

Dear Senators BURTENSHAW, Adams, Semmelroth, and
Representatives MENDIVE, Shepherd, Burns:

The Legislative Services Office, Research and Legislation, has received the enclosed rules of the
Idaho Department of Water Resources:

IDAPA 37.03.08 - Water Appropriation Rules (ZBR Chapter Rewrite, Fee Rule) - Proposed Rule
(Docket No. 37-0308-2301).

Pursuant to Section 67-454, Idaho Code, a meeting on the enclosed rules may be called by the
cochairmen or by two (2) or more members of the subcommittee giving oral or written notice to Research
and Legislation no later than fourteen (14) days after receipt of the rules' analysis from Legislative
Services. The final date to call a meeting on the enclosed rules is no later than 11/17/2023. If a meeting is
called, the subcommittee must hold the meeting within forty-two (42) days of receipt of the rules' analysis
from Legislative Services. The final date to hold a meeting on the enclosed rules is 12/15/2023.

The germane joint subcommittee may request a statement of economic impact with respect to a
proposed rule by notifying Research and Legislation. There is no time limit on requesting this statement,
and it may be requested whether or not a meeting on the proposed rule is called or after a meeting has
been held.

To notify Research and Legislation, call 334-4854, or send a written request to the address on the
memorandum attached below.



Terri Kondeff
Director

Legislative Services Office

Idaho State Legislature

Serving Idaho's Citizen Legislature

MEMORANDUM

TO: Rules Review Subcommittee of the Senate Resources & Environment Committee and the House Resources & Conservation Committee
FROM: Deputy Division Manager - Katharine Gerrity
DATE: October 30, 2023
SUBJECT: Idaho Department of Water Resources

IDAPA 37.03.08 - Water Appropriation Rules (ZBR Chapter Rewrite, Fee Rule) - Proposed Rule (Docket No. 37-0308-2301)

Summary and Stated Reasons for the Rule

The Idaho Department of Water Resources submits notice of proposed rule at IDAPA 37.03.08 - Water Appropriation Rules. This is a zero-based regulation chapter rewrite. It is also a fee rule. According to the department, obsolete and unnecessary provisions were removed and there were modifications to existing rules regarding the processing and evaluation of applications to obtain a water right to divert and use public water in the state. The department states that the rule sets the procedures for obtaining a permit to divert and use unappropriated public waters or a permit for a reallocation of trust water within the Swan Falls Trust Water Area. The rule governs the filing and processing of applications for permit to appropriate water. The rule also establishes the collection of fee(s) to file or republish notice of an application set forth in Idaho Code §§ 42-221A and 42-221F.

Negotiated Rulemaking / Fiscal Impact

The department states that negotiated rulemaking was conducted and there is no impact to the general fund.

Statutory Authority

The rulemaking appears authorized pursuant to Section 42-1805, Idaho Code.

cc: Idaho Department of Water Resources
Megan Jenkins

*** PLEASE NOTE ***

Per the Idaho Constitution, all administrative rules may be reviewed by the Legislature during the next legislative session. The Legislature has 3 options with this rulemaking docket: **1)** Approve the docket in its entirety; **2)** Reject the docket in its entirety; or **3)** Reject the docket in part.

Paul Headlee, Deputy Director Matt Drake, Manager Keith Bybee, Manager April Renfro, Manager Norma Clark, Manager
Legislative Services Office Research & Legislation Budget & Policy Analysis Legislative Audits Information Technology

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IDAPA 37 – IDAHO DEPARTMENT OF WATER RESOURCES

37.03.08 – WATER APPROPRIATION RULES

DOCKET NO. 37-0308-2301 (ZBR CHAPTER REWRITE, FEE RULE)

NOTICE OF RULEMAKING – PROPOSED RULE

AUTHORITY: In compliance with Section § 67-5221(1), Idaho Code, notice is hereby given that this agency has initiated proposed rulemaking procedures. The action is authorized pursuant to Section § 42-1805(8), Idaho Code.

PUBLIC HEARING SCHEDULE: Public hearing(s) concerning this rulemaking will be scheduled if requested in writing by twenty-five (25) persons, a political subdivision, or an agency, not later than October 18, 2023.

The hearing site(s) will be accessible to persons with disabilities. Requests for accommodation must be made not later than five (5) days prior to the hearing, to the agency address below.

DESCRIPTIVE SUMMARY: The following is a nontechnical explanation of the substance and purpose of the proposed rulemaking:

The Idaho Department of Water Resources (IDWR) initiated this rulemaking in compliance with [Executive Order No. 2020-01](#), Zero-Based Regulation (ZBR) (EO 2020-01), issued by Governor Little on January 16, 2020. Pursuant to EO 2020-01, each rule chapter effective on June 30, 2020, must be reviewed by the promulgating agency over a five-year period. This review is being conducted according to a schedule established by the Division of Financial Management, Office of the Governor (DFM), posted at <https://adminrules.idaho.gov>. This rule chapter was scheduled for review in 2023.

With this Notice, IDWR proposes a new chapter of water appropriation rules. The new chapter is approximately 10% shorter than the existing water appropriation rule chapter due to both internal agency analysis and external stakeholder negotiation, commentary, and editing. Changes to the rule come through a combination of (a) removal of obsolete provisions (such as the reprocessing of applications and permits in the Swan Falls Trust Water Area), (b) removal of unnecessary provisions (such as the definition and use of the term “legal subdivision”), and (c) modifications to existing rules regulating the processing and evaluation of applications to obtain a water right to divert and use public water in the state of Idaho.

The development of the proposed rule text through two publicly-released preliminary rule draft iterations may be viewed at: <https://idwr.idaho.gov/legal-actions/rules/idwr-rulemaking-2023-2024/water-appropriation-rules/>. On the same website, IDWR also developed and published rulemaking support documents, which provide IDWR’s recommendations on rulemaking, rulemaking analysis, and responses to substantive comments received through the negotiated rulemaking process.

Citizens of the state of Idaho, water users, governmental agencies, and environmental groups may be interested in commenting on the proposed rule text. After consideration of public comments received in response to this Proposed Rule, IDWR will present the final rule text to the Idaho Legislature in the late fall of 2023.

FEE SUMMARY: The following is a specific description of the fee or charge imposed or increased:

IDAPA 37.03.08 sets the procedures for obtaining a permit to divert and use unappropriated public waters or a permit for a reallocation of trust water within the Swan Falls Trust Water Area. The rule governs the filing and processing of applications for permit to appropriate water. The rule also establishes the collection of fee(s) to file or republish notice of an application set forth in Idaho Code §§ 42-221A and 42-221F.

FISCAL IMPACT: The following is a specific description, if applicable, of any negative fiscal impact on the state General Fund greater than ten thousand dollars (\$10,000) during the fiscal year resulting from this rulemaking: N/A.

NEGOTIATED RULEMAKING: Pursuant to Section 67-5220(1), Idaho Code, negotiated rulemaking was conducted. The Notice of Intent to Promulgate Rules - Negotiated Rulemaking was published in the April 5, 2023, Idaho Administrative Bulletin, [Vol. 23-4, pages 70-71](#).

INCORPORATION BY REFERENCE: Pursuant to Section 67-5229(2)(a), Idaho Code, the following is a brief synopsis of why the materials cited are being incorporated by reference into this rule: N/A.

ASSISTANCE ON TECHNICAL QUESTIONS, SUBMISSION OF WRITTEN COMMENTS: For assistance on technical questions concerning the proposed rule, contact Mathew Weaver at Mathew.weaver@idwr.idaho.gov, (208) 287-4800.

Anyone may submit written comments regarding this proposed rulemaking by mail to the address below or by email to rulesinfo@idwr.idaho.gov. All written comments must be directed to the undersigned and must be delivered on or before October 25, 2023.

DATED this 1st day of September, 2023.

Mathew Weaver, Director
Idaho Department of Water Resources
322 E. Front Street
PO Box 83720
Boise, ID 83720-0098
Phone: (208) 287-4800

THE FOLLOWING IS THE PROPOSED TEXT OF FEE DOCKET NO. 37-0308-2301
(ZBR Chapter Rewrite)

37.03.08 – WATER APPROPRIATION RULES

000. LEGAL AUTHORITY ~~(RULE 0)~~.

The Director of the Idaho Department of Water Resources adopts these rules under the authority ~~provided by~~ o-Sf ~~Section 42-1805(8), Idaho Code.~~ (3-18-22)()

001. TITLE AND SCOPE ~~(RULE 1)~~.

01. Title. These rules are titled IDAPA 37.03.08, “Water Appropriation Rules.” ()

02. Scope. (3-18-22)

~~**a. Background and Purpose.** The 1985 Idaho Legislature authorized reallocation of certain hydropower water rights to new upstream beneficial uses. The reallocation is to be accomplished using statutes designed to provide for the appropriation of unappropriated public water supplemented by a public interest review of those reallocations which significantly reduce existing hydropower generation. These rules provide set the procedures for obtaining the right a permit to divert and use unappropriated public waters as well as water previously appropriated for hydropower use which has been placed in or a permit for reallocation of trust with the State of Idaho and is subject to reallocation water within the Swan Falls Trust Water Area. Guidelines are provided for These rules govern the filing and processing of applications, and criteria are established for determining the actions to be taken by the Director for permits to appropriate water pending on or filed after the adoption of these rules. (3-18-22)()~~

~~**b. Scope and Applicability.** These rules are applicable to appropriations from all sources of unappropriated public water in the state of Idaho under the authority of Chapter 2, Title 42, Idaho Code. Sources of public water include rivers, streams, springs, lakes and groundwater. The rules are also applicable to the reallocation~~

~~of hydropower water rights held in trust by the state of Idaho. The rules are applicable to all applications to appropriate water filed with the Department of Water Resources prior to the effective date of these rules upon which an action to approve or deny the application is pending and to all applications filed subsequent to adoption of the rules and regulations. In addition, the rules are applicable to existing permits to appropriate water required to be reviewed under the provisions of Section 42-203D, Idaho Code.~~ (3-18-22)

002. -- 009. (RESERVED)

010. DEFINITIONS ~~(RULE 10).~~

~~Unless the context otherwise requires, the following definitions govern these rules:~~ The terms “consumptive use,” “digital boundary,” “local public interest,” “municipality,” “municipal provider,” “municipal purposes,” “planning horizon,” “reasonably anticipated future needs,” and “service area” have the meaning given for those terms in Section 42-202B, Idaho Code. The terms “ground water” and “low temperature geothermal resource” have the meaning given for those terms in Section 42-230, Idaho Code. The term “critical ground water area” has the meaning given for that term in Section 42-233a, Idaho Code. (3-18-22)()

01. **Acre-Foot (A~~F~~af).** A volume of water sufficient to cover one (1) acre of land one (1) foot deep and is equal to ~~forty-three thousand~~ hundred twenty-five thousand, eight hundred ~~sixty~~ (43,560) cubic feet fifty (325,850) gallons. (3-18-22)()

~~02. **Advertisement.** The action taken by the Director to provide notice, usually by publication of a legal notice in one (1) or more newspapers, of a proposed appropriation or other notice required in administration of his duties and responsibilities.~~ (3-18-22)

~~03. **Applicant.** The person, corporation, association, firm, governmental entity or agency, or other entity, or the holder of a permit being reprocessed pursuant to Section 42-203D, Idaho Code, who initiates an appropriation of water or related applies to divert and beneficially use public waters ~~matter for the Director's consideration.~~ (3-18-22)()~~

~~04. **Application for Permit.** The written request to the department on forms furnished by the department proposing to appropriate the public waters or trust waters of the state~~ An application for permit to appropriate water filed with the Department. (3-18-22)()

~~05. **Board.** The Idaho Water Resource Board.~~ ()

~~06. **Beneficial Use.** One (1) or more of the recognized beneficial uses of water including but not limited to, domestic, municipal, irrigation, hydropower generation, industrial, commercial, recreation, stockwatering and fish propagation uses for which permits to appropriate water can be issued as well as other uses which provide a benefit to the user of the water as determined by the Director. Industrial use as used for purposes of these rules includes, but is not limited to, manufacturing, mining and processing uses of water.~~ (3-18-22)

~~07. **Cubic Foot Per Second (CFS~~cs~~cfs).** A rate of flow approximately equal to four hundred forty-eight and eight-tenths (448.8) gallons per minute and also equals fifty (50) Idaho miner's inches.~~ (3-18-22)()

~~08. **DCMI.** An acronym for domestic, commercial, municipal and industrial. In these rules it designates certain classes of these uses presumed to satisfy public interest requirements. Domestic use, for purposes of this definition, is water for one or more households and water used for all other purposes including irrigation of a residential lot in connection with each of the households where the diversion to each household does not exceed thirteen thousand (13,000) gallons per day. Also for purposes of this definition, commercial, municipal and industrial uses are any such uses which do not deplete the system containing the trust water more than two (2) acre feet per day.~~ (3-18-22)

~~09. **Department.** The Idaho Department of Water Resources.~~ ()

~~10. **Director.** The Director of the Idaho Department of Water Resources.~~ Per Section 42-1701(3), Idaho Code, the Director may delegate authority to perform duties imposed upon the Director by law, including duties described herein, to a Department employee. (3-18-22)()

08. Generally Described Place of Use. A place of use authorized by an existing water right or permit pursuant to Sections 42-202, 42-219, 42-222, or 42-1411, Idaho Code, consisting of a general area or boundary within which water diverted under the water right or permit is used. ()

11. Legal Subdivision. A tract of land described by the government land survey and usually is described by government lot or quarter-quarter, section, township and range. A lot and block of a subdivision plat recorded with the county recorder may be used in addition to the quarter-quarter, section, township and range description. (3-18-22)

