

THE FOLLOWING IS THE PROPOSED RULE TEXT OF DOCKET NO. 37-0308-2301

37.03.08 – WATER APPROPRIATION RULES

000. LEGAL AUTHORITY.

The Director of the Idaho Department of Water Resources adopts these rules under the authority of Section 42-1805(8), Idaho Code. ()

001. TITLE AND SCOPE.

01. Title. These rules are titled IDAPA 37.03.08, “Water Appropriation Rules.” (3-18-22)

02. Scope. These rules set the procedures for obtaining a permit to divert and use unappropriated public waters or a permit for reallocation of trust water within the Swan Falls Trust Water Area. These rules govern the filing and processing of applications for permits to appropriate water pending on or filed after the adoption of these rules. ()

002. -- 009. (RESERVED)

010. DEFINITIONS.

The terms “consumptive use,” “digital boundary,” “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. The terms “ground water” and “low temperature geothermal resource” have the meaning given for those terms in Section 42-230, Idaho Code. The term “critical ground water area” has the meaning given for that term in Section 42-233a, Idaho Code. ()

01. Acre-Foot (af). A volume of water sufficient to cover one (1) acre of land one (1) foot deep and is equal to three hundred twenty-five thousand eight hundred fifty (325,850) gallons. ()

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

03. Application. An application for permit to appropriate water filed with the Department. ()

04. Board. The Idaho Water Resource Board. (3-18-22)

05. Cubic Foot Per Second (cfs). A rate of flow approximately equal to four hundred forty-eight and eight-tenths (448.8) gallons per minute and also equals fifty (50) Idaho miner’s inches. ()

06. Department. The Idaho Department of Water Resources. (3-18-22)

07. Director. The Director of the Idaho Department of Water Resources. Per Section 42-1701(3), Idaho Code, the Director may delegate authority to perform duties imposed upon the Director by law, including duties described herein, to a Department employee. ()

08. Generally Described Place of Use. A place of use authorized by an existing water right or permit pursuant to Sections 42-202, 42-219, 42-222, or 42-1411, Idaho Code, consisting of a general area or boundary within which water diverted under the water right or permit is used. ()

09. Idaho State Water Plan. The current comprehensive state water plan formally adopted by the Idaho Water Resource Board pursuant to Sections 42-1734A and 42-1734B, Idaho Code. ()

10. Murphy Gage. The United States Geological Survey stream gage station (site identification

number 13172500) located on the right bank of the Snake River at river mile 456.8, approximately 8.5 miles east-northeast of Murphy, Idaho and 0.9 miles downstream from the Swan Falls power plant at latitude 43° 15' 17.33" N, longitude 116° 23' 26.30" W, North American Datum of 1983, in the NW ¼ of the NW ¼ of Section 18, T.2S., R.1E., Boise Meridian, Hydrologic Unit 17050103. ()

11. Permit. The water right document issued by the Director authorizing the diversion and use of unappropriated public waters or reallocated trust water. ()

12. Priority Date. The date of appropriation established when an application is filed in acceptable form, including the applicable filing fee, unless a later date is set in accordance with applicable law. ()

13. Project Works. A general term that includes diversion works, conveyance infrastructure, and any devices used to apply water to the intended use. ()

14. Public Interest. The interests that the people of the state of Idaho have in the effects of a proposed reallocation of trust water pursuant to Section 42-203C(2), Idaho Code. For the definition of "local public interest," see Section 42-202B, Idaho Code. ()

15. Reallocation of Trust Water. Appropriation of trust water for a use other than hydropower generation to the extent the water rights held in trust are subordinated to permits issued for such other uses of water pursuant to Section 42-203C, Idaho Code. ()

16. Subordinated. Subject to diminishment or depletion without compensation by water rights initiated later in time. ()

17. Swan Falls Trust Water Area. 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 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. The Swan Falls Trust Water Area excludes any reach of the Snake River upstream of Milner Dam, any surface or ground water tributary to the Snake River upstream of Milner Dam, the Snake River downstream of Swan Falls Dam, and any surface or ground water tributary to the Snake River downstream of Swan Falls Dam. ()

18. Trust Water. Water in excess of the state established minimum stream flow at the Murphy Gage that was originally appropriated for hydropower generation purposes pursuant to the water rights now held in trust by the state of Idaho and that is made available for reallocation to uses other than hydropower 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. ()

19. Unappropriated Water. The public waters of the state of Idaho in streams, rivers, lakes, springs, other natural surface water bodies, ground water, or low temperature geothermal resources exceeding the amount necessary to satisfy existing water rights. ()

20. Water Right Held in Trust. A water right used for hydropower generation purposes that is in excess of a minimum stream flow established by state action and is held in trust by the state of Idaho pursuant to Subsections (2) or (3) of Section 42-203B, Idaho Code. The water rights held in trust for the Swan Falls Trust Water Area are numbered 02-02001A, 02-02001B, 02-02032B, 02-02036, 02-02056, 02-02057, 02-02059, 02-02060, 02-02064, 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. ()

011. – 024. (RESERVED)

025. GENERAL DESCRIPTION OF THE PROCEDURE FOR APPLICATION REVIEW.

01. Applications to Appropriate Unappropriated Water. The Department will process an

application to appropriate unappropriated public waters under Section 040, and will evaluate the application under Subsection 045.01, using the criteria of Section 42-203A(5), Idaho Code and, for a low temperature geothermal resource, the criteria of Section 42-233, Idaho Code. ()

