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## ADJUDICATION MEMORANDUM #1

TO: Adjudication Bureau Staff

FROM: Don Shaff, Adjudication Bureau Chief 

SUBJECT: Adjudication Claims for New Water Right Applications

REVISED: October 23, 2008

Frequently, when helping a water user prepare claims for the adjudication, we find uses developed since the date it became mandatory to file an application for a new water right, and the uses are not covered by the single family domestic exemption of Section 42-227, Idaho Code, or the enlargement provisions of Section 42-1416B or 42-1426, Idaho Code.

When such a situation occurs, the agent should encourage the water user to file an application for permit for the use. The agent should also advise the water user of restrictions on new appropriations of water if the new application is in an area of special concern, such as a:

- Ground water management area (GWMA)
- Critical ground water area
- Moratorium area
- Another area where agent's knowledge suggests new appropriations are of special concern

IDWR's external website ([www.idwr.idaho.gov](http://www.idwr.idaho.gov)) includes information on critical ground water areas, ground water management areas and moratoriums. Also, IDWR's available GIS layers provide spatial tools for determining claim intersections with areas of special concern, as does the "WR Special Admin Areas Map" available under Query Tools in Workflow.

A claim must be accepted if the water user wishes to have the claim filed. The claimant should be advised of the possibility of the claim being recommended as disallowed in the Director's Report, but the claimant can still file the claim and it must be accepted if it meets the requirements of the rules for being complete and has the proper fee. See Adjudication Memo #9 for additional information on the acceptance of a claim.

## ADJUDICATION MEMORANDUM #2

TO: Adjudication Bureau Staff

FROM: Don Shaff, Adjudication Bureau Chief 

SUBJECT: Late Fees for Adjudication Claims

REVISED: October 23, 2008

Section 42-1414(3), Idaho Code, provides for late fees for adjudication claims not filed by the deadline set in the commencement notice. The late fee is \$50.00 or 15% of the total filing fee for the late claim(s), whichever is greater. A late fee is due for each claim filed after the deadline. The Director can waive all or part of the late fees for good cause.

Late fees are required for all Snake River Basin Adjudication (SRBA) claims unless the claim is deferrable (i.e., most small domestic and/or stockwater claims). The rest of this memo refers to late fees for claims taken in other adjudications, such as adjudications in northern Idaho.

Late fees will be assessed for required claims, delivered in person to an IDWR office, including a recognized temporary office, or received by mail and postmarked after the deadline set by the Director during second round service of the commencement notices. The following are exceptions to assessing late fees for claims received after the deadline set by the Director during second round service of the commencement notices:

1. Late fees are only assessed for claims where filing is required. Claims are not required for deferrable domestic and/or stockwater claims or for permits upon which proof of beneficial use had not been received by the date of an adjudication's commencement order (i.e., November 12, 2008, for the Coeur d'Alene-Spokane River Basin Adjudication).
2. If the claim is received prior to the second round service deadline, late fees will not be assessed.
3. If the claim is received after the deadline for second round service, a late fee will not be assessed if the claimant or the claimant's predecessor(s) did not receive a mailed commencement notice, either in first round service or second round service.
4. Late fees will not be assessed for corrected claims initially timely filed, found defective and returned to the claimant if IDWR receives the corrected claim within 30 days after return to the claimant.
5. Late fees will not be assessed from claimants who received an extension of time to file their claims, and who file no later than the extension deadline. See Adjudication Memo #3 for more information on extensions of time.

Questions regarding late fees should be addressed to the Adjudication Bureau Chief.

### ADJUDICATION MEMORANDUM #3

TO: Adjudication Bureau Staff

FROM: Don Shaff, Adjudication Bureau Chief 

SUBJECT: Extensions of Time to File Adjudication Claims

REVISED: October 23, 2008

This memo does not apply to Snake River Basin Adjudication (SRBA) claims. This memo applies to claims in other adjudications, such as those in northern Idaho.

Section 42-1409(8), Idaho Code, allows the Director to extend the time allowed to file a notice of claim to a water right beyond the deadline set in the commencement notice. The Director has delegated that authority to the Division Administrator and Adjudication Bureau Chief.

A "Request for Extension" (form 42-1409(8)-1) is available for individuals seeking an extension of time to file their claim. The request for extension can be filed any time until the Director's Report is filed with the court. An extension of time request filed after the deadline and before the claim is filed will be considered for the purpose of waiving late fees.

In assisting a claimant with a "Request for Extension," the agent should advise the claimant the extension is more likely to gain approval if the claimant makes a good faith effort to complete the claim by the deadline and is diligent in that effort. When granted, individual extensions will set a new deadline that is reasonable for the claimant but does not frustrate the department's effort to complete receiving all claims.

"Request for Extension" forms should be forwarded to the State Office and will be given expedient consideration. Staff recommendations regarding a particular extension should be on a separate sheet and attached to the extension request.

When action is taken on an extension request, the department will return the original to the claimant and make a copy for each necessary department office. The request form and any supporting information should be filed with the claim when it is received.

## ADJUDICATION MEMORANDUM #4

TO: Adjudication Section and Region Staff

FROM: Jeff Peppersack, Water Allocation Bureau Chief

SUBJECT: Domestic and/or Stockwater Claims

REVISED: October 30, 2013



The definition of domestic use for purposes of both the adjudication statute and the exception to the ground water appropriation permit requirement is set forth at Section 42-111, Idaho Code, which provides:

(1) For purposes of sections 42-221, 42-227, 42-230, 42-235, 42-237a, 42-242, 42-243 and 42-1401A, Idaho Code, the phrase "domestic purposes" or "domestic uses" means:

(a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or

(b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.

(2) For purposes of the sections listed in subsection (1) of this section, domestic purposes or domestic uses shall not include water for multiple ownership subdivisions, mobile home parks, commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in subsection(1)(b) of this section.

(3) Multiple water rights for domestic uses or domestic purposes, as defined in this section, shall not be established or exercised in a manner to satisfy a single combined water use or purpose that would not itself come within the definition of a domestic use or purpose under this section. The purpose of this limitation is to prohibit the diversion and use of water, under a combination of domestic purposes or domestic uses as defined in this section, to provide a supply of water for a use that does not meet the exemption of section 42-227, Idaho Code, and is required to comply with the mandatory application and permit process for developing a right to the use of water pursuant to Title 42, Chapter 2, Idaho Code.

Idaho Administrative Procedures Act (IDAPA) 37.03.01.030(d) (also known as the Adjudication Rules) provides domestic use includes single-ownership, multiple family domestic uses, so long as the total amount of water diverted does

not exceed 13,000 gallons per day. This rule continues to apply to part (1)(a) of the definition.

For uses meeting part (1)(b) definition:

1. All uses of ground water meeting the definition of domestic may be established by beneficial use.
2. Uses that meet the subsection (1)(b) definition may be claimed as domestic on the small domestic and/or stock form, and the filing fee is \$25.00.
3. In the SRBA, only uses meeting the definition of part (1)(a) qualify for the deferral procedure for small domestic and stockwater claims. Uses that can be claimed as domestic under part (1)(b) of the statute do not qualify for the deferral procedure. The order providing for the deferral procedure in the SRBA specifically refers to Section 42-1405(A), Idaho Code, as it appears in the 1988 Supplement to Idaho Code, before the new statute was adopted. Contrarily, uses meeting the definition of part (1)(b) in the Coeur d'Alene-Spokane River Basin Adjudication qualify for the deferral procedure.

Note the two subsections of the definition are mutually exclusive. Either the use meets the definition in subsection (1)(a), or it meets the definition in subsection (1)(b). Part (3) of Section 42-111, Idaho Code, prohibits division of one water use into multiple claims to bring each claim within the quantitative limitations of subsections (1)(a) and (b). This is commonly referred to as stacking domestic rights.

Note also that a domestic ground water right from low temperature geothermal water cannot be perfected by beneficial use after July 1, 1987. Section 42-233, Idaho Code recognizes the validity of domestic water rights for use of low temperature geothermal water perfected by beneficial use prior to July 1, 1987. The use completed after July 1, 1987 must be established by the filing of an application for permit and subsequent approval of the permit. For more information, see Adjudication Memo No. 54.

The following sections contain further discussion as to what uses will or will not qualify as domestic under the definition. For some examples of types of domestic claims, including examples where more than one use or home is claimed from the same well, see Appendix 1. The definition of stockwater use and the uses that will or will not qualify under that definition are addressed in part III below.

- I. Subsection (1)(a) domestic uses:
  - a. Campgrounds and organization camps: Based on statute and rules, there are five prerequisites, as described below. Uses that meet these prerequisites may be claimed on the small domestic and/or stock form with a \$25.00 fee, are exempt from the permit requirement, and are subject to the deferral procedure.
    - i. The total amount of water claimed to be diverted pursuant to the water right claimed can not exceed 13,000 gallons per day.

- ii. The total amount of land claimed to be irrigated can not exceed 1/2 acre per claim, and must be in connection with the campground. If multiple claims are filed, this may be considered stacking and recommendations would be limited to 1/2 acre of irrigation.
  - iii. Use must be for a campground or organization camp. This is not limited to "park and camp" campgrounds, but also includes campgrounds with trailer hook-ups and/or cabins or picnic/rest areas.
  - iv. The campground must be in single-ownership, but can be multiple family. Single-ownership means the entire campground for which water is claimed must be owned by the same person or group of people. Water for several vacation cabins, each owned by a different person or group of people, does not qualify as one campground use; separate claims must be filed for water use on properties owned by different persons.
  - v. The campground or organization camp must not be a commercial or business establishment. In other words, a campground owned by a non-profit organization or public agency qualifies. A campground operated for profit (such as a KOA campground), does not qualify.
  - vi. Note "owned by a group of people" means each member in the group is an owner of the entire facility. Individual ownership of individual parcels is not the same, even though all of them together can be said to own all of the parcels.
- b. Residential use: There are five prerequisites for a residential use to be claimed as a domestic use on the small domestic and/or stock form. These have a \$25.00 fee, and are exempt from the ground water mandatory permit requirement, and subject to the deferral procedure.
- i. The total amount of water claimed to be diverted pursuant to the water right claimed can not exceed 13,000 gallons per day.
  - ii. The total amount of land claimed to be irrigated can not exceed 1/2 acre, and must be in connection with the household. The 1/2 acre limitation is a per claim limitation, not a per residence limitation.
  - iii. The use must be for a residence or use in connection with the household.
  - iv. The residential facility must be in single-ownership, but can be multiple family. For example, two houses owned by the same person or group of people may be claimed on the small domestic and/or stock form if the use claimed otherwise qualifies.
  - v. The use can not be for a commercial or business establishment.
    - 1. This is the element of the definition that is the most difficult to define. Questions have arisen concerning whether residential rental property is a commercial use, whether property used for farm related activities is a commercial use, whether water for a business operated out of the owner's residence must be claimed as a commercial

use, etc. The focus will be on whether the use is primarily residential; if the use is primarily residential it will be deemed domestic even if it has some aspects that are arguably commercial.

- a. Single family houses: A house used as a residence by a single family is a domestic use, even if it is a rental. A house used solely for a business (such as some day care centers and some offices) is a commercial use. If the house is used as a residence, but the resident uses part the house for a business (such as a beauty shop in the basement or a lawn mower repair shop in the garage) the use is domestic.
  - b. Multiple family buildings (duplexes, multiplexes, apartment buildings): A multiple family residence can be a domestic use if it otherwise meets the qualifications above (single ownership, etc.) even if some or all of the units are rentals.
  - c. Non-profit boarding houses are domestic uses because they are primarily residential, but boarding houses operated for profit are commercial uses because they are primarily a business, even if the owner lives there.
  - d. Mobile home courts (specifically excluded by statute) and hotels are commercial uses, even if the owner occupies one of the units.
  - e. "Farmstead" uses are domestic uses. For example, if the claimant uses water for a home, plus an outbuilding for tractor maintenance, plus another outbuilding for storing potatoes, etc., the use is domestic if it otherwise meets the qualifications above (single ownership, etc.)
- II. Subsection (1)(b) domestics: These uses may be claimed on the small domestic and/or stock form with a \$25.00 fee, and are exempt from the ground water mandatory permit requirement. They are not subject to the deferral procedure in the SRBA, but are deferrable in the Coeur d'Alene-Spokane River Basin Adjudication.
- a. There is only one prerequisite for a subsection (1)(b) domestic: the amount of water claimed can not exceed a diversion rate of 0.04 cfs and a diversion volume of 2500 gallons per day.
    - i. Of course, that's the easy part. The hard part is knowing what to say when a claimant asks, "How do I know how much water to claim?"
    - ii. The bottom line, as always, is the claimant should claim the amount used, and the only way to know the amount used is to measure it. However, the Environmental Protection Agency has a

publication called "Individual Water Supply Systems" (1982), which contains a table useful in estimating the amount of water used in various types of establishments. A version is reproduced in Appendix 2.

- iii. Claimants can claim an irrigation use as a subsection (1)(b) domestic. 2500 gallons is enough water to cover 8000 square feet of land (slightly less than 0.2 acres) to 0.50 inches deep. The application of 0.50 inches of water per day is more than sufficient for most lawn and landscape irrigation.
  1. If the claimed "domestic" use is for irrigation of more than 8000 square feet, the agent and/or claimant can consult the reference in Administrator's Miscellaneous Memorandum #16, *Crop Consumptive Use for Water Right Review*. This will help determine if 2500 gallons per day is sufficient to irrigate the area claimed.
  2. An example where this situation may apply is a claimant commenced irrigation use after the mandatory permit statute and irrigates less than 8000 square feet of land. The claimant may file a claim for domestic use and the agent would limit the use to less than 2500 gallons per day in the recommendation.

