

## Administrator's Memorandum

To: Water Allocation Bureau  
Regional Offices

Application Processing No. 79

From: Shelley W. Keen 

Re: "Surface Water First" Requirements for New Ground Water Irrigation  
Appropriations

Date: July 3, 2023

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### Purpose

This memorandum directs Department staff to implement the "surface water first" requirements of Idaho Code § 42-204A.

This memorandum supersedes the September 6, 2022, memorandum entitled "*Surface Water First*" Requirements for Water Right Approvals from Shelley W. Keen to the Water Allocation Bureau and Regional Offices, which was not a numbered administrator's memorandum.

### Background

Since the 1990s the Department has usually conditioned new permits for ground water irrigation to require use of appurtenant surface water rights as the primary source of irrigation water. The Department had several water resource management reasons for requiring the use of surface water first, including:

- Maintaining surface water delivery systems as sources of ground water recharge.
- Conserving ground water to be used where surface water is not available or is not of suitable quality.
- Conserving finite ground water resources for future generations.
- Securing the maximum use and benefit of surface water that would otherwise flow out of state and be lost to Idaho.

In 2022, a district court decision caused the Department to alter its longstanding practice of requiring the use of appurtenant surface water before diverting ground water. In *Eden's Gate LLC v Idaho Dep't of Water Res.*, No. CV14-21-10116 (Canyon Cnty. Dist. Ct. Idaho 2022) ("*Eden's Gate*") the court found that there was no "stated 'blanket' state-wide legislative policy setting forth a preference for the use of surface water over unappropriated ground water in the context of an application to appropriate ground water." *Eden's Gate* at 6-7. Following the *Eden's Gate* decision, the Department changed its practice to only require the use of

appurtenant surface water when the record demonstrated that using surface water was necessary to address the criteria of Idaho Code §42-203A(5) or § 42-222(1).<sup>1</sup>

The 2023 Idaho Legislature addressed the “surface water first” requirement by passing Senate Bill 1033, which creates Idaho Code § 42-204A. Effective July 1, 2023, Idaho Code § 42-204A requires the Department to ensure that new ground water appropriations to irrigate land with surface water rights “be conditioned to require use of available surface water as the primary irrigation supply and the use of ground water as a supplemental water supply when surface water is not available.” Idaho Code § 42-204A(1).

### **Determining Whether Surface Water is Available**

Idaho Code § 42-204A(2) requires the Department, upon receiving an application to appropriate ground water for irrigation purposes, to determine whether surface water is available for the proposed irrigation use. Surface water is available if the proposed place of use has “appurtenant surface water rights for irrigation purposes” or if the proposed place of use is “entitled to distribution of surface water from . . . a water delivery entity . . . capable of delivering water to the land.” Idaho Code § 42-204A(2). Since the statute addresses appurtenant surface water rights separately from water distributed by a water delivery entity, the Department will consider “appurtenant surface water rights” to mean valid water rights not held by a water delivery entity, whether the rights are currently in use or not.

The first step in determining whether surface water is available will be to review the application. If the applicant states in Section 10 of the *Application for Permit* form or elsewhere on the application form or in the application materials that surface water rights are available, IDWR will accept this response as the basis for its determination that surface water is available.

If the applicant leaves Section 10 blank or states that surface water is not available for irrigation, Department staff should review water right records in the water rights database to investigate the proposed place of use for existing permitted, licensed, claimed, or decreed surface water rights. Staff should also use data and imagery in the Department’s GIS system to evaluate the proposed irrigation place of use and the surrounding area for signs of current or historic surface water use. Such signs could include evidence that the proposed place of use has been irrigated or signs of conveyance structures, such as canals and ditches.