02. Applications to Appropriate Water from the Swan Falls Trust Water Area. The Department will process an application to appropriate water from the Swan Falls Trust Water Area under Section 040 and will evaluate the application as follows: ()

a. First, the Director will evaluate the application under Subsection 045.01 using the criteria of Section 42-203A(5), Idaho Code. ()

i. If the application is seeking to appropriate unappropriated water within the Swan Falls Trust Water Area rather than a reallocation of trust water and it satisfies all criteria of Section 42-203A(5), Idaho Code, the Director may approve the application for unappropriated water. An application for unappropriated water within the Swan Falls Trust Water Area must demonstrate the public waters sought for appropriation exceed the amount necessary to satisfy all existing water rights, including the water rights held in trust. ()

ii. 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 available to an existing water right other than a water right held in trust, the Director may deny the application. ()

iii. If the application satisfies all criteria of Section 42-203A(5), Idaho Code, except it is found to reduce the amount of water available to a water right held in trust, it is seeking a reallocation of trust water and the Director will review the application under Paragraph 025.02.b. ()

b. Second, if the application is seeking a reallocation of trust water the Director will evaluate the application under Subsection 045.02 to determine whether it will cause a significant reduction to a water right held in trust pursuant to Section 42-203C(1), Idaho Code. ()

i. If the application will not cause a significant reduction to a water right held in trust pursuant to Section 42-203C(1), Idaho Code, the Director may approve the application without additional evaluation. ()

ii. If the application will cause a significant reduction to a water right held in trust pursuant to Section 42-203C(1), Idaho Code, the Director will review the application under Paragraph 025.02.c. ()

c. Third, if the application is seeking a reallocation of trust water and will cause a significant reduction to a water right held in trust the Director will evaluate the application under Subsection 045.03 to determine if the proposed reduction is in the public interest pursuant to Section 42-203C(2), Idaho Code. ()

i. If the application is in the public interest, the Director may approve the application. ()

ii. If the application is not in the public interest, the Director may deny the application. ()

026. – 034. (RESERVED)

035. APPLICATION REQUIREMENTS.

01. General Provisions. (3-18-22)

a. An application must be filed: ()

i. On the Department form titled “Application for Permit to Appropriate the Public Waters of the State of Idaho,” with any applicable attachments; ()

ii. In accordance with IDAPA 37.01.01, “Rules of Procedure of the Idaho Department of Water Resources,” Section 053, either on paper, digitally in PDF format, or through the Department’s online filing process;

- ()
- iii. With the applicable filing fee prescribed in Section 42-221A, Idaho Code; and ()
 - iv. With all necessary information under Subsection 035.03. ()
- b. The filing fee in Section 42-221A, Idaho Code, is based on the total rate (in cfs) or the total storage volume (in af) to be appropriated. Whenever the application diversion rate and storage volume elements lead to a different filing fee, the higher amount is the applicable filing fee. ()
 - c. The Department will determine whether an application is acceptable for filing under Subsection 035.03 or if it requires clarification or correction. ()
 - d. When an application is not acceptable for filing under Subsection 035.03, the Department will not accept the application and will proceed as directed in Section 42-204, Idaho Code. Filing fees for an unacceptable application will be refunded to the applicant if the application is not timely clarified or corrected. An unacceptable application does not establish a priority date. ()
 - e. When an application is accepted for filing but requires clarification or correction of the information required by Subsection 035.03, the Department will proceed as directed in Section 42-204, Idaho Code. ()

02. Effect of an Application. (3-18-22)

- a. The priority date of an application is the time and date the Department receives 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. ()
- b. 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. ()
- c. An applicant's interest in an application is personal property. An applicant may convey (assign) its interest in an application to another person or entity. The person or entity to whom the application is conveyed must notify the Department of the assignment, in writing, within thirty (30) days after the assignment and notify other parties in the contested case pursuant to IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources," Section 202. ()

03. Requirements for Applications Acceptable for Filing. ()

- a. The following information shall be shown on an An application is acceptable for filing if it is filed in a manner stated in Paragraph 035.01.a. and includes the following information: ()
 - a. Applicant's name and mailing address. ()
 - i. If the applicant is a corporation, also include the names of all directors. ()
 - ii. If the applicant is a partnership, limited liability company, or joint venture, also include the names of all partners or members and the name of the managing partner or member, if any. ()
 - b. Source of water to be appropriated. ()
 - i. Identify only one water source unless the application is for a single interconnected system that will divert water from more than one source. ()
 - ii. For a surface water source, include the official geographic name listed on the United States Geological Survey (USGS) Quadrangle map. If the surface water source is not named on the USGS Quadrangle

map, describe it as an unnamed water body, such as “unnamed stream.” For surface water sources, also identify the first named stream or river to which the source is tributary. If the water source sinks into the ground prior to reaching a stream named on the USGS Quadrangle map, describe the “tributary to” stream as “sinks.” If the water source flows into a stream 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 “tributary to” stream as the named stream on the USGS Quadrangle map.

