



# IDAHO WATER RESOURCE BOARD

**Brad Little**  
*Governor*

May 30, 2023

**Jeff Raybould**  
*Chairman*  
St. Anthony  
At Large

Director Gary Spackman  
Idaho Department of Water Resources  
P.O. Box 83720  
Boise, Idaho 83720-0098  
Submitted via email: [rulesinfo@idwr.idaho.gov](mailto: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 dated April 26, 2023, these comments will address rules IDAPA 37.03.08.30, 40.05.h, and 45.02–.03. The IWRB may provide additional comments on the Final Strawman Draft Preliminary Rule to be issued June 29, 2023.

RULE	COMMENT
37.03.08.045.02	<p><b><u>Introductory Paragraph</u></b></p> <p>Recommend amending the title of this introductory paragraph to better describe an application for Trust Water as follows:</p> <p><b>“Criteria for Evaluating Whether an Application <u>for Reallocation of Trust Water</u> in the Swan Falls Trust Water Area Will Cause a Significant Reduction <u>under I.C. § 42-203C</u>.”</b></p> <p>Recommend further amending the introductory paragraph .02 to make clear that the significant reduction analysis applies to applications for the reallocation of Trust Water. And to more closely track the language regarding “significant reduction” found in I.C. § 42-203C. Presumptions should include a statement as to whether or not they are rebuttable. These presumptions should take into account the burdens of proof found in 37.03.08.040.04. See the IWRB’s previous comments on that section. Recommend the following amendments:</p> <p>“The Director will find an application <u>for reallocation of Trust Water</u> <del>to appropriate water</del> from the Swan Falls trust water area will cause a significant reduction when the proposed <u>d</u> use, individually or cumulatively with <u>other</u> existing uses <del>and other</del> <u>or</u> uses reasonably likely to exist within twelve months of the proposed use, would significantly reduce the amount of <u>Trust W</u>ater available to <u>the user for power purposes of the a W</u>ater <u>R</u>ights <u>H</u>eld in <u>T</u>rust. The Director will presume an application <u>for reallocation of Trust Water within in the Swan Falls Trust Water Area</u> will not cause a significant reduction if the Director determines <u>the application meets both the individual and cumulative tests for evaluating significant reduction as provided in Paragraphs 045.02.a and b. For protested applications, this presumption may be rebutted by the protestant as outlined in paragraph 040.04.d.i and .045.02.c.</u></p> <p><b><u>Paragraph .02.a.</u></b></p> <p>The IWRB further recommends amending paragraph .02.a as follows to clarify the presumptions that apply to the 2 af/day criteria. In connection with these amendments, the IWRB recommends deleting paragraph .02.d because it seems to be at odds with the presumptions set forth in this</p>

section. Paragraph .02.a states that the Director will presume “an irrigation project of two hundred (200) acres or less diverting from a source located in the Swan Falls trust area will not reduce the flows at Murphy Gage by more than two (2) af per day.” But then paragraph .02.d states: “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.” These two paragraphs need to be harmonized. In addition. Paragraph .02.e should be incorporated into paragraph .02.a because it further elucidates the 2 af/day criteria. Suggest using the criteria of 0.2.c to help determine whether the presumptions have been rebutted. Suggest deleting paragraph .02.d, moving paragraph .02.e, and amending paragraph .02.a as follows:

- 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 the Murphy Gage by not more than two (2) af per day. The Director will presume:
  - i. 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 the Murphy Gage by more than two (2) af per day and does not cause a significant reduction. However, this presumption is not applicable to an application which the Director determines to be part of a larger development.
  - ii. 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.
  - iii. For protested applications, these presumption may be rebutted by the protestant as outlined in paragraph 040.04.d.i and using the additional criteria of paragraph .045.02.c.

