IDWR RESPONSE TO PUBLIC COMMENTS
DOCKET NO. 37-0308-2301
IDAPA 37.03.08 WATER APPROPRIATION RULES
June 30, 2023

Note: Rule numbers referenced in the Comment section of this document are based on Preliminary Draft Rule (Strawman v 1.0), dated April 10th, 2023. Rule numbers referenced in the *IDWR Response* section of this document are based on Draft Rule (Strawman v 2.0), dated June 30th, 2023. Comments are listed roughly in the order received.

Clive J. Strong

1. Comment: Regarding Rule 045.01. - Information and criteria reviewed:

> The rule requires that the applicant have evidence that they are in the process of obtaining a right-of -way for federal or state-owned land prior to the approval of an application. The applicant should instead be required to present evidence of legal access to cross federal lands at the time of licensing. State access should not be necessary as IC § 42-1104 states, ""The right of way over and upon any and all lands owned or controlled by the state of Idaho is hereby granted to any and all persons for the purpose of constructing and maintaining any ditch, canal, conduit or other works for the diversion or carrying of water for any beneficial use: provided, that no property shall be taken under the provisions of this section until a just compensation shall be paid therefor, to be ascertained in the manner prescribed by law for the taking of private property for a public use."

IDWR Response: IDWR revised draft rules 040.04.e.iv and 045.01.c.i. to address stakeholders' comments. A water right cannot be established in trespass. The applicant must have access to develop the permit, prior to establishing the water right to avoid establishing a water right in trespass. To ensure the permit application is made in good faith, the applicant should demonstrate the intent to acquire the necessary access prior to permit development.

Steven M. Spencer – USFS Northern Region

2. Comment: Regarding Rule 035.03.b.ii. - Typo:

> The rule currently states that, "For a surface water source include the official geographic name listed on the United States Geological Survey (USFS) Quadrangle map." In the sentence, USFS should be changed to USGS.

IDWR Response: IDWR made the suggested change.

Elisheva Patterson – Racine Olson

3. Comment: Regarding Rule 010.13. – Definition of "Swan Falls Trust Water Area":

   Question: Is the definition in the preliminary draft rule consistent with the map depicting the area in the existing rules (Appendix A Geographic Area From Which Groundwater is Determined To Be Tributary To The Snake River In The Milner Dam To Swan Falls Dam Reach)?

IDWR Response: Yes. The map in the preliminary draft rule language is the same as the map in the existing rules. IDWR does not plan to change the Trust Water area depicted on the map. IDWR might reformate the map to conform with any Idaho rule writer requirements, but IDWR does not intend to change the area depicted.

4. Comment: Regarding Rule 025.02.a. – Use of 'will' instead of 'may' in preliminary draft rule:

   Question: The existing rule says the Director "may approve" an application if the criteria are met. Why did IDWR change this to "will approve" in the preliminary draft rule? Are there other criteria that have to be considered that dictate the "may approve" existing rule language that IDWR is proposing to remove?

IDWR Response: IDWR reverted back to existing rule language "may approve" based on Idaho Rule Writer's Manual statement that "may" is permissive or directory and should be used when granting a right, privilege, or power or indication of discretion to act. "May" is also used in Idaho Code § 42-203A(5) when describing the various actions the Director may take with regard to an application and issuance of a permit. Using "may" is consistent with statutory language and removes the necessity to describe the multiple actions the Director can take after review of the statutory criteria.

5. Comment: Regarding Rule 055.01.:

   Question: Is it a taking to cancel or revoke an approved but undeveloped permit?

IDWR Response: In the creation of moratoriums, IDWR has historically ceased issuing new permits and placed a hold on further development of existing permits. IDWR required existing permit holders to submit proof of beneficial use for development that occurred prior to issuance of the moratorium or request a stay in development if there has been significant investment in development and the permit holder wants to maintain the ability to continue development if the moratorium is lifted. Idaho Code § 42-1805(7) and a judicial decision (*Kugler v IDWR*) affirm IDWR Director's authority to suspend development on existing water right permits.

Dylan B. Lawrence – Varin Thomas Attorneys at Law

6. Comment: Regarding Rule 001.02 – Scope of Water Appropriation Rules:

   Question: Once a permit is issued and there is a change needed, what are the requirements? Is this within the scope of this rulemaking?

IDWR Response: The existing and draft rules intentionally exclude permit amendments. IDWR does not receive or process many of these applications and does not see an immediate need to create rules for the permit amendment process. IDWR relies on the statutes and previous decisions when processing and evaluating permit amendment applications. If it becomes necessary to create rules regarding processing and evaluation of permit amendments, IDWR will likely pursue a new more comprehensive set of rules to do so in order to maintain the current scope of the Water Appropriation Rules rather than expanding it.

Caitlin R. Skulan & Laura A. Schroeder- Schroeder Law Offices, P.C.

7. Comment: Regarding Rule 010. – Deletion of the definition of "beneficial use":

   The term "beneficial use" is used throughout the rules and should be defined in Rule 10 or updated to refer to relevant statutory sections where the term is defined and/or described.

IDWR Response: IDWR declines to include a definition for "beneficial use". IDWR instead proposes deleting the existing rule term "beneficial use" and its definition, because the definition is circular and case law supports a wide interpretation of what qualifies as beneficial use of water. The term "beneficial use" is not specifically defined in statute and there are a limited number of statutory sections wherein the term is described.

8. Comment: Regarding Rule 035.02.c. -Notification of application assignment:

   Question: The rule requires that the department be notified of the conveyance of interest in an application. Will the assignment be retained in a location where the information will be available to the public or another party?

IDWR Response: IDWR included a reference to IDAPA 37.01.01.202 in draft rule 035.02.c. stating the person assigned the application must notify other parties in the contested case for protested applications. When IDWR receives an assignment of application, IDWR updates the water right database with the new applicant's name and posts a scanned image of the assignment documentation which is publicly available via the agency's website.

9. Comment: Regarding Rule 035.03.e.iii. & 010 -Adding a definition/guidance:

Question: The term "planning horizon" is used in the determination of Municipal reasonably anticipated future needs (RAFN) rights, however is not defined in section 10. Can the definition of "planning horizon" be included in section 10 to provide additional guidance and insight into RAFN requirements?

IDWR Response: IDWR included 'planning horizon' and its statutory definition found in Idaho Code § 42-202B by reference in draft rule 010.

10. Comment: Regarding Rule 045.01.f.:

Schroeder Law Offices agrees with the revisions made to Rule 045.01 regarding conservation of water through new applications for appropriation and are looking forward to comments and feedback related to the change and the practical implications of this requirement.

IDWR Response: IDWR made other changes to draft rule 045.01., including rule 045.01.f., based on stakeholder comments.

Dylan B. Lawrence - Varin Thomas Attorneys at Law

11. Comment: General: Regarding Zero-Based Regulation process:

While I recognize the purpose of the Zero-Based Regulation process is to reduce unnecessary regulation, I do not believe the focus should simply be on word count. For a *pro se* participant in IDWR proceedings, it could be confusing to have to constantly cross-reference both the Water Appropriation Rules ("Rules") and Idaho Code. To the extent IDWR is able to reduce the most important legal standards to one document, i.e., the Rules, that would likely be helpful for *pro se* participants, even if it requires more frequent updates to the Rules to remain consistent with changes to Idaho Code over time.

IDWR Response: IDWR agrees that the rules should be clear to *pro se* applicants or participants and considered this in drafting the rule language.

12. Comment: Regarding Rule 010.02. -Expanding the definition of applicant:

The current definition of applicant includes a "governmental agency". Perhaps this should be expanded to "governmental entity or agency", as the phrase agency often refers to entities within the executive branch of the state government.

IDWR Response: IDWR made the suggested change.

13. Comment: Regarding Rule 035.02.b. -Right approval based on laws in effect at the time of approval:

> Rule 35.02(b)states that, "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." Is this language correct in all circumstances? If Idaho Code § 42-203A(5) was changed after advertisement of an application, would IDWR apply the new criterion without public notice of it at the time of application advertisement? The phrase "applicable law" should replace "the laws in effect at the time the application is approved" in Rule 35.02(b).

IDWR Response: IDWR did not revise the draft rule as suggested. The draft rule language is more specific than the language the stakeholder proposed. IDWR must evaluate all pending applications based on the statutory criteria effective at the time the application is approved. If a change to Idaho Code § 42-203A(5) is adopted after the application is advertised, but before the application is approved, IDWR would consider the newly adopted statutory criteria prior to issuing a decision regarding the application.

14. Comment: Regarding Rule 035.02.c. -IDWR is seeking to modify Idaho Code § 42-248:

> Rule 35.02.c. requires an applicant report assignment of a permit to IDWR within 30 days. Idaho Code § 42-248 allows 120 days to report the change of ownership of a permit. I do not believe IDWR has the authority to modify a legislatively-established deadline.

IDWR Response: Idaho Code § 42-248 governs ownership changes for already approved permits, licenses, and decreed water rights. Draft rule 035.02.c. governs assignments of applications for permits, prior to permit issuance. Changes in ownership of applications for permit are not governed by Idaho Code § 42-248.

15. Comment: Regarding Rule 035.03.j. -Period of time allowed for project completion:

> As drafted, the rule could be read to preclude the ability to obtain extensions of the permit development period. The second sentence of Rule 035.03.j. could instead read, "While extensions are possible pursuant to Idaho Code Section 42-204, for the purposes of an Application, this period of time may not exceed five (5) years."

IDWR Response: IDWR revised draft rule based on suggestion.

16. Comment: Regarding Rule 035.03.l.ii. -Inclusion of any government entity or agency:

Rule 035.06.l.ii. discusses signature requirements for "municipalities", as the only government entity listed. Rule 010.02 defines applicant to include "government agency". This rule should also include any "government entity or agency", to ensure that none are excluded.

IDWR Response: IDWR revised draft rule based on suggestion.

17. Comment: Regarding Rule 035.04 -Add reference for amended permits:

Idaho Code Section 42-211 governs the standards for amending both permit applications and permits, however Rule 35.04 only addresses amended applications. Avoid confusion by adding subsection (g) stating something to the effect of, "Amendments of already issued permits shall be governed by Idaho Code Section 42-211."

IDWR Response: The existing and draft rules intentionally exclude permit amendments. IDWR does not receive or process many of these applications and does not see an immediate need to create rules for the permit amendment process. IDWR relies on the statutes and previous decisions when processing and evaluating permit amendment applications. If it becomes necessary to create rules regarding processing and evaluation of permit amendments, IDWR will likely pursue a new more comprehensive set of rules to do so in order to maintain the current scope of the Water Appropriation Rules rather than expanding it.

18. Comment: Regarding Rule 40 -Clarifying applications being referenced:

As IDWR is tasked with the evaluation of many different types of applications the rule should clarify that the rule refers to an application for permit. Based on the definition of "Application" in Rule 010.03, this can be accomplished by simply capitalizing "Application" throughout Rule 40, or by changing "applications" where it occurs to "applications for permit."

IDWR Response: IDWR made the suggested change.

19. Comment: Regarding Rule 040.01.e.i. -Protested Applications:

Rule 40.01.e.i. speaks in terms of protested and unprotested applications. It is not uncommon for protests to be resolved before a hearing. I suggest revising Rule 40.01.e.i. to read, " If unprotested, or if all protests are resolved prior to a hearing, the Director may hold a fact-finding hearing…."

IDWR Response: IDWR did not revise the draft rule as suggested. After further consideration, IDWR removed draft rule 040.01 entirely. IDWR believes this generalization of processing steps is not appropriate in administrative rules. IDWR can supply general processing information to the public in another medium that IDWR can improve to accommodate future efficiencies without requiring an administrative rule change.

20. Comment: Regarding Rule 040.01.a.v. -Deleted from the Strawman v 1.0:

> Idaho Code Section 42-1701A(3) provides a valuable "catch all" hearing requirement to anyone, "who is aggrieved by the action of the director, and who has not been previously afforded an opportunity for a hearing on the matter…," specifically including in an "action upon any application for permit…." For the unprotested application or an application for which protests are resolved prior to a hearing, Section 42-1701A may be the only way for the applicant to create a record that is capable of being reviewed by courts in a judicial review action under the Idaho Administrative Procedure Act. I suggest including the following where the deleted reference used to be: "If the applicant has not already been afforded an opportunity for a hearing on the application, the applicant may request a hearing pursuant to Section 42-1701A."

IDWR Response: IDWR did not revise the draft rule as suggested. The suggested language is a restatement of statute. Additionally, after further consideration, IDWR removed draft rule 040.01 entirely. IDWR believes this generalization of processing steps is not appropriate in administrative rules. IDWR can supply general processing information to the public in another medium that IDWR can improve to accommodate future efficiencies without requiring an administrative rule change.

21. Comment: Regarding Rule 040.01.g. -Include relief as in Rules of Procedure 770 and 780:

> Rule 040.01(g) states that, "Applicant may challenge or appeal the decision in accordance with IDAPA 37.01.01, 'Rules of Procedure of the Idaho Department of Water Resources.'" The Rules of Procedure 770 and 780 allow parties to seek relief (for clarification and stay orders respectively) that may not necessarily constitute a "challenge." Rule 040.01.g. could be reworded to read, "Applicant or other formally recognized party may pursue post-decision relief in accordance with Idaho Code tit. 67, ch. 52 and IDAPA 37.01.01, 'Rules of Procedure of the Idaho Department of Water Resources.'"

IDWR Response: IDWR did not revise the draft rule as suggested. After further consideration, IDWR removed draft rule 040.01 entirely. IDWR believes this generalization of processing steps is not appropriate in administrative rules. IDWR can supply general processing information to the public in another medium that IDWR can improve to accommodate future efficiencies without requiring an administrative rule change.