()

iii. For a water source under the ground surface, identify the source as “ground water.” ()

iv. For a low temperature geothermal resource, state how the source will be used primarily for its heat value and secondarily for its value as water or how the use qualifies for an exemption pursuant to Section 42-233(1), Idaho Code. ()

v. For an application within the Swan Falls Trust Water Area, state if the application is seeking unappropriated water or a reallocation of trust water. ()

c. Legal description of the point of diversion and place of use. ()

i. Describe the location of the point of diversion and the place of use to the nearest forty (40) acre subdivision or United States Government Lot of the Public Land Survey System. ()

ii. Subdivision names, lot and block numbers, and any name in local common usage for the point of diversion or place of use may be included. ()

iii. If irrigation use is proposed, state the number of acres to be irrigated to the nearest whole acre in each forty (40) acre subdivision of the place of use. For an application proposing irrigation of less than ten (10) acres, acreage shall be shown to the nearest one-tenth (0.1) acre. The number of acres per forty (40) acre subdivision is not required when the place of use is a generally described place of use for an existing water right or permit. If the proposed place of use is a generally described place of use with an established digital boundary authorized by a water right or permit, state the name of the generally described place of use, list the water right number serving the generally described place of use, attach a map depicting the generally described place of use boundary, and state the total number of acres to be irrigated. ()

iv. If the application proposes water use for municipal purposes or fire protection by a municipal provider within a service area, the service area need not be described by legal description. Describe the service area in terms sufficient to identify the general location where water will be used and attach a map depicting the service area. ()

d. Quantity of water to be diverted. ()

i. Include the rate of flow in cfs or the volume of water to be stored in af per year for each beneficial use proposed, using values with a maximum of three significant figures with no more precision than hundredths for rate and tenths for volume. ()

ii. For an application to store water, the maximum af per year may not exceed the storage facility capacity unless the application includes a plan of operation for filling the facility more than once per year. The refill plan may include refills for seepage, evaporation, use from storage, and other purposes the applicant intends to replace in the storage facility throughout the year. ()

iii. 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. ()

e. Beneficial use of water. ()

i. Describe the proposed use of water. When a narrative or other application material describes details of the proposed use, the description used in the purpose of use field may be in general terms such as

irrigation, industrial, or municipal. ()

ii. For a municipal purposes application, attach a complete “Municipal Water Right Application Checklist.” The “Municipal Water Right Application Checklist” is a form available on the Department’s website or from the Department upon request. ()

iii. 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 within the anticipated service area at the end of the planning horizon, and the anticipated water demand within the anticipated service area at the end of the planning horizon. Also include a gap analysis showing the extent to which an existing water right will not be sufficient to meet the anticipated water demand at the end of the planning horizon. ()

iv. For a municipal purposes application that does not propose to appropriate water for reasonably anticipated future needs, include a water requirement narrative with a map of the service area, current water needs, water needs after five years, and any existing plan for conveying ownership of the water right to a subdivision homeowner’s association or entity other than individual land parcel owners. ()

v. For an application proposing multi-home domestic use where the applicant intends to convey a portion of the place of use land to an individual parcel or lot owner, describe the applicant’s plan, if any, to keep the permit in single ownership by conveying the permit to a homeowner’s association, water system operator, or other entity prior to conveying an individual parcel or lot with an appurtenant portion of the permit. ()

f. Period of use. ()

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

ii. For irrigation use, the period must coincide with the annual season of use established by the Department. The Department established irrigation season of use is available on the Department’s website or from the Department upon request. If a longer season of use is proposed, the application must justify that the longer season of use is necessary. ()

g. Description of the project works. ()

h. Any other water right used at the place of use for the same purpose. Include the water right number or name of the delivery organization, such as a municipal provider, canal company, irrigation district, or other delivery entity that supplies water for the proposed use at the proposed place of use. Also state if the applicant is entitled to distribution of water from a water delivery entity, but the entity’s distribution system is not capable of delivering water to the proposed place of use. ()

i. Ownership or other legal access to the point of diversion, place of use, and conveyance system. If a person or entity other than the applicant owns the land at the point of diversion, place of use, or where the conveyance system will be established, include a description of the arrangement enabling the applicant to access the land for the purpose proposed in the application. ()

j. Period of time required to complete project works and apply water to beneficial use. While a permit holder may request a permit development period extension pursuant to Section 42-204, Idaho Code, the period of time stated on an application may not exceed five (5) years unless the application proposes municipal purposes for reasonably anticipated future needs. ()

k. Map or plat of sufficient scale to show the proposed project. ()

l. Applicant’s signature or evidence to show the signatory has authority to sign on behalf of the applicant. ()

i. For an application in more than one (1) name, each applicant must sign the application unless “or”

connects the applicant names. ()

ii. For an application by a corporation, company, municipality, governmental entity or organization, or other organization, include the signature and title of an officer of the corporation or company or an elected official of the municipality or an individual authorized by the governmental entity or agency or other organization to sign the application. Alternatively, the application may be signed by an authorized agent of the applicant in accordance with Subparagraph 035.03.1.iii. ()

iii. If the signatory is an authorized agent of the applicant, include a power of attorney or other documentation demonstrating the signatory has authority to sign on behalf of the applicant. If the signatory is a licensed attorney, power of attorney or other documentation is not required. ()

