SECOND IDWR RESPONSE TO PUBLIC COMMENTS
DOCKET NO. 37-0308-2301
IDAPA 37.03.08. WATER APPROPRIATION RULES
October 4, 2023

Note: Rule numbers referenced in the Comment section of this document are based on Draft Rule (Strawman v 2.0), dated June 30th, 2023. Rule Numbers referenced in the *IDWR Response* section of this document are based on the Proposed Rule, dated October 4, 2023. Comments are listed roughly in the order received.

Dylan B. Lawrence - Varin Thomas Attorneys at Law

201. Comment: Regarding Rule 10 –Addition of definition:

> Requesting that the definition of "Idaho State Water Plan" be added, due to the number of references to it and its relative importance. I suggest defining it as, "the current comprehensive state water plan formally adopted by the Board pursuant to Idaho Code Section 42-1734A and 42-1734B."

IDWR Response: IDWR added Proposed Rule 010.09 to define the term "Idaho State Water Plan" based on stakeholder's comment.

202. Comment: Regarding Rule 010.19. –Rewording definition:

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

IDWR Response: IDWR made the suggested change in Proposed Rule 010.19.

203. Comment: Regarding Rule 025.02.a.-c. –Reword, "May" is noncommittal:

> The "mays" in this section should be changed to "shalls" that are subject to conditions of approval necessary pursuant to Section 42-203A(5), Idaho Code. The relevant statutes 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. To say that the Director "may" do something also implies that he or she "may not" do it. If the Director were to find that an application satisfied statutory criteria but denied it anyway, that would be unlikely to withstand judicial scrutiny.

IDWR Response: IDWR has chosen to remain consistent with the existing rule's use of "may" based on the 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 may take after review of the statutory criteria.

204. Comment: Regarding Rule 035.02.c. -IDWR authority to refuse:

> 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." The legal basis for IDWR to refuse to recognize an assignment agreed to by two parties is unclear to me. How does this rule apply if the "decision" on the application is being appealed to the judicial system? The last sentence should 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.

IDWR Response: IDWR revised Proposed Rule 035.02.c. based on stakeholder's comments. The last sentence in Strawman v 2.0 was inserted in response to another stakeholder's previous comment. However, after further consideration, IDWR concluded the consequence for receiving an assignment of application more than thirty (30) days after conveyance should be left up to the Director, hearing officer, or IDWR employee to decide based on the specific circumstances of the application and its current status. 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. Generally speaking, 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.

205. Comment: Regarding Rule 035.03.b.ii. -Suggested rewording:

> 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."

IDWR Response: IDWR revised Proposed Rule 035.03.b.ii. to clarify language based on IDWR review and stakeholder's comments.

206. Comment: Regarding Rule 035.04.a. -"Method" is not a water right element:

> This paragraph states that several 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 "method" of diversion is not a true water right element. The reference to "method or location of water diversion" should be deleted.

IDWR Response: IDWR made the suggested change.

207. Comment: Regarding Rule 040.01.f. -Address mitigation:

> It would be helpful if this paragraph also addressed a situation in which the application also proposes mitigation.
>
> Question: 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 for the application to be published?

IDWR Response: IDWR revised Proposed Rule 040.01.h. (renumbered from Strawman v 2.0 Rule 040.01.f.) language based on stakeholder's comment. IDWR will seek publication of an application that includes a mitigation plan before evaluating the mitigation plan's ability to offset injury to existing water rights and considering other Idaho Code § 42-203A(5) criteria.

208. Comment: Regarding Rule 040.04.e.viii. -Vague wording:

> 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.

IDWR Response: IDWR declines to revise the draft rule language (Proposed Rule 040.04.c.ix. renumbered from Strawman v 2.0 Rule 040.04.e.viii.) that is consistent with existing rule language. Idaho Code § 42-202(4) requires the applicant to state the project diversion works information. Idaho Code § 42-204 affords IDWR the opportunity to request additional information from the applicant. The Proposed Rule language is vague enough to retain the flexibility the Director is afforded by statute to request any additional information as evidence for the evaluation of any of the criteria of Idaho Code § 42-203A(5).

