

ADMINISTRATOR'S MEMORANDUM

To: Water Allocation Bureau
Regional Offices
Amended Adjudication No. 61

From: Shelley Keen, Water Allocation Bureau Chief

Date: April 23, 2021

Subject: Proof of Priority for Deferrable *De Minimis* Claims

Purpose

This memorandum offers guidance to Idaho Department of Water Resources ("IDWR") staff members considering whether to request additional information to support a claimed priority date for deferrable *de minimis* domestic and/or stockwater claims. This memorandum replaces the first version of Adjudication No. 61, which was issued on August 14, 2020.¹

Background

Idaho Code § 42-1411(2) requires IDWR to confirm the elements, including the priority date, of water rights claimed in a general adjudication. For most beneficial uses, IDWR requires water right claimants to "submit information supporting the claimed priority date." *Claim Investigation Handbook*, Chapter 3, Page 1. For deferrable *de minimis* water uses, however, IDWR has not routinely required evidence to support the claimed priority date. In the Snake River Basin Adjudication ("SRBA"), for example, IDWR recommended the claimed priority date for deferrable *de minimis* water uses unless IDWR had contradictory information, which was rare. The *Evidence of Priority* pamphlet IDWR distributes to SRBA claimants states IDWR's practice as follows:

Each claim filed in the SRBA is the claimant's affidavit (statement) of the elements of the water right being claimed. Some claimants in the SRBA will be required to submit additional evidence of the priority date of the water right IF:

1. *The claim is based on beneficial use AND*
2. *The claim is NOT a small domestic and stockwater claim.*

NOTE: Additional proof of priority for beneficial use claims for small D&S uses will not be required unless specifically requested by IDWR.
[Emphasis copied.]

¹ This guidance does not apply to the investigation of deferred claims filed as Motions for Determination of Deferred *De Minimis* Domestic or Stock Water Use.

The relevant portion of the Evidence of Priority pamphlet IDWR distributes for the Northern Idaho Adjudications ("NIA") is nearly identical to the SRBA version, except that "SRBA" is changed to "Adjudication." Even so, in the NIA staff members gradually started requiring additional evidence to support the claimed priority date for a high percentage of deferrable *de minimis* claims. This practice developed in response to the increased availability of aerial imagery from different years and the increased accessibility of county land ownership information that included data such as "year built" dates. IDWR staff members were increasingly trying to reconcile claimed priority dates, county "year built" data, and aerial imagery that offered contradictory information about the timing of water development at claimed places of use.

On November 4, 2014, Carter Fritschle, Adjudication Section manager at the time, addressed this practice in an email to Adjudication program staff:

Since we generally do not require evidence of priority date for a *de minimis* domestic use, we should not automatically recommend a later priority date based solely on a "county built date" that may be junior to the claimed priority date. If you suspect the priority date is in error, you should contact the claimant for additional information to support the claimed priority date.

Prior to issuance of the first version of this memorandum, reliance on imagery and county land parcel data as evidence of priority was so prevalent that IDWR staff members routinely requested additional information from NIA deferrable *de minimis* claimants when priority evidence was not available, not just when information contradicted the claimed priority date. This practice increased the time required for an IDWR staff member to confirm the elements of a deferrable *de minimis* claim, slowing the progress of the adjudication. In many cases the additional effort resulted in no meaningful change because the claimant submitted a statement, affidavit, or other documentation with no different or better information than what was already stated on the notice of claim.

The language of Idaho Code § 42-1411(2) grants IDWR latitude to determine what evidence is needed for claim review. The statute requires IDWR to determine the claim elements "to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law." When deciding the level of evidence needed to determine the priority date of a deferrable *de minimis* claim, IDWR should strike a balance among the following objectives:

- IDWR should review and account for credible, relevant "year built" data, aerial imagery, and other sources of information encountered in IDWR's routine claim review process.
- IDWR should ensure the recommended priority date for a beneficial use claim is not earlier than "the date when the water was first applied to beneficial use." See Idaho Code § 42-1409(1)(d)(i).
- IDWR should complete its claim review process and submit a Director's Report as expeditiously as possible.

