This Guidance Document is not new law but is an agency interpretation of existing law. For more information or to provide input on the document, please contact the Water Rights Section Manager at 208-287-4800. (Feb.2020)

# CLAIM INVESTIGATION HANDBOOK

## CHAPTER 1

## INTRODUCTION

The Idaho Department of Water Resources plays a key role in the Snake River Basin Adjudication. IDWR receives all claims for state law based water rights and investigates them before they are considered by the SRBA District Court. IDWR investigates them to determine how it believes each water right should be described, and then submits its recommendations to the SRBA District Court in the form of a Director's Report. Experience in the Test Basins shows that over 90% of the time IDWR's recommendation to the SRBA District Court is accepted and decreed without objection. Even when objections are filed conversations with IDWR often result in agreements between the claimant and IDWR regarding how the water right should be described. In other words, in most cases the water rights in the SRBA will be decreed in the way that IDWR recommends.

This fact illustrates that IDWR bears a major responsibility to ensure that the water rights decreed in the SRBA accurately describe the water uses that the rights authorize and protect. This revised Claim Investigation Handbook has been developed to assist you in investigating the water right claims in the SRBA. Although it is not possible to provide you with a "cookbook" that describes how every individual claim should be recommended, the guidelines in this manual are designed to assist you in exercising and developing your good judgment regarding water right recommendations. It also explains to you the process that will occur from the time you are assigned a claim until that claim is decreed as a water right.

Examinations of claims and preparation of recommendations is complex work. On one hand there is a temptation to be extremely thorough in this process. On the other, the public cannot afford to pay for a "Cadillac" inspection of every water right. We are seeking a "Chevrolet" inspection, maximizing the use of technology to enhance efficiency and accuracy, while developing a speedy and cost-effective product. We are always open to new ways of doing business to achieve this end.

Remember, this Handbook cannot answer every question. Use your common sense; talk with your co-workers; talk with your supervisor and consult with your regional Deputy Attorney General when you deal with a situation not quite answered by this Handbook. In the end, the State is counting on your diligence, hard work and good judgment to complete the SRBA fairly and efficiently.

Copies of this manual may be provided to the public when specifically requested, subject to payment of mailing and/or copying charges. "Subscriptions" for updates will not be available. THIS CLAIM INVESTIGATION HANDBOOK REMAINS SUBJECT TO REVISION WITHOUT NOTICE TO ANYONE OUTSIDE OF IDWR.

## II.
## CLAIMS INVESTIGATION AND RESOLUTION PROCEDURE

This Handbook applies primarily to the investigation, reporting and decreeing of irrigation and other water rights. Most of the small domestic and stockwater claims were reported by early 1999. The following flow chart lays out the procedure for the processing of these claims from the time of initial investigation until the water right is decreed.

As you look at the flow chart be aware that investigation/error correction is in IDWR's hands. IDWR determines how it will investigate water rights and conduct error correction. Any deviations from the investigation/error correction flow chart must be approved by the Adjudication Bureau Chief.

Following the submission of the Director's Report to the SRBA District Court, processing of claims is within the Court's jurisdiction and conducted pursuant to Administrative Order No. 1. The SRBA District Court and IDWR cooperated in defining IDWR's involvement in subcases following the objection procedure. However, those procedures were established by the Court, and IDWR cannot deviate from them if it wishes to provide meaningful information to the Special Masters during subcase processing. If you have questions regarding the processing of subcases, contact legal staff with your questions.

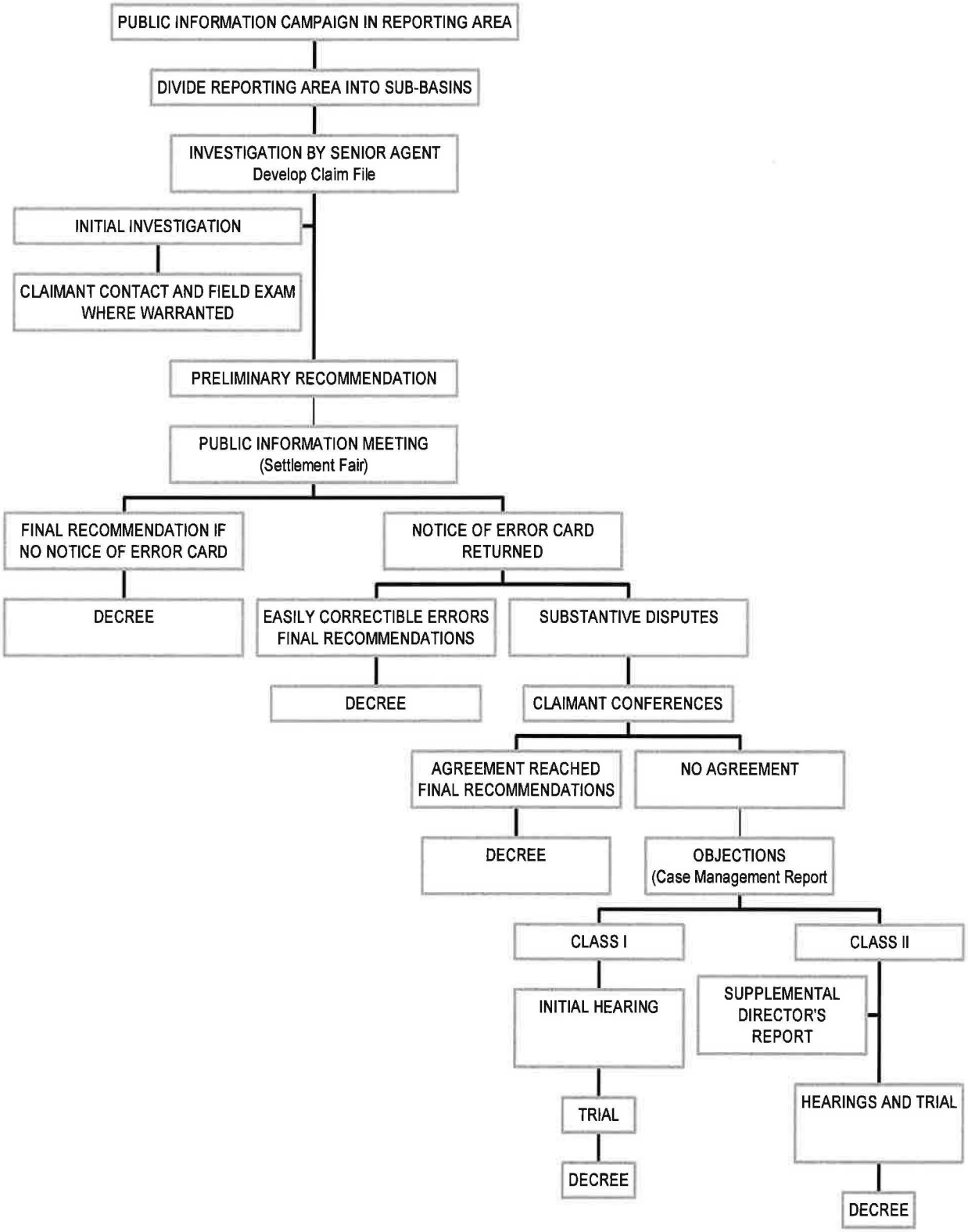
Before IDWR's investigation in a basin begins, contractors will provide GIS shape files and layouts for claims within that basin.

Additionally, a public information campaign may be conducted to inform the citizens of that basin. The State Office will inform the Regional Offices if such a campaign commences in their region.

Claims will be distributed by the regional supervisor to the agents within the region in discrete groups, based upon distinct hydrologic sub-basins. The division of basins into sub-basins is crucial. It allows for the staging of work efforts by the agents both during the investigation/error correction process and during the court process. Regional supervisors will direct comparing the electronic claim inventory with the paper file to ensure that all claims are assigned to an agent.

The agent will want to organize the claims within the sub-basin in a fashion that highlights the inter-relationships between the rights, sources, and ownerships. For instance, the first rights to be investigated could be at the top of the drainage and then the rights moving downstream. The agent must compile a GIS shapefile for all irrigation water rights in the sub-basin. Groupings

## SHAPE FILES AND LAYOUTS CREATED BY CONTRACTOR



should allow for a reasonable grasp of the entire group, and reasonable time for field examinations within the group.

After the agent organizes the group of rights for investigation, the steps for investigation follow:

## A. INITIAL IN-OFFICE INVESTIGATION.

### 1. Reviewing Claim--Electronic Record and Claim Investigation File.

For each claim, an electronic record was created with an "A" prefix. The "A" record should be proofed to make sure that it is the same as the written claim and properly coded, including all amended claims.

A duplicate record with an "R" prefix will then be computer generated for each claim. When the manual indicates that the appropriate action is to change the claim, it is the "R" record that is to be changed. The "R" records for a basin will generally not be available to the public until the proposed recommendations for a basin are distributed. The "R" prefixes will be stripped from the "R" records when the director's report is filed with the court.

Under this procedure, the "A" record will continue to reflect the right as claimed, and data-entry during the review stage will be limited to those situations where the claim is going to be recommended differently than it was claimed, or where an amended claim or notice of change in address/ownership is filed after the "R" record is created.

Every claim also should have a "claim investigation file". This file should contain all pertinent information regarding a claim. Care should be taken to ensure that all Notices of Completed Administrative Proceeding (NCAP's), changes in ownership and all other documents relating to a claim are filed in the claim investigation file. When the partial decree is issued for the water right a copy will be placed in this file and it will be maintained in the vault in the state office in Boise. The claim investigation file becomes the basis of IDWR's permanent record regarding that water right.

A claim verification report (CVR) should be included in each claim investigation file. The "quick-look" page of the CVR will be used to indicate the extent of the review that needs to be done and the status of that review. The claimant contact checklist may be attached to indicate the type of claimant contact to be made.

The claim file for each claim should indicate the basis for the recommendation - NOT just the basis for recommendations that are different than the claim. This may be done in the manner that is convenient for the water agent, but should be appropriate to the degree of complexity. It might, for example, be a remark on the CVR or a separate, more detailed, memo to the file. Comments in the electronic record are recommended and should reference relevant information. In

all situations where the recommendation differs from the claim, a brief narrative summary should be given explaining the reason for the difference.

### 2. GIS Evaluation

The first step of your investigation ordinarily will be to either digitize the water rights or review the digitized water rights provided by the contractor for your sub-basin. This digitizing should be conducted pursuant to IDWR standards. GIS Edits & GIS Guidelines

### 3. Second Round Service.

Once all claims have been digitized for a group or sub-basin, those irrigated acres where a claim has not been filed should be identified and second round service conducted if necessary.

During investigation of the claims, if IDWR discovers an unclaimed water use (other than small D&S), IDWR is required to serve a commencement notice by certified mail on all persons with a record interest in the property on which water appears to be used. Service is not required to be made to such persons who have already filed a claim in the adjudication, even if for a different use. This is known as second round service, which is described in more detail by an order issued by the district court. Click here to see the plan.

The state office will prepare a list of the parcels and persons previously marked for second round service in a basin. The list should be useful for resolving questions as to whether service has already been made to a particular person or for a particular parcel. Completion of second round service will continue to be primarily a state office effort, supported by regional office input.

### 4. Review of IDWR records.

The agent needs to review IDWR's records regarding a water use. These records will often assist the agent in determining the water user's intent when the water use commenced, the historical use of the water, how the water use has been transferred and changed, and such basic items as priority date, point of diversion, place of use and so on. Copies of the records, or precise references to them should be maintained in the claim investigation file.

The following is a basic list of records that IDWR may have regarding a water right and the statutory citation for how the record is developed. All agents should be familiar with these records, where and how they are maintained and the information that is found within them.

| | |
|---|---|
| Posted Notices | Idaho Laws 1881, p. 267, 1899, p. 380 |
| Applications to Lease Water | Idaho Code § 42-108B |
| Approved Applications to Lease Water | Idaho Code § 42-108B |
| Applications to Appropriate Water | Idaho Code § 42-202 |
| Water Right Permits | Idaho Code § 42-204 |

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|---|---|
| Reports of Beneficial Use Investigation | Idaho Code § 42-217 |
| Water Right Licenses | Idaho Code § 42-219 |
| Applications to Change Water Right | Idaho Code § 42-222 |
| Approved Water Right Changes(Transfers) | Idaho Code § 42-222 |
| Extensions of Time Extending Time for Forfeiture | Idaho Code § 42-222/42-223 |
| Emergency Transfers During Drought Conditions | Idaho Code § 42-222A |
| Well Drilling Permits | Idaho Code § 42-235 |
| Well Drillers Reports | Idaho Code § 42-238 |
| Consent Orders | Idaho Code § 42-238b(3)/351(3) |
| Water Right Claims | Idaho Code § 42-243 |
| Permit Cancellations | Idaho Code § 42-310 |
| Orders Revoking Licenses | Idaho Code § 42-350 |
| BLM Stockwatering Permits, Licenses, Certificates | Idaho Code § 42-501 |
| Reports of Watermasters | Idaho Code § 42-606 |
| Reports of Water Diversions | Idaho Code § 42-701(5) |
| Reports of District Hydrographers | Idaho Code § 42-708 |
| Water Measurement Reports | Idaho Code § 42-706/708 |
| Water Right Decrees | Idaho Code § 42-1403/1413 |
| Approved Minimum Stream Flows | Idaho Code § 42-1503 |
| Dam Plans, Drawings and Specifications | Idaho Code § 42-1712 |
| Supplementary Dam Drawings or Descriptive Matters | Idaho Code § 42-1716 |
| Carey Act Proposals | Idaho Code § 42-2002/2003 |
| Carey Act Contracts | Idaho Code § 42-2009 |
| Applications to Enter Carey Act Lands | Idaho Code § 42-2014 |
| Certificates of Location of Entry on Carey Act Lands | Idaho Code § 42-2014 |
| Proofs of Reclamation and Settlement of Carey Act Lands | Idaho Code § 42-2019 |
| Carey Act Land Patents | Idaho Code § 42-2022 |
| Carey Act Contractors Annual Reports | Idaho Code § 42-2037 |
| Transfers of Water Right in Carey Act Projects | Idaho Code § 42-2504 |
| Petitions to Establish Flood Control Districts | Idaho Code § 42-3105 |
| Reports of Aquifer Recharge Districts | Idaho Code § 42-4212 |

When you have completed the review of IDWR documents, the GIS information and other photography in IDWR's possession you should have an initial impression of whether the right claimed is consistent with IDWR's in-office records. If IDWR's information is consistent with the claim, then the agent may prepare the preliminary recommendation without further investigation or claimant contact. If the IDWR information is incomplete or does not match the claim, the next step in the investigation is the initial claimant contact and field examination.

## B. INITIAL CLAIMANT CONTACT AND FIELD EXAMINATION.

### 1. Claimant Contact.

During the field investigation process, there needs to be some claimant contact in all cases where the in-office review makes it look likely that IDWR's recommendation will significantly change or reduce any element of the claim. The agent should develop a schedule of field exams for rights within the sub-basin needing further investigation. The schedule should allow the agent to concentrate the field work to minimize the number of times the agent is required to visit an area. The schedule should be developed in cooperation with the claimants to be visited. The agent may use discretion in the means of contacting the claimant, but the following information should be conveyed:

- explain the investigation process;
- identify the agent conducting the investigation;
- set an appointment time for the field exam;
- explain that if the claimant cannot be at this appointment, he/she should call to reschedule the exam within a reasonable amount of time; and
- explain that the claimant should gather all evidence in his/her possession regarding their water use to show the agent during the field exam.

When arranging for the field exam, conducting the exam, and putting the final recommendation together you will likely speak with the claimant often. A written or taped record MUST be made and included in the file, which states the name of the person with whom the water agent spoke, the name of the agent, the date of the conversation, notes of the relevant portions of the conversation, and notes of any other relevant information the agent has about the issue.

When contacting a claimant that has an attorney of record, you should also contact the attorney. One time-effective technique is to send the attorney an email when you plan to initiate contact with the claimant. The attorney's email address can be found in the Tucker Legal Directory, available from IDWR legal staff. In this way you can seek information from the claimant while keeping counsel informed. Save a paper copy of the email in the file, or place the electronic version of the email in the electronic document management system, to show we attempted to make contact with the attorney.

### 2. Field Examination.

The agent should try in as many cases as possible to do the field exam with the claimant present to the full extent the claimant wants to participate. Whenever possible the field exam should be done per an appointment the agent has made with the claimant. The following procedures should be followed during the exam:

(a.) The agent should always take a copy of the GIS map to the field exam. (Two copies may be preferable in cases where it appears likely that the claimant will be asked to mark locations of POD, POU, etc. on the map. The agent should also have a copy for the agent's own use, since a major purpose of the field exam will be to determine on the ground the truth and accuracy of the GIS map itself.) If available, the agent should also take a copy of the ASCS map covering that POU wherever it appears that the claimant may be able to orient himself to the map better than to the GIS map file.

(b.) The agent should communicate to the claimant during the field exam what the agent is observing/ what problems the agent is seeing at that time. The agent should also note comments made or information provided by the claimant--especially numbers repeated by the claimant (such as acres or inches), information on previous/historical use, crop rotation, previous owners, or conflicts with neighbors. The agent should communicate with the water user regarding the appearance or existence of previous diversion systems that may have served the property.

(c.) The agent should have the claimant draw or mark on the GIS map (or the ASCS map if appropriate) the particulars of the water right (e.g. point of diversion, location of ditches, and especially the boundaries/location of the acres irrigated). If the claimant cannot draw the particulars on the map the agent should do so and ask the claimant if he/she agrees. This copy of the map should be clearly identified for the claim file as the claimant's representation of the particulars of the water right. The agent subsequently will prepare the agent's own map, which also should be clearly identified in the claim file.

(d.) The agent should try to reach general consensus with the claimant on the big points during the field exam, but the agent must base recommendations on findings and in some instances agreement may not be possible.

(e.) The agent should take care to photograph land which the claimant asserts is being used or irrigated, but as to which the agent has doubts--especially areas which the claimant asserts are irrigated but which do not appear to the agent to have been irrigated. Notes should be prepared documenting the time, location, orientation, photographer, other persons present, and content of photographs.

(f.) The agent should ask to examine any documentary evidence the claimant might have regarding any element of the water right (e.g. date of priority of a beneficial use right). The agent should make notes (see section (h.) below) as to what these documents are and what they purport to show. The agent should ask the claimant to send copies of whatever documents the agent believes are necessary for retention in the claim file to support the recommendation of any particular element of the right. If--based upon the field exam and the evidence the

agent has seen up to that point--the agent believes there is at least an initial disagreement between the claimant and the agent as to any element of the water right, the agent should specify to the claimant either orally or in writing what that initial disagreement is and specify what additional information the claimant might provide the agent in order for the agent to be able to recommend that element as the claimant wants it.

(g.) The agent should leave a business card or field exam card at the conclusion of the exam, and should ask the claimant to call if the claimant thinks of any additional information about any aspect of the exam or the water right that the claimant thinks the agent should know about. The agent should emphasize and encourage further communication from the claimant.

(h.) Immediately following the field exam the agent should make oral notes of the conversation and his/her observations on a hand-held tape recorder. That recording should then be placed and noted in the claim file. The hand-held tape recorder may **not** be used to record the agent's conversation with the claimant, unless the claimant knows that the recorder is being used and the recording is made with their full permission. This should be done in rare circumstances, but may be useful to memorialize the observations of an elderly or sickly witness, or one who may leave the jurisdiction.

