots and the Applicant has already invested capital and installations costs for three of those pivots that are fully functional, the Applicant should be allowed a time period to provide proof of beneficial use as to those three pivots which would then not be subject to cancellation or modification.

Thank you for the opportunity to provide these comments.

Sincerely,

Rebecca Voss
Corporate and Real Estate Transactions Counsel

Cc: Vic Conrad via e-mail (vic.conrad@simplot.com)