209. Comment: Regarding Rule 040.04.e.iv. -Additional references:

In subparagraph (iv), in addition to "deeds" and "leases," perhaps also include references to "easements" and "well sharing agreements."

IDWR Response: IDWR made the suggested change in Proposed Rule 040.04.c.iv. (renumbered from Strawman v 2.0 Rule 040.04.e.iv.).

210. Comment: Regarding Rule 040.04.e.iv. and vi. -Authorization to cross public land:

It would be helpful to clarify which subparagraph (040.04.e.iv. or vi.) applies to obtaining authorizations to cross public land.

IDWR Response: Proposed Rule 040.04.c.iv. (renumbered from Strawman v 2.0 Rule 040.04.e.iv.) describes the information requirements regarding authorizations to cross land not in the applicant's ownership, which includes public land. Proposed Rule 045.01.c.ii. is the criteria the Director will use to evaluate the information provided by the applicant under Proposed Rule 040.04.c.iv. and states the requirements for applications involving federally owned land. Proposed Rule 040.04.c.vi. requests information regarding authorizations needed to construct and operate the proposed project, one of which may be an authorization to cross public land. However, the Director will primarily rely on Proposed Rule 040.04.c.iv. to request information regarding access and Proposed Rule 045.01.c. to evaluate the access-related information received.

211. Comment: Regarding Rule 040.04.e.ix. -Revision suggested to elaborate:

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."

IDWR Response: IDWR revised Proposed Rule 040.04.c.viii. (renumbered from Strawman v 2.0 Rule 040.04.e.ix.) based on stakeholder's comments.

212. Comment: Regarding Rule 045.01.d.ii. –"construction schedule" undefined:

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)."

IDWR Response: IDWR revised Proposed Rule 045.01.d.ii. based on stakeholder's comments.

213. Comment: Regarding Rule 045.01.e.iii. -Word use error:

I believe the "into" in the fourth line should be changed to "not."

IDWR Response: IDWR made the suggested change.

214. Comment: Regarding Rule 045.02.a.iv. -Explain further or remove presumption:

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.

IDWR Response: IDWR deleted Strawman v 2.0 Rule 045.02.a.iv. from the Proposed Rules based on stakeholder's comment. The evaluation of the "significant reduction" criteria is largely a quantitative analysis. As the stakeholder points out, this presumption and IDWR's understanding of the origins of this presumption is largely qualitative in nature and is more

relevant in the "public interest" criterion. The Department proposes to retain the existing rule presumption that direct diversions from the Snake River or springs directly tributary to the Snake River for irrigation uses within the Swan Falls Trust Water Area are not in the public interest in Proposed Rule 045.03.g. The Department proposes to clarify that presumptions made in the evaluation of the "significant reduction" and "public interest" evaluation are rebuttable by the protestant or applicant in Proposed Rules 045.02.c., 045.03.f.iv. and 045.03.g.

215. Comment: Regarding Rule 045.03.f. -Add content/context of "public interest":

> 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."

IDWR Response: IDWR declines to include the suggested language in the Proposed Rules. The presumption stated in Proposed Rule 045.03.f.i. is based on a presumption in the existing rules. The presumption stated in Proposed Rule 045.03.f.ii. is a new presumption added in the proposed rules based on a comment from the Idaho Water Resource Board asking IDWR's Director to presume a very specific type of application, an Idaho-sponsored ground water recharge project, is in the public interest when the Director evaluates the application under Idaho Code § 42-203C. The presumption stated in Proposed Rule 045.03.f.iii. is based on presumptions in the existing rules. As the Idaho Water Resource Board confirmed in its comment to IDWR on July 26, 2023, the criteria for establishing what is in the "public interest" for the Idaho State Water Plan, outlined in Idaho Code § 42-1734A, is not the same as the criteria for establishing what is in the "public interest" under Idaho Code § 42-203C. Given that the public interest statements made in the Idaho State Water Plan were not made with the Idaho Code § 42-203C definition in mind, a blanket designation of all uses generally referenced in the Idaho State Water Plan as being in the public interest is not appropriate.

