VARIN THOMAS
ATTORNEYS AT LAW

DYLAN B. LAWRENCE
DYLAN@VARINTHOMAS.COM

242 N. 8TH STREET, SUITE 220
P.O. BOX 1676
BOISE, IDAHO 83701
P: 208.345.6021
F: 1.866.717.1758
VARINTHOMAS.COM

May 30, 2023

VIA EMAIL

IDWR Rules Review Officer
P.O. Box 83720
Boise, ID 83720
rulesinfo@idwr.idaho.gov

Re: Docket No. 37-0308-2301 (ZBR Chapter Rewrite)
IDAPA 37.03.08 – Water Appropriation Rules
Comments on Rules 30, 40.05(h), 45.02, and 45.03

Dear Sir or Madam:

I hereby submit the following written comments in the above-referenced matter, in advance of the public meeting scheduled for June 15, 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. 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. All of the comments below relate to trust water issues.

Rule 40.05(f) (Additional Information Requirements)

Rule 40.05 allows IDWR to request additional information from permit applicants when the existing record does not have sufficient information to evaluate applicable criteria. Rule 40.05(f) does so within the specific context of applications for permit within the trust water area.

In Rule 40.05(f)(i), IDWR is proposing to add the phrase "that is definite enough to evaluate the project's implications under Subsection 045.03." That subsection, in turn, contains the criteria for evaluating "public interest" under Idaho Code Section 42-203C(2). I agree with the intent of this clarification. I find the Water Appropriation Rules in general, and those governing trust water in particular, to be somewhat difficult reads. Therefore, these types of internal cross-references are helpful.

The question I have, however, is whether the phrase "project design and estimate of development cost" is the correct one to use here. The public interest criteria include economic benefits, impacts to utility rates, promotion of the family farming tradition, promotion of the multiple use development of state water resources, and the staged development of irrigation projects. The connection between multiple criteria and the design/cost of a project are not immediately apparent. And, subsections (ii) through (vii) require additional information that is relevant to these criteria. It appears to me that the reference to "project design and estimate of development cost" should be revised, or the reference to "Subsection 045.03" should more specifically refer to the individual criteria to which a project's design and costs are relevant.

Rule 40.05(f)(iii) allows IDWR to request information regarding the "number and kinds of jobs created or eliminated as a direct result of project development…." By contrast, Section 42-203C(2)(i) requires IDWR to evaluate the "potential benefits, ***both direct and indirect***, that the proposed use would provide to the ***state and local*** economy." Certainly, jobs are relevant to direct economic benefits, but it seems like other factors could be relevant too (*e.g.*, increased economic activity, increased tax revenue, improved infrastructure, *etc*.). And, nothing in Rule 40.05(f) appears intended to elicit information regarding "indirect" economic benefits. Impacts to jobs is certainly relevant, but it seems too narrowly focused to capture all of the "direct and indirect" benefits to the state and local economy. Rule 45.03(a) lists some of the contents of an economic evaluation. Perhaps Rule 40.05(f)(iii) could simply refer to or incorporate that rule.

Similarly, none of the items enumerated in Rule 40.05(f) appear to request information regarding "the availability, foreseeability and cost of alternative energy sources to ameliorate such impact" to electric utility rates pursuant to Section 42-203C(2)(a)(ii). In general, the items listed in Rule 40.05(f) do not appear broad enough to capture all of the criteria in Section 42-203C(2)(a). To address this, I suggest including a new "catch-all" at the end of Rule 40.05(f) that reads something to the effect of, "Any other information the applicant believes is relevant to any of the criteria in Section 42-203A(2)(a)."

Rule 45.02 (Significant Reduction)

The opening paragraph of Rule 45.02 does not contain any reference to Section 42-203C(1), and the phrase "significant reduction" is not otherwise defined. This seems confusing. I suggest adding a quick reference to that statute, such that the revised version of the rule would read, "…will cause a significant reduction pursuant to Section 42-203C(1) when the proposed use…."