### III. Stockwater

- a. Section 42-1401A(11), Idaho Code, defines stockwater as the use of water solely for livestock or wildlife where total use does not exceed 13,000 gallons per day, but domestic use can include livestock use. Uses that meet the stockwater definition may be claimed on the small domestic and/or stock form with a \$25.00 fee, are exempt from the permit requirement for ground water, and subject to the deferral procedure. Instream stockwater, of course from surface water, is exempt from the permit requirement in all circumstances and is subject to the deferral procedure. If the claimant wishes to claim an out-of-stream diversion associated with an instream stockwater use, the claimant must first file notice under Section 42-113(3)(c), Idaho Code, and then file their adjudication claim.
- b. Note that the small domestic and/or stock form may be used for domestic and/or stockwater claims. Stockwater use therefore can be, but does not have to be, claimed on the same form with domestic use. Stockwater use can also be a commercial or business use, since the definition of stockwater does not contain any commercial or business use limitation.
- c. Stockwater use may also include dairy use on the small domestic and/or stock form if it is in conjunction with stockwater use and the total use is 13,000 gallons per day or less. (In other words, if the claimant has a dairy, but someone else keeps the cows, then it is a commercial use that must be claimed on the irrigation and other form, even if the use is 13,000 gallons per day or less.) If the claim is for more than 13,000 gallons per day, it must be filed on the irrigation and other form, and the amount of water

claimed for dairy use should be stated separately from the amount of water claimed for stockwater use, and the dairy use should be listed as commercial use. For assistance determining quantity to claim and if the claimed stockwater use will meet the definition, see the table in the instructions attached to the claim form.

- IV. Small domestic and/or stock form claim fees
  - a. A flow chart for determining claim fees is in Appendix 3.
- V. Irrigation and other form domestic and stockwater uses
  - a. Domestic and stockwater uses that must be claimed on the irrigation and other form (usually because they exceed the 13,000 gallon per day limitation) should still be designated as domestic and stockwater use on the longer form.
  - b. Where a multiple unit residential facility is claimed on one form because it is in single ownership, but is claimed on the irrigation and other form because it is in excess of the 13,000 gallon per day limitation or the ½-acre irrigation limitation, the irrigation use should be claimed separately as irrigation, and the other uses should be claimed separately as domestic use.
  - c. Highway stations and national guard stations, used for storage and maintenance of vehicles and to provide restrooms for staff, do not qualify as domestic under subsection (1)(a) but may qualify under subsection (1)(b). They may be labeled as domestic uses for data entry purposes, whether or not they qualify as domestic under subsection (1)(b). They are not within the definition of domestic use for purposes of the deferral procedure.
  - d. Churches do not qualify as domestic under subsection (1)(a) but may qualify under subsection (1)(b). They may be labeled as domestic uses for data entry purposes. They are not within the definition of domestic use for purposes of the deferral procedure. This is true even if a house for the minister is included with the church, because the purpose of use is not primarily for a household.
  - e. The fee for domestic and stockwater claims that do not meet the statutory definition is \$50.00 per claim and \$100.00 per cfs. See IDAPA 37.03.01.35.04.a.

**APPENDIX 1. Guidelines for recommending small domestic beneficial use claims (\$25.00 filing fee) with a ground water source in the SRBA and the CSRBA**

Often, small domestic uses are exempt from permitting requirements. However, when the legislature refined the definition of domestic uses in Section 42-111, Idaho Code, in 1995, its statement of purpose said,

The exemption is not intended to provide a means by which several water uses, each individually meeting the definition of Section 42-111, can be utilized together to supply water for a use that requires a water right to be developed under the provisions of Section 42-229, or that could only have been developed under the constitution prior to March 25, 1963.

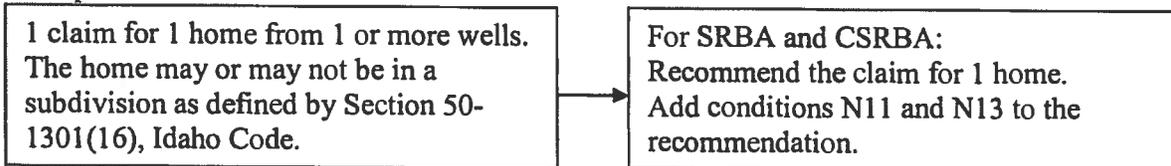
The legislature, in its statement of intent, went on to say,

The definition, as amended in 1990, was intended to allow a water right for a home with up to one-half acre of irrigation and/or a limited number of livestock, to enjoy some benefits of special consideration or reduced processing requirements under the law. The definition was also intended to allow a second home to be added to an existing water system and enjoy the same benefits. The definition was not intended to allow unrestricted development of a new water use by adding or combining 13,000 gallon per day increments.

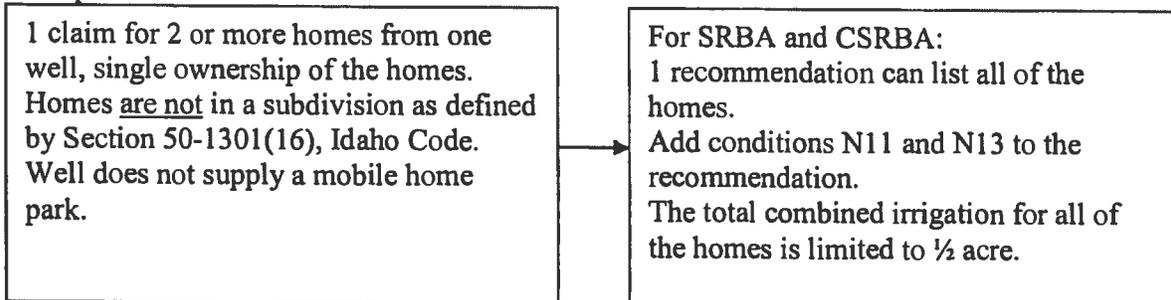
The review of domestic claims, especially those from a single well with multiple domestic uses may be tied to whether the domestic use was developed as part of a subdivision. Section 50-1301(16), Idaho Code, sets forth the state's definition of a subdivision. In general, Section 50-1301(16), Idaho Code, states five or more lots divided with the intent for development is a subdivision. If presented with a multiple ownership scenario that does not coincide with an example below, consult the attorney assigned to the basin.

It is important to remember that more than one pump may be installed in a single well. Each pump represents a separate "system" and each system must have its own claim or claims.

**Example 1**



**Example 2**



### Example 3

1 claim for 2 or more homes from one well, and homes are in multiple ownership.  
Homes are not in a subdivision as defined by Section 50-1301(16), Idaho Code.  
Well does not supply a mobile home park.

- For SRBA: If the claim was filed prior to the revision of the Adjudication Rules in 2007 (IDAPA 37, Title 03, Chapter 01) a separate claim was required for each home. If the claim was filed after 2007, see below.
- For SRBA late claims and CSRBA:
  - 1 recommendation can list up to 4 homes.\* All owners should be listed separately.
  - Add conditions N11 and N13 to the recommendation.
  - The total combined irrigation for all of the homes is limited to ½ acre.
  - There must be no valid competing claims.
  - Reviewing agent needs to confirm person who filed claim has authority to file on behalf of other owners.

\* If more than 4 homes are claimed, consult the attorney assigned to the basin to determine if homes are in a subdivision.

### Example 4

Multiple claims for multiple homes (1 claim for each home) from one well, and homes are in multiple ownership.  
Homes are not in a subdivision as defined by Section 50-1301(16), Idaho Code.  
Well does not supply a mobile home park.

For SRBA and CSRBA: All claims with a priority date earlier than March 20, 1995, may be recommended. Conditions N11 and N13 apply. Any claims with a priority date after March 20, 1995, must be evaluated to determine if a stacking of domestic rights has occurred.

### Example 5

1 Claim for 2 or more homes from one well, and the homes are in single or multiple ownership.  
Homes are in a subdivision as defined by Section 50-1301(16), Idaho Code.

For SRBA late claims and CSRBA: 1 recommendation can list 1 home with 13,000 gallons per day and up to one half (½) acre of irrigation. Conditions N11 and N13 apply. **OR**, multiple homes can be recommended on one claim under Section 42-111(1)(b).\*\*

### Example 6

Multiple claims for multiple homes (1 claim for each home) from one well, and the homes are in multiple ownership. Homes are in a subdivision as defined by Section 50-1301(16), Idaho Code.

For SRBA and CSRBA: A maximum of 1 claim may be recommended. Conditions N11 and N13 apply. All others must file an application for permit.

**\*\*A domestic use claimed under Section 42-111(1)(b), Idaho Code, has no limit on the number of homes served. The only limitations are the diversion rate cannot exceed 0.04 cfs and the volume diverted cannot exceed 2,500 gallons per day. Therefore, it may be possible that claims that cannot be recommended consistent with the examples above could be recommended as a “part b” domestic use. However, the claimant should be notified and offered the opportunity to file an Application for Permit for any claimed water uses that cannot be recommended with the 13,000 gallon per day limit unless the claimant specified the water use should be limited to 2,500 gallons per day.**

When making a recommendation for a beneficial use claim for a water system with multiple homes, the earliest priority date that can be recommended is the date the last home was added to the system. The claimant should be contacted if there was a significant period of time between when the first home was added to the system and the last home was added to the system, and the if the earlier priority date has been claimed. The purpose of the contact is to give the claimant the opportunity to file an additional claim or claims or an application for permit.

Section 42-111(3), Idaho Code, addresses the stacking of domestic rights. Department staff with additional questions regarding evaluating claims for stacking domestic uses should consult the attorney assigned to the basin.

## APPENDIX 2. PLANNING GUIDE FOR WATER USE

### Type of Establishment Gallons per day:

Airports (per passenger) 3-5

Apartments, multiple family (per resident) 60

Bath Houses (per bather) 10

### Camps:

Construction, semi permanent (per worker) 50

Day, with no meals served (per camper) 15

Luxury (per camper) 100-150

Resorts, day and night, with limited plumbing (per camper) 50

Tourist with central bath and toilet facilities (per person) 35

Churches (per person) 5

Cottages with seasonal occupancy (per resident) 50

Courts, tourist with individual bath units (per person) 50

### Clubs:

Country (per resident member) 100

Country (per nonresident member present) 25

### Dwellings:

Boardinghouses (per boarder) 50

Additional kitchen requirements for nonresident boarders 10

Luxury (per person) 100-150

Multiple-family apartments (per resident) 40

Rooming houses (per resident) 60

Single family (per resident) 50-75

Estates (per resident) 100-150

Factories (per person per shift) 15-35

Highway rest area (per person) 5

### Hotels:

With private baths (2 persons per room) 60

Without private bath (per person) 50

Hospitals (per bed) 250-400

Institutions other than hospitals (per person) 75-125

Laundries, self-serviced (gallons per washing, i.e., per customer) 50

### Motels:

With bath, toilet and kitchen facilities (per bed space) 50

With bed and toilet (per bed space) 40

### Parks:

Overnight with flush toilets (per camper) 25

Trailers with individual bath units, no sewer connection (per trailer) 25

Trailers with individual bath units, connected to sewer (per person) 50

### Picnic:

With bathhouses, showers and flush

toilets (per picnicker) 20

With toilet facilities only (per picnicker) 10

Type of Establishment Gallons per day:

Restaurants:

With toilet facilities (per patron) 7-10

Without toilet facilities (per patron) 2 1/2-3

With bars and cocktail lounge (additional quantity per patron) 2

Schools:

Boarding (per pupil) 75-100

Day with cafeteria, gym and showers (per pupil) 25

Day with cafeteria but no gym or showers (per pupil) 20

Day without cafeteria, gym or showers (per pupil) 15

Service stations (per vehicle) 10

Stores (per restroom) 400

Swimming pools (per swimmer) 10

Theatres:

