

SUMMARY OF SURFACE WATER FIRST LEGISLATION I.C. Section 42-204A

Current Status:

There is an existing statute which provides for the surface water first when there is new development under the land use planning act. Idaho Code section 67-6537 provides the policy encouraging the continued use of surface water and provides such surface water shall be used when there is a land use change under the land use planning act.

Based upon this policy, it has been the practice of IDWR for decades to condition new groundwater applications which are for irrigation and already have existing surface water rights to provide that the groundwater is supplemental. In other words, if a property owner is already in an irrigation district or canal company and has available surface water then the new groundwater right cannot be used to replace the surface water but rather is supplemental and may be used during the shoulder season or to supplement the existing surface water. Below is the standard “surface water first condition” IDWR has been utilizing to condition new ground water applications when there is existing surface water.

The primary surface irrigation water for the place of use authorized under this right is delivered by _____ Irrigation District. The right holder shall make full beneficial use of said primary surface water rights available to the right holder for irrigation of lands within the authorized place of use for this right. The right holder may divert water under any groundwater rights to irrigate land with appurtenant primary surface water rights when the primary surface water supply is not reasonably sufficient to irrigate the place of use or is not available due to drought, curtailment by priority, or the seasonal startup and shutoff of maintenance schedule for the irrigation delivery entity. The right holder shall not divert water for irrigation purposes under any groundwater rights if use of the primary surface water rights is intentionally discontinued or reduced (for example abandoned, forfeited, sold, disallowed by court decree, or leased to the Water Supply Bank) or is not deliverable due to non-payment of annual assessments, without an approved transfer pursuant to Idaho Code § 42-222 or other Department approval.

Proposed Legislation:

The need for the proposed legislation arises because of a recent case called Eden’s Gate in which the SRBA Judge, Judge Wildman, held that the Director of IDWR did not have the authority to condition new groundwater irrigation rights, even when there is existing surface water rights, if there was no development under the land use planning act because the water appropriation statutes and criteria, specifically the local public interest criteria, does not include such authority. The decision by Judge Wildman can be found on IDWR’s website at: [Edens Gate, LLC v. IDWR](#). Judge Wildman held that the Director exceeded his authority by relying on the policy provided in I.C. section 67-6537 for purposes of conditioning new groundwater applications.

Thus, the proposed legislation, which is also supported by IDWR, is intended to codify IDWR’s existing policy, **and is limited to** new “irrigation” ground water applications where there is an existing “irrigation” surface water right by expressly providing the authority to IDWR to condition such new groundwater applications as being supplemental. It is not applicable to domestic groundwater applications (only new irrigation) and it is not applicable to new groundwater applications where there is not already an existing surface water right.

What the Proposed Legislation Does:

- It only applies to new applications
- It only applies to new applications for irrigation use
- It only applies when there is already existing surface water rights
- It provides IDWR the authority to condition such applications in the same manner it has for decades

What the Proposed Legislation Does Not Do:

- It does not apply to existing water rights (this only applies to a new application)
- It does not apply to new applications for surface water (only groundwater)
- It does not apply to new applications for domestic or other uses (only irrigation)
- It does not apply to if there is not already an existing surface water right (there must be an existing surface water right)
- It does not alter or change the existing surface water rights (it only provides authority to IDWR to condition the new application)
- It does not alter or change the existing apportionment or shares for the property (see above)
- As an exception, it does not apply when a user can demonstrate use of the groundwater is in the local public interest or to conserve the resources of the State
- As an exception, it does not apply when submitted in connection with a proposed or approved mitigation plan
- It does not alter the application of this policy to a new development by cities or counties under the Land Use Planning Act (I.C section 67-6537 still exists).