

ADMINISTRATOR'S MEMORANDUM

TO: Regional Offices
Water Allocation Bureau

FROM: Shelley Keen *SWK*

RE: Accepting Online Submittals of Applications for Permit to Appropriate Water

DATE: July 20, 2021

Purpose

Idaho Code § 42-202 requires anyone intending to establish a water right in Idaho to file an application with the Department of Water Resources ("IDWR"). Idaho Code § 42-1805(12) authorizes IDWR "[t]o receive, file, record, or retain documents of record on media other than paper." IDWR's Rules of Procedure (IDAPA 37.01.01) and Water Appropriation Rule 35 (IDAPA 37.03.08.035) establish the requirements for submitting an acceptable *Application for Permit to Appropriate the Public Waters of the State of Idaho* ("Application"). The Uniform Electronic Transactions Act ("UETA") states, at Idaho Code § 28-50-118, that "each governmental agency of this state shall determine whether, and the extent to which, it will send and accept electronic records and electronic signatures. . . ." As described below, IDWR interprets these statutes and rules to authorize the filing of an Application in digital form by means of IDWR's online application and claim software ("Online Tool").¹

Idaho Code § 42-202

Idaho Code § 42-202 does not specify that an Application must be filed on paper or on any other specific medium. It simply states that anyone desiring to establish a new water use in Idaho must "make an application to the department of water resources for a permit to make such appropriation" and sets forth the information that must be included in an Application. Idaho Code § 42-202 provides IDWR the discretion to determine the medium and format of the Application.

Idaho Code § 42-1805(12)

The 2020 Idaho Legislature passed House Bill 329 to enact Idaho Code § 42-1805(12), which grants IDWR the authority "[t]o receive, file, record, or retain documents of record on media other than paper." The statement of purpose for House Bill 329 states:

¹ Requirements for filing of an adjudication claim using the Online Tool are addressed in the Adjudication Rules (IDAPA 37.03.01) at 60.02.n and 60.02.p.

The purpose of this legislation is to give the Director of the Idaho Dept. of Water Resources explicit authority to receive, file, record, or retain documents of record on media other than paper. This legislation would enable use of digital documents, online form submissions, and other document technology to conduct the duties of the department, including long-term document storage.

The Online Tool enables IDWR to receive online form submissions for the Application process, consistent with the plain language and purpose of Idaho Code § 42-1805(12).

Rules of Procedure and Water Appropriation Rules

IDAPA 37.01.01.220 states all pleadings, such as applications and claims, shall be submitted on IDWR approved forms, if available. IDAPA 37.03.08.035.01.d states all applications shall be on the Application form. Therefore, IDWR's approved form for applying for a water right is the Application. As explained below, the Online Tool generates an Application consistent with the Rules of Procedure and the Water Appropriation Rules.

When the requisite data is input, the Online Tool digitally displays the data in text form. The display generated by the Online Tool bears the title "Application for Permit to Appropriate the Public Waters of the State of Idaho", and it contains the same information presented in the same order as the PDF Application available from IDWR's website.² The difference between the PDF version of the Application currently in use and the Online Tool version of the Application is the medium by which the Application data is submitted to IDWR. The PDF version is printed on paper and signed by the Applicant before being submitted to IDWR, which then manually enters the data into the Enterprise database. Application data in the Online Tool is submitted to IDWR in digital media form and uploaded into the Enterprise database, saving IDWR time and effort. For acquiring the necessary Application data, there is no substantive difference between a paper or PDF application and one generated in the Online Tool.

IDAPA 37.01.01.300 requires an applicant to file "[a]n original . . . of all documents" with IDWR. Dictionary.com (www.dictionary.com/browse/original, June 11, 2021) defines the noun "original" as "an original work, writing, or the like, as opposed to any copy or imitation." The Online Tool version of the Application is an original because it is initially generated within the Online Tool and is not a copy or imitation. Dictionary.com (www.dictionary.com/browse/document, June 11, 2021) defines the noun "document" to mean, among other things, "a computer data file, especially one with formatted text." The Online Tool version of the Application is a document because it is a computer data file with formatted text. Because it is both original and a document, an Application generated and submitted with the Online Tool complies with the requirements of IDAPA 37.01.01.300.

² An exception is that the PDF Application has four checkboxes in Part 2 to collect information about a representative's authorization to receive and submit information, whereas the Online Tool Application does not collect and store that information. However, the checkboxes collect information that is not required by statute or rule.

IDAPA 37.03.08.035.01.d further states that an Application must be “endorsed by the department as to the time and date received.” For Applications submitted on paper, the endorsement is accomplished by applying a date stamp to the form and by writing the date and time received and the filing fee receipt number on the form. When a user submits an Application via the Online Tool, the submission date is digitally recorded, and the Application data goes into a database specifically for online submittals. At this stage in the online submittal process, IDWR staff members review the Application data. In addition, IDWR staff members use IDWR’s Receipt Search program to determine if IDWR received the applicable filing fee. If the filing fee has been received and Application data entry standards are met, IDWR staff import the Application data into the Enterprise database. IDWR staff members then review the Application for completeness in accordance with IDAPA 37.03.08.035. If the Application data is complete and IDWR received the filing fee, IDWR staff enter into the Enterprise database a priority date corresponding to the submission date, i.e. the date the Application data was received or the date IDWR received the complete filing fee, whichever is later, as required by IDAPA 37.03.08.035.02.b.

