

ADJUDICATION MEMORANDUM #23

TO: Adjudication Section Staff

FROM: Carter Fritschle, Adjudication Section Manager *CF*

SUBJECT: Effect of Mandatory Permit Statutes

REVISED: September 4, 2013

I. Surface Water

As of May 20, 1971, a right to surface water can be obtained only by compliance with the application, permit and license procedure established by statute. See Section 42-201, Idaho Code.

The first exception to this rule is water rights used solely for instream watering of domestic livestock can still be established by beneficial use. See Section 42-113, Idaho Code. Note "domestic" livestock does not mean the livestock use must be associated with a household use. The second exception to this rule is an enlargement approved under Section 42-1426, Idaho Code.

The priority date of a water right established by diversion and application to beneficial use is the date water is put to beneficial use. Incremental development of beneficial use water rights require separate priority dates for each development period. Beneficial use rights do not start with the commencement of development; they start when development is completed and water is put to beneficial use.

II. Ground Water

As of March 25, 1963, a right to ground water can be obtained only by compliance with the application, permit and license procedure established by Section 42-229, Idaho Code.

The first exception to this rule is water rights for domestic purposes, as defined in Section 42-111, Idaho Code, can still be established by beneficial use. See Section 42-227, Idaho Code. The second exception to this rule is an expansion right approved under Section 42-1416B, Idaho Code, or an enlargement right approved under Section 42-1426, Idaho Code.

See Adjudication Memorandum #4 for further discussion of the definition of domestic purposes and the effect of mandatory permit statutes on domestic rights.

III. Cut Off Dates

Both the ground water and surface water statutes provide, “In the event an appropriation has been commenced by diversion and application to beneficial use prior to the effective date of this act it may be perfected under such method of appropriation.”

In general, a surface water right with a priority of May 20, 1971, or later, or a claim to a ground water right with a priority of March 25, 1963, or later, is invalid because it is in violation of the mandatory permit statute.

However, a beneficial use right with a priority after the cut-off date can be established if the claimant can show the right was commenced (the first step in the appropriation by diverting the water) before the cut-off date, and the appropriation was completed (put to beneficial use) with due diligence after the right was commenced.

Due diligence will be presumed if the appropriation was completed within five years after the appropriation was commenced. Five years is the relevant period since this is the maximum amount of time allowed for completion of an appropriation under a permit. Since the priority date of such a right is the date the appropriation was completed, there may be claims based on beneficial use with priority dates after the effective date of the permit requirement, but the priority date will generally be within five years of the effective date of the permit requirement.

A longer period for completion will be deemed reasonable under the same circumstances where an extension would be granted by the director for completion of an appropriation pursuant to a permit. Recommending a beneficial use right with a priority after the effective date of the permit requirement based on a period for completion in excess of five years requires Bureau Chief approval.

IV. Effect on Adjudication

A claim should not be rejected on the basis the water right is in violation of the mandatory permit system. IDWR might not recommend it, but the claimant can still claim it.

Where a claimant has filed a notice of claim to a water right clearly in violation of the mandatory permit statute, the practice has been to inform the claimant of the possible problem, and give the claimant the option to:

- 1) file just the notice of claim,
- 2) file just an application for permit, or
- 3) file both a notice of claim and an application.

Option 3 offers the best protection of the claimant's interests, but is also the most expensive. (Note that claimants have been allowed to withdraw a notice of claim and get their filing fee back if the claimant is filing an application instead of the notice of claim.)

This is an exception to the general rule that fees will be refunded only where the fee was miscalculated at the time of filing the notice of claim.)