

# IDAHO DEPARTMENT OF WATER RESOURCES

## A Water Users Information Guide



# IDAHO WATER RIGHTS A PRIMER

### What is a water right?

The constitution and statutes of the State of Idaho declare 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 and ground waters of the state, to be public waters.

The constitution and statutes of the State of Idaho guarantee the right to appropriate the public waters of the State of Idaho. When a private right to the use of public waters is established by appropriation, a water right is established that is a real property right much like property rights in land. The constitution and statutes of the state of Idaho protect private property rights, including water rights.

A water right is the right to divert the public waters of the state of Idaho and put them to a beneficial use, in accordance with one's priority date.

A priority date is the date the water right was established. How this date is determined is described in the section below. The priority date is important because the priority date determines who gets water when there is a shortage. If there is not enough to satisfy all of the water rights, then the oldest (or senior) water rights are satisfied first and so on in order until there is no water left. It is the new (or junior) water rights that do not get water when there is not enough to satisfy all the water rights.

Beneficial uses include such uses as domestic use, irrigation, stockwatering, manufacturing, mining, hydropower, municipal use, aquaculture, recreation, fish and wildlife, among others. The amount of the water right is the amount of water put to beneficial use. Due to the beneficial use requirement, a water right (or a portion of a water right) may be lost if it is not used for a continuous five-year period.

A diversion is a structure used to divert the water from its natural source. Typical diversion structures include pumps, headgates, ditches, pipelines, and dams or some combination. A diversion is generally required to establish a water right. The Idaho Water Resource Board is authorized to acquire water rights without diversions. These water rights are called "instream flow" water rights, and are typically authorized for purposes of protecting some public interest in a natural stream or lake, such as recreation, wildlife, or natural beauty. A water right may also be acquired to water livestock directly from the stream, which is called an "instream livestock" water right.

Water law in Idaho is based on the appropriation doctrine, because water rights in Idaho are based upon diversion and beneficial use of water. The appropriation doctrine has also been called "first in time is first in right", because the priority date determines who gets water when there is not enough to go around. The water right is said to have "appropriated" water.

You may also have heard of something called "riparian rights". In some states, an owner of land has the right to make a "reasonable use" of ground water underneath her land, or water naturally flowing on, through, or along the borders of her land. A riparian right to make use of the water is not limited by priority date and it cannot be lost by non-use. Idaho law does not recognize a "riparian right" to divert and use water.

A water right under the law of the state of Idaho can be established only by appropriation, and once established, it can be lost if it is not used.

### How is a water right established?

#### *Surface Water*

Prior to May 20, 1971, there were two ways in which a right to surface water could be established. The first was to simply divert water and apply it to beneficial use. These water rights are called "beneficial use", "historic use" or "constitutional" water rights. The priority date for a water right established by this method is the date water was first put to beneficial use.

The second way to establish a water right to surface water was to comply with the statutory method in effect at the time the water right was established. The current statutory method is an application/permit/license procedure that is described further below. The priority date for a water right established by this method is the date of filing the application with IDWR, and this priority date is shown on the license that is issued when the process is completed. Prior to 1903, Idaho had a "posted notice" statute, which provided for posting of a notice at the point of diversion and recording the notice at the county recorder's office, followed by actual diversion and beneficial use of water, among other things. If the statutory requirements were met then the priority date for a water right established under the posted notice statute was the date of posting the notice. Water rights established under the old statutory method are called "Posted Notice" water rights, but are considered beneficial use rights because they are not confirmed by a license or decree.

As of May 20, 1971, there is only one way to establish a right to surface water, and that is by following the application/permit/license procedure that is described further below. The one exception to this rule is for water rights used solely for instream watering of livestock.

#### *Ground Water*

Prior to March 25, 1963, there were two ways to establish rights to ground water, which are the same methods described above under Surface Water. As of March 25, 1963, there is only one way to establish a right to ground water, and that is by following the application/permit/license procedure that is described further below. There is one exception to this rule. A "beneficial use" right to ground water may still

be established for domestic purposes. “Domestic purposes” is defined by statute as “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.” Domestic purposes does not include “water for multiple ownership subdivision, mobile home parks, commercial or business establishments” unless the 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.

### **Can a water right be changed?**

The point of diversion, place of use, period of use, or nature of use of a water right may be changed so long as the change meets certain conditions as described below.

