

THIRD IDWR RESPONSE TO PUBLIC COMMENTS
DOCKET NO. 37-0308-2301
IDAPA 37.03.08. WATER APPROPRIATION RULES
January 3, 2024

Note: Rule numbers referenced in the Comment section of this document are based on the Proposed Rule, dated October 4, 2023. Rule numbers referenced in the *IDWR Response* section of this document are based on the Pending Rule, dated January 3, 2024. Comments are listed in the order received.

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236. Comment: Regarding Rule 40.03.d –Clarify when burdens of proof apply:

In my letter dated May 9, 2023, 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 (6th 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 unprotested 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 040.03(c), which deals with protested trust water applications.

IDWR Response: IDWR declined to change the language in Pending Rule 040.03.d. based on stakeholder’s comments. Pending Rule 040.03.d. speaks solely of the situation where an application is unprotested; either no protest was filed, or any filed protest is resolved prior to IDWR issuing a decision. In his comment, the stakeholder first agrees with IDWR’s bifurcation of the burden of proof into a burden of production and a burden of persuasion. The stakeholder also agrees that the burden of production lies with the applicant, even for unprotested applications. By this statement, the stakeholder recognizes that there is a circumstance when the burden of proof lies with an applicant even for uncontested applications. However, the stakeholder then applies a general definition of “burden of proof” from Black’s law dictionary to argue “that a burden of proof normally has application only in a legal proceeding with opposing parties.” The inconsistency in the stakeholder’s position notwithstanding, it is incorrect to say that the burden of proof normally has application only in a legal proceeding with opposing parties. For example, in an adjudication, “[e]ach claimant of a water right acquired under state law has the ultimate burden of persuasion for each element of a water right.” Idaho Code § 42-1411(5). This burden applies even in cases where there is no party opposing the claim. *State v Hagerman Water Rights Owners, Inc.*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1997). It has long been the rule in Idaho that where an appropriator seeks to appropriate water, the burden is on the water user to “produce ‘clear and convincing evidence showing that the prior appropriator would not be injured or affected by the diversion.’ The burden is on [the water user] to show such facts.” *Cantlin v. Carter*, 88 Idaho 179, 187, 397 P.2d 761, 766 (1964). Nothing in the case law suggests that the burden evaporates if an application is not protested or if the protest is withdrawn.

IDWR is required to analyze the criteria outlined in Idaho Code §§ 42-203A and 42-203C, regardless of whether an application is protested or not. As the stakeholder mentioned, an applicant is statutorily obligated, upon request, to submit information necessary for IDWR to analyze the statutory criteria. For an unprotested application, if IDWR initially finds the

statutory criteria are not met, IDWR requests additional information from the applicant to persuade IDWR the criteria are met prior to permit approval. Pending Rule 040.03.d. reflects this practice and is consistent with statutory provisions authorizing IDWR to request additional information. Idaho Code § 42-203A(5) states IDWR may reject an application or refuse issuance of a permit if it does not meet the statutory criteria. The applicant can provide information to persuade IDWR that the application meets the criteria, as is contemplated in statutes and the Pending Rules. If IDWR is not persuaded by the applicant's information and other available evidence, the applicant may pursue an administrative appeal.

The stakeholder also stated Pending Rule 040.03.d. should be modified because it conflicts with Idaho Code § 42-203C(2)(b). Pending Rule 040.03.d. addresses unprotested applications, which Idaho Code § 42-203C(2)(b) does not expressly speak to. Therefore, Pending Rule 040.03.d. does not conflict with Idaho Code § 42-203C(2)(b).