To achieve the appropriate balance, it is not necessary to suspend claim review and contact the claimant for additional information each time contradictory priority evidence is encountered. IDWR can achieve the appropriate balance by implementing the practice described below.

Guidance

During its initial review of claims, IDWR staff members will review readily available information for deferrable *de minimis* claims. Readily available information usually includes such items as county "year built" data, well driller reports, aerial imagery, and information provided in the claim or attached to the claim. IDWR staff members will respond as follows regarding the claimed priority date:

1. If the readily available information does not contradict the claimed priority date, or if no additional priority evidence is encountered in IDWR's regular claim review process, IDWR will recommend the claimed priority date.

Example: The claimed priority date for domestic use of a well is June 1, 1969. The available parcel data does not contain a "year built" date. A home can be seen in 1975 aerial photography but not in the 1954 aerial photography. The claimant states on the claim that the well was first used when the house was built in 1969. The available evidence does not contradict the claim that the house and well existed in 1969. Recommend the priority date as claimed.

2. If the readily available information contradicts the claimed priority date, and the claimed priority date is junior to the readily available information, IDWR will presume the claimant made an informed choice, and IDWR will recommend the claimed priority date without requiring the claimant to submit additional information.

Example: The claimed priority date for domestic use of a well is June 1, 1969. County parcel data lists a "year built" date for the home as 1954. The claimed priority date is junior to the readily available information. Recommend the priority date as claimed.

3. If the readily available information contradicts the claimed priority date, and the claimed priority date is senior to the readily available information, IDWR will modify the priority date in the recommendation to match the available information and finish the recommendation, assuming the other elements of the claim can be confirmed. Simultaneously with completing the recommendation, IDWR will send the claimant a letter explaining the priority date recommendation and notifying the claimant of the opportunity to submit evidence supporting the originally claimed priority date or another priority date. (See Attachment A, below, for an example letter). IDWR will reconsider the recommended priority date if the claimant submits additional evidence or the claimant offers a different interpretation of the evidence already available.

Example 1: The claimed priority date for domestic use of a well is June 1, 1969. No home or domestic structures are visible in 1975 aerial photography. A home is first visible in 2004 aerial photography. Available evidence contradicts the claimed priority date of June 1, 1969. Recommend priority date of December 31, 2004, and send the claimant a letter like the one in Attachment A.

Example 2: The claimed priority date for a stockwater pond is June 1, 1969. The pond is not visible in 1975 aerial photography. The pond is first visible in 2004 aerial photography. Available evidence contradicts the claimed priority date of June 1, 1969. The available evidence does not support a conclusion that the pond was in place prior to the mandatory permit requirement for surface water. Recommend the claim as disallowed.

Staff members will document their priority date evaluations in the Claim Verification Report for each claim. The recommended priority date can be revised if additional information becomes available during the notice of error or objection phases of the adjudication process. The reasoning behind any revisions made to the recommended priority date should be documented in the Claim Verification Report.

Staff members should direct questions about requiring additional evidence to the Adjudication Section Manager or IDWR's legal counsel.

Attachment A

(Date)

(Name)

(Street Address)

(City, State Zip)

RE: Evidence of Priority Date
Claim number(s) (XX-XXXXXX)

Dear Claimants:

The Idaho Department of Water Resources (IDWR) is reviewing claims filed in (adjudication name) River Basin Adjudication. During its review, IDWR found information that is not consistent with the claimed priority date. Based on the <county built date, well log, aerial photography, information provided with the claim, etc.>, IDWR can recommend a priority date of (date). I have enclosed a copy of the preliminary recommendation for your water right. If you concur with the recommended priority date, then no further action is required on your part.

If you disagree with the recommended priority date, please submit documentation supporting the claimed priority date or another date by **(2 week deadline)**. **Label all documents with the claim number shown above.** I have also enclosed a pamphlet describing the types of documentation or evidence that will fulfill this requirement.

If you have any questions not covered by this letter or the enclosed pamphlet, please feel free to contact me at (208) XXX-XXXX.

Sincerely,

(Name)

(Title)

Enclosure: Brochure on "Evidence of Priority"
Preliminary Recommendation for (XX-XXXXXX)