04. Amended Applications. (3-18-22)

a. An applicant or the applicant's agent must amend an application if the applicant intends to change the purpose of use, period of use, amount of diversion, point of diversion, place of use, or make other substantial changes. The Department may clarify a source or tributary name or the irrigation period of use that do not meet Paragraphs 035.03.b. and 035.03.f. requirements by documenting the official record without requiring the applicant to amend the application. ()

b. An applicant or the applicant's agent 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. ()

c. An applicant or the applicant's agent may not amend a municipal purposes application not originally seeking water for reasonably anticipated future needs to seek water for reasonably anticipated future needs. ()

d. An amendment that increases the rate of diversion, increases the volume of water diverted per year, lengthens the period of use, or adds an additional beneficial use will result in the Department changing the priority date to the date the Department received the amended application. ()

e. An applicant or the applicant's agent may amend an application by: ()

i. Striking each item to be changed on the original application form and initialing and dating each change; ()

ii. Filing a new application form designated as an amended application; or ()

iii. Changing an application electronically via the Department's online filing process. ()

f. If an amendment increases the total diversion rate or total storage volume requested, the amended application must include any additional filing fee required by Section 42-221A, Idaho Code. ()

g. If the applicant's name or mailing address changes, the applicant or the applicant's agent must notify the Department of the change in writing. ()

036. DELAYED PROCESSING. An applicant may request in writing that the Department delay commencement or interrupt processing of the applicant's application for a period not to exceed one (1) year. The Department may approve the request 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. The Department may approve a request for delay for a shorter period or upon conditions. Upon written request, the Department may renew the authorized delay successive times as long as the delay meets the requirements stated above. ()

037. -- 039. (RESERVED)

040. PROCESSING APPLICATIONS FOR PERMIT.

01. Public Notice Requirement.

(3-18-22)

- a.** Publication of an application will be pursuant to Section 42-203A, Idaho Code. ()
- b.** For an application that proposes diversion in excess of ten (10) cfs or storage of one thousand (1,000) af, the Department will accomplish statewide circulation pursuant to Section 42-203A(2), Idaho Code, by publication of a legal notice at least once each week for two (2) successive weeks in; ()
- i.** A newspaper, as defined in Section 60-106, Idaho Code, of general circulation in the county in which the point of diversion is located; and ()
- ii.** At least one (1) daily newspaper, as defined in Section 60-107, Idaho Code, that the Director determines is of general circulation within each of the Department's four (4) administrative regions. ()
- c.** The Department shall make an application accepted for filing available on the Department's website pursuant to Section 42-203A(3), Idaho Code. ()
- d.** Publication in the newspaper pursuant to Section 42-203A(2), Idaho Code, constitutes the official notice of the application. ()
- e.** An application amended under Paragraph 035.04.a. after publication requires republication. The applicant must file the amended application with the republication fee required by Section 42-221F, Idaho Code. ()
- f.** If a moratorium order is amended or repealed allowing the Director to continue processing an application previously held without final action, the Department will republish an application that was published prior to being held for the moratorium. Before republication, the applicant must pay the republication fee required by Section 42-221F, Idaho Code. ()
- g.** Failure to pay a required republication fee within thirty (30) days after the applicant is notified to do so is cause for the Director to void the application, unless a processing delay is approved under Section 036. ()
- h.** The Director may deny approval of an application filed for diversion of ground water in a designated critical ground water area without publication of the application if the Director believes that there is insufficient water available for the proposed water use. An application that includes a mitigation plan proposing to offset injury to existing water rights will be published prior to the Director's evaluation of the application under Subsection 045.01. ()

02. Protests, Intervention, Hearings, and Appeals.

(3-18-22)

- a.** Section 42-203A, Idaho Code, governs protests against application approval. The Department will treat a protest as a pleading filed pursuant to IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources." ()
- b.** A protest may be filed on a form supplied by the Department or in any other format that includes the same information as the Department's form. ()
- c.** If a single protest names more than one individual protestant and does not identify a representative, the Department will consider the first person listed to be the spokesperson and primary contact for service of documents for the group of individuals named as protestants. ()
- d.** The Department will not consider a general protest (blanket protest) against an application for a particular class of use or from a particular source of water a valid protest. A protest must identify the specific application being protested. ()

e. The Department will not accept a protest or petition to intervene unless the protest or petition to intervene is filed with the statutory filing fee required by 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. ()

f. Petitions to intervene in a protested application matter must comply with IDAPA 37.01.01, “Rules of Procedure of the Idaho Department of Water Resources.” ()

g. Hearings will be scheduled and held pursuant to IDAPA 37.01.01, “Rules of Procedure of the Idaho Department of Water Resources.” ()

h. A decision of the Department may be appealed pursuant to IDAPA 37.01.01, “Rules of Procedure of the Idaho Department of Water Resources.” ()

03. Burden of Proof. (3-18-22)

a. Burden of proof has two (2) parts: first, the burden of producing evidence to present a prima facie case, and second, the ultimate burden of persuasion. ()

b. For evaluation of Section 42-203A(5), Idaho Code criteria for a protested application: ()

i. The applicant has the initial burden of producing evidence for the evaluation of Section 42-203A(5)(a) through (d) and (f) through (g), Idaho Code criteria and of producing evidence of which the applicant is knowledgeable for the evaluation of Section 42-203A(5)(e), Idaho Code criteria. ()

ii. The protestant has the initial burden of producing evidence of which the protestant can reasonably be expected to be more cognizant than the applicant for Section 42-203A(5)(e), Idaho Code criteria. ()

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

c. For evaluation of Section 42-203C, Idaho Code criteria for a protested application: ()

i. The protestant has the initial burden of producing evidence under Subsection 045.02, 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 can reasonably be expected to be knowledgeable. ()

ii. The protestant has the ultimate burden of persuasion on whether the application causes a significant reduction under Subsection 045.02 and whether it meets the public interest criteria in Section 42-203C(2), Idaho Code under Subsection 045.03. ()

d. For an unprotested application or an application for which all protests have been resolved, the Director will evaluate the application, any information submitted pursuant to Subsections 040.04, 045.01, 045.02, and 045.03, and information in the Department’s files and records to determine compliance with Sections 42-203A(5) and 42-203C, Idaho Code. For an unprotested application or an application for which all protests have been resolved, the applicant has the burden of producing evidence and the ultimate burden of persuasion on whether the application satisfies the applicable statutory criteria. ()

