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VIA EMAIL

IDWR Rules Review Officer
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Re: Docket No. 37-0308-2301 (ZBR Chapter Rewrite)
IDAPA 37.03.08 – Water Appropriation Rules
Comments on Strawman v2.0

Dear Sir or Madam:

I am writing to provide comments in the above-referenced matter. Thank you very much to the members of the Department and Attorney General's office who have been working so hard on this matter. They have all thoughtfully dealt with, and responded to, a high volume of comments, many of which are of a detailed and technical nature. I believe these efforts will greatly benefit Idaho's water user community.

Rule 010: Given its importance and the number of references to it in the Rules, I think it would be helpful to provide a definition of the "Idaho State Water Plan." Perhaps it could be defined as " the current comprehensive state water plan formally adopted by the Board pursuant to Idaho Code Section 42-1734A and 42-1734B."

Rule 010.19: In this definition of "Unappropriated Water," would the term "existing" instead of "prior" make a little more sense?

Rule 025: While others have already commented on this issue, I believe the "mays" in this section should be changed to "shalls" that are subject to conditions of approval necessary pursuant to Idaho Code Section 42-203A(5). The relevant statutes (Sections 42-203A(5) and 42-203C) require the Director to evaluate certain statutory criteria and give him or her discretion to make a decision based on the evaluation of those criteria. This Rule is structured differently, in that it is stating what the Director will do if he finds the relevant criteria to either be satisfied or not. If the Director were to find that an application satisfied statutory criteria but denied it anyway, that would be unlikely to

withstand judicial scrutiny. To say that the Director "may" do something also implies that he or she "may not" do it. This seems non-committal and is of limited value to a user of the rules.

Rule 035.02(c): The last sentence of this paragraph purports to authorize IDWR to "not accept" assignments of water permit applications "received more than thirty (30) days after the assignment if the Department issued a decision for the Application." While IDWR is statutorily required to track ownership of water rights, the legal basis for IDWR to refuse to recognize an assignment agreed to by two parties is unclear to me. Also, how does this rule apply if the "decision" on the application is being appealed to the judicial system? This last sentence should either be removed, or more detail is needed regarding how this rule jibes with potential post-decision relief under IDWR's Rules of Procedure and the Idaho Administrative Procedure Act.

Rule 035.03(b)(ii): This sub-paragraph deals with requirements for identifying the source of water on a permit application. In the fourth line, perhaps it should read, "[i]f the water source sinks into the ground prior to reaching a tributary named on the USGS Quadrangle map, describe the source as tributary ~~as~~to 'sinks.'" Similarly, perhaps the last line should read, "[i]f the water source flows into a tributary named on the USGS Quadrangle map for part of the year and sinks into the ground for the other part of the year, identify the source as tributary ~~as~~to the named ~~source~~tributary on the USGS Quadrangle map."

Rule 035.04(a): This paragraph states that a number of actions require amendment of a permit application, including changing the "method or location of water diversion." However, changing the point of diversion is already listed as an action requiring amendment. And, aside from source and point of diversion, the "method" of diversion is not a true water right element. It seems like the reference to "method or location of water diversion" should be deleted.

Rule 040.01(f): This paragraph authorizes the Director to avoid publishing notice of a permit application in a designated critical ground water area if he or she "believes that there is insufficient water available for the proposed water use." It would be helpful if this paragraph also addressed a situation in which the application also proposes mitigation. For example, if the application includes a mitigation plan, is that automatically sufficient for publication? Or, is there some threshold that even the mitigation plan needs to reach in order for the application to be published?

Rule 040.04(e)(viii): This sub-paragraph authorizes the Director to request "[p]lans, specifications, and estimated construction costs for the project works definitive enough to allow for determination of project impacts and implications." The phrase "impacts and implications"—and the term "implications" in particular—is vague. IDWR should consider more specifically describing the goal of this information request and which statutory criteria it relates to.

040.04(e)(iv), (vi): These two subparagraphs authorize the Director to request a variety of items to demonstrate the applicant's efforts to obtain "possessory interests" and to pursue "[a]pplications for other needed permits, licenses, and approvals." In subparagraph (iv), in addition to "deeds" and

"leases," perhaps also include references to "easements" and "well sharing agreements." In addition, it may be helpful to clarify which of these two subparagraphs applies to obtaining authorizations to cross public land.

