ADMINSITRATIVE UPDATE: RULEMAKING AND ADMINISTRATIVE DECISIONS

PETER ANDERSON, HEARING OFFICER COORDINATOR
AGENDA

• IDWR and IWRB Rules of Administrative Procedure
• IDWR Precedential Orders
• Recent Administrative Decisions
IDWR AND IWRB RULES OF PROCEDURE

IDAPA 37.01.01
Statutes, Rules, and Hearing Procedures

IDWR Rulemaking

The Idaho Administrative Procedure Act ("APA") (Title 67, Chapter 52, Idaho Code), which governs rulemaking in Idaho, defines rulemaking as the process for the formulation, adoption, amendment, or repeal of a rule. This process can be driven by a number of different events but two of the most common are the enactment of a new or amended statute by our state Legislature or the enactment of a new law or regulation by the federal government. However, a citizen's petition to amend or adopt a new rule, a change in an agency's process or procedure requirements, a court order, or the need to simply update the rule can cause an agency to initiate rulemaking and set the process in motion.

In Idaho, rules are typically proposed by state agencies, opened for public comment, and in many instances, reviewed by a board of citizens appointed by the governor. If approved by the board, the rules are then sent to the Legislature for review. If the Legislature does not act on the rules, they automatically take effect at the end of the legislative session. However, legislative action affirmatively approving a rule is required when a rule implements a new fee or revises an existing fee. Rules are compiled in administrative codes and people who do not adhere to the rules may be subject to enforcement actions. Rules specifically governing the actions of the Idaho Water Resource Board (IWRB) and the Idaho Department of Water Resources (IDWR) are contained in Chapter 37 of the Idaho Administrative Code.

When feasible, negotiated rulemaking is conducted with interested parties, in order to improve the final rule and expedite the rulemaking process by drawing upon shared information, knowledge, expertise, and technical abilities. Negotiated rulemaking begins with the publication of a Notice of Negotiated Rulemaking in the Idaho Administrative Bulletin. In the event the IWRB or IDWR determines that negotiated rulemaking is not feasible, they will publish an explanation of the basis for their determination.
Department of Water Resources

Agency Contact:
Phone: (208) 287-4800
agency website

IDAPA 37 Current Administrative Rules

37.01.01, Rules of Procedure for the Idaho Department of Water Resources

37.02.01, Comprehensive State Water Plan Rules
37.02.02, Water Supply Bank Rules
37.02.04, Shoshone-Bannock Tribal Water Supply Bank Rules

37.03.01, Adjudication Rules
37.03.02, Beneficial Use Examination Rules
37.03.03, Rules and Minimum Standards for the Construction and Use of Injection Wells
37.03.04, Drilling for Geothermal Resources Rules
37.03.05, Site-Tailing Impoundment Structures Rules
37.03.06, Safety of Dams Rules
37.03.07, Stream Channel Alteration Rules
37.03.08, Water Appropriation Rules
37.03.09, Well Construction Standards Rules
37.03.09, Land Driller Licensing Rules
37.03.11, Rules for Conjunctive Management of Surface and Ground Water Resources
37.03.12, Idaho Department of Water Resources Water Distribution Rules - Water District 34

Contact Information:
Email: adminrules@idaho.gov
Phone: (208) 334-2500
Filing with IDWR, Rule 53:
- Paper
- E-mail -- file@idwr.idaho.gov
  - Filed when sent, unless filing fee needed
- On-line Process
- No Faxes!

Service, Rule 53:
- Email when authorized by the presiding officer
Informal v. Formal Proceedings, Rule 100:
- Informal, Rule 101
  - Administrative Processing
  - Fewer Attorney Requirements
  - Informal Settlement Conferences
- Formal, Rule 102
  - Notice of Prehearing Conference
  - Attorney Requirements
  - Hearing Officer
RULES OF PROCEDURE OF IDWR AND IWRB

- One Representative, Rule 200
- Representation of Parties, Rule 201
  - Informal Proceedings, Rule 201.01
    - Attorney representation not necessary
  - Formal Proceedings, Rule 201.02
    - Generally, entities must be represented by an attorney
RULES OF PROCEDURE OF IDWR AND IWRB

- Motions, Rule 220
- Motions for Summary Judgment, Rule 220.03
  - Undisputed Facts
  - Entitled to a decision as a matter of law
  - Director considers them to be an extraordinary remedy in light of the right to have a hearing
IDWR PRECEDENTIAL ORDERS
IDAHO DEPARTMENT OF WATER RESOURCES

Active Matters  Settlements
Administrative Actions  Curtailments
Archived Matters  Guidance Documents
Orders  Statutes, Rules, And Hearing Procedures

Current Topics

North Idaho Water Users- IDWR is sending out commencement notices for the Clark Fork – Pend Oreille (CFPRB) Adjudication in 5 mailing groups through 2022.