Drive in (per car space) 5

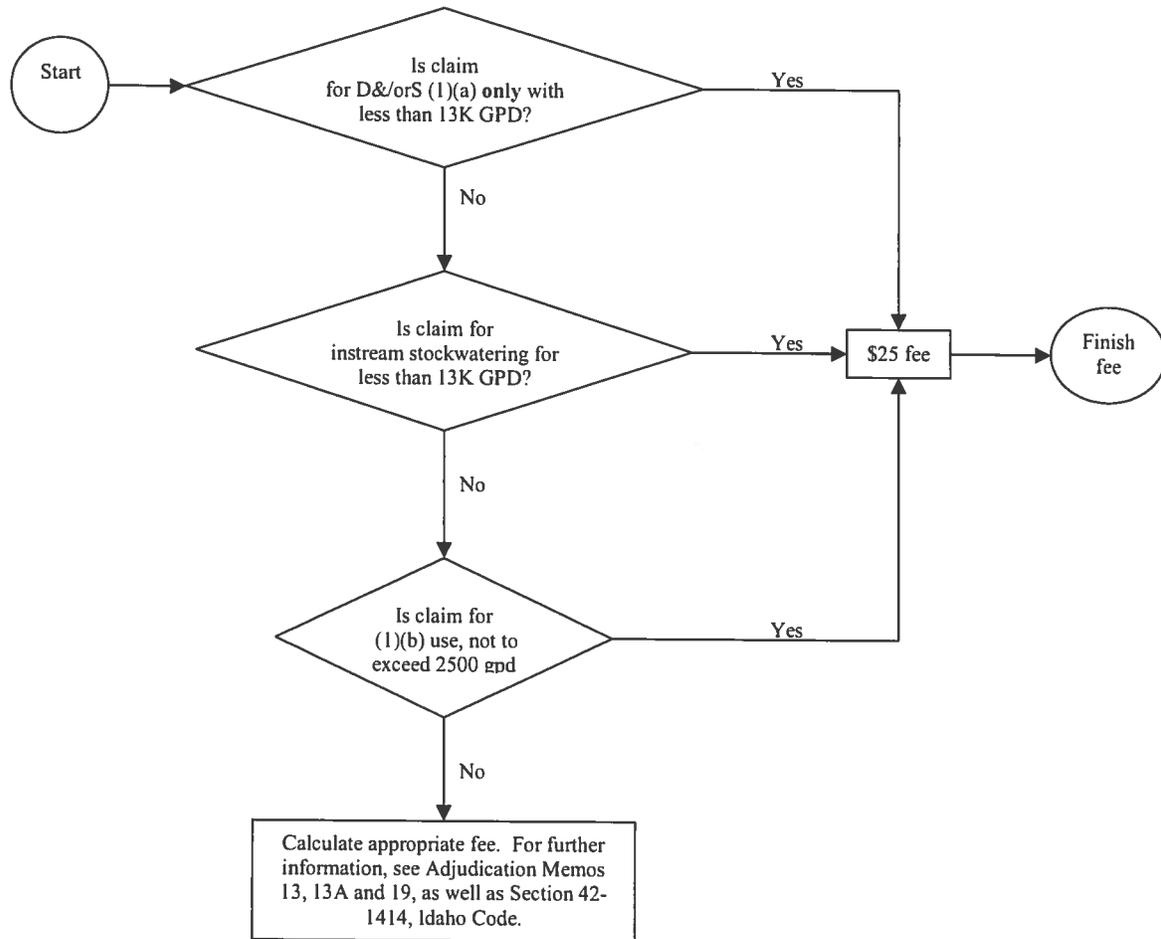
Movie (per auditorium seat) 5

Workers:

Construction (per person per shift) 50

Day (school or offices per person per shift) 15

APPENDIX 3. Calculation of fees for claims meeting requirements of Section 42-111, Idaho Code



## ADJUDICATION MEMORANDUM #5

TO: Adjudication Bureau Staff

FROM: Don Shaff, Adjudication Bureau Chief 

SUBJECT: Transfers

REVISED: December 15, 2008

As of May 26, 1969, any person desiring to make a change in use of a water right was required to make application and receive the approval of the department prior to making the change. (See Sections 42-108 and 42-222, Idaho Code.) However, legislation has been adopted waiving this requirement for changes made prior to November 19, 1987, for the Snake River Basin Adjudication (SRBA) and prior to January 1, 2006, for the Northern Idaho Adjudications (NIA). For the accomplished transfer statute, see Section 42-1425, Idaho Code.

For the SRBA, the claimant should be advised to claim the water right as it was used as of November 19, 1987. For the NIA, the claimant should be advised to claim the water right as it was used as of January 1, 2006. The claimant must describe the changes between when the water use was initiated and when these changes occurred on the notice of claim form. Quite often, these changes are those in point(s) of diversion, place of use (POU), or water use.

A claimant does not have to file a transfer application for a change made as of November 19, 1987, for the SRBA or January 1, 2006, for the NIA.

A transfer application should, however, be filed for any changes in use made after November 19, 1987, or January 1, 2006. If the use of water was changed after November 19, 1987, or January 1, 2006, and a transfer application has not been approved, the water right will not be recommended as changed.

## ADJUDICATION MEMORANDUM #9

TO: Adjudication Bureau Staff

FROM: Don Shaff, Adjudication Bureau Chief 

RE: Rejection of Claims

REVISED: December 15, 2008

There are two grounds upon which a notice of claim may be rejected and returned to the claimant:

1. The claim form is incomplete. Claims must comply with Section 42-1409, Idaho Code, and Idaho Administrative Procedures Act (IDAPA) 37.03.01.060, also known as Adjudication Rule 60. Examples of incomplete forms are:
  - a. Improper form was used
  - b. The form does not have all the necessary information, such as blanks left on the form.
  - c. More than one water right is claimed on one form with the exception of IDAPA 37.03.01.060.02.b
  - d. The form is not signed by the claimant(s).
  - e. The form is not signed at all.
2. The proper filing fee was not submitted with the claim. Section 42-1414, Idaho Code, provides the department shall not accept a notice of claim unless the proper filing fee is submitted concurrently. The fee schedule is set forth in Section 42-1414, Idaho Code.

If a claim is rejected, the department should return the claim to the claimant by ordinary mail at the most recent address shown by department records. The rejected claim shall be accompanied by a letter stating the reason(s) for rejection. Claims rejected and returned to the claimant may be refiled with the appropriate fees and information at any time prior to the deadline for filing the original claim. For more information, see IDAPA 37.03.01.065. Generally, refunds are not granted for rejected claims. See the Adjudication Bureau Chief with questions.

Merely because a point of diversion is outside the boundaries of a current adjudication is not grounds for rejection of a claim. See the Adjudication Bureau Chief for details.

## ADJUDICATION MEMORANDUM #11

TO: Adjudication Bureau Staff

FROM: Don Shaff, Adjudication Bureau Chief 

SUBJECT: Private and Diffused Waters

REVISED: August 31, 2009

This memo defines “private” and diffused surface waters and provides some advice to agents regarding what to say when a landowner considers filing a claim for such waters.

### 1. “Private” Springs and Lakes

Frequently, IDWR personnel have seen the word “private” in the statute, and assumed the word indicated that the spring or lake was the exclusive property of the owner of the land where the source is located, no one else can use it, and the landowner can use it without having to get a permit. This is not correct.

Section 42-101, Idaho Code, 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. The only distinction expressed by Sections 42-212 and 42-213, Idaho Code, 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 the application must state whether the application is for private water and whether the applicant has a written right of way.

#### a. The Statute

Section 42-212, Idaho Code, 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.

Section 42-213, Idaho Code provides:

Diversion of private waters - Applicants must show right of way. - All

applicants to the department of water resources for 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.

b. When is a spring or lake “private” water?

A spring must sink on the landowner’s property to be “private” water. If it runs off the landowner’s property (whether or not in a natural channel), or enters a natural channel (whether or not on the landowner's property), it is not “private.” A spring is probably not private if it intermittently but regularly runs off the landowner’s property or into a natural channel (see 2.b. below for discussion of natural channel). A lake must be circled entirely by the landowner’s property to be private. Presumably, if the lake is fed by a navigable stream, or drained by a navigable stream, it is not private, because the state owns the stream bank to the high water mark. The status of a spring or lake may change if the landowner sells a portion of the property so the spring or lake is no longer located entirely on the landowner’s property. Whether the spring or lake is "private" is a question of fact, and the answer may not always be clear.<sup>1</sup>

c. Practical Considerations

A claimant might ask why they would want to file a claim for “private” water. In most instances it may not be important to obtain a permit, license, or a decree for a right to use water from a spring or lake on one’s own land, since no one else can appropriate it without permission. However, someone else could make an appropriation from another source that affects the supply from the spring or lake (for example, a ground water appropriation that affects the flow of a spring) or a prior appropriator could seek to enjoin the landowner’s use on the basis that the spring or lake is a significant source of water to the public source, and the landowner’s use deprives a prior appropriator of water. Also, as noted above, a spring or lake on private land may not always be “private” water. In those instances, the landowner would need a licensed or decreed water right to have an enforceable priority. Finally, in some cases a person with “private” water on their property has granted to others the right to use the spring or lake without specifying the relative rights of those using the spring or lake. In those instances, the relative rights of those using the spring or lake would be determined based upon prior appropriation, as long as it is consistent with the intent of the parties as expressed in the deeds.

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<sup>1</sup> There exists a case which some have interpreted as contrary to this analysis. King v. Chamberlain 20 Idaho 504, 118 P. 1099 (1911). However, the department has distinguished this case. Please see a department attorney for further discussion.

Ultimately, the claimant chooses whether to claim the water use. The claimant, not the claims-taker, should assess the risk inherent in not filing a claim.

#### d. General Adjudications

The adjudication statute, at Section 42-1401A(12), Idaho Code, defines water system to include springs and lakes and does not exclude “private” water. The SRBA and CSRBA commencement orders require all rights to the use of water within the boundaries of the water system to be adjudicated, and does not exempt claimants of “private” water.

Neither the adjudication statutes or the adjudication rules require the claimant to submit proof of rights of way for the point of diversion or the rest of the water delivery system along with the notice of claim.

The department also does not investigate whether the claimant of an existing right to the use of water obtained such rights of way at the time the appropriation was established. Such an issue would be investigated in response to an objection to the director’s report raising such an issue. Such an investigation is not made for each water right because an adjudication deals with existing rights. The department generally assumes where an otherwise valid water right exists, the water user must have had a right of way for the water delivery system, or the landowners would have denied the water user access and thereby prevented the completion of the appropriation. Where a claimant has an established use, the issue of whether the claimant has a right of way is appropriately litigated by the claimant and the owner of the land.

## 2. Diffused Surface Water

### a. What is diffused surface water?

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 v. Chamberlain, 20 Idaho 504, 118 P 1099 (1911). 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. Id.

However, it is well-settled that a prior appropriator of water is entitled to enjoin the use of water by others that depletes the source of supply to the watercourse and thereby interferes with the appropriator’s use. It has also been held that, in an action by a senior appropriator against a junior appropriator for interference with the senior appropriator’s rights, the burden of proof is on the junior to show that the water in the junior’s ditch is not tributary to the source of the senior’s appropriation. Martiny v. Wells, 91 Idaho 215, 419 P.2d 470 (1966).

So, the landowner is entitled to use diffused surface water occurring on the landowner’s property before it enters a natural channel, but the use may be enjoined if the diffused surface water is a source of supply to a natural watercourse.

The big question is where exactly is the line drawn. The one clear rule is the diffused surface water must be a significant source, so interception results in substantial injury to a prior appropriator. “Significant” or “substantial” probably means “measurable.” See Franklin Cub River Pumping Co. v. Le Fevre, 79 Idaho 107, 311 P.2d 763 (1957).

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.

b. What is not diffused surface water?

Diffused surface water presumably would not include percolating water from springs, or flood flows, because such waters are fed by a regular (albeit intermittent) flow of water.

Diffused water is not water in a natural channel. 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).

c. Should a person file a claim for diffused surface water in an adjudication?

If a landowner is in doubt, they may want to file a claim. Currently, there is no clear rule of law that diffused surface water is exempt from a general adjudication. IDWR will make the conservative assumption diffused surface water is included until it is determined otherwise. There may be difficult issues of fact as to whether the water is indeed diffused surface water. The only way to get a determination of a water right is to claim it in the adjudication. If the claimant does not file and there is a later ruling that diffused surface water is included in the adjudication, the claimant runs the risk of losing their priority date.

## ADJUDICATION MEMORANDUM #12

TO: Adjudication Bureau Staff

FROM: Don Shaff, Adjudication Bureau Chief 

SUBJECT: Multiple Sources on a Single Claim

REVISED: January 22, 2009

Idaho Administrative Procedures Act (IDAPA) 37.03.01.060.02.c.ii (also known as the Adjudication Rules) permits more than one source to be claimed if the claim is for a single water delivery system where more than one source was developed as part of the same project, or the claim is for a single licensed or decreed right that covers more than one water delivery system.

More than one source may also be claimed where the claimant developed an additional point of diversion after the water right was initiated. (An example is where a person is using water from an artesian spring, but the flow of the spring decreased and the water user later drilled a well near the spring to be able to continue to get the full amount of the appropriation.) However, where the additional point of diversion is used for additional uses, to irrigate additional acres, or divert more water than originally appropriated, there has been an expansion and may be a second water right for the additional use, irrigation, or diversion. When the department identifies such a scenario, a second claim should generally be filed for the expansion. See the Adjudication Bureau Chief with questions.

A common example is the use of multiple springs for stockwatering use. If there is more than one spring on the claimant's parcel of land, and the use of water for stockwatering was initiated on all of the springs at the same time or as part of the same project, all of the springs can be claimed as one water right. The same rule applies if the claimant has more than one parcel, so long as the parcels are contiguous. (Note that where there is a water right with a diversion system, the place of use may consist of noncontiguous parcels where the parcels are connected by a single water delivery system.)

Where there are two water rights with different priorities, the claimant may in some instances claim both as a single water right if the claimant wants to claim both with the later priority date. For example, the claimant has a parcel with a spring and the claimant started using the spring to water stock in 1935. The claimant then acquired a contiguous parcel with a spring and started using the spring to water stock in 1940. The claimant could submit one notice of claim for both springs if a 1940 priority date is claimed. (Or, the claimant started using a spring to water 100 head of stock in 1935, and added an additional 100 head in 1940. The claimant could submit one notice of claim for watering 200 head with a 1940 priority date.)

## ADJUDICATIONS MEMORANDUM #13

TO: Adjudications Bureau Staff  
FROM: Don Shaff, Adjudication Bureau Chief   
REVISED: July 29, 2009  
RE: Claim Fees for Recently Adjudicated Water Rights

Idaho Code §42-1414 provides for fees for filing a notice of claim in adjudication proceedings commenced or enlarged on or after January 1, 1985. This language has been interpreted by IDWR as exempting certain claimants from paying a filing fee for notices of claims filed in the SRBA.