22. Comment: Regarding Rule 040.04.a. -Clarify when burdens of proof apply:

> To clarify that burdens of proof only apply in contested case proceedings involving protested applications IDWR should consider revising Rule

40.04(a) to read, "Burden of proof for protested applications is divided into two (2) parts…."

IDWR Response: IDWR revised draft rule 040.03 to clarify the burdens of proof for all applications for water right permits based on stakeholders' comments.

23. Comment: Regarding Rule 040.04.d. -Further clarify when burdens of proof apply:

> To further clarify that burdens of proof only apply in contested case proceedings involving protested applications IDWR should revise Rule 40.04(d) to read, "For an unprotested application or an application for which all protests have been resolved, there is no burden of proof. Instead, the Director will evaluate the application, information filed pursuant to Subsection 40.05 and information in the files and records of the Department to determine compliance….."

IDWR Response: IDWR revised draft rule 040.03 to clarify the burdens of proof for all applications for water right permits based on stakeholders' comments. The burdens of proof are not only for protested applications. The applicant bears the burden of persuasion for an unprotested application, certainly for the criteria of Idaho Code § 42-203A(5). *See* A&B Irr. Dist. v. Idaho Dep't Of Water Res., 153 Idaho 500, 516, 284 P.3d 225, 241 (2012) and Shokal v. Dunn, 109 Idaho 330, 339, 707 P.2d 441, 450 (1985).

24. Comment: Regarding Rule 040.05.e.iv. -Possessory interest or proof of action to obtain interest:

> As revised, this rule would require an applicant to "submit evidence that the applicant is taking appropriate actions to obtain" possessory interests that can be obtained by eminent domain proceedings. This seems to suggest that the applicant should have already initiated eminent domain proceedings at the time it submits a water permit application. This seems backwards and inconsistent with Rule 45.01(c)(i), which states that mere "authority to exercise eminent domain" is sufficient proof of access for the purposes of the "good faith" criterion.
>
> Particularly for governmental entities, eminent domain proceedings are often a last resort that they prefer to avoid if at all possible. As a practical matter, initiating eminent domain proceedings against members of the public seems much more tolerable and justified when a permit has already been issued. As a legal matter, Idaho Code Section 7-704(1) requires the use of land acquired by eminent domain to be "a use authorized by law." Under Idaho Code Section 42-202, construction of a water project prior to having a permit is prohibited. Therefore, arguably, the use is not "authorized by law" until the permit has been issued.

IDWR Response: IDWR revised draft rule language based on suggestion. A water right cannot be established in trespass. The applicant must have access to develop the permit, prior to establishing the water right to avoid establishing a water right in trespass. To ensure the permit application is made in good faith, the applicant should demonstrate the intent to acquire the necessary access prior to permit development.

25. Comment: Regarding Rule 45.01.g. -Development and implementation of criterion:

> IDWR's proposed revisions to Rule 45.01 include a reference stating that the content to implement Idaho Code Section 42-203A(5)(g) will be negotiated during the rule-making process. This is the statutory provision requiring IDWR to evaluate whether certain diversions "will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates…."
>
> This is a relatively open-ended criterion that is outside IDWR's traditional expertise in water resources. In addition, it has received little if any judicial treatment. Under these circumstances, IDWR should be reluctant to adopt formal rules implementing this criterion. Instead, it seems more prudent to allow this criterion to be developed in the context of future water right and judicial review proceedings, rather than in a "vacuum."

IDWR Response: IDWR agrees. The draft rule language proposed for Idaho Code § 42-203A(5)(g) criterion is largely taken directly from the statute. IDWR has one precedential order evaluating this criterion (*Order on Exceptions; Final Order in the matter of Application for Permit No. 63-34348 in the Name of Elmore County, Board of Commissions*) but IDWR would prefer to allow this criterion to develop further in future decisions before establishing rule criteria.

26. Comment: Regarding Rule 055.01 -Authority to cancel permit:

> IDWR's proposed amendments to Rule 55 would purport to provide the Director with authority to "cancel or modify undeveloped permits for which the permit holder has not submitted proof of beneficial use…." In support of this proposed amendment, IDWR circulated the district court opinion in *Kugler v. IDWR*, Case No. CV 2011-15672 (5th Dist., May 23, 2012). After reading that opinion, I do not believe it justifies hard-coding the ability to cancel permits into the Rules.
>
> At the outset, the *Kugler* opinion should be construed narrowly, for multiple reasons. First, it is not an opinion of the Idaho Supreme Court. When presented with this issue, it is certainly possible the Idaho Supreme Court would come to a different conclusion or employ a different analysis. Second, the Kuglers were *pro se* litigants. While it is certainly the case that

courts are required to hold *pro se* litigants to the same standards that they hold represented parties within the course of a proceeding, that is a different question than the precedential weight the case should be given after-the-fact. In general, I would not expect *pro se* litigants to raise the same nuanced arguments that experienced water rights counsel would.

Ultimately, the issue turns on the primary statute discussed in *Kugler*—Idaho Code Section 42-1805(7), which reads:

> In addition to other duties prescribed by law, the director of the department of water resources shall have the following powers and duties:… After notice, to **suspend the issuance or further action on permits or applications** as necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of minimum flow provisions of the state water plan. (Emphasis added)

When the Department evaluates a permit application, it is required to evaluate several statutory criteria, including that the proposed diversion will not "reduce the quantity of water under existing water rights…." IDAHO CODE § 42-203A(5)(a). As a legal matter, according to the Idaho Supreme Court, these determinations have precedential value that cannot be collaterally attacked later. *See, e.g., McInturff v. Shippy,* Dkt. No. 45418 (Ida. Sup. Ct. Aug. 27, 2019). As a practical matter, what is the purpose of the Section 42-203A(5) evaluations if they cannot be relied upon by a permittee?

The existing version of Rule 50.07 authorizes the Director to void an issued permit specifically because "the applicant submitted false or misleading information on the application or supporting documents." It seems reasonable to retain that authority. However, to the extent the standards in Section 42-1805(7) are duplicative of the standards in Section 42-203A(5), they cannot be the basis to "cancel" an issued permit. That is clearly an impermissible collateral attack on the determinations made by IDWR in issuing the permit in the first place.

IDWR Response: IDWR revised draft rule based on stakeholders' comments.

Chris M. Bromley & Candice M. McHugh- McHugh Bromley, PLLC

27. Comment: Regarding Rule 035.03.j. -Wording changed from "shall" to "may":

Question: "Period of time required for completion of the project works and application of water to beneficial use. This period of time shall may not

exceed five (5) years." In the original rule, the period of time for completion could not exceed five years, with use of the word "shall." In the proposed rewrite, why has the rule been changed from mandatory to permissive?

IDWR Response: The phrase "shall not" was replaced with "may not" based on IDWR's understanding of Idaho Rule Writer's Manual directive. The applicable excerpt from the Idaho Rule Writer's Manual (pg 50) follows: "Whenever possible, an obligation or discretion to act should be stated positively. However, if a right, privilege, or power is abridged and the sentence contains a negative subject, "may not" or "no person may" should be used. This is preferable to "shall not" and "no person shall" since "no person shall" literally means that no one is required to act. A rule that includes this phrase negates the obligation, but not the permission to act. "No person may" also negates the permission to act and is, therefore, the stronger prohibition."

28. Comment: Regarding Rule 035.03.l.iii. -Power of attorney requirement:

A difficulty our law office has had over the years is some staff require us to submit a power of attorney, with other staff not requiring a power of attorney. We've heard other law offices having similar problems. The underlined text proposes to address this problem by providing that licensed attorneys do not have to file a power of attorney because we are actual attorneys.

"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. If the representative is a licensed attorney, a power of attorney is not required."

IDWR Response: IDWR made the suggested change.

29. Comment: Regarding Rule 040.01.e.i. -Director's authority to hold a fact-finding hearing:

Question: Rule 040.01.e.i. states, "In unprotested, the Director may hold a fact-finding hearing or may request the applicant file additional information under Subsection 040.05." If the Director has this authority, please let us know where the authority is located.

IDWR Response: After further consideration, IDWR removed draft rule 040.01 entirely. IDWR believes this generalization of processing steps is not appropriate in administrative rules. IDWR can supply general processing information to the public in another medium that IDWR can improve to accommodate future efficiencies without requiring an administrative rule change.

30. Comment: Regarding Rule 040.02.c. -Wording changed from "shall" to "may":

> "The Director ~~will~~ shall make an application accepted for filing available on the Department's website in accordance with Section 42-203A(3), Idaho Code." Because the code section that's cited uses the word "shall" as opposed to the word "will" we suggest staying consistent and replacing "will" with "shall" as shown in underline and strikethrough.

IDWR Response: IDWR made the suggested change in draft rule 040.01.c.

31. Comment: Regarding Rule 040.02.f. -Preventing the advertisement of the application:

> Question: Rule 040.02.f. states, "The Director may deny approval of an application filed for diversion of ground water in a designated critical ground water area without advertisement of the application." If an application in a critical ground water management area proposes to mitigate for its full depletions, why would the Director have the authority to prevent the advertisement of the application?

IDWR Response: IDWR revised draft rule based on stakeholder's comment.

32. Comment: Regarding Rule 040.03.b. -Protest or petition filing fee:

> A difficulty our office has had in the past is some staff require a filing fee for municipal clients, despite the fact that Idaho Code § 67-2301 prevents the collection of such fees. To resolve the issue, we generally have to speak with attorneys for the Department, who then instruct staff not to collect such fees. A proposed edit, as shown in underline, is to write into the rule that political subdivisions are exempt from paying filing fees.
>
> "The Director will not accept a protest or petition to intervene unless the protest or petition intervene is filed with the statutory filing fee prescribed in Section 42-221L, Idaho Code, except any subdivision of the state, as defined in Section 67-2301, Idaho Code, is exempt from paying filing fees."

IDWR Response: IDWR made the suggested change in draft rule 040.02.c.

33. Comment: Regarding Rule 040.03.d. -Intention of word change:

> Question: "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." This rule change is unclear; what is intended?

IDWR Response: IDWR revised the draft rule to clarify intent.

34. Comment: Regarding Rule 045.02.e. -Significant reduction presumption:

> Question: "Other provisions of these rules not withstanding, 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." Why was 2 af/day picked?

IDWR Response: Two (2) af per day is a value retained from the current Water Appropriation Rules. IDWR was unable to find documentation on the origins of this presumption. However, IDWR does believe it is very likely this presumption was negotiated between the State of Idaho, Idaho Power, and others in 1986 when it was established in adoption of the rules originally. Rather than remove the presumption, IDWR plans to retain it, because IDWR does not plan to re-negotiate this presumption given the presumption is rebuttable and the Swan Falls Trust Water Area is under a moratorium.

35. Comment: Regarding Rule 045.03.j. -Public interest presumption:

> Question: "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) af per day meet the public interest criteria of Section 42-203C(2), Idaho Code, unless protested." Why was 2 af/day picked?

IDWR Response: Two (2) af per day is a value retained from the current Water Appropriation Rules. IDWR was unable to find documentation on the origins of this presumption. However, IDWR does believe it is very likely this presumption was negotiated between the State of Idaho, Idaho Power, and others in 1986 when it was established in adoption of the rules originally. Rather than remove the presumption, IDWR plans to retain it, because IDWR does not plan to re-negotiate this presumption given the presumption is rebuttable and the Swan Falls Trust Water Area is under a moratorium.

Michael P. Lawrence- Veolia Water Idaho, Inc.

36. Comment: Regarding Rule 001.02. -Clarification of 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.

IDWR Response: IDWR added the underlined language in revision of draft rule 001.02.

37. Comment: Regarding Rule 010. -Terms defined in Section 42-202B, Idaho Code:

> 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.

IDWR Response: IDWR added the underlined terms in revision of draft rule 010.

38. Comment: Regarding Rule 010.02. -Clarification for definition of applicant:

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

IDWR Response: IDWR added the underlined language in revision of draft rule 010.02.

39. Comment: Regarding Rule 010.08. -Addition of relevant text from decrees:

> Suggest inserting actual text from decree remark rather than referencing decrees.

IDWR Response: IDWR made the revision suggested. The definition of "Murphy Gage" in draft rule 010.09. reflects Remark No. 2 in Second Amended Partial Decrees for the water rights held in trust. If the Murphy Gage location changes in the future, the partial decrees and this rule will need to be updated.

40. Comment: Regarding Rule 010.09. -Rewording to be inclusive vs alternative:

> 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.

IDWR Response: IDWR revised draft rule based on stakeholders' comments.

41. Comment: Regarding Rule 010.10. -Definition of 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.

IDWR Response: IDWR added the underlined language in revision of draft rule 010.11.

42. Comment: Regarding Rule 010.12. -Definition of Subordinated:

> 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).

IDWR Response: IDWR revised draft rule 010.15. based on stakeholders' comments.

43. Comment: Regarding Rule 010.13. -Expanding definition to describe the lower reach:

> 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.

IDWR Response: IDWR revised draft rule 010.16. based on stakeholder's comment.

44. Comment: Regarding Rule 010.14. -Definition language change:

> 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.

IDWR Response: IDWR declines to make the suggested revision. While a water right holder can't call for more water than is needed to accomplish the beneficial use, the quantity on the water right is what is appropriated. It is the amount someone may use. Therefore, when IDWR quantifies the amount available for appropriation, IDWR evaluates the quantity authorized by existing water rights, without an analysis of the amount beneficially used. IDWR assumes the amount that is necessary to satisfy a water right is the amount authorized by the water right. IDWR recognizes there are times when the entire quantity authorized by the water right is needed to accomplish the beneficial use or satisfy the water right. However, the amount that is unappropriated is the amount not allocated or

accounted for, which is the amount over and above the quantity authorized on existing water rights.

45. Comment: Regarding Rule 010.15. - Revise to more closely match statutory language:

> That portion of a~~n 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.

IDWR Response: IDWR revised draft rule 010.20 based on stakeholders' comments and relevant documents.