- Due to the large volume of expected claims, commencement notices will be mailed out in groups between September 2021 – August 2022. Property owners in IDWR administrative Basin 96 will begin receiving commencement notices as early as May 2022.

Upcoming Events

**10 MAY**
10:00 am - 12:00 am
SWAN FALLS TECHNICAL WORKING GROUP

**11 MAY**
9:00 am - 2:00 pm
EASTERN SNAKE HYDROLOGIC MODELING COMMITTEE

Map & GIS Data Hub

Water Resource Board
### IDWR-Issued Orders

**Orders**

- Preliminary Order Modifying Water District No. 110, with Cover Letter
- Preliminary Order Modifying Water District No. 140 to Exclude Sub-Districts as Independent Districts
- Preliminary Order Requiring Measuring Devices and Controlling Works in Water District 11F
- Amended Preliminary Order Approving Application for Permit 95-17896
- Preliminary Order Approving Application for Permit 95-17896
- Preliminary Order Approving Applications for Permits 96-9685 and 96-9686 and Rejecting Applications for Permit 96-9683
- Preliminary Order Denying Applications for Permit 67-15292 and 67-15297 in the Name of Eckhardt Family LLLP
- Preliminary Order Denying Applications for Permit 67-15292 and 67-15297 in the Name of Eckhardt Family LLLP
- Preliminary Order Requiring Measuring Devices for Ground Water Diversions in Water District No. 33
- Order on Reconsideration; Amended Preliminary Order Approving Permit Upon Conditions in the Matter of Application for Permit 63-36465 in the Name of Elmore

**Orders Completed**

- Precedential Orders
- Local/County Orders
- IDWR-Issued Orders

**Archived Legal Matters**

**Settlements**

- Curtailment Notices and Orders

**Guidance Documents**

- Statutes, Rules, and Hearing Procedures

**Administrative Actions**

**Delivery Call Actions**

**District Court Actions**

**Mitigation Plan Actions**
IDaho Department of Water Resources

Precedential Orders

In accordance with Idaho Code § 67-5250 an "Indexing of Precedential Agency Orders" is to be made available for inspection by the public.

When taken together, the following documents contain a list of all orders determined to be precedential to IDWR in its enforcement of the laws and statutes of the State of Idaho.

→ Precedential Agency Orders (2017–Current)
→ Precedential Agency Orders (1993–2016)
Searching Precedential Decisions

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<tr>
<th>Issue Date/Document Title Link</th>
<th>Docket No./Case Caption</th>
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<th>Statutory and Rule Interpretations</th>
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| 9/2/2021 Order on Exceptions; Final Order Approving Application for Amendment of Permit with Conditions and Denying Transfer | In the Matter of Application for Amendment of Permit No. 63-32225 in the Name of Intermountain Sewer & Water, Corp. and Application for Transfer No. 83873 in the Name of Gregory B. Johnson | • Administrative Basin 63  
• Mayfield Springs Planned Community  
• Mountain Home Groundwater Management Area  
• Cinder Cone Butte Critical Groundwater Management Area  
• I-84 Corridor between Boise and Mountain Home  
Parties:  
• Intermountain Sewer & Water  
• Gregory B. Johnson  
• Mary Walsh | • There may be circumstances where irrigation water and municipal water could be commingled while still preventing enlargement.  
• The Director is statutorily required to examine all evidence of whether the proposed transfer will cause enlargement, not just evidence brought forth by an applicant. 42-222(1).  
• Historic conditions imposed in prior water transfer cases do not control which conditions might be attached to a | • If the irrigation water right cannot be monitored and measured to show it is being used pursuant to its authorized use, the use could exceed the amount of beneficial use authorized under the right prior to the proposed transfer. This is enlargement.  
• The Director agrees with the hearing officer’s conclusion and concern that monitoring the Water Right based on authorized annual volume limits may result in water, diverted pursuant to an irrigation Water Right, being applied to municipal uses.  
• The act of commingling irrigation water for end use by residential irrigators means control over the irrigation water is turned over to the end user. |
In April/May 2021 a drought was predicted for the irrigation season. Based on runs of the Wood River Valley Groundwater Flow Model, the Director believed "that the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue (the Bellevue Triangle) would affect the use of senior surface water rights on Silver Creek and its tributaries."