If the accuracy of the GIS map can be determined during a "drive by" field examination--where the agent would not otherwise meet with the claimant and walk the property--this type of exam should be done if the parcel to be viewed is near other parcels that are to be investigated and would not require a special or time-consuming trip. The "ground-truthing" of the GIS map should be noted on the map by date and time, and the agent's name.

## C. PREPARATION OF PRELIMINARY RECOMMENDATION

Following the field exam and the review of the claimant's evidence the agent should be in a position to make IDWR's preliminary recommendation. If the claimant's information has not been provided, the preliminary recommendation should be made as if that information does not exist. The claimant will have another opportunity during the notice of error process to provide the information.

Generally, a right should not be preliminarily recommended substantially "in excess" of the right claimed. This includes a priority earlier than the priority claimed, amounts in excess of the amount claimed, purposes of use in addition to purposes of use claimed, or a total number of irrigated acres greater than the number claimed. An amended claim (or additional claim) is required before the excess may be recommended. An amended claim is generally not required to recommend a different place of use, a different point of diversion, additional points of diversion, or a longer season of use for irrigation.

The agent should generally assume that the claimant claimed everything the claimant wanted to claim. The agent may contact the claimant to inquire whether this assumption is correct or whether they wish to claim the remainder. This contact generally should not be made unless the water right is clearly underclaimed. "Clearly underclaimed" means that there is a significant difference between the claim and a general adjudication decree, license, or the field exam for a beneficial use claim. What is a significant difference requires an exercise of judgment on the part of the agent. For example, a difference of an acre or two on a forty acre claim might not be significant, whereas a difference of an acre or two on a claim to a few acres might be.

### 1. Proof Of Facts.

In many instances the question of what is to be recommended depends on whether a fact has been sufficiently proven. Absolute proof of every essential fact is never required for making a recommendation. It is impossible to describe to you what evidence is "enough" to prove a fact. The amount of proof that is required to make a recommendation of a water right depends upon your good judgment as well as common sense, with an eye towards the legal burden of proof. The question you must answer in your own mind is whether you feel reasonably certain that your opinion regarding how a water right should be recommended is based upon reasonable facts, assumptions and analyses.

The claimant seeking to have a water right confirmed bears the burden of proof to establish every element of his or her water right. You should feel free to ask the claimant what information they have or could submit at trial that supports their water right. Consider what the Court would do if presented with a certain piece of evidence or testimony. Remember that because this is a civil case the standard of proof the Court will apply is whether a certain element is more likely than not correct.

A good example is proof of priority of beneficial use claims. The claimant submits some information supporting the priority date claimed. Absent contradictory information, the claimant's information would likely be accepted by the Court as meeting the claimant's burden of proof. In this situation the claimed priority date could be recommended. If IDWR has other information which contradicts the claimant's information, then the claimant may be asked to clear up the confusion, if they can, and then all of the relevant information should be "weighed" to determine if the claimed priority is correct.

In determining the facts for purposes of recommending claims, the water agents will have to make some close calls. Make a reasonable attempt to gather the relevant evidence; exercise good judgment in evaluating that evidence; and document the evidence for the file in case it is needed in court later. All the available information should be documented for the file, not just the information supporting the recommendation; for the file to justify the recommendation it must also show the contradictory information that was considered in making the recommendation.

Documentation of information upon which the facts are determined is very important. The more complicated the claim, or the more likely the claim is to be contested, the more important the

documentation is. "Documentation" does not necessarily mean that the water agent has to find written evidence before a fact can be determined; it does mean that if a determination is based on information that is not in writing, the agent should prepare written or taped notes for the file.

It is important to remember that once a recommendation is made it is not locked in stone. The claimants will have an opportunity to file notices of error with IDWR to IDWR's proposed recommendation, and will have the opportunity to file objections with the district court to the director's report. More information may become available as part of these processes.

### 2. Proof of Ownership

IDWR will generally not require proof that the claimant is the owner of the water right claimed or that the right was not initiated in trespass for purposes of preparing the recommendation. Ownership issues should be investigated, however, in the following circumstances:

(a.) Duplicative claims - different claimants file claims to the same water right or the same portion of a water right (See page 2 of Chapter 12);

(b.) There is reason to believe, from information already available to IDWR, that there is an ownership or trespass problem.

### 3. Disallowal Recommendations.

A claim recommended for disallowal should have a status of "I". The claim should include a GENeral remark indicating the basis for disallowal. Adjudication Memo #32 lists standard remarks for basis for disallowal (the "P" prefix remarks). If none of the standard remarks seem appropriate, then the water agent should contact legal staff.

The recommendation should also include a standard condition that offers a brief explanation of the basis for disallowal and additional explanation should be provided in the comment field. Adjudication Memo #32 lists the conditions for the standard bases for disallowal (the "P" prefix conditions, which are numbered the same as the "P" prefix remarks to which they correspond) and see Chapter 11 for disallowals based upon forfeiture and abandonment. [The disallowal conditions will print only in the proposed recommendations, and not in the report (see Adjudication Memo #32 as to the proposed recommendation/notice of error procedure). It is not necessary to delete any other conditions in the claim record, because the computer will ignore other remarks in a claim record with an "I".

### 4. Applications For Transfer.

Generally, the agent should consider an approved transfer in the same fashion as a water right license. Conditions of approval should be carried forward in the recommendation if they modify an element of the right or are necessary for the administration of the right. However,

because transfers may be ongoing, care must be taken to be sure that the transfer process is coordinated with the recommendation process. Questions should be directed to legal counsel.

(a.) Application approved after claim filed but before recommendation is final.

The adjudication statute requires the claimant to amend a claim consistent with an approved transfer. An approved transfer will be deemed to amend the claim without the claimant having to file an amended claim. Allocations staff will send copies of the approved transfer to the region, and regional adjudication staff should include it in the claim file and data-enter the changes in the "A" record (and the "R" record, if one has been created).

(b.) Application pending at time recommendation prepared.

If an application for transfer has been filed for a change in use that was made prior to commencement of the adjudication, then it may be possible to recommend the change as an accomplished transfer, in which case the administrative transfer proceeding is unnecessary. If the change is to be recommended in the report, then allocations staff should be informed of the recommendation.

If the transfer applied for may not be recommended as an accomplished transfer, then the right should not be recommended with the changes proposed in the transfer application until the transfer has been approved and the order approving the transfer has become final.

**5. Permits For Which Proof of Beneficial Use Was Filed Prior to Commencement.**

There are some permits on file with IDWR for which a proof of beneficial use was filed prior to commencement but for which a license will not have been issued at the time the permit is investigated for purposes of preparing the director's report. Water allocations staff will be coordinating with adjudication staff to ensure that licenses are issued for these rights prior to filing the director's report to the extent possible. Once the license is issued, then the claim should be recommended as based on a license, and an enlargement or accomplished transfer should be reviewed in generally the same manner as any other enlargement or accomplished transfer of a licensed right.

There is, however, one important caveat. For various reasons, there has in some cases been a substantial period of time between the filing of the proof of beneficial use, completion of the licensing field exam, and the issuance of the license. An enlargement or accomplished transfer must have occurred prior to commencement of the adjudication to be claimed in the adjudication, but cannot be claimed based on a permit. The problem that arises from the lapse of time is that a claimant could be prevented from claiming an expansion or change in use that occurred prior to commencement because the water use was still based on a permit at that time.

This problem will be resolved, for purposes of the enlargement and accomplished transfer analysis, by treating the right as if the license were issued when the proof of beneficial use was submitted. The result of this policy is that 1) an enlargement should not be recommended with a

priority date earlier than the date the proof of beneficial use was submitted, 2) the date of change for purposes of the injury analysis will be deemed to be no earlier than the date the proof of beneficial use was submitted, and 3) an enlargement and accomplished transfer should not be recommended for a right for which the proof of beneficial use was submitted after commencement of the adjudication.

There is another situation where coordination of the efforts of adjudications and allocations staff will be very important. In some cases, the extent to which beneficial use has been made of a permit pending action by the allocations staff is dependent on the nature and extent of other water rights, the use of which is combined with the permitted right. Where the claim to be investigated is pending action in the water allocations section, or overlaps with another right pending action in the water allocations section, adjudications staff should coordinate with allocations staff, in a timely manner that allows both sections to meet their schedules.

### 6. Enlargement claims.

Before any enlargement claims may be recommended pursuant to Idaho Code § 42-1426 they must be published. Prior to completing the preliminary recommendations for a sub-basin the agent should identify all enlargement claims. Type II enlargements will be easy to identify. Type I enlargements are more problematic.

Under Idaho Code § 42-1416(1) holders of previously adjudicated water rights were presumed to have validly applied all of the water being used at the time of the SRBA with no change in priority. This allowed holders of adjudicated water rights to claim all of their water use under their previously adjudicated right under one claim, even if there was an enlargement in use. These claimants claimed, and in the test basins were recommended, one water right with one priority date. **These are Type I enlargements.**

Under Idaho Code § 42-1416(2) holders of unadjudicated water rights who expanded their use in violation of the mandatory permit requirements were presumed to have created an additional water right with a priority date as of the completion of the expansion. These claimants claimed, and in the test basins were recommended, two water rights with differing priority dates. **These are Type II enlargements.**

During the initial investigation and claimant contact the agent should solicit any additional claims for Type I enlargements that claimants wish to file. See **[LINK TO the Memo of October 27, 1997]** Enlargement Memo, that is designed to assist you in identifying these situations. After the filing of any additional claims the agent should arrange for publication of all enlargement claims at the same time the preliminary recommendations are sent to the claimants. This starts the 120 day period for the filing of petitions to assert injury. During this time period the notice of error process will be conducted.

## D. NOTICE OF ERROR PROCESS

## 1. Overall Approach.

1. Goals of Notice of Error Process: The Notice of Error (NOE) process is to be implemented to achieve the following goals:

   (a). To ensure that each water right recommendation in future director's reports is as accurate as possible;

   (b). To resolve all disagreements between IDWR and the claimant--that possibly can be resolved--before the recommendation of the claimant's water right is included in the director's report, so that most objections filed to recommended water rights are third party objections;

   (c). To identify as early as possible those disagreements between IDWR and the claimant that cannot be resolved through negotiation or alternative dispute resolution prior to the filing of the director's report, to prioritize those issues by degree of complexity per IDWR's case management system, and to direct them onto the appropriate track for resolution by the SRBA Court.

## 2. Notice of Error Procedures.

Once the agents have investigated all claims in a basin the agents prepare the preliminary recommendations. Each claimant within the basin will then be sent the preliminary recommendations of each of that claimant's claims from the State Office. The NOE mailing will consist of:

(i) An introductory letter from the Director
(ii) an introductory letter from the SRBA District Court urging people to participate;
(iii) one page of instructions and explanatory material;
(iv) the preliminary recommendation with the GIS map, and
(v) the NOE form
(vi) a return envelope for the NOE.

The NOE forms will be due to the regional office within 30 days of the NOE mailing.

1. The introductory information will set a time for a public meeting which will be conducted as a "settlement fair." The public meeting will be held in the evening at a central location in the reporting area. At that meeting IDWR and Attorney General's Office personnel will be available to answer questions and settle disputes. Claimants will also have the opportunity to set an appointment to discuss their rights. NOE form will be collected at this meeting. If claimants do not attend the public meeting, they will be able to mail their NOE forms to IDWR.

2. Sorting of NOE Return Forms: The NOE forms will be sent back directly to the regional offices. The agent who prepared the preliminary recommendations will receive the NOE forms for those recommendations for placement in the claim file. At that point the agent will sort all water right **recommendations** into one of three categories:

(a.) Recommendations for which no NOE form is returned will be considered to be completed and that recommendation is ready to be sent to the state office for inclusion in the director's report. Presumably (hopefully) no objection will be received and this right will be decreed as recommended unless a third party objection is received.

(b.) Recommendations for which a NOE form is returned indicating minor concerns such as changes of address, clerical errors, and other changes that the agent feels can be corrected. The agent should make the changes and document the reasons in the claim file. Time permitting, the amended preliminary recommendation should be sent to the claimant with a form letter indicating that the requested change had been made as shown on the revised preliminary recommendation. These recommendations will then be ready to be sent to the state office for inclusion in the director's report. Presumably (hopefully) no objection will be received and this right will be decreed as recommended unless a third party objection is received.

(c.) Recommendations for which a NOE letter is returned which indicate that a meeting should be held with the claimant to review the basis for the recommendation and the basis of the claimant's concerns. Claimant conferences should be set up for these claimants.

3. Claimant Conferences: For NOEs requiring more than form letter response, the agent, legal counsel, and, if necessary, a State Office technical staff person should meet to discuss the NOEs. Based upon this review they should cooperatively develop a schedule of claimant conferences for all NOE claimants. When a workable schedule has been developed, contact should be made with the claimants to set up a conference.

The claimant contact should:

- acknowledge IDWR's receipt of their NOE card;
- set an appointment time for the claimant conference;
- explain that if the claimant cannot be at this appointment, he/she should call to reschedule the appointment within a reasonable time; and
- explain that the claimant should bring all evidence in his/her possession regarding their NOE to discuss at the conference.

IDWR should bring all information upon which it relied in preparing the recommendation to the NOE conference. IDWR will be represented by the investigating agent

and legal counsel with authority to enter into a settlement agreement on the spot. The conference will be primarily an information sharing meeting. The agent should explain--and show to the claimant--all information the agent relied upon in making the proposed recommendation. The claimant in turn should show the agent all information in the claimant's possession that supports the claimant's position. The agent should make for the claim file copies of all documents provided by the claimant. If possible, agreement should be reached as to each element of the water right to be recommended in the director's report. The agent should draft all changes to the proposed recommendation at the conference (e.g. by writing the changes on the face of a copy of the proposed recommendation.) The agent and the claimant should then sign a brief written agreement that this is how the water right will be recommended in the director's report. These recommendations will then be ready to be sent to the state office for inclusion in the director's report after the agent has completed any necessary data entry. Presumably (hopefully) no objection will be received and this right will be decreed as recommended unless a third party objection is received.

The agent and legal counsel should review all claims for which an agreement on IDWR's recommendation was not reached in the claimant conference. This should be the only category of recommendation that might be objected to by the claimant. The nature of the dispute should be classified as Class I or Class II under Administrative Order No. 1. The claim investigation file should be reviewed to ensure that the necessary exhibits are contained in the file. The agent's next involvement with this matter, if any, will be in the context of a subcase proceeding.

## E. SUBCASE PROCEEDINGS

If an objection is filed to a recommendation the final decision regarding that water right claim will be made by the SRBA district court. The level of involvement by the agent will depend on whether the case is a Class I or Class II case. The following is a quote from the Administrative Order No. 1 which describes the difference and IDWR's involvement in each type of case:

*2. DEFINITIONS*

* * *

*y. Subcase - A water right which is the subject of any post-Director's Report pleading.*

*(1) Class One Subcase - Subcases where the difference between the Director's Report and the claim is less than 40 acres and/or the difference in quantity is less than 0.80 cfs and all claims where the objection relates only to owner identification, priority date, source or point of diversion.*

*(2) Class Two Subcase - Subcases not included in the definition of Class One Subcase.*

*NOTE: The purpose of separating subcases into two classifications is to expedite the SRBA and provide claimants a speedy and cost-effective method to litigate cases where the difference between the Director's Report and the claim is less significant, as in the Class One Subcases. This allows the court, the parties and IDWR to focus more time and resources on resolving the more significant issues associated with Class Two subcases.*

*10. PROCEDURE FOR WATER RIGHTS WHERE AN OBJECTION HAS BEEN FILED*

*a. When the first objection to a recommendation or abstract is filed, a subcase file shall be opened and separately docketed on IWATRS. The water right number becomes the subcase number. All subsequent filings for that water right, including objections and responses, will be docketed under that subcase.*

*b. Subcases will generally be referred to a Special Master by an Order of Reference.*

*c. Unless otherwise ordered by the Presiding Judge or a Special Master, each subcase shall proceed separately from other subcases or matters at issue in the SRBA.*

*d. No later than 30 days after the objection period has expired, IDWR shall file a case management report with the court dividing each reporting area into Class One and Class Two Subcases.*

*e. Scheduling*

*(1) Class One Subcases -*

*(a) At the end of the objection period, the court may hold an Initial Hearing for each subcase. At the Initial Hearing, each claimant and/or objector shall be given an opportunity to meet with IDWR in an attempt to reconcile the difference between the Director's Report, the claim and the objection(s) for each subcase. If the objection(s) cannot be reconciled, the court shall set the matter for trial. The claimant and objecting party, if any, must be present at the Initial Hearing.*

*(b) The trial should be held within 45 days of the Initial Hearing unless otherwise ordered by the Special Master.*

*(2) Class Two Subcases - At the end of the objection period, the court shall hold a Scheduling Conference under I.R.C.P. 16(b). These subcases shall proceed under the court's scheduling or pre-trial order.*

*(3) Discretion of the Presiding Judge or Special Master - On motion of any party to the subcase or as ordered by the Presiding Judge or Special Master, a subcase may be reclassified and proceed accordingly.*

*f. Amendment of Claims*

*(1) Class One Subcases - Absent leave of court, claims shall be amended at or before the Initial Hearing except for the name and address of the claimant which may be amended at any time.*

*(2) Class Two Subcases - Absent leave of court, claims shall be amended no later than 14 days after the Scheduling Conference except for the name and address of the claimant which may be amended at any time.*

*(3) IDWR investigation of amended claim - The court may request that IDWR prepare an Amended Director's Report for any amended claim, including claims amended at trial to conform to the evidence. The claimant may be ordered to pay all necessary costs associated with investigating and reporting the amended claim.*

*g. IDWR Involvement*

*(1) Class One Subcases - Except where a party calls a representative of IDWR as its own witness, the role of IDWR will be limited to presenting geographic information (GIS) in the form of an illustration depicting the place of use and point of diversion. IDWR may also provide any documents such as permits, licenses, decrees or transfers which may be relevant to a claim. A party calling IDWR as its own witness must notify IDWR, in writing, 7 days prior to trial.*

*(2) Class Two Subcases -*

*(a) Within 14 days following the Scheduling Conference, IDWR shall serve on each party an affidavit setting forth the factual basis of IDWR's recommendation on the disputed element(s). IDWR shall file the affidavit with the court. The court may consider the affidavit for any pre-trial matter or in lieu of any direct testimony by the IDWR affiant at trial.*

*(b) IDWR must be notified, in writing, at or before the pre-trial conference, should any party choose to cross-examine the IDWR affiant or call a witness from IDWR at trial.*

*(3) Discretion of the Presiding Judge or Special Master - Nothing herein shall prevent the Presiding Judge or Special Master from calling a representative of IDWR as its own witness consistent with I.R.E. 706 or 614 for Class One or Class Two Subcases.*

The SRBA attorneys will be establishing case files, especially in the Class II cases, before the objection period has closed. During that time you will be contacted to assist in the development of the necessary evidence to be filed by IDWR. In IDWR's case management report to the SRBA district court subcases will likely be grouped in the sub-basin format under which claims were assigned to you. This should assist you in scheduling discrete time periods when you will need to be in court. Your assigned counsel will keep you informed of the progress of your case.

## F. THE OBJECTION SETTLEMENT PROCESS

When an objection has been filed to IDWR's recommendation, "settlement" negotiations often commence between the objectors, any parties filing a response and IDWR. IDWR's role in the negotiations is to ensure that any settlement that is reached reflects a reasonable description of the water right(s) at issue based upon the information brought to it by the parties. After reviewing a proposed settlement IDWR either concurs by signing a Standard Form 5, or recommends that the settlement not be adopted by the SRBA District Court. If IDWR does not concur in a settlement, the subcase will go to hearing.