If Department staff think surface water is or may be available, but the applicant has left Section 10 of the application blank or stated that surface water is not available, Department staff members should resolve the discrepancy. If Department staff think that individually owned surface water rights are appurtenant to the proposed place of use, the Department should

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<sup>1</sup> See the September 6, 2022, memorandum entitled “*Surface Water First*” Requirements for Water Right Approvals from Shelley W. Keen to the Water Allocation Bureau and Regional Offices.

communicate with the applicant to gather information to confirm whether surface water is available or not. If an applicant's place of use appears to be entitled to receive surface water from an irrigation district, municipal irrigation system, canal company, ditch company, association, or other water delivery entity, the Department should either:

- Send a letter or email to the water delivery entity asking whether water is available and can be delivered to the application's place of use for irrigation, or
- Ask the applicant to contact the water delivery entity to obtain its written statement regarding the availability of surface water to irrigate the proposed place of use.

Seeking information about surface water availability directly from the water delivery entity may be more expeditious. However, requiring the applicant to contact the water delivery entity promotes dialogue that could result in a revised irrigation proposal, such as the water delivery entity serving the proposed irrigation use.

Department staff should place the water delivery entity correspondence or documentation in the water right file. If surface water availability is confirmed, and if the Department concludes that all other statutory requirements have been met and a permit should be issued, the Department will condition the permit to require the use of the surface water, as described below. When the Department determines that surface water is not available, the Department may issue a permit for the diversion and use of ground water for irrigation purposes, assuming all other statutory review criteria are met.

### **Applications for Irrigation Associated with a Domestic Use**

Idaho Code § 42-204A applies to applications for "irrigation purposes." The Department often receives applications for irrigation in connection with domestic use. The Department has described the beneficial uses on these applications differently, depending on when the applications were filed, where the use was located, and whether the proposed use met the definition of domestic purposes in Idaho Code § 42-111(1). For applications proposing irrigation in connection with domestic use, the Department will apply Idaho Code § 42-204A as follows:

- In areas open to new consumptive-use appropriations, the Department's practice for multi-household (subdivision) water systems is to describe the in-house use as "domestic" and the lawn, landscaping, and garden watering as "irrigation."<sup>2</sup> In such cases, the Department shall require available surface water to be used as the primary supply for the irrigation component of the development.

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<sup>2</sup> See Application Processing Memorandum No. 22, issued in 1980: "'Domestic' has in the past been interpreted to include a variety of uses for multi-household water systems. Henceforth this term should be used to identify only the in-house culinary aspect for these systems."

- In many areas closed to new consumptive-use appropriations – such as moratorium areas and ground water management areas – the Department’s practice since the 1990s has been to process applications for new ground water rights for multiple-household (subdivision) systems, including irrigation of lawns and gardens on dwelling lots, where each domestic unit does not exceed the Idaho Code § 42-111(1)(a) limitations. Idaho Code § 42-111(1)(a) authorizes the irrigation of half an acre in connection with a domestic use.<sup>3</sup> When the Department concluded that the proposal met the Idaho Code § 42-203A(5) criteria, which in some cases necessitated mitigation for the consumptive use that would result from the proposed irrigation, the Department’s permits for these systems included the irrigation component of the proposed multiple-household (subdivision) use as part of the “domestic” beneficial use. The irrigation component of the proposal was not listed as a separate beneficial use. When the Department explicitly authorized the irrigation of subdivision dwelling lots, it did so with an approval condition like, “The irrigation occurring under this domestic use shall not exceed 1/2 acre within each platted subdivision lot upon which a home has been constructed.”<sup>4</sup> The Department listed “domestic” as the only beneficial use because the Department did not want to confuse the public by advertising applications for irrigation purposes in areas closed to new consumptive appropriations. Looking ahead, continuing to authorize irrigation of subdivision lots as part of the domestic beneficial use could result in questions about whether Idaho Code § 42-204A applies because the statute addresses applications “for irrigation purposes” and is silent about irrigation associated with domestic uses. To avoid possible confusion, beginning today the Department will no longer include irrigation as a component of a proposed subdivision’s domestic beneficial use. Instead, in closed areas where the controlling order or Department guidance states that the Department will process applications and issue permits for multiple-household (subdivision) water systems, the Department will list the irrigation use within the subdivision as a separate beneficial use, consistent with the directive in Application Processing Memorandum No. 22. When reviewing applications proposing irrigation from ground water for subdivision dwelling lots, the Department shall determine whether surface water is available. If surface water availability is confirmed, and if the Department concludes that all other statutory requirements have been met and a permit should be issued, Department shall require available surface water to be used as the primary supply for the irrigation of dwelling lots in the subdivision.

