

Summary of Comments Received and Clarifying Questions

Water Appropriation Rules IDAPA 37.03.08
for May 22, 2023 Negotiated Rulemaking Meeting
by Angie Hansen, IDWR 5/22/2023

SUMMARY OF COMMENTS RECEIVED PRIOR TO MAY 22, 2023:

Comments Received:

- Oral Comments at 4/14/2023 Rulemaking Meeting: Elisheva Patterson (Racine Olson) and Dylan Lawrence (Varin Thomas) = 4 Total Comments
- Written Comments: Clive Strong, Steve Spencer (USFS Northern Region), Caitlin Skulan & Laura Schroeder (Schroeder Law Offices, P.C.), Dylan Lawrence (Varin Thomas), Chris Bromley & Candice McHugh (McHugh Bromley, PLLC), Jeff Raybould (Idaho Water Resource Board), Michael Lawrence (Veolia Water Idaho, Inc.), Rebecca Voss (J.R. Simplot Co.), and Scott Pugrud (Idaho Power Co.) = 148 Total Comments from 9 Entities.

General Comments:

- Beneficial for *pro se* applicants if IDWR includes text of key statutes in Rules, even though this would require more frequent rule updates.

Rule 1:

- Suggest add language ‘pending on or after the adoption of these rules’ to draft rule language.
- Scope may be misinterpreted as stated in draft rule language. Suggest include ‘reallocation of Trust Water within the Swan Falls trust water area’.

Rule 10:

- Suggest additional terms; Beneficial Use (proposed for deletion), Generally Described Place of Use, Municipality, Municipal Provider, Planning Horizon, Public Interest, Significant Reduction, and Trust Water.
- Suggest revisions to terms; Applicant, Director, Murphy Gage, Permit, Priority Date, Subordinated, Swan Falls Trust Water Area, Unappropriated Water, and Water Right Held in Trust.

Rule 25:

- 025.02.c. draft rule language uses term ‘local public interest’ erroneously. Need to revise draft rule language to use correct term ‘public interest’.
- Idaho Power Co. comment IDWR should first determine how much water is available for appropriation in the Trust Water Area, if none, rulemaking may be unnecessary. Suggest rule include reference to Amended Snake River Basin Moratorium issued 10/21/2022.

Rule 30:

- Suggest maintain since it states what sources of water are not Trust Water. IDWR's goal is to clearly define sources of water within the Swan Falls Trust Water Area so there is no need to state what is *not* within the area.

Rule 35:

- Encourage IDWR to place a 30-day timeline to review acceptability of application for filing.
- Assignment of application 30-day submittal requirement. Comment I.C. § 42-248 allows 120 days, which applies to already issued permits not applications.
- Question need to require names and addresses of *all* directors and officers.
- Suggest additional information needed to elaborate on 'generally described place of use'
- Ensure applicant understands opportunity for permit development period extensions.
- Clarify signature requirements.
- Suggest use 'Applicant's representative' or 'Applicant's agent', not both.
- 'Depletion' and 'point of discharge or return flow' are not required elements of application, should not include in application amendment rule.

Rule 36:

- Clarify draft rule language that delay-request renewals may result in multi-year delays.
- Clarify who 'others' are that cannot be injured by delays.

Rule 40:

- Encourage IDWR to place a 60-day timeline to advertise an acceptable application.
- Encourage IDWR to place a one-year timeline to make a decision on an application.
- Clarify process steps for an application with protests resolved prior to a hearing.
- Clarify how IDWR determines an amended application needs to be re-advertised.
- Clarify a mitigated application in a critical ground water area will not be denied without advertisement.
- Clarify burdens of proof.
- Clarify Director authority to request or not request additional information.

Rule 45:

- Good faith criteria – legal access, including eminent domain, review standard.
- Local public interest criteria – revisions to draft rule language should consider 2003 amendments to I.C. § 42-202B(3) legislative statement of purpose, *Shokal v Dunn* (1985), and *Eden's Gate* (2022).
- Effect on local economy of the watershed or local area within which the source of water for the proposed use originates – suggest use I.C. § 42-203A(5) language rather than create rules with limited examples of criteria analysis.

Rule 50:

- Suggest additional permit condition topics to ensure compliance with; State Water Plan, intent of agreements between State and power water right holders, and state's obligation to continually review the reallocation of Trust Water.

Rule 55:

- Consider alternative interpretation of I.C. § 42-1805(7) – does not grant IDWR authority to cancel permits.
- Suggest Director cease approvals in moratorium, ground water management, and critical ground water areas.

CLARIFYING QUESTIONS FOR MAY 22, 2023 RULEMAKING MEETING:

1. Rule 1 ‘Scope’ – What value is there in expanding the scope of the Rules to include permit amendments? Would it be sufficient to add a simple statement confirming amendments of permit shall be governed by I.C. § 42-211 and address whether ‘local public interest’ will or will not be considered?
2. Rule 10 ‘Beneficial Use’ Definition – What value is there in retaining a definition of ‘beneficial use’?
3. Rule 40.05 – ‘Additional Information’ – IDWR’s goal is to inform the applicant generally when information will or will not be requested while maintaining the Director’s discretion to request information necessary for any application to evaluate the statutory criteria. Is there better language to capture this intent?
4. Rule 45 ‘Good Faith’ Criteria – What should IDWR require regarding legal access to the property necessary to construct and operate the proposed project?
5. Rule 45 ‘Conservation of Water Resources’ Criteria – Other than those in the draft rule language, are there other factors IDWR should consider?
6. Rule 45 ‘Effect on Local Economy or Local Area of Watershed Where Water Originates’ Criteria – Should IDWR wait until this criterion is more well established before creating rule content?