04. Additional Information Requirements. (3-18-22)

a. The Department may require the applicant to file any of the additional information under Paragraph 040.04.c. or 040.04.d. if the official record for the application does not contain sufficient information to evaluate the applicable criteria in Section 045 and other statutory criteria. The Department will notify the applicant of the additional information required. ()

b. Unless the Department extends the time for filing, the additional information must be filed within thirty (30) days after the Department notifies the applicant of the additional information requirements. ()

i. The Department may grant an extension of time to file the required additional information if the applicant files a written request showing good cause. ()

ii. If the required additional information is not filed within the time allowed, including any extensions granted, the Department may void the application. ()

c. For purposes of evaluating the application under Subsection 045.01, the Department may request additional information, including but not limited to the following: ()

i. Project design, construction, operation techniques, or mitigation measures that the applicant will employ to eliminate or reduce the impact on other water rights. ()

ii. The proposed project water requirements including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that water is required, and the volume of water that will be consumptively used per year. ()

iii. The quantity of water available from the source applied for, including, but not limited to, the flow rates for surface water sources available during periods of peak and average project water demand, the properties of the aquifers from which water is to be taken from for ground water sources, and other sources of supply that may be used to supplement the water source proposed in the application. ()

iv. Evidence documenting an interest in the lands necessary for all project works and the place of use including, but not limited to, copies of deeds, leases, easements, or well sharing agreements. In the instance the land necessary to construct and operate the proposed project is privately-owned land not in the applicant's ownership, the applicant must submit evidence documenting that the applicant has an interest in the land, has authority to exercise eminent domain to obtain the interest, or has another arrangement with the landowner establishing an interest. In the instance of a project diverting water from or conveying water across federally owned land, the applicant must submit evidence documenting that the applicant filed the appropriate form to request or initiate access and that access is authorized or a decision is pending. ()

v. For hydropower use, evidence demonstrating compliance with Sections 42-205 and 42-206, Idaho Code. ()

vi. Requests for other needed permits, licenses, and approvals. The applicant must keep the Department apprised of the status of the requests and any subsequent approvals or denials. ()

vii. Evidence to show that it is reasonably probable that financing will be available to appropriate the water and put it to the beneficial use proposed. ()

viii. 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 describing how the applicant intends to utilize its taxing, bonding, or contracting authority in connection with the proposed project construction schedule. ()

ix. Plans, specifications, and estimated construction costs for the project works definite enough to allow for determination of project impacts and implications. ()

x. Letters requesting comment and any responding comment on the proposed project construction and operation from the governing body of the city, county, or tribal reservation within which the point of diversion and place of use are located; any irrigation district, canal company, or other water delivery entity within which the proposed project is located; and from other people, entities, or agencies with interests in the local area that may be affected by the proposed water use as determined by the Department. ()

xi. Design, construction, operation techniques, or mechanical equipment that will be employed to achieve efficiency in conveyance or use of water and to minimize waste. ()

xii. Evidence demonstrating compliance with the Idaho State Water Plan. ()

d. For purposes of evaluating the application under Subsections 045.02 and 045.03, the Department may request additional information including, but not limited to, the following: ()

i. If the project proposes irrigation use, the crop rotation, including acres under each crop type, for newly developed land. Also the kinship, if any, of the operator of the land to be irrigated by the project to the applicant; the location and acreage of other irrigated land owned, leased, or rented by the applicant; a soil survey prepared in accordance with the Natural Resources Conservation Service irrigable land classification system; a schedule for bringing into production the project land; the name, address, and number of shares held by each shareholder if the applicant is a corporation; and evidence of tax-exempt status if the applicant is a corporation so claiming. ()

ii. The number and kinds of jobs created or eliminated as a direct result of project development including both the construction and operating phases of the project. If jobs are seasonal, the estimated number of months per year of employment. ()

iii. For an application that proposes appropriating more than twenty-five (25) cfs, or more than ten thousand (10,000) af of storage, or generating more than five (5) megawatts of power, the changes to community services required during the construction and operation phases of the project including, but not limited to, changes to schools, roads, housing, public utilities, and public health and safety facilities, if any. ()

iv. The source of energy for diverting and using water for the project, the estimated instantaneous demand and total amount of energy that will be used, the efficiency of use, and energy conservation methods. ()

v. The location, amount, and quality of return flow water, and any water conservation features of the project. ()

vi. The availability, foreseeability, and cost of alternative energy sources to ameliorate the economic impact the proposed use will have on electric utility rates in the state of Idaho. ()

e. Unless the Director determines otherwise, information under Paragraph 040.04.c. or 040.04.d. is not required for: ()

i. An application that seeks to appropriate five (5) cfs or less, or store five hundred (500) af or less of unappropriated water. ()

ii. An application that proposes to use water from a source in the Swan Falls Trust Water Area to irrigate two hundred (200) acres or less or any other use that the Director determines will reduce the flow of the Snake River measured at the Murphy Gage by two (2) af per day or less. ()

f. Unless the Director determines otherwise, information under Paragraph 040.04.d. is required for an application that proposes to use water from a source in the Swan Falls Trust Water Area to irrigate more than two hundred (200) acres or any other use that the Director determines will reduce the flow of the Snake River measured at the Murphy Gage by more than two (2) af per day. ()