46. Comment: Regarding Rule 025.02.a. -Change to reference:

> 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 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 0~~2~~45.02.c.

IDWR Response: IDWR revised draft rule 025.02.a. to clarify the intent based on stakeholders' comments and relevant documents. The reference is intended to point the reader to the subsequent review step in Paragraph 025.02.b. Paragraph 025.02.b. includes the reference the stakeholder proposes in the comment's suggested revision.

47. Comment: Regarding Rule 025.02.b. -Change to reference:

> 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 0~~2~~45.02.c.

IDWR Response: IDWR revised draft rule 025.02.b. to clarify the intent based on stakeholders' comments and relevant documents. The reference is intended to point the reader to the subsequent review step in Paragraph 025.02.c. Paragraph 025.02.c. includes

applicable reference to rule 45 the stakeholder proposes in the comment's suggested revision.

48. Comment: Regarding Rule 035.01.c. – Addition of reference:

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

IDWR Response: IDWR added the underlined language in revision of draft rule 035.01.c.

49. Comment: Regarding Rule 035.01.d. -Addition of descriptive wording:

> 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.

IDWR Response: IDWR added the underlined language in revision of draft rule 035.01.d.

50. Comment: Regarding Rule 035.02.a. -Changing the verb "receive":

> The priority date of an application is established as of the time and date the Department receives~~d~~ 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.

IDWR Response: IDWR made the suggested change.

51. Comment: Regarding Rule 035.02.c. -Change to wording:

> 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.
>
> Question: What happens if no notification to Department within 30 days?

IDWR Response: IDWR made the suggested change. There is no explicit statutory or rule penalty if the Department is not notified of an application assignment within 30 days. Similar to the fact that Idaho Code § 42-248 provides no explicit penalty if a notice of

ownership change is not received within 120 days. The Department will process an application assignment if a decision on the application has not occurred. However, if the Department issues a decision on the application and then the applicant submits an assignment of application executed more than 30 days prior to the decision, the Department can reference this rule requirement to justify why the Department should not recognize the late application assignment. IDWR added language in the rule to clarify these consequences.

52. Comment: Regarding Rule 035.03. -Change to reference:

> An application is acceptable for filing if it is filed in a manner stated in Subsection~~paragraphs~~ 035.01.a. ~~through iii.~~ and includes the following information:

IDWR Response: IDWR revised draft rule 035.03 based on stakeholders' comments. IDWR used the term "Paragraph" in reference based on Idaho Rule Writer's Manual directive.

53. Comment: Regarding Rule 035.03.b-. Change in wording:

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

IDWR Response: IDWR made the suggested change.

54. Comment: Regarding Rule 035.03.b.i. -Interconnected system source(s):

> Question: Can ground water and surface water be in a single application?

IDWR Response: Yes, if the two sources are part of a single interconnected system.

55. Comment: Regarding Rule 035.03.b.iv. -Relocate or change wording:

> 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...."

IDWR Response: IDWR declines to add the suggested rule language. The rules do not direct an applicant how the required information is to be provided, other than on the IDWR prescribed form. IDWR will update the standard application form and instructions to inform the applicant how to submit the required information rather than restricting the applicant, by rule, to submitting the information in a narrative.

56. Comment: Regarding Rule 035.03.c.iii. -Addition of wording and clarification of phrasing:

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 <u>or permit</u> 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.

Question: Could, "within the Pioneer Irrigation District Boundary" meet the requirement to, 'state the name' of the generally described place of use?

IDWR Response: IDWR added the underlined language in revision of draft rule 035.03.c.iii. Yes, "Pioneer Irrigation District Boundary" is an example of an acceptable generally described place of use boundary name.

57. <u>Comment</u>: Regarding Rule 035.03.d.i. -Change in wording and clarification of "three significant figures":

    Change "…storing…" to "…stored…".

    Question: 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?

IDWR Response: IDWR made the change suggested. Yes, a maximum of three significant figures means 14.9 cfs instead of 14.86 cfs and 100 af instead of 100.5 af. The draft rule language regarding significant figures is based on IDWR's Administrative Application Processing Memo No. 6.

58. <u>Comment</u>: Regarding Rule 035.03.d.iii. -Inclusion of other water rights for same purpose:

    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 <u>in combination with other water rights for the same purpose.</u>

IDWR Response: IDWR revised draft rule 035.03.d.iii. based on stakeholder's comment and further IDWR consideration.

59. Comment: Regarding Rule 035.03.e.i. -Addition of requirement description:

> 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.

IDWR Response: IDWR added the underlined language in revision of draft rule 035.03.e.i.

60. Comment: Regarding Rule 035.03.e.iii. -Addition of the word "are":

> 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.

IDWR Response: IDWR declines to make the suggested revision based on IDWR's understanding of the Idaho Rule Writer's Manual directive. The Idaho Rule Writer's Manual states "[i]n administrative rules the singular number includes the plural and the plural number includes the singular. This means that phrases such as "person or persons" are unnecessary. The rule writer should not use the singular and the plural interchangeably either. To avoid ambiguity, the writer generally should use only the singular, regardless of any intent of the rule to encompass both. In addition, a singular noun should generally be used in order to avoid the problem of whether the law applies separately to each member of a class or to the whole class."

61. Comment: Regarding Rule 035.03.f. -Clarification of period of use requirement:

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

IDWR Response: IDWR made the suggested change.

62. Comment: Regarding Rule 035.03.h. -Narrowing the scope of the requirement:

> 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.

IDWR Response: IDWR made the suggested change.

63. Comment: Regarding Rule 035.03.i.-Addition of descriptive language:

Ownership or other legal access to the point of diversion, place of use, and conveyance system. If 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.

IDWR Response: IDWR made the suggested change.

64. Comment: Regarding Rule 035.03.j. -Adding municipal application exception language:

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.

IDWR Response: IDWR made the suggested change.

65. Comment: Regarding Rule 04.a. -Addressing amendment of permits:

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.

IDWR Response: The existing and draft rules intentionally exclude permit amendments. IDWR does not receive or process many of these applications and does not see an immediate need to promulgate rules for the permit amendment process. IDWR relies on the statutes and previous decisions when processing and evaluating permit amendment

applications. IDWR evaluates the criteria in Idaho Code § 42-211 and local public interest per the *Hardy v Higginson* decision when processing permit amendment applications. If it becomes necessary to create rules regarding processing and evaluation of permit amendments, IDWR will likely pursue a new more comprehensive set of rules to do so in order to maintain the current scope of the Water Appropriation Rules rather than expanding it.

66. Comment: Regarding Rule 035.04.a. -Changes in the scope of requirement:

> As the "point of discharge or return flow" and "depletion" are not elements of a water right and are not required on the application form we suggest the following changes:
>
> 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.

IDWR Response: IDWR deleted "point of discharge" and "or depletion" from draft rule 035.04.a. based on suggestion. IDWR declines to change "agent" to "authorized representative". IDWR understands an "agent" to be someone who can sign and act on behalf of a person or entity. A "representative" may or may not be able to sign on behalf of a person or entity. IDWR revised other draft rules to consistently use the term "Applicant's agent" when referring to someone who can sign on behalf of an applicant in Subsection 035.03 and amend an application on behalf of an applicant in Subsection 035.04 based on stakeholders' comments.

67. Comment: Regarding Rule 035.04.b. -Change the naming of authorized party:

> 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.

IDWR Response: IDWR declines to change "agent" to "authorized representative". IDWR understands an "agent" to be someone who can sign and act on behalf of a person or entity. A "representative" may or may not be able to sign on behalf of a person or entity. IDWR revised other draft rules to consistently use the term "Applicant's agent" when referring to someone who can sign on behalf of an applicant in Subsection 035.03 and amend an application on behalf of an applicant in Subsection 035.04 based on stakeholders'

comments.

68. Comment: Regarding Rule 035.04.c. -Removing depletion from the scope of requirement:

> Amounts "depleted" is not an element of a water right and is not required on the application form. We suggest the following change:
>
> 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.

IDWR Response: IDWR made the suggested change.

69. Comment: Regarding Rule 035.04.d. – Change the naming of authorized party:

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

IDWR Response: IDWR declines to change "agent" to "authorized representative". IDWR understands an "agent" to be someone who can sign and act on behalf of a person or entity. A "representative" may or may not be able to sign on behalf of a person or entity. IDWR revised other draft rules to consistently use the term "Applicant's agent" when referring to someone who can sign on behalf of an applicant in Subsection 035.03 and amend an application on behalf of an applicant in Subsection 035.04 based on stakeholders' comments.

70. Comment: Regarding Rule 036. -Processing delays exceeding one year:

> Question: Rule 36 states, "The Department may approve a request for delay for a shorter period or upon conditions and may renew the approval upon written request." Does this mean there can be processing delays exceeding 1 year if "renewed"?

IDWR Response: Yes, unless the delay will injure existing water rights, the applicant seeks the delay for speculative purposes, or the delay does not serve the interest of the people of Idaho.

71. Comment: Regarding Rule 040.01. -Clarification of order of processing steps:

Questions: 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?

IDWR Response: The steps are meant to be taken in order and represent a non-exclusive list. However, after further consideration, IDWR removed draft rule 040.01 entirely. IDWR believes this generalization of processing steps is not appropriate in administrative rules. IDWR can supply general processing information to the public in another medium that IDWR can improve to accommodate future efficiencies without requiring an administrative rule change.

72. Comment: Regarding Rule 040.01.b. -Addition of CGWA consideration by Director:

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

IDWR Response: IDWR did not revise the draft rule as suggested. After further consideration, IDWR removed draft rule 040.01 entirely. IDWR believes this generalization of processing steps is not appropriate in administrative rules. IDWR can supply general processing information to the public in another medium that IDWR can improve to accommodate future efficiencies without requiring an administrative rule change.

73. Comment: Regarding Rule 040.01.c. -Change to description of processing step:

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.

IDWR Response: IDWR did not revise the draft rule as suggested. After further consideration, IDWR removed draft rule 040.01 entirely. IDWR believes this generalization of processing steps is not appropriate in administrative rules. IDWR can supply general processing information to the public in another medium that IDWR can improve to accommodate future efficiencies without requiring an administrative rule change.

74. Comment: Regarding Rule 040.02.b. -Change to be consistent with statutory language:

This should be made consistent with 42- 203A(2).

IDWR Response: IDWR is uncertain how the preliminary draft rule language was inconsistent

with Idaho Code § 42-203A(2). However, IDWR did restructure the language of draft rule 040.01.b. to simplify the content and address this stakeholder comment.

75. Comment: Regarding Rule 040.02.e. -When re-advertisement is required:

> Question: Regarding, "If the Department determines that an application amended after advertisement requires re-advertisement…", How is this determination made?

IDWR Response: Idaho Code § 42-211 states "If amendment is made after publication of notice of the original application, said notice shall be republished following amendment, upon payment by the applicant of the statutory fee for republication as in this act provided." Idaho Code § 42-211 does not list the changes requiring an amendment to the application specifically, it only lists the changes requiring amendments to permit. The list of changes requiring amendments to a permit is similar to the list proposed in Rule 035.04.a. IDWR revised draft rule 040.01.e. to be more consistent with Idaho Code § 42-211's broad statement implying all amended applications should be republished.

76. Comment: Regarding Rule 040.02.f. -Denial of applications in moratorium areas added:

> 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.

IDWR Response: IDWR declines to add suggested rule language. Idaho Code § 42-1805(7) only authorizes the Director to "...suspend the issuance or further action on permits or applications...". The Director does not have statutory authority to deny or return applications filed in a moratorium area, only to suspend further action on them.

77. Comment: Regarding Rule 040.03. -Accept protest without protest form:

> Suggested addition:
>
> 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.
>
> The addition would require renumbering subsequent paragraphs.

IDWR Response: IDWR revised draft rule 040.02 to add paragraph b. and renumbered subsequent paragraphs based on stakeholder's suggestion.

78. Comment: Regarding Rule 040.03.c. -Identifying protestant(s):

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~~.

IDWR Response: IDWR revised draft rule 040.02.d. based on stakeholder's suggestion.

79. Comment: Regarding Rule 040.04.d. -Adding wording, "any":

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.

IDWR Response: IDWR revised draft rule 040.03.d. based on stakeholders' comments.

80. Comment: Regarding Rule 040.05.e.iv. -Agreements with landowner:

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.

IDWR Response: IDWR revised draft rules 040.04.e.iv and 045.01.c.i. to address stakeholders' comments. A water right cannot be established in trespass. The applicant must have access to develop the permit, prior to establishing the water right to avoid establishing a water right in trespass. To ensure the permit application is made in good faith, the applicant should demonstrate the intent to acquire the necessary access prior to permit development.

81. Comment: Regarding Rule 040.05.e.ix. -Adding a description of comment letters:

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.

IDWR Response: IDWR made the suggested change.

82. Comment: Regarding Rule 045.01.a.iii. -Wording change:

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.

IDWR Response: IDWR made the suggested change.

83. Comment: Regarding Rule 045.01.c. – Wording added, "of" and "to be" to criteria:

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:

IDWR Response: IDWR revised draft rule 045.01.c. based on suggestion and to be more consistent with Idaho Code § 42-203A(5)(c) language.

84. Comment: Regarding Rule 045.01.c.i. -Inclusion of any property not owned by applicant:

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

IDWR Response: IDWR revised draft rules 040.04.e.iv and 045.01.c.i. to address stakeholders' comments. A water right cannot be established in trespass. The applicant must have access to develop the permit, prior to establishing the water right to avoid establishing a water right in trespass. To ensure the permit application is made in good faith, the applicant should demonstrate the intent to acquire the necessary access prior to permit development.

85. Comment: Regarding Rule 045.01.c.ii. -Adding licenses and approvals to criteria:

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

IDWR Response: IDWR inserted the underlined language in revision of draft rule 045.01.c.ii.