IDAPA 37.03.08.035.02.b. also requires an Application’s priority date be established on the date when a complete application form, including the filing fee, is received “in any official office” of IDWR. One advantage of online filing is that Application data will be instantly available at all IDWR offices. For this reason, IDWR considers Application submission via the Online Tool to be submission to an official IDWR office.³

IDAPA 37.03.08.035.03 requires certain information to be submitted in connection with an Application. For example, IDAPA 37.03.08.035.03.a.i. requires an Application in the name of a corporation or partnership to include the names and addresses of its directors, officers, partners, and managing partner as applicable. In addition, Idaho Code requires certain additional information to be submitted in connection with an Application. For example, Idaho Code § 42-202(2) lists the additional information required for an Application proposing a municipal water right for reasonably anticipated future needs. An applicant must attach this information to its Application for IDWR to consider the application complete. To accomplish the required information submittals, the Online Tool provides the ability to attach digital files and images to an Application.

Idaho Code § 42-202(4) and IDAPA 37.03.08.035.03.a.xi require an applicant to include a map with an Application. In the Online Tool, the applicant digitizes the proposed point(s) of diversion and place(s) of use shapes, which can be displayed in digital map form at any scale in a Geographic Information System (“GIS”) and/or printed, as needed. The point of diversion and place of use spatial data is imported into the

³ IDWR prefers use of the Online Tool for electronic filing of applications. Because IDWR has not yet adopted a procedure for filing Applications by email, staff members should encourage applicants who want to file electronically to use the Online Tool. To establish an email submittal process for Applications in addition to the Online Tool process, IDWR will have to address the requirements of IDAPA 37.03.08.035.02.b. Which email box will constitute submittal to any office of IDWR? How will the application fee be paid? And how will the date received (priority date) be determined if the fee and Application are not submitted together? An advantage of the Online Tool is that it answers these questions. IDWR may consider email filing options in the negotiated rulemaking processes for the Rules of Procedure and the Water Appropriation Rules.

Enterprise database along with the other required Application data. IDWR considers submittal of the point of diversion and place of use spatial data to comply with Idaho Code § 42-202(4) and IDAPA 37.03.08.035.03.a.xi.

Uniform Electronic Transactions Act and Electronic Signatures

IDAPA 37.03.08.035.03.a.xii through xiv require an applicant, or an individual authorized on behalf of the applicant, to sign the application and/or submit a “power of attorney” authorized by the applicant along with the application. IDAPA 37.01.01.306 through 311 state that IDWR will accept electronically signed documents when the signatures comply with Idaho Code §§ 67-2351 through 67-2357 and IDAPA 37.01.01.306 through 311. However, the electronic signature requirements in Idaho Code §§ 67-2351 through 67-2357 and IDAPA 37.01.01.306 through 311 are antiquated and obsolete. The Idaho Legislature repealed Idaho Code §§ 67-2351 through 67-2357 in 2003, and IDWR has removed IDAPA 37.01.01.306 through 311 from the pending temporary Rules of Procedure, effective July 1, 2021.

With the electronic signature rules removed from IDWR’s Rules of Procedure, IDWR will apply the UETA, codified at Idaho Code § 28-50-101 et seq., to the signature requirements in IDAPA 37.03.08.035.03.a.xii through xiv for Applications filed using the Online Tool. Idaho Code § 28-50-118, states:

(a) Except as otherwise provided in section 28-50-112(f), Idaho Code, each governmental agency of this state shall determine whether, and the extent to which, it will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use and rely upon electronic records and electronic signatures.

(b) To the extent that a governmental agency uses electronic records and electronic signatures under subsection (a) of this section, the governmental agency, giving due consideration to security, may specify:

(1) The manner and format in which the electronic records must be created, generated, sent, communicated, received and stored and the systems established for those purposes;

(2) If electronic records must be signed by electronic means, the type of electronic signature required, the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process;

Electronic signature is defined at Idaho Code § 28-50-102(8) as: “an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”

The purpose of a signature on an Application is to confirm the identity of the person applying for a water right. In the Online Tool, the person submitting an Application “signs” the Application confirming his or her unique identity by certifying that he or she is the applicant or an authorized representative of the applicant. If the person submitting the application is an authorized representative, the person must attach power of attorney or other documentation demonstrating the legal authority to sign on behalf of the applicant. The Online Tool prompts the user to attach documentation at the end of the data entry process. If the applicant does not submit this documentation with the online application submittal, the Application is not acceptable.

The certification method of signing an Application is consistent with Idaho Code § 28-50-118, which authorizes a State agency to specify “the type of electronic signature” and “manner and format in which the electronic signature must be affixed to the electronic record”, as well as the “criteria that must be met” by “any third party” to submit a document to the agency. The certification method of signing an Application is also a “process” meeting the definition of electronic signature in Idaho Code § 28-50-102(8). Because the certification process qualifies as an electronic signature pursuant to state law, which also authorizes State agencies to specify the “manner and format” of electronic signatures, IDWR views the certification signature method in the Online Tool to be sufficient to meet the requirements of IDAPA 37.03.08.035.03.a.xii through xiv.⁴

⁴ Alternatively, the applicant or representative may print the Application from the Online Tool, apply a “pen and ink” signature, and submit the paper application to IDWR or upload a PDF of the signed signature page of the Application.