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October 25, 2023

**VIA EMAIL**

IDWR Rules Review Officer  
P.O. Box 83720  
Boise, ID 83720  
rulesinfo@idwr.idaho.gov

Re: Docket No. 37-0308-2301 (ZBR Chapter Rewrite)  
IDAPA 37.03.08 – Water Appropriation Rules  
Comments on Proposed Rule

Dear Sir or Madam:

I am writing to comment on the proposed rule published in the October 4, 2023 Idaho Administrative Bulletin in the above-referenced matter. Please note, I previously submitted comment letters in this matter dated May 9, May 30, and July 17, 2023. While the Department revised the rules in response to several of my comments, of course, not all of my suggestions have been adopted. Still, even when the Department rejected a suggestion, it clearly gave the suggestion thoughtful consideration, which is appreciated. For this reason, it does not seem worthwhile for me to simply repeat those prior comments here. Instead, with one small exception, I will simply incorporate my prior comments here by reference.

One concept I would like to elaborate further on is one that I raised in my letter dated May 9, 2023. In that letter, I suggested including language clarifying that burdens of proof only apply to proceedings involving protested applications, such that there is no burden of proof when no protests have been filed or when all protests have been resolved prior to a hearing-on-the-merits. The Department rejected that suggestion, and proposed Rule 40.03(d) places both the burden of producing evidence and the ultimate burden of persuasion on the applicant, even when there are no pending protests.

At the outset, I agree with the Department's bifurcation of the burden of proof into a burden of producing evidence and a burden of persuasion. I also agree that the burden of producing evidence lies with the applicant, even for unprotested applications. This is because, under the Idaho statutes governing water permit applications, it is the applicant that is responsible for providing the

information necessary for the Department to evaluate the application, regardless of whether the application is protested. *See* IDAHO CODE §§ 42-202, 42-203A(5), 42-204(1). However, for two reasons, I do not believe it is correct for Rule 40.03(d) to impose an ultimate burden of persuasion on the applicant when there are no pending protests.

First, Black's Law Dictionary (6<sup>th</sup> ed.) defines burden of proof as:

In the law of evidence, the necessity or duty of affirmatively proving a fact or facts *in dispute* on an issue raised *between the parties* in a cause.

(Emphasis added).

The emphasized language above clearly demonstrates that a burden of proof normally has application only in a legal proceeding with opposing parties. Again, because the Idaho statutes make the applicant responsible for supplying the necessary information to the Department regardless of protest status, it is likely acceptable for the rule language to say that the burden of producing evidence lies with the applicant even on unopposed applications. But to refer to a burden of persuasion in a proceeding that lacks an opposing party seems contrary to the overall concept of a burden of proof.

Second, for applications to appropriate trust water, Idaho Code Section 42-203C(2)(b) specifically states that "[t]he burden of proof under the provisions of this section shall be on the protestant." Therefore, as drafted, Rule 40.03(d) conflicts with Idaho Code Section 42-203C(2)(b) and proposed Rule 40.03(c), which deals with protested trust water applications. Of course, as a statute, Section 42-203C(2)(b) is controlling over proposed Rule 40.03(d). However, I assume the Department would prefer to minimize overt conflicts between the rules and the statutes. Based on the foregoing, I suggest removing the reference to a burden of persuasion from Rule 40.03(d).

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

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Sincerely,

VARIN THOMAS

A handwritten signature in blue ink, appearing to read "Dylan Lawrence", with a stylized, cursive script.

Dylan B. Lawrence