041. -- 044. (RESERVED)

045. EVALUATION CRITERIA.

01. Criteria for Evaluating All Applications to Appropriate Water. The Director will use the following criteria in evaluating whether an application should be approved, denied, approved for a smaller amount of water, or approved with conditions. ()

a. Reduction of water available under an existing water right (injury) criteria. A proposed use will be determined to reduce the quantity of water under an existing water right if: ()

i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree, claim, or the historical amount beneficially used by the water right holder of such permit, license, decree, or claim, whichever is less; ()

ii. The holder of an existing water right will be forced to an unreasonable effort or expense to divert water for an existing water right. The reasonable pumping level provisions of Section 42-226, Idaho Code govern protection of existing ground water rights; or ()

iii. The proposed use would make the quality of the water available unusable by an existing water right and could not be restored to usable quality without unreasonable effort or expense. ()

iv. An application that would otherwise be denied because of injury to another water right may be approved upon conditions that mitigate losses of water for an existing water right, as determined by the Director. ()

v. If an existing water right is subordinated to future beneficial uses which include the application's proposed use, the existing subordinated water right cannot be injured. ()

b. Sufficiency of water supply. The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to accomplish the proposed beneficial use. ()

c. Good faith criteria. The evaluation of whether an application is not made in good faith or whether it is 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 putting 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 have not been made in good faith if: ()

i. In the instance the land necessary to construct and operate the proposed project is privately owned and not in the applicant's ownership, the applicant does not have an interest in the land at the time of the application filing or the authority to exercise eminent domain; or ()

ii. In the instance of a project diverting water from or conveying water across federally owned land, the applicant has not filed the appropriate form to request access; or ()

iii. The applicant is not in the process of obtaining other permits, licenses, and approvals needed to construct and operate the project; or ()

iv. There are obvious impediments that prevent the successful completion of the project. ()

d. Financial resources criteria. The Director will find an applicant does not have sufficient financial resources: ()

i. Upon a showing that it is not reasonably probable that funding is or will be available for project construction; or ()

ii. If the applicant is a governmental entity without taxing, bonding, or contracting authority necessary to raise the funds needed to commence and pursue project construction consistent with the proposed project construction schedule. ()

e. Local public interest criteria. The Director will consider the following in determining whether the

project will conflict with the local public interest: ()

i. The direct effect the project will have on public water resources that are of interest to people in the local area directly affected by the proposed water use including, but not limited to, 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 water uses that might be made within a reasonable time; and ()

ii. Whether the proposed water use is consistent with Idaho's policy of securing the maximum use and benefit from the public water resources. ()

iii. Although the Director has independent responsibility for the overall assessment and balancing of factors weighing on the local public interest, the Director will give due regard to expertise of other state and federal regulatory agencies charged with assessing individual issues under Subparagraphs 045.01.e.i. and ii., recognizing that it is not the primary job of the Department to protect all aspects of the health and welfare of Idaho's citizens and visitors. ()

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 regulatory agencies with jurisdiction over subject matter relevant to the local public interest. ()

v. The Director will deny an application that conflicts with the local public interest unless the project can be approved with conditions to resolve the local public interest conflict. ()

f. Conservation of water resources within the state of Idaho criteria. The application will be determined contrary to the conservation of water resources if: ()

i. A diversion rate greater than 0.02 cfs per acre is proposed, but is not necessary for irrigation use; ()

ii. Design, construction, operation techniques, or mechanical equipment will not be employed to achieve a water use efficiency consistent with contemporary engineering, industry, and regulatory standards; ()

iii. A proposed storage facility will exceed a seepage rate of 0.2 feet per day. This criterion does not apply if the proposed storage facility will be used as an infiltration basin for ground water recharge, an excavated pond filled by intercepting ground water, or an impoundment for irrigation use not exceeding five (5) af of stored water per acre of irrigation; or ()

iv. The proposed irrigation use is not consistent with the requirements of Section 42-204A, Idaho Code. ()

g. In the case where the place of use is outside the watershed or local area where the source of water originates, the project effect on the local economy or local area criteria. The Director will consider 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. ()

h. Idaho State Water Plan criteria. The Director will consider whether the proposed diversion and use of water complies with the Idaho State Water Plan, including plans developed for specific geographic areas. ()

02. Criteria for Evaluating Whether an Application for Reallocation of Trust Water in the Swan Falls Trust Water Area Will Cause a Significant Reduction Under Section 42-203C(1), Idaho Code. The Director will find an application for a reallocation of trust water within the Swan Falls Trust Water Area will cause a significant reduction when the proposed use, individually or cumulatively with other existing uses and uses reasonably likely to exist within twelve months of the proposed use, would significantly reduce the amount of trust water available to the user for hydropower generation purposes under a water right held in trust. The Director will presume an application for a reallocation of trust water within the Swan Falls Trust Water Area will not cause a significant reduction if the Director determines that the application meets both the individual and cumulative tests

for evaluating significant reduction under Paragraphs 045.02.a. and 045.02.b. ()

a. Individual test. The Director will presume: ()

i. A proposed use, when fully developed and its impact is fully felt, that individually does not reduce the flow of the Snake River at the Murphy Gage by more than two (2) acre-feet per day does not cause a significant reduction; and ()