The Director initiated an administrative proceeding, pursuant to the Idaho Code § 42-237a.g. provision that "water in a well shall not be deemed available to fill a water right therein if withdrawal of the amount called for by the right would affect ... the present or future use of any prior surface or ground water right."

The case presented the question of how to distribute water in a year of drought and shortage in the absence of a call.

Currently before the Idaho Supreme Court on the following general issues:

- Use of Idaho Code § 42-237a.g
- Necessity of finding an area of common ground water supply
- Necessity of finding material injury
The City of Nampa used to discharge GW-sourced effluent into Indian Creek. Riverside Irrigation District relied on that waste flow for irrigation. However, to avoid costly upgrades to the wastewater treatment facility to continue discharging into Indian Creek, the City of Nampa chose instead to land apply the water. Nampa’s plan was to discharge effluent to a third party (Pioneer Irrigation) to treat the effluent by using it for irrigation on Pioneer’s lands.

Riverside would lose the additional wastewater flows to Indian Creek and asserted Pioneer could not irrigate with this water without a water right.

Director determined the proposal was legal under Idaho Code § 42-201 (8) because land application can be carried out by a contractor (e.g. Pioneer).

Riverside was not entitled to protection for its water supply that was wastewater.

Upheld by the SRBA District Court.
A developer, One More Mile, owned 28 acres of irrigated land near Fruitland, Idaho. The 28 acres were originally irrigated with surface water. One More Mile split the 28 acres into 14 two-acre parcels and applied for 14 permits for ground water irrigation and domestic use. The applications were protested by Farmers Cooperative Ditch Company, arguing that One More Mile should first use its surface water shares for irrigation.

One More Mile then sold the parcels and permit applications to Eden’s Gate, but did not sell the Farmers Cooperative shares with the parcels.

The Land Use Planning Act, 63-6537, expressly states the public interest value of encouraging the use of existing surface water systems before developing new ground water sources. It is proper to consider this section as a relevant factor when analyzing the local public interest in approving the use of new ground water sources on lands already served by surface water and surface water delivery systems.

Eden Gates intentional action to discontinue the surface water and delivery system use should be discouraged.

Appealed to the SRBA District Court
In the Matter of Application for Amendment of Permit No. 63-32225 in the Name of Intermountain Sewer & Water, Corp. and Application for Transfer No. 83875 in the Name of Gregory B. Johnson

9/2/2021

- This transfer proposed to take an existing irrigation water right and to commingle it in a municipal system for use on lawns and landscaping within a planned development.

- This is an old and recurring issue -- whether IDWR should approve transfers of irrigation water rights when the plan is to comingle the water within municipal water systems, without taking the municipal consumption “haircut” required by a change of use. IDWR has historically authorized a few of these. But these transfers have caused problems with monitoring and enforcement.

- The Director determined that if the irrigation water right cannot be monitored and measured in the municipal system to show it is being used only for its authorized use, the use could exceed the amount authorized under the right prior to the proposed transfer. This is enlargement.

- Although the Director did say there may be circumstances where irrigation water and municipal water could be commingled while still preventing enlargement, this case serves as a signal to the public that IDWR is not going to readily allow these types of transfers.
Issue here is the unstacking of water rights and whether the proposed transfer would result in an enlargement.

Surface water shares developed on Duffin’s land. Then a ground water right was developed on the land and used exclusively for many years.

Duffin wants to transfer the ground water right off and rely solely on the surface water again. Transfer denied by IDWR as an enlargement -- it would result in the doubling the number of acres irrigated by the two water rights. Allowing this type of unstacking would have big implications for the ESPA.

The District Court affirmed the decision.

Upheld (as renamed) by the Idaho Supreme Court: 3G AG LLC v. IDWR (CV06-20-1467)
QUESTIONS?