If the claimant is claiming a water right determined by a decree or judgment entered in prior adjudications listed below, the following special rules apply with regard to the payment of fees for filing notices of claims. (This includes permits listed in the director's report in those adjudications, even where the report said the permits were included for information purposes only or the permits remained subject to the statutory provisions applicable to permits.)

- Payette River Drainage Adjudication (Gem County Civil No. 3667)
- Lemhi River Drainage Adjudication (Lemhi County Civil No. 4948)
- Basin Creek Drainage Adjudication (Cassia County Civil No. 11125)
- Cougar Creek Adjudication (Kootenai County Civil No. 63035)
- Twin Lakes Adjudication (Kootenai County Civil No. 32572)
- Hayden Lake Adjudication (Kootenai County Civil Nos. 22418, 22419, 22420)
- Lewellen Creek Adjudication (Kootenai County Civil No. 39405)
- Blanchard Creek Adjudication (Bonner County Civil No. 12152)
- Smith Creek Adjudication (Bonner County Civil No. 27289)
- \*Cow Creek Adjudication (Boundary County Civil No. 5745)

If the claimant is claiming a water right the same as it was determined in the decree, or the same as it was described in a transfer approved or partially approved by IDWR after the right was decreed, then:

1. The claimant is exempt from the fee for filing a notice of claim, but will be subject to late fees for late-filed notices of claims.
2. Shortly after the mailing of the commencement notices in the affected counties, the claimant should have received a notice of claim form from IDWR in the mail with the water right already printed on the form as it was determined in the decree, or as it was described in a transfer approved or partially approved by IDWR after the right was decreed. Note, this procedure will not occur in the Northern Idaho Adjudication.

If the claimant is claiming a water right differently than it was decreed, or differently than it was described in a transfer approved or partially approved by IDWR after the right was decreed, then the claimant is required to pay the fee for filing the notice of claim.

A claimant is not considered to be claiming a water right differently if the only item that is changed is the name, address, and phone number of the claimants. A claimant is also not considered to be claiming a water right differently if the only change is that the water right has been "partitioned by conveyance to" (legal term meaning divided between) different owners. For example, Water User A has a right to 80 inches of water for the irrigation of 80 acres, and then sells 40 acres to Claimant B and 40 acres to Claimant C. If Claimant B files a notice of claim to 40 inches, for 40 acres described as the place of use in the decree (or in an approved transfer), with the same point of diversion, etc., then Claimant B does not have to pay a fee for filing the notice of claim (but may be required to pay a late fee for a late filed claim). The same is true for Claimant C.

Late fees should be calculated based upon the filing fee that would apply if the claim were subject to filing fees. For example, the late fee for Claimant B would be \$50.00 (\$50.00 being greater than 15% of \$90.00).

\* Cow Creek in Basin 98 is not authorized in 2009 for a general adjudication and is specifically excluded by law from the Northern Idaho Adjudication.

## ADJUDICATIONS MEMO #13A

TO: Adjudications Bureau Staff

FROM: Dave Tuthill

UPDATED: November 13, 2000

RE: Fees for Claims filed in Snake 02, Hurd Gulch, and Fosha Adjudications

### I. Snake 02 Adjudication

In 1981, an adjudication was commenced of rights to surface water from the mainstem of the Snake River from Milner Dam to the Idaho-Oregon border, which is referred to in-house as the Snake 02 Adjudication. Claims were taken, and fees were paid under the old fee statute. The Snake 02 Adjudication was dismissed by order of the district court dated June 12, 1989. Claims previously filed in the Snake 02 Adjudication must be refiled in the SRBA.

When a claim is filed in the SRBA for a water right that was claimed in the Snake 02 Adjudication, the claimant should be credited with the amount of the filing fee that was paid for that claim in the Snake 02 Adjudication. This is true even if the person claiming the water right in the SRBA is not the same person that claimed it in the Snake 02 Adjudication.

The Snake 02 claims are in the water rights database with an A02 basin number (there are also a few with an A36, A37, A51, or A63 basin number.). A list of the claim numbers and the amount of the fee paid for claims filed in the Snake 02 Adjudication is attached to this memo. (Note that if the same claim number is listed twice on the attachment, different claimants filed separate claims for the same water right and paid a filing fee. When one of these claims is re-filed, only the amount paid by that claimant (or its predecessor) should be credited to that claimant.)

Of course, the next question that is bound to arise is how does the credit work when a claim previously filed in the Snake 02 Adjudication is split in the SRBA. The amount of the fee paid should be split in the same proportion as the split in the amount of water claimed, and rounded off to the nearest dollar.

### II. Hurd Gulch Adjudication

Hurd Gulch is in the same status as the Snake 02, so the filing fees should work the same way. The claims filed and the fees paid in the Hurd Gulch Adjudication are as follows:

A63-00500 - \$35.00 A63-04544 - \$35.00

A63-00501 - \$45.00 A63-08180 - none  
A63-03629 - \$10.00 A63-08311 - \$10.00  
A63-04383 - \$35.00

### III. Fosha Adjudication

The Fosha Adjudication was an adjudication of ground water rights in a nine section area in Cassia County, which was consolidated with the SRBA. The claims filed in the Fosha Adjudication are considered to have been already filed in the SRBA, and have already been entered in the adjudications database. Those claims include the following:

A43-00479 A43-02350  
A43-00480 A43-02351  
A43-00481 A43-02356  
A43-02346A A43-02476A  
A43-02346D A43-02483  
A43-02346F A43-02506  
A43-02349 A43-04320

#### Claim # Fee Claim # Fee Claim # Fee

02-0001 45 02-0046 45 02-0091 0  
02-0002 45 02-0047 45 02-0092 0  
02-0003 30 02-0048 30 02-0093 0  
02-0004 45 02-0049 30 02-0094 0  
02-0005 45 02-0050 45 02-0095 0  
02-0006 165 02-0051 45 02-0096 45  
02-0007 30 02-0052 65 02-0097 45  
02-0008 30 02-0053 225 02-0098 30  
02-0009 30 02-0054 185 02-0099 10  
02-0010 30 02-0055 45 02-0100 10  
02-0011 30 02-0056 205 02-0101 45  
02-0012 45 02-0057 45 02-0102 30  
02-0013 65 02-0058 30 02-0103 0  
02-0014 305 02-0059 30 02-0104 65  
02-0015 45 02-0060 105 02-0105 185  
02-0016 85 02-0061 145 02-0106 30  
02-0017 30 02-0062 30 02-0202 10  
02-0018 30 02-0063 45 02-0203 10

#### **FEES PAID FOR CLAIMS FILED IN SNAKE 02 ADJUDICATION, Page 2**

#### Claim # Fee Claim # Fee Claim # Fee

02-0019 30 02-0064 225 02-0204 10  
02-0020 30 02-0065 725 02-0205 10  
02-0021 30 02-0066 0 02-0206 10  
02-0022 30 02-0067 185 02-0207 10  
02-0023 30 02-0068 205 02-0208 10

02-0024 30 02-0069 30 02-0209 10  
02-0025 30 02-0070 45 02-0210 10  
02-0026 45 02-0071 45 02-0211 10  
02-0027 30 02-0072 30 02-0212 10  
02-0028 30 02-0073 65 02-0213 10  
02-0029 1212 02-0074 10 02-0214 2575  
02-0030 30 02-0075 30 02-0215 0  
02-0031 85 02-0076 65 02-0216 0  
02-0032 30 02-0077 125 02-0217 0  
02-0033 0 02-0078 1675 02-2001A 10  
02-0034 0 02-0079 0 02-2001B 10  
02-0035 0 02-0080 10 02-2016 10  
02-0036 0 02-0081 10 02-2018 10  
02-0037 0 02-0082 45 02-2027A 10  
02-0038 15 02-0083 425 02-2027B 10  
02-0039 15 02-0084 30 02-2032 10  
02-0040 15 02-0085 65 02-2033 20  
02-0041 45 02-0086 45 02-2034 10  
02-0042 30 02-0087 0 02-2036 10  
02-0043 30 02-0088 0 02-2040 10  
02-0044 45 02-0089 0 02-2041 10  
02-0045 45 02-0090 0 02-2042 10  
02-2043 10 02-2113A 10 02-2175C 10  
02-2044 10 02-2113B 10 02-2175D 10  
02-2047 10 02-2114 10 02-2175E 10  
02-2051 10 02-2115 10 02-2176A 10  
02-2052 10 02-2118 0 02-2176B 10  
02-2053 0 02-2124 10 02-2176C 20  
02-2054 10 02-2126 10 02-2177 10  
02-2055 10 02-2128 10 02-2178 10  
02-2056 10 02-2129 10 02-2181 10  
02-2057 10 02-2130 10 02-2182 10  
02-2059 10 02-2133 10 02-2183 10  
02-2060 10 02-2134 10 02-2184 10  
02-2061 10 02-2136 10 02-2185 10  
02-2063 10 02-2137 10 02-2186 10  
02-2064 10 02-2138 10 02-2186 10  
02-2065 10 02-2139 0 02-2191 10

**FEES PAID FOR CLAIMS FILED IN SNAKE 02 ADJUDICATION, Page 2**

Claim # Fee Claim # Fee Claim # Fee  
02-2066 10 02-2144 10 02-2192 10  
02-2068 10 02-2145 10 02-2193 10  
02-2069 10 02-2148 10 02-2194A 10  
02-2070 10 02-2149 10 02-2194B 10  
02-2072 10 02-2150 10 02-2194C 10  
02-2073 10 02-2150B 10 02-2195 10

02-2075 10 02-2152 10 02-2196 10  
02-2076 10 02-2153 10 02-2197A 10  
02-2077 10 02-2154 10 02-2197B 10  
02-2080 10 02-2155 10 02-2198 10  
02-2082 10 02-2156 10 02-2199 10  
02-2083 10 02-2157 10 02 - 2201 10  
02-2084 10 02-2159 10 02-2202 10  
02-2085 10 02-2160A 10 02-2203 10  
02-2086 10 02-2160B 10 02-2204 10  
02-2088 10 02-2161 10 02-2204 10  
02-2090 10 02-2162 10 02-2205 10  
02-2091 10 02-2163 10 02-2206 10  
02-2092A 10 02-2164 10 02-2208 10  
02-2092B 10 02-2166 10 02-2209 10  
02-2094 10 02-2167 10 02-2209 10  
02-2096 10 02-2168 10 02-2210 10  
02-2097B 10 02-2170 10 02-2211 10  
02-2098 10 02-2171 10 02-2211 10  
02-2100A 10 02-2172 10 02-2212 10  
02-2100B 10 02-2173 10 02-2213 10  
02-2102 10 02-2174 10 02-2214 10  
02-2106 10 02-2175A 10 02-2215 10  
02-2107 10 02-2175B 10 02-2216 10  
02-2217 10 02-2298 10 02-2405B 10  
02-2218 10 02-2305 10 02-2406 10  
02-2219A 10 02-2308 10 02-2407 10  
02-2219B 10 02-2313 10 02-2409 10  
02-2219C 10 02-2314 10 02-2418 10  
02-2220 10 02-2318 10 02-2420 10  
02-2221 10 02-2336D 10 02-2422 10  
02-2222 10 02-2339 10 02-2423 10  
02-2240 10 02-2340 10 02-2424 10  
02-2241 10 02-2341 10 02-2428 10  
02-2242 10 02-2345 10 02-2429 10  
02-2243 10 02-2353 10 02-2432 0  
02-2245 10 02-2354 10 02-2433 10  
02-2246 10 02-2355 10 02-2436A 10  
02-2249 10 02-2356 10 02-2437 10

**FEES PAID FOR CLAIMS FILED IN SNAKE 02 ADJUDICATION, Page 3**

Claim # Fee Claim # Fee Claim # Fee  
02-2250 10 02-2357A 10 02-2439 10  
02-2251 10 02-2357B 10 02-2440 10  
02-2252 10 02-2358 10 02-2441 10  
02-2253 10 02-2361 10 02-4000 10  
02-2254 10 02-2361B 0 02-4001 10  
02-2255 10 02-2363 10 02-4003A 30

02-2256 10 02-2367 10 02-4003B 85  
02-2258 10 02-2368 10 02-4004 85  
02-2259 10 02-2370 10 02-4005 45  
02-2260 10 02-2371 10 02-4006 45  
02-2261 10 02-2372 10 02-4007A 30  
02-2261A 10 02-2375 10 02-4007B 30  
02-2261B 10 02-2376 10 02-4008 45  
02-2262 10 02-2378 10 02-4013 85  
02-2266 10 02-2379 10 02-4015A 65  
02-2267 10 02-2380 20 02-4015B 85  
02-2268 10 02-2383 10 02-4017 30  
02-2269 10 02-2384 10 02-4019 45  
02-2271 10 02-2386 10 02-4020 65  
02-2272 10 02-2387 10 02-4021 245  
02-2275 10 02-2388 10 02-4023 0  
02-2277 10 02-2390 10 02-4024 85  
02-2279 10 02-2391A 10 02-4025A 45  
02-2280 10 02-2391B 10 02-4025B 30  
02-2281 10 02-2392 10 02-4025C 85  
02-2282 10 02-2398 10 02-4025D 0  
02-2284 10 02-2399 10 02-4026 45  
02-2285 10 02-2401 10 02-4027 125  
02-2288 10 02-2402 10 02-4028 30  
02-2294 10 02-2405A 10 02-4030 30  
02-4031 45 02-7065 10 02-7179 10  
02-4032 30 02-7068 10 02-7182 10  
02-7001 10 02-7070 10 02-7184 10  
02-7002 10 02-7071 10 02-7188 10  
02-7004 10 02-7074 10 02-7189 10  
02-7010 10 02-7075 10 02-7195 10  
02-7011 10 02-7076 10 02-7196 10  
02-7012 10 02-7077 10 02-7199A 10  
02-7013 10 02-7078 10 02-7206 10  
02-7017 10 02-7081 10 02-7207 10  
02-7018 10 02-7086 10 02-7210 10  
02-7019 10 02-7087 10 02-7211 10  
02-7020 10 02-7088 10 02-7212 10  
02-7021 10 02-7089 10 02-7215 10