86. Comment: Regarding Rule 045.01.e. -Clarification of rule scope or intent:

> Local public interest review must be limited to effects on the public water resource, as required by the 2003 amendments to Idaho Code § 42-202B(3). The 2003 amendments made clear that there are no "other appropriate factors."
>
> We suggest, "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:"

IDWR Response: IDWR revised draft rule 045.01.e. based on stakeholders' comments and to be more consistent with Idaho Code 42-202B(3), the Statement of Purpose for the 2003 statute change, and prior water right decisions.

87. Comment: Regarding Rule 045.01.e.i. -Removal of Rule 045.01.e.i.:

> 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.

IDWR Response: IDWR revised draft rule 045.01.e.i. based on stakeholders' comments and to be more consistent with Idaho Code 42-202B(3), the Statement of Purpose for the 2003 statute change, and prior water right decisions.

88. Comment: Regarding Rule 045.01.e.ii. -Clarification of rule scope and intent:

> The 2003 Statement of Purpose explicitly emphasizes that the local public interest evaluation should not stray into secondary effects of projects.
>
> We suggest, "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~~;
>
> This [suggested] 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.

IDWR Response: IDWR revised draft rule 045.01.e.ii. based on stakeholders' comments and to be more consistent with Idaho Code 42-202B(3), the Statement of Purpose for the 2003 statute change, and prior water right decisions.

89. Comment: Regarding Rule 045.01.e. -Add new content:

Consider adding, "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;"

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.

IDWR Response: IDWR added draft rule 045.01.e.iii. based on stakeholders' comments and to be more consistent with Idaho Code 42-202B(3), the Statement of Purpose for the 2003 statute change, and prior water right decisions.

90. Comment: Regarding Rule 045.01.e. -Add new content:

Consider adding, "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;" This is also dictated by the clear teaching of Shokal v. Dunn and Eden's Gate.

IDWR Response: IDWR added draft rule 045.01.e.iv. based on stakeholders' comments and to be more consistent with Idaho Code 42-202B(3), the Statement of Purpose for the 2003 statute change, and prior water right decisions.

91. Comment: Regarding Rule 045.01.e. – Overriding state or national need:

Consider changing preliminary draft rule 045.01.iii. to read, "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."

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.

IDWR Response: IDWR declines to maintain current rule language as the stakeholder suggests. IDWR believes the existing rule language is inconsistent with the statutory definition of "local public interest" in Idaho Code § 42-202B(3) and is outside the scope of IDWR's criteria review authority in Idaho Code § 42-203A(5).

92. Comment: Regarding Rule 045.01.f.iii. -Clarification of seepage rate measurement:

Question: Is this AF or vertical feet?

IDWR Response: "0.2 feet per day" is vertical feet not acre-feet.

93. Comment: Regarding Rule 045.01.g. -Adding explanatory wording:

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~~:

IDWR Response: IDWR revised draft rule 045.01.g. based on stakeholders' comments.

94. Comment: Regarding Rule 045.01.g.i. -Harmonizing to statute language:

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.

We suggest changing 45.01.g.i. to read, "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."~~

IDWR Response: IDWR made the suggested change.

Jeff Raybould- Idaho Water Resource Board

95. Comment: Regarding Rule 001.02 -Broadening the scope of rules:

> As drafted, the scope of this rule is too narrow. The rule states they are only "the procedures for obtaining the right to divert and use unappropriated public water and sources within the Swan Falls trust water area." The water appropriation rules should apply everywhere within the State of Idaho, not just within the Swan Falls trust area. In addition, these rules provide the procedures for obtaining a "permit" to divert water; the rules for licensing a water right are found in other sections of IDAPA. Note also that a water right appropriates "water," not a "source." The "source" element of a water right is a term of art with a specific meaning, and a water right does not confer any interest in the "source" other than the right to divert water from it for the authorized beneficial use. Finally, the waters in the Swan Falls trust area that are available for diversion and use are not limited to "unappropriated" flows—these waters also include flows that are appropriated under the hydropower water rights held in trust by the State. This is the very reason "trust water" applications can be evaluated under the additional criteria of Idaho Code § 42-203C without violating Art XV s 3 of the Idaho Constitution. See comments below with regard to the definition of "Trust Water."
>
> Suggest editing the rule as follows: "These rules set the procedures for obtaining a permit ~~the right~~ to divert and use unappropriated public water ~~and sources~~ within the State of Idaho and for the relocation of Trust Water within the Swan Falls trust water area."

IDWR Response: IDWR revised draft rule 001.02 based on stakeholders' suggestions.

96. Comment: Regarding Rule 010.12. -Adding term and definition, "public interest criteria":

> Recommend adding the term "public interest" or "public interest criteria" to the list of defined terms, and define it with reference to Idaho Code § 42-203C(2). It is important to distinguish the "public interest" under Idaho Code § 42-203C(2) from the "local public interest" as defined in Idaho Code § 42-202B(3).

IDWR Response: IDWR added term "Public Interest" as draft rule 010.13 to differentiate it from "Local Public Interest", which is also defined by reference to Idaho Code § 42-202B in draft rule 010, based on stakeholder comment.

97. Comment: Regarding Rule 010.07. -Change of citation:

> Recommend changing the citation to "Section 42-1701(3)."

IDWR Response: IDWR made the suggested change.

98. Comment: Regarding Rule 010.09. -Changing definition, "permit":

> See preceding comment for Rule 01.02. Suggest the following changes: "The water right document issued by the Director authorizing the diversion and use of unappropriated public waters of the state or 2 ~~sources of~~ the relocation of Trust Water within the Swan Falls trust water area."

IDWR Response: IDWR revised draft rule 010.10 based on stakeholders' comments.

99. Comment: Regarding Rule 010.12. -Change definition, "subordinated":

> Subordination may apply to water rights both upstream and downstream from the subject right. Recommend the following changes: "Subject to diminishment or depletion without compensation by ~~upstream~~ water rights initiated later in time."

IDWR Response: IDWR made the suggested change in draft rule 010.15.

100. Comment: Regarding Rule 010.14. -Adding term and definition, "trust water":

> Recommend adding a definition for the term "Trust Water" immediately after the definition of "Swan Falls Trust Water Area." Adding a new definition for "Trust Water" will prevent confusion. The term "Trust Water" is firmly established in general usage so that to leave it out of the rules could raise confusion with how it is the same or different from "Water Right Held in Trust." "Trust Water" is a statutory term; it appears in Idaho Code § 42-203C(1). Both Idaho Code § 42-203C and 42- 203B(2) also contain references to "water" held in trust.
>
> Recommend adopting the following definition which is based on the language of Idaho Code § 42-203B(2) and § 42-203C and the discussion of the discussions of the term "trust water" in pages 48–51 of the State Water Plan and pages 39–41 of the SRBA District Court's Memorandum Decision and Order on Cross-Motions for Summary Judgment, SRBA Subcase 00-92023 (Apr. 18, 2008).
>
> "Trust Water. Flows of water appropriated for power purposes by the Water Rights Held in Trust listed below in Rule 10.15. Trust water is reallocated to uses other than power generation to the extent the Water Rights Held in Trust are subordinated to permits issued for such other uses pursuant to Section 42-203C, Idaho Code."

IDWR Response: IDWR added term "Trust Water" as draft rule 010.17 based on stakeholder's comment. The definition is based on suggested language, but also the documents referenced in the stakeholder's comment. IDWR incorporated the concept that 'Trust Water' is water in excess of established minimum stream flows within the draft rule definition.

101. Comment: Regarding Rule 010.15. -Clarification of definition:

Rule 10.15's proposed definition of "Water Rights Held in Trust" is both incorrect and difficult to understand because it relies on Idaho Code § 42-203B(5). Idaho Code § 42-203B(5) did not create the trust (the trust was created by Idaho Code § 42-203B(2) and (3), as expressly stated in subsection (1)), and Idaho Code § 42-203B(5) also does not define the Water Rights Held in Trust. Idaho Code § 42-203B(5) simply 1. authorizes the Governor to enter into the type of agreements contemplated by Idaho Code § 203B(2), and 2. ratified the Governor's execution of the Swan Falls Agreement (which also does not define the Water Rights Held in Trust). Water Rights Held in Trust are defined, rather, by the partial decrees issued in the SRBA.

The Rules' definition of the Water Rights Held in Trust, therefore, should refer to two authorities: 1. the statutory subsections that actually establish the trust—Idaho Code § 42-203B(2) and (3); and 2. the partial decrees issued in the SRBA. This avoids the legal error of referring to Idaho Code § 42-203B(5) as if it created the trust or defines the water rights held in trust and is clearer.

Providing a list of the water right numbers also avoids the need to grapple with statutory language that was already interpreted and implemented in the SRBA, and removes any confusion or ambiguity as to which specific water rights are the "Water Rights Held in Trust." Note that referring to the water rights themselves also eliminates any need to discuss subordination or the Murphy Flows. The conditions in the partial decrees already explain subordination and the relationship between the Murphy Flows and the Water Rights Held in Trust. This removes the need to discuss these matters in the Rules' definition of "Water Rights Held in Trust": the partial decrees speak for themselves on these points.

Recommend that the definition of "Water Right Held in Trust" be entirely re-written, as follows:

"Water Right Held in Trust. A water right for power purposes held in trust by the State of Idaho pursuant to subsection (2) or subsection (3) of Section 42-203B, Idaho Code. The Water Rights Held in Trust for the Swan Falls

trust water area were decreed in the Snake River Basin: 02-02001A, 02-02001B, 02-02032B, 02-02036, 02-02056, 02-02057, 02-02059, 02-02060, 02-0264, 02-02065, 02-04000B, 02-04001B, 02-10135, 36-02013, 36-02018, 36-02026, 37-02128, 37-02471, 37-02472, 37-20709, and 37-20710."

IDWR Response: IDWR revised the definition in draft rule 010.20 based on stakeholder's comment. The definition is based on suggested language, but also the documents referenced in the stakeholder's comment. IDWR incorporated the concept that a "Water Right Held in Trust" is for water in excess of established minimum stream flows within the draft rule definition. Also, IDWR corrected the water right number the stakeholder referenced as "02-0264" to the correct number of "02-02064" based on the Snake River Basin decrees.

102. Comment: Regarding Rule 025.02. -Change to title and statute clarification:

Introductory Paragraph Recommend changing the title of this section to:

"Applications for Reallocation of Trust Water within the Swan Falls Trust Water Area under I.C. § 42-203C."

This language more closely follows the language of Idaho Code § 42-203C and better describes the fact that the water is being reallocated because it has already been appropriated by the Water Rights Held in Trust.

Recommend further amending this section to make clear the statutes that apply to evaluation of the reallocation of Trust Water and to more explicitly follow the requirements of Idaho Code § 42-203C that require the Director first evaluate the application under the criteria of Idaho Code § 42-203A. Recommend amending the introductory paragraph as follows:

"The Director will process applications to reallocate Trust Water ~~appropriate water~~ from the Swan Falls trust water area as described in I.C. § 42-203C, I.C. § 42-203A, Section 040 and 045."

IDWR Response: IDWR declines to change the title of draft rule 025.02 as the stakeholder suggested. The content of draft rule 025.02 pertains to unappropriated water and reallocation of trust water. The suggested title is too narrow. IDWR instead revised the draft rule content of 025.02 and 025.02.a. to clarify the intent based on stakeholders' comments.

103. Comment: Regarding Rule 025.02.a. -Clarification of rule scope and intent:

Idaho Code § 42-203C simply states that the Director must first evaluate the reallocation of Trust Water first using the criteria of Idaho Code § 42-

203A. The rule should more clearly express that all criteria of Idaho Code § 42-203A(5) must be met and should more clearly state that the criteria of 42-203A(5)(a) does not include an evaluation of effect on Water Rights Held in Trust. Further, if the application meets the requirements of Idaho Code § 42-203A(5), the next step is to consider whether it causes a significant reduction under IDAPA 37.03.08.025.02.b. Recommend amending the subsection a. as follows:

a. First, the Director will evaluate the application using the criteria of Section 42-203A(5), Idaho Code , 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.~~ except that evaluation of criteria I.C. § 42-203A(5)(a) will not include an evaluation of effects on Water Rights Held in Trust. If the application does not satisfy the criteria of Section 42-203A(5) ~~b~~ (a) 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) (a) through (g), Idaho Code, ~~except Section 42-203A(5)(a), Idaho Code,~~ the Director will review the application under Paragraph 025.02.~~c~~b.

IDWR Response: IDWR revised draft rule 025.02.a. based on stakeholder's comments and relevant statutes and other legal documents.

104. Comment: Regarding Rule 025.02.b. -Clarification of rule scope and intent:

There are no statutory "criteria" in Idaho Code § 42-203C for making a "significant reduction" determination. The "criteria" in IC 42-203C(2) apply to making a "public interest" determination after it has already been determined there will be a "significant reduction." In other words, while Idaho Code § 42-203C calls for determining whether the proposed use will "significantly reduce" the water available for hydropower production under the water rights held in trust by the state, there are no statutory "criteria" for making this "significant reduction" determination. The statutory "criteria" apply only after it has already been determined the proposed use will cause a "significant reduction." In that case, the "criteria" in Idaho Code § 42-203C(2) apply in determining whether the proposed use will be approved *despite* the fact that it will "significantly reduce" the water available for hydropower. Recommend amending subsection b. as follows:

"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 025.02.c.

IDWR Response: IDWR revised draft rule 025.02.b. based on stakeholder's comments.

105. Comment: Regarding Rule 025.02.c. -Local public interest vs public interest:

This provision should address the "public interest" requirement of Idaho Code § 42-203C(2). However, it refers to the "local public interest" which was defined in IDAPA 37.03.08.010 with a reference to Idaho Code § 42-202B. The definition of "local public interest" in Idaho Code § 42-202B should not be applied to the analysis under Idaho Code § 42-203C. Idaho Code § 42-203C sets forth additional/different criteria for making a "public interest" determination. Therefore, it is recommended that subsection c. be amended to delete the word "local" as follows:

"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."

