

ADJUDICATION MEMORANDUM #57

TO: Adjudication Staff

FROM: Carter Fritschle, Adjudication Section Manager *CF*

SUBJECT: Determining Place of Use where Decree or License is Indeterminate

REVISED: October 20, 2011

Some decrees or licenses do not describe the number of acres per quarter-quarter (QQ) in the place of use (POU). For example, a license or decree defines the POU by QQ but does not define the number of irrigated acres within the QQ.

Legal Analysis

In addition to the analysis the Department would normally conduct in this matter, Section 42-1427, Idaho Code, provides specific guidance. Subsection 2 provides, "If a license or decreed water right does not describe all of the elements of a water right required in Section 42-1409, Idaho Code, the Director shall include in his report recommendations for those elements not defined by the prior license or decree based upon the extent of beneficial use of the water right as of the date of the commencement of the adjudication." Further guidance in the statute is contained in subsection 1(b):

Because of the passage of time it is not possible to establish with any degree of certainty the undefined elements of a decreed or licensed water right as they existed on the date the right was established, because water delivery has occurred based upon the historic water use patterns and custom, and because attempts to define elements of a water right based upon conditions in existence on the date of the establishment of the water right could result in significant impacts upon the claimant, the local economy and tax base, the legislature finds that it is in the public interest to provide a mechanism to decree previously undefined elements of existing water rights based upon conditions existing on the date of commencement of the adjudication provided the claimant is not exceeding any previously determined and recorded elements of the decreed or licensed water right.

Guidance for Preparing Recommendations

Where location of the ditch is certain:

Given the scenario in the example (see Appendix 1, number 1), and in light of the legislative guidance, there are five possible outcomes for the acres above the ditch:

1. The reviewing agent should look at the claim as filed and determine if a second claim is necessary.
2. If a second claim is necessary, the reviewing agent should contact the claimant to solicit a second claim.
3. If two claims are filed, one for the original licensed/decreed right and one for the additional 15 acres of development, timing of development is important.
 - a. If the 15 acres in question were irrigated prior to the mandatory permit statute for the source, those 15 acres could be recommended under a junior beneficial use right. This assumes 25 acres was recommended under the original decree/license. This is a non-permissible place of use (non-PPU) example.
 - b. If the 15 acres in question were irrigated after the mandatory permit statute for the source, but on or before November 19, 1987, the 15 acres could be recommended as a separate enlargement right. Applicable combined limits, as well as enlargement and base right conditions should be added to both rights. Under most circumstances, this recommendation would include permissible place of use (PPU) conditions.
 - c. If two claims are filed for the entire 40 acres, recommend the decree or license with a PPU of 25 acres within the 40 acres. Recommend the second claim with a PPU of 15 acres within the 40 acres. Applicable combined limits should be added to both rights.
4. If a second claim is not filed, recommend the decree or license with a PPU of 25 acres anywhere within the 40 acres. (NOTE: If water use is claimed in the Northern Idaho Adjudications (NIA), the irrigation above the ditch must have occurred on or before January 1, 2006. If water use is claimed in the Snake River Basin Adjudication (SRBA), the irrigation above the ditch must have occurred on or before November 19, 1987.) Applicable accomplished transfer conditions should be included.
5. The recommendation for the original decree or license could cover the entire 40 acres with the priority date advanced to the date the additional 15 acres were developed, provided the recommended priority date is on or before the mandatory permit statute date for the source.

Where location of the ditch is uncertain

Given the scenario in the example (see Appendix 1, number 2), and in light of the legislative guidance, there are four possible outcomes for the acres above the ditch:

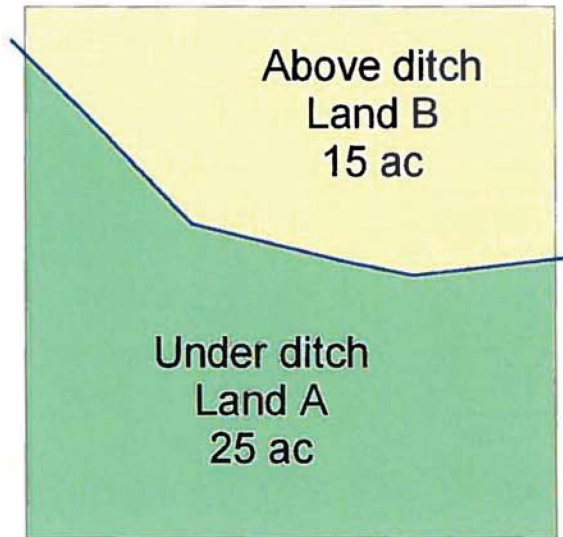
1. The reviewing agent should specifically look at the duty of water allowed by the original decree or license to determine if a second claim is necessary. If the duty of water is clearly stated as one miner's inch per acre, the number of acres would equal the number of miner's inches decreed or licensed.
2. If a second claim is necessary, the reviewing agent should contact the claimant to solicit a second claim.