09. Idaho State Water Plan. The current comprehensive state water plan formally adopted by the Idaho Water Resource Board pursuant to Sections 42-1734A and 42-1734B, Idaho Code. ()

10. Murphy Gage. The United States Geological Survey stream gage station (site identification number 13172500) located on the right bank of the Snake River at river mile 456.8, approximately eight point five (8.5) miles east-northeast of Murphy, Idaho and zero point nine (0.9) miles downstream from the Swan Falls power plant at latitude 43° 15' 17.33" N, longitude 116° 23' 26.30" W, North American Datum of 1983, in the NW ¼ of the NW ¼ of Section 18, T.2S., R.1E., Boise Meridian, Hydrologic Unit 17050103. ()

121. Permit or Water Right Permit. The water right document issued by the Director authorizing the diversion and use of unappropriated public waters of the state or water held in or reallocated trust by the state water. (3-18-22)()

132. Priority, or Priority of Appropriation, or Priority Date. The date of appropriation established in the development of a water right. The priority of a water right for public water or trust water is used to determine the order of water delivery from a source during times of shortage. The earlier or prior date being the better right, when an application is filed in acceptable form, including the applicable filing fee, unless a later date is set in accordance with applicable law. (3-18-22)()

143. Project Works. A general term which that includes diversion works, conveyance works infrastructure, and any devices which may be used to apply the water to the intended use. Improvements which have been made as a result of application of water, such as land preparation for cultivation, are not a part of the project works. (3-18-22)()

15. Single Family Domestic Purposes. Water for household use or livestock and water used for all other purposes including irrigation of up to one half (1/2) acre of land in connection with said household where total use is not in excess of thirteen thousand (13,000) gallons per day. (3-18-22)

14. Public Interest. The interests that the people of the state of Idaho have in the effects of a proposed reallocation of trust water pursuant to Section 42-203C(2), Idaho Code. For the definition of "local public interest," see Section 42-202B, Idaho Code. ()

15. Reallocation of Trust Water. Appropriation of trust water for a use other than hydropower generation to the extent the water rights held in trust are subordinated to permits issued for such other uses of water pursuant to Section 42-203C, Idaho Code. ()

16. Subordinated Water Right. A water right used for hydropower generation purposes that is subject to diminishment or depletion without compensation by upstream water rights which are initiated later in time and which are for a purpose other than hydropower generation purposes. (3-18-22)()

17. Swan Falls Trust Water Area. The reach of the Snake River extending downstream from Milner Dam (located in Sections 28 and 29, Township 10 South, Range 21 East, Boise Meridian) to Swan Falls Dam (located in Section 18, Township 2 South, Range 1 East, Boise Meridian) and all surface and ground water sources tributary to that reach of the Snake River. The area within which ground water is presently designated tributary to the reach of the Snake River extending downstream from Milner Dam to Swan Falls Dam is depicted in APPENDIX A. The Swan Falls Trust Water Area excludes any reach of the Snake River upstream of Milner Dam, any surface or ground water tributary to the Snake River upstream of Milner Dam, the Snake River downstream of Swan Falls Dam, and any

surface or ground water tributary to the Snake River downstream of Swan Falls Dam. ()

178. Trust Water. ~~That portion of an unsubordinated water right used~~ Water in excess of the state established minimum stream flow at the Murphy Gage that was originally appropriated for hydropower generation purposes ~~which is in excess of a minimum stream flow established pursuant to the water rights now held in trust by the state action either with agreement of the holder of the~~ of Idaho and that is made available for reallocation to uses other than hydropower ~~right as provided by~~ generation to the extent the water rights held in trust are subordinated to permits issued for such other uses pursuant to Section 42-203B(5)C, Idaho Code ~~or without an agreement as provided by Section 42-203B(3), Idaho Code.~~ (3-18-22)()

189. Unappropriated Water. The public waters of the state of Idaho in streams, rivers, lakes, springs, ~~or other natural surface water bodies,~~ ground water ~~in excess of that,~~ or low temperature geothermal resources exceeding the amount necessary to satisfy ~~prior existing water~~ rights ~~including prior rights reserved by federal law.~~ (3-18-22)()

20. Water Right Held in Trust. A water right used for hydropower generation purposes that is in excess of a minimum stream flow established by state action and is held in trust by the state of Idaho pursuant to Subsections (2) or (3) of Section 42-203B, Idaho Code. The water rights held in trust for the Swan Falls Trust Water Area are numbered 02-02001A, 02-02001B, 02-02032B, 02-02036, 02-02056, 02-02057, 02-02059, 02-02060, 02-02064, 02-02065, 02-04000B, 02-04001B, 02-10135, 36-02013, 36-02018, 36-02026, 37-02128, 37-02471, 37-02472, 37-20709, and 37-20710. ()

011. -- 024. (RESERVED)

025. GENERAL DESCRIPTION OF THE PROCEDURE ~~TO BE USED FOR ALLOCATION (RULE 25)~~ APPLICATION REVIEW.

01. Applications to Appropriate Unappropriated Water ~~and Water Held in Trust.~~ Applications The Department will process an application to appropriate unappropriated public waters ~~and water held in trust as provided by Section 42-203B(3), Idaho Code, under Section 040, and will be evaluated the application under Subsection 045.01, using the criteria of Section 42-203A(5), Idaho Code, ~~which requires an assessment to be made of the impact of the proposed use on water availability for existing water rights, the adequacy of the water supply for the proposed use, whether the application is filed for speculative purposes, the financial ability of the applicant to complete the project, and the effect of the proposed use on the local public interest~~ and, for a low temperature geothermal resource, the criteria of Section 42-233, Idaho Code. (3-18-22)()~~

02. Applications to Appropriate Water from ~~Sources Held by State in the Swan Falls Trust Water Area.~~ The Department will process an application to appropriate water from ~~sources on which the state holds water in trust, pursuant to Section 203B(5), Idaho Code,~~ will be processed in a three-step analysis. Evaluation will consider the purposes of “trust water” established in Section 42-203B, Idaho Code Swan Falls Trust Water Area under Section 040 and will evaluate the application as follows:- (3-18-22)()

a. First, ~~the proposed use must be evaluated using the procedures and~~ the Director will evaluate the application under Subsection 045.01 using the criteria of Section 42-203A(5), Idaho Code. ()

i. If the application is seeking to appropriate unappropriated water within the Swan Falls Trust Water Area rather than a reallocation of trust water and it satisfies all criteria of Section 42-203A(5), Idaho Code, ~~are satisfied,~~ the Director may approve the application ~~may be approved~~ for unappropriated water. An application for unappropriated water within the Swan Falls Trust Water Area must demonstrate the public waters sought for appropriation exceed the amount necessary to satisfy all existing water rights, including the water rights held in trust. ()

ii. If the application does not satisfy the criteria of Section 42-203A(5) ~~(b, c, d, and e) through (g),~~ Idaho Code, or is found to reduce the water available to an existing water rights other than ~~those a water right~~ held in trust ~~by the state,~~ the Director may deny the application ~~will be denied.~~ ()

iii. If the application satisfies all criteria of Section 42-203A(5), Idaho Code, except ~~Section 42-~~

~~203A(5)a, Idaho Code, but it is found to reduce the amount of water available to a water right held in trust by the state, the application will be reviewed under criteria of Section 42-203C, Idaho Code it is seeking a reallocation of trust water and the Director will review the application under Paragraph 025.02.b. (3-18-22)()~~

~~b. Second, Section 42-203C, Idaho Code, requires a determination of whether the proposed use will significantly reduce, individually or cumulatively with existing uses and other uses reasonably likely to exist within twelve months of the proposed use, the amount of if the application is seeking a reallocation of trust water available to the holder of the Director will evaluate the application under Subsection 045.02 to determine whether it will cause a significant reduction to a water right used for power production that is defined by agreement held in trust pursuant to subsection (5) of Section 42-203C(1), Idaho Code (hereinafter termed "significant reduction"). ()~~

~~i. If a the application will not cause a significant reduction will not occur to a water right held in trust pursuant to Section 42-203C(1), Idaho Code, the Director may approve the application may be approved without an additional evaluation of the public interest criteria of Section 42-203C(2), Idaho Code. ()~~

~~ii. If the application will cause a significant reduction to a water right held in trust pursuant to Section 42-203C(1), Idaho Code, the Director will review the application under Paragraph 025.02.c. (3-18-22)()~~

~~c. Third, based upon a finding of if the application is seeking a reallocation of trust water and will cause a significant reduction to a water right held in trust, the Director will evaluate the application under Subsection 045.03 to determine if the proposed use will be evaluated reduction is in terms of the public interest criteria of pursuant to Section 42-203C(2), Idaho Code. (3-18-22)()~~

~~i. If the application is in the public interest, the Director may approve the application. ()~~

~~ii. If the application is not in the public interest, the Director may deny the application. ()~~

~~026.—029. (RESERVED)~~

~~030. LOCATION AND NATURE OF TRUST WATER (RULE 30):~~

~~01. Snake River Water Rights Agreement. The legislation ratifying the Snake River water rights agreement between the state of Idaho and Idaho Power Company places in trust a part of the flows available to Idaho Power Company under its hydropower water rights in the Snake River Basin between Swan Falls Dam and Milner Dam. The flows subject to the trust water provisions and reallocation under Section 42-203C(2), Idaho Code, are as follows: (3-18-22)~~

~~a. Trust water flows under the Snake River water rights agreement are located in the Snake River between Swan Falls Dam located in Section 18, Township 2 South, Range 1 East, Boise Meridian (B.M.) and Milner Dam located in Sections 28 and 29, Township 10 South, Range 21 East, Boise Meridian (B.M.) and all surface and groundwater sources tributary to the Snake River in that reach. (3-18-22)~~

~~b. Surface water and groundwater tributary to the Snake River upstream from Milner Dam is not trust water. After giving notice and considering public comment, the Director will designate the area in which groundwater is presumed to be tributary to the Snake River upstream from Milner Dam. Modification or changes in the designated boundary may be made only after providing notice and considering public comment. The area presently designated as tributary to the Snake River in the Milner Dam to Swan Falls Dam reach is appended to these rules (See Attachment A in APPENDIX A located at the end of this chapter), for information purposes only. (3-18-22)~~

~~e. Trust water flows under the Snake River water rights agreement are those occurring in the Snake River and tributaries in the geographic area designated in Subsection 030.01.a. that exceed the established minimum stream flows but are less than the water rights for hydropower generating facilities in the Swan Falls Dam to Milner Dam reach of Snake River, to the extent such rights were unsubordinated prior to the Snake River water rights agreement. Minimum average daily flows have been established by action of the Board and legislature at the U.S. Geological Survey gauging station located near Murphy (Section 35, Township 1 South, Range 1 West B.M.) in the amount of three thousand nine hundred (3900) cfs from April 1 to October 31 and five thousand six hundred (5600) cfs from November 1 to March 31, and at Milner gauging station located in Section 29, Township 10 South, Range 21~~

~~East, B.M. in the amount of zero (0) cfs from January 1 to December 31. (3-18-22)~~

~~**02. Trust Water Created by State Action.** Section 42-203B(3), Idaho Code, provides that trust water can be created by state action establishing a minimum flow without an agreement with the holder of the hydropower water right. Allocation of trust water so established will be pursuant to state law except the criteria of Section 42-203C, Idaho Code, will not be considered. (3-18-22)~~

~~**03. Sources of Public Water Not Trust Water.** The following sources of public water are not trust water and are not subject to the public interest provisions of Section 42-203C, Idaho Code: (3-18-22)~~

~~**a.** Sources or tributaries to sources upon which no hydropower generating facilities are located downstream within the state of Idaho. (3-18-22)~~

~~**b.** Sources or tributaries to sources which have a state hydropower water right permit or license or Federal Energy Regulatory Commission license which have not been subordinated, and the state of Idaho has not entered into an agreement with the holder of the hydropower water right pursuant to Section 42-203B(2), Idaho Code, and the State of Idaho has not established a minimum stream flow for purposes of protecting hydropower generation. (3-18-22)~~

~~**c.** Sources or tributaries to sources for which a state hydropower water right permit or license, or the Federal Energy Regulatory Commission license included a subordination condition. Such flows are considered to be public waters subject to appropriation under the provisions of Section 42-203A, Idaho Code. (3-18-22)~~

~~**d.** Flows in excess of established rights including rights used for hydropower purposes. Such flows are unappropriated waters subject to allocation under Section 42-203A, Idaho Code. (3-18-22)~~

~~**e.** Flows in the Snake River upstream from Milner Dam and all surface and groundwater tributaries to that reach. Such flows are subject to allocation under Section 42-203A, Idaho Code, without consideration of water rights existing downstream from Milner Dam (Reference: 42-203B(2), Idaho Code). (3-18-22)~~

~~03126. -- 034. (RESERVED)~~

035. APPLICATION REQUIREMENTS (RULE 35).

01. General Provisions. ()

~~**a.** No person shall commence the construction of any project works or commence the diversion of the public water or trust water of the state of Idaho from any source without first having filed an application for permit to appropriate the water or other appropriate form with the department and received approval from the Director, unless exempted by these rules or by statute. (3-18-22)~~

~~**b.** Any person proposing to commence a diversion of the public water or the trust water of the state of Idaho from a groundwater source for single family domestic purposes is exempt from the application and permit requirements of Subsection 035.01.a. (3-18-22)~~

~~**c.** Any person watering livestock directly from a natural stream or natural lake without the use of a constructed diversion works is exempt from Subsection 035.01.a. (3-18-22)~~