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<sup>3</sup> See, for example, Application Processing Memorandum No. 47, which addresses the Department’s practices for issuing water right permits in ground water management areas that do not have management plans:

The department will issue a water right permit for “community” domestic wells provided that each domestic unit served by the community well does not exceed the rate and volume limitations of the “domestic purposes” definition described in Section 42-111, Idaho Code and individually would be exempt from the filing of an application for permit as provided in Section 42-227, Idaho Code. Note that these approvable uses also are not limited to inhouse use.”

<sup>4</sup> For examples, see Water Right License Nos. 11-7718, 37-8850, and 61-7746.

- Some applications are for the diversion and use of ground water for a domestic use that meets the definition in Idaho Code § 42-111(1)(a) or (b). When such applications are otherwise approvable because the Idaho Code § 42-203A(5) criteria are met and the applications are not subject to a moratorium order or similar restriction, the Department will not require the use of surface water first because “irrigation of up to one-half (1/2) acre of land” is part of the “domestic” beneficial use.

### **Conditioning Ground Water Irrigation Permits**

When the Department determines that the application’s irrigation place of use has available surface water rights, the new ground water right, if approved, will be conditioned to use surface water as the primary irrigation source, to use ground water only when the surface water is not available, and to prohibit diversion of ground water if the surface water supply is intentionally discontinued or reduced.<sup>5</sup>

The Department will also condition the permit to limit the combined rate per acre and total annual maximum diversion volume to be supplied jointly by the surface water and ground water irrigation sources.<sup>6</sup>

### **Exceptions**

According to Idaho Code § 42-204A(4), there are two circumstances where the Department can elect to forego requiring the use of available surface water as the primary irrigation supply. First, the Department may choose to forego limiting a new ground water right if the identified surface water sources are not distributed by a water delivery entity and the applicant demonstrates that the use of surface water for irrigation is not necessary to protect the local public interest or to conserve water resources in the state of Idaho. For example, the appropriation of ground

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<sup>5</sup> The Department’s current approval condition for this purpose is no. 943, which states:

The right holder shall make full beneficial use of all surface water available to the right holder for irrigation of lands within the authorized place of use for this right. The right holder may divert ground water under this right to irrigate land with appurtenant surface water rights when the surface water supply is not reasonably sufficient to irrigate the place of use for this water right or is not available due to drought, curtailment by priority, or the seasonal startup and shutoff or maintenance schedule for canal company or irrigation district deliveries. The right holder shall not divert ground water for irrigation purposes under this right if use of the surface water supply is intentionally discontinued or reduced (for example abandoned, forfeited, sold, disallowed by court decree, or leased to the Water Supply Bank), or is not deliverable due to non-payment of annual assessments, without an approved transfer pursuant to Idaho Code § 42-222 or other Department approval.

<sup>6</sup> Currently, the Department uses condition no. WB7 for this purpose.

water may be more aligned with local public interest than a surface water use that adversely affects fish and wildlife, especially one that potentially dewateres a stream.

Second, according to Idaho Code § 42-204A, the Department may choose not to require the use of surface water first if the application to use ground water is “submitted in connection with a proposed or approved mitigation plan or ground water management plan that allows the diversion of ground water to irrigate land with appurtenant surface water rights.” A hypothetical example would be where ground water irrigation is approved at location A so the appurtenant storage water can be delivered to another user at location B as mitigation for injury caused by diversion of water at location C. The Department currently expects this exemption from the normal Idaho Code § 42-204A requirements to be rarely applied.