IDWR Response: IDWR made the suggested change.

106. Comment: Regarding Rule 035.03.i.-Criteria to demonstrate ownership/access:

It may be necessary to further describe the amount or type of information that is needed to demonstrate ownership or other legal access to the point of diversion, place of use, and conveyance for the purpose of accepting an application as complete. A water right may not be initiated in trespass. However, there may be certain circumstances when access to the property necessary to complete the project cannot be demonstrated at the time the application is filed. This is especially true for large water projects, such as those initiated by the IWRB. Holding an application as incomplete because demonstration of legal access cannot be shown at the time of filing may affect an applicant's ability to secure a priority date and could delay or impede some water projects, especially large and complicated ones.

IDWR Response: IDWR revised draft rules 035.03.i., 040.04.e.iv, and 045.01.c.i. to address stakeholders' comments. A water right cannot be established in trespass. The applicant must have access to develop the permit, prior to establishing the water right to avoid establishing a water right in trespass. To ensure the permit application is made in good faith, the applicant should demonstrate the intent to acquire the necessary access prior to

permit development.

107. Comment: Regarding Rule 035.04.a. -Clarification of depletion implications:

The term "depletion" is not defined with the rules and is vague. As written, an amendment to an application that results in an increase in water "depleted per year" will result in IDWR advancing the priority date of the application. Clarification should be given as to when there might be an increase in "depletion" that would not also be an increase in diversion rate or volume.

IDWR Response: IDWR revised draft rule 035.04.a. based on stakeholders' comments.

108. Comment: Regarding Rule 040.04. -Revise to clarify the burden of proof:

The conflation of the analyses of unprotested and protested applications and applications under Idaho Code § 42-203A(5) and 42-203C makes this section difficult to understand. It is only if the application is protested that the opportunity arises to divide the burdens of proof among the different parties. If an application is not protested, the burden is on the applicant to provide the Director with all the information necessary to support its application. In the case of an application for unappropriated water, that burden includes information demonstrating the criteria of Idaho Code § 42-203A(5) is met. In the case of an application for reallocation of Trust Water, that includes providing information demonstrating: (1) that the criteria of Idaho Code § 42-203A(5) are met, (2) information demonstrating that the project will not cause a significant reduction (or meets one of the presumptions in IDAPA 37.03.08.045.02), and, if it will cause a significant reduction (3) that it meets the public interest criteria of Idaho Code § 42-203C(2) (or meets one of the presumptions in IDAPA 37.03.08.045.03).

If an application is protested, then the burdens of proof may be divided between the parties. The burdens of proof set forth for the analysis of the criteria of Idaho Code § 42-203A(5) should apply to both applications to appropriate unappropriated water and applications for reallocation of Trust Water. Once those burdens have been met they may be further divided for the purposes of determining (1) whether there will be a significant reduction under Idaho Code § 42-203C and IDAPA 37.03.08.045.02 and if there will be a significant reduction (2) whether they meet the public interest criteria of Idaho Code § 42-203C(2) and IDAPA 37.03.08.045.03. Based on these comments it is recommended the section be amended as follows:

04. Burden of Proof

a. For an unprotested application, the Director will evaluate, as appropriate the application, information filed by the applicant pursuant to Subsection 040.05, 045.01, 045.02, and 045.03, and information in the files and records of the Department to determine compliance with Sections 42-203A(5) and 42-203C, Idaho Code.

b. For protested applications, the burden of proof has two parts: first, the burden of producing evidence to present a prima facie case, and second, the burden of persuasion.

c. For evaluation of criteria under I.C. § 42-203A(5):

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 and 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.

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

iii. The applicant has the burden of persuasion of the criteria of Section 42-203A(5) (a) through (g).

d. For evaluations under I.C. § 42-203C:

i. The protestant has the initial burden of producing evidence, as outlined in Section 040.02, that the application will cause a significant reduction, except that the applicant has the initial burden of producing evidence of the proposed project design, construction, operation, and directly associated operations of which the applicant is knowledgeable or reasonably can be expected to be knowledgeable.

ii. If it is demonstrated the application does cause a significant reduction, the protestant has the initial burden of producing evidence, as outlined in Section 040.03, that it does not meet the public interest criteria of Section 42-203C(2), Idaho Code.

iii. The protestant has the ultimate burden of persuasion on both whether the application causes a significant reduction, as outlined in Section 040.02, and whether it meets the public interest criteria of Section 42-203C(2), as outlined in Section 040.03.protestant has the initial burden of producing evidence, as outlined in Section 040.03, that it does not meet the public interest criteria of Section 42-203C(2), Idaho Code. iii. The

protestant has the ultimate burden of persuasion on both whether the application causes a significant reduction, as outlined in Section 040.02, and whether it meets the public interest criteria of Section 42-203C(2), as outlined in Section 040.03.

IDWR Response: IDWR revised draft rule 040.03 based on stakeholders' comments.

109. Comment: Regarding Rule 040.05.a. -Clarification for statutory reference:

Based on the preceding comments, it is recommended the section be amended to remove the reference to subsection (2) of Idaho Code § 42-203C. The additional information may be needed to help the Director determine significant reduction, as well as public interest. Therefore, a broader statutory reference to Idaho Code § 42-203C in total may be more helpful.

IDWR Response: IDWR revised draft rule 040.04 to include broader rule reference to Section 045, which references two applicable statutes, Idaho Code §§ 42-203A(5) and 42-203C.

110. Comment: Regarding Rule 040.05.c. – Harmonize with 045.02.e and f.:

This section both gives the Director discretion to request additional information and also tries to take that discretion away. The Director "will request" the information in Section 40.05.f, "unless the Director determines otherwise."

Beyond this confusion it is unclear what the exact interaction is between this section and the "presumptions" set forth in Section 045.02.e and f. Section 045.02.d provides that 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." This section states that the Director must only request addition information regarding the "public interest" criteria of Idaho Code § 42-203C(2) and 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." It is not clear why the 200 acres was added to this section.

Section 045.05.e provides "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." It is unclear why the terms "domestic, commercial, municipal, or industrial" were removed from this

section. Recommend that this section be harmonized with Section 045.02.e and f.

IDWR Response: IDWR revised draft rules 040.04.b. and 040.04.c. based on stakeholders' comments.

111. Comment: Regarding Rule 040.05.f. -Change reference to Idaho Code § 42-203C:

The Director may need additional information to determine both whether there is a "significant reduction" and whether the application meets the criteria of 42-203C(2). Therefore, recommend amending this section to read as follows:

"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:

IDWR Response: IDWR made the suggested change in draft rule 040.04.f.

112. Comment: Regarding Rule 045.01.c.i. -Needs/complexities of large-scale projects:

The IWRB engages in many large-scale water projects, such as ground water recharge, the Anderson Ranch Dam Raise, and Mountain Home Air Force Base Pipeline project. These water projects are complex and cover large areas of land, often with multiple private, state, or federal lands at issue. The requirement that an applicant provide evidence of access to the point of diversion and/or place of use at the time the water right application is being evaluated often creates a difficult "chicken and egg" scenario in which (1) one must have access to the land, but the grantor doesn't want to provide access to the land until the project is fully known/developed or (2) the water project hasn't been developed yet so the place of use designated on the application is far broader than what will actually be developed, but one can't develop the project and know where the final place of use will be without first obtaining the water right.

It also provides a forum for entities, often the federal government, to step into the state water right process via a protest and to use that protest to prevent the completion of the water right process until all federal land use agreements are in place. Federal land access processes can sometimes take years. This scenario can make it extremely difficult to complete the water right process, obtain a water right permit, and to move large water projects to completion.

It is recommended that changes be made to this section to take into account the specific needs/complexities of large-scale water projects that are initiated by the IWRB.

IDWR Response: IDWR revised draft rules 035.03.i., 040.04.e.iv., and 045.01.c.i. to address stakeholders' comments. A water right cannot be established in trespass. The applicant must have access to develop the permit, prior to establishing the water right to avoid establishing a water right in trespass. To ensure the permit application is made in good faith, the applicant should demonstrate the intent to acquire the necessary access prior to permit development.

113. Comment: Regarding Rule 050.01. -Revise consistent with state water plan:

The Director must also issue water right permits that are consistent with the State Water Plan. Idaho Code § 42-1734B(4). Recommend amending the section as follows:

"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, to ensure the permit is consistent with the State Water Plan as required by 42-1734B(4), 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."

IDWR Response: IDWR revised draft rule 050.01 based on stakeholders' comments.

114. Comment: Regarding Rule 055.01.a.iii. -Clarification of intent:

Only the IWRB may hold a minimum streamflow water right. Title 42 Chapter 15. Recommend deleting the word "Director" as follows:

"Prevent reduction of flows below a minimum streamflow ~~established~~ held by ~~the Director or~~ the Board pursuant to applicable law."

IDWR Response: IDWR made the suggested change.

Scott N. Pugrud- Idaho Power Co.

115. Comment: Regarding - Trust Water:

IDWR assumes, by this rulemaking, that there is still water available for appropriation. Idaho Power believes that IDWR should first determine if

and how much water is available for appropriation in the Trust Water Area. This can be accomplished through a Trust Water Review (as referenced in Article III of the 2009 Framework) to determine availability, and the public interest criteria. As noted above, in 1988 IDWR determined that the Snake River, and ground and surface water tributaries between Milner and the Murphy Gage were fully appropriated. Trust Water is not unappropriated water, and the State holds Idaho Power's water rights in trust. Likewise, the Director issued an Amended Moratorium Order on new appropriations of water on October 21, 2022 for the entire Snake River Basin, including the Trust Water Area. Because there may not be water to appropriate, this negotiated rulemaking may be unnecessary.

In the event that there is water available for appropriation, the State must abide by the terms of the Swan Falls Settlement and the 2009 Framework. In those agreements, Idaho Power agreed to place its water rights in trust. The State's obligation is to serve as the trustee and manage that trust for the beneficiaries. The Swan Falls Settlement lists the beneficiaries of the Trust as Idaho Power and the citizens of the State of Idaho. To the extent that IDWR seeks to define how to appropriate Trust Water, Idaho Power believes that the State and IDWR should use the lens that the parties agreed to in 1984.

IDWR Response: IDWR concurs with the Idaho State Water Plan policy 4C statement "[t]he actual amount of development that can take place without violation of the [Murphy] minimum stream flows will depend on the nature and location of each new development, as well as the implementation of new practices to augment the stream flow." IDWR believes it is necessary to retain rules for the appropriation of unappropriated water throughout the state of Idaho, which is largely outside the Swan Falls Trust Water Area (Snake River reach between the Milner and Swan Falls dams and tributary surface and ground water). IDWR also believes it is prudent to retain rules for the reallocation of trust water within the Swan Falls Trust Water Area in concurrence with the sentiment of Idaho State Water Plan policy 4C quoted above. IDWR is considering the Swan Falls Settlement, 2009 Framework, and other subsequent applicable legal documents and decisions in this rulemaking effort. IDWR is also working with Idaho Power and other members of the Swan Falls Technical Working Group and the Swan Falls Implementation Group to address IDWR's obligations under the Swan Falls Settlement and the 2009 Framework.

116. Comment: Regarding Rule 010.09. -Definition of "permit":

IDWR deleted the word unappropriated from the definition of permit. The reference to unappropriated should be reinserted to the definition.

IDWR Response: IDWR made the suggested change.

117. Comment: Regarding Rule 025.01. -Add reference to SRB Moratorium Order:

> IDWR should reference the Amended Snake River Basin Moratorium Order issued by the Director on October 21, 2022 in this Section.

IDWR Response: IDWR did not add the reference suggested by the stakeholder. IDWR is uncertain in what context the stakeholder desires IDWR to add the reference. Also, IDWR is unclear what purpose adding this reference would serve.

118. Comment: Regarding Rule 025.02. -Clarification of rule scope or intent:

> Appropriations within the Trust Water Area or which appropriate Trust Water, should be evaluated under these procedures. Such proposed applications would reduce the property held in trust.

IDWR Response: IDWR revised draft rule 025.02 based on stakeholders' comments.

119. Comment: Regarding Rule 025.02.b. -Add definition, "significant reduction":

> In evaluating an application, IDWR should define "significant reduction".

IDWR Response: IDWR declines to add the term "significant reduction" and to define it. There is no statutory definition or criteria for "significant reduction." A definition for "significant reduction" would be cumbersome to create and would require a significant amount of technical analysis and negotiations with various stakeholders. IDWR believes draft rule 045.02.a. defines the criteria for considering what is or is not a "significant reduction" is sufficient to establish how the Director will evaluate an application proposing a reallocation of trust water to determine if it will cause a "significant reduction". The draft rule includes several criteria including presumptions that are rebuttable. It would be difficult to weigh all the criteria to conclude what is or is not a "significant reduction" for purposes of creating a definition.

120. Comment: Regarding Rule 025.02.c. -Revise consistent with 42-203C(2):

> The language provided by IDWR significantly limits the review of an application for the appropriation of Trust Water to the "local public interest". This limitation fails to recognize the beneficiaries of the Trust as Idaho Power and the citizens of the State. Applicants should be required to show that the appropriation of Trust Water benefits the state economy, minimizes impacts on water available for hydropower generation, and the promotion of full economic and multiple use development of water resources. Further, the public interest evaluation needs to be consistent with Section 42-203C(2), Idaho Code.

IDWR Response: IDWR revised draft rule 025.02.c. based on stakeholders' comments.

121. Comment: Regarding Rule 030. -Rule removed from Strawman:

> Question: Why remove "Location and nature of Trust Water (Rule 30)? The historical context of Rule 30 provides a potential applicant with an understanding of a proposed Trust Water application, what sources of water are considered Trust Water or what is not considered Trust Water by rule.