ii. An irrigation project of two hundred (200) acres or less diverting water from a source other than the Snake River or springs directly tributary to the Snake River located in the Swan Falls Trust Water Area will not reduce the flow at Murphy Gage by more than two (2) acre-feet per day and does not cause a significant reduction. However, this presumption is not applicable to an application the Director determines to be part of a larger development. ()

b. Cumulative test. The Director will presume a proposed use meets the cumulative test if the use, when fully developed and its impact is fully felt and when considered cumulatively with other existing uses and other uses reasonably likely to exist within twelve (12) months of the proposed use, will not deplete the flow of Snake River measured at Murphy Gage by more than: ()

i. Forty thousand (40,000) af per calendar year when considered with all other uses approved for development of trust water during that calendar year; ()

ii. Forty thousand (40,000) af per calendar year using a four (4) year moving average when considered with all other uses approved for development of trust water during that four (4) year period; and ()

iii. Twenty thousand (20,000) af per calendar year from filings approved for reallocation of trust water that meet the criteria of Paragraph 045.02.a. ()

c. The presumptions in Subsection 045.02, Paragraph 045.02.a., and Paragraph 045.02.b. may be rebutted by the protestant. In rebutting the presumptions that an application does not cause a significant reduction, the Director may consider: ()

i. The amount of the reduction in hydropower generation that the proposed use will cause individually and cumulatively with other uses expected to be developed within twelve (12) months of the proposed use as compared to the existing hydropower generation output of the affected facility. ()

ii. The relative importance of the affected hydropower facility to other sources of electrical power generation available to the holder of the facility. ()

iii. The timing of the reduction in hydropower generation both on an annual basis and on a long-term basis considering the lag time between the beginning of diversion by the proposed use and the resulting reduction in hydropower generation. (3-18-22)

iv. The effect of the reduction in hydropower generation on the unit cost of hydropower from the facility and the average cost of electrical power offered by the facility holder. ()

v. The terms of contracts, mortgages, or regulatory permits and licenses which require the hydropower generation facility holder to retain the capability to produce hydroelectric power at a specific level. ()

03. Criteria for Evaluating Whether an Application for Reallocation of Trust Water in the Swan Falls Trust Water Area is in the Public Interest Under Section 42-203C(2), Idaho Code. If the Director determines that an application for reallocation of trust water within the Swan Falls Trust Water 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 a use

consistent with Paragraph 045.03.f. The Director will presume an application is not in the public interest if it proposes a use consistent with Paragraph 045.03.g. In evaluating the public interest criteria, no single public interest criterion will be entitled to greater weight than any other public interest criterion. When evaluating the public interest criteria, the Director will consider: ()

a. The potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy. The economic evaluation will be based upon generally accepted economic analysis procedures which uniformly evaluate the following factors within the state of Idaho and the county directly affected by the project: ()

i. Direct project benefits. (3-18-22)

ii. Indirect benefits including net revenues to the processing, transportation, supply, service, and government sectors of the economy. ()

iii. Indirect project costs, including verifiable costs to government in net lost revenue and increased regulation costs, verifiable reductions in net revenue resulting from losses to other existing instream uses, and the increased cost of replacing reduced hydropower generation from unsubordinated hydropower generating facilities. (3-18-22)

b. The economic impact the proposed use would have upon the electric utility rates in the state of Idaho, and the availability, foreseeability, and cost of alternative energy sources to ameliorate such impact. These evaluations will include the following considerations: ()

i. Projections of electrical supply and demand for Idaho and the Pacific Northwest made by the Bonneville Power Administration and the Northwest Power Planning Council and information available from the Idaho Public Utilities Commission or from the electric utility from whose water right trust water is being reallocated. (3-18-22)

ii. The long-term reliability of the substitute source and the cost of alternatives including the resulting impact on electrical rates. ()

c. Whether the proposed use will promote the family farming tradition in the state of Idaho. For purposes of this evaluation the Director will presume the application promotes the family farming tradition if the total land to be irrigated by the applicant, including currently owned and leased irrigated land and land proposed to be irrigated in the application and other applications and permits of the applicant, does not exceed nine hundred sixty (960) acres. For an application proposing to divert 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. This presumption may be rebutted by the protestant under Paragraph 040.03.c.ii. If the presumption above does not apply, the Director will consider whether the proposed use has the following characteristics: ()

i. The farming operation developed or expanded as a result of the application is operated by the applicant or a member of the applicant's family (spouse, parents or grandparents, lineal descendants, including those that are adopted, lineal descendants of parents, and spouse of lineal descendants); ()

ii. In the event the application is filed in the name of a partnership, one or more of the partners operates the farming operation; and ()

iii. If the application is in the name of a corporation, the number of stockholders does not exceed fifteen (15) persons, and one or more of the stockholders operates the farming operation unless the application is filed by an irrigation district, drainage district, canal company, or other entity authorized to appropriate water for landowners within the district or for stockholders of the company all of whom satisfy the presumption in Paragraph 045.03.c. ()

d. Whether the proposed project will promote full economic and multiple use development of the

water resources of the state of Idaho: ()