216. Comment: Regarding Rule 045.03.g. -Rule inconsistent with Idaho State Water Plan:

> 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 "development 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…."

IDWR Response: IDWR declines to add the suggested language in the Proposed Rules. The Idaho Water Resource Board confirmed in its comment to IDWR on July, 26, 2023, the criteria for establishing what is in the "public interest" for the Idaho State Water Plan, outlined in Idaho Code § 42-1734A, is not the same as the criteria for establishing what is in the "public interest" under Idaho Code § 42-203C. IDWR believes the presumption in Proposed Rule 045.03.g. 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 or change the presumption, IDWR plans to retain it, because IDWR does not plan to renegotiate this presumption given the presumption is rebuttable and the Swan Falls Trust Water Area is under a moratorium. Also, as the Idaho Water Resource Board confirmed in its comment to IDWR on July 26, 2023, the criteria for establishing what is in the "public interest" for the Idaho State Water Plan, outlined in Idaho Code § 42-1734A, is not the same as the criteria for establishing what is in the "public interest" under Idaho Code § 42-203C.

Sarah W. Higer- Surface Water Coalition ("SWC")

217. Comment: General. -Consistent Capitalization:

SWC recommends consistent capitalization throughout the rules. For example, "Applicant" appears in both uppercase and lowercase throughout the rules.

IDWR Response: IDWR intended to capitalize all instances of the word "applicant" in Strawman v 2.0 based on stakeholder comment(s). However, after further consideration, IDWR does not believe it is necessary to capitalize the word "applicant" even though it is a defined term. IDWR's uses the word "applicant" as a common noun rather than a proper noun in the Propose Rules in the sense that an "applicant" can be different people or entities rather than a specific person or entity. IDWR revised the Proposed Rules to ensure all instances of the word "applicant" are consistent with the term "applicant" as defined in the rules.

218. Comment: Regarding Rule 040.03.d. -References to wrong rule:

There are a few instances where the "new" Rule 040.04 is still identified as its previous number "Rule 040.05." See generally, Page 9 in Strawman v 2.0.

040.03.d "For an unprotested Application or an Application for which all protests have been resolved, the Director will evaluate the Application, any information filed pursuant to Subsections 040.0~~5~~4 ..."

IDWR Response: IDWR made suggested change.

219. Comment: Regarding Rule 40.04.a. -Reference to wrong rule:

040.04.a. "The Director may require the Applicant to file any of the additional information described in Paragraphs 040.0~~5~~4.e. or 040'0~~5~~4.f'..."

IDWR Response: IDWR made suggested change.

220. Comment: Regarding Rule 040.04.c. -Reference to the wrong rule:

040.04.c. "Unless the Director determines otherwise, information described in Paragraph 040.0~~5~~4.f. is required..."

IDWR Response: IDWR made suggested change.

221. Comment: Regarding Rule 010. -Definition of Ground Water Management Area:

For Rule 010, Definitions, SWC recommends adding a definition for "Ground Water Management Area" by referencing Section 42-233b, Idaho Code, as follows: The term "critical ground water area" has the meaning given for that term in Section 42-233a, Idaho code. The term "ground water management area" has the meaning given for that term in Section 42-233b, Idaho Code.

IDWR Response: IDWR declines to make the suggested revision. The term "Ground Water Management Area" is not used in the Proposed Rules. Therefore, it is not necessary to include a definition by reference as suggested.