The settlement process is a collaboration between IDWR staff and their legal counsel. The Regional Supervisor will identify who the responsible agent will be for subcases in that region. This should occur as legal staff is preparing the case management report for a basin. In the event that due to other assignments the regional agent responsible for the water right does not have sufficient time to actively support the objection resolution process, the Regional Supervisor for the agent should seek assistance from the State office for a proxy agent to conduct these duties. Generally, the legal counsel for a region will be the responsible attorney for subcases arising in that region.

The original claim file should be pulled and placed with the responsible agent. Documents in the claim file will be copied and provided to legal staff as they prepare the case management report. Copies of claim files should be provided to legal staff within two weeks of the close of the objection period. Upon settlement of the case, or following trial, and issuance of the partial decree, the original claim files should be forwarded to the State office for storage.

Counsel will take the lead in communicating with the parties or their attorneys in the settlement process. The agent responsible for that water right must work closely with counsel to

be sure counsel is fully informed regarding the basis for IDWR's recommendation, and to set the factual framework within which IDWR would be willing to agree to a modification of its recommendation. The agent should not be "locked in" to a recommendation and should have an open mind regarding information provided in the settlement process. All Standard Form 5 agreements must be approved by the agent and approved as to form by their legal counsel.

Settlement negotiations can often begin immediately after the filing of the objection, but typically the negotiations commence after the filing of IDWR's case management report. The negotiations can be informally structured before any action by the SRBA District Court, can be driven by the setting of initial hearings or status conferences, or can be formally commenced by the scheduling of a court ordered settlement conference. Legal counsel will ensure that agents are kept informed and involved in all settlement negotiations. Staff must make time to ensure that the negotiation process moves quickly to resolution.

## III.
## BASIC IDAHO WATER LAW

### A. Water Rights.

#### 1. Basic Legal Regime.

The appropriation doctrine of water rights has prevailed in Idaho since before statehood. *Malad Valley Irrig. Co. v. Campbell*, 2 Idaho 411, 18 P. 52 (1888). The state constitution approved by Congress on July 3, 1890, endorses the appropriation system of water rights. IDAHO CONST. art. 15, § 3 (26 Stat. 215). The Idaho Supreme Court held at an early date that a prior appropriator has a superior right over a riparian water user who subsequently applies the waters to a beneficial use. *Drake v. Earhart*, 2 Idaho 750, 23 P. 541 (1890). The appropriation doctrine governs the use of both surface and ground water in Idaho. IDAHO CODE §§ 42-103 and 42-229.

A water right in Idaho is defined by the historic beneficial use of the water. This historic use is generally described by the following elements or descriptors: date of priority, amount, season of use, purpose of use, point of diversion, source and place of use. *Id.* § 42-1411; *Olsen v. Idaho Dep' t of Water Resources,* 105 Idaho 98, 666 P.2d 188 (1983). A water right holder may use water up to the limits of that historic use so long as such use is both beneficial and has not been lost by transfer, forfeiture, abandonment, or adverse possession.

##### a. Beneficial Use.

An appropriation of water must be for a useful or beneficial purpose. IDAHO CODE § 42-104. There is no statutory limitation on what uses are beneficial. The state constitution recognizes agriculture, mining, manufacturing, milling, power and domestic purposes as beneficial. IDAHO CONST. art. 15, § 3. The Idaho Supreme Court has held that the beneficial uses set out in the constitution are not exclusive. *State Dep't of Parks v. Idaho Dep't of Water Admin.,* 96 Idaho

440, 530 P.2d 924 (1974) (commonly referred to as the *Malad Canyon* decision). The court found recreation and scenic beauty to be beneficial uses of water under appropriate circumstances. *Id.*

The legislature in 1996 approved statutory changes recognizing as a beneficial use of water the acquisition and holding of water rights by a municipality to provide for future growth. 1996 IDAHO SESS. LAWS 967, codified at IDAHO CODE §§ 42-202, 42-202B, 42-217, 42-219, 42-222. The changes provide that a license may be issued to a municipal provider for an amount up to the capacity of the system constructed provided that the director of the Department of Water Resources determines that the amount is reasonably necessary to provide for the existing uses and reasonably anticipated future needs within the service area of the municipality. *Id.* § 42-219. The director is required to condition the license to prohibit any transfer of the place of use outside the service area, or to allow for a change in the nature of use for amounts held for reasonably anticipated future needs. The law defines "municipal providers" to include (1) cities, counties and state institutions; (2) corporations or associations holding a franchise to supply water for municipal purposes; and (3) corporations and associations supplying water through a regulated "public water supply" system. Id. § 42-202B.

**b. "Public" Waters Subject to Appropriation.**

Idaho Code §42-101 declares, "All the waters of the state, when flowing in their natural channels, including the water of all natural springs and lakes within the boundaries of the state are declared to be property of the state...." All natural springs and lakes are therefore public waters, subject to appropriation, subject to the laws that establish the procedures for making an appropriation, subject to the laws that govern the distribution of water, and subject to the laws that govern the adjudication of water rights.

A natural channel is "a stream of water flowing in a definite channel, having a bed and sides or banks." Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 P/ 1059 (1909). The flow of water need not be constant, so an intermittent stream that has a flow only in springtime is still a natural channel. Id. The channel must have some element of permanence, but proof of ancient age is not required. Scott v. Watkins, 63 Idaho 506, 122 P.2d 220 (1942). A stream does not lose its character as a natural channel just because it flows through a marsh that lacks definite sides. Bachman v. Reynolds Irrigation District, 56 Idaho 507, 55 P.2d 1314 (1936). Nor does a stream lose its character as a natural channel just because part of the channel has been artificially created. Poole v. Olaveson, 82 Idaho 496, 356 P.2d 61 (1960).

Ground water has also been declared public property by statute. Idaho Code § 42-226. A permit must now be obtained to appropriate ground water. Idaho Code § 42-229. The Idaho Supreme Court held that the statute did not deprive the overlying landowners of their property without just compensation. State ex rel. Tappan v. Smith, 92 Idaho 451, 444 P.2d 4 1 2 (1968).

**c. Water Not Subject to Appropriation.**

Some uses of water do not need to be authorized by a water right and do not receive water right protection. These uses are rare and their existence has little or no practical impact on the SRBA. The statutory provisions regarding so-called "private waters" do not really describe water that is not subject to the water rights laws.

i. Diffused Surface Water

Use of diffused water does not require a water right. A landowner has the right to use diffused surface water occurring upon the landowner's property before it joins a natural stream, lake, or other public source. *King v. Chamberlain*, 20 Idaho 504, 118 P.2d (1099). Diffused, surface water is water on the surface of the land "from rains and melting snow, but is in no way fed from any natural stream or regular flow of water", before it enters a natural channel. *King*. Diffused surface water does not include percolating water from springs, or flood flows, because such waters are fed by a regular (albeit intermittent) flow of water. Whether a particular source is diffused surface water is a question of fact, and the answer may involve difficult issues as to the source of water, when it enters a natural channel, and whether it is a significant source of water to a public water source.

There may also be a question as to when there has been a "capture of diffused surface water". For example, terracing is a common practice of dryland farmers in eastern Idaho. The terracing enables the farmer to make better use of the rainfall. This is a "capture of diffused surface water". The damming of natural swales to collect surface water is a common practice in northern Idaho. This is a capture of diffused surface water if the water has not formed into a definite natural channel at the time of capture.

ii So-Called "Private Waters"

Idaho Code §§42-212 and 42-213 use the term "private waters" in their headings. The actual text of these sections does not, however, describe private water that is not subject to appropriation. Idaho Code §42-212 provides:

> Diversion of private waters. - The department of water resources is hereby prohibited from issuing or granting permits to divert or appropriate the waters of any lake not exceeding five (5) acres in surface area at high water mark, pond, pool or spring in this state, which is located or situated wholly or entirely upon the lands of a person or corporation, except to the person or corporation owning said land, or with his or its written permission, executed and acknowledged as required for the conveyance of real estate.

Idaho Code §42-213 provides:

> Diversion of private waters - Applicants must show right of way. - All applicants to the department of water resources or permits to divert or appropriate the waters of any lake, pond, pool, or spring shall state whether

> such lake, pond, pool or spring is wholly or entirely located upon the land of any person or corporation other than the applicant, and, in the event that it is, such application shall state that the applicant has the written permission from such owner, executed and acknowledged as required by the provisions of the preceding section to divert or appropriate such water.

The only unique attribute of water bodies that qualify as the "private" waters described in Idaho Code §§42-212 and 42-213 is that an applicant for a permit must have a written right of way from the owner of the land where the source is located, and that the application must state whether the application is for private water and whether the applicant has a written right of way. The waters described in those sections continue to be "public" waters subject to appropriation.

iii. Practical Considerations in the SRBA.

Whether or not water is subject to appropriation has no practical consequences for IDWR's activities in the SRBA. In claims taking the claimant must determine whether or not they need a water right for their water use. If they file a claim they are protecting their water right. If they do not file a claim they are gambling that their water use does not need a water right. If it later turns out that the water use does require a water right, the water user would be barred by the provisions of Idaho Code § 42-1420 from claiming a pre-SRBA water right. The assessment of the risk of not filing a claim must be made by the claimant, not the claims-taker, no matter how insistent the claimant's demands for advice.

The department does not investigate whether the claimant of an existing right to the use of water rights of way for the point of diversion or the rest of the water delivery system at the time the appropriation was established. The adjudication deals with existing rights, and where a party has an otherwise valid water right, the water user must have had rights of way for the water delivery system. Otherwise, the landowner would have denied the water user access and thereby prevented the completion of the appropriation. Where a party has an established use, the issue of the whether the water user has a right of way is appropriately litigated by the water user and the owner of the land who claims that the water user lacked the necessary rights of way. The landowner would presumably raise this issue by filing an objection to the director's report.

**d. Instream Uses.**

Water rights for instream uses are recognized in Idaho. The common understanding has been that such uses are recognized only when acquired by a state agency pursuant to statute. See IDAHO CODE §§ 67-4301 to -4312 (Department of Parks and Recreation) and *id.* §§ 42-1501 to -1505 (Water Resource Board). A recent decision by the SRBA District Court holds that a diversion is not necessary to create a water right. This potentially would allow for others to hold instream flow rights. This decision is being appealed to the Idaho Supreme Court. In addition, the Idaho Supreme Court has held that the Department of Water Resources has a duty to consider the need for instream flows for fish and wildlife habitat, aquatic life, recreation, aesthetic beauty,

navigation, transportation and water quality before approving an appropriative water right. *Shokal v. Dunn,* 109 Idaho 330, 707 P.2d 441 (1985).

### e. Measure of the Right.

The rate of flow of a water right is measured in cubic feet per second (c.f.s.), and the volume of stored water is measured in acre-feet. IDAHO CODE §§ 42-102 and 42-202. One c.f.s. is equal to fifty miner's inches in Idaho. When water is used for irrigation, no license or court decree may allot more than one c.f.s. of water for each fifty acres of irrigated land unless it can be shown that a greater amount is necessary. *Id.* § 42-220. When flood or winterflow waters are stored for later irrigation use, no more than five acre-feet of water may be stored for each acre of land to be irrigated. *Id.* § 42-202.

The amount of water that may be diverted under a water right is limited to the historical beneficial use and further limited, at the time of use, to the amount necessary to satisfy the beneficial purpose served by the right. *See Glavin v. Salmon River Canal Co.,* 44 Idaho 583, 589, 258 P. 532, 534 (1927); *Coulson v. Aberdeen-Springfield Canal Co.,* 39 Idaho 320, 323-24, 227 P. 29, 30 (1924). No water user is entitled to make a wasteful use of water. *Twin Falls Land & Water Co. v. Twin Falls Canal Co.,* 7 F. Supp. 238, 251 (D. Idaho 1933). The Idaho Supreme Court has held that many factors enter into a determination of the appropriate duty of water for a particular use based upon considerations of beneficial and economical use. *See Uhrig v. Coffin,* 72 Idaho 271, 274, 240 P.2d 480 (1952). In addition, an appropriator is entitled to a reasonable allowance for loss in conveying the water from the point of diversion to the place of use. *Martiny v. Wells,* 91 Idaho 215, 219, 419 P.2d 470, 474 (1966); *Basinger v. Taylor,* 36 Idaho 591, 597, 211 P. 1085, 1086 (1922).

The Idaho Supreme Court recently ruled that the description of a water right may not be reduced from the historic beneficial use by considerations of current beneficial use, absent a finding of forfeiture, abandonment, adverse possession or other voluntary change such as a transfer. *In re SRBA*, 1997 WL 564393 (Idaho Sept. 11, 1997).

### f. Adjudications.

Three types of proceedings exist for the court adjudication of water rights: private adjudications under IDAHO CODE § 42-1404; general adjudications under IDAHO CODE §§ 42-1405 to -1423; and summary supplemental adjudications under IDAHO CODE § 42-1424. A private adjudication determines those water rights necessary to resolve a local dispute. A general adjudication determines all rights to the use of water from a water system. A summary supplemental adjudication may determine rights developed subsequent to the entry of a decree in a private or general adjudication, or determine preexisting rights of a claimant not made a party to the earlier proceeding.

The Idaho Supreme Court recently issued a decision regarding the effect of a prior adjudication in the SRBA. *In re SRBA*, 1997 WL 564393 (Idaho Sept. 11, 1997). The Court indicated that a

decree from a private adjudication "evidences" a water right, but is not conclusive. The water right claimant bears the burden to prove each element of the right, and IDWR may make independent findings regarding the right. Presumably this applies to supplemental adjudication decrees as well. On the other hand, the Idaho Supreme Court indicated that a general adjudication decree should be given conclusive effect in the SRBA. *See* Idaho Code § 42-1420.

### 2. Establishing a Water Right.

The state constitution provides that, "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial use, shall never be denied . . . . " IDAHO CONST. art. 15, § 3. Under this constitutional sanction, IDAHO CODE § 42-103 has provided since statehood that "The right to the use of the waters of rivers, streams, lakes, springs, and of subterranean waters, may be acquired by appropriation." Historically, there are four basic methods by which a water right could be obtained in Idaho: constitutional method, posted notice, permit and enlargement.

#### a. Constitutional Method.

Surface or ground water rights established by means of diversion and application to beneficial use, prior to the statutory procedure having become mandatory, are called 'beneficial or constitutional" use water rights in reference to art. 15, § 3 of the Idaho Constitution. The basic findings that must be made to determine that such a right has been established are: (1) an intent to appropriate water for a beneficial use; (2) diversion; and (3) application of the diverted water to the beneficial use for which it is appropriated. The SRBA District Court recently held that the requirement of diversion is not necessary to create a beneficial use right in Idaho. This decision is on appeal to the Idaho Supreme Court.

Claims for constitutional use rights, other than for domestic purposes, are required to have been filed with the state Department of Water Resources by June 30, 1988. IDAHO CODE § 42-243 (statutory claims). Rights not claimed by that date are deemed lost, unless the right is claimed in a general water rights adjudication proceeding commenced prior to June 30, 1988. Id. § 42-245. Generally, a statutory claim should be evaluated the same as any other affidavit by a claimant. However, the statutory claim speaks ONLY as to the date as of which the claim was filed. It is NOT evidence in support of a priority prior to the date the statutory claim was filed.

#### b. Posted Notice.

The posted notice method of appropriating water was first enacted in 1881. Idaho Laws 1881, p. 267. This method provided that if the appropriator posted notice of his intent to appropriate water at the point of diversion and recorded that notice in the same fashion as for mining claims in the county where the diversion is located, then if the water use was commenced within a reasonable time the priority date of the right was the date of posting. The primary difference between this and the constitutional method is that there is clear evidence of the appropriator's intent and the priority date of posted notice rights relates back to the date notice was posted. *Sandpoint Water & Light Co. v. Panhandle Development Co.*, 11 Idaho 405 (1905). A posted notice appropriator has a reasonable time within which to apply the diverted water to the intended beneficial use

**c. Permit.**

The third method of obtaining a water right is the familiar permit method administered by IDWR. First enacted in 1903, the statutes governing the appropriation of water are contained in Title 42, Chapters 1, 2 and 3, Idaho Code. For much of its history the permit system was not mandatory, it simply provided a means to provide an earlier priority date for a water right than the constitutional method. The doctrine of relation allows the priority date of a water right based upon a permit to "relate" back to the date of permit application. To gain the benefit of the doctrine of relation, the requirements of the permit statutes and conditions of IDWR's permits must be strictly followed. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380 (1927).

Compliance with the statutory procedure is now mandatory for establishing an appropriative right to both ground and surface water in Idaho. IDAHO CODE §§ 42-103 and 42-229. Effective March 25, 1963, the Idaho Legislature made the statutory procedure mandatory for the appropriation of ground water. Id. § 42-229. An exception exists for wells diverting water for domestic purposes. Id. § 42-227. The Idaho Supreme Court upheld this mandatory permit procedure in *State ex rel. Tappan v. Smith,* 92 Idaho 451, 444 P.2d 412 (1968). The court held the mandatory permit statute does not violate art. '15, § 3 of the Idaho Constitution, as extended to subterranean waters by IDAHO CODE § 42-103, because the permit statute does not deny the right of appropriation but merely regulates the method and means by which one might perfect a right to the use of ground water.

The statutory permit procedure for the appropriation of surface water became mandatory on May 19, 1971. IDAHO CODE § 42-103. An exception exists for instream livestock watering. Id. § 42-113. Prior to 1971 a surface water right could be obtained in Idaho by diverting unappropriated water and applying it to a beneficial use. *See Nielson v. Parker,* 19 Idaho 727, 115 P. 488 (1911); *Silkey v. Tiegs,* 51 Idaho 344, 5 P.2d 1049 (1931). The Idaho Supreme court has not yet considered a constitutional challenge to the statute but there is no reason to expect that the court would not uphold the mandatory permit procedure for appropriating surface water.

The Idaho Supreme Court has held that the constitution does not make a physical diversion mandatory, but it has construed Idaho's general water appropriation statutes to require a physical diversion. *State Dep't of Parks v. Idaho Dep't of Water Admin.,* 96 Idaho 440, 530 P.2d 924 (1974). An exception exists where the legislature has authorized a state agency to appropriate

instream flow water rights. See IDAHO CODE §§ 67-4301 to -4312 and §§ 42-1501 to -1505. As previously noted, the SRBA District Court recently held that there is no diversion requirement to obtain a water right in Idaho. Because this differs from the historic understanding of how water rights may be obtained there are few, if any, water licenses issued for instream uses in Idaho other than to the Water Resource Board

The Director of the Idaho Department of Water Resources, Statehouse, Boise, Idaho 83720, is responsible for issuing state water right permits. IDAHO CODE §§ 42-202 and 42-1701. An "application for permit" for a proposed water use must be submitted on a department form requiring the applicant's name and address; a description of the water supply, the nature and period of use, the point of diversion, and the time for project completion; and a map of the project. *Id.* § 42-202. A fee is charged which varies with the amount of water sought to be appropriated. *Id.* § 42-221

The department publishes notice of an application for permit in one or more newspapers. Any protest to the application must state the objections to the proposed appropriation. *Id.* § 42-203A. The statute requires a hearing to be held on the protest under the provisions of the state administrative procedure act. Chap. 52, Title 67, Idaho Code. If no protest is filed the department may take action on the application for permit without holding a hearing. *Id.* § 42-203A. If the applicant is aggrieved by the department decision, a hearing may be requested before the agency pursuant to IDAHO CODE § 42-1701A(3).