~~**da.** All applications for permit to appropriate public water or trust water of the state of Idaho shall An application must be filed: ()~~

~~**i.** On the Department form provided by the department en titled "Application for Permit to Appropriate the Public Waters of the State of Idaho," and include all necessary information as described in with any application attachments: ()~~

~~**ii.** In accordance with IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources," Section 053, either on paper, digitally in PDF format, or through the Department's online filing process;~~

- ()
- iii. With the applicable filing fee prescribed in Section 42-221A, Idaho Code; and ()
- iv. With all necessary information under Subsection 035.03. An application for permit that is not complete as described in ()
- b. The filing fee in Section 42-221A, Idaho Code, is based on the total rate (in cfs) or the total storage volume (in af) to be appropriated. Whenever the application diversion rate and storage volume elements lead to a different filing fee, the higher amount is the applicable filing fee. ()
- c. The Department will determine whether an application is acceptable for filing under Subsection 035.03 or if it requires clarification or correction. ()
- d. When an application is not acceptable for filing under Subsection 035.03, the Department will not be accepted for filing and will be returned along with any accept the application and will proceed as directed in Section 42-204, Idaho Code. Filing fees submitted for an unacceptable application will be refunded to the person submitting the application applicant if the application is not timely clarified or corrected. No An unacceptable application does not establish a priority will be established by an incomplete application date. Applications meeting the requirements of ()
- e. When an application is accepted for filing but requires clarification or correction of the information required by Subsection 035.03, the Department will be accepted for filing and will be endorsed by the department as to the time and date received. The acceptability of applications requiring clarification or corrections shall be determined by the Director proceed as directed in Section 42-204, Idaho Code. (3-18-22)()
- e. The department will correspond with the applicant concerning applications which have been accepted for filing by the department which require clarification or correction of the information required by Subsection 035.03. If the additional or corrected information is supplied after thirty (30) days, the priority date of the application will be determined by the date the additional or corrected information is received by the department unless the applicant has requested within the thirty (30) day period additional time to provide the information, has shown good reasons for needing additional time, and the Director has granted additional time. (3-18-22)
- f. Failure to submit the additional or corrected information is cause for the Director to void the department's records of the application. (3-18-22)
- 02. Effect of an Application.** ()
- a. Any application that seeks to appropriate water from a source upon which the state holds trust water shall be considered an application for appropriation of unappropriated water. If the Director determines unappropriated water is not available, the application, if otherwise approvable, will be reviewed for compliance with provisions of Section 42-203C, Idaho Code. (3-18-22)
- ba. The priority date of an application for unappropriated or trust water is established as of the time and date the Department receives the application is received in complete a form along acceptable for filing with the statutory filing fee in any official office of the department. The priority date of the application remains fixed unless changed by an action of the Director in accordance with applicable law. (3-18-22)()
- eb. An application for permit to appropriate water is not a water right and does not authorize diversion or use of water until approved by the Director in accordance with statutes the laws in effect at the time the application is approved. (3-18-22)()
- dc. An applicant's interest in an application for permit to appropriate water is personal property. An assignment of applicant may convey (assign) its interest in an application to another party or entity. The person or entity to whom the application is conveyed must include evidence satisfactory to notify the Director that Department of the application was not filed for speculative purposes assignment, in writing, within thirty (30) days after the assignment and notify other parties in the contested case pursuant to IDAPA 37.01.01, "Rules of Procedure of the

Idaho Department of Water Resources,” Section 202. (3-18-22)()

03. Requirements for Applications ~~to Be~~ Acceptable for Filing. (3-18-22)()

~~a.~~ The following information shall be shown on a ~~An application is acceptable for filing if it is filed in a manner stated in Paragraph 035.01.a. and includes the following information: for permit form and submitted together with the statutory fee to an office of the department before the application for permit may be accepted for filing by the department.~~ (3-18-22)()

~~ia.~~ The Applicant’s name and post office mailing address of the applicant shall be listed. ()

~~i.~~ If the application applicant is in the name of a corporation, also include the names and addresses of its all directors and officers shall be provided. ()

~~ii.~~ If the application applicant is filed by or on behalf of a partnership, limited liability company, or joint venture, the application shall provide also include the names and addresses of all partners or members and designate the name of the managing partner or member, if any. (3-18-22)()

~~ib.~~ The name of the Source of water source sought to be appropriated shall be listed. ()

~~i.~~ Identify only one (1) water source unless the application is for a single interconnected system that will divert water from more than one (1) source. ()

~~ii.~~ For a surface water sources, the source of water shall be identified by include the official geographic name listed on the U.S. United States Geological Survey (USGS) Quadrangle map. If the surface water source has is not been named on the USGS Quadrangle map, it can be described describe it as an unnamed water body, such as “unnamed stream.” but For surface water sources, also identify the system first named stream or river to which it the source is tributary shall be identified. If the water source sinks into the ground prior to reaching a stream named on the USGS Quadrangle map, describe the “tributary to” stream as “sinks.” If the water source flows into a stream named on the USGS Quadrangle map for part of the year and sinks into the ground for the other part of the year, identify the “tributary to” stream as the named stream on the USGS Quadrangle map. ()

~~iii.~~ For groundwater sources a water source under the ground surface, identify the source shall be listed as “ground water.” Only one source shall be listed on an application unless the application is for a single system which will have more than one source. (3-18-22)()

~~iv.~~ For a low temperature geothermal resource, state how the source will be used primarily for its heat value and secondarily for its value as water or how the use qualifies for an exemption pursuant to Section 42-233(1), Idaho Code. ()

~~v.~~ For an application within the Swan Falls Trust Water Area, state if the application is seeking unappropriated water or a reallocation of trust water. ()

~~ic.~~ The Legal description of the point of diversion and place of use shall be listed. ()

~~i.~~ Describe the location of the point(s) of diversion and the place of use shall be described to the nearest forty (40) acre subdivision or U.S. United States Government Lot of the Public Land Survey System. The location of springs shall be described to the nearest ten (10) acre tract. ()

~~ii.~~ Subdivision names, lot and block numbers, and any name in local common usage for the point of diversion, or place of use shall may be included in the comments section of the application form. ()

~~iii.~~ If irrigation is listed as a purpose of use is proposed, state the number of acres to be irrigated to the nearest whole acre in each forty (40) acre subdivision of the place of use shall be listed. For an application proposing irrigation of less than ten (10) acres, acreage shall be shown to the nearest one-tenth (0.1) acre. The number of acres per forty (40) acre subdivision is not required when the place of use is a generally described place of use for an

existing water right or permit. If the proposed place of use is a generally described place of use with an established digital boundary authorized by a water right or permit, state the name of the generally described place of use, list the water right number serving the generally described place of use, attach a map depicting the generally described place of use boundary, and state the total number of acres to be irrigated. (3-18-22)()

iv. If the application proposes water use for municipal purposes or fire protection by a municipal provider within a service area, the service area need not be described by legal description. Describe the service area in terms sufficient to identify the general location where water will be used and attach a map depicting the service area. ()

iv.d. The quantity of water to be diverted shall be listed as a ()

i. Include the rate of flow in cubic feet per second cfs and/ or as a the volume of water to be stored in acre feet af per year for each purpose of beneficial use requested proposed, using values with a maximum of three (3) significant figures with no more precision than hundredths for rate and tenths for volume. (3-18-22)()

vii. Impoundment (storage) applications shall show For an application to store water, the maximum acre feet requirement af per year which shall may not exceed the storage facility capacity of the impoundment structure unless the application describes includes a plan of operation for filling the reservoir facility more than once per year. The refill plan may include refills for seepage, evaporation, use from storage, and other purposes the applicant intends to replace in the storage facility throughout the year. (3-18-22)()

viii. Every For an application to store water in an off-stream storage impoundment application shall show facility include a maximum rate of diversion to storage as well as and the total storage volume. (3-18-22)()

vii.e. The nature of the proposed beneficial Beneficial use or uses of the water shall be listed. ()

i. While the purpose may be described Describe the proposed use of water. When a narrative or other application material describes details of the proposed use, the description used in the purpose of use field may be in general terms such as irrigation, industrial, or municipal, a description sufficient to identify the proposed use or uses of the water shall also be included. (3-18-22)()

ii. For a municipal purposes application, attach a complete "Municipal Water Right Application Checklist." The "Municipal Water Right Application Checklist" is a form available on the Department's website or from the Department upon request. ()

iii. For a municipal purposes application that proposes to appropriate water for reasonably anticipated future needs, include justification for the planning horizon, the anticipated service area at the end of the planning horizon, the anticipated population within the anticipated service area at the end of the planning horizon, and the anticipated water demand within the anticipated service area at the end of the planning horizon. Also include a gap analysis showing the extent to which an existing water right will not be sufficient to meet the anticipated water demand at the end of the planning horizon. ()

iv. For a municipal purposes application that does not propose to appropriate water for reasonably anticipated future needs, include a water requirement narrative with a map of the service area, current water needs, water needs after five (5) years, and any existing plan for conveying ownership of the water right to a subdivision homeowner's association or entity other than individual land parcel owners. ()

v. For an application proposing multi-home domestic use where the applicant intends to convey a portion of the place of use land to an individual parcel or lot owner, describe the applicant's plan, if any, to keep the permit in single ownership by conveying the permit to a homeowner's association, water system operator, or other entity prior to conveying an individual parcel or lot with an appurtenant portion of the permit. ()

viii.f. The period of each year during which water will be diverted, stored and beneficially used shall be listed use. ()

- i. A period of use must be listed for each beneficial use proposed in the application. ()
- ii. The period of use for irrigation purposes shall use, the period must coincide with the annual periods season of use shown in Figure 1 in APPENDIX B (located at the end of this chapter), unless it can be shown to the satisfaction of the Director established by the Department. The Department established irrigation season of use is available on the Department's website or from the Department upon request. If a longer season of use is proposed, the application must justify that a different period the longer season of use is necessary. (3-18-22)()
- ix.g. The proposed method of diversion, conveyance system and system for distributing and using the water shall be described Description of the project works. (3-18-22)()
- h. Any other water right used at the place of use for the same purpose. Include the water right number or name of the delivery organization, such as a municipal provider, canal company, irrigation district, or other delivery entity that supplies water for the proposed use at the proposed place of use. Also state if the applicant is entitled to distribution of water from a water delivery entity, but the entity's distribution system is not capable of delivering water to the proposed place of use. ()
- i. Ownership or other legal access to the point of diversion, place of use, and conveyance system. If a person or entity other than the applicant owns the land at the point of diversion, place of use, or where the conveyance system will be established, include a description of the arrangement enabling the applicant to access the land for the purpose proposed in the application. ()
- x.i. The period of time required for completion of the to complete project works and application of apply water to the proposed beneficial use shall be listed. This While a permit holder may request a permit development period extension pursuant to Section 42-204, Idaho Code, the period of time shall stated on an application may not exceed the time required to diligently and uninterruptedly apply the water to beneficial use and shall not exceed five (5) years unless the application proposes municipal purposes for reasonably anticipated future needs. (3-18-22)()
- xi.k. A Map or plat of sufficient scale (not less than two (2) inches equal to one (1) mile) to show the proposed project proposed shall be included. The map or plat shall agree with the legal descriptions and other information shown on the application. (3-18-22)()
- xii.l. The application form shall be signed by the applicant listed on the application Applicant's signature or evidence must be submitted to show that the signatory has authority to sign the application on behalf of the applicant. ()
- i. For an application in more than one (1) name shall be signed by, each applicant must sign the application unless the names are joined by "or" or "and/or" connects the applicant names. (3-18-22)()
- xiii.i. Applications For an application by corporations, companies or municipalities a corporation, company, municipality, governmental entity or organization, or other organizations shall be signed organization, include the signature and title of by an officer of the corporation or company or an elected official of the municipality or an individual authorized by the governmental entity or agency or other organization to sign the application. The signator's title shall be shown with the signature. Alternatively, the application may be signed by an authorized agent of the applicant in accordance with Subparagraph 035.03.l.iii. (3-18-22)()
- xiv.iii. Applications may be signed by a person having a current "If the signatory is an authorized agent of the applicant, include a power of attorney" or other documentation demonstrating the signatory has authority to sign on behalf of authorized by the applicant. A copy of the "If the signatory is a licensed attorney, power of attorney" shall be included with the application or other documentation is not required. (3-18-22)()
- xv. Applications to appropriate water in connection with Carey Act or Desert Land Entry proposals shall include evidence that appropriate applications have been filed for the lands involved in the proposed project. (3-18-22)
- xvi. The application form shall be accompanied with a fee in the amount required by Section 42-221A;

Idaho Code: (3-18-22)