Rule 040.04(e)(ix): This sub-paragraph authorizes the Director to request from governmental entities "a plan demonstrating the taxing, bonding, or contracting authority will be exercised in accordance with the project construction schedule." However, the rules do not define or explain what "the project construction schedule" is—what it should contain, when it should be prepared, *etc*. In addition, the requirement that the plan submitted must "demonstrate" that the taxing, bonding, or contracting authority "will be exercised" in the future is too high of a standard to meet at the application stage, particularly when the touchstone for this criterion is intent. Perhaps the following revisions are more realistic and reflective of the application process: "If the Applicant is a governmental entity proposing to use taxing, bonding, or contracting authority to raise the funds needed to commence and pursue project construction, a proposed project construction schedule and a plan ~~demonstrating the~~describing how the Applicant intends to utilize its taxing, bonding, or contracting authority ~~will be exercised~~ in ~~accordance~~connection with the ~~project construction~~proposed schedule."

Rule 045.01(d)(ii): This subparagraph provides that a governmental entity will be found to have adequate financial resources if it has "the taxing, bonding, or contracting authority necessary to raise the funds needed to commence and pursue construction in accordance with the construction schedule." Similar to the previous comment, this seems to attribute a level of finality and concreteness to an undefined "construction schedule" that is not commensurate with this early phase of the application process, particularly for large, complex, expensive water projects. I suggest revising this subparagraph as follows: "If the Applicant is a governmental entity with the taxing, bonding, or contracting authority necessary to raise the funds needed to commence and pursue construction ~~in accordance~~consistent with the proposed construction schedule described in subparagraph 040.04(e)(ix)."

Rule 045.01(e)(iii): I believe the "into" in the fourth line should be changed to "not."

Rule 045.02(a)(iv): This paragraph contains the presumption that direct irrigation diversions from the Snake River within the Swan Falls Trust Water Area cause a significant reduction. IDWR's responses to comments on this issue raise two issues that are worth a brief follow-up discussion. First, IDWR states it is retaining the presumption "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." Again, this explanation seems much more relevant to the "public interest" criterion than the "significant reduction" criterion. In addition, IDWR states it is retaining the presumption in part because it "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." If IDWR is not able to more definitively explain the basis for a presumption, it seems the presumption is at risk of being invalidated upon judicial review

under the Idaho Administrative Procedure Act. I would still suggest either removing the presumption or explaining its basis more definitively.

Rule 045.03(f): This paragraph enumerates the situations in which the Director will presume an Application for Reallocation of Trust Water in the Swan Falls Trust Water Area to be in the Public Interest. Two of the subparagraphs include references to the Idaho State Water Plan, but in very specific contexts. The statute governing the State Water Plan requires promotion of the "public interest." *See* IDAHO CODE § 42-1734A(1), (2)(d). The current version of the State Water Plan (2012) discusses "public interest" frequently, in contexts other than just the two specific references in Rule 045.03(f). I suggest adding the following language as a new, standalone sub-paragraph within that paragraph that is presumed to be in the Public Interest: "A use of water that has been identified as in the public interest pursuant to the Idaho State Water Plan then in effect."

Rule 045.03(g): This paragraph states that the Director will presume an Application for Reallocation of Trust Water in the Swan Falls Trust Water Area is not in the Public Interest if it "proposes an irrigation project diverting water directly from the Snake River or from springs directly tributary to the Snake River in the Swan Falls Trust Water Area." This seems potentially inconsistent with Policy 4F of the current State Water Plan, which states that "[d]evelopment of supplemental water supplies to sustain existing agricultural development is in the public interest." In order to avoid conflicts between the Rules and the State Water Plan, IDWR should insert the following language at the beginning of this paragraph: "Unless the Idaho State Water Plan declares otherwise, the~~The~~ Director will presume…."

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If you have any questions or if there are further explanations I can provide that would be helpful, please let me know. Thank you again for your efforts and for the opportunity to provide these comments.

Sincerely,

VARIN THOMAS

Dylan B. Lawrence