

TITLE 42
IRRIGATION AND DRAINAGE -- WATER RIGHTS AND RECLAMATION

CHAPTER 1
APPROPRIATION OF WATER -- GENERAL PROVISIONS

42-101. NATURE OF PROPERTY IN WATER. Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved. All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied; and the right to continue the use of any such water shall never be denied or prevented from any other cause than the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for the delivery of such water.

[(42-101) 1900, p. 191, sec. 9b; reen. R.C. & C.L., sec. 3240; C.S., sec. 5556; I.C.A., sec. 41-101.]

42-102. MEASUREMENT OF WATER. A cubic foot of water per second of time shall be the legal standard for the measurement of water in this state, and it shall be the duty of the department of water resources to devise a simple, uniform system for the measurement and distribution of water.

[(42-102) 1899, p. 380, secs. 1, 21; reen. R.C. & C.L., sec. 3241; C.S., sec. 5557; I.C.A., sec. 41-102.]

42-103. RIGHT ACQUIRED BY APPROPRIATION. The right to the use of the unappropriated waters of rivers, streams, lakes, springs, and of subterranean waters or other sources within this state shall hereafter be acquired only by appropriation under the application, permit and license procedure as provided for in this title, unless hereinafter in this title excepted.

[(42-103) R.S., sec. 3155; 1899, p. 380, sec. 2; reen. R.C. & C.L., sec. 3242; C.S., sec. 5558; I.C.A., sec. 41-103; am. 1971, ch. 177, sec. 1, p. 843.]

42-104. APPROPRIATION MUST BE FOR BENEFICIAL PURPOSE. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases.

[(42-104) R.S., sec. 3156; 1899, p. 380, sec. 3; reen. R.C. & C.L., sec. 3243; C.S., sec. 5559; I.C.A., sec. 41-104.]

42-105. USE OF NATURAL WATERWAYS -- MEASUREMENT OF COMMINGLED WATER -- APPROVAL OF RIGHT TO EXCHANGE WATER. (1) The water that a person is entitled to divert by reason of a valid water right may be turned into the channel of a natural waterway and mingled with its water, and then reclaimed, but in reclaiming the water so mingled, the amount of water to which prior appropriators may be entitled shall not be diminished, and due allowance shall be made for loss by evaporation and seepage. The use of natural waterways to commingle and reclaim water shall be subject at all times to the supervision and control of the director of the department of water resources and shall be subject to the regulation of the watermaster within an established water district. The amounts of water turned into or diverted from all natural waterways are subject to the requirement of measurement and reporting.

(2) The water that a person is entitled to divert by reason of a valid water right, or water that a person is seeking to appropriate, may be exchanged for water under another water right, or for other water from the same or another source, as hereinafter provided:

(a) If the applicant intends to exchange water the applicant is entitled to divert under an existing valid water right for any other water, approval of the exchange shall be obtained by filing an application under the provisions of section 42-240, Idaho Code;

(b) If the applicant proposes to exchange water that the applicant is seeking to appropriate, approval of the exchange shall be obtained by filing an application to appropriate water under section 42-202, Idaho Code. The proposed exchange shall be described in the application and the application shall be processed in accordance with the provisions of section 42-203A, Idaho Code. If the application seeks to exchange the water to be appropriated with water available under another water right, the application shall be accompanied by an agreement to exchange signed by the owner of the existing water right. An exchange with water under an existing water right cannot result in an enlargement in use of the existing right.

(3) An exchange of water hereafter made without the approval of the department of water resources as provided in this section shall be invalid. Nothing in this section shall affect the right a person may have or may obtain to turn water into a ditch or other artificial conveyance and reclaim the water.

[(42-105) R.S., sec. 3158; reen. R.C., sec. 3244; am. 1911, ch. 149, sec. 1, p. 454; C.L., sec. 3244; C.S., sec. 5560; I.C.A., sec. 41-105; am. 1969, ch. 300, sec. 1, p. 900; am. 1998, ch. 424, sec. 1, p. 1339.]

42-106. PRIORITY. As between appropriators, the first in time is first in right.

[(42-106) R.S., sec. 3159; 1899, p. 380, sec. 4; reen. R.C. & C.L., sec. 3245; C.S., sec. 5561; I.C.A., sec. 41-106.]

42-107. PRIORITY -- WASTE, SEEPAGE, AND SPRING WATERS. All ditches now constructed or which may hereafter be constructed for the purpose of utilizing seepage, waste or spring water of the state, shall be governed by the same laws relating to priority of right as those ditches, canals and conduits constructed for the purpose of utilizing the waters of running streams.