**FEES PAID FOR CLAIMS FILED IN SNAKE 02 ADJUDICATION, Page 4**

Claim # Fee Claim # Fee Claim # Fee  
02-7022 10 02-7090 10 02-7221 10  
02-7023 10 02-7091 10 02-7222 10  
02-7024 10 02-7095 10 02-7229 10  
02-7025 10 02-7102A 10 02-7237A 10  
02-7026 10 02-7103 10 02-7241 10  
02-7027 10 02-7104 10 02-7242A 10

02-7028 10 02-7105 10 02-7242B 10  
02-7030 10 02-7106 10 02-7242C 0  
02-7032A 10 02-7107 10 02-7242D 0  
02-7032B 10 02-7108 10 02-7242E 10  
02-7033 10 02-7109 10 02-7242F 10  
02-7034 10 02-7112 10 02-7245 10  
02-7036 10 02-7113 10 02-7255 10  
02-7037 10 02-7117 10 02-7257 10  
02-7039 10 02-7124 10 02-7258 10  
02-7040 10 02-7126 10 02-7259 10  
02-7046A 10 02-7127 10 02-7261 10  
02-7046B 10 02-7132 10 02-7262 10  
02-7048 10 02-7133 10 02-7263 10  
02-7050 10 02-7135 10 02-7273 10  
02-7052 10 02-7139 10 02-7275 10  
02-7053 10 02-7140 10 02-7277 10  
02-7054 10 02-7144 10 02-7278 10  
02-7055 10 02-7148 10 02-7279 10  
02-7057 10 02-7154 10 02-7280 10  
02-7059 10 02-7168 10 02-7284 10  
02-7060 10 02-7172 10 02-7285 10  
02-7061 10 02-7172B 10 02-7286 10  
02-7062 10 02-7172C 10 02-7291 10  
02-7063A 10 02-7177 10 02-7296 10  
02-7064 10 02-7178A 10 02-7299 10

Claim # Fee

02-7313 10  
02-7317 10  
02-7321 10  
02-7327 10  
02-7339 10  
02-7344 10  
02-7349 10  
02-7350 10  
02-7357 10  
02-7358 10  
02-7359 10

**FEES PAID FOR CLAIMS FILED IN SNAKE 02 ADJUDICATION, Page 5**

Claim # Fee

02-7361 10  
02-7363 10  
02-7365 10  
02-7377 10  
02-7381 10  
02-7382 10

02-7384 10  
02-7389 10  
36-2037 10  
37-2797 10  
51-2250E 10  
51-2250F 10  
63-2754 10  
63-2975 10  
63-3104 10  
63-3490 10  
63-3492 10  
63-7561 10  
63-7793 10

## ADJUDICATIONS MEMO #14

TO: Adjudications Bureau Staff

FROM: Dave Tuthill

REVISED: March 1, 2001

RE: Effect of Prior Decrees

Idaho Code §42-1420 (previously §42-1411) provides that a decree in a general adjudication is a conclusive determination of all rights to water from the water system. There is an exception where the claimant, or the claimant's predecessor at the time of the prior adjudication, was not properly joined as a party in the adjudication.

The question that has arisen is what happens if a claimant in the SRBA wants to file a notice of claim to a right from a water system that has been the subject of a general adjudication and wants to claim a priority predating the decree.

Generally speaking, the department will not recommend the water right with the priority date claimed unless the water right was not determined in the adjudication. Contact your legal counsel if faced with this type of claim. Additional investigation will be necessary to determine whether the prior decree precludes assertion of the priority date claimed or precludes assertion of the water right, or whether the claimant or the claimant's predecessor was not properly joined in the prior adjudication. (The scope of the prior adjudication is particularly relevant. For example, some adjudications did not include ground water, and some adjudications included only the main stem of a river and not the tributaries.)

The department may recommend the water right with a priority subsequent to the date of entry of the decree if the establishment of a water right with that priority date is not in violation of the mandatory permit and license statute. If the establishment of a water right with a priority date subsequent to the date of entry of the decree is a violation of the mandatory permit and license statute, then the water right would not be recommended at all, and the claimant should file an application for permit.

Note that due to changes in the adjudication procedure over the years, the cut-off date is not always the date of decree. The dates are the cut-off dates in recent general adjudications in which IDWR conducted joinder, claims-taking, and a recommendation of water rights.

1. Payette Adjudication: October 18, 1977, for all rights to water from the Payette River water system.

2. Lemhi Adjudication: April 1, 1972, for all rights to water from the Lemhi River water system.

3. Basin Creek Adjudication: April 8, 1976, for all rights to water from the Basin Creek water system and those rights from Summit Creek diverted from the NW4 NW4 Sec. 22, T. 14 S., R. 23. E. B.M.

4. Shoofly Creek: September 7, 1982, for all rights to water from the Upper Shoofly Creek water system.

5. Reynolds Creek: August 6, 1979, for all rights to water from the Reynolds Creek water system.

## ADJUDICATION MEMORANDUM #15

TO: Adjudication Staff

FROM: Don Shaff, Adjudication Bureau Chief 

SUBJECT: Preparing Domestic & Stockwater Claims for Data Entry

REVISED: March 3, 2009

The following are recommended guidelines for staff to follow when data entering claims. Circumstances sometimes require changes to facilitate data entry. The scope of this memo is to address when and how to make clarifications. Depending on the situation, notifying the claimant of changes may be necessary.

The original claim form received by IDWR must not be altered except for the received stamp, receipt number, initials of person receiving claim, etc. The information describing the water right must not be altered on the original claim form. Any clarifications are to be made to a photocopy of the claim form received by IDWR. Annotations on the copy must be initialed, dated and the copy kept with the original claim form.

### **A. Data entry not requiring notification of the claimant:**

#### Item #1

If the mailing address is incomplete, it may be completed by use of a telephone book, check stub, internet lookup, etc. (e.g. claimant supplies zip code but does not list city). If two names are listed but there is no connector, supply "and/or."

#### Item #3

If the claimant indicates the source as "well," "ground," "aquifer," etc., the source will be data entered as "ground water." If a source is not listed in Item #3, but is described on the claim form (usually in Item #5), add the source.

#### Item #4

If the complete legal description is not listed, but documentation such as a deed is attached or the parcel number is listed, IDWR will add the legal description listed on the attached documentation. If a subdivision is indicated with the lot and block, IDWR will data enter the legal description using applicable county subdivision maps or tax lot data. If the county is not listed, supply the county.

#### Item #5

If this item is not completed, but the diversion is indicated elsewhere (e.g. “well” indicated in Item #3), add the description during data entry.

Item #9

If the complete legal description is not listed, but documentation such as a deed is attached or the parcel number is listed, data enter the legal description listed on the attached documentation. If a subdivision with lot and block is listed, data enter the legal description using applicable county subdivision maps or tax lot data. If the county is not listed, supply the county. If the purposes are not checked, the same purposes listed in Item #6 will be supplied.

Data enter the place of use consistent with the purpose(s) listed under Item #6, regardless of purpose(s) of use checked under Item #9. If there is any confusion, IDWR should contact the claimant.

Item #10

Data enter the county if not listed.

Item #11

If ownership is not indicated, assume “yes” unless otherwise indicated by claimed documentation.

Item #12

If no other rights are listed, data enter “none.”

Item #14

If the basis of claim is not indicated and there is no indication of a previously recorded water right, data enter “beneficial use.” If the basis is listed incorrectly (e.g. license has been issued but a permit is claimed as the basis), data enter accordingly.

Item #15

If the docket sheet subscription is not marked, assume no subscription is desired.

**B. Data entry requiring notification of the claimant:**

Notification is defined as sending a letter, with a copy of the data entered form, informing the claimant of the clarifications. The form would not have to be signed and returned by the claimant to make the changes permanent. The claimant has the opportunity to change any items on the form that misrepresent their intent by returning a signed, amended form.

## Item #2

When only a year is listed, data enter the last day of the year. When only a year and month are listed, data enter the last day of the month. Note: These guidelines also apply when “approximately” or “estimated” precede the claimed date. If seasons of a particular year are claimed, data enter the following dates:

- Spring – May 20
- Summer – August 20
- Fall – November 20
- Winter – December 31

An apparently erroneous priority date (e.g. date claim was completed) appearing in the priority date can be corrected if an apparently correct date appears elsewhere on the form such as in Item #5. If a correct date does not appear elsewhere, the claim form should be returned to the claimant for completion or correction.

## Item #4

If a deed, parcel number or plat is attached, and the legal description listed in Item #4 does not match the parcel(s) shown in the attached information, data enter the legal description consistent with the attached information.

## Item #6

If the period of use is not listed for domestic or stockwater, data enter year-round use. If the amounts for each purpose are not listed but the total amount is provided on the claim, supply the standard amount for each purpose if domestic and/or stockwater uses are described on the claim (i.e. number of households and stock) and if each standard amount is not greater than the total amount claimed.

## Item #7

If the total quantity claimed is not completed, data enter the sum of the amounts listed in Item #6.

## Item #8

If domestic use is the only purpose claimed, data enter 1 house for domestic use in the absence of other information.

## Item #9

If it appears the claimant’s intent was to claim the same 40-acre tract as the point of diversion, data enter the POU accordingly. If #9 is blank, but a POD legal description is listed in #4, data enter the POU accordingly.

**C. There are many situations in which a claim should be returned. Some of these include:**

- a. Name or address not included.
- b. No priority date listed or more than one priority date listed.
- c. Complete POD and POU legal description (40-acre) tract not listed nor a deed or other documentation describing the 40-acre parcel attached.
- d. Claim not signed by appropriate parties.
- e. Appropriate filing fees not submitted.
- f. Claim is for two or more separate water rights.
- g. Claim is for uses which fall under permit requirements for which no permit was filed. In this case be sure the claimant is advised of his option to file the claim. (See Adjudication Memorandum #1.)
- h. Claim is for uses which are not appropriate for the domestic and stockwater form. (We do not return claims for instream stock watering on the domestic and stockwater form if all needed information has been included.)

**ADJUDICATION MEMORANDUM #16C**

TO: Adjudication Staff

FROM: Jeff Peppersack, Water Allocation Bureau Chief 

SUBJECT: Reviewing Claims for Changes Based on Accomplished Transfers, Enlargements or Expansions

DATE: January 17, 2012

This memo supersedes Adjudication Memorandums #16A and #16B.

Section 42-222, Idaho Code, requires the department evaluate, among other issues, whether there would be injury to other water rights and whether there would be an enlargement in use of the original right. The department must also evaluate the validity of the right and ensure the applicant owns the right as part of its review. This guidance applies to changes filed as accomplished transfers under Section 42-1425, Idaho Code, enlargements under Section 42-1426, Idaho Code, or expansions under Section 42-1416B, Idaho Code.

The purpose of this memo is to provide guidance to Adjudication staff on how to review changes to water rights based on Sections 42-1416B, 42-1425 and 42-1426, Idaho Code. These statutes allow the department to recognize some limited changes made to pre-existing water rights, provided certain conditions are met, as discussed below.

**Accomplished Transfers (Changes Based on Section 42-1425, Idaho Code)**

Section 42-1425(a), Idaho Code, provides:

The legislature finds and declares that prior to the commencement of the Snake River basin adjudication, many persons entitled to the use of water or owning land to which water has been made appurtenant either by decree of the court or under provisions of the constitution and statutes of this state changed the place of use, point of diversion, nature or purpose of use, or period of use of their water rights without compliance with the transfer provisions of Sections 42-108 and 42-222, Idaho Code.

Section 42-1425(b), Idaho Code, continues:

The legislature finds that many of these changes occurred with the knowledge of other water users and that the water has been distributed to the right as changed. The legislature further finds and declares that the continuation of the historic water use patterns resulting from these changes is in the local public interest provided no other existing water right was injured at the time of the change. Denial of a claim based solely upon a failure to comply with Sections 42-108 and 42-222, Idaho Code, where no injury or enlargement exists, would cause significant undue financial impact to a claimant and the local economy. Approval of the accomplished transfer through the procedure set forth in this section avoids the harsh economic impacts that would result from a denial of the claim.