The statutory criteria for approving an application for permit are: (a) that the use will not reduce the quantity of water under existing water rights; (b) that the water supply is sufficient for the proposed use; (c) that the application is made in good faith and not for purposes of speculation and delay; (d) that the applicant has sufficient financial resources to complete the project; (e) that the project will not conflict with the local public interest; and (f) that the proposed use is not contrary to the conservation of water resources within the state. *Id.* § 42-203A. The director may approve an application in whole, in part or upon conditions, or reject the application. *Id.* The holder of a permit is given up to five years to complete the project a submit proof of beneficial use. *Id.* § 42-204. one five-year extension of time to place the water to beneficial use may be granted upon a showing of due diligence. *Id.* Additional time may be allowed for delay caused by litigation or the obtaining of necessary federal approvals. *Id.*

Judicial review of the agency decision before the district court is limited to a review on the record created before the department. *Id.* §§ 42-203A, 42-1701A and Chap. 52, Title 67. Appellate procedure before the district court is governed by IDAHO CODE §§ 67-5270 through 67-5279 and Rule 83 of the IDAHO RULES OF CIVIL PROCEDURE. Further appeal from the district court to the Idaho Supreme Court is governed by the IDAHO APPELLATE RULES.

After proof of beneficial use is submitted, the department will cause the use of water under the permit to be examined. *Id.* § 42-217. If the results of the examination are satisfactory, the department will issue a license for the right. *Id.* § 42-219. A water right license is binding upon the state and is prima facie evidence of the water right. *Id.* § 42-220.

#### d. Enlargement.

In 1994, the Idaho Legislature enacted the so-called "amnesty statutes." One of these statutes authorizes recognition of claims to the use of water in the Snake River Basin Adjudication in circumstances where an underlying water right was "enlarged," without complying with the mandatory statutory requirements for establishing a new water right. IDAHO CODE §§ 42-1426. The validity of this statute was upheld by the Idaho Supreme Court in *In re SRBA: Fremont-Madison Irrig. Dist. v. Idaho Ground Water Appropriators, Inc.,* 129 Idaho 454, 926 P.2d 1301 (1996). The court held the statute was constitutional as written. The court determined that the statute permits only those enlargements which do not increase the rate of diversion, do not injure other water rights existing on the date of enlargement, and which fully mitigate any potential injury to junior water rights existing as of the date of enactment of the amnesty statutes. *Id.* at 926 P.2d 1307. IDWR has construed this language to mean that all enlargement rights should be subordinated to rights existing prior to the 1994 passage of Idaho Code § 42-1426 in order to preserve the priority position of those already existing rights.

### 3. Changing or Losing a Water Right

A water right's historic description can be changed in several ways. The most simple is by the sale or conveyance of the water right to a new owner. Other, more substantive changes, include transfers and changes in use, loss through forfeiture or abandonment, and accomplished transfer.

#### a. Sale or Conveyance.

Title to previously established state water rights may be acquired in a manner similar to that for acquiring title to land. *See* IDAHO CODE § 55-101. This may include acquisition by lease or purchase, or in appropriate circumstances by eminent domain. IDAHO CONST. art. 15, § 3; *Basinger v. Taylor,* 30 Idaho 289, 164 P. 522 (1917). Water rights in Idaho are appurtenant to the land on which used and pass with a conveyance of the land unless specifically reserved in the deed or unless it can be shown clearly that the parties did not intend the water rights to be conveyed. See IDAHO CODE SS 42-220 and 42-1402; *Hunt v. Bremer,* 47 Idaho 490, 493, 276 P. 964 (1929); *Russell v. Irish,* 20 Idaho 194, 118 P. 501 (1911). However, title to a water right is separate from the underlying land and a water right may be developed by a person not owning the underlying land. *Sarret v. Hunter* 32 Idaho 536 (1919) This ability is limited by the rule that a water right cannot be developed in trespass. *Rabido v. Furey*, 33 Idaho 56 (1920).

#### b. Administrative Change.

The holder of a water right who desires to change the point of diversion, place of use, period of use, or nature of use of the right must first receive the approval of the Department of Water Resources. IDAHO CODE § 42-222. The application must be on forms furnished by the department. After providing notice and opportunity for protest and hearing, the department may approve the transfer in whole, or in part, or upon conditions, provided the following criteria are

satisfied: (1) no other water rights are injured by the change; (2) the change does not enlarge the use of the original right; (3) the change is consistent with the conservation of water resources within the state; and (4) the change is in the local public interest. *Id.* A change in nature of use from agriculture may be allowed as long as the change does not significantly affect the agricultural base of the local area. *Id.* An expedited procedure is provided for the approval of emergency transfers during drought conditions. *Id.* § 42-222A.

#### c. Accomplished Transfer.

The second "amnesty statute" enacted in 1994 authorizes recognition of claims to the use of water in the Snake River Basin Adjudication in circumstances where an underlying water right was transferred without complying with the mandatory statutory requirements for changing an existing water right. IDAHO CODE §§ 42-1425. The validity of this statutes was upheld by the Idaho Supreme Court in *In re SRBA: Fremont-Madison Irrig. Dist. v. Idaho Ground Water Appropriators, Inc.,* 129 Idaho 454, 926 P.2d 1301 (1996). The court held the statute was constitutional as written. The court determined that the provision that provides for the prevention of injury to other water right holders and prohibited enlargements allowed for approval of accomplished transfers.

#### d. Forfeiture, Abandonment and Adverse Possession.

State water rights are generally considered to remain valid for as long as they are beneficially used for an approved purpose. Rights for power purposes licensed after July 1, 1985, are required to be limited to a term of years set by the Department of Water Resources. *Id.* § 42-203B.

All or part of a water right may be lost by statutory forfeiture through a failure for five consecutive years to apply the water to the beneficial use for which appropriated. *Id.* § 42-222(2). An extension of time for an additional five-year period to avoid forfeiture may be requested. *Id.* Water rights appurtenant to land while in a federal cropland set-aside program are not subject to forfeiture. *Id.* Similarly, rights while placed in the state water supply bank are not subject to forfeiture. *Id.* § 42-1764.

The Legislature in 1996 amended Idaho's forfeiture statute to provide that a water right shall not be lost by a failure to divert and apply the water to beneficial use if the water is not needed to maintain full beneficial use under the right because of land application of waste for disposal purposes, including but not limited to discharge from dairy lagoons, used in combination with or substituted for water diverted under the water right. IDAHO CODE § 42-222(2).

The Idaho Supreme Court has frequently addressed the loss of water rights through statutory forfeiture, common-law abandonment, and prescription through adverse use. *See Jenkins v. State, Dep't of Water Resources,* 103 Idaho 384, 647 P.2d 1256 (1982); *Gilbert v. Smith,* 97 Idaho 735, 552 P.2d 1220 (1976). These cases clarify that abandonment, in contrast to statutory forfeiture, is a question of intention and must be evidenced by a clear and decisive act. The cases also confirm

that water rights lost through abandonment or forfeiture revert to the state and are again subject to appropriation from the state.

Forfeiture and abandonment may be prevented by resumption of use. The key to whether resumption prevents forfeiture or abandonment is whether there is injury to other water users by such injury. Injury can include loss of priority, so if there exist other water users on the water source where the resumption occurs there may either be a loss of priority or an invalid resumption.

Prescriptive title to a water right may be acquired by adverse use for five years if the adverse use is open, hostile, exclusive, continuous and under claim of right. *Gilbert v. Smith,* 97 Idaho 735, 552 P.2d 1220 (1976).

## IV.
## WATER LAW RESEARCH

The following sources are available to persons researching Idaho water law issues:

Idaho Code, Vol. 1 - Idaho Constitution (1980), and Vol. 8 - Water Rights (1990), published by The Michie Company, P.O. Box 7587, Charlottesville, Virginia 22906.

Idaho Department of Water Resources, IDAHO WATER LAW HANDBOOK (1988) (includes Dep't rules and regulations and water rights adjudication handbook).

W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES (1971) (Idaho Summary Vol. III, pages 261-286).

Barber, *Statutory Water Rights Permits: A Necessary Problem in Real Property Conveyancing*, 9 IDAHO L. REV. 1 (1972).

Blumm, *Saving Idaho's Salmon: A History of Failure and a Dubious Future*, 28 IDAHO L. REV. 667 (1991-92).

Burnett, *Surface Water and Nuisance Law: A Proposed Synthesis*, 20 IDAHO L. REV. 183 (1984).

Fereday & Creamer, *Swan Falls in 3-D: A New Look at the Historical, Legal and Practical Dimensions of Idaho's Biggest Water Rights Controversy*, 28 IDAHO L. REV. 575 (1991-92).

Frost, *Protecting and Enhancing Wild and Scenic Rivers in the West*, 29 IDAHO L. REV. 313 (1992-93).

Grant, *Registration of Constitutional Method Water Rights*, 17 IDAHO L. REV. 7 (1980).

Grant, *The Idaho Water Plan: Two Threshold Constitutional Problems and Suggested Solutions*, 15 IDAHO L. REV. 443 (1979).

Harwood, *Forfeiture of Rights to Federal Reclamation Project Waters: A Threat to the Bureau of Reclamation,* 29 IDAHO L. REV. 153 (1992-93).

Hutchins, *The Idaho Law of Water Rights*, 5 IDAHO L. REV. 1 (1968) (129 pages - comprehensive).

Krogh, *Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems & Solutions*, 30 LAND AND WATER L. REV. 9 (1995).

Krogh-Hampe, *1986 Idaho Water Rights Adjudication Statute*, 23 IDAHO L. REV. 1 (1986).

Parker, *Fishing From the Bank: Public Recreational Rights Along Idaho's Rivers and Lakes*, 21 IDAHO L. REV. 275 (1985).

Rassier, *Idaho Adjudication Presumption Statutes*, 28 IDAHO L. REV. 509 (1991-92).

Reed, *Should Rivers Have Running? Toward Extension of the Reserved Rights Doctrine to Include Minimum Stream Flows*, 12 IDAHO L. REV. 153 (1976).

Reed, *Use It and Lose It-Surface Water Rights in Idaho*, 15 IDAHO L. REV. 569 (1979) (public trust doctrine).

Rice, *Beyond Reserved Rights: Water Resource Protection For the Public Lands*, 28 IDAHO L. REV. 715 (1991-92).

Note, *Brizendine v. Nampa Meridian Irrigation District: Tort Liability of Irrigation Districts,* 13 IDAHO L. REV. 427 (1977).

Note, *Dayley v. City of Burley: A City's Legal Considerations in Drainage of Excess Surface Waters,* 12 IDAHO L. REV. 125 (1976).

Note, *The Effect of Bonnie and Clyde Upon the Acquisition of Water Rights in Idaho,* 6 IDAHO L. REV. 105 (1969) (mandatory permit statute).

Note, *The Idaho System for the Distribution of Water Among Its Appropriators: An Examination-and Assessment,* 9 IDAHO L. REV. 187 (1972)./

Note, *In-Stream Appropriation for Recreation and Scenic Beauty: Idaho Department of Parks v. Idaho Department of Water Administration,* 12 IDAHO L. REV. 263 (1976).

Note, *The Winters Doctrine on Reserved Water Rights in Idaho: Avondale Irrigation District v. North Idaho Properties, Inc.,* 15 IDAHO L. REV. 591 (1979).

# CHAPTER 2

## NAME & ADDRESS

Idaho Code § 42-1411(2)(a) requires IDWR to determine the name and address of the claimant in its recommendation. Generally, the claimant and the owner of a water right are the same. See Chapter 12 on duplicative claims for advice when there are two claimants for the same water right.

### A. ADDRESS AND OWNERSHIP RECOMMENDATION

The agent should recommend the water right to the person or entity and address shown on the claim, or the most recent, proper, notice of change in address or ownership received by IDWR. If there is reason to believe that there has been a change in address or ownership, and proper notice of the change in address or change in ownership has not been received, then the claimant should be contacted to obtain proper documentation of the change. If such documentation is not received, notices will be sent to the claimant or to the name/address shown on the most recent notice of change in address or ownership.

A complete address must be recommended for each right. See Adjudication Memo #18 for more information as to changes in ownership and address.

### B. PHONE NUMBER

If available, a phone number should be inserted in the electronic and written file for each right.

### C. ATTORNEY

The name of the attorney, if any, representing a claimant should be reflected in the electronic and written file. See Adjudication Memo #22 as to changes in attorney.

This Guidance Document is not new law but is an agency interpretation of existing law. For more information or to provide input on the document, please contact the Water Rights Section Manager at 208-287-4800. (Feb.2020)

# CHAPTER 3

## PRIORITY DATE

## I. INTRODUCTION

A water right's priority date is dependent upon the legal method by which the water right was established. When examining a water right's priority date agents must keep in the front of their mind the significant dates in Idaho water law. Click here for a link to a memorandum setting forth those dates. There are five different methods of obtaining a water right, each with a different method of determining the priority date:

- Beneficial Use Method.
- Posted Notice Method.
- Permit Method.
- 42-1426 Enlargement Method.
- 42-1416B Expansion Method.

## II. BENEFICIAL USE WATER RIGHTS.

### A. Priority date.

The priority date for a beneficial use water right is the date when water is first appropriated by application to beneficial use. This doctrine can cause problems when a water user has gradually developed the water use over time. There could be multiple water rights for one overall water use. When a water user is claiming gradual development of the water use the agent should likely consult legal counsel to discuss the appropriate priority date(s) to recommend.

### B. Evidence of priority

The claim file must document the evidence upon which the agent recommended a beneficial use water right priority date. If that recommendation was based upon an oral conversation with an "old timer" or a claimant relaying their parents' stories, that should be documented in the file with notes or a recording. Obtaining affidavits from "old timers" is also helpful to preserve their testimony. A statutory claim filed under Idaho Code § 42-243 is not evidence of priority. A public information brochure describing the types of information that a claimant may submit to IDWR to show a priority date has been prepared and distributed to the regions. The brochure with an appropriate cover letter should be mailed to all beneficial use claimants in a sub-basin at the beginning of the investigation stage for the sub-basin.

All claimants of irrigation and other rights based on beneficial use must submit information supporting the claimed priority date. It is up to the agent to use common sense to evaluate the credibility of the information, to weigh conflicting information, and to

determine, in light of any contradictory information, whether the claimant's information supports the priority date, and if not, to determine what date it does support. If there is insufficient information to support a priority date that is not in violation of the mandatory permit statute, then the claim should be recommended for disallowal, and should include the following GENeral remark: "NO LAWFUL APPROPRIATION SHOWN." (P01 and condition P01)

A beneficial use priority should not be recommended that is outside the season of use for the purposes of use to be recommended. For example, a priority date of December 31 should not be recommended for a right recommended solely for irrigation purposes. If a claimant provides information that only supports the year in which water was put to beneficial use for irrigation but not a date, the agent should recommend (the last day of the year)(the last day of the irrigation season)(the first day of the irrigation season for the next year)(?)

### C. Effect of Mandatory Permit Statute.

Where the year of the priority claimed is 1963 and later for ground water or 1971 and later for surface water, there must be some evidence that would tend to show that the appropriation was completed prior to the effective date of the mandatory permit statute, or was commenced prior to the effective date of the mandatory permit statute and completed within a reasonable time thereafter. (The effective dates of the mandatory permit statute were March 25, 1963 for ground water, and May 20, 1971 for surface water) A beneficial use right with a priority after the effective date of the mandatory permit statute may still be valid if the claimant can show that the appropriation was commenced prior to the effective date of the statute and completed with reasonable diligence. See Adjudication Memo #23 for more information as to the effect of the mandatory permit statutes.

Historically, it was not uncommon for a person with a beneficial use right to seek documentation of the right by filing an application for permit. Under the statute, the only priority date that could be licensed was the date of filing the application, even though the right was in fact established earlier.

Where an earlier priority date is claimed for a right for which a license has been issued, then the claim should be reviewed as a claim based on beneficial use, and if recommended with a beneficial use priority, then the basis of the claim should be changed to beneficial use. A new number should be assigned to the beneficial use water right to avoid confusion with the license. However, the evidence submitted by the claimant in support of a claim based on beneficial use should be weighed in light of any evidence in the water right record.

If the claimant's evidence is sufficient to recommend only a portion of the licensed amount with an earlier priority date, then the claim may be recommended as two water rights, one with the earlier priority for the portion of the claim for which the required evidence was submitted, and one with the licensed priority for the remainder.

## III. POSTED NOTICE WATER RIGHTS

### A. Priority Date.

From February 10, 1881 thru March 11, 1903, Idaho had a "posted notice" statute, which described one means to perfect a water right. As a first step an appropriator was required to post a notice describing the intended appropriation at the proposed point of diversion. The notice then had to be recorded and diversion works were required to be completed and water applied to a beneficial use with due diligence. If the requirements of the statute were satisfied, then the priority date of the water right "related back" to the date of posting. The agent should consult with their legal counsel to determine the exact requirements in effect at the time in question.

### B. Evidence of Priority Date.

A posted notice is evidence of the intent to appropriate water, but it is not evidence of application of water to beneficial use nor due diligence in completing the appropriation. Some evidence of completion of the appropriation within a reasonable time after the date of posting must be found by the agent before a claim may be recommended based on a posted notice. Completion within five years is reasonable; the reasonableness of longer periods will depend on the circumstances.

The claimant should be notified that the claimant should submit evidence of the date of first use in the same fashion as beneficial use right claimants. If the claimant submits evidence of completion of the appropriation within a reasonable time following the date of posting, then the date of posting should be recommended as the priority date.

If the date of first use is not within a reasonable amount of time from the date of posting the right might be recommended as a beneficial use right.

#### 1. Sufficiency of posted notice.

The agent should review the posted notice with legal counsel to be sure it met the statutory requirements. The posted notice must contain the following:

a. Name of appropriator
b. Source
c. Amount of water
d. Location of point of diversion
e. Purposes of use
f. Location of place of use
g. Description of means of diversion
h. For notices posted or recorded between March 7, 1895 and February 24, 1899, the length of time necessary to complete the appropriation, which may not be more than five years.

i. Date of recording between February 10, 1881 and March 10, 1903, and within the following time limits from the date of posting:

Prior to June 1, 1887 - 15 days
June 1, 1887 to February 19, 1895 - 10 days
February 20, 1895 to March 10, 1903 - 15 days

The date of recording is the date the notice was recorded with the office of the county recorder for the county in which the land was located at the time the notice was recorded (there have been some changes in county boundaries since the posted notice statutes). A copy of the posted notice from the county recorder's office will have an endorsement by the county recorder that shows the date of recording.

If the posted notice does not meet these minimum requirements, then the basis of the claim should be changed to beneficial use and the claim should be reviewed the same as a claim based on beneficial use.

2. Does the posted notice include the right claimed?

The water right claim based upon the posted notice statute should accurately reflect the information shown on the notice. If not, the agent must examine the right carefully to determine if it is, in fact, the use intended under the posted notice statute. Keep in mind that the original right might have been transferred. If the claimed use cannot be reconciled with the posted notice, examine the claim to determine if it is for a beneficial use right.

If the claimed right is partially included in the posted notice, or may partially be considered a change in use of the appropriation described in the posted notice, then the claim may need to be separated into two claims, one based on posted notice and a second based on beneficial use.