04. Amended Applications. ()

a. ~~Applications for permit shall be amended whenever significant changes~~An applicant or the applicant's agent must amend an application if the applicant intends to change the place purpose of use, period or nature of the intended use, method or location of diversion or proposed use of the water amount of diversion, point of diversion, place of use, or make other substantial changes, from that shown on the pending application are intended. An application shall be amended if the proposed change will result in a greater rate of diversion or depletion (see Subsection 035.04.e.), if the point of diversion, place of use, or point of discharge of the return flow are to be altered, if the period of the year that water will be used is to be changed, or if the nature of the use is to be changed. The Department may clarify a source or tributary name or the irrigation period of use that do not meet Paragraphs 035.03.b. and 035.03.f. requirements by documenting the official record without requiring the applicant to amend the application. (3-18-22)()

b. An applicant or the applicant's agent may amend an application ~~can be amended~~ to clarify the name of the source of water but may not ~~be amended~~ amend an application to change the source of water. (3-18-22)()

c. An applicant or the applicant's agent may not amend a municipal purposes application not originally seeking water for reasonably anticipated future needs to seek water for reasonably anticipated future needs. ()

d. An amendment ~~which that~~ increases the rate of diversion, increases the volume of water diverted per year ~~or the volume of water depleted~~, lengthens the period of use, or adds an additional ~~purpose of~~ beneficial use ~~shall will~~ result in the Department changing the priority ~~of the application for permit being changed date~~ to the date the Department received the amended application ~~is received by the department.~~ (3-18-22)()

e. An ~~application for permit~~ applicant or the applicant's agent may ~~be amended~~ amend an application by: ()

i. ~~endorsement by the applicant or his agent~~Striking each item to be changed on the original application ~~for permit form which endorsement shall be initialed and dated, and initialing and dating each change;~~ ()

ii. If the changes required to the information on the application are, in the judgment of the Director, substantial enough to cause confusion in interpreting the application form, the Filing a new application form designated as an amended application ~~shall be submitted on a new application for permit form to be designated as an amended application; or~~ (3-18-22)()

iii. Changing an application electronically via the Department's online filing process. ()

f. An amended application shall be accompanied by the additional fee required by Section 42-221A, Idaho Code, ~~if an amendment increases~~ the total rate of diversion rate or total volume of storage volume requested ~~is increased and by the fee required by Section 42-221F, Idaho Code, for readvertising if notice of the original application has been published, the amended application must include any additional filing fee required by Section 42-221A, Idaho Code.~~ (3-18-22)()

g. If the applicant's name or mailing address changes, the applicant ~~shall~~ or the applicant's agent must notify the Department of the change in writing ~~notify the department of the change.~~ (3-18-22)()

036. DELAYED PROCESSING.

An applicant may request in writing that the Department delay commencement or interrupt processing of the applicant's application for a period not to exceed one (1) year. The Department may approve the request unless the delay will injure existing water rights, the applicant seeks the delay for speculative purposes, or the delay does not serve the interest of the people of Idaho. The Department may approve a request for delay for a shorter period or upon conditions. Upon written request, the Department may renew the authorized delay successive times as long as the delay meets the requirements stated above. ()

0376. -- 039. (RESERVED)

040. PROCESSING APPLICATIONS FOR PERMIT ~~AND REPROCESSING PERMITS (RULE 40).~~

- ~~01. General. (3-18-22)~~
- ~~a. Unprotested applications, whether for unappropriated water or trust water, will be processed using the following general steps: (3-18-22)~~
- ~~i. Advertisement and protest period; (3-18-22)~~
 - ~~ii. Department review of applications and additional information, including department field review if determined to be necessary by the Director; (3-18-22)~~
 - ~~iii. Fact finding hearing if determined to be necessary by the Director; (3-18-22)~~
 - ~~iv. Director's decision; (3-18-22)~~
 - ~~v. Section 42-1701A, Idaho Code, hearing, if requested; and (3-18-22)~~
 - ~~vi. Director's decision affirmed or modified. (3-18-22)~~
- ~~b. Protested applications, whether for unappropriated water or trust water, will be processed using the following general steps: (3-18-22)~~
- ~~i. Advertisement and protest period; (3-18-22)~~
 - ~~ii. Hearing and/or conference; (3-18-22)~~
 - ~~iii. Department review of applications, hearing record and additional information including department field review if determined to be necessary by the Director. (3-18-22)~~
 - ~~iv. Proposed decision (unless waived by parties); (3-18-22)~~
 - ~~v. Briefing or oral argument in accordance with the department's adopted Rules of Procedure. (3-18-22)~~
 - ~~vi. Director's decision accepting or modifying the proposed decision. (3-18-22)~~
- ~~c. The Director's decision rejecting and denying approval of an application for permit filed for diversion from a source previously designated as a critical groundwater area or upon which a moratorium has previously been entered may be issued without advertisement of the application. (3-18-22)~~
- ~~d. An applicant may request in writing that commencement of processing of his or her application be delayed for a period not to exceed one (1) year or that processing be interrupted for a period not to exceed six (6) months. The Director at his discretion may approve the request unless he determines that others will be injured by the delay or that the applicant seeks the delay for the purpose of speculation, or that the public interest of the people of Idaho will not be served by the delay. The Director may approve a request for delay for a shorter period of time or upon conditions, and may renew the approval upon written request. (3-18-22)~~
- 021. Public Notice Requirement. (3-18-22)()**
- a. Applications for permit which have not been advertised Publication of an application will be pursuant to Section 42-203A, Idaho Code. (3-18-22)()**
- i.b. Advertisement of applications for permit proposing a rate of For an application that propose ds**

~~diversion in excess of ten (10) cfs or less or storage of one thousand (1,000) AF or less shall comply with Section 42-203A, Idaho Code. The first required advertisement will be published on the first or third Thursday of a month when published in daily newspapers and on the first or third publishing day of the month for weekly newspapers. (3-18-22)~~

~~ii. Advertisement of applications for permit in excess of the amounts in Subsection 040.02.a.i. shall comply with Subsection 040.02.a.i. and shall also be published in a newspaper or newspapers to achieve statewide circulation. (3-18-22)~~

~~iii. Statewide circulation with respect af, the Department will accomplish statewide circulation pursuant to Section 42-203A(2), Idaho Code, ~~shall be obtained~~ by publication of a legal notice at least once each week for two (2) successive weeks in: ()~~

~~i. a newspaper, as defined in Section 60-106, Idaho Code, of general circulation in the county in which the point of diversion is located; and ()~~

~~ii. by publication of a legal notice at least once each week for two (2) successive weeks in a at least one (1) daily newspaper, as defined in Section 60-107, Idaho Code, ~~published in each of the department's four (4) administrative regions and determined by that~~ the Director ~~to be determines is~~ of general circulation within each of the department's four (4) administrative regions, within which it is published. The administrative regions of the department are identified on Figure 2 in APPENDIX C (located at the end of this chapter). The names of newspapers used for statewide publication are available from any department office. (3-18-22)()~~

~~b. Applications for permit which have been advertised. (3-18-22)~~

~~i. Notice of applications for permit for water from the Snake River between Swan Falls Dam and Milner Dam or surface and groundwater tributaries to that reach of Snake River which were advertised prior to July 1, 1985 and have been held without final action by the department due to the Swan Falls controversy shall be readvertised by the Director in accordance with Subsection 040.02.a. as appropriate to allow opportunity for protests to be entered with respect to the public interest criteria of Section 42-203C(2), Idaho Code. (3-18-22)~~

~~ii. Applications for permit from the Snake River or surface and groundwater sources upstream from Milner Dam which have been held without action due to the Swan Falls controversy may be processed without readvertisement. (3-18-22)~~

~~iii. The applicant shall pay the readvertisement fee provided in Section 42-221F, Idaho Code, prior to the readvertisement. (3-18-22)~~

~~iv. Failure to pay the readvertising fee within thirty (30) days after the applicant is notified to do so is cause for the Director to void the application. (3-18-22)~~

~~e. Notice of existing permits. (3-18-22)~~

~~i. Existing permits appropriating water held in trust by the state of Idaho issued prior to July 1, 1985, unless exempted by Subsection 040.02.c.ii. shall be subject to the review requirements of Section 42-203D, Idaho Code, and shall be readvertised in accordance with Subsection 040.02.a. as appropriate. The review is limited to the criteria described in Section 42-203C(2), Idaho Code. (3-18-22)~~

~~ii. Permits exempt from the provisions of Section 42-203D, Idaho Code, include: (3-18-22)~~

~~(1) Permits appropriating water not held in trust by the state of Idaho; (3-18-22)~~

~~(2) Permits for DCMI uses, stockwater uses and other essentially non-consumptive uses as determined by the Director; and (3-18-22)~~

~~(3) Permits for which an acceptable proof of beneficial use submittal was received by the department prior to July 1, 1985, or permits for which an acceptable proof of beneficial use was submitted after July 1, 1985, if evidence satisfactory to the Director has been received to show that the permit was fully developed prior to July 1,~~

~~1985 to the extent claimed on the proof of beneficial use.~~ (3-18-22)

c. The Department shall make an application accepted for filing available on the Department's website pursuant to Section 42-203A(3), Idaho Code. ()

d. Publication in the newspaper pursuant to Section 42-203A(2), Idaho Code, constitutes the official notice of the application. ()

~~iii.e. Holders of permits subject to the review requirement of Section 42-203D, Idaho Code, shall pay in advance, upon the request of the Director, the readvertising~~An application amended under Paragraph 035.04.a. after publication requires republication. The applicant must file the amended application with the republication fee required by Section 42-221F, Idaho Code. (3-18-22)()

f. If a moratorium order is amended or repealed allowing the Director to continue processing an application previously held without final action, the Department will republish an application that was published prior to being held for the moratorium. Before republication, the applicant must pay the republication fee required by Section 42-221F, Idaho Code. ()

~~iv.g. Failure to pay the readvertising~~a required republication fee within thirty (30) days after the applicant is notified to do so is cause for the Director to ~~cancel the permit~~void the application, unless a processing delay is approved under Section 036. (3-18-22)()

h. The Director may deny approval of an application filed for diversion of ground water in a designated critical ground water area without publication of the application if the Director believes that there is insufficient water available for the proposed water use. An application that includes a mitigation plan proposing to offset injury to existing water rights will be published prior to the Director's evaluation of the application under Subsection 045.01. ()

~~032.~~ Protests, Intervention, Hearings, and Appeals. ()

a. Protests. (3-18-22)

~~i. Protests~~Section 42-203A, Idaho Code, governs protests against ~~the application~~ approval of an application for permit or against a permit being reprocessed ~~shall comply with the requirements for pleadings as described in the department's adopted. The Department will treat a protest as a pleading filed pursuant to IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources."~~ (3-18-22)()

~~ii. Protests against the approval of an application for permit or against a permit being reprocessed will only be considered if received by the department after receipt of the application by the department and prior to the expiration of the protest period announced in the advertisement unless the protestant successfully intervenes in the proceeding.~~ (3-18-22)

b. A protest may be filed on a form supplied by the Department or in any other format that includes the same information as the Department's form. ()

c. If a single protest names more than one (1) individual protestant and does not identify a representative, the Department will consider the first person listed to be the spokesperson and primary contact for service of documents for the group of individuals named as protestants. ()

~~iii.d. General statements of~~The Department will not consider a general protest (blanket protests) against appropriations an application for a particular class of use or from a particular source of water ~~will not be considered as a valid protests by the Director. A protest must identify the specific application being protested.~~ (3-18-22)()

e. The Department will not accept a protest or petition to intervene unless the protest or petition to intervene is filed with the statutory filing fee required by Section 42-221L, Idaho Code, except any subdivision of the state, as defined in Section 67-2301, Idaho Code, is exempt from paying filing fees. ()

~~bf.~~ Intervention Requests~~Petitions~~ to intervene in a ~~proceeding pending before the department shall~~ protected application matter must comply with ~~the Department's adopted~~ IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources." (3-18-22)()

~~eg.~~ Hearings~~Hearings~~ will be scheduled and held ~~in accordance with the department's adopted~~ pursuant to IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources." (3-18-22)()

~~dh.~~ Appeals~~Any final~~ A decision of the ~~Director~~ Department may be appealed ~~in accordance with~~ Section 42-1701A, Idaho Code pursuant to IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources." (3-18-22)()

043. Burden of Proof. ()

a. Burden of proof ~~is divided into~~ has two (2) parts: first, the burden of ~~coming forward with~~ producing evidence to present a prima facie case, and second, the ultimate burden of persuasion. (3-18-22)()

b. ~~The burden of coming forward with evidence is divided between the applicant and the protestant as follows~~For evaluation of Section 42-203A(5), Idaho Code, criteria for a protested application: (3-18-22)()

i. The applicant ~~shall bear~~ has the initial burden of ~~coming forward with~~ producing evidence for the evaluation of Section 42-203A(5)(a) through (d) and (f) through (g), Idaho Code, criteria (a) through (d) of and of producing evidence of which the applicant is knowledgeable for the evaluation of Section 42-203A(5)(e), Idaho Code; criteria. (3-18-22)()

ii. ~~The applicant shall bear the initial burden of coming forward with evidence for the evaluation of criterion (e) of Section 42-203A(5), Idaho Code, as to any factor affecting local public interest of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant shall bear~~ has the initial burden of ~~coming forward with~~ producing evidence of which the protestant can reasonably be expected to be more cognizant than the applicant for those factors relevant to criterion (e) of Section 42-203A(5)(e), Idaho Code, ~~of which the protestant can reasonably be expected to be more cognizant than the applicant~~ criteria. (3-18-22)()

iii. ~~The protestant shall bear the initial burden of coming forward with evidence for the evaluation of the public interest criteria of Section 42-203C(2), Idaho Code, and of demonstrating a significant reduction, except that the applicant shall provide details of the proposed design, construction, and operation of the project and directly associated operations to allow the impact of the project to be evaluated.~~ (3-18-22)