## What changes can be made under Section 42-1425, Idaho Code?

The Department can recommend an accomplished change if it could be approved under Sections 42-108 and 42-222, Idaho Code. Changes to the following elements may be recognized as accomplished transfers:

- Place of Use (POU)
  - Previously recorded water rights (decree, license, sometimes statutory claims or posted notices)
    - If the reviewer determines the claimed POU is different than previously recorded for the water right, the change must have occurred prior to November 19, 1987, for SRBA claims. For the northern Idaho adjudications (i.e. the Coeur d'Alene-Spokane River Basin Adjudication, or CSRBA), the changes must have taken place prior to January 1, 2006.
    - The changes must be supported by information documenting the change, such as affidavits, crop reports, tax documents, aerial photos, power records, etc.
    - The changes can not constitute an enlargement of the right or injure other water users pursuant to Section 42-222, Idaho Code.
  - Water rights not previously recorded (beneficial use, sometimes statutory claims or posted notices)
    - The reviewer must determine the elements and extent of beneficial use as of the proposed or supported priority date.
    - The reviewer must then determine the extent of the change to the POU.
    - The change must have occurred prior to November 19, 1987, for SRBA claims. For the northern Idaho adjudications (i.e. the Coeur d'Alene-Spokane River Basin Adjudication, or CSRBA), the changes must have taken place prior to January 1, 2006.
    - The changes must be supported by information documenting the change, such as affidavits, crop reports, tax documents, aerial photos, power records, etc.
    - The changes can not constitute an enlargement of the right or injure other water users pursuant to Section 42-222, Idaho Code.
- Point of Diversion (POD) – without changing source
  - Previously recorded water rights (decree, license, sometimes statutory claims or posted notices)
    - If the reviewer determines the claimed POD is different than previously recorded for the water right, the change must have occurred prior to November 19, 1987, for SRBA claims. For the northern Idaho adjudications (i.e. the Coeur d'Alene-Spokane River Basin Adjudication, or CSRBA), the changes must have taken place prior to January 1, 2006. PODs where advances in technology describe the POD in a different tract are not identified as accomplished changes but they can be corrected in the adjudication process.
    - If the claimed POD is located within the same tract (10-acre or 40-acre) as the recorded POD, no change is necessary.

- Additional PODs can be recognized as an accomplished transfer, provided the additional POD(s) do not constitute an enlargement of the right or injure other water users, pursuant to Section 42-222, Idaho Code.
    - The changes must be supported by information documenting the change, such as affidavits, well logs, aerial photos, power records, etc.
    - The changes can not constitute an enlargement of the right or injure other water users pursuant to Section 42-222, Idaho Code.
  - Water rights not previously recorded (beneficial use, sometimes statutory claims or posted notices)
    - The reviewer must determine the location of the POD(s) as of the proposed or supported priority date.
    - The reviewer must then determine if there has been a change of POD.
    - The change must have occurred prior to November 19, 1987, for SRBA claims. For the northern Idaho adjudications (i.e. the Coeur d'Alene-Spokane River Basin Adjudication, or CSRBA), the changes must have taken place prior to January 1, 2006.
    - Additional PODs can be recognized as an accomplished transfer, , provided the additional POD(s) do not constitute an enlargement of the right or injure other water users, pursuant to Section 42-222, Idaho Code.
    - The changes must be supported by information documenting the change, such as affidavits, well logs, aerial photos, power records, etc.
    - The changes can not constitute an enlargement of the right or injure other water users pursuant to Section 42-222, Idaho Code.
  - If a claim is proposing an exchange of POD from one source to another, consult the attorney for the basin.
- Purpose of Use (also called Nature of Use)
  - Previously recorded water rights (decree, license, sometimes statutory claims or posted notices)
    - If the reviewer determines the claimed purpose is different than previously recorded for the water right, the change must have occurred prior to November 19, 1987, for SRBA claims. For the northern Idaho adjudications (i.e. the Coeur d'Alene-Spokane River Basin Adjudication, or CSRBA), the changes must have taken place prior to January 1, 2006.
    - The changes must be supported by information documenting the change, such as affidavits, crop reports, tax documents, aerial photos, power records, etc.
    - The changes can not constitute an enlargement of the right or injure other water users pursuant to Section 42-222, Idaho Code.
      - Generally a less consumptive water use cannot be changed to a more consumptive water use without injury to other water rights. The less consumptive water uses generally are mining, power, fish propagation, etc. More consumptive water uses generally are irrigation, municipal, storage, etc.
      - When recommending a change from one use to another, the reviewer should determine the historic consumptive use under the

- original use. The reviewer should limit consumption under the new use to the historic consumption of the original use.
    - Water rights not previously recorded (beneficial use, sometimes statutory claims or posted notices)
      - The reviewer must determine the purpose of use as of the proposed or supported priority date.
      - The change must have occurred prior to November 19, 1987, for SRBA claims. For the northern Idaho adjudications (i.e. the Coeur d'Alene-Spokane River Basin Adjudication, or CSRBA), the changes must have taken place prior to January 1, 2006.
      - The changes must be supported by information documenting the change, such as affidavits, crop reports, tax documents, aerial photos, power records, etc.
      - The changes can not constitute an enlargement of the right or injure other water users pursuant to Section 42-222, Idaho Code.
        - Generally a less consumptive water use cannot be changed to a more consumptive water use without injury to other water rights. The less consumptive water uses generally are mining, power, fish propagation, etc. More consumptive water uses generally are irrigation, municipal, storage, etc.
        - When recommending a change from one use to another, the reviewer should determine the historic consumptive use under the original use. The reviewer should limit consumption under the new use to the historic consumption of the original use.
  - Period of Use (also called Season of Use)
    - Previously recorded water rights (decree, license, sometimes statutory claims or posted notices)
      - Generally, an accomplished change in Period of Use coincides with an accomplished change in Purpose of Use.
      - If the proposed change would increase the original consumptive use (i.e. irrigation to municipal), the reviewer should determine the historic consumptive use under the original use. The reviewer should only recommend the historic consumption of the original period of use for the accomplished period of use.
      - As with accomplished changes in purpose of use, the change must have occurred prior to November 19, 1987, for SRBA claims. For the northern Idaho adjudications (i.e. the Coeur d'Alene-Spokane River Basin Adjudication, or CSRBA), the changes must have taken place prior to January 1, 2006.
      - The changes must be supported by information documenting the change, such as affidavits, power records, etc.
      - The changes can not constitute an enlargement of the right or injure other water users pursuant to Section 42-222, Idaho Code.
    - Water rights not previously recorded (beneficial use, sometimes statutory claims or posted notices)

- The reviewer must determine the period of use as of the proposed or supported priority date.
- Generally, an accomplished change in Period of Use coincides with an accomplished change in Purpose of Use.
- If the proposed change would increase the original consumptive use (i.e. irrigation to municipal), the reviewer should determine the historic consumptive use under the original use. The reviewer should only recommend the historic consumption of the original period of use for the accomplished period of use.
- As with accomplished changes in purpose of use, the change must have occurred prior to November 19, 1987, for SRBA claims. For the northern Idaho adjudications (i.e. the Coeur d'Alene-Spokane River Basin Adjudication, or CSRBA), the changes must have taken place prior to January 1, 2006.
- The changes must be supported by information documenting the change, such as affidavits, power records, etc.
- The changes can not constitute an enlargement of the right or injure other water users pursuant to Section 42-222, Idaho Code.

What changes cannot be made under Section 42-1425, Idaho Code?

- Change in Source
  - An accomplished change in source is not acceptable because it is not provided for in Section 42-1425, Idaho Code. Additionally, an accomplished change in source introduces an additional diversion from the source that may injure junior water users.
  - It may be possible to have an accomplished change in POD that diverts shallow ground water adjacent to the original surface water source. Please note this is not a change in source, but an accomplished change in POD. The source is described as ground water tributary to the original surface water source. For analysis instructions, see Transfer Processing Memorandum #24, Transfer Processing Policies & Procedures.
  - For guidance on moving a POD from a tributary to the main channel, see the attorney assigned to the basin.
- Unstacking water rights
  - Water rights are stacked when multiple rights were developed on or transferred to the same POU for the same purpose of use. Unstacking occurs when a claimant proposes to move one of two or more stacked water rights to a new POU. This would allow additional acreage to be irrigated and increases the consumptive use. When multiple rights are authorized on the same POU, the reviewer should not recommend the water rights on separate tracts.
  - Unstacking water rights generally constitutes an enlargement (see Unstacking Overlapping POU's below).

## **Enlargements (Changes Based on Section 42-1426, Idaho Code)**

Section 42-1426(1)(a), Idaho Code, provides:

The legislature finds and declares that prior to the commencement of the Snake River basin adjudication and subsequent to the mandatory permit system provided in Sections 42-201 and 42-229, Idaho Code, persons entitled to the use of water or owning any land to which water has been made appurtenant by decree, license or constitutional appropriation have, through water conservation and other means, enlarged the use of said water without increasing the rate of diversion and without complying with the mandatory permit system adopted by the legislature. Thus, the legislature further finds and declares that it is in the public interest to waive the mandatory permit requirements for these enlargements in use prior to the commencement of a general adjudication, so long as such enlargements in use did not increase a rate of diversion provided in Section 42-202, Idaho Code, after the enlargement of use, and the enlargement of use did not reduce the quantity of water available to other water rights existing on the date of the enlargement in use.

It is important to note that Section 42-1426(3), Idaho Code, requires advertisement of enlargements: “The notice shall contain a summary of the notice of claim and shall be published in the same manner as notices for applications to appropriate water in Section 42-203A, Idaho Code.”

### **What constitutes an enlargement under Section 42-1426, Idaho Code?**

Enlargements are increased uses where the water user did not comply with the mandatory permit statute. Typically an enlargement is an increase in irrigated acres but it can apply to other elements, such as additional purposes for the same water. An enlargement may only be recommended if the diversion rate has not been increased but an enlargement can include additional diversion volume, even if consumptive use is increased.

If the use is located within a critical ground water area, it is an expansion under Section 42-1416B, Idaho Code, and should be reviewed under the requirements set forth in that section, and as described later in this memo.

If the enlargement claim is for anything other than irrigated place of use, consult the attorney for the basin.

### **When must the enlargement have occurred to be recognized?**

An enlargement must have occurred after the mandatory permit statutes but on or before November 19, 1987. For ground water, the mandatory permit statute date is March 25, 1963. For surface water, the date is May 20, 1971.

If the enlargement occurred before the mandatory permit statutes, it could be recommended as a beneficial use right and not an enlargement.

## What can be recommended under Section 42-1426, Idaho Code?

Enlargements are increases in beneficial use that have occurred after the mandatory permit statute for the source and on or before November 19, 1987, without an increase in diversion rate of the original right. There are four general types of enlargements:

- Additional purposes of use from what was recorded
- Increase in recorded use (increase in number of homes, acres, etc.)
- Increase in recorded period of use (from irrigation season to year-round use)
- Increase in recorded diversion volume

## It may be helpful to look at enlargements by looking at the elements of a water right

- Purpose of Use
  - If the original purpose of use remains as developed and additional purposes are added, or the original purposes are increased, those purposes constitute an enlargement.
    - Examples of increases in purpose of use are: an increase in number of homes for domestic water rights, increased plant facilities for industrial water rights, etc.
      - If the original water right specifies the number of homes, size of the industrial plant, etc., and the claimant identified more than the original water right specified, the Department should review for enlargement.
      - If the original water right does not specify the number of homes, size of the industrial plant, etc., the Department can recognize the purpose of use as it existed at the adjudication's commencement, provided the original diversion rate of the right is not exceeded.
  - The original diversion rate, as with all enlargements, cannot be increased.
  - Adding a storage component to a water use can be an enlargement.
- Place of Use (POU)
  - An increase in irrigated acres constitutes an enlargement. Nearly all POU enlargement claims are for increased irrigated acres. See Appendix 1 for a list of examples.
  - As long as the beneficial use is not increased, increasing the number of 40-acre tracts in a water right does not constitute an enlargement in POU, but rather a change in POU. Depending on the timing, this might be an accomplished transfer.
- Point of Diversion (POD)
  - Additional PODs do not constitute an enlargement.
  - If the water user added a POD but did not increase the diversion rate, it is an accomplished transfer. If the water user added a POD and increased the diversion rate prior to the mandatory permit statute for the source, they should file an additional claim. If the water user added a POD and increased the diversion rate after the mandatory permit statute for the source, they should file an application for permit.
- Period of Use (also called Season of Use)

- Any use of water outside the established period of use for the water right is an enlargement.
- Enlargements in period of use can include domestic rights (i.e. decreed for 5/1 to 10/31 for a summer cabin but cabin is now occupied year-round).
- If the claimant is claiming irrigation use earlier or later than the established irrigation season for an area, that use of water may be an enlargement.
- Sometimes the standard season of use for an irrigation water right has changed and the Department now recognizes a longer season than previously recorded. In that case, the recommended season of use should reflect the original right's season of use, but include a so-called "shoulder remark" to reflect the currently recognized season of use. This is not treated the same as an enlargement, but the priority date for the extended part of the season is subordinated.
- There may be specialized shoulder language for each basin. Consult the Adjudication Section Manager for more information.
- Quantity
  - The original diversion rate of a water right cannot be increased, but an enlargement can recognize an increase in volume. There are cases where a water user diverted volume in excess of their water right without increasing diversion rate.
- Priority date
  - The priority date for the enlargement in use is the date of the enlargement and must be on or before November 19, 1987. Recommendations for enlargements should include a Condition C11 or its equivalent: "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 42-1426, Idaho Code. As between water rights decreed as enlargements pursuant to Section 42-1426, Idaho Code, the earlier priority right is the superior right."

Recommending claims based on enlargements pursuant to Section 42-1426, Idaho Code

- Enlargement recommendations require some specific conditions.
  - POU
    - If the enlargement is for irrigation:
      - The base right recommendation requires an acre limit
      - The enlargement recommendation must identify the number of acres enlarged from the base right
      - Both recommendations have a total combined acre limit
    - If the enlargement is for other than irrigation, conditions for the base and enlargement recommendations must be customized to best describe the situation.
    - For further guidance on conditioning a Permissible Place of Use (PPU), see the PPU section below.
  - Priority Date
    - The recommended priority date for an enlargement claim is the date supported by the evidence for the enlarged use, but must be on or before November 19, 1987.