IDWR Response: IDWR incorporated key concepts from existing rule 030 into draft rule 010 (terms and definitions). Existing rule 030.01 references the Swan Falls Agreement, which is a legal document that speaks for itself and there is no need to paraphrase. IDWR considered and incorporated existing rules 030.01.a. and b. content in draft rule 010.16. Existing rule 030.01.b. contemplates designation of the Swan Falls Trust Water Area shown in Appendix A. IDWR proposes to keep Appendix A as part of the rules. If changes to this area become necessary in the future, a rule change is needed, as is the case currently. Since the area has already been designated, IDWR does not see the need to include the associated content of existing rule 030.01.b. in the draft rules. Existing rule 030.01.c. describes what the Swan Falls Agreement does and includes a reference to the minimum flows at the Murphy Gage. The Swan Falls Agreement is a legal document that speaks for itself. Draft rule 045.01.a. contemplates reviewing all water rights, which includes minimum stream flow water rights, when evaluating an application. There is no need to call out specific minimum stream flow water rights within the rules. Existing rule 030.02 is duplicative of Idaho Code § 42-203B(3), which the state of Idaho has not created or implemented since 1985. This is not a category of trust water that exists in current reality. If it comes into existence, IDWR would need to fully consider and modify or create rules for it in the future. Existing rule 030.03. describes what trust water is not. Draft rules 010.16 "Swan Falls Trust Water Area" and 010.17 "Trust Water" incorporate key concepts from existing rule 030.03.

122. Comment: Regarding Rule 036. -Clarification needed:

> In adding this rule the rule should define what is meant by the phrase "the delay will injure others." Who are the intended protected parties?

IDWR Response: IDWR revised draft rule 036 based on stakeholders' comments.

123. Comment: Regarding Rule 040.02.b.i. -Removal from Strawman:

> Question: Has this notice and re-advertising been completed? If so, then Idaho Power supports removal.

IDWR Response: IDWR identified a few active applications received prior to 7/1/1985 that were not advertised and are now being held in compliance with the Amended Snake River Basin Moratorium Order. IDWR revised existing rule 040.02.b.i. and renumbered it as draft

rule 040.01.g. to ensure the Department has the same authority vested in the existing rules to readvertise an application advertised prior to being held in a moratorium if the moratorium is lifted.

124. Comment: Regarding Rule 040.05.c. -Review process and authority:

> Question: What does the phrase "unless the Director determines otherwise" mean and how is it applied and under what authority?

IDWR Response: This phrase is meant to give the Director discretion not to request the applicant provide information that is already available to the Department or to request the applicant provide information that is not normally necessary for the applicant to submit, but is required for the evaluation of statutory criteria. Idaho Code § 42-203A(5) requires the Director to evaluate the statutory criteria based on 'evidence presented'.

125. Comment: Regarding Rule 040.05.e.-Reason for change of scope:

> Question: It appears that the scope of applications evaluated under this rule was modified. What is the intent of the modifications?

IDWR Response: IDWR proposes to modify existing rule 040.05.e. to list all the pieces of information IDWR may request to evaluate any of the criteria in Idaho Code § 42-203A(5) and other statutes, not just the good faith criteria that the rule was previously limited to. IDWR chose to list all the information it may request in one list rather than dividing it by specific Idaho Code § 42-203A(5) criteria, because some pieces of information are used for the review of more than one statutory criteria.

126. Comment: Regarding Rule 045.02. -Clarification of rule scope or intent:

> The criteria of a significant reduction should apply to applications in the Trust Water Area or divert Trust Water.

IDWR Response: IDWR revised draft rule 045.02 based on stakeholders' comments.

127. Comment: Regarding Rule 050.01.-Other statutory duties:

> Under this rule, the language "in compliance with the intent of agreements entered into by and between the State and holders of water rights for power purposes and the State's obligation to continual review the reallocation of Trust Water consistent with Section 42- 203, Idaho Code," should be inserted following the phrase "other statutory duties."

IDWR Response: IDWR revised draft rule 050.01.f. to include suggested language.

128. Comment: Regarding Rule 055. -Cease approvals:

> The Director should cease approvals in areas where a moratorium order, groundwater management area order or a critical ground water management area order has been entered as well as a – c identified.

IDWR Response: IDWR declines to include suggested areas, because to do so would create redundancy within the rules. Orders establishing moratoriums, ground water management areas, and critical ground water areas are based on protecting existing water rights. Idaho Code § 42-1805(7), the statutory basis for moratorium orders, explicitly references protection of existing water rights. Idaho Code § 42-233a, the statutory basis for critical ground water areas, states they are established when the ground water supply is insufficient for the uses. When establishing a moratorium within a critical ground water area, the Director considers those uses as defined by existing water rights. Idaho Code § 42-233b, the statutory basis for ground water management areas, directly references Idaho Code § 42-233a and the Director again considers uses defined by existing water rights. Also, applications within these areas can propose mitigation to offset the impacts to existing water rights and therefore they can be processed.

Rebecca Voss- J.R. Simplot Co.

129. Comment: Regarding Rule 010.09. -Definition of "Permit" outside Trust Water:

> Question: 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?

IDWR Response: IDWR revised draft rule 010.10 based on stakeholders' comments.

130. Comment: Regarding Rule 010.12. – Clarification of "Subordinated":

> The definition references water upstream from Milner Dam but does 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."

IDWR Response: IDWR revised draft rule 010.15 to remove "upstream" based on stakeholders' comments so the definition's scope clearly includes both upstream and downstream water rights.

131. Comment: Regarding Rule 010.13. – Clarification of "Swan Falls Trust Water Area":

The definition references water upstream from Milner Dam but does 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."

IDWR Response: IDWR revised draft rule 010.16 based on stakeholders' comments.

132. Comment: Regarding Rule 025.02. -Typo:

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.

IDWR Response: IDWR made the suggested change.

133. Comment: Regarding Rule 025.02.c. -Removing word, "local":

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.

IDWR Response: IDWR made the suggested change.

134. Comment: Regarding Rule 035.01.c. -Add completion timeline:

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 refiling 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.

IDWR Response: IDWR declines to include the stakeholder's suggested rule language. IDWR prioritizes reviewing new applications for completeness, often completing this review the same day or within a few days of receiving the application. A rule-set deadline seems unnecessary based on IDWR's current practices, may be difficult to meet if the application is

complex in nature or IDWR workload begins to exceed its capacity, and may restrict IDWR's ability to prioritize workloads to meet the needs of the people of Idaho.

135. Comment: Regarding Rule 035.01.e. -Discrepancies and typographical errors:

> 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.''

IDWR Response: IDWR declines to include the stakeholder's suggested rule language. IDWR believes an application should sufficiently describe the proposed water use in a clear and correct manner before establishing a priority date. Given the importance of priority in the prior appropriation doctrine, IDWR does not believe an application with 'discrepancies' and 'typographical errors' that does not clearly state the proposed water use should be given priority over a well-reasoned, well-prepared, complete application. Furthermore, the terms 'discrepancies' and 'typographical errors' are broad and may be misinterpreted when applying such a rule with other rules for an acceptable filing and amendments requiring an advancement in priority date.

136. Comment: Regarding Rule 035.03. -Reference error:

> 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.

IDWR Response: IDWR revised draft rule 035.03 based on stakeholder's comment.

137. Comment: Regarding Rule 035.03.a.ii. -Application requirements:

> Question: 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)?

IDWR Response: Requesting names of all directors, not just the name of the director that signed the application required by draft rule 035.03.l.ii., is need to show authority of directors, including the person who signed the application (if they are a director), that may wish to act on behalf of the applicant for the application or any subsequently issued permit or license. This information is used to demonstrate who has authority to act and sign on behalf of the applicant for the application, as well as any resulting permit or license.

138. Comment: Regarding Rule 035.03.c.iii. -Add definition or explanation of phrase:

Question: 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?

IDWR Response: IDWR added draft rule 010.08 to define the term "Generally Described Place of Use" to clarify the intent of draft rule 035.03.c.iii. based on stakeholder's comment.

139. Comment: Regarding Rule 035.03.l.ii. -Add authorization requirement:

In Subsection (l)(ii) 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).

IDWR Response: IDWR revised draft rule 035.03.l.ii. based on stakeholders' comments.

140. Comment: Regarding Rule 035.03.l.iii. - Add authorization requirement:

In Subsection (l)(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).

IDWR Response: IDWR revised draft rule 035.03.l.iii. based on stakeholders' comments.

141. Comment: Regarding Rule 035.03. -Wording, representative or agent:

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.

IDWR Response: IDWR revised draft rules 035.03 and 035.04 based on stakeholders' comments. IDWR intends the term "agent" to refer to someone who is authorized to act and sign on behalf of the applicant. A "representative" doesn't always have the authority to sign on behalf of an applicant.

142. Comment: Regarding Rule 040.01.a. -Add completion timeline:

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

IDWR Response: After further consideration, IDWR removed draft rule 040.01 entirely. IDWR believes this generalization of processing steps is not appropriate in administrative rules. IDWR can provide general processing information to the public in another medium that IDWR can improve to accommodate future efficiencies without requiring an administrative rule change.

143. Comment: Regarding Rule 040.01.d. -Add advertisement timeline:

> 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.

IDWR Response: After further consideration, IDWR removed draft rule 040.01 entirely. IDWR believes this generalization of processing steps is not appropriate in administrative rules. IDWR can provide general processing information to the public in another medium that IDWR can improve to accommodate future efficiencies without requiring an administrative rule change.

144. Comment: Regarding Rule 040.01.e.i. -Provide example:

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

IDWR Response: After further consideration, IDWR removed draft rule 040.01 entirely. IDWR believes this generalization of processing steps is not appropriate in administrative rules. IDWR can provide general processing information to the public in another medium that IDWR can improve to accommodate future efficiencies without requiring an administrative rule change.

145. Comment: Regarding Rule 040.01.f. -Add decision timeline:

> 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.

IDWR Response: After further consideration, IDWR removed draft rule 040.01 entirely. IDWR believes this generalization of processing steps is not appropriate in administrative rules. IDWR can provide general processing information to the public in another medium that IDWR can improve to accommodate future efficiencies without requiring an

administrative rule change.

146. Comment: Regarding Rule 045.01.f.iii. -Provide example and implications:

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

IDWR Response: The 0.2 feet per day and exceptions included in draft rule 045.01.f.iii. are based on IDWR's Administrative Application Processing Memo No. 76 "Seepage Loss Standards for Ponds and Reservoirs". This administrative memo is available on IDWR's website and provides additional details regarding how IDWR would apply draft rule 045.01.f.iii. and some examples.

147. Comment: Regarding Rule 045.01.i. -Procedure and criteria:

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

IDWR Response: The preliminary draft rule (Strawman v 1.0) did not include a rule 045.01.i., but IDWR assumes the stakeholder is referring to 045.01.g. based on the comment referring to content to be negotiated. IDWR revised draft rule 045.01.g. based on other stakeholders' comments. IDWR anticipates rulemaking negotiations regarding this content will be finalized prior to IDWR's submission of the proposed rule to the Division of Financial Management in advance of the October administrative bulletin. IDWR assumes by "public interest", the stakeholder is referring to "public interest" criteria described in Idaho Code 42-203C(2). This criteria is only applicable to applications proposing a reallocation of trust water. The "public interest" criteria evaluation is included in draft rule 045.03 and will not be considered in drafting of the content of rule 045.01.g.

148. Comment: Regarding Rule 055.01.a. -Partially developed beneficial use:

> 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.

IDWR Response: IDWR revised draft rule 055.01.c. based on stakeholders' comments. However, IDWR afforded sixty (60) days rather than the thirty (30) days the stakeholder suggested. IDWR sends proof due notices to permit holders sixty (60) days in advance of the proof of beneficial use due date per Idaho Code § 42-204. Allowing sixty (60) days instead of

thirty (30) days is more consistent with the statute and related process.

Chris Meyer – Givens Pursley, LLP

149. Comment: Regarding New Content – Permit amendments:

> Question: Existing rules do not apply to amendments of permit. What criteria should apply to amendments of permit? The statute [Idaho Code § 42-211] is limited to enlargement and injury, but the 1993 case of *Hardy v Higginson* included local public interest. In my mind this is contrary to the statute, but that is now established case law. Has that changed since the amendment of the local public interest statute [Idaho Code 42-202B(3)] in 2003? I don't know. Mike and I suggest however IDWR views it, it should be articulated in the rules one way or the other. I don't believe a new section is needed in rule to address this. The rule could simply say if it does or does not include the [local public interest] criteria.

IDWR Response: The existing and draft rules intentionally exclude permit amendments. IDWR does not receive or process many of these applications and does not see an immediate need to draft rules for the permit amendment process. IDWR relies on the statutes and previous decisions when processing and evaluating permit amendment applications. If it becomes necessary to draft rules regarding processing and evaluation of permit amendments, IDWR will likely pursue a new more comprehensive set of rules to do so in order to maintain the current scope of the Water Appropriation Rules rather than expanding it. IDWR does consider local public interest when evaluating a permit amendment application.

Andy Waldera – Sawtooth Law Offices, PLLC

150. Comment: Regarding Rule 045.01.g. – Rule content:

> The local economy or local area adverse effect of out of basin uses. Rule g. should use the statutory language for this criterion in its entirety to avoid inconsistency or appearance of a lessor standard in the rules. I hope there's some meat IDWR can offer on the bones of this statutory criterion based on permit application proceedings since statutory criteria added (2003 or 2011 statutory changes). He and his clients are sensitive to this criterion as water supplies change or evolve with climate change implications, more large-scale projects are planned based on a lot of federal and state dollars out there, and potentially more inter-basin projects. He doesn't have specific language to suggest, but rather hopes IDWR can propose new language based on orders that have issued in the next version of the strawman [Strawman v 2.0].