222. Comment: Regarding Rule 35.03.e.ii. -Reword to improve guidance:

SWC suggests changing this sentence as follows to help expedite municipal permit applications: "The 'Municipal Water Right Application Checklist' is a form attachment available ~~from the Department~~ on the Department's website."

IDWR Response: IDWR revised Proposed Rule 035.03.e.ii. based on stakeholder's comment.

223. Comment: Regarding Rule 045.03.f.iv. -Reference to wrong rule:

> Rule 045.03.f.iv should refer to "f.i through iii" instead of "g.i through iii" to read “The presumptions outlined in Subparagraphs 045.03.f.i. through iii. may be rebutted by...."

IDWR Response: IDWR made suggested change.

TJ Budge- Idaho Ground Water Appropriators, Inc.

224. Comment: Regarding Rule 036. -Authority to grant delays:

> The Department has historically allowed applicants to request successive delays or interruptions in processing of an application for good cause shown. Consider adding a sentence to the end of Rule 036 to memorialize the Department’s authority to grant successive requests for good cause shown.

IDWR Response: IDWR revised Proposed Rule 036 based on stakeholder’s comment.

225. Comment: Regarding Rule 040.04.d.i. -Reword in more vague terms:

> Revise Rule 054.d.i to replace “will only” with “may.”

IDWR Response: IDWR made the suggested change in Proposed Rule 040.04.b.i. (renumbered from Strawman v 2.0 rule 040.04.d.i.).

226. Comment: Regarding Rule 040.04.d.ii. -Identify extensions in criteria requirement:

> Revise Rule 040.d.ii to read “. . . within the time allowed, an extension has not been granted, the Director may void. . .”

IDWR Response: IDWR revised Proposed Rule 040.04.b.ii. (renumbered from Strawman v 2.0 Rule 040.04.d.ii.) language based on stakeholder’s comment.

Michael P. Lawrence- Veolia Water Idaho, Inc.

227. Comment: Regarding Rule 035.03.e.iii. -Addition of wording to clarify intent:

> Revise Rule 035.03.e.iii. to read “For a municipal purposes Application that proposes to appropriate water for reasonably anticipated future needs, include justification for the planning horizon, the anticipated service area at the end of the~~,~~ planning horizon, the anticipated population

at the end of the planning horizon ~~projection~~, and the anticipated water demand within the service area anticipated at the end of the planning horizon. Also include a gap analysis showing the existing water right is insufficient to meet the municipal purposes need at the end of the planning horizon."

Veolia believes that the statutory definitions, IDWR's existing guidance, and common sense dictate determining future needs within the service area anticipated to exist at the end of the planning horizon.

Veolia believes calculating RAFN (reasonably anticipated future needs) based on demands projected within a reasonably anticipated future service area is consistent with law and IDWR policy and common sense, and that it is prudent to make this clear in this rulemaking.

IDWR Response: IDWR revised Proposed Rule 035.03.e.iii. based on stakeholder's comments.

228. Comment: Regarding Rule 045.01.e.i. -Revise language for consistency with Idaho law:

Revise Rule 045.01.e.i. to read "The direct effect the project will have on public water resources that are of interest to the people in the area directly affected by the proposed water use, including but not limited to, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, ~~and~~ 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; and"

The revised language is consistent with the current statute [Idaho Code § 42-202B(3)] and the 2003 statutory amendment's Statement of Purpose.

IDWR Response: IDWR made the suggested changes.

229. Comment: Regarding Rule 045.01.e.ii. Revise language for consistency with Idaho law:

Revise Rule 045.01.e.ii. to read "Whether the proposed water use is consistent with the State's policy of securing the maximum use and benefit ~~greatest possible benefit~~ from the public water resources ~~is achieved by considering the effect the project will have on the availability of water for alternative uses of water that might be made within a reasonable time~~.

The revised language is consistent with the 2003 Statement of Purpose [for amendment of Idaho Code § 42-202B(3)], but replaces "greatest possible benefit" with "maximum use and benefit" which is terminology long enshrined in Idaho law.

