

TITLE 42  
IRRIGATION AND DRAINAGE -- WATER RIGHTS AND RECLAMATION

CHAPTER 3  
APPROPRIATION OF WATER -- CANCELATION OF PERMITS

42-301. PERMITS CONTESTABLE -- WHEN AND BY WHOM. If the holder of a permit to appropriate the public waters shall fail to comply with the requirements of his permit as to the commencing of work or the filing of bond thereunder, or the completion of one-fifth (1/5) of the construction work within one-half (1/2) the time allowed for the entire completion of such construction work, or shall fail to complete the entire construction work within the time specified in his permit, said permit may be cancelled and voided by the department of water resources as hereinafter provided at the instance of any person or persons holding any permit for the diversion of water from the same stream, such permit postdating the permit which is sought to be cancelled.

[(42-301) 1909, p. 299, sec. 1; reen. C.L., sec. 3265a; C.S., sec. 5584; I.C.A., sec. 41-301.]

42-302. PETITION FOR CANCELLATION. Any person as above specified desiring the cancellation of a permit shall file with the department of water resources a petition clearly setting forth the facts upon which he bases his prayer for cancellation, plainly stating wherein the holder of the permit, which is sought to be cancelled, has failed to comply with the law and with the requirements of his permit.

[(42-302) 1909, p. 299, part of sec. 2; reen. C.L., sec. 3265b; C.S., sec. 5585; I.C.A., sec. 41-302.]

42-303. NOTICE OF CONTEST. Upon receipt of such petition, the department of water resources shall issue a notice, naming the petitioner as contestant and all persons, shown by the records of the department of water resources to have any claim of title or interest in the permit sought to be cancelled as contestees, and requiring all contestees to appear at the office of the department on a day to be specified therein, which day shall be not less than sixty (60) nor more than ninety (90) days from the date of the notice, and show cause, by affidavit, if any there be, why said permit should not be cancelled. Such notice shall be sent by registered mail, addressed to every person named therein at his last known post-office address.

[(42-303) 1909, p. 299, part of sec. 2; reen. C.L., sec. 3265c; C.S., sec. 5586; I.C.A., sec. 41-303.]

42-304. HEARING. On the day set for the hearing the contestant and such contestees as have filed the affidavit hereinbefore required of them, shall file such affidavits in support of their respective allegations as they may desire, and the department of water resources may require such additional evidence and may make or cause to be made by an engineer whom the department may designate, such personal examination of the work done under the permit in question, as the department may deem necessary to enable it to render a fair decision: provided, that before making or causing such examination to be made the department shall estimate the cost of such examination and shall require the contestant to deposit a sum equal to such estimate and if after the making of such examination it is found that the amount so deposited is in excess of the cost of such examination the department shall return such ex-

cess to the contestant. For the purpose of producing additional testimony in making investigations, the department may continue the hearing to such time, not exceeding thirty (30) days, as would seem to it advisable. The hearing shall be conducted in accordance with section 42-1701A(1) and (2), Idaho Code, and the contestant or contestee may seek judicial review pursuant to section 42-1701A(4), Idaho Code, of the final order of the director.

[(42-304) 1909, p. 299, part of sec. 2; reen. C.L., sec. 3265d; C.S., sec. 5587; I.C.A., sec. 41-304; am. 1980, ch. 238, sec. 11, p. 542.]

42-310. RECORD OF CANCELLATION. In case the decision of the department of water resources shall be adverse to the contestee and in case no appeal has been taken and no action commenced in the district court within ninety (90) days from said notice of decision, as hereinbefore provided for, said department shall cause to be spread upon the record copy of the permit in question an order of cancellation, which order shall be final and shall determine said permit to be cancelled and voided, by reason of the facts established on the hearing of the contest.

[(42-310) 1909, p. 299, sec. 6; compiled and reen. C.L., sec. 3265j; C.S., sec. 5593; I.C.A., sec. 41-310.]

42-311. CANCELLATION OF PERMIT -- GROUNDS -- HEARING -- PERMITTEE DEFINED. (1) If the director of the department of water resources finds, on the basis of available information at any time after a permit is issued but prior to license, that the permittee has refused or failed to comply with any of the conditions in the permit, or has refused or failed to comply with the provisions of the law governing the permit, then the director of the department of water resources may issue (a) an order to show cause before the director of the department or the director's designee on or before a date therein set, which shall be not less than thirty (30) days from the date of service, why the director of the department should not cancel said permit; or (b) an order directing the permittee to cease and desist the activity or activities alleged to be in violation of the conditions of the permit or in violation of provisions of the law governing the permit. A cease and desist order may direct compliance with the permit forthwith or may provide for a time schedule to bring the permittee into compliance with the conditions of the permit.