IDWR Response: IDWR has not issued a lot of decisions on applications proposing to use water from one basin in another. It would be helpful if stakeholders could email IDWR to remind us of specific cases that decided this criterion. The language proposed in draft rule 045.01.g. for Idaho Code § 42-203A(5)(g) is largely taken directly from the statute. IDWR has one precedential order evaluating this criterion (Order on Exceptions; Final Order in the matter of Application for Permit No. 63-34348 in the Name of Elmore County, Board of Commissions), but IDWR would prefer to allow the criterion to develop further in future decisions before establishing specific rule criteria.

151. Comment: Regarding Rule 045.01.d.ii. – Rule content:

> If you are a governmental entity there are two boxes to check; 1) has taxing or bonding authority ***and*** 2) can raise the financing necessary to construct the project in accordance with the construction schedule. Projects that far exceed their annual average budget should have some check and balance. In this conservative state, I'm not sure how successful bond levy elections will be. There should be some bookends and better policing on at least some crude construction timeline (even if assume permit extensions allowed).

IDWR Response: IDWR added draft rule 040.05.e.ix. to grant IDWR the authority to request the applicant provide information confirming the taxing or bonding authority will be exercised in accordance with the construction schedule.

Chris Meyer – Givens Pursley, LLP

152. Comment: Regarding Rule 045.01.g. – Rule content:

> It might make sense not to tackle this criterion in rulemaking, but rather re-articulate statutory criterion, because this is a new and potentially challenging criterion to consider, it's a giant complicated area. It might be more effectively addressed in agency guidance, because guidance can be changed more easily.

IDWR Response: IDWR agrees. The language proposed in draft rule 045.01.g. for Idaho Code § 42-203A(5)(g) is largely taken directly from the statute. IDWR has one precedential order evaluating this criterion (Order on Exceptions; Final Order in the matter of Application for Permit No. 63-34348 in the Name of Elmore County, Board of Commissions), but IDWR would prefer to allow the criterion to develop further in future decisions before establishing specific rule criteria.

Andy Waldera – Sawtooth Law Offices, PLLC

153. Comment: Regarding Rule 045.01.g. – Rule content:

> I don't necessarily disagree with Chris [Meyer]. I'm not aware of any IDWR memos on the subject. If there are some bookends that might exist in precedential orders IDWR should consider those and comments it receives.

IDWR Response: IDWR recognizes the value in rule content. However, there is some hesitancy to draft rule content when IDWR does not have much experience evaluating this criterion.

154. Comment: Regarding Rule 050.01 – Rule content:

> Question: I agree IDWR should be considering the State Water Plan, but I'm just curious has IDWR actively consulted State Water Plan when revising an application to make some base determination if the application is consistent with State Water Plan (including individual plans)?

IDWR Response: IDWR does consider the Idaho State Water Plan when reviewing applications, for example protected river reaches and individual basin plans. IDWR has developed conditions to respond to elements of Idaho State Water Plan including individual basin plans. IDWR strives to be responsive to Idaho State Water Plan and consider when reviewing applications for permit.

155. Comment: Regarding Rule 045.01 – Rule content:

> If IDWR does consider State Water Plan, is there one of the statutory criteria that can include State Water Plan consideration in evaluation criteria of Rule 45? Basin 65 refill applications filed by the Bureau of Rec are being processed now. The State Water Plan for Payette recognizes and encourages or requires spill and fill flood control operations, because of the runoff nature of the basin and only 30% of basin being controllable by two existing reservoirs. If IDWR is bound by State Water Plan provisions, then IDWR should include somewhere in the application evaluation criteria.

IDWR Response: IDWR added draft rule 045.01.i. based on stakeholder's suggestion.

Chris Meyer – Givens Pursley, LLP

156. Comment: Regarding Rule 045.01.e. – Rule content:

> Question: To what extent should IDWR evaluate areas within the expertise of other regulatory agencies? The tension is embodied in three cases. A decision by Director Spackman in the Twin Lakes Canal Co. case of 2012 in

which the applicant said IDWR should defer the local public interest analysis to the Federal Energy Regulatory Commission to which IDWR said no way that he has a responsibility. On the other hand, in two other important cases, *Shokal v Dunn* and *Eden's Gate*, both of which emphasis that IDWR needs to be mindful of other regulatory agencies that have expertise. 2003 local public interest statute changes address this approach. IDWR must make a local public interest decision, but there might be individual components of that in which IDWR might want to give appropriate deference to other agencies with regulatory expertise on the particular component. The division in responsibility might be articulated in the form of conditions of permit approval.

IDWR Response: Local public interest was an area that IDWR earmarked for further revisions, so IDWR appreciates the comments Chris and Mike submitted [on behalf of Veolia Water Idaho, Inc.] on this subject.

Thomas J. Budge – Racine Olson

157. Comment: Regarding Rule 045.01.e. – Rule content:

Question: TJ Budge asked if Chris Meyer or Mike Lawrence dug into federal cases dealing with preemption in the context of FERC licensing? Chris Meyer said no. For hydropower permits that are regulated by FERC, there is a line of cases that distinguish between what is within the state's jurisdiction and what's within FERC jurisdiction and preemption does apply to a lot of what we consider local public interest criteria. In the Federal Power Act, there is an exemption for water distribution/water administration, but when it comes to fisheries and some of those other environmental factors that are explicitly part of FERC's analysis preemption does apply. Case law is clear that there is not going to be double review.

IDWR Response: IDWR looks forward to any written comment stakeholders have on this subject.

Dylan B. Lawrence- Varin Thomas Attorneys at Law

158. Comment: Regarding Rule 040.05.f.i. -Revision of criteria:

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 irrelevant 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.

IDWR Response: IDWR deleted preliminary draft rule 040.05.f.i. based on stakeholder's comment. Idaho Code § 42-203C(2) does not require IDWR to evaluate the direct project cost, only the economic benefits compared to the costs of reduced hydropower production. IDWR retained existing rule 045.03.a.iv. (renumbered to draft rule 045.03.a.iii.) as evaluation of the indirect project costs described should be included in considering the overall benefits of the project.

159. Comment: Regarding Rule 040.05.f.iii. -Inclusion of indirect economic benefits:

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.

IDWR Response: Draft rule 040.05.f. states the Director may request information including but not limited to the information listed in the remaining portion of the rule. IDWR has limited experience reviewing the statutory criteria of Idaho Code § 42-203C(2) and therefore does not have specific pieces of information it recommends including to address stakeholder's comment. Therefore, IDWR will rely on the broad authority of draft rule

040.05.f. to request information it identifies is specifically required for an application to evaluate the statutory criteria and Subsection 045.03.

160. Comment: Regarding Rule 040.05.f. –"Catch-all" soliciting information:

> 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)."

IDWR Response: Rather than add a broad 'catch all', IDWR included draft rule 040.05.f.viii. in referencing more specific information from Idaho Code § 42-203C(2).

161. Comment: Regarding Rule 045.02. -Reference supporting 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…."

IDWR Response: IDWR revised draft rule 045.02 based on stakeholders' comments.

162. Comment: Regarding Rule 045.02. -The significant reduction of Trust Water:

> Question: 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?

IDWR Response: Yes. IDWR revised draft rule 045.02 based on stakeholders' comments to clarify this point.

163. Comment: Regarding Rule 045.02.d. -Quantifying significant reduction and basis for presumption:

> Question: 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.

IDWR Response: IDWR revised draft rules 045.02.a.ii. and iv. to clarify the original presumption. It is IDWR's understanding, the presumption is based on the overarching principle that above Milner preference should be given to uses diverting water from the Snake River, but below preference should be given to hydropower or instream uses. This principle is discussed in several documents describing the origins of the "two rivers" concept including the Idaho State Water Plan, the *Memorandum in Support of State of Idaho's Amended Motion for Summary Judgement on Issue Recharge Subordination* in Re SRBA Case No. 39576, and *Memorandum in Support of State of Idaho's Motion for Partial Summary Judgement Re: Milner Zero Minimum Flow* in Re SRBA Case No. 39576. IDWR believes it is very likely this presumption was negotiated between the State of Idaho, Idaho Power, and others when it was established in adoption of the rules in 1986. Rather than delete the presumption, IDWR plans to retain it, because IDWR does not plan to re-negotiate this presumption given the presumption is rebuttable and the Swan Falls Trust Water Area is under a moratorium.

164. Comment: Regarding Rule 045.02.e. – Basis for presumption:

> Question: 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.

IDWR Response: IDWR retained the existing rule presumption in draft rule 045.02.a.iii. It is IDWR's understanding, the presumption is based on Policy 32B of the 1985 Idaho State Water Plan. The current, 2012 Idaho State Water Plan policy 4G does not contain a policy statement that a specific amount of trust water be reallocated to meet future domestic,

commercial, municipal, and industrial uses as the 1985 plan did. IDWR was unable to find documentation regarding the origins of this presumption. However, IDWR does believe it is very likely this presumption was negotiated between the State of Idaho, Idaho Power, and others when it was established in adoption of the rules in 1986. Rather than delete the presumption, IDWR plans to retain it, because IDWR does not plan to re-negotiate this presumption given the presumption is rebuttable and the Swan Falls Trust Water Area is under a moratorium.

165. Comment: Regarding Rule 045.03.a. – Wording, "evaluation" vs "appraisal":

> 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."

IDWR Response: IDWR made the suggested change.

166. Comment: Regarding Rule 045.03.c. -Basis for "family farming tradition":

> Question: 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.

IDWR Response: IDWR believes the presumption may be based on the Reclamation Reform Act of 1982 threshold that privately-owned land in excess of 960 acres cannot receive federally subsidized water. IDWR believes it is very likely this presumption was negotiated between the State of Idaho, Idaho Power, and others when it was established in adoption of the rules in 1986. Rather than delete the presumption, IDWR plans to retain it, because IDWR does not plan to re-negotiate this presumption given the presumption is rebuttable and the Swan Falls Trust Water Area is under a moratorium.

167. Comment: Regarding Rule 045.03.c. -Irrigation organizations:

> 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."

IDWR Response: IDWR revised draft rule 045.03.c. based on stakeholder's comment.

168. Comment: Regarding Rule 045.03.e.-Rewording to reflect statutory language:

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…."

IDWR Response: IDWR made the suggested change.

169. Comment: Regarding Rule 045.03.i. -Elimination of presumption:

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.

IDWR Response: IDWR retained the existing presumption in draft rule 045.03.g. It is IDWR's understanding, the presumption is based on the overarching principle that above Milner preference should be given to uses diverting water from the Snake River, but below preference should be given to hydropower or instream uses. This principle is discussed in several documents describing the origins of the "two rivers" concept including the Idaho

State Water Plan, the *Memorandum in Support of State of Idaho's Amended Motion for Summary Judgement on Issue Recharge Subordination* in Re SRBA Case No. 39576, and *Memorandum in Support of State of Idaho's Motion for Partial Summary Judgement Re: Milner Zero Minimum Flow* in Re SRBA Case No. 39576. IDWR believes it is very likely this presumption was negotiated between the State of Idaho, Idaho Power, and others when it was established in adoption of the rules in 1986. Rather than modify or delete the presumption, IDWR plans to retain it, because IDWR does not plan to re-negotiate this presumption given the presumption is rebuttable and the Swan Falls Trust Water Area is under a moratorium.

Rebecca Voss- J.R. Simplot Co.

170. Comment: Regarding Rule 040.05.f.ii. -Purpose of information:

> Question: In respect to subsection (ii), we would request the requirement to provide crop rotation information be deleted. What purpose is this information used for? Does the Director intend to regulate the type of crop an applicant can raise? What would happen if a crop type changed during or after application processing due to economic conditions?

IDWR Response: IDWR declines to remove crop rotation information requirement, but rather retains it in draft rule 040.04.f.i. Idaho Code § 42-203C(2) requires the Director to evaluate the potential project benefits to the state and local economy. Proposed crop type and rotation information is necessary to estimate the potential economic benefits of an irrigation project. The Department does not intend to regulate crop type. If the crop type changed during or after application processing due to economic conditions, it is likely the change is the result of higher demand or low supply, either way the economic benefit is likely to increase as a result of the change. Regardless, the Department and others are legally bound by the decisions made prior to issuance of a permit, so a change to crop type after the application is processed would not matter.

171. Comment: Regarding Rule 040.05.f.vii. -Purpose of information:

> Question: What is the purpose of the applicant providing the "location and acreage of other irrigated lands owned, leased, or rented by the applicant"? What is this information used for?

IDWR Response: The information is used to evaluate the criteria in Idaho Code § 42-203C(2)(iii) regarding whether the project promotes the family farming tradition and related rule content in Paragraph 045.03.c.

Jeff Raybould- IWRB

172. Comment: Regarding Rule 045.02. -Application description:

Recommend amending the title of this introductory paragraph to better describe an application for Trust Water as follows:

"Criteria for Evaluating Whether an Application for Reallocation of Trust Water in the Swan Falls Trust Water Area Will Cause a Significant Reduction under I.C. § 42-203C."

IDWR Response: IDWR made the suggested change.

173. Comment: Regarding Rule 045.02.-Significant reduction analysis:

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 Idaho Code § 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:

"The Director will find an application for reallocation of Trust Water ~~to appropriate water~~ from the Swan Falls trust water area will cause a significant reduction when the proposed use, individually or cumulatively with other existing uses ~~and other~~ or uses reasonably likely to exist within twelve months of the proposed use, would significantly reduce the amount of Trust W~~w~~ater available to the user for power purposes of the a W~~w~~ater R~~r~~ights H~~h~~eld in T~~t~~rust. The Director will presume an application for reallocation of Trust Water within in the Swan Falls Trust Water Area will not cause a significant reduction if the Director determines 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.

IDWR Response: IDWR revised draft rule 045.02 to clarify the intent based on stakeholders' comments.

174. Comment: Regarding Rule 045.02.d. -Deleting paragraph and harmonizing:

IWRB recommends deleting paragraph .02.d because it seems to be at odds with the presumptions set forth in this 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.