[(42-107) 1899, p. 380, sec. 23; reen. R.C. & C.L., sec. 3246; C.S., sec. 5562; I.C.A., sec. 41-107.]

42-108. CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR NATURE OF USE -- APPLICATION OF ACT. The person entitled to the use of water or owning any land to which water has been made appurtenant either by a decree of the court or under the provisions of the constitution and statutes of this state, may change the point of diversion, period of use, or nature of use, and/or may voluntarily abandon the use of such water in whole or in part on the land which is receiving the benefit of the same and transfer the same to other lands, if the water rights of others are not injured by such change in point of diversion, place of use, period of use, or nature of use, provided; if the right to the use of such water, or the use of the diversion works or irrigation system is represented by shares of stock in a corporation or if such works or system is owned and/or managed by an irrigation district, no change in the point of diversion, place of use, period of use, or nature of use of such water shall be made or allowed without the consent of such corporation or irrigation district. Any permanent or temporary change in period or nature of use in or out-of-state for a quantity greater than fifty (50) cfs or for a storage volume greater than five thousand (5,000) acre-feet shall require the approval of the legislature, except that any temporary change within the state of Idaho for a period of less than three (3) years may be approved by the director without legislative approval.

Any person desiring to make such change of point of diversion, place of use, period of use, or nature of use of water shall make application for change with the department of water resources under the provisions of section 42-222, Idaho Code. After the effective date of this act, no person shall be authorized to change the period of use or nature of use, point of diversion or place of use of water unless he has first applied for and received approval of the department of water resources under the provisions of section 42-222, Idaho Code.

[(42-108) R.S., sec. 3157; 1899, p. 380, sec. 11; reen. R.C. & C.L., sec. 3247; C.S., sec. 5563; I.C.A., sec. 41-108; am. 1943, ch. 53, sec. 1, p. 101; am. 1947, ch. 80, sec. 1, p. 130; am. 1969, ch. 303, sec. 1, p. 905; am. 1981, ch. 147, sec. 1, p. 253; am. 1986, ch. 313, sec. 1, p. 764.]

42-108A. LEASING OF WATER FOR HYDROELECTRIC GENERATION -- EXCEPTION TO REQUIREMENT OF APPLICATION TO CHANGE NATURE OF USE. Any person having the right to the beneficial use of a water right may lease the water to a private or public utility doing business in the state of Idaho for hydroelectric generation purposes within the state of Idaho for a period not to exceed one (1) year on application to the department of water resources indicating the name of the owner of the right, the lessor, the lessee, the amount of water leased, the duration of the lease, and the proposed place of use and point of diversion. Such a lease or leases shall not constitute a change in the nature of use of such water nor shall the same constitute an abandonment or forfeiture or any other diminution of such water right.

[42-108A, added 1981, ch. 267, sec. 1, p. 566.]

42-108B. LEASING OF WATER UNDER ESTABLISHED RIGHTS -- NOTICE -- APPEAL. Any person, entitled to the use of water whether represented by a license issued by the department of water resources, or by decree of the court, who shall desire to lease the water pursuant to section 42-108A, Idaho Code, shall make application to the department of water resources. Such application shall be upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be leased. Upon

receipt of said application, an application filing fee of thirty dollars (\$30.00) and a publication fee of fifty dollars (\$50.00), it shall be the duty of the director of the department of water resources to examine same and if otherwise proper, to cause notice of the proposed leasing of water and setting forth the hearing date at which protests will be heard, to be published once a week for two (2) consecutive weeks in a newspaper published and of general circulation within the county where the water is diverted, if there is such a paper, otherwise in a newspaper of general circulation within the county. Such notice shall advise that anyone who desires to protest the proposed leasing of water and who has a superior right to use the water and who may suffer pecuniary loss shall file notice of protest with the department within five (5) days of the last date of publication. The hearing date set by the director of the department of water resources shall be held not sooner than ten (10) nor later than fifteen (15) days after the last date of publication. Upon receipt of any protest, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon. He shall also advise the watermaster of the district in which such water is used of the proposed lease.

