



S1339

Outline of changes to Title 42, Chapters 11 & 12

Chapter 11 Rights of Way (§§ 42-1101 — 42-1108)

- 42-1101. Rights of landowners to water. [Repealed 2021.]
- 42-1102. Owners of land — Right to right-of-way.
 - Amend
- 42-1103. Owners of springs and streams — Right to right of way.
 - Repeal
- 42-1104. Right of way over state lands.
 - Amend
- 42-1105. Right of way for riparian proprietors.
 - Repeal & Reenact
- 42-1106. Right of eminent domain.
 - Amend
- 42-1107. Right of way for drains.
 - No change
- 42-1108. Right to cross ditches.
 - Repeal

Chapter 12 Maintenance and Repair of Ditches (§§ 42-1201 — 42-1209)

- 42-1201. Ditches to be kept full.
 - Amend
- 42-1202. Maintenance of ditch.
 - Repeal (move to 42-1201)
- 42-1203. Maintenance of embankments.
 - Repeal (move to 42-1201)
- 42-1204. Prevention of damage to others.
 - Repeal (move to 42-1201)
- 42-1205. Bridges over ditches.
 - Repeal
- 42-1206. Repair of community ditches.
 - Repeal
- 42-1207. Change of ditch, canal, lateral, drain or buried irrigation conduit.
 - Amend
- 42-1208. Easements, rights-of-way, and other real property not subject to adverse possession.
 - No change
- 42-1209. Encroachments on easements and rights-of-way.
 - Amend

18-4308. Change of ditch, canal, lateral, drain or buried irrigation conduit

➤ [Amend](#)

S1339 reduces approximately 760 words, a 19% reduction (including amendments of Title 42, chapters 11 and 12, and amendment of I.C. 18-4308).

Current word count:

Word Count ? ×

Statistics:

Pages	8
Words	3,993
Characters (no spaces)	20,125
Characters (with spaces)	24,075
Paragraphs	48
Lines	260

Word count after amendments:

Word Count ? ×

Statistics:

Pages	6
Words	3,230
Characters (no spaces)	16,924
Characters (with spaces)	20,121
Paragraphs	57
Lines	235

Chapter 11 Rights of Way (§§ 42-1101 — 42-1108)

42-1101. Rights of landowners to water. (riparian land owner's entitlement to water)

- Enacted 1880, repealed 2021 (inconsistent w/ prior appropriation).

42-1102. Owners of land — Right to right-of-way.

- Subsections of 42-1102 enacted 1880, 1911, 1996, 2004, amended 2019 and 2021 as noted below.
- Amend 42-1102 to include laterals and drains. While 42-1102 currently references “ditches, canals and conduits” and “ditch, canal, conduit embankments and irrigation structures”, 42-1207 (ditch relocation & piping), 42-1208 (ROWs not subject to adverse possession) and 42-1209 (ditch encroachment protections) apply more broadly to “any ditch, canal, **lateral or drain** or buried irrigation conduit” (42-1207) and ROWs “owned by irrigation districts, Carey act operating companies, nonprofit irrigation entities, **lateral ditch associations, and drainage districts**” (42-1208, 42-1209). Including laterals and drains in 42-1102 conforms the provisions of chapter 11 with these provisions of chapter 12.

(1) [EXISTING] ROW entitlement for “ditch, canal or other conduit” to convey water for irrigation

- Enacted 1880, amended 2021.
- Creates and defines ROW **for existing ditches, canals and other conduits**, confers right to enter the servient estate owner's land. *Hood v. Poorman*, 519 P.3d 769, 780 (2022); *Chester v. Wild Idaho Adventures RV Park, LLC*, 519 P.3d 1152, 1162 (2022); *Morgan v. New Swed. Irr. Dist.*, 160 Idaho 47, 49 (2016); *Morgan v. New Swed. Irr. Dist.*, 156 Idaho 247, 253 (2014); *Sellers v. Powell*, 120 Idaho 250, 252 (1991).
- NOTE: “A right-of-way is a specific type of easement, which gives “[t]he right to pass through property owned by another.” *Hood v. Poorman*, 519 P.3d 769, 780 (2022). A “statutory ditch right-of-way consists of two parts: the primary easement and the secondary easement. *Hood*, Idaho at P.3d at , 2022 Ida. LEXIS 130.” *Chester*, 519 P.3d at 1165 (emphasis added).
- NOTE: Without agreement of the servient estate owner, eminent domain is the means by which a ROW **for a proposed ditch etc. or drain** is to be established. I.C. 42-1105, 42-1106 and 42-1107.
- “[S]uch owners or claimants of land” at the beginning of current subsection (1) refers to riparian land owners who were entitled to water from the stream per I.C. 42-1101. Since I.C. 42-1101 was repealed in 2021, this reference is removed.
- Amend to include laterals and drains as explained above

(2) [EXISTING] ROW O&M rights for “ditch, canal, conduit, embankments, and irrigation structures”

- Enacted 1996, amended 2021.
- Amend to include laterals and drains as explained above

(3) [EXISTING] ROW owner duty to maintain “Ditch, canal or conduit” and liability for damages

- Enacted 1880, not subsequently amended.
- Ditch maintenance duties and liabilities are comprehensively covered by 42-1202 (Maintenance of ditch), -1203 (Maintenance of embankments) and -1204 (Prevention of damage to others).
- Repeal this subsection. A ROW owner’s maintenance duties and liabilities will be covered by 42-1201, which consolidates 42-1202, -1203 and -1204.