## IV. LICENSED WATER RIGHTS

### A. Priority Date.

The priority date for a water right based upon the permit/license method is generally the date the application for permit was filed with IDWR. Idaho Code § 42-219.

### B. Evidence of Priority.

The priority date of a licensed water right should appear on the face of the license or permit.

## V. 42-1416 ENLARGEMENT WATER RIGHTS

### A. Priority Date.

The priority date of a water right claimed as an enlargement under Idaho Code § 42-1416 is the date of the completion of that enlargement. The date of completion must be on or before November 19, 1987. In order to prevent injury to junior water users IDWR has also determined that all 42-1416 enlargements should also be recommended with the following subordination remark:

> This water right is subordinate to all water rights with a priority date earlier than April 12, 1994, that are not decreed as enlargements pursuant to Section 42-1416, Idaho Code. As between water rights decreed as enlargements pursuant to 42-1416, Idaho Code, the earlier priority right is the superior right.

### B. Evidence of Priority.

A person claiming an enlargement right should be requested to provide evidence of the date of the completion of the enlargement in the same fashion as for beneficial use rights.

## VI. 42-1416B EXPANSION WATER RIGHTS

### A. Priority Date.

The priority date for a water right recommended under Idaho Code § 42-1416B is June 30, 1985.

### B. Evidence of Priority.

No evidence of priority date is necessary for a water right claimed under Idaho Code § 42-1416B. So long as the water right can be recommended under this statute, the statutory priority date should be used.

## VII. ACTIONS AFFECTING AVAILABLE PRIORITY

### A. Decrees

The available priority dates for water rights claimed in an area that has been adjudicated may be limited. If a water right was required to be claimed in an adjudication, and was not, the claimant may be barred from claiming a water right with a priority date preceding the date of the adjudication decree. The issue of whether, or not, a water right was required to be claimed in an adjudication is complex, and agents should consult with their legal counsel when faced with this question. See Adjudication Memo #14 for the decree dates of some recent adjudications.

Generally, IDWR will place the burden on the claimant to show the claimant is not "bound" by an adjudication, either by showing that the owner at the time of the more recent adjudication was not a party to the more recent adjudication (some water right adjudications

are binding only on named parties, not on all claimants from the source), by showing that particular water right claims were not required to be filed, or by showing that the source claimed was not included in the water system adjudicated. If the claimant does not meet this burden of proof, then IDWR will recommend either that the claim is barred or that the priority date must be advanced to after the adjudication.

Some water rights have been adjudicated more than once. Claims for these rights should be referred for further review by legal staff.

### B. Claimed priority date later than available priority date.

Some claimants claim a priority date later than the date which appears to be available to them under a decree, license or other evidence. In this situation the claimant should be contacted to allow the claimant the opportunity to file an amended claim asserting the earlier priority date, otherwise the earlier priority is waived. A priority earlier than the claimed priority may not be recommended.

### C. Subordination.

The priority date of a water right may be "subordinated" to water rights that would, in the normal course, have a later priority date. A water right is subordinated when those water rights with a later priority date are moved ahead of the subordinated water right in priority. Subordination can result from voluntary agreement by the water right owner, by operation of legal principles such as laches and estoppel, and through conditions placed on a water right license by IDWR. Water rights that have been should be recommended with a subordination remark placed under the ostensible priority date. Agents should not impose a subordination remark in the absence of clear evidence of subordination.

This Guidance Document is not new law but is an agency interpretation of existing law. For more information or to provide input on the document, please contact the Water Rights Section Manager at 208-287-4800. (Feb.2020)

# CHAPTER 4

## SOURCE

## I. EVALUATION OF CLAIMED SOURCE

A water right's source is first determined at the time of establishment of the right, and then as it may have been transferred. Although determining the source is not particularly dependent upon the legal method by which the water right was established, the evidence available to the agent differs based upon the legal method. This chapter is concerned primarily with claimed sources where there is little evidence regarding historic use of the source, such as with beneficial use rights, and accomplished transfers that have not been approved by IDWR. However, there are a few other general issues described in Section II below of which the agent should be aware.

There are five different methods of obtaining a water right, each with different amounts of evidence regarding the source of water used by the appropriator:

- Beneficial Use Method.
- Posted Notice Method.
- Permit Method.
- 42-1426 Enlargement Method.
- 42-1416B Expansion Method.

### A. BENEFICIAL USE WATER RIGHTS

The source of water for a beneficial use water right is the source used when water is first appropriated by application to beneficial use. However, with the passage of the accomplished transfer statute, Idaho Code § 42-1425, the source to be recommended for most beneficial use rights is the source used by the water user as of the commencement of the adjudication on November 19, 1987. The agent's investigation of the source claimed should consist of an evaluation of whether the source claimed under a beneficial use claim is that source of water being used on the commencement date. A field exam will be necessary to fully evaluate this element.

The accomplished transfer statute was a legislative attempt to protect the pattern of water use as of the date of commencement of the SRBA, including source. Therefore, IDWR generally will recommend a beneficial use water right with the source as it existed as of commencement. IDWR will allow the objection process provided in Idaho Code § 42-1425(2)(a) to raise issues of injury and will not do so in its investigation.

The exception to this general rule is that if the agent is aware of an accomplished transfer changing the source of a beneficial use water right, the agent should refer the question of whether or not such a change will be recommended to the State Office for evaluation. An example of this would be where a ground water source is claimed with a

priority date that suggests the right was established using a surface water source. This circumstance should be rare.

## B. CLAIM BASED ON DECREE, POSTED NOTICE OR LICENSE

If the claimed source is the same as the source shown on the decree, posted notice or license (as amended by any approved transfers), then no further review of this item generally is required. If the agent's GIS review reveals that the claimed source is inaccurate, the agent may wish to contact the claimant to verify the source information.

If the claimed source is not the same as the source shown on the decree, posted notice or license (as amended by any approved transfers), then the agent should refer the change to the State Office for evaluation.

## C. CLAIM BASED ON PERMIT

### 1. Permits for which a proof due notice was filed prior to commencement

If the claim is based on a permit for which a proof due notice was submitted prior to commencement, then contact water allocations staff in the state office before proceeding with review of this claim. See Introduction for a general discussion of claims in this category.

### 2. Source claimed different than source on permit

If the claim is to be recommended with a basis of permit, and the source claimed is different than the source shown on the permit (as amended by any approved amendments to the permit), then the source shown on the permit (as amended by any approved amendments to the permit) should be recommended.

A change in source may not be recommended for a claim based on a permit, because the accomplished transfer statute does not apply to permits. The only way to change the source on a permit is to file an application to amend the permit with IDWR.

## D. CLAIM BASED ON 42-1426 ENLARGEMENT OR 42-1416B EXPANSION

The source of a claim based on the enlargement statute or a critical GW expansion may not be different than the source of the original right. The evaluation of the enlargement or expansion claim should parallel the analysis used for the base right.

### E. RECOGNITION OF ACCOMPLISHED TRANSFER STATUTE.

If IDWR approves an accomplished change in source, then the recommendation should include the following condition: "RIGHT INCLUDES ACCOMPLISHED CHANGE IN SOURCE PURSUANT TO IDAHO CODE 42-1425." (C02)

## II. CONSIDERATIONS WHEN IDENTIFYING SOURCE

### 1. Common names

Use the name for a source shown on the USGS maps. If no name is shown on the map use a local name, if any, or simply a description of the water body. Where the source has a local name that is different from the name shown on USGS maps, then the claim should include the following remark: "SOURCE IS ALSO KNOWN AS _____." (B01)

### 2. Multiple sources

If the water use has multiple sources, is used in a single delivery system, and a single priority date, the use may be recommended as a single water right. If the water use has more than one source, with a separate systems for each source, and a single priority date, and the claim can readily be split so that each claim shows only one source, then the claim should be split (with alpha suffixes assigned to the claim numbers). If the claim is split, then appropriate remarks should be included where necessary to limit combined use of the rights to the total of the original right See Adjudication Memo #12 as to review of a claim with multiple sources.

### 3. Wastewater

When investigating claims to wastewater the agent should attempt to identify: (1) the original source of the wastewater, (2) the original appropriator of the water, and (3) the tributary destination of the wastewater. This information should be documented in the claim file. The recommendation should show the source as "wastewater" and the tributary destination. The GO1 and 2 remarks are being re-evaluated, and in the future the original source of the wastewater may also be identified.

### 4. Developed/salvaged water

Developed water (or foreign water) is water added to the water system that was not previously part of the water system. A right to developed water has a priority independent of the water system to which the water was added (although the right should have a priority relative to the water system from which the water came). Salvaged water is water that was originally part of the water system, then was lost from the system (not through diversion), and is added back in. Salvaged water also has a priority independent of the water system. Conserved water, or water saved through conservation practices (after diversion), is **not** salvaged water.

Any claim that asserts the water is developed or salvaged should be referred for further review by the bureau chief.

### 5. Exchanges

The agent should consult with legal counsel if examining a water right claim involving an exchange of water. See Idaho Code §§ 42-105 and 42-240 for more information about recommendation of claims involving an exchange of water from one source for water from another source.

This Guidance Document is not new law but is an agency interpretation of existing law. For more information or to provide input on the document, please contact the Water Rights Section Manager at 208-287-4800. (Feb.2020)

# CHAPTER 5

## POINT OF DIVERSION

## I. EVALUATION OF CLAIMED POINT OF DIVERSION

A water right's point of diversion is first determined at the time of establishment of the right, and then as it may have been transferred. Although determining the point of diversion is not particularly dependent upon the legal method by which the water right was established, the evidence available to the agent differs based upon the legal method. This chapter is concerned primarily with claimed point of diversions where there is little evidence regarding historic use of the point of diversion, such as with beneficial use rights, and accomplished transfers that have not been approved by IDWR. However, there are a few other general issues described in Section II below of which the water agent should be aware.

There are five different methods of obtaining a water right, each with different amounts of evidence regarding the point of diversion of water used by the appropriator:

- Beneficial Use Method.
- Posted Notice Method.
- Permit Method.
- 42-1426 Enlargement Method.
- 42-1416B Expansion Method.

### A. BENEFICIAL USE WATER RIGHTS

The point of diversion for a beneficial use water right is the point of diversion used when water is first appropriated by application to beneficial use. However, with the passage of the accomplished transfer statute, Idaho Code § 42-1425, the point of diversion to be recommended for most beneficial use rights is the point of diversion used by the water user as of the commencement of the adjudication on November 19, 1987. The agent's investigation of the point of diversion claimed should consist of an evaluation of whether the point of diversion claimed under a beneficial use claim is that point of diversion of water being used on the commencement date. The claimant should be contacted to determine the point of diversion used prior to commencement of the SRBA. A field exam will be necessary to fully evaluate this element.

The accomplished transfer statute was a legislative attempt to protect the pattern of water use as of the date of commencement of the SRBA, including point of diversion. Therefore, IDWR generally will recommend the point of diversion for beneficial use water rights as they exist as of commencement. IDWR will allow the objection process provided in Idaho Code § 42-1425(2)(a) to raise issues of injury and will not do so in its investigation.

Where the evidence supports a finding that the change occurred after commencement, then the original point of diversion should be recommended. (NAPP

photography may be useful in this regard.) In this situation the agent should notify the claimant that a transfer is required under Idaho Code § 42-222.

## B. CLAIM BASED ON DECREE, POSTED NOTICE OR LICENSE

If the claimed point of diversion is the same as the point of diversion shown on a decree, posted notice or license (as amended by any approved transfers), then no further review of this item generally is required. If the agent's GIS review reveals that the claimed point of diversion is inaccurate, the agent may wish to contact the claimant to verify the point of diversion information.

If the claimed point of diversion is not the same as the point of diversion shown on the decree, posted notice or license (as amended by any approved transfers), then the agent should recommend the point of diversion in the same fashion as for beneficial use claims.

If the 1987 point of diversion is different than both the claimed point of diversion and the point of diversion shown on the decree or license (as amended by any approved transfers), recommend the 1987 point of diversion. An amended claim is not required.

The point of diversion is an essential element of a water right. The failure of a decree to include the point of diversion in the listing of rights is an ambiguity in the decree. In other words, when the decree determined the water right, it necessarily determined the point of diversion as of the same time as the rest of the elements of the water right; the decree just failed to describe it. The relevant question at this point is how to resolve the ambiguity. For purposes of preparing the director's report, it will be assumed that the current point of diversion is the decreed point of diversion, unless there is reason to believe that there has been a change in point of diversion. The point of diversion of a claim based on a decree that does not state the point of diversion should therefore be analyzed the same as the point of diversion of a claim based on beneficial use (but the basis of the claim should not be changed).

## C. CLAIM BASED ON PERMIT

### 1. Permits for which a proof due notice was filed prior to commencement

If the claim is based on a permit for which a proof due notice was submitted prior to commencement, then contact water allocations staff in the state office before proceeding with review of this claim. See Introduction for a general discussion of claims in this category.

### 2. Point of diversion claimed different than point of diversion on permit

If the point of diversion claimed is different than the point of diversion shown on the permit (as amended by any approved amendments to the permit), then the point of diversion

shown on the permit (as amended by any approved amendments to the permit) should be recommended.

A change in point of diversion may not be recommended for a claim based on a permit, because the accomplished transfer statute does not apply to permits. The only way to change the point of diversion on a permit is to file an application to amend the permit with IDWR.

### D. CLAIM BASED ON 42-1426 ENLARGEMENT OR 42-1416B EXPANSION

The point of diversion of a claim based on the enlargement statute or a critical GW expansion may not be different than the point of diversion of the original right. The evaluation of the enlargement or expansion claim should parallel the analysis used for the original right. GIS Guidelines

### E. RECOGNITION OF ACCOMPLISHED TRANSFER STATUTE.

If IDWR approves an accomplished change in point of diversion, then the recommendation should include the following condition: "RIGHT INCLUDES ACCOMPLISHED CHANGE IN POINT OF DIVERSION PURSUANT TO IDAHO CODE 42-1425."

## II. CONSIDERATIONS WHEN IDENTIFYING POINT OF DIVERSION

### A. DIVERSION REQUIREMENT

Claims based on state law must have a physical diversion from the natural source, unless an appropriation without a diversion has been authorized by statute. Appropriations without diversions that have been authorized by statute include a) instream flows held by the Water Resource Board, and b) minimum lake level appropriations by the Water Resource Board and other state agencies (all of the claims in these categories should have a permit or license). Although stock watering rights are called "instream" uses, the diversion in these cases is the stock drinking the water. This is distinguishable from wildlife instream uses because wildlife do not drink from natural sources as an instrumentality of human enterprise and intent.

When water is stored or backed-up through the use of a dam structure, even if water is not removed in so many words from the natural stream channel, the location of the dam is the point of diversion.

### B. REMARKS DESCRIBING POINT OF DIVERSION

Adjudication Memo #32 sets forth standard remarks to describe the following:

a. common name of ditch (F01),

b. multiple points of diversion in a single tract (F02),
c. point of diversion in center of four tracts (F03),
d. point of diversion on boundary between two tracts (F04),
e. other rights diverted through same point of diversion (F05, F06).

## C. POINT OF DIVERSION FLAGS

Where stored water or water from another point of diversion is conveyed in a natural channel, then the point of injection should be included as a point of diversion with an "I" flag, and the point of rediversion should be included as a point of diversion with an "R" flag. See Adjudication Memo #32 for standard remarks identifying the point of diversion to which water is injected and rediverted. (G01, G02).

The beginning point and ending point of instream flow claims should be included as points of diversion with a "B" and an "E" flag.

## D. DESCRIPTION OF POINT OF DIVERSION

Use the Geographic Coordinate Database (GCDB) locations to describe the location of the point of diversion. The agent should include government lot, homestead entry, mineral survey number, or government tract descriptions as appropriate. If the claimant has survey data that information needs to be considered when describing the location. See Adjudication Memo #30 as to when the point of diversion should be described by ten acre tract.

## E. WHEN IS A CHANGE A CHANGE?

### 1. Changes within a tract.

An administrator's memorandum dated May 10, 1984 states that an application for transfer is necessary when the point of diversion is moved from one tract to another, or where an additional point of diversion is added, even if the additional point of diversion is in the same tract. A tract for these purposes is the quarter-quarter unless the license, permit, or decree established the quarter-quarter-quarter or other description. However, in adjudication a change in point of diversion condition code should be inserted in the recommendation when a new point of diversion within the same tract is substituted for the old point of diversion to provide notice to other claimants and allow them to assert injury by filing an objection.

### 2. Additional point of diversion.

An additional point of diversion established prior to commencement of the adjudication may be recommended as a result of an accomplished transfer of the point of diversion. Generally, a partial change in point of diversion results where the claimant established a new point of diversion for a portion of a water right previously appropriated.

In such cases, the partial change in point of diversion should be recommended the same as any other change in point of diversion.

### 3. New ground water wells.

For ground water right claims the agent must consider whether a new well is a change in point of diversion, or whether it is really a new appropriation from a separate source. The fact that both points of diversion are wells for the diversion of groundwater is not sufficient to make this determination, because the two wells could divert water from aquifers that are not tributary or are separately administered. See Chapter 4 as to changes in source. The agent should consult with legal counsel if this situation arises.

This Guidance Document is not new law but is an agency interpretation of existing law. For more information or to provide input on the document, please contact the Water Rights Section Manager at 208-287-4800. (Feb.2020)

# CHAPTER 6

## PURPOSE OF USE, QUANTITY FOR EACH PURPOSE, AND TOTAL QUANTITY

## I. INTRODUCTION

The purpose and quantity elements of a water right lie at the heart of the description of water use under a water right. The agent must be familiar with how to describe the various uses of water the investigation uncovers. Further, the method by which the water right was established determines to a large extent what evidence is relevant to the purpose of use and quantity to be recommended.

## II. PURPOSES OF USE AND QUANTITY

Any use of water can be recommended for a water right so long as the use is for a beneficial purpose. The following subsections describe various beneficial uses, how they should be reported, and the quantity to recommend for each.

Adjudication Memo #32 sets forth standard remarks to describe the following:

a. right measured at point other than point of diversion (D01),
b. portion of right solely for conveyance loss (D02 - D04),
c. storage capacity (D05),
d. facility volume (D06).

The agent's recommendation on quantity must include the rate and volume of diversion for each use, and the total rate and volume of diversion. See Adjudication Memo #31 as to measurement of flow for ground water claims that require field exam; see Adjudication Memo #34 as to which rights require determination of diversion volume. Application Processing Memo 14 discusses the determination of as to the amount for rights that include storage purposes.

For a claimed quantity to be recommended the full amount must be beneficially used and the amount must be reasonable. Otherwise the amount recommended will be limited to a reasonable amount. In determining whether the amount used is reasonable, the following factors should be taken into account: the nature of use, the purpose of use, transmission losses, and quantities used for the same purpose by others in the area, and amount of return flows. The fact that water is returned to the stream does not automatically make the diversion unreasonable. A determination that the quantity diverted for a long-standing use is not reasonable is a decision that should be made only after consultation with legal staff and the bureau chief.

There may be instances in which the total quantity may appropriately be less than the sum of the amounts for each purpose, such as where all or part of the amount for one purpose may also be used for another purpose. (For example, if an appropriator diverts 10

cfs for irrigation, and runs that same 10 cfs through a small hydropower facility, the total rate of diversion would be 10 cfs, not 20.)

## A. Irrigation.

"Irrigation" is the spreading of water on land to materially increase the productiveness of the land for raising crops. The particular crop to be raised does not need to be identified in the recommendation, but may be necessary to conduct a Hubble analysis. The number of acres irrigated needs to be identified in the recommendation.