The version of Rule 45.01.e.ii in Strawman 2.0 could be construed as creating a requirement that an applicant prove that its proposed use achieves the greatest possible benefit from the water resource – a kind of "highest and best use" standard that is not present in (or consistent with) Idaho law. Veolia's proposed revisions make the rule consistent with longstanding Idaho law and policy.

IDWR Response: IDWR made the suggested changes.

Ann Yribar – Idaho Water Resource Board ("IWRB")

230. Comment: Regarding Rule 045.03 –Response to IDWR question whether "public interest" referenced in the Idaho State Water Plan is the same "public interest" referenced in Idaho Code § 42-203C:

> Idaho Constitution Article 15 Section 7 creating the Idaho Water Resource Board uses the term "public interest." The term "public interest" is used again in Idaho Code § 42-1734A where it directs the Idaho Water Resource Board to adopt the Idaho State Water Plan. It sets forth a set of criteria in this statute that the Idaho Water Resource Board needs to consider when it does adopt the Idaho State Water Plan. I think that is where those references to "public interest" are coming from and not Idaho Code § 42-203C.

IDWR Response: The IWRB provided this comment to address a question IDWR posed to stakeholders during the July 26, 2023 negotiated rulemaking meeting. IDWR appreciates the IWRB's comment and used the information when evaluating other stakeholders' comments.

M'Leah Woodard – US Forest Service, Intermountain Region

231. Comment: Regarding Rule 035.03.i. –Revise language to be more specific:

> Revise Rule 035.03.i. to read: "Ownership or other legal access to the point of diversion, place of use, and conveyance system. If ~~someone~~ a person or entity other than the Applicant owns the property…"

IDWR Response: IDWR made the suggested change.

232. Comment: Regarding Rule 040.04.e.iv. –Authorization to cross public land:

> A third party water user must obtain authorization from the Forest Service to use or occupy National Forest System lands. The Forest Service processes requests for use and occupancy of NFS lands pursuant to guiding authorities, including 36 CFR 251.20 et seq. The fact of an application

to IDWR for a water right/permit is not persuasive evidence in our analysis; our rules and regulations still apply. In other words: please be advised that if your language stands, re: IDWR is satisfied that the Applicant "has contacted the land owner to initiate action to obtain the necessary [permission]," we encourage a follow up mechanism on your side in the event that the permission is not granted by the Forest Service.

IDWR Response: IDWR revised Proposed Rule 040.04.c.iv. (renumbered from Strawman v 2.0 Rule 040.04.e.iv.) based on stakeholder comments. The revision states, for projects involving federally owned land, an applicant must submit evidence that the applicant has filed the appropriate form to request or initiate access and that access is authorized or a decision is pending.

233. Comment: Regarding Rule 045.01.c.i. –Authorization to cross public land:

The current language reads that the Applicant "intends to take action to obtain the necessary interest, right of way, or other arrangement…" Note that an intention is not permission, privilege, right, or legal interest. My sense is that if the roles were reversed, this language would not be satisfactory to the Forest Service. We would need more – proof of authorization, proof that an application has been submitted and is under consideration with no protests filed, etc.

IDWR Response: IDWR revised Proposed Rule 045.01.c.ii. (renumbered from Strawman v 2.0 Rule 045.01.c.i.) based on stakeholder comments. The revision states that in order for the Director to find that an application involving federally owned land is not made in good faith, the applicant must not have filed the appropriate form to request access to divert water from or convey water across federally owned land. IDWR also added Proposed Rule 050.01.h. stating IDWR may condition a permit to require the permit holder "…to obtain authorization necessary to access the point of diversion, place of use, or to convey water across federal land prior to diversion and use of water under the permit." IDWR acknowledges that a water right cannot be established in trespass. However, IDWR received several stakeholder comments stating the application process to obtain access to federal land can be lengthy and complicated thus unfairly delaying the water right application decision and progress on water use projects specifically large-scale projects. IDWR believes the proposed rule language related to federal public land access allows IDWR to determine an application is not made in good faith if an application to authorize federal land access has not been filed, while allowing for the continued evaluation of an application if the applicant has filed the appropriate form to acquire access to federal lands. Then, if an application to authorize federal land access has been filed and all the other statutory criteria are met, IDWR may approve the water right application and issue a water right permit conditioned upon the applicant acquiring the required federal land access authorizations before developing the water use. As the stakeholder suggested, this will require IDWR to follow-up and evaluate if the permit holder did actually acquire authorization in compliance with the law prior to IDWR issuing a water