**Paragraph .02.b**

The cumulative test is difficult to understand. It is unclear how the determinations of the stated quantities are to be made. However, it is assumed IDWR understands the tests and how to apply them. Any changes made to the quantities or method of determining a cumulative impact should be fully vetted and discussed with appropriate input from technical advisors. The IWRB lacks sufficient information or knowledge at the time of these comments to recommend either that they stay the same or be revised.

Because paragraph .b creates a presumption that there won't be a significant reduction if the test is met, it would be helpful to add a sentence regarding rebutting the presumption.

**Paragraph .02.c**

The first sentence of this paragraph is confusing and makes it difficult to understand when this section applies. This section should be harmonized with the presumptions and burdens of proof set forth in paragraphs .040.04 and .045.02.a and b. It is unclear exactly how the "which meets both tests but has been protested" language interacts with the presumptions and analysis in paragraphs .a and b, especially if the protestant is given a chance to rebut the presumptions. It is also unclear why further analysis is needed if it has already been determined under the individual and cumulative tests that the application does create a significant reduction. If it has been determined that there is a significant reduction the next step under paragraph .025.02 is to move on to the public interest criteria analysis. It would seem to make most sense to allow the protestant to use the additional criteria set forth in paragraph .c to rebut the presumption that the application will not cause a significant reduction under the individual or cumulative tests. Suggest amending the paragraph .c as follows:

- c. In rebutting the presumptions under paragraph 045.02.a and 045.02.b that an application does not cause a significant reduction, the Director may consider additional information presented by the protestant that: ~~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:~~

**Paragraph d.**

As stated above, suggest deleting this paragraph as it seems to be contrary to the presumption set forth in paragraph a.

**Paragraph e.**

Suggest incorporating paragraph .e into paragraph .a as outlined above.

37.03.08.045.03

**Introductory Paragraph**

Suggest moving paragraph .f to the introductory paragraph .03. Further suggest moving the “presumptions” up to the beginning of the section so that they are clear up front. Suggest moving paragraph .g into this section. Suggest adding language that ground water recharge projects are also presumed to be in the public interest. Other paragraphs containing presumptions will be further discussed below. As above, suggest including whether or not the presumptions are rebuttable. Also suggest amending some language to better reflect the wording of I.C. § 42-203C as follows:

“If the Director determines that an application for reallocation of Trust Water ~~an appropriation~~ from the Swan Falls trust 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. The Director will presume an application is in the public interest if it proposes to store surface water from the Snake River and surface tributaries upstream from the Murphy Gage or if it is a state-sponsored ground water recharge project that is consistent with the State Water Plan. These presumptions may be rebutted as set forth in paragraph .040.04.d and paragraphs 045.a–e below.

In evaluating the public interest criteria of 42-203C(2), Idaho Code, no single public interest criterion will be entitled to greater weight than any other public interest criterion. The Director will consider:

**Paragraph b.**

Suggest amending paragraph b. to more closely follow the statutory language of I.C. § 42-203C(2)(ii) as follows:

“The economic impact the proposed use would have upon the electric utility . . . .”

**Paragraph f.**

As noted above, propose incorporating this paragraph into the introductory paragraph .03 as outlined above.

**Paragraph g.**

As noted above, propose incorporating this paragraph into the introductory paragraph .03 as outlined above.

**Paragraph h.**

This paragraph may no longer be needed. The SRBA court decreed water rights that are delineated in this section. Suggest deleting.

**Paragraph i.**

This section seems to be in conflict with the presumption set forth in paragraph .02 that irrigation projects of less than 200 acres do not reduce the flows at the Murphy Gage by more than 2 af per day and are therefore presumed to not cause a significant reduction. This section and previous sections dealing with presumptions surrounding applications with an irrigation purpose of use need to be harmonized.

**Paragraph j.**

Again, this section needs to be harmonized with previous sections dealing with presumptions applying to the significant reduction analysis. If a use does not cause a significant reduction (and that presumption is not rebutted) there is no need to go on to the public interest analysis. In addition, the “unless protested” language is confusing and should be dealt with in a similar way to the presumptions/rebuttal set forth in comments above.