### 1. Instantaneous Quantity.

If not otherwise determined by a license or reasonable decree the agent must determine an instantaneous quantity for irrigation. Idaho Code § 42-220 provides that no more than an inch per acre may be decreed under a water right unless it is shown that a greater amount of water is necessary. The quantity, alone or as combined, to be recommended for most irrigation rights is an inch per acre. Claims to flows in excess of the statutory standard of an inch per acre have been referred to generally as "excessive flow" claims. Excessive flow claims can be of two types - a single water right for more than an inch per acre, or multiple rights that total more than an inch per acre.

The agent should complete the excess irrigation requirement worksheet to determine if more than an inch per acre is reasonably required. The agent should use the Hubble analysis to determine if the excess amount is necessary due to field requirements. If so the claim should include a remark identifying the per acre rate of diversion at the field headgate. It may be that the excess flow is required for conveyance loss, which is discussed in subsection Q of this section.

The quantity to be recommended should, in the first instance, be the quantity based upon the irrigation system used at the time the adjudication commenced. However, if the water user demonstrates that in the past a reasonable water system used more water to accomplish the same purpose, the agent should recommend a quantity consistent with the needs under the historic system. Use the Hubble analysis to calculate this quantity.

Adjudication Memo #32 sets forth standard remarks for claims to be recommended with excessive flows for irrigation (D02, D03, D04, D08).

The agent should not recommend less than an inch per acre unless (1) the claim is for less than an inch per acre, or (2) historic use has always been less than an inch per acre.When a claimant claims much less water than would appear to be reasonably necessary to irrigate the number of acres claimed the agent should make further inquiry to ensure that the water use is beneficial.

### 2. Annual Volume.

The agent should recommend an annual volume for all groundwater irrigation rights. Use the "Field Headgate Requirement" map for this determination if the information is not otherwise determined in a license, transfer or reasonable decree.

Annual volume may also be recommended if there is a need to protect junior priority rights on a stream, spring or other source with limited quantities of water and should be recommended if contained in a license, transfer or reasonable decree.

### B. Municipal.

Municipal use is defined by statute:

> "Municipal purposes" refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider.

Idaho Code § 42-202B(4). Further relevant definitions are also contained in this section.

#### 1. Instantaneous Quantity.

If not otherwise determined by a license or reasonable decree the agent must determine an instantaneous quantity for this purpose.

The amount of water to be recommended for a municipal water right should be at least the amount actually diverted by the municipal provider, and should not exceed the full constructed capacity of the municipal system. The total amount recommended should equal the amount that is reasonably necessary to provide for the existing uses plus the reasonably anticipated future needs of the municipality.

#### 2. Annual Volume.

Municipal water rights should not be recommended with an annual volume unless contained in a license, transfer or reasonable decree.

### C. Stockwatering.

Stockwatering use refers to the diversion of water for drinking by domestic livestock or wildlife. This use can be either instream (or "in situ"), in which case the diversion is made by the animal itself, or out-of-stream stock watering use. In the case of wildlife there must be some type of human intent to divert the water to create a water right. Thus, drinking from a natural source by natural wildlife does not constitute stockwatering.

Where the purpose to be recommended is stockwatering the use should be further described in "explanatory material." The number and type of stock should be described if known.

### 1. Instantaneous Quantity.

If not otherwise determined by a license or reasonable decree the agent must determine an instantaneous quantity for this purpose.

For small instream stock watering claims the amount to be recommended is .02 cfs with a limit of 13,000 gallons per day. For small diverted stockwatering claims the amount to be recommended is the claimed cfs, if reasonable, with a limit of 13,000 gallons per day. For large stock watering claims the amount to be recommended is the amount actually used at the time the appropriation commenced. This is dependent upon the number of stock. See Adjudication Memo 36.

### 2. Annual Volume.

Groundwater rights should be recommended with an annual volume. Annual volume may also be recommended if there is a need to protect junior priority rights on a stream, spring or other source with limited quantities of water.

## D. Mining.

Mining use refers to the use of water for the exploration for, and extraction and reduction of, raw mineral ore. Generally, mining use should occur at the future or present mine site. The extraction of sand and gravel where there is no effort to recover mineral ore does not constitute mining use. Where the purpose to be recommended is mining, the use should be further described in "other uses."

### 1. Instantaneous Quantity.

If not otherwise determined by a license or reasonable decree the agent must determine an instantaneous quantity for this purpose.

The quantity to be recommended is that amount actually used at the time the appropriation commenced. If the agent believes an amount claimed is unreasonable or wasteful, this issue should be referred to the Bureau Chief.

### 2. Annual Volume.

Groundwater rights for mining should be recommended with an annual volume based on historic annual use. Annual volume may also be recommended if there is a need to protect junior priority rights on a stream, spring or other source with limited quantities of water and should be recommended if contained in a license, transfer or reasonable decree.

## E. Domestic.

Idaho Code § 42-111 defines de minimis domestic water rights for purposes of the exemption from the mandatory groundwater permit requirements and filing fee determinations. Generically, domestic use is defined in Adjudication Memorandum 4.

Where the purpose to be recommended is domestic the use should be further described in the "non-irrigation uses" field. "" For instance, with domestic use for households, the number of households should be described under this field. For domestic uses pursuant to part B of the statutory definition, the facility in which the water is used should be described. A USE remark should be used if the length of the description is longer than 17 characters, including spaces.

**1. Instantaneous Quantity.**

If not otherwise determined by a license or reasonable decree the agent must determine an instantaneous quantity for this purpose. The amount to be recommended for rights established under Part A of the statutory definition is the claimed cfs, if reasonable, with a limit of 13,000 gallons per day. The amount to be recommended for rights established under Part B of the statutory definition is the claimed cfs, if reasonable, with a limit of .04 cfs and 2,500 gallons per day. For other domestic claims the amount to be recommended is the amount actually used at the time the appropriation commenced.

**2. Annual Volume.**

Non-de minimis, ground water rights should be recommended with an annual volume. Annual volume may also be recommended for any domestic water right if there is a need to protect junior priority rights on a stream, spring or other source with limited quantities of water.

**F. Industrial/Commercial.**

There is no clear distinction between industrial and commercial uses. Generally, industrial use refers to the use of water in the manufacturing, refining or other processing of a product. It can also be applied to washing agricultural products, food processing and sand and gravel washing. Diverting water with which to create steam at a power generating plant is an industrial use. Commercial uses, generally, are those that use water in an involving service or sales to the general public, other than a production context. Car washes, greenhouses and laundries are examples of commercial use.

Where the purpose to be recommended is industrial or commercial the use should be further described in the "non-irrigation uses" field. A USE remark should be used if the length of the description is longer than 17 characters, including spaces. The facility in which the water is used should be described.

**1. Instantaneous Quantity.**

If not otherwise determined by a license or reasonable decree the agent must determine an instantaneous quantity for this purpose. Actual beneficial use at the time of commencement of the appropriation is the standard measure.

**2. Annual Volume.**

Groundwater rights should be recommended with an annual volume. Annual volume may also be recommended if there is a need to protect junior priority rights on a stream, spring or other source with limited quantities of water.

## G. Fish Propagation.

Fish propagation refers to the use of water to raise fish for commercial or public purposes. The recommendation should include a description of the volume of the raceways or other facilities in which the fish are raised.

**1. Instantaneous Quantity.**

If not otherwise determined by a license or reasonable decree the agent must determine an instantaneous quantity for this purpose. Actual beneficial use at the time of commencement of the appropriation is the standard measure.

**2. Annual Volume.**

Groundwater rights should be recommended with an annual volume. Annual volume may also be recommended if there is a need to protect junior priority rights on a stream, spring or other source with limited quantities of water.

## H. Power.

Power use refers to the use of water to create electrical or mechanical power. When investigating water use at a hydropower plant information regarding the power generated in kilowatt capacity and the head should be collected and noted in the claim file. Since the 1940's IDWR has imposed a subordination condition on most licenses for hydropower uses. The agent should be sure to carry forward that subordination condition in recommendations for power, power storage or power from storage if contained in a license or subordination agreement. If no subordination condition exists the agent should contact the attorney assigned to the basin to initiate a subordination condition investigation prior to preparing the Director's Report recommendation for the water right.

**1. Instantaneous Quantity.**

If not otherwise determined by a license or reasonable decree the agent must determine an instantaneous quantity for this purpose. The actual amount beneficially used at the commencement of the appropriation is the standard measure.

### 2. Annual Volume.

Annual volume may also be recommended if there is a need to protect junior priority rights on a stream, spring or other source with limited quantities of water.

## I. Recreation.

Recreation use refers to water use for private, non-commercial sports and entertainment. Examples of recreation use include swimming pools, fishing ponds and water skiing facilities. The recommendation should describe the facilities used and include facility volume, if any.

### 1. Instantaneous Amount.

If not otherwise determined by a license or reasonable decree the agent must determine an instantaneous quantity for this purpose. The actual amount beneficially used at the commencement of the appropriation is the standard measure.

### 2. Annual Volume.

Groundwater rights should be recommended with an annual volume. Annual volume may also be recommended if there is a need to protect junior priority rights on a stream, spring or other source with limited quantities of water.

## J. Aesthetics.

Aesthetic use refers to the use of water for artistic or landscape purposes. Examples of aesthetic use includes fountains, artificial streams and ponds. The recommendation should describe the facilities used and include facility volume, if any.

### 1. Instantaneous Quantity.

If not otherwise determined by a license or reasonable decree the agent must determine an instantaneous quantity for this purpose. The actual amount beneficially used at the commencement of the appropriation is the standard measure.

### 2. Annual Volume.

Groundwater rights should be recommended with an annual volume. Annual volume may also be recommended if there is a need to protect junior priority rights on a stream, spring or other source with limited quantities of water.

## K. Wildlife.

Wildlife use refers to the use of water for wildlife habitat and watering. Because wildlife uses natural water bodies without any human intervention or intent, only that use that results from actual diversion of water qualifies for this purpose of use.

**1. Instantaneous Quantity.**

If not otherwise determined by a license or reasonable decree the agent must determine an instantaneous quantity for this purpose. The actual amount beneficially used at the commencement of the appropriation is the standard measure.

**2. Annual Volume.**

Groundwater rights should be recommended with an annual volume. Annual volume may also be recommended if there is a need to protect junior priority rights on a stream, spring or other source with limited quantities of water.

**L. Heating.**

Heating use refers to the use of water temperature to warm structures and equipment.

Beneficial use of geothermal water generally requires beneficial use of the heat resource. An agent reviewing a claim to geothermal water should review Idaho Code § 42-233.

Field exams for rights to ground water and springs should include an examination of water temperature. For purposes of preparing the report, a temperature measurement is not usually required. In most cases, it will be readily apparent or the agent will already know that the source is something other than cold water. In such cases, a temperature measurement should be made where it would not be unreasonably difficult. Reasonable attempts should also be made to obtain information as to well depth. The temperature and well depth data should noted in the water right claim files.

Adjudication Memo #32 sets forth standard remarks to be used to identify rights to geothermal water (B05 - B08).

**1. Instantaneous Quantity.**

If not otherwise determined by a license or reasonable decree the agent must determine an instantaneous quantity for this purpose. The actual amount beneficially used at the commencement of the appropriation is the standard measure.

**2. Annual Volume.**

Groundwater rights should be recommended with an annual volume. Annual volume may also be recommended if there is a need to protect junior priority rights on a stream, spring or other source with limited quantities of water.

### M. Cooling.

Cooling use refers to the use of water temperature to absorb heat and by doing so, cool structures and equipment.

#### 1. Instantaneous Quantity.

If not otherwise determined by a license or reasonable decree the agent must determine an instantaneous quantity for this purpose. The actual amount beneficially used at the commencement of the appropriation is the standard measure.

#### 2. Annual Volume.

Groundwater rights should be recommended with an annual volume. Annual volume may also be recommended if there is a need to protect junior priority rights on a stream, spring or other source with limited quantities of water.

### N. Instream Flow.

The Water Resource Board has filed claims for instream flow purposes. These claims are based upon approved applications for minimum stream flows issued pursuant to Chapter 15, Title 42, Idaho Code. These claims should be recommended consistently with IDWR's approval in the permit or license. A quantity is set forth in the approval.

Other claims for instream flow purposes should be referred to the Bureau Chief for review.

### O. Fire Protection.

Fire protection use refers to the diversion of water to maintain a fire suppression system. Actual suppression of a fire is not necessary to complete an appropriation for this purpose.

#### 1. Instantaneous Quantity.

The capacity of the fire suppression system at the commencement of the appropriation should be recommended, so long as some amount was actually diverted when the system was developed.

#### 2. Annual Volume.

Annual volume of diversion need not be recommended for fire protection rights.

## P. Storage.

Storage alone is not an appropriate purpose of use for water. Storing the water itself should be identified with some eventual use of the water. This storage should be recommended as "storage for (purpose)". Additionally, a purpose of use may be claimed for water released from storage. This use should be recommended by the particular use as follows: "(purpose) from storage".

### 1. Instantaneous Quantity.

Storage rights are usually not recommended with an instantaneous quantity. However, if the storage right diverts from the stream into a storage facility an instantaneous quantity should be recommended. If not otherwise determined by a license or reasonable decree the agent must determine an instantaneous quantity for this purpose. The capacity of the diversion works at the commencement of the appropriation is the standard measure.

### 2. Annual Volume.

A storage right should be recommended as an annual volume of storage. The agent should consider whether the storage facility has historically filled more than once per year. Generally, storage rights are limited to one fill per year.

## Q. Quantity for Conveyance Loss.

Idaho Code § 42-110 provides that water users are entitled to the quantity of water which they are decreed measured at their point of diversion. Likewise, the Idaho Supreme Court has indicated that water rights are to be measured at their point of diversion. *Glenn Dale Ranches, Inc. v. Shaub*, 94 Idaho 585 (1972). As a consequence, some additional amount of water may be required to compensate for conveyance loss between the point of diversion and the field headgate, if the quantity is not established by a license or decree. The agent should use the Worstell method to calculate this conveyance loss if no other information is available.

If an excess amount (more than 0.02 cfs/acre) is necessary due to conveyance losses, then the right should be recommended with a remark limiting (explanatory material describing?) that portion of the right to use for conveyance losses in delivery of the right. Careful attention should be paid where there are multiple rights and all or part of one or more of the rights is limited to use for conveyance losses. EACH of the rights should contain a conveyance loss remark of some form.

**EXAMPLE:** Claimant has two rights to surface water from the same point of diversion, which total 1.2 cfs for 50 acres, and one right to 1 cfs of groundwater for the same 50 acres. 0.2 cfs of the surface water rights is in excess of an inch per acre; it is to be recommended due to actual, reasonable conveyance losses. The three

rights will contain a combined use remark limiting the three rights to 1.2 cfs for irrigation of 50 acres.

## III. EVIDENCE OF PURPOSE OF USE AND QUANTITY.

A water right's purpose of use and quantity is first determined at the time of establishment of the right, and then as it may have been changed. Although determining the purpose of use and quantity is not dependent upon the legal method by which the water right was established, the evidence available to the agent differs based upon the legal method. This section is concerned primarily with claimed purposes of use and quantities where there is little evidence regarding historic use, such as with beneficial use rights, and accomplished transfers that have not been approved by IDWR.

There are five different methods of obtaining a water right, each with different amounts of evidence regarding the purpose for which water is used by the appropriator:

- Beneficial Use Method.
- Posted Notice Method.
- Permit Method.
- 42-1426 Enlargement Method.
- 42-1416B Expansion Method.

### A. BENEFICIAL USE WATER RIGHTS

The purpose of use and quantity for a beneficial use water right is based on the use when water is first appropriated by application to beneficial use. As a general matter IDWR will have little evidence of the original purpose of use and quantity for beneficial use water rights.

With the passage of the accomplished transfer statute, Idaho Code § 42-1425, the purpose of use to be recommended for most beneficial use rights is the purpose of use as of the commencement of the adjudication on November 19, 1987. The agent's initial investigation of the purpose of use claimed should consist of an evaluation of whether the purpose of use claimed under a beneficial use claim is that purpose of use of water being used on the commencement date.

IDWR will start with the 1987 information because of the accomplished transfer statute. Idaho Code § 42-1425. The accomplished transfer statute was a legislative attempt to protect the pattern of water use as of the date of commencement of the SRBA. Therefore, IDWR generally will recommend beneficial use water rights as they exist as of commencement. IDWR will allow the objection process provided in Idaho Code § 42-1425(2)(a) to raise issues of injury and will not do so in its investigation.

Where the evidence supports a finding that a change occurred after commencement, then the original purpose of use should be recommended.

The agent should look at available evidence to determine whether the 1987 purpose of use is an enlargement from the use when the right was initiated. Available evidence includes: aerial and other photography in IDWR's possession, county assessors records regarding irrigated land, interviews with the claimant, and interviews with neighbors or other old timers. If the agent believes that an enlargement has occurred the claimant should be contacted to submit an enlargement claim.

The quantity element for beneficial use rights is more problematic. The accomplished transfer statute does not provide a legal basis to look solely to 1987 information. The agent will need to use claimant contacts, measurements and other research to determine whether the claimed quantity was the amount diverted and put to beneficial use at the time the right was initiated. It is fair that the agent assume that the water user has followed the law and has not enlarged the quantity used in the absence of evidence to the contrary.

If the agent discovers evidence that the quantity used has enlarged over time, the claimant should be notified that the claimant must submit evidence showing that the amount currently used was the amount originally appropriated. The claimant may be urged to file an additional claim for the additional amount with a priority as of the date of the increase and submit some evidence in support of the priority date claimed, or to file an application for permit, depending on when use of the additional amount was initiated. Absent evidence to the contrary, the additional amount should not be recommended because it appears to be a beneficial use in violation of the mandatory permit statutes.

## B. CLAIM BASED ON DECREE, POSTED NOTICE OR LICENSE

If the claimed purpose of use is the same as the purpose of use shown on a decree, posted notice or license (as amended by any approved transfers) then no further review of this item generally is required. If the agent's review reveals that the claimed purpose of use is inaccurate, the agent may wish to contact the claimant to verify the purpose of use information.

The total amount decreed or licensed should be recommended as long as reasonable; the original purpose(s) and amounts for each purpose should be recommended to the extent claimed as long as reasonable; and the recommendation should include other claimed purpose(s) and amounts for each purpose that may be recommended as a change in use pursuant to the analysis below. A total amount greater than the total amount decreed or licensed may not be recommended.

Purpose of use is the central element of a water right. The failure of a decree to include purpose of use in the listing of rights renders the decree ineffective. Claims based on such a decree should be examined as beneficial use claims.

There are some decrees in the files which list the name, source, amount, priority, and property to which the water right is appurtenant, but contain only general language as to purpose, such as: "The following rights are decreed for irrigation, culinary, livestock,

milling, mining, and other beneficial purposes." This does not mean every water right listed is decreed for any purpose at all and the purpose may be changed whenever the owner feels like changing it. In these circumstances, the general rule is to first look to the decree, or other documents from the case that are already available in IDWR files. The decree should be interpreted as including any claimed purpose for which there is some specific support in these documents. For example, if a right is decreed to a party in an amount that is consistent with IDWR's irrigation standard or the duty of water set forth in the decree (i.e. 40 inches for use on forty acres), then this is some specific support for an irrigation purpose. If a right is decreed to a power and light company, this is some specific support for a hydropower purpose; similarly, if a right is decreed to a city or town, this is some support for a municipal purpose.