(4) [EXISTING] Ditch presence = notice to landowner of ROW

- Enacted 1996, not subsequently amended.
- Renumber as subsection (3).
- This amendment simplifies language and clarifies that a servient estate owner has notice of a ROW for an irrigation conveyance facility if: “(a) the servient estate owner has actual or constructive knowledge of the irrigation conveyance facility; or (b) the irrigation conveyance facility or any feature thereof is visible or reasonably discoverable.”
- Amend to include laterals and drains as explained above
- NOTE: These standards for notice are well established in case law: *Nampa Highway Dist. No. 1 v. Knight*, 166 Idaho 609, 616-617 (2020); *Tiller White, LLC v. Canyon Outdoor Media, LLC*, 160 Idaho 417 (2016); *Weitz v. Green*, 148 Idaho 851, 858-859 (2010); *West Wood Invs. v. Acord*, 141 Idaho 75, 86 (2005); *Kalange v. Rencher*, 136 Idaho 192, 195-196 (2001); *Haugh v. Smelick*, 126 Idaho 481, 483 (1993); *Villager Condominium Ass’n v. Idaho Power Co.*, 121 Idaho 986, 990-991 (1992); *Wood v. Simonson*, 108 Idaho 699 at 702-04 (Ct. App. 1985); *Fajen v. Powlus*, 96 Idaho 625, 627 (1975); *Langroise v. Becker*, 96 Idaho 218, 220-221 (1974); *Checketts v. Thompson*, 65 Idaho 715 (1944).
- NOTE: Servient estate owners will not be deemed to have notice of buried irrigation and drainage conduits if they do not have actual or constructive knowledge of them, or their existence is not reasonably discoverable (e.g. shown in a subdivision plat).
- NOTE: Whether a party has notice is a question of fact. *West Wood Invs. v. Acord*, 141 Idaho 75, 85 (2005).
- NOTE: ROW is created by 42-1102(1), not this subsection.

(5) [EXISTING] Written Permission Required

- Enacted 2004, amended 2019 to add “operator” and “landscaping, trees, vegetation”.
- Renumber as subsection (4).
- Amend to add “written permission shall not be unreasonably withheld”, per Cities & INT Gas request (also added to 42-1207(1)(d) and 42-1209(1)).

(5) [EXISTING] Remedy When Written Permission Not Obtained

- Enacted 2004.
- Renumber as subsection (5).
- Amend to include the same remedial provisions added to 42-1207(1)(e) and 42-1209(2), based on the *Pioneer v. Caldwell* 153 Idaho 599-600 explanation of the “right to self-help”.

(6) [NEW] Responsibility for encroachment O&M

- Person/entity causing or permitting encroachment is responsible for its O&M to ensure non-interference with ditch & ditch ROW.
- Consistent with obligations in 42-1108 (repeal), 42-1205 (repeal), 42-1207 ((1)(c) and (2)(c) as amended).
- Provision also added to 42-1209(3)

(7) [EXISTING] No effect on eminent domain in I.C. 7-701

- Renumber as subsection (7).
- No change proposed.

(8) [EXISTING] 42-1102 applies to “ditches, canals, conduits and embankments existing on and after act

- Enacted 1996, not subsequently amended.
- Renumber as subsection (6).
- Amend to include laterals and drains as explained above

42-1103. Owners of springs and streams — Right to right of way.

- Enacted 1880, not subsequently amended.
- 42-1103 was originally Rev. Stat. 3185. It provides that a ditch ROW may be acquired through the county commissioner petition procedure provided in Rev. Stats. 3182 and 3183, which was replaced by the right of eminent domain provision in 42-1106.
- Repeal. Acquisition of ROW by eminent domain provided by 42-1105 and 42-1106.

42-1104. Right of way over state lands.

- Enacted 1880, not subsequently amended.
- Amend to include laterals and drains as explained above
- Add “or other water conveyance facility to convey water for beneficial use” to capture 42-1103: “or to any city or town for the use of the inhabitants thereof, or to any factory, or to any distant place, with the intent to apply the same to a beneficial use”.

42-1105. Right of way for riparian proprietors.

- Enacted 1880, not subsequently amended.
- Provides riparian property owner the right to install diversion works in stream channels
- Interpreted in *Schodde v. Twin Falls Land & Water Co.* 161 F. 43, 47 (1908): “The permission here given is a mere license to the owner of lands adjacent to a stream

to use any appropriate method for raising the water to a level above the banks for distribution upon such adjacent lands, but it is immaterial to the state what particular method is used. The landowner may use a ram, a pump, or a wheel, or he may raise the water by means of a ditch. And he may change from one method to another as the situation or circumstances may require.”