The director of the department of water resources shall examine all of the evidence and available information and, provided no other water rights senior or junior to the water to be leased are injured thereby, may reject and refuse approval for, or may partially approve for less quantity of water, or may approve upon conditions any proposed lease of water where the proposed use is such that it will reduce the quantity of water available under other existing water rights, the water supply involved is insufficient for the purpose for which it is sought, the lease would cause the use of water to be enlarged beyond that authorized under the water right to be leased, the lease would be contrary to any local rental pool procedure as authorized under section 42-1765, Idaho Code, the lease will conflict with the local public interest as defined in section 42-202B, Idaho Code, or the lease will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates. A copy of the approved application for leasing of water shall be returned to the applicant, and he shall be authorized upon receipt thereof to lease the water pursuant to section 42-108A, Idaho Code. In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny same and forward a notice of such action to the applicant by certified mail, which decision shall be subject to review pursuant to section 42-1701A, Idaho Code.

All fees received by the department of water resources under the provisions of this section shall be submitted to the state treasurer for deposit in the water administration fund.

[42-108B, added 1981, ch. 267, sec. 2, p. 567; am. 2011, ch. 243, sec. 1, p. 655.]

42-109. CHANGE IN COURSE OF DITCH -- WHEN PROHIBITED. Whenever any ditch or canal has been constructed for the purpose of conveying water and selling the same for irrigating purposes, it is unlawful for the owner or owners of said ditch or canal to change the line of said ditch or canal so as to prevent or interfere with the use of water from said ditch or canal, by any

one who, prior to the proposed change, had used water for irrigating purposes from said ditch or canal.

[(42-109) R.S., part of sec. 3189; reen. R.C. & C.L., sec. 3248; C.S., sec. 5564; I.C.A., sec. 41-109.]

42-110. RIGHT TO DIVERT WATER. The proprietors of any ditch, canal or conduit, or other works for the diversion and carriage of water, whose right relative to the quantity of water they shall be entitled to divert by means of such works shall have been established by any valid claim, permit, license or decree of court, shall be entitled to such quantity measured at the point of diversion, subject, however, to all prior rights. Water diverted from its source pursuant to a water right is the property of the appropriator while it is lawfully diverted, captured, conveyed, used, or otherwise physically controlled by the appropriator.

[(42-110) 1899, p. 380, sec. 32; reen. R.C. & C.L., sec. 3249; C.S., sec. 5565; I.C.A., sec. 41-110; am. 2004, ch. 191, sec. 1, p. 601.]

42-111. DOMESTIC PURPOSES DEFINED. (1) For purposes of sections 42-221, 42-227, 42-230, 42-235, 42-237a, 42-242, 42-243 and 42-1401A, Idaho Code, the phrase "domestic purposes" or "domestic uses" means:

(a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or

(b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.

(2) For purposes of the sections listed in subsection (1) of this section, domestic purposes or domestic uses shall not include water for multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in subsection (1) (b) of this section.

(3) Multiple water rights for domestic uses or domestic purposes, as defined in this section, shall not be established or exercised in a manner to satisfy a single combined water use or purpose that would not itself come within the definition of a domestic use or purpose under this section. The purpose of this limitation is to prohibit the diversion and use of water, under a combination of domestic purposes or domestic uses as defined in this section, to provide a supply of water for a use that does not meet the exemption of section 42-227, Idaho Code, and is required to comply with the mandatory application and permit process for developing a right to the use of water pursuant to chapter 2, title 42, Idaho Code.

[(42-111) 1899, p. 380, part of sec. 12; reen. R.C. & C.L., sec. 3250; C.S., sec. 5566; I.C.A., sec. 41-111; am. 1990, ch. 319, sec. 1, p. 870; am. 1995, ch. 233, sec. 1, p. 790.]

42-112. COMPLETION DEFINED. By completion is meant conducting the waters to the place of intended use.

[(42-112) R.S., sec. 3162; 1899, p. 380, sec. 7; reen. R.C. & C.L., sec. 3251; C.S., sec. 5567; I.C.A., sec. 41-112.]

42-113. IN-STREAM AND OTHER WATER USE FOR LIVESTOCK. (1) A permit may be issued, but shall not be required for appropriation of water for the

in-stream watering of livestock. In the consideration of applications for permits to appropriate water for other purposes, the director of the department of water resources shall impose such reasonable conditions as are necessary to protect prior downstream water rights for in-stream livestock use, and in the administration of the water rights on any stream, the director, and the district court where applicable, shall recognize and protect water rights for in-stream livestock use, according to priority, as they do water rights for other purposes. As used in this section, the phrase "in-stream watering of livestock" means the drinking of water by livestock directly from a natural stream, without the use of any constructed physical diversion works.