~~e-iii.~~ The applicant has the ultimate burden of persuasion ~~for the criteria~~ of Section 42-203A(5)(a) through (g), Idaho Code, and the protestant has the ultimate burden of persuasion for the criteria of Section 42-203C, Idaho Code. criteria. (3-18-22)()

c. For evaluation of Section 42-203C, Idaho Code, criteria for a protested application: ()

i. The protestant has the initial burden of producing evidence under Subsection 045.02, that the application will cause a significant reduction, except that the applicant has the initial burden of producing evidence of the proposed project design, construction, operation, and directly associated operations of which the applicant is knowledgeable or can reasonably be expected to be knowledgeable. ()

ii. The protestant has the ultimate burden of persuasion on whether the application causes a significant reduction under Subsection 045.02 and whether it meets the public interest criteria in Section 42-203C(2), Idaho Code, under Subsection 045.03. ()

d. For an ~~unprotected applications or permits to be reprocessed~~ application or an application for which all protests have been resolved, the Director will evaluate the application, any information submitted pursuant to Subsections ~~040.05-e 040.04, 045.01, 045.02, and 045.03,~~ and information in the ~~Department's~~ Department's files and records ~~of the department, and the results of any studies the department may conduct~~ to determine compliance with ~~the appropriate~~ Sections 42-203A(5) and 42-203C, Idaho Code. For an unprotected application or an application for which all protests have been resolved, the applicant has the burden of producing evidence and the ultimate burden of

~~persuasion on whether the application satisfies the applicable statutory~~ criteria. (3-18-22)()

~~e. In protested matters the Director will take official notice of information as described in the department's adopted Rules of Procedure, and will, prior to considering, circulate to the parties information from department studies and field examinations concerning the protested application or permit being reprocessed, if such information has not otherwise been made a part of the hearing record.~~ (3-18-22)

054. Additional Information Requirements. ()

~~a. The Department may require the applicant to file any of the additional information under Paragraph 040.04.c. or 040.04.d. if the official record for the application does not contain sufficient information to evaluate the applicable criteria in Section 045 and other statutory criteria. The Department will notify the applicant of the additional information required.~~ ()

~~ab. For unprotested applications and permits being reprocessed, Unless the Department extends the time for filing, the additional information required by Subsection 040.05.e. shall be submitted must be filed within thirty (30) days after the Director Department notifies the applicant that the application or permit is being reviewed for decision of the additional information requirements.~~ ()

~~i. The Director Department may extend the grant an extension of time within which to submit file the required additional information upon if the applicant files a written request by the applicant and upon a showing of good cause.~~ ()

~~ii. Failure to submit If the required additional information is not filed within the time period allowed will be cause for, including any extensions granted, the Director to Department may void an the application, or to advance the priority of a permit being reprocessed by the number of days that the information submittal is late. The Director will provide opportunity for hearing as provided in Section 42-1701A, Idaho Code.~~ (3-18-22)()

~~b. For protested applications or protested permits being reprocessed, the information required by Subsection 040.05.e. may be requested by the Director to be submitted within thirty (30) days after notification by the Director, may be made a part of the record of the hearing held to consider the protest, or may be made available in accordance with any pre-hearing discovery procedures. Failure to submit the required information within the time period allowed will be cause for the Director to void an application or to advance the priority of a permit being reprocessed by the number of days that the information submittal is late.~~ (3-18-22)

~~c. The following information shall be submitted for applications to appropriate unappropriated water or trust water and for permits being reprocessed for trust water. The additional information submittal requirements of this rule are waived for filings which seek to appropriate five (5) cfs or less or storage of five hundred acre feet (500 AF) or less and for filings seeking reallocation of trust water which the Director determines will reduce the flow of the Snake River measured at Murphy Gauge by not more than two (2) acre-feet per day. For filings proposing irrigation as a purpose of use, the additional information is required if more than two hundred (200) acres will be irrigated. However, the Director may specifically request submittal of any of the following information for any filing, as he determines necessary. Information relative to the effect on existing water rights, Section 42-203A(5)(a), Idaho Code, shall be submitted as follows For purposes of evaluating the application under Subsection 045.01, the Department may request additional information, including but not limited to the following:~~ (3-18-22)()

~~i. For applications appropriating springs or surface streams with five (5) or fewer existing users, either the identification number, or the name and address of the user, and the location of the point of diversion and nature of use for each existing water right shall be submitted.~~ (3-18-22)

~~ii. For applications appropriating groundwater, a plat shall be submitted locating the proposed well relative to all existing wells and springs and permitted wells within a one-half mile radius of the proposed well.~~ (3-18-22)

~~iii. Information shall be submitted concerning any Project design, construction, or operation techniques which, or mitigation measures that the applicant will be employed to eliminate or reduce the impact on other water rights.~~ (3-18-22)()

~~d.~~ Information relative to sufficiency of water supply, Section 42-203A(5)(b), Idaho Code, shall be submitted as follows: (3-18-22)

~~ii.~~ Information shall be submitted on the The proposed project water requirements of the proposed project, including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that water is required, and the volume of water that will be consumptively used per year. (3-18-22)()

~~iii.~~ Information shall be submitted on The quantity of water available from the source applied for, including, but not limited to, information concerning the flow rates for surface water sources available during periods of peak and average project water demand, information concerning the properties of the aquifers that from which water is to be taken from for ground water sources, and information on other sources of supply that may be used to supplement the applied for water source proposed in the application. (3-18-22)()

~~e.~~ Information relative to good faith, delay, or speculative purposes of the applicant, Section 42-203A(5)(c), Idaho Code, shall be submitted as follows: (3-18-22)

~~iv.~~ The applicant shall submit Evidence documenting an interest in the lands necessary for all project works and the place of use including, but not limited to, copies of deeds, leases, easements, or applications for rights-of-way from federal or state agencies documenting a possessory interest in the lands necessary for all project facilities and the place of use or if such interest can be obtained by well sharing agreements. In the instance the land necessary to construct and operate the proposed project is privately-owned land not in the applicant's ownership, the applicant must submit evidence documenting that the applicant has an interest in the land, has authority to exercise eminent domain proceedings the applicant must show that appropriate actions are being taken to obtain the interest, or has another arrangement with the landowner establishing an interest. In the instance of a project diverting water from or conveying water across federally owned land, the applicant must submit evidence documenting that the applicant filed the appropriate form to request or initiate access and that access is authorized or a decision is pending. ()

~~v.~~ Applicants ~~F~~For hydropower uses shall also submit information required to demonstrate, evidence demonstrating compliance with Sections 42-205 and 42-206, Idaho Code. (3-18-22)()

~~vi.~~ The applicant shall submit copies of applications Requests for other needed permits, licenses, and approvals, and The applicant must keep the ~~d~~Department apprised of the status of the applications requests and any subsequent approvals or denials. (3-18-22)()

~~f.~~ Information Relative to Financial Resources, Section 42-203A(5)(d), Idaho Code, shall be submitted as follows: (3-18-22)

~~vii.~~ The applicant shall submit a current financial statement certified to show the accuracy of the information contained therein, or a financial commitment letter along with the financial statement of the lender or other evidence Evidence to show that it is reasonably probable that financing will be available to appropriate the water and apply put it to the beneficial use proposed. (3-18-22)()

~~viii.~~ If the applicant is a governmental entity proposing to use taxing, bonding, or contracting authority to raise the funds needed to commence and pursue project construction, a proposed project construction schedule and a plan describing how the applicant intends to utilize its taxing, bonding, or contracting authority in connection with the proposed project construction schedule. ()

~~ix.~~ The applicant shall submit plans and Plans, specifications, along with and estimated construction costs for the project works. The plans shall be definite enough to allow for determination of project impacts and implications. (3-18-22)()

~~x.~~ Information Relative to Conflict with the Local Public Interest, Section 42-203A(5)(e), Idaho Code, shall be submitted as follows: The applicant shall seek comment and shall submit all letters of Letters requesting comment and any responding comment on the proposed project construction and operation effects of the construction and operation of the proposed project from the governing body of the city and/or county and/or tribal

reservation within which the point of diversion and place of use are located, ~~the Idaho Department of Fish and Game, the Idaho Department of Environmental Quality, and;~~ any irrigation district ~~or~~ canal company, or other water delivery entity within which the proposed project is located; and from other people, entities, or agencies with interests in the local area that may be affected by the proposed water use as determined by the ~~Director~~ Department. (3-18-22)(____)

xi. Design, construction, operation techniques, or mechanical equipment that will be employed to achieve efficiency in conveyance or use of water and to minimize waste. (____)

xii. Evidence demonstrating compliance with the Idaho State Water Plan. (____)

~~hd.~~ The following information relative to the Public Interest Criteria of Section 42-203C(2), Idaho Code, shall be submitted by an applicant seeking reallocation of trust water for a project which the Director determines will reduce the flow of the Snake River by more than two (2) acre feet per day. For filings proposing irrigation as a purpose of use, the additional information is required if more than two hundred (200) acres will be irrigated. The Director may request any or all of the following information for any filing seeking the reallocation of trust water. For purposes of evaluating the application under Subsections 045.02 and 045.03, the Department may request additional information including, but not limited to, the following: (3-18-22)(____)

i. A project design and estimate of cost of development shall be submitted. For applications appropriating more than twenty-five (25) cfs, or ten thousand (10,000) AF of storage, or generating more than five (5) megawatts, the information shall be prepared and submitted by a qualified engineer licensed under the provisions of Chapter 12, Title 54, Idaho Code, unless waived by the Director. The design shall be definite enough to reflect the project's impacts and implications as required in subsequent rules. (3-18-22)

ii. If the project proposes development for irrigation purposes use, information shall be submitted on the crop rotation, including acreages acres under each crop type, for lands when newly developed land. Also the kinship, if any, of the operator of the land to be irrigated by the project to the applicant; the location and acreage of other irrigated land owned, leased, or rented by the applicant; a soil survey prepared in accordance with the Natural Resources Conservation Service irrigable land classification system; a schedule for bringing into production the project land; the name, address, and number of shares held by each shareholder if the applicant is a corporation; and evidence of tax-exempt status if the applicant is a corporation so claiming. (3-18-22)(____)

iii. Information shall be submitted concerning tThe number and kinds of jobs ~~that will be~~ created or eliminated as a direct result of project development including both the construction and operating phases of the project. If jobs are seasonal, the estimated number of months per year of employment ~~shall be submitted.~~ (3-18-22)(____)

iviii. For applications or permits being reprocessed for an application that proposes appropriating more than twenty-five (25) cfs, or more than ten thousand (10,000) AF af of storage, or generating more than five (5) megawatts of power, information shall be submitted concerning the changes to community services ~~that will be~~ required during the construction and operation phases of the project including, but not limited to, changes to schools, roads, housing, public utilities, and public health and safety facilities, if any. (3-18-22)(____)

iv. Information shall be submitted concerning tThe source of energy for diverting and using water for the project, the estimated instantaneous demand and total amount of energy that will be used, the efficiency of use, and energy conservation methods. (3-18-22)(____)

vi. Information shall be submitted concerning tThe location, amount, and quality of return flow water, and any water conservation features of the ~~proposed~~ project. (3-18-22)(____)

vii. If the project proposes irrigation as a use, information shall be submitted concerning the kinship, if any, of the operator of the land to be irrigated by the project to the applicant, the location and acreage of other irrigated lands owned, leased, or rented by the applicant, the names, addresses and number of shares held by each shareholder if the applicant is a corporation, evidence of tax-exempt status if a corporation is so claiming, a soil survey prepared in accordance with the U.S. Soil Conservation Service irrigatable land classification system, and a schedule for bringing into production the project lands. (3-18-22)

vi. The availability, foreseeability, and cost of alternative energy sources to ameliorate the economic impact the proposed use will have on electric utility rates in the state of Idaho. ()

e. Unless the Director determines otherwise, information under Paragraph 040.04.c. or 040.04.d. is not required for: ()

i. An application that seeks to appropriate five (5) cfs or less, or store five hundred (500) af or less of unappropriated water. ()

ii. An application that proposes to use water from a source in the Swan Falls Trust Water Area to irrigate two hundred (200) acres or less or any other use that the Director determines will reduce the flow of the Snake River measured at the Murphy Gage by two (2) af per day or less. ()

f. Unless the Director determines otherwise, information under Paragraph 040.04.d. is required for an application that proposes to use water from a source in the Swan Falls Trust Water Area to irrigate more than two hundred (200) acres or any other use that the Director determines will reduce the flow of the Snake River measured at the Murphy Gage by more than two (2) af per day. ()

041. -- 044. (RESERVED)

045. EVALUATION CRITERIA ~~(RULE 45).~~

01. **Criteria for Evaluating All Applications to Appropriate Water.** The Director will use the following criteria in evaluating whether an application ~~to appropriate unappropriated water or trust water~~ should be approved, denied, approved for a smaller amount of water, or approved with conditions. (3-18-22)()

a. ~~Criteria for determining whether the proposed use will reduce the quantity~~ Reduction of water available under an existing water rights (injury) criteria. A proposed use will be determined to reduce the quantity of water under an existing water right ~~(i.e., injure another water right)~~ if: (3-18-22)()

i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree, ~~or valid claim,~~ or the historical amount beneficially used by the water right holder ~~under such recorded rights of such permit, license, decree, or claim,~~ whichever is less; (3-18-22)()

ii. The holder of an existing water right will be forced to an unreasonable effort or expense to divert ~~his water for an~~ existing water right. ~~Protection~~ The reasonable pumping level provisions of Section 42-226, Idaho Code, govern protection of existing ground water rights ~~are subject to reasonable pumping level provisions of Section 42-226, Idaho Code;~~ or (3-18-22)()

iii. The proposed use would make the quality of the water available ~~to the holder of~~ unusable by an existing water right ~~is made unusable for the purposes of the existing user's right, and the water cannot~~ and could not ~~be~~ restored to usable quality without unreasonable effort or expense. (3-18-22)()

iv. An application that would otherwise be denied because of injury to another water right may be approved upon conditions ~~which will that~~ mitigate losses of water ~~to the holder of~~ for an existing water right, as determined by the Director. (3-18-22)()

v. ~~The provisions of Subsection 045.01.a.v. are not intended to require compensation or mitigation for loss of flow to holders of~~ If an existing water right is subordinated ~~hydropower rights or those from which trust water is reallocated to future beneficial uses which include the application's proposed use, the existing subordinated water right cannot be injured.~~ (3-18-22)()

b. ~~Criteria for determining whether the~~ Sufficiency of water supply ~~is insufficient for the proposed use.~~ The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient ~~to make the project economically feasible (direct benefits to applicant must exceed direct costs to applicant), unless there are noneconomic factors that justify application approval. In assessing~~