3. If two claims are filed, one for the original licensed/decreed right and one for the additional development, timing of development is important.
 - a. If the duty of water is clearly stated, the reviewing agent should recommend the number of acres consistent with the duty of water established in the decree or license. If the development under the second claim occurred before the mandatory permit statute for the source, the reviewing agent should recommend the additional development. Applicable combined limits should be added to both rights. This is a PPU example.
 - b. If the duty of water is clearly stated, and the development in question occurred after the mandatory permit statute for the source, but on or before November 19, 1987, the additional development could be recommended as a separate enlargement right. Applicable combined limits, as well as enlargement and base right conditions should be added to both rights. Under all circumstances, this recommendation would include permissible place of use (PPU) conditions.
4. If a second claim is not filed, and the duty of water is clearly stated, recommend the decree or license with an acre limit within a PPU consistent with the duty of water established in the decree or license as of the date of the commencement of the adjudication.
5. If a second claim is not filed and the duty of water is not clearly stated, the prior decree or license is ambiguous and water use should be examined as of the date of commencement of the adjudication. (NOTE: If water use is claimed in the Northern Idaho Adjudications (NIA), the irrigation above the ditch must have occurred on or before January 1, 2006. If water use is claimed in the Snake River Basin Adjudication (SRBA), the irrigation above the ditch must have occurred on or before November 19, 1987.) If the 40 acres were irrigated as of the commencement date of the adjudication, the entire 40 acres can be recommended under the original decreed or licensed priority date and the original decreed or licensed diversion rate.

Possible recommendations are outlined in Appendix 1.

Appendix 1. Possible recommendations.

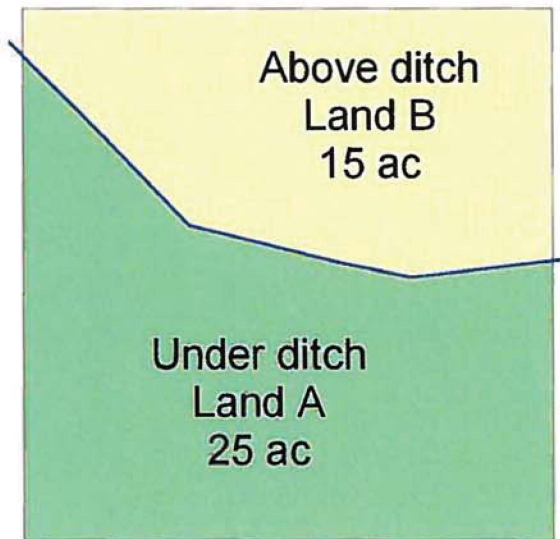
1. Where the location of the original ditch is certain:



In this specific example, we know through communication with the claimant, or other evidence, that the QQ in question was only irrigated by gravity flow from the ditch that conveys water through the property. The 25 acres shown in Land A are located under the ditch, and this is the only land that would have been irrigated from the original water right. We also know the 15 acres shown in Land B are also presently irrigated, and this land was irrigated prior to commencement, but was not irrigated by the original ditch. In this example, the claimant has claimed irrigation of 40 acres based on the original decree or license.

- a. For each water right based on a license or decree with unspecified acreage, where information in the file specifies it provides one miner's inch per acre and the licensed or decreed flow is 25 miner's inches:
 - i. POU for Land A = 25 acres and 0.50 cfs (under the original water right)
 - ii. POU for Land B = 15 acres (under a separate water right)
- b. For each water right based on a license or decree with unspecified acreage, where the license or decree does not specify providing one miner's inch per acre and the flow licensed or decreed is 25 miner's inches:
 - i. POU for Land A = 25 acres and 0.50 cfs (under the original water right)
 - ii. POU for Land B = 15 acres (under a separate water right)
- c. For each water right based on beneficial use, more information is needed to provide additional certainty prior to making the recommendation (i.e. evidence of priority for the additional development).

2. Where the location of the original ditch is uncertain:



In this specific example, we know through communication with the claimant, or other evidence, that the QQ in question was irrigated by gravity flow from a ditch. NOTE: The ditch shown in the example at left is not necessarily the original ditch. In this example, the claimant has claimed irrigation of 40 acres based on the original decree or license.

- a. For each water right based on a license or decree with unspecified acreage, where information in the file specifies it provides one miner's inch per acre and the licensed or decreed flow is 25 miner's inches:
 - i. POU for Land A = 25 acres and 0.50 cfs (with 40 acres as a PPU)
 - ii. POU for Land B = 15 acres (under a separate water right)
- b. For each water right based on a decree or license with unspecified acreage where the decree or license does not specify that it provides one miner's inch per acre and the flow decreed is 25 miner's inches, and irrigation of 40 acres has occurred since prior to commencement of the adjudication:
 - i. POU = 40 acres and 0.50 cfs under the original water right and priority date¹
- c. For each water right based on beneficial use, more information is needed to provide additional certainty prior to making the recommendation (i.e. evidence of priority for the additional development).

¹ Finding 40 acres here instead of 25 acres is expressly due to the guidance in Section 42-1427, Idaho Code. Without this statute our standard review process would have resulted in a recommendation of 25 acres.