- The recommended period of use for the enlargement would be the additional portion of the year not included in the base right.
  - Additional conditions
    - The base right recommendation must include a reference to the enlargement right, and the enlargement right recommendation must reference the base right.
- Advertising
  - Pursuant to Section 42-1426(3), Idaho Code, the enlargement recommendation must be published in the same manner as notices for applications to appropriate water in Section 42-203A, Idaho Code.

### **When Sections 42-1425 and 42-1426 Overlap**

#### Permissible places of use or PPU

There are two general types of permissible place of use (PPU) claims: single right and multiple rights. A PPU provides flexibility by allowing a water user to irrigate the number of acres authorized under the right(s) within a larger described POU.

With a single right PPU, the claimant has one water right that is rotated from year to year to irrigate different acres within the PPU. For example, the claimant has 80 acres, and a water right for 40 inches (0.80 cfs) of water for 40 acres with a 1940 priority date. The claimant may rotate the water right to irrigate any 40 acres within a single irrigation season and claims the water right for the entire 80-acre tract. Again, so long as the right is limited to irrigation of any 40 acres within the 80 acres in a single irrigation season, then there is no enlargement or expansion (although there is a change in place of use, which should be analyzed for potential injury). For a discussion of how a single right PPU is recommended, see Appendix 1.

With a multiple right PPU, the claimant has several rights and the water is distributed through one system, and the entire POU has appurtenant water rights. For example, the claimant has 80 acres, and a water right for 80 inches (1.6 cfs) of water with a 1940 priority. The claimant has another 80 acres with a water right for 80 inches (1.6 cfs) of water with a 1950 priority date. The claimant files two claims, one for each water right, but claims the full 160 acres as the place of use of each water right. So long as each right is limited to irrigation of 80 acres within the 160-acre PPU in a single irrigation season, then there is no enlargement or expansion (although there is a change in place of use, which should be analyzed for potential injury). For a discussion of how a multiple right PPU is recommended, see Appendix 1.

The department can recommend a PPU where the claimant can show they diverted water as claimed prior to commencement of the adjudication. The change must not result in injury (or should be conditioned to prevent injury) and the recommendation should be conditioned to prevent an enlargement or expansion.

A combined diversion volume for ground water rights (and other rights where a diversion volume is required) should be determined and stated in conditions. The diversion volume for the individual rights may also be listed. If the rights are not sufficient to cover the entire POU, then

diversion volume should be determined based on the total number of acres that may be irrigated in a single season within the POU, rather than the total number of acres in the PPU. If there are surface rights that overlap multiple ground water rights, then the total diversion volume for the ground water rights only should be determined and stated in the remarks for ground water rights only, unless a volume limit would also be required for the surface water rights.

The POU would be the entire PPU, but each right should be conditioned to limit the right to the original number of acres irrigated. The recommendation(s) should include a condition in the following form: "This right is limited to the irrigation of \_\_\_ acres within the place of use described above in a single irrigation season." This is currently the K06 condition.

If the sum of the individual right acre limits from the same source exceed the total number of acres within the PPU, the K06 condition may not be necessary for the most junior right(s). For example, if there are three water rights for 40 acres but they are appurtenant to an 80-acre POU, the three water rights should have a combined limit of 80 acres and conditioning should reflect an 80-acre PPU. The most senior water right should have a K06 condition limiting it to 40 acres. The next most senior water right should have a K06 condition limiting it to 40 acres. The third right, the junior one, would not necessarily have a K06 condition. There may be some extenuating circumstances for this type of situation, particularly if the rights are from different sources. See the attorney assigned to the basin for additional information.

If the sum of the individual right acre limits from the same source is less than the total number of acres within the PPU, a modified K06 condition will be necessary for all of the rights. That condition must list the total number of authorized irrigated acres within the permissible place of use in a single irrigation season. For example, if there are three water rights, each for separate 20-acre tracts, but appurtenant to an 80-acre POU, the three water rights should have a combined limit of 60 acres within the 80-acre PPU and conditioning should reflect an 80-acre PPU. Each water right should have a K06 condition limiting it to 20 acres within a single irrigation season.

### Unstacking overlapping POUs

Unstacking of water rights from an overlapping POU should not be allowed, unless the recommendations can be conditioned to prevent injury and enlargement. The unstacked right, regardless of its origin, becomes a beneficial use right. There are two scenarios where unstacking may be recommended:

1. If the unstacking occurred before the mandatory permit statute went into effect for the source: The priority date for the beneficial use recommendation should be the date of the unstacking and no enlargement condition is necessary.
2. If the unstacking occurred on or after the mandatory permit statute went into effect for the source but on or before November 19, 1987, it could be an enlargement or an accomplished transfer, depending on the circumstances. If an enlargement, the priority date for the beneficial use recommendation should be the date of the unstacking and enlargement conditions are required. For more information, see the Adjudication Section Manager.

Example: A water user has a decreed surface water right for 80 acres. During a drought year, the water user obtained a licensed ground water right for the same 80 acres. The water user eventually acquired 80 acres which had never been irrigated that was adjacent to the 80 acres, and began using the ground water right exclusively on the newly acquired land. The acquisition of the dry 80 acres and application of water there occurred after March 25, 1963, but before November 19, 1987. The surface water from the original 80 acres was never used on the “new” 80 acres, so a PPU is not possible.

There are two possible scenarios here:

1. Accomplished transfer and enlargement
  - a. The supplemental ground water right becomes a primary right limited to the number of acres equivalent to its prior consumptive use. The claimant is required to provide documentation of consumptive use before the change consistent with Administrator’s Transfer Memorandum #24, *Transfer Processing Policies & Procedures*.
  - b. The remaining acres should be claimed and recommended as an enlargement with a priority date commensurate with the date of change. The recommendation should include Condition C11 or its equivalent: “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 42-1426, Idaho Code. As between water rights decreed as enlargements pursuant to Section 42-1426, Idaho Code, the earlier priority right is the superior right.”
2. Enlargement
  - a. Beneficial use ground water right may be recommended as an enlargement onto the “new” 80 acres, provided the priority date of the ground water right becomes the date the change occurred. The original ground water license is recommended as disallowed and the unstacked beneficial use ground water right is given a new number. (Note: If claimed under a new number, the Department should create a claim record under the license number and recommend it as disallowed.) The beneficial use right must also be conditioned with Condition C11 or its equivalent: “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 42-1426, Idaho Code. As between water rights decreed as enlargements pursuant to Section 42-1426, Idaho Code, the earlier priority right is the superior right.”

## **Expansions**

Section 42-1416B(1), Idaho Code, provides:

Within any critical ground water area designated pursuant to Section 42-233a, Idaho Code, a claim to the expanded use of a ground water right, which use was expanded in violation of the mandatory permit requirements, may be decreed in a general water rights adjudication if the expansion occurred after the designation of the critical ground water area, before the commencement of the adjudication, and before the date of enactment of this section. The priority date for the right decreed shall be June 30, 1985.

## What constitutes an expansion under Section 42-1416B(1), Idaho Code?

Expansions are uses in critical ground water areas where the water user did not comply with the mandatory permit statute. Typically an expansion is an increase in irrigated acres but it can apply to other elements, such as additional purposes for the same water. An expansion may only be recommended if the diversion rate has not been increased. As opposed to enlargements, recommendations for expansions cannot include additional diversion volume.

The expansion statute works similar to the enlargement statute, with some notable exceptions:

- The claimant does not need to show the specific date the expansion occurred, but only that the expansion occurred on or before November 19, 1987;
- The expansion statute does not apply to an increase in season of use;
- The claimant must show that the expansion was accomplished without an increase in diversion volume; and
- It results in a priority date of June 30, 1985. However, the development must have been completed on or before commencement of the adjudication.

## Other Considerations

### Supplemental

Supplemental rights are generally not identified when making recommendations for adjudication claims. However, some water rights have conditions that describe them as supplemental to other rights serving the same POU, even if the term supplemental is not used. If a water right has previously been identified as supplemental, it should be recommended with those conditions.

### Alternate points of diversion for municipal or other large POU

Claims with Alternate Points of Diversion conditions are generally municipal rights where multiple PODs are claimed as accomplished transfers. The PODs claimed are in addition to the POD(s) that was used to perfect the right, and are frequently spread over an extensive geographical area. The PODs must be part of an interconnected distribution system that is used to supply the municipal service area.

Example: A municipal water right was developed from a single POD (well), was claimed and is being recommended with multiple PODs through an accomplished transfer. Condition 208 or its equivalent should be included in the recommendation: “To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, ground water was first diverted under this right from \_\_\_\_\_ Well No. \_ located in T\_\_\_, R\_\_\_, S\_\_\_, \_\_\_\_.” Typically, the municipal provider refers to the various wells by name or number. The name used by the municipal provider is used to fill in the first blank, and if the provider uses numbers to identify the wells, that number is used to fill in the second blank. If the wells are only identified by name, that name should be used to fill in the first blank and “No. \_” should be deleted.

Example: A municipal water right was developed from more than one POD (well), was claimed and is being recommended with PODs through an accomplished transfer that are in addition to the wells used when the right was perfected. Condition 209 or its equivalent should be included in the recommendation: “To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, ground water was first diverted under this right from \_\_\_\_\_ Well No. \_ located in T\_\_\_\_, R\_\_\_\_, S\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ Well No. \_ located in T\_\_\_\_, R\_\_\_\_, S\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ Well No. \_ located in T\_\_\_\_, R\_\_\_\_, S\_\_\_\_, \_\_\_\_\_.”

Example: A municipal water right was developed from a POD (well) that was abandoned when a replacement well was drilled. The original POD for the right was informally transferred to a replacement well. The right was claimed and is being recommended as an accomplished transfer to add multiple PODs to the right. Condition 210 or its equivalent should be included in the recommendation: “To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, ground water was first diverted under this right from \_\_\_\_\_ Well No. \_ located in T\_\_\_\_, R\_\_\_\_, S\_\_\_\_, \_\_\_\_\_ which was replaced by \_\_\_\_\_ Well No. \_ located in T\_\_\_\_, R\_\_\_\_, S\_\_\_\_, \_\_\_\_\_.”

Note: Recommendations for irrigation districts or other large water delivery organizations that rely on ground water supplied from multiple wells may also need to be examined to see if Alternate Points of Diversion conditions are required. Consult the attorney assigned to the basin.

## **Appendix 1 – Recommending Permissible Places of Use (PPU)**

### **PPU: Single right**

In this example, a right licensed for 40 acres is now claimed to be used in a rotation on 80 acres. The department can recommend a PPU if the right is only used to irrigate a specific 40 acres within the overall 80 acres in a single irrigation season. The 40 acres that are irrigated can change each irrigation season, but not within an irrigation season, meaning the claimant can not irrigate the north 40 from 4/1 thru 6/30 and then the south 40 from 7/1 to 10/31.

<u>Water Right</u>	<u>Acres</u>	<u>Priority</u>	<u>Source</u>	<u>Rate</u>	<u>Volume</u>	
67-1000	40	1940	ground water	0.8 cfs	160 af	claimed POU is 80 ac

Recommend right for the claimed 80-acre place of use.

- Add K06 (or equivalent) to recommendation:

This right is limited to the irrigation of 40 acres within the place of use described above in a single irrigation season

- Add C05 (or equivalent) to recommendation:

Right includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.

### **PPU: Two rights from the same source where rights do not exceed 0.02 cfs per acre**

<u>Water Right</u>	<u>Acres</u>	<u>Priority</u>	<u>Source</u>	<u>Rate</u>	<u>Volume</u>	
67-1000	80	1940	ground water	1.6 cfs	320 af	claimed POU is 160 ac
67-1001	80	1950	ground water	1.6 cfs	320 af	claimed POU is 160 ac

Recommend each right for the claimed 160-acre place of use.

- Add K06 (or equivalent) to both rights:

This right (67-1000) is limited to the irrigation of 80 acres within the place of use described above in a single irrigation season.

This right (67-1001) is limited to the irrigation of 80 acres within the place of use described above in a single irrigation season.

- Add E55 (or equivalent) to each recommendation:

Right Nos. 67-1000 and 67-1001 are limited to the irrigation of a combined total of 160 acres in a single irrigation season.

- Add C05 (or equivalent) to each recommendation:

Right includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.

There is no need for a diversion rate limiting condition because the sum of the two licensed diversion rates do not exceed 0.02 cfs per acre on the recommended POU.

There is no need for a diversion volume limiting condition because the sum of the two licensed diversion volumes does not exceed the 4.0 af per acre field headgate requirement used for this example.

**PPU: Two rights from the same source where rights exceed 0.02 cfs per acre**

Two licensed rights where the sum of the combined diversion rate exceeds 0.02 cfs per acre. There is no overlap between the original POUs.

<u>Water Right</u>	<u>Acres</u>	<u>Priority</u>	<u>Source</u>	<u>Rate</u>	<u>Volume</u>	
67-1000	120	1940	ground water	2.4 cfs	480 af	claimed POU is 136 ac
67-1001	40	1950	ground water	0.8 cfs	160 af	claimed POU is 136 ac

Recommend each right for the claimed 136-acre place of use.