~~such noneconomic factors, the Director will also consider the impact on other water rights if the project is abandoned during construction or after completion, the impact on public resource values, and the cost to local, state and federal governments of such an abandonment~~ accomplish the proposed beneficial use. (3-18-22)(____)

~~c. Criteria for determining whether the application is made in g~~ Good faith ~~criteria.~~ The ~~criteria~~ criteria requiring that the Director evaluate evaluation of whether an application is not made in good faith or whether it is made for delay or speculative purposes requires an analysis of the ~~intentions of the applicant with respect to the filing and diligent pursuit of applicant's intent to follow~~ application requirements and diligently pursue permit development. The judgment of another person's intent can only be based upon the substantive actions that encompass ~~the proposed project.~~ Speculation for ~~the purpose of~~ this rule is an intention to obtain a water right ~~permit to appropriate water~~ without the intention of applying putting the water to beneficial use with reasonable diligence. Speculation does not prevent an applicant from subsequently selling the ~~developed~~ project for a profit or from making a profit from the use of the water. An application will be found to have not been made in good faith if: (3-18-22)(____)

~~i. The applicant shall have legal access to the property~~ In the instance the land necessary to construct and operate the proposed project is privately owned and not in the applicant's ownership, has the applicant does not have an interest in the land at the time of the application filing or the authority to exercise eminent domain ~~authority to obtain such access;~~ ; or (____)

~~ii. In the instance of a project diverting water from or conveying water across~~ federally owned ~~land in state or federal ownership, has filed all applications for a right of way. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry.~~ the applicant has not filed the appropriate form to request access; and or (3-18-22)(____)

~~iii. The applicant is not in the process of obtaining other permits,~~ licenses, and approvals needed to construct and operate the project; ~~and or~~ (3-18-22)(____)

~~iiiiv. There are no obvious impediments that prevent the successful completion of the project.~~ (3-18-22)(____)

~~d. Criteria for determining whether the applicant has sufficient f~~ Financial ~~resources to complete the project~~ criteria. The Director will find an applicant does not (3-18-22)

~~i. An applicant will be found to have sufficient financial resources;~~ (3-18-22)(____)

~~i. u~~ Upon a showing that it is not reasonably probable that funding is or will be available for project construction ~~or upon a financial commitment letter acceptable to the Director. This showing is required as described in Subsection 040.05.c. or at the time the hearing provided by Subsection 040.05.c. is conducted;~~ or (3-18-22)(____)

~~ii. AIf the applicant is a governmental entity will be determined to have satisfied this requirement if it has the without~~ taxing, bonding, or contracting authority necessary to raise the funds needed to commence and pursue project construction in accordance consistent with the proposed project construction schedule. (3-18-22)(____)

~~e. Criteria for determining whether the project conflicts with the l~~ Local ~~public interest~~ criteria. The Director will consider the following, ~~along with any other factors he finds to be appropriate,~~ in determining whether the project will conflict with the local public interest: (3-18-22)(____)

~~i. The direct effect the project will have on the economy of public water resources that are of interest to people in~~ the local area directly affected by the proposed water use ~~as determined by the employment opportunities, both short and long term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains;~~ (3-18-22)

~~ii. The effect the project will have on recreation, including, but not limited to, fish and wildlife resources in the local area affected by the proposed use~~ habitat, aquatic life, recreation, aesthetic beauty,

transportation, navigation, water quality, and the effect of such use on the availability of water for alternative water uses that might be made within a reasonable time; and (3-18-22)()

ii. Whether the proposed water use is consistent with Idaho's policy of securing the maximum use and benefit from the public water resources. ()

iii. Although the Director has independent responsibility for the overall assessment and balancing of factors weighing on the local public interest, the Director will give due regard to expertise of other state and federal regulatory agencies charged with assessing individual issues under Subparagraphs 045.01.e.i. and ii., recognizing that it is not the primary job of the Department to protect all aspects of the health and welfare of Idaho's citizens and visitors. ()

iv. The Director may condition approval of an application on compliance with orders, rules, requirements, and authorizations issued or to be issued by state and federal regulatory agencies with jurisdiction over subject matter relevant to the local public interest. ()

~~iii.v. An~~ The Director will deny an application which the Director determines will conflict that conflicts with the local public interest will be denied unless the Director determines that an overriding state or national need exists for the project or that the project can be approved with conditions to resolve the local public interest conflict with the local public interest. (3-18-22)()

f. Conservation of water resources within the state of Idaho criteria. The application will be determined contrary to the conservation of water resources if: ()

i. A diversion rate greater than two hundredths (0.02) cfs per acre is proposed, but is not necessary for irrigation use; ()

ii. Design, construction, operation techniques, or mechanical equipment will not be employed to achieve a water use efficiency consistent with contemporary engineering, industry, and regulatory standards; ()

iii. A proposed storage facility will exceed a seepage rate of zero point two (0.2) feet per day. This criterion does not apply if the proposed storage facility will be used as an infiltration basin for ground water recharge, an excavated pond filled by intercepting ground water, or an impoundment for irrigation use not exceeding five (5) af of stored water per acre of irrigation; or ()

iv. The proposed irrigation use is not consistent with the requirements of Section 42-204A, Idaho Code. ()

g. In the case where the place of use is outside the watershed or local area where the source of water originates, the project effect on the local economy or local area criteria. The Director will consider the extent of adverse effect on the local economy of the watershed or local area within which the source of water for the proposed use originates. ()

h. Idaho State Water Plan criteria. The Director will consider whether the proposed diversion and use of water complies with the Idaho State Water Plan, including plans developed for specific geographic areas. ()

02. Criteria for Evaluating Whether a Proposed Use an Application for Reallocation of Trust Water in the Swan Falls Trust Water Area Will Cause a Significant Reduction. ~~Reference: Under Section 42-203C(1), Idaho Code, and Subsection 025.02.b. For purposes of reallocating trust water made available by the Snake River water rights agreement,~~ The Director will find an application for a reallocation of trust water within the Swan Falls Trust Water Area will cause a significant reduction when the proposed use, individually or cumulatively with other existing uses and uses reasonably likely to exist within twelve months of the proposed use, would significantly reduce the amount of trust water available to the user for hydropower generation purposes under a water right held in trust. The Director will presume an application for permit or a permit being reprocessed, a reallocation of trust water within the Swan Falls Trust Water Area will be presumed to not cause a significant reduction if the Director determines that it complies with the application meets both the individual and cumulative tests for evaluating significant reduction as provided in Subsections under Paragraphs 045.02.a. and 045.02.b. (3-18-22)()

- a. Individual test ~~for evaluating significant reduction.~~ The Director will presume: ()
- i. A proposed use ~~will be presumed to not cause a significant reduction if~~ when fully developed and its impact is fully felt, ~~the use will that~~ individually does not reduce the flow of the Snake River ~~measured at the~~ Murphy ~~Gauge~~ Gage by ~~not~~ more than two (2) acre-feet per day: does not cause a significant reduction; and ()
- ii. An irrigation project of two hundred (200) acres or less diverting water from a source other than the Snake River or springs directly tributary to the Snake River located ~~anywhere~~ in the ~~Snake River Basin above~~ ~~Murphy Gauge~~ Gage proposing to use trust water is presumed to Swan Falls Trust Water Area will not reduce the flow at Murphy ~~Gauge~~ Gage by more than two (2) acre-feet per day and does not cause a significant reduction. ~~The~~ However, ~~this~~ presumption of this section is not applicable to applications or permits to be reprocessed which an application the Director determines to be part of a larger development. (3-18-22)()
- b. Cumulative test ~~for evaluating significant reduction.~~ A. The Director will presume a proposed use ~~will be presumed to not cause a significant reduction;~~ meets the cumulative test if the use, when fully developed and its impact is fully felt and when considered cumulatively with other existing uses and other uses reasonably likely to exist within twelve (12) months of the proposed use, will not deplete the flow of Snake River measured at Murphy ~~Gauge~~ Gage by more than:
- i. Forty thousand (40,000) ~~acre-feet~~ af per calendar year when considered with all other uses approved for development of trust water during that calendar year; (3-18-22)()
- ii. Forty thousand (40,000) ~~acre-feet~~ af per calendar year using a four (4) year moving average when considered with all other uses approved for development of trust water during that four (4) year period; and (3-18-22)()
- iii. Twenty thousand (20,000) ~~acre-feet~~ af per calendar year from filings approved for reallocation of trust water ~~which that~~ meet the criteria of Subsection Paragraph 045.02.a. (3-18-22)()
- c. ~~The Director will determine on a case-by-case basis from available information whether a permit to be reprocessed or~~ The presumptions in Subsection 045.02, Paragraph 045.02.a., and Paragraph 045.02.b. may be rebutted by the protestant. In rebutting the presumptions that an application ~~for trust water which exceeds the flow depletion limits of Subsection 045.02, or one which meets the flow depletion limits but has been protested, will~~ does not cause a significant reduction. ~~In making this determination,~~ the Director ~~will~~ may consider: (3-18-22)()
- i. The amount of the reduction in hydropower generation that the proposed use will cause individually and cumulatively with other uses expected to be developed within twelve (12) months of the proposed use as compared to the existing hydropower generation output of the affected facility ~~or facilities.~~ (3-18-22)()
- ii. The relative importance of the affected hydropower facility ~~or facilities~~ to other sources of electrical power generation available to the holder of the facility ~~or facilities.~~ (3-18-22)()
- iii. The timing of the reduction in hydropower generation both on an annual basis and on a long-term basis considering the lag time between the beginning of diversion by the proposed use and the resulting reduction in hydropower generation. ()
- iv. The effect of the reduction in hydropower generation on the unit cost of hydropower from the facility ~~or facilities~~ and the average cost of electrical power offered by the facility holder ~~of the facility.~~ (3-18-22)()
- v. The terms of contracts, mortgages, or regulatory permits and licenses which require the hydropower generation facility holder ~~of the hydropower generation facility~~ to retain the capability to produce hydroelectric power at a specific level. (3-18-22)()
- ~~d. Other provisions of these rules notwithstanding, applications or permits to be reprocessed proposing a direct diversion of water for irrigation purposes from the Snake River between Milner Dam and Swan~~

~~Falls Dam or from tributary springs in this reach are presumed to cause a significant reduction. (3-18-22)~~

~~e. Other provisions of these rules notwithstanding, applications or permits to be reprocessed for DCMI purposes are presumed to not cause a significant reduction. (3-18-22)~~

03. Criteria for Evaluating Whether an Application for Reallocation of Trust Water in the Swan Falls Trust Water Area is in the Public Interest Under Section 42-203C(2), Idaho Code. If the Director determines that ~~a proposed use an application for reallocation~~ of trust water ~~held by the state pursuant to Section 42-203B(5), Idaho Code, within the Swan Falls Trust Water Area~~ will cause a significant reduction, the Director will consider the criteria of Section 42-203C(2), Idaho Code, before ~~acting on the application or permit being reprocessed approving or denying the application.~~ The Director shall consider and balance the relative benefits and detriments for each factor required to be weighed under Section 42-203C(2), Idaho Code, to determine whether a proposed reduction of the amount of water available for power production serves the greater public interest. The Director shall evaluate whether the proposed use sought in the permit being reprocessed or the application will provide the greater benefit to the people of the state of Idaho when balanced against other uses for the same water resource. In The Director will presume an application is in the public interest if it proposes a use consistent with Paragraph 045.03.f. The Director will presume an application is not in the public interest if it proposes a use consistent with Paragraph 045.03.g. In evaluating the public interest criteria, no single public interest criterion will be entitled to greater weight than any other public interest criterion. When evaluating the public interest criteria, the Director will ~~use the following guidelines consider:~~ (3-18-22)()

a. The ~~Director will consider the~~ potential benefits, both direct and indirect, ~~and~~ that the proposed use would provide to the state and local economy. The economic ~~appraisal shall~~ evaluation will be based upon generally accepted economic analysis procedures which uniformly evaluate the following factors within the state of Idaho and the county ~~or counties~~ directly affected by the project: (3-18-22)()

i. Direct project benefits. ()

ii. Indirect benefits including net revenues to the processing, transportation, supply, service, and government sectors of the economy. (3-18-22)()

~~iii. Direct project costs, to include the opportunity cost of previous land use. (3-18-22)~~