- i. Promoting and conforming with the adopted Idaho State Water Plan; ()
- ii. Providing for coordination of proposed and existing uses of water to maximize the beneficial use of available water supplies; ()
- iii. Utilizing technology economically available to enhance water and energy use efficiency; ()
- iv. Providing multiple use of the water, including multipurpose storage; ()
- v. Allowing opportunity for reuse of return flows; ()
- vi. Preserving or enhancing water quality, fish, wildlife, recreation, and aesthetic values; or ()
- vii. Providing supplemental water supplies for existing uses with inadequate supplies. ()

e. Whether a proposed irrigation development will conform to a staged development policy of up to twenty thousand (20,000) acres per year or eighty thousand (80,000) acres in any four (4) year period in the Swan Falls Trust Water Area. In applying these criteria, the Director will consider the following: ()

i. Twenty thousand (20,000) acres per year or eighty thousand (80,000) acres per four (4) year period is a four (4) year moving average of twenty thousand (20,000) acres per year of permits issued during a calendar year for irrigation development. If permits for development of less than twenty thousand (20,000) acres are issued in a year, additional development in excess of twenty thousand (20,000) acres can be permitted in succeeding years. Likewise, if more than twenty thousand (20,000) acres is permitted in one year (recognizing that a single large project could exceed twenty thousand (20,000) acres) the permitted development in succeeding years must be correspondingly less to maintain no greater than a twenty thousand (20,000) acres per year average for any four (4) year period; ()

ii. The criteria of Paragraph 045.03.e. applies to multiple-use projects with irrigation as a principal purpose. Projects which use irrigation as only an incidental purpose, such as the land treatment of waste, will not be included within this policy; and ()

iii. The Director may approve an application determined to be otherwise approvable but found to exceed the acreage limitations of Paragraph 045.03.e., when considered with other applications approved for development, with conditions prescribing the construction of project works and beneficial use of water commence in a future year. ()

f. The Director will presume an application is in the public interest if it proposes: ()

i. To store surface water from the Snake River and surface tributaries upstream from the Murphy Gage consistent with the Idaho State Water Plan; or ()

ii. A state of Idaho-sponsored ground water recharge project that is consistent with the Idaho State Water Plan; or ()

iii. Domestic, commercial, municipal, or industrial use that does not have a maximum consumptive use of more than two (2) af per day. ()

iv. The presumptions of Subparagraphs 045.03.f.i. through iii. may be rebutted by the protestant under Paragraph 040.03.c. In evaluating a proposed rebuttal to these presumptions, the Director may consider the criteria in Paragraphs 045.03.a. through e. ()

g. The Director will presume an application 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. Such proposals are presumed to prevent the full economic and multiple use of water in the Snake River Basin and to adversely affect hydropower availability and electrical energy rates in the state of Idaho. This presumption may be rebutted by the applicant. In evaluating a rebuttal to this presumption, the Director may consider the criteria in Paragraphs 045.03.a. through e. ()

046. -- 049. (RESERVED)

050. CONDITIONS OF APPROVAL.

01. Issuance of Permits with Conditions. The Director may issue a permit with conditions to ensure compliance with: ()

- a.** Chapter 2, Title 42, Idaho Code, and other applicable laws and statutes; ()
- b.** Efficient administration of water rights by priority date; ()
- c.** The Idaho State Water Plan as required by Section 42-1734B(4), Idaho Code; ()
- d.** The criteria of Section 42-203A, Idaho Code; ()
- e.** Requirements of Section 42-203B, Idaho Code including conditions to subordinate a permit for hydropower generation to all rights to the use of water, other than hydropower, and limit a permit for hydropower generation to a term in connection with the power project; ()
- f.** Requirements of Section 42-203C, Idaho Code, including conditions to promote efficient use and conservation of water; ()
- g.** The intent of agreements entered into by and between the state of Idaho and holders of water rights for power purposes and the state of Idaho's obligation to continually review the reallocation of trust water consistent with Section 42-203, Idaho Code; or ()
- h.** The requirement 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. ()

02. Voiding Approval of Permit. Permits may be conditioned to authorize the Director to void the permit if the Director determines that the applicant submitted false or misleading information on the application or supporting documents. ()

051. -- 054. (RESERVED)

055. MORATORIUM.

01. Applications or Permits. ()

a. The Director may cease action on an application or stay further development of a permit for which the permit holder has not submitted proof of beneficial use in a designated geographical area upon finding a need to: ()

- i.** Protect existing water rights; (3-18-22)
- ii.** Ensure compliance with Chapter 2, Title 42, Idaho Code; or ()
- iii.** Prevent reduction of flows below a minimum stream flow held by the Board pursuant to applicable law. ()

b. Notice of the Director's action to cease further action on an application or stay further

development of a permit will be by: ()

- i. Order served by certified mail upon the then affected applicant or permit holder; and ()
- ii. Publication for three (3) consecutive weeks in a newspaper of general circulation in the area affected. ()

c. The order of the Director's action to stay further development of a permit will require a permit holder to file, within sixty (60) days of order issuance, either; ()

i. Proof of beneficial use for the extent of diversion and beneficial use accomplished prior to issuance of the order; or ()



ii. A response with supporting information demonstrating the permit holder made a substantial investment, prior to receipt of the order, in project works to divert and beneficially use water under the permit that merits the granting of additional time to complete all or part of the project. ()

iii. Failure to submit proof of beneficial use or a response will result in suspension of further development of the permit. ()

d. Objections to the Director's action will be considered pursuant to IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources" and applicable law. ()

056. -- 999. (RESERVED)

Geographic Area From Which Groundwater Is Determined To Be Tributary To The Snake River In The Milner Dam To Swan Falls Dam Reach.

-  Tributary Area
-  Perched Aquifers Not Tributary But Deep Regional Aquifer Is Tributary.