right license as contemplated in Idaho Code § 42-219.

234. Comment: Regarding Rule 045.01.c.i. –Consistent capitalization:

> This paragraph has an "applicant" that needs a capital "A" (second word).

IDWR Response: IDWR intended to capitalize all instances of the word "applicant" in Strawman v 2.0 based on stakeholder comment(s). However, after further consideration, IDWR does not believe it is necessary to capitalize the word "applicant" even though it is a defined term. IDWR's uses the word "applicant" as a common noun rather than a proper noun in the rules in the sense that an "applicant" can be different people or entities rather than a specific person or entity. IDWR revised the Proposed Rules to ensure all instances of the word "applicant" are consistent with the term "applicant" as defined in the rules.

Ann Yribar – Idaho Water Resource Board ("IWRB")

235. Comment: Regarding Rule 045.01.c.i. –Response to IDWR question if IDWR should call out public land access vs. private land access requirements or leave the rule more general as drafted now:

> The IWRB has found it difficult to meet the requirement, at the time of a water right application is filed, of demonstrating that it has access to public lands, specifically federal public lands. The federal agencies have used the rule's requirement that access be demonstrated at the time the application is filed as a basis of protesting water right applications. Because the federal process for obtaining access to federal lands can be lengthy and complicated, the IWRB has found that its water right applications cannot move forward until access to federal public lands has been granted. This makes it very difficult to get large scale projects off the ground. The IWRB recognizes that access to federal public lands must, at some point, be obtained because a water right cannot be initiated in trespass. However, the IWRB would suggest that requiring applicants to demonstrate access to federal public lands at the time of application provides an opportunity for the federal land access processes to unduly delay or prevent the issuance of a state-based water right. The IWRB would suggest that it is more appropriate to require a demonstration of access to federal public lands at the time of licensing. The IWRB believes that including this distinction in the Water Appropriation Rules would facilitate the efficient issuance of water right permits under the rules.

IDWR Response: IDWR revised Proposed Rule 045.01.c.ii. based on stakeholder comments. The revision states that in order for the Director to find that an application involving federally owned land is not made in good faith, the applicant must not have filed the appropriate form to request access to divert water from or convey water across federally owned land. IDWR

also added Proposed Rule 050.01.h. stating IDWR may condition a permit to require the permit holder "…to obtain authorization necessary to access the point of diversion, place of use, or to convey water across federal land prior to diversion and use of water under the permit." IDWR acknowledges that a water right cannot be established in trespass. However, IDWR received several stakeholder comments, including yours, stating the application process to obtain access to federal land can be lengthy and complicated thus unfairly delaying the water right application decision and progress on water use projects specifically large-scale projects. IDWR believes the proposed rule language related to federal public land access allows IDWR to determine an application is not made in good faith if an application to authorize federal land access has not been filed, while allowing for the continued evaluation of an application if the applicant has filed the appropriate form to acquire access to federal lands. Then, if an application to authorize federal land access has been filed and all the other statutory criteria are met, IDWR may approve the water right application and issue a water right permit conditioned upon the applicant acquiring the required federal land access authorizations before developing the water use. This will require IDWR to evaluate if the permit holder did acquire authorization in compliance with the law prior to IDWR issuing a water right license as contemplated in Idaho Code § 42-219.