~~iv.iii.~~ Indirect project costs, including verifiable costs to government in net lost revenue and increased regulation costs, verifiable reductions in net revenue resulting from losses to other existing instream uses, and the increased cost of replacing reduced hydropower generation from unsubordinated hydropower generating facilities. ()

b. The ~~Director will consider the~~ economic impact the proposed use would have upon the electric utility rates in the state of Idaho, and the availability, foreseeability, and cost of alternative energy sources to ameliorate such impact. These evaluations will include the following considerations: (3-18-22)()

i. Projections of electrical supply and demand for Idaho and the Pacific Northwest made by the Bonneville Power Administration and the Northwest Power Planning Council and information available from the Idaho Public Utilities Commission or from the electric utility from whose water right trust water is being reallocated. ()

ii. The long-term reliability of the substitute source and the cost of alternatives including the resulting impact on electrical rates. (3-18-22)()

c. ~~The Director will consider w~~Whether the proposed use will promote the family farming tradition in the state of Idaho. For purposes of this evaluation the Director will presume the application promotes the family farming tradition if the total land to be irrigated by the applicant, including currently owned and leased irrigated land and land proposed to be irrigated in the application and other applications and permits of the applicant, does not exceed nine hundred sixty (960) acres. For an application proposing to divert water within the service area of a water delivery organization or to divert water through infrastructure shared by otherwise independent farming operations, the Director will evaluate this presumption on an individual basis within the relevant service area or place of use. This

presumption may be rebutted by the protestant under Paragraph 040.03.c.ii. If the presumption above does not apply, the Director will consider whether the proposed use has the following factors characteristics:- (3-18-22)()

i. The farming operation developed or expanded as a result of the application is operated by the applicant or a member of the applicant's family (spouse, parents or grandparents, lineal descendants, including those that are adopted, lineal descendants of parents, and spouse of lineal descendants); ()

ii. In the event the application is filed in the name of a partnership, one (1) or more of the partners operates the farming operation; and ()

iii. If the application is in the name of a corporation, the number of stockholders does not exceed fifteen (15) persons, and one (1) or more of the stockholders operates the farming operation unless the application is filed by an irrigation district, drainage district, canal company, or other entity authorized to appropriate water for landowners within the district or for stockholders of the company all of whom satisfy the presumption in Paragraph 045.03.c. ()

~~d. If the total land to be irrigated by the applicant, including currently owned and leased irrigated land and land proposed to be irrigated in the application and other applications and permits of the applicant, do not exceed nine hundred sixty (960) acres, the application will be presumed to promote the family farming tradition. (3-18-22)~~

~~e. If the requirement of Subsection 045.03.e.i. is not met, the Director will consider the extent the applicant conforms to the following characteristics: (3-18-22)~~

~~i. The farming operation developed or expanded as a result of the application is operated by the applicant or a member of his family (spouse, parents or grandparents, lineal descendants, including those that are adopted, lineal descendants of parents; and spouse of lineal descendants); (3-18-22)~~

~~ii. In the event the application is filed in the name of a partnership, one or more of the partners shall operate the farming operation; and (3-18-22)~~

~~iii. If the application is in the name of a corporation, the number of stockholders does not exceed fifteen (15) persons, and one or more of the stockholders operates the farming operation unless the application is submitted by an irrigation district, drainage district, canal company or other water entity authorized to appropriate water for landowners within the district or for stockholders of the company all of whom shall meet the family farming criteria. (3-18-22)~~

~~f.d. The Director will consider the promotion of~~Whether the proposed project will promote full economic and multiple use development of the water resources of the state of Idaho. ~~In this regard, the extent to which the project proposed complies with the following factors will be considered: (3-18-22)()~~

i. ~~Promotes~~ing and ~~conforms~~ing with the adopted Idaho State Water Plan; (3-18-22)()

ii. ~~Provides~~ing for coordination of proposed and existing uses of water to maximize the beneficial use of available water supplies; (3-18-22)()

iii. ~~Utilizes~~ing technology economically available to enhance water and energy use efficiency; (3-18-22)()

iv. ~~Provides~~ing multiple use of the water, including multipurpose storage; (3-18-22)()

v. ~~Allows~~ing opportunity for reuse of return flows; (3-18-22)()

vi. ~~Preserves~~ing or ~~enhances~~ing water quality, fish, wildlife, recreation, and aesthetic values; ~~or~~ (3-18-22)()

vii. ~~Provides~~ing supplemental water supplies for existing uses with inadequate supplies. (3-18-22)()

~~ge.~~ Whether a proposed use, which includes irrigation, irrigation development will conform to a staged development policy of up to twenty thousand (20,000) acres per year or eighty thousand (80,000) acres in any four (4) year period in the Snake River drainage above Murphy Gauge Swan Falls Trust Water Area. In applying these criteria, the Director will consider the following: (3-18-22)()

~~i.~~ “Above Murphy gauge” means the Snake River and any of its surface or groundwater tributaries upstream from Murphy gauge which gauge is located on the Snake River approximately four (4) miles downstream from Swan Falls Dam from which trust water is to be reallocated; (3-18-22)

~~ii.~~ Twenty thousand (20,000) acres per year or eighty thousand (80,000) acres per four (4) year period is a four (4) year moving average of ~~Twenty thousand (20,000) acres~~ per year of permits issued during a calendar year for irrigation development. If permits for development of less than twenty-thousand (20,000) acres are issued in a year, additional development in excess of twenty thousand (20,000) acres can be permitted in succeeding years. Likewise, if more than twenty thousand (20,000) acres is permitted in one year (recognizing that a single large project could exceed twenty thousand (20,000) acres) the permitted development in succeeding years must be correspondingly less to maintain no greater than a twenty thousand (20,000) acres per year average for any four (4) year period; (3-18-22)()

~~iii.~~ The criteria of ~~Subsection Paragraph~~ 045.03.g. applies to multiple-use projects with irrigation as a principal purpose. Projects which use irrigation as only an incidental purpose, such as the land treatment of waste, ~~shall will~~ not be included within this policy; and (3-18-22)()

~~iv.~~ iii. ~~An~~ The Director may approve an application determined ~~by the Director~~ to be otherwise approvable but found to exceed the acreage limitations of Paragraph 045.03.e., when considered with other applications approved for development, may be approved with conditions providing for prescribing the construction of project works and beneficial use of water to be commenced in a future year. (3-18-22)()

~~h.~~ No single public interest criterion will be entitled to greater weight than any other public interest criterion. (3-18-22)

~~if.~~ The Director will presume an application is in the public interest if it proposes: ()

~~i.~~ Until such time as the studies prescribed in Policy 32-I of the State Water Plan are completed and accepted by the Idaho Water Resource Board, applications and permits reprocessed which propose to divert water to surface storage To store surface water from the Snake River and surface tributaries upstream from the Murphy Gauging Station shall be presumed to satisfy the public interest criteria of Section 42-203C(2), Idaho Code. Applications or reprocessed permits which are approved prior to completion of the studies, will not be subject to additional reprocessing Gage consistent with the Idaho State Water Plan; or (3-18-22)()

~~ii.~~ A state of Idaho-sponsored ground water recharge project that is consistent with the Idaho State Water Plan; or ()

~~iii.~~ Domestic, commercial, municipal, or industrial use that does not have a maximum consumptive use of more than two (2) af per day. ()

~~iv.~~ The presumptions of Subparagraphs 045.03.f.i. through iii. may be rebutted by the protestant under Paragraph 040.03.c. In evaluating a proposed rebuttal to these presumptions, the Director may consider the criteria in Paragraphs 045.03.a. through e. ()

~~j.~~ Applications for permit for trust water sources filed prior to July 1, 1985, for projects for which diversion and beneficial use was complete prior to October 1, 1984, are presumed to satisfy the public interest criteria of Section 42-203C(2), Idaho Code. (3-18-22)

~~kg.~~ Applications or permits to be reprocessed proposing a direct diversion of water for The Director will presume an application is not in the public interest if it proposes an irrigation purposes project diverting water directly from the Snake River ~~between Milner Dam and Swan Falls Dam~~ or from tributary springs ~~in this reach are~~

~~presumed not to be in the public interest as defined by Section 42-203C, Idaho Code directly tributary to the Snake River in the Swan Falls Trust Water Area.~~ Such proposals, are presumed to prevent the full economic and multiple use of water in the Snake River Basin and to adversely affect hydropower availability and electrical energy rates in the state of Idaho. This presumption may be rebutted by the applicant. In evaluating a rebuttal to this presumption, the Director may consider the criteria in Paragraphs 045.03.a. through e. (3-18-22)()

~~f. Proposed DCMI uses which individually do not have a maximum consumptive use of more than two acre feet/day are presumed to meet the public interest criteria of Section 42-203C(2), Idaho Code, unless protested.~~ (3-18-22)

046. -- 049. (RESERVED)

050. CONDITIONS OF APPROVAL (RULE 50).

01. Issuance of Permits with Conditions. The Director may issue a permits with conditions to ensure compliance with: ()

a. the provisions of Title 42, Chapter 2, Title 42, Idaho Code, and other statutory duties, the public interest, and specifically to meet applicable laws and statutes; ()

b. Efficient administration of water rights by priority date; ()

c. The Idaho State Water Plan as required by Section 42-1734B(4), Idaho Code; ()

~~d. The criteria of Section 42-203A, Idaho Code;~~ and to meet ()

e. Requirements of Section 42-203B, Idaho Code, including conditions to subordinate a permit for hydropower generation to all rights to the use of water, other than hydropower, and limit a permit for hydropower generation to a term in connection with the power project; ()

~~f. the R~~ Requirements of Section 42-203C, Idaho Code, to the fullest extent possible including conditions to promote efficient use and conservation of energy and water; (3-18-22)()

g. The intent of agreements entered into by and between the state of Idaho and holders of water rights for power purposes and the state of Idaho's obligation to continually review the reallocation of trust water consistent with Section 42-203, Idaho Code; or ()

h. The requirement to obtain authorization necessary to access the point of diversion, place of use, or to convey water across federal land prior to diversion and use of water under the permit. ()

~~**02. Requirements to Mitigate Impact of Flow Depletion.** Permits to be reprocessed or applications approved to appropriate water from the main stem of the Snake River between Milner and Murphy gauging station for diversion to off-stream storage during the period November 1 to March 31 shall include requirements to mitigate, in accordance with the State Water Plan, the impact of flow depletions on downstream generation of hydropower.~~ (3-18-22)

~~**03. Applications and Existing Permits That Are Junior and Subordinate.** Applications and existing permits approved for hydropower generation shall be junior and subordinate to all rights to the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of the application or existing hydropower permit. A subordinated permit shall not give rise to any right or claim against future rights to the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of the application or existing hydropower permit. A permit issued for hydropower purposes shall contain a term condition on the hydropower use in accordance with Section 42-203B(6), Idaho Code.~~ (3-18-22)

~~**04. Permanent Flow Measuring Device Requirement.** Applications approved for on-stream storage reservoirs will, unless specifically waived by the Director, require permanent flow measuring devices both upstream and downstream from the reservoir.~~ (3-18-22)

~~05. Well Spacing and Well Construction Requirements. Applications approved for diversion of groundwater may include conditions requiring well spacing and well construction requirements. (3-18-22)~~

~~06. Reprocessed Permits. Permits reprocessed pursuant to Section 42-203D, Idaho Code, may be cancelled, modified or conditioned by the Director to make the permit comply in every way with any permit that would be issued for the same purpose based upon a new application processed under these rules. (3-18-22)~~

~~07. Voiding Approval of Permit. Permits may be conditioned to authorize the Director to void the approval of the permit if he the Director determines that the applicant submitted false or misleading information on the application or supporting documents. (3-18-22)()~~

~~08. Retention of Jurisdiction. The Director may condition permits to retain jurisdiction to insure compliance with the design, construction and operation provisions of the permit. (3-18-22)~~

~~09. Insuring Minimum Stream Flows and Prior Rights. The Director may condition permits to insure that established minimum stream flows and prior rights including prior rights reserved by federal law are not injured. (3-18-22)~~

~~10. Insuring Compliance with Water Quality Standards. The Director may condition permits to insure compliance with Idaho's water quality standards. (3-18-22)~~

~~11. Insuring Assignment of Interest. The Director may condition a permit issued for trust water to require that any amendment (Section 42-211, Idaho Code), transfer (Section 42-222, Idaho Code), or assignment of interest in the permit by any method whatsoever shall not result in the project failing to meet the public interest criteria of Section 42-203C, Idaho Code except, however, lenders obtaining title to the project through default will have a reasonable period of time, as determined by the Director, to meet such criteria or to convey the project to a person or entity that does meet the criteria. (3-18-22)~~

051. -- 054. (RESERVED)

055. MORATORIUM ~~(RULE 55).~~

01. Applications for Permits. (3-18-22)()

a. The Director may cease to approve applications action on an application or stay further development of a permit for which the permit holder has not submitted proof of beneficial use in a designated geographical area upon finding a need to: (3-18-22)()

i. Protect existing water rights; ()

ii. Ensure compliance with the provisions of Chapter 2, Title 42, Idaho Code; and or (3-18-22)()

iii. Prevent reduction of flows below a minimum stream flow which has been established held by the Director or the b Board pursuant to applicable law. (3-18-22)()

b. Notice of the Director's action to cease further action on an application approval or stay further development of a permit will be by: (3-18-22)()

i. Summary Order served by certified mail upon the then existing affected applicants or permit holder; and (3-18-22)()

ii. Publication of the order for three (3) consecutive weeks in a newspaper or newspapers of general circulation in the area affected. (3-18-22)()

c. The order of the Director's action to stay further development of a permit will require a permit

holder to file, within sixty (60) days of order issuance, either: ()

i. Proof of beneficial use for the extent of diversion and beneficial use accomplished prior to issuance of the order; or ()

ii. A response with supporting information demonstrating the permit holder made a substantial investment, prior to receipt of the order, in project works to divert and beneficially use water under the permit that merits the granting of additional time to complete all or part of the project. ()

iii. Failure to submit proof of beneficial use or a response will result in suspension of further development of the permit. ()

~~ed.~~ Objections to the Director's action ~~shall~~ will be considered ~~under the department's adopted~~ pursuant to IDAPA 37.01.01, "Rules of Procedure of the Idaho Department of Water Resources," and applicable law. (3-18-22)()

~~02. Permits.~~ (3-18-22)

~~a.~~ To the extent a permit has not been developed, the Director may cancel, or modify permits for which proof of beneficial use has not been submitted in a designated geographical area as an extension of Subsection 055.01. (3-18-22)