## C. CLAIM BASED ON PERMIT

### 1. Permits for which a proof due notice was filed prior to commencement

If the claim is based on a permit for which a proof due notice was submitted prior to commencement, then contact water allocations staff in the state office before proceeding with review of this claim. See Introduction for a general discussion of claims in this category.

### 2. Purpose of use claimed different than purpose of use on permit

If the purpose of use claimed is different than the purpose of use shown on the permit (as amended by any approved amendments to the permit), then the purpose of use shown on the permit (as amended by any approved amendments to the permit) should be recommended.

A change in purpose of use may not be recommended for a claim based on a permit, because the accomplished transfer statute does not apply to permits. The only way to change the purpose of use on a permit is to file an application to amend the permit with IDWR.

## D. CLAIM BASED ON 42-1426 ENLARGEMENT OR 42-1416B EXPANSION

The evaluation of the purpose of use of an Idaho Code § 42-1426 enlargement or 42-1416B expansion claim should parallel the analysis used for beneficial use rights. The purpose of use should be that purpose as of 1987. Remember that a 42-1416B expansion claim cannot include an increase in volume of use. See Adjudication Memorandum 16C (Completion Pending) for further explanation of how these claims should be investigated and recommended.

If a claim includes both the original purpose and an enlargement purpose, then the claimant should be contacted to allow the claimant the opportunity to file a separate claim

based on Idaho Code § 42-1426 or beneficial use for the additional purpose. The agent should consult with legal counsel when investigating such an enlargement.

## E. RECOGNITION OF ACCOMPLISHED TRANSFER STATUTE.

A water right's purpose of use is transferred to an alternate purpose when the original purpose of use ceases, in whole or in part, and the water is instead used, in whole or in part, for a new purpose. Further information on this complex topic is available. **[Insert link to administrators memo]**An accomplished transferred purpose of use is a change in use that may be recommended with its original priority pursuant to Idaho Code § 42-1425. The agent should consult with legal counsel when investigating such a transfer. By way of contrast, an enlargement occurs when the original use continues without an increase in the diversion rate, and (1) the water is reused for a different purpose, (2) when the new use is made possible by conservation methods employed in making the original use, or (3) a new, non-consumptive use can be added to the original delivery system. Enlargements must be claimed separately.

A change in use may include an expansion in the number of acres irrigated with stored water pursuant to Idaho Code §42-222. In addition, a change to an alternative nature of use of stored water is a change in use that will generally not result in injury to other water rights because the water, once lawfully stored, is not part of the natural flow to which junior appropriators hold rights. Therefore, the review of expansions in irrigated acreage and changes to an alternative nature of use of stored water is the same.

If IDWR recommends an accomplished change in purpose of use, then the recommendation should include the following condition: "RIGHT INCLUDES ACCOMPLISHED CHANGE IN PURPOSE OF USE PURSUANT TO IDAHO CODE 42-1425."

This Guidance Document is not new law but is an agency interpretation of existing law. For more information or to provide input on the document, please contact the Water Rights Section Manager at 208-287-4800. (Feb.2020)

# CHAPTER 7

## SEASON OF USE

### A. GENERAL

Idaho Code § 42-1411(2)(g) requires IDWR to determine "the period of the year when water is used" for each purpose for which a water right is claimed. The Idaho Supreme Court stated in its basin-wide issue number 5 decision that:

> [E]ach irrigator's water right shall be decreed with a specific period of use setting forth a beginning date and an ending date, previously adhered to by IDWR.

*In Re SRBA*, 98.9 ISCR 363, 366 (April 22, 1998).

### B. IRRIGATION SEASON OF USE:

IDWR will recommend the licensed season of use for all licensed irrigation water rights. If an irrigation right has been transferred pursuant to Idaho Code § 42-222 the season established in the approval should be recommended IDWR will recommend the decreed season of use for all decreed irrigation water rights from general adjudications.. IDWR will recommend the decreed season of use from private adjudications, so long as the decreed season is reasonably supportable.

For beneficial use rights, IDWR has re-examined its season of use methodology and expanded its recommended season to take in the majority of the late and early season irrigation use. IDWR will recommend this season for all beneficial use right claimants claiming a full irrigation season right, whether the claim is for a longer or shorter season.

#### 1. Early and Late Season Irrigation.

For the most part, IDWR will recommend an early- and late- season irrigation general provision only when such a provision has been decreed in a general stream adjudication or such use represents historic practice. This is especially important when the provision has been previously decreed, because the length of the decreed season of use may depend upon the existence of such a provision.

If a water right is licensed or decreed with an irrigation season shorter than IDWR's uniform season the following remark, in most instances, should be placed under the irrigation season:

> The use of water for irrigation under this right may begin as early as [standard irrigation start date] and may continue to as late as [standard irrigation end date] provided other elements of the right are not exceeded. The use of water for irrigation before [licensed or decreed irrigation start

date] and after [licensed or decreed irrigation end date] under this remark is subordinate to all water rights having no subordinated early or late irrigation use and a priority date earlier than the date a partial decree is entered for this right.

This remark should not be placed on a water right that has a short season for a particular reason, ie. as a result of a contested case hearing involving a protested application for permit or transfer, a settlement of a contested case hearing, a specific finding that the shorter season is necessary, or to prevent interference with other water rights. The agent should examine the decree or licensing file carefully to determine if one of these circumstances is present.

2. Customized irrigation season of use

IDWR will consider an irrigation season of use outside the uniform parameters in certain circumstances. See Memo for a discussion of how to consider a customized irrigation season.

## C. SEASON OF USE FOR OTHER PURPOSES:

1. Licensed and Decreed Rights.

IDWR will recommend the licensed season of use for all licensed water rights. If an irrigation right has been transferred pursuant to Idaho Code § 42-222 the season established in the approval should be recommended IDWR will recommend the decreed season of use for all decreed water rights from general adjudications. IDWR will recommend the decreed season of use from private adjudications, so long as the decreed season is reasonably supportable. If the license or decree does not contain a season of use, the right should be treated as a beneficial use right for purposes of season of use.

2. Beneficial Use Rights.

Most beneficial use water rights for uses other than irrigation have a year-round season of use because they are not limited by seasonal factors. Storage water rights for irrigation generally fall into this category as well. As a result, IDWR will generally not seek proof of the season of use for beneficial use rights. If you suspect, however, that a water right has not been, or cannot be, used year-round you should investigate the season of use.

## D. CHANGES IN SEASON OF USE.

A water user may wish to claim a changed season of use for a water right. The available records regarding historic beneficial use determine how the agent should investigate and report a changed season of use.

1. Beneficial Use Rights.

IDWR generally has very little record of the historic pattern of use of most beneficial use rights. As a consequence, in most instances the agent should simply recommend the season of use currently applicable to a beneficial use right. Third party objections will be needed to raise issues of injury or enlargement of the season of use. If IDWR has records for a water right indicating a season of use historically different from the claimed season of use, then the right should be treated similarly to a decreed or licensed right.

2. Licensed and Decreed Rights.

The most common example of a changed season of use is when the claimant claims a change in nature of use from irrigation to a nature of use that is year-round, such as storage, municipal or commercial uses. The claimant can obtain this new season of use in a number of ways.

a. Beneficial Use Right.

If the new season of use occurred before 1963 for ground water rights, or before 1971 for surface water rights, the claimant may have a separate beneficial use right for the changed season. The claimant needs to file a new claim for this use, with a different priority date.

b. Enlargement Right.

If the new season of use occurred after 1963 for ground water rights, or after 1971 for surface water rights, and before the SRBA commenced, the claimant may have a separate enlargement right for the changed season. The claimant needs to file a new claim for this use, with a different priority date. Such an enlargement right may be recommended only if the requirements of I.C. §§ 42-1426 or 42-1416B are satisfied, including the subordination of the enlargement right using the standard language. This can be a complex determination, so contact with your legal counsel is recommended in this situation.

c. Transfer.

A claimant may wish to transfer a portion of a water right to a new season of use. To accomplish this, in general, there must be both a cessation of use during a portion of the season of use and new use during a new portion of the period. This can be a complex determination, so contact with your legal counsel is recommended in this situation. If the claimant shows that the change occurred prior to onset of the adjudication, the change should be recommended. If an objection claiming injury is filed, the right will be remanded to IDWR pursuant to I.C. § 42-1425(a) for a determination whether the change caused injury to other water rights.

This Guidance Document is not new law but is an agency interpretation of existing law. For more information or to provide input on the document, please contact the Water Rights Section Manager at 208-287-4800. (Feb.2020)

# MEMORANDUM

TO: DAVE TUTHILL
FROM: PETER ANDERSON
RE: CUSTOMIZED SEASON OF USE
DATE: DECEMBER 18, 1998

## INTRODUCTION

Over the summer and this fall IDWR developed new general recommendations for the irrigation season of use based upon the latitude and elevation of the irrigation water use. The use of general season of use parameters for purposes of recommendation is authorized by Idaho Code § 42-1401B, which provides, in part, that:

> The director shall make recommendations as to the extent of beneficial use and administration of each water right under state law and may use uniform parameters for quantification of beneficial use recommended for rights within climatic regions of the state.

IDWR excepted from its intention to recommend the uniform irrigation season of use those water rights that have been decreed or licensed with an explicit season. At public meetings held on October 15 and 16, 1998, IDWR stated a further exception, as follows:

> For situations where an irrigator has specific evidence to support an expanded season, IDWR will consider the expanded season.

Although IDWR developed uniform parameters for its irrigation season of use recommendations, it recognized exceptions for the licensed and decreed season of use, and for situations where the irrigator has specific evidence supporting an expanded season.

The reason for the exceptions lies in the difference between IDWR's recommendation and the actual water right. The legislature wisely allowed IDWR to make its recommendations based upon uniform parameters. The use of uniform parameters recognizes that evidence of actual irrigation season may be hard to find; that the State cannot afford to closely investigate the irrigation season for every right; that claimants may not have the legal, factual and financial wherewithal to prove their particular irrigation season at trial; and that in most cases irrigation water use in an area begins and ends at approximately the same time. The actual water rights, however, may not be accurately described by the uniform parameters. In Idaho, water rights are determined by the extent of historic beneficial use, which may be evidenced by a license or decree. Historic use may extend past the uniform parameters in IDWR's recommendations. If so, the actual water right may have an irrigation season that extends outside the uniform parameter. The exceptions allow IDWR to conform its recommendations more closely to the actual water right in appropriate circumstances.

The question posed is how and when will IDWR consider specific evidence of a longer irrigation season.

## DISCUSSION

**General Standard:**

1. Claimant's Burden.

The first rule to be applied to claims for an irrigation season longer than the standard season for an area is that the claimant bears the burden of bringing the information to IDWR's attention. Although the statute puts the initial investigatory burden on IDWR in Idaho Code § 42-1410, the authorization to use uniform parameters effectively limits the extent to which IDWR must investigate irrigation season of use. If the claimant wants IDWR to recommend something other than the uniform season, the claimant must bring the necessary information to IDWR's attention.

2. Evidence of Actual Use.

The second rule to be applied is that the claimant must bring substantial, competent evidence that water has been used historically at times outside the uniform season. To be competent the evidence must be from a reasonably reliable historical source. Personal testimony of old time water use should come from an old timer, not from a new owner whose "understanding" is that water was always used this way. Types of possible evidence include historic diaries or journals, newspaper accounts, historic letters, affidavits of individuals that also establish credibility and source of knowledge, or conversations with individuals that also establish the same. Evidence of physical circumstances that suggest that water was used during the extended period would also be helpful, such as historic weather reports and records, stream flow records and other evidence of watershed characteristics. The evidence should be produced and presented in a way that establishes that it is credible.

3. Evidence that the Use is Beneficial.

The third rule to be applied is that the claimant must bring substantial, competent evidence that water use outside the uniform season is beneficial. This evidence will primarily need to be based on agricultural science. Possible sources for this type of evidence include county agents or ASC crop specialists. However, the claimant may be able to bring sufficient evidence of the physical circumstances to allow IDWR to determine whether or not the historic, extended use was beneficial.

## CONCLUSION

IDWR must make its own conclusions regarding whether or not the information brought forward by a claimant is sufficient to support a recommendation of early season or late season beneficial use. The hurdle for the claimant in this regard is high. The

standard irrigation season established by IDWR is very generous. **If an agent is faced with a question regarding irrigation season of use they would be well served to discuss the issue with their legal liaison.**

This Guidance Document is not new law but is an agency interpretation of existing law. For more information or to provide input on the document, please contact the Water Rights Section Manager at 208-287-4800. (Feb.2020)

# CHAPTER 8

## PLACE OF USE

## I. INTRODUCTION

The investigation of a water right's place of use is dependent both upon the type of use and upon which of the five legal methods under which the water right was established. Because the majority of the rights are for irrigation use, this use will receive the most attention.

## II. PLACE OF USE GENERALLY.

A water right's place of use is first determined at the time of establishment of the right, and then as it may have been transferred, forfeited or abandoned. Although determining the place of use is not particularly dependent upon the legal method by which the water right was established, the evidence available to the agent differs based upon the legal method. This Section is concerned primarily with claimed place of uses where there is little evidence regarding historic use of the place of use, such as with beneficial use rights, and accomplished transfers that have not been approved by IDWR. There are specific issues relating to irrigation and municipal water rights that are described in Sections III and IV below.

There are five different methods of obtaining a water right, each with different amounts of evidence regarding the place of use of water used by the appropriator:

- Beneficial Use Method.
- Posted Notice Method.
- Permit Method.
- 42-1426 Enlargement Method.
- 42-1416B Expansion Method.

### A. BENEFICIAL USE WATER RIGHTS

The place of use for a beneficial use water right is the place of use used when water is first appropriated by application to beneficial use. As a general matter IDWR will have little evidence of the original location and size of the place of use for beneficial water rights. However, with the passage of the accomplished transfer statute, Idaho Code § 42-1425, the place of use to be recommended for most beneficial use rights is the place of use used by the water user as of the commencement of the adjudication on November 19, 1987. The agent's initial investigation of the place of use claimed should consist of an evaluation of whether the place of use claimed under a beneficial use claim is that place of use of water being used on the commencement date. This should be done in the first instance by the GIS analysis of the 1987 NAPP photography.

IDWR will start with the 1987 information because of the accomplished transfer statute. Idaho Code § 42-1425. The accomplished transfer statute was a legislative attempt to protect the pattern of water use as of the date of commencement of the SRBA. Therefore, IDWR generally will recommend beneficial use water rights as they exist as of commencement. IDWR will allow the objection process provided in Idaho Code § 42-1425(2)(a) to raise issues of injury and will not do so in its investigation.

Where the evidence supports a finding that the change occurred after commencement, then the original place of use should be recommended. (NAPP photography may be useful in this regard.)

The agent should look at available evidence to determine whether the 1987 place of use is an enlargement from the use when the right was initiated. Available evidence includes: aerial and other photography in IDWR's possession; county assessors records regarding irrigated land; interviews with the claimant; interviews with neighbors or old timers. If the agent believes that an enlargement has occurred the claimant should be contacted to submit an enlargement or additional beneficial use claim. Otherwise, the agent should not include the enlargement area in the preliminary recommendation for the beneficial use right.

## B. CLAIM BASED ON DECREE, POSTED NOTICE OR LICENSE

If the claimed place of use is the same as the place of use shown on a decree, posted notice or license (as amended by any approved transfers) and they all correspond with IDWR's GIS analysis, then no further review of this item generally is required. If the agent's review reveals that the claimed place of use is inaccurate, the agent may wish to contact the claimant to verify the place of use information.

If the claimed place of use is not the same as the place of use shown on the decree, posted notice or license (as amended by any approved transfers), then the agent should recommend the place of use as of 1987 in the same fashion as for beneficial use claims.

If the 1987 place of use is different than both the claimed place of use and the place of use shown on the decree or license (as amended by any approved transfers), recommend the 1987 place of use. An amended claim is not required.

The place of use is an essential element of a water right. The failure of a decree to include the place of use in the listing of rights is an ambiguity in the decree. In other words, when the decree determined the water right, it necessarily determined the place of use as of the same time as the rest of the elements of the water right; the decree just failed to describe it. The relevant question at this point is how to resolve the ambiguity. For purposes of preparing the director's report, assume that the 1987 place of use is the decreed place of use. The place of use of a claim based on a decree that does not state the place of use should therefore be analyzed the same as the place of use of a claim based on beneficial use.

## C. CLAIM BASED ON PERMIT

### 1. Permits for which a proof due notice was filed prior to commencement

If the claim is based on a permit for which a proof due notice was submitted prior to commencement, then contact water allocations staff in the state office before proceeding with review of this claim. See Introduction for a general discussion of claims in this category.

### 2. Place of use claimed different than place of use on permit

If the place of use claimed is different than the place of use shown on the permit (as amended by any approved amendments to the permit), then the place of use shown on the permit (as amended by any approved amendments to the permit) should be recommended.

A change in place of use may not be recommended for a claim based on a permit, because the accomplished transfer statute does not apply to permits. The only way to change the place of use on a permit is to file an application to amend the permit with IDWR.

## D. CLAIM BASED ON 42-1426 ENLARGEMENT OR 42-1416B EXPANSION

The evaluation of the place of use of an Idaho Code § 42-1426 enlargement claim should parallel the analysis used for beneficial use rights. The place of use should be that area that was irrigated as of 1987.

If a claim includes both the original acres and an enlargement in irrigated acres, then the claimant should be contacted to allow the claimant the opportunity to file a separate claim based on Idaho Code § 42-1426 or beneficial use for the additional acres. The original claim should be limited to the number of original acres under the water right. Where the claim includes a change in use as well as an enlargement, it may be difficult to tell which acres should be recommended. In such cases, a common sense approach should be used, taking into account any information as to where the enlargement is likely to have occurred, the nature of the diversion system, etc.

Idaho Code §42-1416B expressly provides that an expansion in irrigated acres from groundwater in a critical GW area that occurred after designation of the critical GW area may not include an increase in either diversion volume or rate. Therefore, there must be information from the claimant with which it can be determined that there has been a change in cropping or in the method of application which would allow the same volume to be spread to additional acres, and to determine the number of additional acres (up to the total number of additional acres claimed) to which the original volume can be spread. If such a determination cannot be made, then the claim should be recommended for disallowal, and should include the following remark: "NO LAWFUL APPROPRIATION SHOWN." (P01 and condition P01)

### E. RECOGNITION OF ACCOMPLISHED TRANSFER STATUTE.

If IDWR recommends an accomplished change in place of use, then the recommendation should include the following condition: "RIGHT INCLUDES ACCOMPLISHED CHANGE IN PLACE OF USE PURSUANT TO IDAHO CODE 42-1425."

## III. PLACE OF USE FOR IRRIGATION WATER RIGHTS.

The basic process for determining the place of use for irrigation water right claims is set forth in the Introduction to this handbook. The agent should try to reconcile the claim, the GIS analysis, and IDWR's records. When they all correspond, the recommendation should be fairly straightforward. When they do not correspond claimant contact, both in the initial investigation and during the error correction process, is crucial to developing an understanding of how and where the irrigation water is used. Further, development of the digitized claims is critical for determining second round service of unclaimed or underclaimed water rights. Protocols for IDWR's GIS analysis have been developed and the agent should be familiar with them.. GIS Guidelines

Additional topics regarding the investigation of the place of use for irrigation water rights follow.