After May 26, 1969, any person wishing to make a change in use of the water right must file an application for transfer with IDWR for approval of the change. IDWR may approve the proposed change if it a) will not injure other water rights, b) does not constitute an enlargement of the original water right, c) is a beneficial use, d) is consistent with the conservation of water resources within the state of Idaho, and e) is in the local public interest. IDWR may approve the change in whole, in part, or approve it subject to conditions where necessary to meet those five requirements. If the proposed change does not meet those five requirements, then the proposed change is not approved and the application for change is denied.

### **How do I get a water right?**

If you are currently diverting the public waters of the state and putting the water to beneficial use, then you may already have a valid water right established either by the statutory method or by beneficial use.

If water was used on your property before you acquired it, and the person you acquired the property from did not “reserve” the water right in the deed conveying the property to you, and you continued the use of water, you may have acquired a valid water right along with your land. Also, some water rights (including both water rights established by the statutory method and water rights established by beneficial use) have been confirmed by a decree of a state or federal court.

IDWR keeps records of water right decrees and licenses, and these records are available for public inspection.

You may need a new water right for an existing use of water if a water right was not properly established for the existing use. (For example, If a use of surface water was initiated after 1971 without applying to IDWR for a permit.) A new water right is also needed for a new use of water. If you wish to establish a new water right, then there are certain procedures you will need to follow.

First, an application for a permit must be filed with IDWR. Application forms are available from IDWR. The information that must be included in the application is described by statute and in rules and regulations of IDWR.

IDWR is required to publish notice of the application, and other persons may file protests to the application with IDWR. If protests are filed, then IDWR must hold a hearing, if protests cannot be resolved.

IDWR must then review the application (including any hearing record), and if the application meets the requirements of the statute and the Rules and regulations, a permit is issued. The permit describes the appropriation to be made and the deadline within which the appropriation must be completed.

Prior to the end of the period in which the appropriation must be completed, IDWR sends the permit holder a notice that the deadline is approaching and that the permit holder must submit proof of beneficial use. “Proof of beneficial use” is a form sent to the permit holder by IDWR, that the permit holder fills out and returns to IDWR. In the proof form, the permit holder states that she has completed her appropriation.

After filing the proof form, a field examination must be made. The permit holder may request that the field examination be made by IDWR, in which case an examination fee is required to be paid to IDWR at the time proof is filed. The permit holder may instead have the field examination completed by a certified field examiner not associated with IDWR, in which case the field examiner submits a report to IDWR after the examination is completed and prior to the proof due date. The purpose of the field examination is to ensure that water is in fact being used as described in the permit. If so, the IDWR issues a license that describes the appropriation that has been completed.

### **What is a claim?**

There are two different types of filings that are often called “claims”. The first is a “statutory claim” that was filed with IDWR to make a record of an existing beneficial use right. In 1978, a statute was enacted requiring persons with beneficial use rights (other than water rights used solely for domestic purposes as defined above) to record their water rights with IDWR. The purpose of the statute was to provide some means to make records of water rights for which there were previously no records. However, these records are merely affidavits of the water users, and do not result in a license, decree, or other confirmation of the water right.

The other type of claim is a “notice of claim” to a water right that is filed with IDWR in water rights adjudications. An adjudication is a court action for the determination of existing water rights, which results in a decree that confirms and defines each water right. (The application/permit/and license procedure described above is for purposes of establishing new water rights.) When an adjudication of a particular source is commenced, IDWR is required to notify the water users of the commencement of the adjudication, and notify the water users that they are required to file notices of claims for the water rights with IDWR. IDWR then investigates the notices of claims and prepares a report that is filed with the court. Claimants of water rights are notified of the filing of the report, and objections to the report may be filed with the court by anyone who disagrees with the findings in the report. If no objection is filed to a water right described in the report, then the court determines the water right after a hearing and decrees the water right. A general adjudication of the Coeur d’Alene-Spokane River Basin in Idaho is currently ongoing. Information about the Coeur d’Alene-Spokane River Basin Adjudication (CSRBA) is available on the IDWR website.

### **Other kinds of water “rights”**

Some persons have a right to receive water that is not an “appropriation”. For example, some persons have the right to receive water that is represented by shares in a ditch company. In such cases, the ditch company has the appropriation, and the water users have a right to receive water from the ditch company.

Other examples are persons who receive water from a city, an irrigation district, or a water utility company (such as United Water of Idaho). Again, the water user may have a right to receive water from the city, district, or utility, (usually contingent upon payment of a fee), but does not have an appropriation.

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