~~b.~~ Notice of the Director's action to cancel or modify permits shall be by: (3-18-22)

i. Summary Order served by certified mail upon the affected permit holders in the designated area. (3-18-22)



ii. Publication of the order for three (3) consecutive weeks in a newspaper or newspapers of general circulation in the area. (3-18-22)

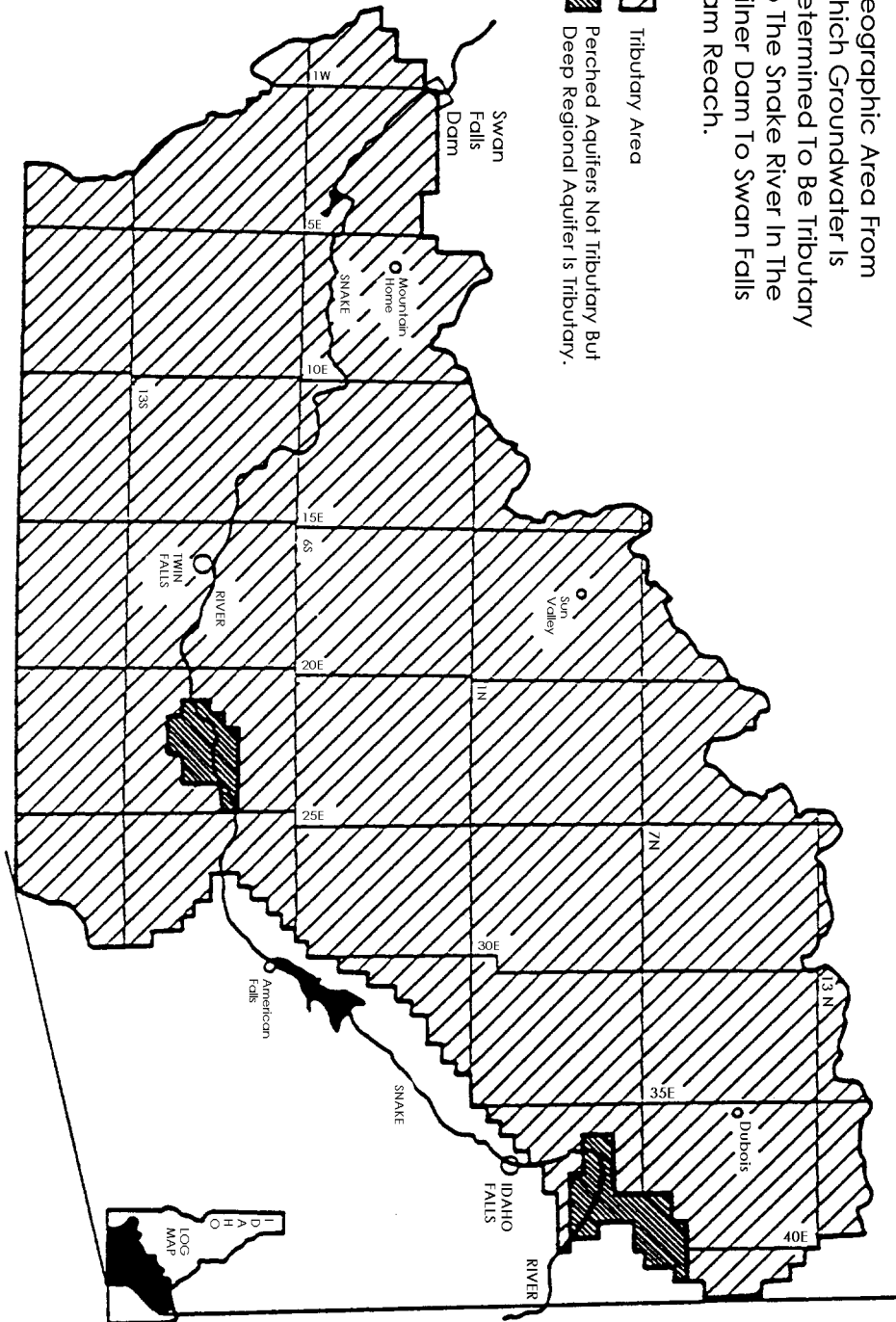
~~e.~~ Objections to the Director's action shall be considered under the department's adopted Rules of Procedure and applicable law. (3-18-22)

056. -- 999. (RESERVED)

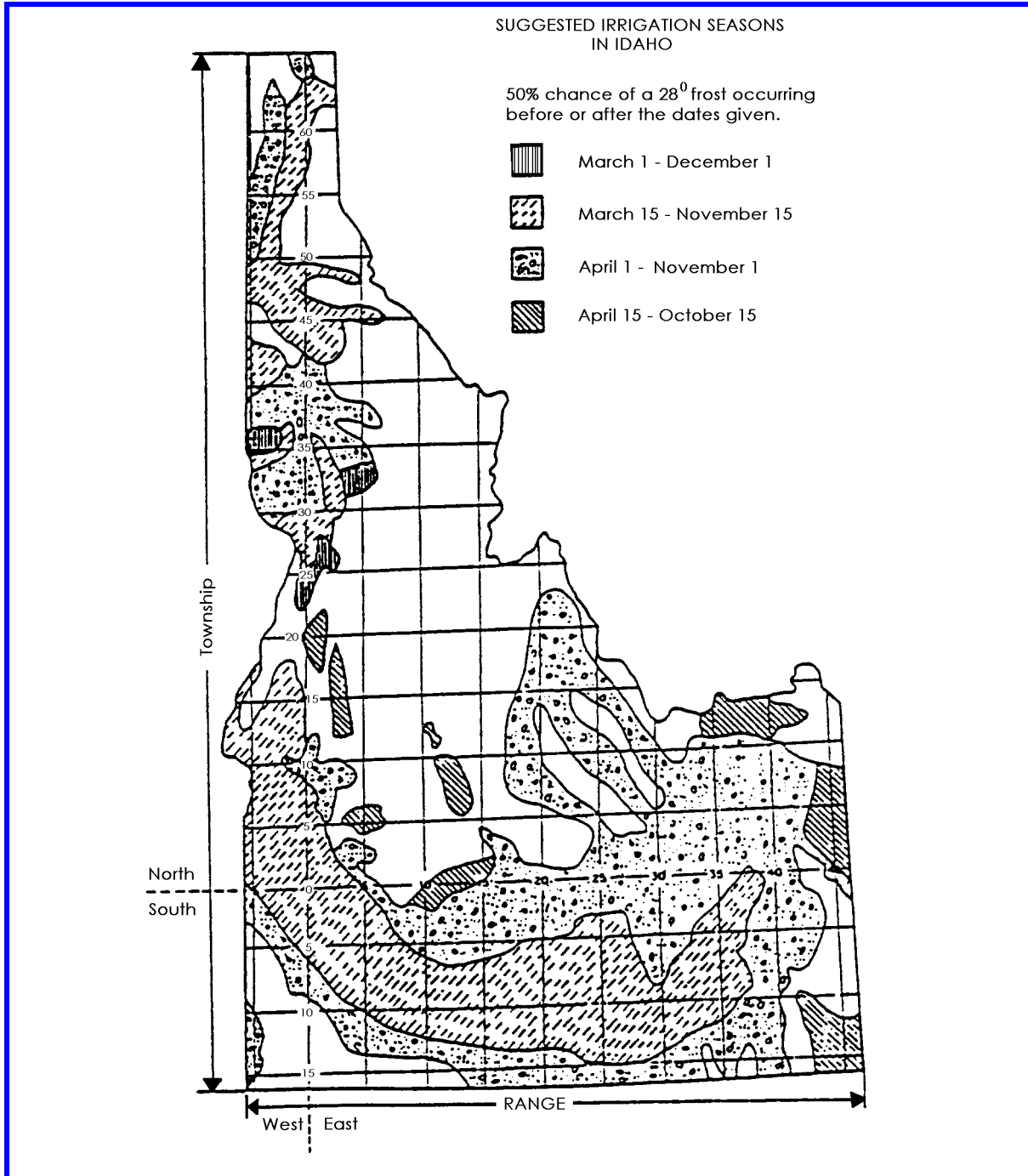
APPENDIX A

Geographic Area From Which Groundwater Is Determined To Be Tributary To The Snake River In The Milner Dam To Swan Falls Dam Reach.

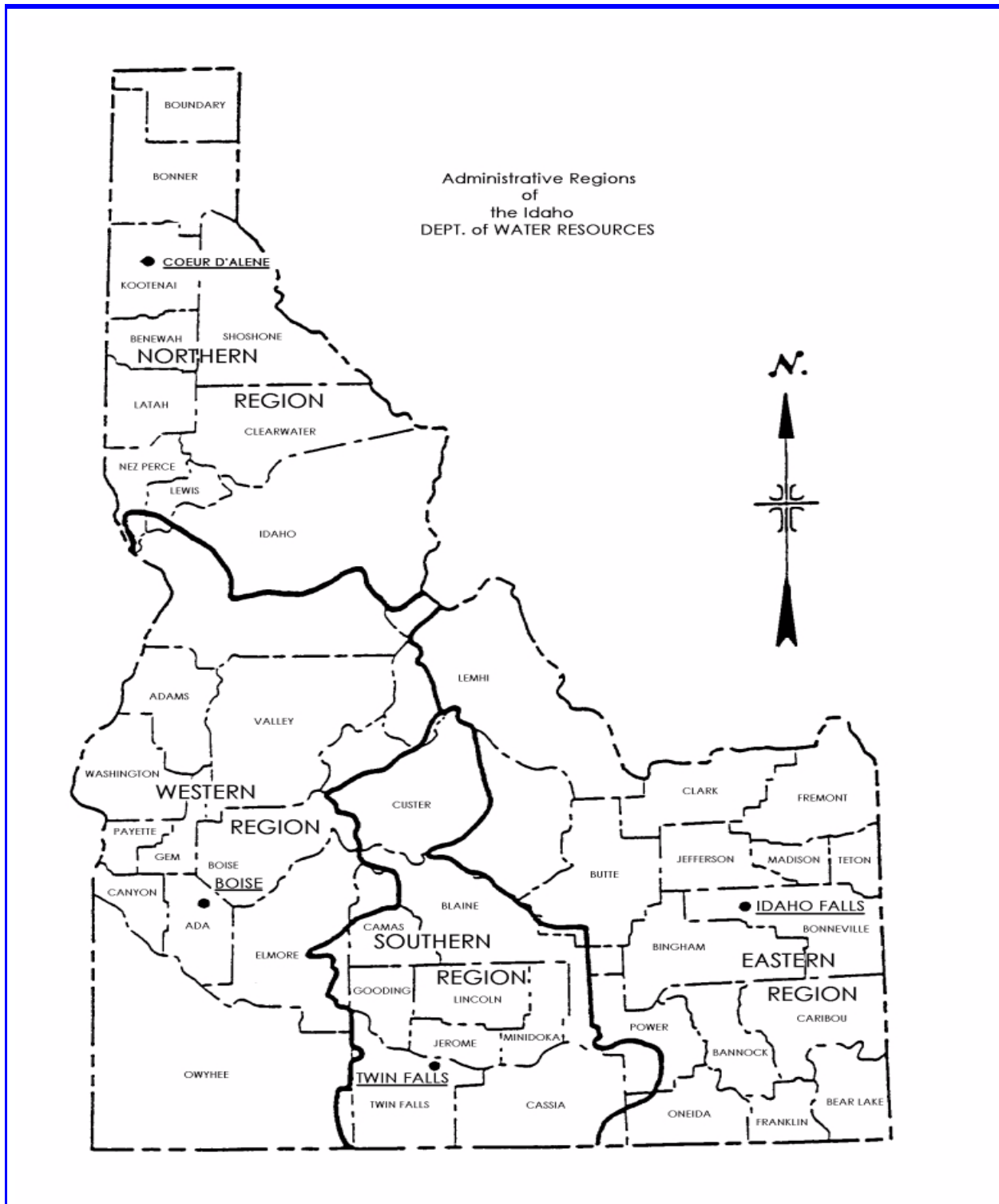
-  Tributary Area
-  Perched Aquifers Not Tributary But Deep Regional Aquifer Is Tributary.



APPENDIX B



APPENDIX C



PROPOSED RULE COST/BENEFIT ANALYSIS

Section 67-5223(3), Idaho Code, requires the preparation of an economic impact statement for all proposed rules imposing or increasing fees or charges. This cost/benefit analysis, which must be filed with the proposed rule, must include the reasonably estimated costs to the agency to implement the rule and the reasonably estimated costs to be borne by citizens, or the private sector, or both.

Department or Agency: Idaho Department of Water Resources

Agency Contact: Mathew Weaver

Phone: 208.287.4800

Date: September 1, 2023

IDAPA, Chapter and Title Number and Chapter Name:

IDAPA 37.03.08 Water Appropriation Rules

Fee Rule Status: Proposed Temporary

Rulemaking Docket Number: 37-0308-2301

STATEMENT OF ECONOMIC IMPACT:

IDAPA 37.03.08 sets the procedures for obtaining a permit to divert and use unappropriated public waters or a permit for a reallocation of trust water within the Swan Falls Trust Water Area. The rule governs the filing and processing of applications for permit to appropriate water. The rule also establishes the collection of fee(s) to file or republish notice of an application. This chapter was adopted under the legal authority of Section 42-1805(8), Idaho Code.

The proposed rule has no impact on the state general fund, dedicated funds, or federal funds. Application filing fees and republication fees are set in statute rather than rule. Refer to Sections 42-221A and 42-221F, Idaho Code. As a result, the proposed rule does not change existing fees.