(2) For rights to the use of water for in-stream or out-of-stream livestock purposes, associated with grazing on federally owned or managed land, established under the diversion and application to beneficial use method of appropriation:

(a) The priority date shall be the first date that water historically was used for livestock watering associated with grazing on the land, subject to the provisions of section 42-222(2), Idaho Code; and

(b) The water right shall be an appurtenance to the base property. When a federal grazing permit is transferred or otherwise conveyed to a new owner, the associated stockwater rights may also be conveyed and, upon approval of an application for transfer, shall become appurtenant to the new owner's base property.

(3) This subsection is established to promote the watering of livestock away from streams and riparian areas, but not to require fencing of livestock away from streams and riparian areas.

(a) Any person having an established water right or appropriating water for in-stream watering of livestock pursuant to subsection (1) of this section may, in addition to the in-stream use, divert the water for livestock use away from the stream or riparian area. The diversion may occur only if the following conditions are met:

(i) The water is diverted from a surface water source to a trough or tank through an enclosed water delivery system;

(ii) The water delivery system is equipped with an automatic shut-off or flow control mechanism or includes a means for returning unused water to the surface water source through an enclosed delivery system, and the system is designed and constructed to allow the rate of diversion to be measured;

(iii) The diversion is from a surface water source to which the livestock would otherwise have access and the watering tank or trough is located on land from which the livestock would have access to the surface water source from which the diversion is made;

(iv) The diversion of water out of the stream in this manner does not injure other water rights;

(v) The use of the water diverted is for watering livestock; and

(vi) The bed and banks of the source shall not be altered as that term is defined in section 42-3802, Idaho Code, except that an inlet conduit may be placed into the source in a manner that does not require excavation or obstruction of the stream channel, unless additional work is approved by the director of the department of water resources.

(b) The amount of water diverted for watering of livestock in accordance with this subsection shall not exceed thirteen thousand (13,000) gallons per day per diversion.

(c) Before construction and use of a water diversion and delivery system as provided in this subsection, the person or other entity proposing to construct and use the system shall give notice to the director of the department of water resources. Separate notice for each diversion shall be provided on a form approved by the director and shall be accompanied by a twenty-five dollar (\$25.00) fee for each notice filed. Filing of the notice as herein provided shall serve as a substitute for filing a notice of claim to a water right pursuant to section 42-243, Idaho Code. The director may provide notice to holders of water rights and others as the director deems appropriate.

(d) Compliance with the provisions of this subsection is a substitute for the requirements for transfer proceedings in section 42-222, Idaho Code. In the administration of water diverted for livestock watering pursuant to this subsection, the director, and the district court where applicable, shall recognize and protect water rights for out-of-stream livestock watering use pursuant to this subsection as they would in-stream livestock watering use. The priority date for out-of-stream watering of livestock pursuant to this subsection shall be the first date that water historically was used for livestock watering and shall not be altered due to the diversion out-of-stream.

(e) Any water right holder who determines that diversion or use of water under the provisions of this subsection is depriving the water right holder of water to which the water right holder is entitled may petition the director of the department of water resources to curtail the diversion or use of water for livestock purposes. Upon such petition, the director shall cause an investigation to be made and may hold hearings or gather information in other ways. If the director finds that an interference is occurring, the director may order curtailment of diversion or use of the water or may require the water diversion and delivery system to be modified to prevent injury to other water rights. Any person feeling aggrieved by an order of the director in response to a petition filed as herein provided shall be entitled to review as provided in section 42-1701A, Idaho Code.

(4) No change in use of any water right used for watering of livestock, whether proposed under this section or section 42-222, Idaho Code, shall be made or allowed without the consent of the permittee in the federal grazing allotment, if any, in which the water right is used for the watering of livestock.

[42-113, added 1984, ch. 124, sec. 1, p. 299; am. 1998, ch. 344, sec. 1, p. 1095; am. 2000, ch. 255, sec. 1, p. 722; am. 2018, ch. 146, sec. 1, p. 303.]

42-114. STOCK WATERING PERMIT. Any permit issued for the watering of domestic livestock shall be issued to the person or association of persons making application therefor and the watering of domestic livestock by the person or association of persons to whom the permit was issued shall be deemed a beneficial use of the water.

As used in this section, the "watering of domestic livestock" means the drinking of water by domestic livestock from a natural stream, ground water source or other source.

[42-114, added 1986, ch. 199, sec. 1, p. 498.]