(2) Any order to show cause or order to cease and desist shall contain a statement of findings of fact and of conclusions of law that provide a factual and legal basis for the order of the director of the department of water resources.

(3) The director of the department of water resources shall serve a copy of any such order on the permittee by personal service or by certified mail. If reasonable efforts to personally serve the order fail, or if the certified mail is returned unclaimed, the department may serve the order by publication by publishing a summary of the order once a week for two (2) consecutive weeks in a newspaper of general circulation in the county in which the point of diversion is located. Service by certified mail shall be complete upon receipt of the certified mail. Personal service may be completed by department personnel or a person authorized to serve process under the Idaho rules of civil procedure. Service by publication shall be complete upon the date of the last publication.

(4) The permittee shall have a right to an administrative hearing before the department if requested in writing within twenty-one (21) days from

the date of service of the order, and to judicial review, all as provided in section 42-1701A, Idaho Code.

(5) The term "permittee," as used in this chapter, includes the heirs, successors, or assigns of the person to whom the department issued a water right permit.

[42-311, added 1986, ch. 313, sec. 7, p. 772; am. 1988, ch. 83, sec. 1, p. 143.]

42-350. REVOCATION OF LICENSE -- GROUNDS -- HEARING -- LICENSEE DEFINED. (1) If the director of the department of water resources finds, on the basis of available information at any time after a license is issued, that the licensee has ceased to put the water to a beneficial use for a period of five (5) continuous years or that the licensee has wilfully or intentionally failed to comply with any of the conditions in the license, or has wilfully or intentionally failed to comply with provisions of the law governing the license, then the director of the department of water resources may issue (a) an order to show cause before the director of the department or the director's designee on or before a date therein set, which shall be not less than thirty (30) days from the date of service, why the director of the department should not revoke said license; or (b) an order directing the licensee to cease and desist the activity or activities alleged to be in violation of the conditions of the license or in violation of provisions of the law governing the license. A cease and desist order may direct compliance with the license forthwith or may provide for a time schedule to bring the licensee into compliance with the conditions of the license.

(2) Any order to show cause or order to cease and desist shall contain a statement of findings of fact and of conclusions of law that provide a factual and legal basis for the order of the director of the department of water resources.

(3) The director of the department of water resources shall serve a copy of any such order on the licensee by personal service or by certified mail. If reasonable efforts to personally serve the order fail, or if the certified mail is returned unclaimed, the department may serve the order by publication by publishing a summary of the order once a week for two (2) consecutive weeks in a newspaper of general circulation in the county in which the point of diversion is located. Service by certified mail shall be complete upon receipt of the certified mail. Personal service may be completed by department personnel or a person authorized to serve process under the Idaho rules of civil procedure. Service by publication shall be complete upon the date of the last publication.

(4) The licensee shall have a right to an administrative hearing before the department, if requested in writing within twenty-one (21) days from the date of service of the order, and to judicial review, all as provided in section 42-1701A, Idaho Code.

(5) If the director of the department of water resources has issued an order to show cause why the director should not revoke a license, the licensee may, within twenty-one (21) days from the date of service of the order, notify the director in writing of the intent of the licensee to waive the right to an administrative hearing before the department and to file a complaint in the district court for a determination of the validity of the license. The complaint shall name the director of the department of water resources as a defendant and shall be filed either in the county where the point of diversion or the place of use under the license is located, or in

the county where the director issued the order to show cause. The complaint shall be filed within forty-two (42) days of the date of service of the order to show cause by the director.

(6) The term "licensee," as used in this chapter, includes the heirs, successors, or assigns of the person to whom the department issued a water right license.

[42-350, added 1986, ch. 313, sec. 8, p. 773; am. 1988, ch. 83, sec. 2, p. 144.]

42-351. ILLEGAL DIVERSION OR USE OF WATER -- ENFORCEMENT PROCEDURE -- INJUNCTIVE RELIEF. (1) It is unlawful for any person to divert or use water from a natural watercourse or from a ground water source without having obtained a valid water right to do so, or to divert or use water not in conformance with a valid water right.

(2) It is unlawful for any person to divert or use water in substantial violation of any provision of this title, or any rule, permit, condition of approval or order issued or promulgated pursuant to this title that is related to the diversion or use of water.

(3) Upon investigation of available information, the director of the department of water resources shall have the discretion to issue a written notice of violation to the person in accordance with the provisions of section 42-1701B, Idaho Code, for the illegal diversion or use of water.

(4) Notwithstanding the issuance of a notice of violation, the director may also file an action seeking injunctive relief directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or any existing water right.

[42-351, added 1986, ch. 313, sec. 8, p. 774; am. 1988, ch. 83, sec. 3, p. 145; am. 1994, ch. 450, sec. 5, p. 1438; am. 1998, ch. 173, sec. 4, p. 602; am. 2003, ch. 165, sec. 1, p. 467.]