### A. Water Delivery Organizations

Idaho Code § 42-1411(2)(h) requires IDWR to determine "a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except as provided in section 42-219". (Emphasis added.) Idaho Code § 42-219(5) and (6) provide, in part, that:

> (5) For irrigation projects where the canals constructed cover an area of twenty-five thousand (25,000) acres or more, or within irrigation districts organized and existing as such under the laws of the state of Idaho ....It shall not be necessary to give a description of the land by legal subdivisions but a general description of the entire area under the canal system shall be sufficient. ....
>
> (6) For an irrigation project developed under a permit held by an association, company, corporation or the United States to divert and deliver or distribute surface water under any annual charge or rental for the beneficial use by more than five (5) water users in an area of less than twenty-five thousand (25,000) acres, the license issued shall be issued to the permit holder. For the place of use description in the license issued for the irrigation project, it shall be sufficient to provide a general description of the area within which the total number of acres developed under the permit are

located and within which the location of the licensed acreage can be moved provided there is no injury to other water rights. (Emphasis added.)

The agent should read these sections very carefully before constructing the place of use for water distribution entities. For instance, subsection 5 applies as follows:

*All irrigation districts come under this section.
*Irrigation projects covering more than 25,000 acres come under this section.
*The project may utilize either ground or surface water.
*The generally described place of use must be "under" the delivery system.

Subsection 6 applies as follows:

*Irrigation projects delivering or distributing surface water to under 25,000 acres come under this section.
*There must be at least 5 water users in the project.
*The generally described place of use functions like a permissible place of use.

The state office will solicit the boundaries from the water delivery organizations in advance of the regional office investigation. The boundaries will be digitized in the state office prior to assignment to the agent. The agent should then provide a first draft of the boundary to the organization and any State or Federal agency owning land within the draft boundary. What will follow should be an exchange of information until IDWR makes its final determination regarding the boundary and acreage it will recommend to the district court. The final recommendation of the boundary should result from a careful consideration of the information of the water delivery organization and governmental entities by the agent. Extensive claimant contact is expected for these claims, as well as consultation with IDWR legal staff. GIS Guidelines

**B. Transfer vs. Enlargement.**

When investigating the place of use for an irrigation water right claimed at a location different than that shown on IDWR's records the agent should keep in mind the difference between an accomplished transfer and an enlargement. An accomplished transfer occurs where the new place of use is different than the old place of use, but irrigated acres at the new place of use is no greater than the old place of use. An enlargement has occurred where the irrigated acres at the new place of use is greater than the old place of use. An enlargement must be claimed and recommended as a separate water right. **[INSERT LINK]**

When investigating an accomplished transfer for a licensed or decreed water right, the agent should check to be sure that the irrigated acres at the original place of use have been dried up. If not, then an enlargement of some sort has occurred. However, an accomplished transfer of the place of use of an irrigation storage water right may include an increase in the number of acres irrigated without being considered an enlargement pursuant to Idaho Code §42-222.

### C. Supplemental rights

Rights are supplemental when they are for the same purpose of use at the same place of use, and the total amount of the rights (diversion rate and diversion volume) on their faces add up to more than the total that can be beneficially used. Generally, supplemental rights are from different sources, but may in some instances be from the same source. Supplemental rights are an exception to the general rule that rights for the same purpose at the same place of use may only "add up" to the total that can be beneficially used for that use.

Sometimes an appropriator will rely primarily on a right from one source (for example, surface water), with the result that this right is sometimes referred to as the "primary" right. The appropriator will then supplement the surface water with other water (for example, stored water), with the result that this right is sometimes referred to as the "supplemental" right. For purposes of this analysis, both rights are referred to as supplemental to each other and have, at least in part, the same place of use.

Generally, supplemental rights may not be "unstacked" and recommended to different places of use. Doing so would enlarge the total use.

### D. Permissible Places of Use.

A permissible place of use occurs where the claimant irrigates a limited number of acres within a larger place of use with the water right. This often occurs through an accomplished transfer. GIS Guidelines

### E. Partition of Property and Water Right,

Questions are going to arise where there is an ambiguity as to the number of irrigated acres and the property has been partitioned by sale of a portion of the property. The general rule is that where one conveys part of a parcel of land with appurtenant water rights, one also conveys a proportionate part of the appurtenant water right, unless the deed provides otherwise or there is clear evidence of a contrary mutual intent.

**EXAMPLE**

An old decree for the Weiser River describes a right to 5 inches of water that is appurtenant to a 120 acre parcel. The decree has a uniform duty of water of 5/8" per acre. Assume, therefore, that the original number of irrigated acres is eight acres. The 120 acre parcel has since been split into two 60 acre parcels, now owned by different owners. In this instance, the right was fully claimed by one owner and no claim was filed by the other owner, so presume that the owner who filed the claim owns the entire water right. However, if a claim were filed by the other owner, then presume that each owner acquired one-half of the right (four acres worth), unless the claimant(s) submitted evidence to the contrary. Absent such evidence, a

claim to more than four acres by either claimant would be analyzed as an enlargement.

## IV. MUNICIPAL WATER RIGHTS.

The place of use for a municipal water right is its "service area" defined in Idaho Code § 42-202B. The investigation process for these service areas for municipal water right claimants who have brought themselves under the provisions of this statute by a transfer or license issued after 1996 will be similar to that being done for water delivery organizations. The state office will solicit the boundaries from the municipal water providers in advance of the regional office investigation. Those boundaries will be digitized before assignment to a senior agent. The agent should then provide a first draft of the boundary to the municipal provider. What will follow will be an exchange of information until IDWR makes its final determination regarding the service area it will recommend to the district court. If total claims to pre-1996 municipal water rights for a municipal provider do not exceed its total installed capacity, IDWR will not investigate the place of use, and will simply recommend the "service area."

## V. REMARKS DESCRIBING PLACE OF USE.

Adjudication Memo #32 sets forth standard remarks to describe the following:

a. Subdivision parcels (J01),
b. Other common means of identifying place of use, such as homestead entry number, etc. (J02),
c. Place of use is lands within municipal service area(J03),
d. Place of use for irrigation is in another state (J04 - J09).

GIS Guidelines

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# CHAPTER 9

## OTHER RIGHTS

When IDWR developed its claim form it invited parties to identify on their claim "other rights" used on the same place of use for the same purpose. This information was then put into a database field entitled "other rights." Although this field, as such, is not one of the elements reported by the Director, it could be helpful during the investigation process. Use the information in this field to begin analysis of combined use limitations and overlapping rights. See Adjudication Memo #32 for standard remarks.

This Guidance Document is not new law but is an agency interpretation of existing law. For more information or to provide input on the document, please contact the Water Rights Section Manager at 208-287-4800. (Feb.2020)

# CHAPTER 10

## REMARKS

See Adjudication Memo #32 for standardized remarks and conditions. Remarks for specific elements of a right are often noted in this manual in the discussion of that element.

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# CHAPTER 11

## FORFEITURE AND ABANDONMENT

This chapter provides guidance to the agents when developing recommendations in the SRBA based upon the concepts of total or partial forfeiture or abandonment. Always remember, however, that the focus of the agent's investigation should be to confirm the water use as claimed. The agent should recommend forfeiture only when the agent finds virtually no evidence of beneficial use during a five year period or clear intent to abandon the water use. These circumstances should be rare.

## I. ABANDONMENT

The doctrine of abandonment has been established by case law (unlike forfeiture, which is established by statute). The elements of abandonment are "intent to abandon" the right, **concurrent** with "actual relinquishment" of the right. Intent to abandon must be shown by "clear and unequivocal acts"; nonuse alone is not sufficient, but a substantial period of nonuse gives rise to a **rebuttable** presumption of intent to abandon. Unlike forfeiture, no defenses to abandonment have been recognized.

Absent a substantial period of nonuse, abandonment is generally difficult to prove, due to the requirement of evidence of intent to abandon by "clear and unequivocal acts." The following example provides guidance to the agent regarding a situation in which it is appropriate to initially recommend **abandonment** when considering evidence of intentional relinquishment of water rights:

- A farmer makes statements to neighbors to the effect that he's had enough and isn't going to farm his land anymore, and proceeds to plow under the ditches and dig up the headgates.

## II. THE IDAHO SUPREME COURT'S EMPHASIS ON HISTORIC BENEFICIAL USE IN WATER RIGHT FORFEITURE ANALYSIS.

The Idaho Supreme Court has provided direction to the SRBA District Court regarding how it is to analyze water rights in the adjudication. The following steps describe the legal analysis necessary to determine whether a water right has been forfeited:

1. Define the elements of the water right using the scope and extent of historic beneficial use at the inception of the right as defined by the constitutional, posted notice, permit, or enlargement methods of obtaining a water right.

2. Determine if clear and convincing evidence establishes that water was not used under this water right for a period of five consecutive years from the date of the

inception of the right to the present (this will be referred to as determining **continuity of use)**.

3. If a five-year cessation in water use has occurred, determine if any of the statutory or common law defenses to forfeiture are present.

4. If a five-year cessation in water use has occurred, but the use has resumed, determine if any other water right holders are injured by such resumption.

When an agent is asked to present the basis for a forfeiture recommendation in court, the agent must be sure that the analysis described above has been fully conducted. The analysis should be fully documented in the claim file. Section III, below, describes the circumstances when this complete analysis is necessary.

## III. PARTIAL FORFEITURE.

The agent must consider the following when making a partial forfeiture recommendation:

### A. Irrigation Uses.

An irrigation use may be recommended as partially forfeited only if there is a reduction in the actual number of acres irrigated. Descriptive elements of a water right, standing alone, will not be recommended as forfeited except in the context of a limitation in the number of acres. When there is a recommendation of partial forfeiture based upon the number of acres irrigated, the diversion rate and volume may need to be adjusted down, depending upon the extent of the original diversion rate and volume.

### B. Other Uses.

For all other uses, the agent should consult with their legal liaison and State Office staff if there is a potential partial forfeiture.

## IV. CLEAR AND CONVINCING EVIDENCE OF FORFEITURE?

It is not possible to provide a general rule for what constitutes clear and convincing evidence of forfeiture. There is a range within which different fact-finders could find forfeiture. At one end of the range would be two photographs, five years apart which show that water was not used in either of those years. At the other end of the range would be physical evidence such as a parking lot or a diversion system with limited capacity that was in place for five or more years. In between is a host of possibilities with testimony from neighbors, watermaster records, electrical bills, assessors' records, crop records, and so on. The question is: when looked at most favorably for the water right holder, does the evidence clearly show that water was not used for five years?

The type and degree of evidence of forfeiture will determine how IDWR participates in subcase proceedings. In situations where IDWR has some evidence of forfeiture, the agent may recommend forfeiture, but should not expect IDWR to submit extensive evidence of this recommendation if challenged in a subcase. The forfeiture recommendation will be used to raise a presumption that water has not been used for a specifically identified five year period, and the claimant will have to specifically rebut this presumption with evidence showing **continuity of use.** Where IDWR has what it considers to be clear and convincing evidence of forfeiture, IDWR will enter the full basis for its recommendation in a Class II subcase context. Forfeiture cases should be discussed with the agent's legal liaison when the case management report to the SRBA District Court is being prepared to assess the strength of the recommendation.

The following examples provide guidance to the agent regarding situations in which it is appropriate to initially recommend **forfeiture** when considering evidence of non-use of water rights:

- ▶ Permanent physical features preventing use, such as parking lots or homes, are constructed after the right is established.
- ▶ Two photos greater than five years apart showing no use.
- ▶ A photo and field exam greater than five years apart showing no use.
- ▶ Anecdotal information from a neighbor of five consecutive years of non-use.

If the claimant presents evidence during the notice of error process that establishes **continuity of use** and disproves forfeiture, the preliminary recommendation will be changed. If not, the forfeiture recommendation will be issued to the SRBA District Court and the claimant will need to show **continuity of use** to the Court.

The following examples illustrate situations when **forfeiture should not be recommended** when considering evidence of non-use of water rights:

- ▶ Incidental acreage not irrigated due to the characteristics of the irrigation system, such as corners on land now irrigated with circles, but originally square.
- ▶ Water use resumed in good faith at time of field examination.
- ▶ Less than five percent (< 5%) discrepancy between claimed irrigation acres and irrigation determined by G.I.S. analysis.

In these situations third parties would have to allege and prove forfeiture if they disagree with IDWR's recommendation.

## V. RECOMMENDING FORFEITURE IN THE SRBA.

The following is how various right categories will be treated by IDWR *vis a vis* forfeiture in the SRBA:

**A. Beneficial Use Rights.**

Although, as a technical matter, there are only four methods or bases for developing a water right in Idaho--beneficial use, posted notice, permit method, and §42-1426 enlargement--IDWR generally considers "decree" as being the fifth basis for a water right. For purposes of this section, beneficial use rights will be considered to be those rights that are not memorialized in a water rights decree. For beneficial use rights IDWR will not investigate or recommend forfeiture.

For beneficial use water rights IDWR will recommend recent beneficial use as shown by aerial and satellite photography, field examinations, and other general information in the possession of IDWR. IDWR will not extensively investigate the historic development of these rights, except in the context of priority date, and **will not** make recommendations based upon forfeiture. Beneficial use rights will be recommended as either: (1) a right described by recent beneficial use or (2) disallowed based upon no recent beneficial use.

**B. Posted Notice Rights.**

Posted notice water rights will be treated in the same way as beneficial use rights.

**C. Licensed Rights.**

IDWR will recommend forfeiture in appropriate circumstances for water rights based upon the statutory permit method. The license will be considered to describe the elements of the right.

In situations where there is evidence of past non-use, but the licensed right is currently being used consistently with the license provisions, the right will be recommended as licensed. Third parties will need to raise issues of forfeiture and injury if the use of a right has resumed after a period of non-use.

For situations where natural physical features always prevented the use of a water right as described in the license (such as a cliff or other impassable barrier), IDWR will recommend the actual use of the licensed right, not forfeiture.

**D. Decreed Rights.**

Decreed water rights will be treated in the same way as licensed rights.

**E. Enlargement Rights.**

Enlargement water rights will be treated in the same way as beneficial use rights.

## V. FORM OF RECOMMENDATIONS.

### A. Form of Recommendation in Partial Forfeiture Situations.

When a right is recommended as having been partially forfeited the recommendation should indicate "The remainder of this water right was forfeited for non-use from _____ to _____."

### B. Form of Recommendation in Total Forfeiture Situations.

When a right is recommended as having been totally forfeited the recommendation should indicate "This water right was forfeited for non-use from _____ to _____.

## VI. DEFENSES TO FORFEITURE

If the agent preliminarily recommends that a water right has been forfeited the claimant will have the opportunity to rebut this preliminary recommendation. The claimant can, of course, show that the water right has been used during the period in question. If the water right has not been used, Idaho Code § 42-222(2) provides exceptions to the application of forfeiture as follows:

- Nonuse during a period of time when land is contracted in a federal cropland set-aside program does not count towards forfeiture.

- Nonuse of a water right held by a municipal supplier to meet reasonably anticipated future needs generally will not lead to the forfeiture of that right.

- Nonuse of a water right because land application of waste for disposal purposes satifies the need for water does not count towards forfeiture.

- Nonuse of a water right when an extension of time to avoid forfeiture has been granted by IDWR does not count towards forfeiture.

Idaho Code § 42-1764 provides that nonuse of a water right during the time when it is credited to the water supply bank does not count towards forfeiture.

Generally nonuse of a water right does not count towards forfeiture when the nonuse is involuntary either due to natural shortages or due to the acts of others. Supplemental rights are generally not subject to forfeiture.

This Guidance Document is not new law but is an agency interpretation of existing law. For more information or to provide input on the document, please contact the Water Rights Section Manager at 208-287-4800. (Feb.2020)

# CHAPTER 12

## MISCELLANEOUS

### A. APPROVAL CONDITIONS ON PERMITS, LICENSES, AND TRANSFERS

See Adjudication Memo #32 as to when and how approval conditions on permits, licenses, and transfers should be carried over into the recommendation of a claim.

### B. SPLIT RIGHTS, SPLITS ADD UP TO MORE THAN ORIGINAL RIGHT

The general rule governing transfers of water rights is that the water right passes with the land unless the deed specifically states otherwise, or unless a contrary MUTUAL intent is clearly demonstrated. (The most typical example of a clearly demonstrated contrary mutual intent is where the contract makes specific provisions as to water rights that are not repeated in the deed. There may be others.) This is known as the silent deed rule.

Where the water rights are split by conveyance to different owners, then the general rule is that the water right is divided up in the same proportion as the land. There are two exceptions to this rule. The first exception is where the deed conveying the land expressly states how the water right will be divided. The second exception that may exist is where a specific portion of the water right is appurtenant to a specific portion of the tract of land. An example of the second exception is where there is a 40 acre tract with an irrigation right for the entire tract plus an additional amount for one house. The owner conveys 20 acres plus the house to one person, and the other 20 acres to another person. The first person gets the domestic portion, and two split the irrigation portion equally.

First, determine if each claim from the original right is consistent with the general rule that the water right is divided in the same proportion as the land division. If not, document the discrepancy in the file. The agent should conduct a field exam of the claim and discuss the discrepancy with the claimant.

The claimant should be told that IDWR will recommend the claimant's portion of the water right proportionally with the claimant's portion of the land division, unless the claimant submits evidence that the claimant is entitled to a greater proportion. If the claimant submits evidence that the claimant is entitled to a greater portion of the original right, then the claim should be referred for further review by legal staff. If the claimant acquired a greater portion of the original water right, then the recommendation of this claim and the other splits should be modified accordingly. If not, then the portion of the claim that is not consistent with the proportion of the land the claimant owns should be evaluated to determine if a different water right is applicable.

## C. DUPLICATE CLAIMS

This section refers to the situation where two or more claimants file different claims to the same right, and it isn't a split.

The first task is to find out if they are in fact duplicate claims. In some instances we have received duplicate claims not because the claimants are contesting who owns the right, but because they are co-claimants who did not know who should file, so they both did. Claimant contact should be made for both claims, which says: we have these claims filed for the same right by these persons: we're sending letters to both/all of you; would one of you like to withdraw the claim and get your money back (and leave the claim in the other claimant's name, or have the other claimant file an amended claim to include your name), or are you contesting ownership with these other people?

If a duplicate claim is withdrawn, then there is no problem. If the claimant is contesting ownership, then the claimant needs to submit evidence that the claimant does in fact own the water right claimed. Contested ownership issues should be submitted to legal staff for review.

When duplicate claims are filed, and it is determined that one claim should be recommended for disallowal on the basis that the right is owned by another claimant, then the claim that is disallowed should include the following remark: "RECOMMENDED AS RIGHT NO. _____." (P06 and condition P06.)

When duplicate claims for water rights on state land are filed by the state and the lessee of lands leased from the state, the contact described above should be made to the lessee only. (It is already known that the state plans to file claims for all water rights on state lands). If the lessee does not withdraw the claim, then the lessee should be recommended as a current owner on the state's claim. The lessee's name should appear on the recommendation of the state's claim in the following form: JOHN SMITH, LESSEE. The lessee's individual claim should be recommended for disallowal, with the remark and condition described above.

When duplicate claims are filed by the United States and another entity for water rights on lands leased from the United States by the other entity, refer to a policy letter prepared on July 3, 1997 and a response prepared on July 31, 1997.

In all other instances where duplicate claims are filed by the owner and a lessee of the owner's lands, then the claimant contact described above should be made, and the claimant contact should further state that if the claim is not withdrawn, then the claimant must submit a copy of the lease agreement. The claim should then be referred to legal staff for further review.