

**REVISED**  
**Summary of Comments Received and Clarifying Questions**

Water Appropriation Rules IDAPA 37.03.08  
Rules 25, 40.05.h/f, 45.02-03, and Related Definitions  
for June 15, 2023 Negotiated Rulemaking Meeting  
by Angie Hansen, IDWR 6/14/2023 revised 6/15/2023

**SUMMARY OF COMMENTS RECEIVED PRIOR TO JUNE 14, 2023:**

**Rule 25, 40.05.h/f, 45.02-03, and Related Definitions (Rule 10) Comments Received:**

- Oral Comments at 4/14/2023 Rulemaking Meeting: Elisheva Patterson (Racine Olson) = 2 Total Comments
- Written Comments: Chris Bromley & Candice McHugh (McHugh Bromley, PLLC), Michael Lawrence (Veolia Water Idaho, Inc.), Jeff Raybould (Idaho Water Resource Board), Scott Pugrud (Idaho Power Co.), Rebecca Voss (J.R. Simplot Co.), Dylan Lawrence (Varin Thomas), and Sarah W. Higer (Surface Water Coalition) = 63 Total Comments from 7 entities.

**Rule 10:**

- Suggest revisions to ‘Murphy Gage’, ‘Permit’, ‘Swan Falls Trust Water Area’, and ‘Water Right Held in Trust’ definitions.

**Rule 25:**

- IDWR should first determine how much water is available for appropriation in the Trust Water Area, if none, rulemaking may be unnecessary. Suggest rule include reference to Amended Snake River Basin Moratorium issued 10/21/2022.
- Suggest continue to use terms ‘reallocation’ and ‘trust water’.
  - IDWR is concerned term ‘reallocation’ as used in the current rules may be misleading. Permit is not ‘reallocating’ water rights held in trust, but rather authorizing a new use (new priority) that benefits from subordination provisions. IDWR will seek to define term ‘reallocation’ consistent with the Idaho State Water Plan and SRBA decisions.
  - IDWR is concerned term ‘trust water’ as used in the current rules is misleading. Term ‘trust water’ proposed to be replaced with ‘water right held in trust’ consistent with SRBA decisions and the Idaho State Water Plan. Term ‘trust water’ implies a “block of water” is held in trust, rather than water rights. IDWR hopes simply stating the area of the state and sources where the additional review steps (I.C. § 42-203C) apply will simplify rules for those unfamiliar with the history of the Swan Falls Settlement and subsequent SRBA actions.
- Erroneously referred to ‘local public interest’ instead of ‘public interest’ in Strawman v1.
- Should define term ‘significant reduction’.

- Some rephrasing suggested, but procedure understood;
  1. Evaluate I.C. § 42-203A(5) criteria. If met, approve. If met all but reduction in water available to water rights held in trust, then;
  2. Evaluate if use will cause a significant reduction per I.C. § 42-203C(1), if not approve. If so, then;
  3. Evaluate public interest per I.C. § 42-203C(2).

**Rule 30 (proposed for deletion):**

- Asked why remove when it provides applicant understanding of ‘trust water’ application and what water sources are or are not considered ‘trust water’.
  - IDWR proposes edits in Rule 10 and Rule 25 to capture critical content. Rule 30.02. is not needed, because since 1985, Idaho has not held a water right in trust under I.C. § 42-203B(3) – rules can be changed if Idaho ever does.

**Rule 40.05.h/f.:**

- Does not include request for the applicant to submit information needed to evaluate:
  1. ‘indirect’ benefits to the state and local economy.
  2. “the availability, foreseeability and cost of alternative energy sources to ameliorate such impact” to electric utility rates per I.C. § 42-203C(2)(a)(ii).
- Asked what is purpose of ‘crop rotation’ and ‘location of other farming operations’ information.

**Rule 45.02 - 03:**

- Asked why was 2 af/day selected for ‘significant reduction’ threshold.
- ‘Cumulative Test’ is difficult to understand.
- Asked what the basis for the presumptions is.
- Recommended statement that presumptions are rebuttable.
- Recommended add state-sponsored ground water recharge and surface water storage upstream of Murphy Gage is presumed to be in the public interest.

**Rule 50:**

- Suggest additional permit condition topics to ensure compliance with; intent of agreements between State and power water right holders and state’s obligation to continually review the reallocation of trust water.

**CLARIFYING QUESTIONS FOR JUNE 15, 2023 MEETING:**

1. IDWR would like to clarify term ‘reallocation of trust water’.
  - Proposing to simplify approach by stating that applications within the Swan Falls Trust Water Area will be reviewed first, as with all applications, per I.C. § 42-203A(5) and then with two additional steps (I.C. § 42-203C significant reduction and public interest reviews) if the use will reduce the amount of water available to water rights held in trust.

- If an application in the Swan Falls Trust Water Area proposes use of water over and above the amount needed to satisfy water rights held in trust, then the application will not reduce water available to the water rights held in trust and IDWR will not need to evaluate the application under I.C. § 42-203C criteria.
  - Are there any pitfalls IDWR is not anticipating using this approach?
2. Does anyone have a comment regarding the origins of the significant reduction individual and cumulative test thresholds?
  3. Does anyone have a comment regarding the origins of the presumptions regarding significant reduction or public interest?
    - Irrigation of 200 acres or less anywhere within the Swan Falls Trust Water Area **will not** cause a significant reduction.
    - Irrigation directly from the Snake River between Milner Dam and Swan Falls Dam or from tributary springs in this reach **will** cause a significant reduction.
    - Domestic, commercial, municipal, and industrial uses **will not** cause a significant reduction.
    - Irrigation by the applicant of 960 acres or less **is** presumed to promote the family farming tradition.
    - Surface water storage upstream from Murphy Gage that is consistent with the Idaho State Water Plan **is in** the public interest.
    - Irrigation directly from the Snake River between Milner Dam and Swan Falls Dam or from tributary springs **is not in** the public interest.
    - Domestic, commercial, municipal, and industrial use that consumes 2 af/day or less **is in** the public interest, unless protested.