- Provide right to install diversion works to water right owners, not just riparian land owners
- Clarify location as the “authorized point of diversion in any of the waters of the state described in section 42-101” (“waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes” 42-101. (Note ref. to “public streams or other natural water sources” in 42-1201).
- Clarify that right is “for the purpose of diverting and conveying water to the place of use in accordance with the water right”.

42-1106. Right of eminent domain for ditch, canal or conduit.

- Enacted 1899, not subsequently amended.
- Amend to include laterals and drains as explained above

42-1107. Right of eminent domain for drain.

- Enacted 1911, not subsequently amended.
- No change proposed.

42-1108. Right to cross ditches.

- Enacted 1899, not subsequently amended.
- Repeal. 42-1102(5) and 42-1209 encroachment provisions cover the “right to cross” a ditch ROW with another ditch, flume or conduit.

Chapter 12 Maintenance and Repair of Ditches (§§ 42-1201 — 42-1209)

42-1201. Ditches to be kept full.

- Enacted 1899, amended 1989.
- Creates easement for existing ditches, confers right to enter the servient estate owner’s land. NOTE: Without agreement of the servient estate owner, eminent domain is the means by which a ROW for a proposed ditch etc. or drain is to be established. 42-1105, 42-1106 and 42-1107.
- Remove fixed dates for irrigation water delivery in subsection (a) to reflect ditch operators’ discretion to determine irrigation start and end dates.
- Consolidate in 42-1201 all ditch maintenance duties from 42-1202 (maintenance of ditch), 42-1203 (maintenance of embankments) and 42-1204 (prevention of damage to others).

42-1202. Maintenance of ditch.

- Enacted 1899, not subsequently amended
- Move to 42-1201 (1)(b)

42-1203. Maintenance of embankments.

- Enacted 1899, amended 2012, 2019
- Move to 42-1201 (1)(c, d) & (2)

42-1204. Prevention of damage to others.

- Enacted 1880, amended 1996, 2012, 2019, 2021
- Move to 42-1201 (1)(e) & (2)

42-1205. Bridges over ditches.

- Enacted 1899, not subsequently amended
- Repeal. Antiquated & not used

42-1206. Repair of community ditches.

- Enacted 1880, not subsequently amended
- Repeal. Antiquated and not used. Collection of O&M costs for lateral ditches (“community ditches”) covered by Title 42, chapter 13.

42-1207. Change of ditch, canal, lateral, drain or buried irrigation conduit.

- Enacted 1907, amended 1994, 2002, 2005, 2011, 2019
- subsection (1) – relocation, piping by servient estate owner
 - ✓ (1)(d) - clarifies written permission requirement.
 - ✓ (1)(d)(iii) Amend to add “written permission shall not be unreasonably withheld”, per Cities & INT Gas request (also added to 42-1102(4) and 42-1209(1)).
 - ✓ (1)(e) - mirrors existing remedial provisions in 42-1102(5) and 42-1209(2).
 - ✓ (1)(e)(i)(ii) - (i) and (ii) are the same remedial provisions added to 42-1102(5) and 42-1209(2), based on *Pioneer v. Caldwell* 153 Idaho 599-600 explanation of the “right to self-help”.
- subsection (2) - relocation, piping by irrigation facility owner
- subsection (3) – 42-1207 applies to facilities existing on or established after effective date

42-1208. Easements, rights-of-way, and other real property not subject to adverse possession.

- Enacted 1981, amended 2004, 2021
- No change

42-1209. Encroachments on easements and rights-of-way.

- Enacted 2004, amended 2019

(1) [EXISTING] Responsibility for encroachment O&M

- renumber as subsection (1)
- amend to reference incidental easement rights and protections of 42-1102 and 42-1207
- Amend to add “written permission shall not be unreasonably withheld”, per Cities & INT Gas request (also added to 42-1102(4) and 42-1207(1)(d)).

(2) [EXISTING] Responsibility for encroachment O&M

- renumber as subsection 2
- amend to include remedial provisions added to 42-11102(4) and 42-1207(1)(e), based on *Pioneer v. Caldwell* 153 Idaho 599-600.

(3) [NEW] Responsibility for encroachment O&M

- Person/entity causing or permitting encroachment is responsible for its O&M to ensure non-interference with ditch & ditch ROW.
- Consistent with obligations in 42-1108 (repeal), 42-1205 (repeal), 42-1207 ((1)(c) and (2)(c) as amended).
- Provision also added to 42-1102(5)

(4) [EXISTING] No effect on eminent domain in I.C. 7-701

- Renumber as subsection 4.
- No change proposed.
- Same as existing 42-1102(7).

(5) [NEW] 42-1209 applies to ditches, canals, laterals, drains or conduits and ROWs existing on and after act

- Same as existing 42-1102(7).

18-4308. Change of ditch, canal, lateral, drain or buried irrigation conduit.

- Enacted 1972, amended 1994, 2000, 2002, 2005
- Current language mirrors 42-1207
- Amend to reference 42-1207 rather than repeat 42-1207.