IDWR Response: IDWR revised draft rules 045.02.a.ii. and iv. to clarify the presumption based on stakeholders' comments.

175. Comment: Regarding Rule 045.02.e. -Move to 045.02.a.:

Paragraph .02.e should be incorporated into paragraph .02.a because it further elucidates the 2 af/day criteria.

IDWR Response: IDWR revised draft rule 045.02.a.iii. based on stakeholder's comment.

176. Comment: Regarding Rule 045.02.a. -Revisions to content:

The IWRB further recommends amending paragraph .02.a as follows to clarify the presumptions that apply to the 2 af/day criteria. Suggest using the criteria of .02.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, this 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.

IDWR Response: IDWR revised draft rule 045.02.a. based on stakeholders' comments.

177. Comment: Regarding Rule 045.02.b. -Vetting methods and quantities:

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.

IDWR Response: IDWR agrees. IDWR revised draft rule 045.02.c. based on stakeholder's comments.

178. Comment: Regarding Rule 045.02.c. -Harmonize with presumptions and burden of proof:

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:~~

IDWR Response: IDWR revised draft rule 045.02.c. based on stakeholders' comments.

179. Comment: Regarding Rule 045.03. -Reorganizing, including water recharge:

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 Idaho Code § 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:

IDWR Response: IDWR revised draft rules 045.03 and 045.03.f. based on stakeholder's comments.

180. Comment: Regarding Rule 045.03.b. -Align with statutory language:

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

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

IDWR Response: IDWR made the suggested change.

181. Comment: Regarding Rule 45.03.f. -Incorporate into introductory paragraph:

Propose incorporating this paragraph into the introductory paragraph .03 as outlined in the introductory paragraph suggestions.

IDWR Response: IDWR made the suggested change.

182. Comment: Regarding Rule 045.03.h. -Delete paragraph:

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

IDWR Response: IDWR made the suggested change.

183. Comment: Regarding Rule 045.03.i. -Harmonize with presumption:

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.

IDWR Response: IDWR revised draft rule 045.03.g. to clarify intent.

184. Comment: Regarding Rule 045.03.j. -Harmonize with previous sections:

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 the introductory paragraph comments.

IDWR Response: IDWR revised draft rule 045.03.f.iii. based on stakeholder's comments. IDWR believes it is very likely this presumption was negotiated between the State of Idaho, Idaho Power, and others when it was established in adoption of the rules in 1986. Rather than modify or delete the presumption, IDWR plans to retain it, because IDWR does not

plan to re-negotiate this presumption given the presumption is rebuttable and the Swan Falls Trust Water Area is under a moratorium.

Sarah W. Higer- Surface Water Coalition

185. Comment: Regarding Rule 040.05.f.vii. -Description of relationship:

> In Rule 40.05.h.vii, the first sentence currently reads "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 .... " (Emphasis added). Because the word "kinship" implies a familial relationship, SWC proposes changing the word "kinship" to "relationship" to broaden the applicability beyond an implied familial relationship.

IDWR Response: "Kinship" is meant to imply the familial relationship, because the information is required to evaluate Idaho Code § 42-203C(2)(iii), which is specific to the "family farming tradition". IDWR retained the word "kinship" in draft rule 040.04.f.vi.

186. Comment: Regarding Rule 045.02. -Typo:

> In Rule 45.02, the first paragraph, second sentence, the language should be changed to read "The Director will find an application to appropriate water from the Swan Falls trust water area will cause a significant reduction when the ~~propose~~ proposed use .... "

IDWR Response: IDWR made the suggested change.

187. Comment: Regarding Rule 045.03.g. -Typo:

> In Rule 45.03.g, the language should be changed to read "The Director will presume an application ~~satisfy~~ satisfies the public interest criteria ... "

IDWR Response: IDWR revised draft rule 045.03.f.i. based on stakeholders' comments.

188. Comment: Regarding Rule 045.03.h. -Typo:

> In Rule 45 .03 .h, the language should be changed to read "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~~ satisfies the public interest criteria ..."

IDWR Response: IDWR revised draft rule 045.03.f.i. and deleted preliminary draft rule 045.03.h. based on stakeholders' comments.

Ann Yribar – IWRB

189. Comment: Regarding Rule 025.02 –Rule content:

> The IWRB recommends terms 'reallocation' and 'trust water' be addressed head on in the rules because they are in statutes, Idaho State Water Plan, and continue to be used colloquially. The IWRB recognizes some of the terms like 'trust water' are often used incorrectly, however failing to address these terms and create clear definitions of them in the rules will only create more confusion going forward.

IDWR Response: IDWR included the term "Reallocation of Trust Water" and a definition in draft rule 010.14 based on stakeholder's comments. IDWR incorporated the term "Reallocation of Trust Water" into revisions of draft rule 025.02 based on stakeholders' comments.

190. Comment: Regarding deleted Rule 010.17 –Retain term and definition:

> The IWRB's written comments included a definition of "trust water" that it thinks could clarify its meaning so that it doesn't get confused with a 'block of water'. The IWRB thinks a definition of "trust water" needs to be included in the rules.

IDWR Response: IDWR included the term "Trust Water" and a definition in draft rule 010.17 based on stakeholder's comments. The definition is based on stakeholder's May 11, 2023 suggestions and the documents the stakeholder referenced in its May 11, 2023 comments. IDWR also incorporated the statement that Trust Water is water in excess of the established minimum stream flows to further clarify the term.

191. Comment: Regarding Rule 025.02 –Rule content:

> The IWRB's written comments suggested the term "reallocation of trust water" continue to be used, because it is used in statutes and policy documents. Also, because it describes the process by which the hydropower water rights held in trust by the state are subordinated and it is that subordination then frees up water that may then be reallocated to uses other than hydropower. It is this reallocation of water that was already appropriated by the hydropower water rights held in trust by the state. Idaho Code § 42-203B, Idaho State Water Plan policy 4C, and the SRBA court's 2008 decision in the consolidated subcase 92-23 all describe this process of reallocation and are very helpful background documents IDWR can consider as IDWR decides what terms to use in the rule.

IDWR Response: IDWR included the term "Reallocation of Trust Water" and definition in

draft rule 010.14 based on stakeholder's comments. IDWR incorporated the term "Reallocation of Trust Water" into revisions of draft rule 025.02 based on stakeholders' comments.

192. Comment: Regarding Rule 025.02.a. –Rule content:

> The IWRB's written comments on rule 25.02.a. try to further clarify the approach to processing applications that may reduce the amount of water available to water rights held in trust. The effects on existing water rights is two pronged when an appropriation is in the trust water area; first, the effect on regular existing water rights and second the effect on hydropower water rights held in trust by the state. How to determine if there are effects on water rights held in trust by the state is set forth in Idaho Code § 42-203C and the rules about significant reduction and public interest. Additional thought needs to be given to what analysis will occur under Idaho Code § 42-203A(5)(a) and how that analysis dovetails with Idaho Code § 42-203C's significant reduction analysis when reviewing applications in the trust water area. It's a little bit unclear how these two things work together in terms of moving from one analysis to another.

IDWR Response: IDWR revised draft rule 025.02.a. based on stakeholders' comments.

193. Comment: Regarding Rule 040.04 –Rule content:

> The rules don't capture very well how the analysis under Idaho Code §§ 42-203A(5) and 42-203C work with the burdens of proof. Because the burdens of proof under Idaho Code §§ 42-203A(5) and 42-203C are different, it is really important to be clear on the steps and how they all work together. The IWRB provided written comments on how it thinks that might work with the burdens of proof, but just want to highlight again as an issue that needs to be considered.

IDWR Response: IDWR revised draft rule 040.03 to clarify intent based on stakeholders' comments.

194. Comment: Regarding Rule 025.02 –Rule content:

> If we are going to say there might be an application that will only occur during high flood events and would not be taking reallocated waters held in trust but actually is unappropriated water, it might be helpful to have that distinction better laid out in the rules. Applications for flows in excess of the quantities of the hydropower water rights held in trust are not seeking reallocated water, because reallocated water is simply trust water that has been reallocated to a new use other than hydropower through the

subordination of the hydropower rights held in trust. In short, and by definition, such applications seek to appropriate water that is not trust water but is simply unappropriated water. There are probably very few applications that would be like that ground water recharge is one that comes to mind that might qualify as being such a creature. It might be helpful to have criteria that set forth what an application would have to demonstrate in order to be in that category.

IDWR Response: IDWR revised draft rules 025.02.a.i. and 035.03.b.v. based on stakeholders' comments.

195. Comment: Regarding Rule 045.02.e. –Rule content:

Some categories of use are excluded from needing to go through Idaho Code § 42-203C analysis, because they are presumed not to cause a significant reduction. Those applications would arguably be just treated under Idaho Code § 42-203A(5) and would be treated very similarly to applications for unappropriated flows in the trust water area. There is more thought that needs to occur there with regards to presumptions and also unappropriated flows in the trust water area.

IDWR Response: IDWR revised draft rule 045.02. 045.02.a., and 045.02.c. based on stakeholders' comments.

196. Comment: Regarding Rule 045.02 -Rule content:

The origins of the current rule's significant reduction analysis and the presumptions regarding applications within the trust water area are very important. IWRB would like to provide detailed comments, but IWRB is not able to provide substantive comments today, because the IWRB has not had time to adequately research them or to think about them from a technical or policy perspective. I do know that my office has documentation that may help us to better understand how the significant criteria were developed or understood when these rules were first created, but it will take some time to pull that documentation together. We're happy to do that and share that documentation with IDWR when we find it. We may also have documentation regarding how the presumptions were determined, but once again we need to dig in and figure out what we have. I think both the significant reduction and the presumptions discussions are important and should not be rushed. It is important that people have adequate time to think about and provide comments.

IDWR Response: IDWR did not make substantive changes to the significant reduction analysis or any of the presumptions for applications filed in the trust water area in the draft

rules. IDWR believes it is very likely this content was negotiated between the State of Idaho, Idaho Power, and others when it was established in adoption of the rules in 1986. Rather than modify or delete this content, IDWR plans to retain it, because IDWR does not plan to re-negotiate this content, the presumptions are rebuttable, and the Swan Falls Trust Water Area is under a moratorium so there is likely to be few applications processed in this area. However, IDWR would like to consider the significant reduction analysis and the presumptions for applications in the trust water area in IDWR's zero-base regulation analysis. If anyone is able to provide documents or let IDWR know what documents we should be reading on this subject, it is appreciated. In the last 25 years, IDWR has not processed many applications under the Idaho Code § 42-203C criteria and so IDWR doesn't have a lot of experience with these rules. So IDWR doesn't have a tremendous amount of perspective to offer on how to apply these rules and what they mean. There's not a lot of IDWR orders, for example, to refer to and see how IDWR has interpreted things. IDWR is interested in the public's comments and suggestions. Given the moratorium in place, IDWR is not sure what these reviews will look like in the future, but it would be great to have a clear path if we get to the point where we need to apply this content.

Caitlin R. Skulan & Laura A. Schroeder- Schroeder Law Offices, P.C.

197. Comment: Regarding Rule 001.02 –Clarification of rules' scope:

> The revised scope of IDAPA 37.03.08 as outlined in Section 001-02 of the rules is misleading and could be better clarified regarding the rules' general application to water appropriations. Our office would suggest switching the order of the statements currently drafted to first list the general application of the rules followed by the application as it specifically applies to Swan Falls trust water. As drafted, noting first the application to Swan Falls, the scope could be misinterpreted to only apply to Swan Falls trust water rather than to appropriations generally. Alternatively, or additionally, our office suggests retention of or an equivalent to the previous language in subsection b stating the rules are applicable "to appropriations from all sources of unappropriated public water in the state of Idaho" including "rivers, streams, lakes, and groundwater."

IDWR Response: IDWR revised draft rule 001.02 based on stakeholders' suggestions.

198. Comment: Regarding Rule 010 –Deletion of definition of "beneficial use":

> Regarding the definition section, we will simply echo our prior suggestion that the definition of "beneficial use" be retained at least to the extent it references the statutory provisions that already define it. We would suggest language such as "Beneficial Use as used in these rules shall have the meaning defined by statute in Idaho Code, Sections .. .." While our

office understands that the term is already defined in statute, a road map to the applicable statutory definitions would assist in the determination of the meaning of "beneficial use", especially for any lay persons attempting to review and understand the rules.

IDWR Response: IDWR declines to include a definition for "beneficial use". IDWR instead proposes deleting the existing rule term "beneficial use" and its definition, because the definition is circular and case law supports a wide interpretation of what qualifies as beneficial use of water. The term "beneficial use" is not specifically defined in statute and there are a limited number of statutory sections wherein the term is described.

199. Comment: Regarding Rule 010 –Add term "Swan Falls trust area" and definition:

We would additionally recommend Section 010 include a definition of "Swan Falls trust area" to help determine the applicability of the rules specific to water from that area.

IDWR Response: IDWR included preliminary draft rule 010.13 and draft rule 010.16 term "Swan Falls Trust Water Area" and an associated definition. IDWR revision in draft rule 010.16 is based on stakeholders' comments.

200. Comment: Regarding Rule 045.02.c.i. -Rule content:

In the evaluation criteria for applications to appropriate water, the proposed rule states in section 045-01-c-i that the applicant must have legal access to property necessary to construct and operate the proposed project. In determining access, this subsection notes that for water diverted from or conveyed across land in state or federal ownership "there must be evidence that the application is in the process of obtaining a right-of-way." Our office would suggest IDWR expand the language as follows: "there must be evidence that applicant has or is in the process of obtaining a right-of-way pursuant to state or federal processes and law, including but not limited to a right-of-way application or the confirmation of an R.S. 2399 right-of-way by a court of competent jurisdiction."

IDWR Response: IDWR revised draft rule 045.01.c.i. based on stakeholders' comments.