In addition, the opening paragraph of Rule 45.02 purports to apply to all applications in the "Swan Falls Trust Water Area." However, Rule 10.13 defines that phrase solely with respect to geography and without distinguishing between trust water and flows in the Snake River that are over and above the amount of trust water. Instead, that concept is introduced in Rule 10.15, with the definition of "water right held in trust." Shouldn't the "significant reduction" criteria only apply to applications

to appropriate a portion of trust water, as opposed to applications to appropriate flows within the "Swan Falls Trust Water Area" that are over and above the amount of trust water?

Rule 45.02(d) contains a presumption that a direct diversion of water from the Snake River between Milner Dam and Swan Falls Dam for irrigation purposes will cause a "significant reduction." It would be helpful for IDWR to explain the basis for this presumption. For one thing, the lack of any quantity-based threshold seems strange for a criterion that is inherently based on quantity and not on the individual type of beneficial use. In addition, there is an established water district, watermaster, and real-time gauging of stream flows on the mainstem Snake River, and IDWR has authority to condition permit approvals. *See generally* IDAHO CODE § 42-203A(5). Therefore, any diversions from the river, for irrigation or any other purpose of use, can be regulated as needed to protect established minimum stream flows.

In reviewing Section 42-203C, the Swan Falls Agreement, and the 2012 State Water Plan, the basis for this presumption is not obvious to me. Since one of the stated goals of this rule-making effort is to "modernize" rules that have largely remained untouched since 1986, IDWR should re-visit and explain the basis for the presumptions in Rule 45.02.

Rule 45.03 (Public Interest Criteria)

Rule 45.03(a) lists the contents of an economic "appraisal." The term "appraisal" suggests that the economic evaluation should identify a specific dollar amount, such as an appraisal of a house. This seems like a much more precise endeavor than evaluating the economic "impact" required by Section 42-203C2(a)(ii). I suggest replacing the term "appraisal" with "evaluation."

Rule 45.03(c) contains criteria for evaluating whether an application promotes "the family farming tradition" pursuant to Section 42-203C(2)(iii). This includes a presumption that the family farming tradition is promoted "if the total land to be irrigated….do [*sic*] not exceed nine hundred sixty (960) acres…." Again, some explanation as to the basis of this presumption would be helpful.

In addition, application of this standard does not make sense if the water is being used within the service area of a water delivery organization, such as an irrigation district, canal company, or ditch company. In addition, there are multiple instances in which a pump station from the Snake River is owned by a single entity that delivers water to multiple otherwise separate farming operations.

This issue is already addressed in Rule 45.03(c)(iii) as to the number of stockholders, but a similar concept should be applied to the acreage threshold. Perhaps the following language could be added to the end of the opening paragraph of Rule 45.03(c): "For applications proposing to provide water within the service area of a water delivery organization or to divert water through infrastructure shared by otherwise independent farming operations, the Director will evaluate this presumption on an individual basis within the relevant service area or place of use."

Rule 45.03(e) contains the standards for the staged development of irrigation projects pursuant to Section 42-203C(2)(a)(v). The use of the term "development" in the statute suggests the creation of newly irrigated acres, as distinguished from supplemental irrigation. On a related point, State Water Plan (2012) Policy No. 4F states that, "Development of supplemental water supplies to sustain existing agricultural development is in the public interest." To remain more consistent with the statutory language, I suggest revising the first sentence of Rule 45.03(e) to begin, "Whether a proposed irrigation development~~use~~ will conform to a staged development policy…."

Rule 45.03(i) contains a presumption that diversions from the Snake River for irrigation are not in the public interest. As with Rule 45.02(d), I believe this presumption should be revisited. While I have not researched this exhaustively, I suspect these presumptions were adopted in 1986 based upon the State Water Plan in effect at that time. However, the current State Water Plan contains no such presumptions. In light of State Water Plan Policy No. 4F quoted above, I believe the presumption should be eliminated. At the very least, if these presumptions remain in place, they should more expressly exclude applications for supplemental irrigation.

***

Thank you again for the opportunity to provide these comments.

Sincerely,

VARIN THOMAS

Dylan B. Lawrence