- Add K06 (or equivalent) to 67-1000 but not 67-1001:

This right (67-1000) is limited to the irrigation of 120 acres within the place of use described above in a single irrigation season.

- Add E55 (or equivalent) to each recommendation:

Right Nos. 67-1000 and 67-1001 are limited to the irrigation of a combined total of 136 acres in a single irrigation season.

- Add E60 (or equivalent) to each recommendation:

Right Nos. 67-1000 and 67-1001 are limited to a total combined diversion rate of 2.72 cfs and to a total combined annual diversion volume of 544 af. (NOTE: The applicant can provide a Hubble analysis to support a diversion rate greater than 0.02 cfs per acre.)

- Add C05 (or equivalent) to each recommendation:

Right includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.

**PPU: Two rights from more than one source where rights exceed 0.02 cfs per acre and 4 af per acre**

Two rights where the sum of the combined diversion rate and volume exceed IDWR standards.

NOTE: At least 36 acres from the two rights could not have overlapped prior to the accomplished transfer. Otherwise, this would be an enlargement.

<u>Water Right</u>	<u>Acres</u>	<u>Priority</u>	<u>Source</u>	<u>Rate</u>	<u>Volume</u>	
67-1000	100	1940	surface water	2.0 cfs	400 af	claimed POU is 136 ac
67-1001	80	1950	ground water	1.6 cfs	320 af	claimed POU is 136 ac

Recommend each right for the claimed 136-acre place of use.

- Add K06 (or equivalent) to each recommendation:

This right (67-1000) is limited to the irrigation of 100 acres within the place of use described above in a single irrigation season.

This right (67-1001) is limited to the irrigation of 80 acres within the place of use described above in a single irrigation season.

- Add E55 (or equivalent) to each recommendation:

Right Nos. 67-1000 and 67-1001 are limited to the irrigation of a combined total of 136 acres in a single irrigation season.

- Add E60 (or equivalent) to each recommendation:

Right Nos. 67-1000 and 67-1001 are limited to a total combined diversion rate of 2.72 cfs and to a total combined annual diversion volume of 544 af. (NOTE: The applicant can provide a Hubble analysis to support a diversion rate greater than 0.02 cfs per acre.)

- Add C05 (or equivalent) to each recommendation:

Right includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.

Both rights when used in combination are limited to 0.02 cfs per acre, and to the field headgate diversion volume of 4.0 af per acre.

**PPU: Two rights from the same source with an enlargement**

Beneficial use right where diversion volume and rate exceed IDWR standards.

<u>Water Right</u>	<u>Acres</u>	<u>Priority</u>	<u>Source</u>	<u>Rate</u>	<u>Volume</u>	
67-1000 (Base)	120	1940	ground water	2.4 cfs	480 af	claimed POU is 136 ac
67-1001 (Enlg.)	16	1980	ground water	0.28 cfs	64 af	claimed POU is 136 ac

Recommend each right for the claimed 136-acre place of use.

- Add K06 (or equivalent) to 67-1000:

This right is limited to the irrigation of 120 acres within the place of use described above in a single irrigation season

- Add K01 (or equivalent) to 67-1000:

Right No. 67-1001 is an enlargement of this right pursuant to Section 42-1426, Idaho Code.

- Add C11 (or equivalent) to 67-1001:

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 42-1426, Idaho Code. As between water rights decreed as enlargements pursuant to Section 42-1426, Idaho Code, the earlier priority right is the superior right.

- Add K09 (or equivalent) to 67-1001:

This right is for an enlargement of 16 acres within the place of use described for this right.

- Add K02 (or equivalent) to 67-1001:

This right is based upon an enlargement of Right No. 67-1000 pursuant to Section 42-1426, Idaho Code.

- Add E55 (or equivalent) to each recommendation:

Right Nos. 67-1000 and 67-1001 are limited to the irrigation of a combined total of 136 acres in a single irrigation season.

- Add E60 (or equivalent) to each recommendation:

- Right Nos. 67-1000 and 67-1001 are limited to a total combined diversion rate of 2.4 cfs and to a total combined annual diversion volume of 544 af.

- Add C05 (or equivalent) to 67-1000:

Right includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.

## ADJUDICATION MEMORANDUM #17

TO: Adjudication Staff

FROM: Don Shaff, Adjudication Bureau Chief 

SUBJECT: Deferral of Domestic and Stockwater Claims

REVISED: March 3, 2009

In both the Snake River Basin Adjudication (SRBA) and the Coeur d'Alene-Spokane River Basin Adjudication (CSRBA), the United States of America and the State of Idaho entered into stipulations agreeing deferral of small domestic and stockwater claims does not divest Idaho courts of jurisdiction over the United States. These agreements paved the way for allowing small domestic and stockwater claims to be deferred in these adjudications. The deferral process has been approved by both the SRBA district court and the CSRBA district court. Both courts have issued orders adopting special procedures for the deferral of small domestic and stockwater (D&S) claims.

This memo describes which water rights are eligible for deferral for each adjudication and the consequences of a decision to file (or not to file) a notice of claim for a small D&S water right. Please note the stipulation and order will not result in excluding small D&S claims; rather, the adjudication of such claims will be indefinitely postponed until a need to adjudicate such claims arises.

It is important to note there is no difference between the SRBA and CSRBA in the deferral of small stockwater claims. Such claims are deferrable in both the SRBA and the CSRBA.

### I. Summary of Procedure

#### A. Definition of Domestic - SRBA

The SRBA district court deferral order applies the deferral procedure to small domestic and stockwater uses, as defined by Section 42-1401A(5) and (12), Idaho Code, as provided in the 1988 supplement to the Idaho Code. The definition of domestic at 42-1401A(5), Idaho Code, in turn references 42-111, Idaho Code. It is important to remember when the order adopting the stipulation was entered in the SRBA in 1987, the definition of domestic was different than it is today. In 1990, the Idaho legislature changed the definition of domestic to contain a two part definition. The current definition provides, in relevant part:

42-111. DOMESTIC PURPOSES DEFINED. (1) For purposes of sections 42-221, 42-227, 42-230, 42-235, 42-237a, 42-242, 42-243

and 42-1401A, Idaho Code, the phrase "domestic purposes" or "domestic uses" means:

- (a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or
- (b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.

See Adjudication Memorandum #4 for a detailed discussion of the definition of stockwater and each part of the definition of domestic. Subpart (b) of this definition was added in 1990. Therefore, only domestic uses which meet subpart (a) of the domestic definition qualify for deferral in the SRBA. Domestic uses which meet the subpart (b) qualify for the domestic and stockwater form and the \$25.00 fee, but do not qualify for deferral.

Under this procedure, all water right holders are joined in the adjudication (served with the commencement notice), and will therefore be parties in the adjudication and will be bound by decrees entered in the adjudication. The deferral procedure therefore does not affect the notice and joinder stage of the adjudication.

The deferral procedure does affect the claims-taking stage of the adjudication. Notices of claims for small D&S uses may, but do not have to, be filed at this time. A water right meeting the definition of small D&S as defined in 1988 will not be forfeited for failure to file a notice of claim in the SRBA at this time. The owner of a small D&S right may file a motion with the district court at a later date to have a small D&S water right adjudicated if the need arises.

There are two limitations that apply when the owner of a small D&S water right seeks to have the right adjudicated at a later date.

- The water right owner will only be allowed to claim a water right that comes within the statutory definition of a small D&S claim. Anything in excess of the statutory definition for which a notice of claim is not filed will be deemed to have been forfeited.
- The extent of the small D&S water right is limited by actual beneficial use.

There is no presumption that a small D&S use is entitled to a water right for the full 13,000 gallons per day.

#### B. Definition of Domestic - CSRBA

The CSRBA district court deferral order applies the deferral procedure to small domestic and stockwater uses, as defined in 2008 by Section 42-1401A(4) and (11), Idaho Code.

As in the SRBA, both subparts (a) and (b) qualify for the domestic and stockwater form and the \$25.00 fee. In the CSRBA, uses meeting the definition of subpart (a) and subpart (b) qualify for deferral; in the SRBA, only subpart (a) qualified for deferral. The definition of stockwater remains unchanged. See Adjudication Memorandum #4 for a detailed discussion of the definition of stockwater and each part of the definition of domestic.

As with the SRBA:

- All water right holders are joined in the adjudication (served with the commencement notice), and will therefore be parties in the adjudication and will be bound by decrees entered in the adjudication. The deferral procedure therefore does not affect the notice and joinder stage of the adjudication.
- The deferral procedure does affect the claims-taking stage of the adjudication. Notices of claims for small D&S uses may, but do not have to, be filed at this time. A water right meeting the definition of small D&S as defined in 2008 will not be forfeited for failure to file a notice of claim in the CSRBA at this time. The owner of a small D&S right may file a motion with the district court at a later date to have a small D&S water right adjudicated if the need arises.
- There are two limitations that will apply when the owner of a small D&S water right seeks to have the right adjudicated at a later date.
  - i. The water right owner will only be allowed to claim a water right that comes within the statutory definition of a small D&S claim. Anything in excess of the statutory definition for which a notice of claim is not filed will be deemed to have been forfeited.
  - ii. The extent of the small D&S water right is limited by actual beneficial use.

There is no presumption a small D&S use is entitled to a water right for the full 13,000 gallons per day.

## II. "I may, but I don't have to. So should I?"

Only the claimant can make the decision to defer filing a claim for small D&S water rights. Here are some factors the claimant may consider:

- The claim fee for a small D&S use is only \$25.00. If the small D&S use is adjudicated later, the claimant may be required to pay the department's cost of investigating and preparing a report on the water right claimed. It will almost certainly cost more to do it later than to do it now.
- The deferral procedure will affect administration of water rights pursuant to decrees entered in the adjudications. The owner of a small D&S water right must agree to have the water use adjudicated before the owner can seek administration of the water right or approval of a change in use (such as a change in point of diversion, change in place of use, change in nature of use, etc.) of the water right.

- By filing a \$25.00 claim, the water user will be included in mailings and notices related to the adjudication. To ensure the claimant receives notice of the filing of the director's report if they do not want to file a claim, they can get a subscription to the docket sheet through the CSRBA district court.
- If the claimant's water use might exceed the deferral limitations, the claimant should not assume they will meet the deferral procedure. In such cases, the claimant should be encouraged to file a claim on the irrigation and other claim form. If the claimant chooses to defer filing a claim for a water use that is later determined to exceed deferral limitations, the only possible water use that may be recommended is a small D&S use.
- If the claimant needs further information, there is an informational brochure on the Northern Idaho Adjudication webpage ([http://www.idwr.idaho.gov/water/North\\_Id\\_Adju/](http://www.idwr.idaho.gov/water/North_Id_Adju/)).
- If the claimant is still in doubt, they can be encouraged to consult their attorney or consultant.

### III. Late Fees for Late Filed Small D&S Claims in SRBA and CSRBA

Pursuant to order of the SRBA District Court, there are no late fees for the late filing of a small D&S claim. The Department will continue this approach in the CSRBA and will not charge late fees for the filing of late small D&S claims.

## ADJUDICATION MEMORANDUM #18

TO: Adjudication Staff

FROM: Carter Fritschle, Adjudication Section Manager *CF*

SUBJECT: Changes in Address/Ownership

REVISED: December 26, 2014

### I. Changes in Address

Section 42-1409(6), Idaho Code, and SRBA Court Administrative Order 1 (A.O.1) require claimants to file written notice of a change in address while the adjudication of a claim is pending. When a partial decree is issued for a claim, the responsibility for maintenance of the IDWR record for the water right comes under Section 42-248, Idaho Code. The minimum requirements for a notice of change in address are as follows:

- a. Reporting areas for which a director's report has not been submitted to the district court:
  - i. IDWR must receive written notice. It can be on an IDWR form or a simple letter. The exception is when IDWR has learned or determined the change in address is not one of location but change of postal delivery address from rural route or high contract (HC), for instance, to a grid or street or road address. In this specific instance, IDWR can make the change to the contact information without written notice from the claimant(s).
  - ii. The notice should include the claim number(s) and claimant name. This information is required to make sure we are changing the address on the correct claim(s).
  - iii. The notice must include the new mailing address. The new telephone number and old address should be included, but the notice should not be considered incomplete if these elements are missing. An email address may also be included.
  - iv. The notice must be signed by the claimant or by authority of the claimant. It can be signed by any of the following:
    1. Any of the persons listed as claimant on the notice of claim;
    2. The claimant's attorney if the notice of appearance is completed on the notice of claim, or if a notice of appearance has been filed with

the court (the docket sheet lists notices of appearance filed with the court).

3. Any other person if a copy of a power of attorney is included that indicates that person's authority to act on behalf of the claimant; and
  4. A person, other than the claimant, who signed and had authority to sign the notice of claim, such as a trustee.
  - v. The notice does not have to be notarized.
  - vi. When a change in address has been received, it should be reviewed by the office receiving the notice to make certain it meets the minimum requirements. If the minimum requirements have been met, then the new address should be data-entered by the office receiving the notice, and the claimant's name and new address should have a label Current Owner. The change is made to the existing contact record(s) and not by creating new contacts.
  - vii. The address change document is scanned and profiled in IDWR's database to each of the water right numbers affected. After initial data-entry, the notice should be marked "data-entered" and forwarded to the IDWR office that has the original claim file.
  - viii. The notice of change in address should be kept in the claim file. If the notice of change in address does not meet the minimum requirements, seek further correspondence from the sender, and keep any correspondence in the claim file. Once the minimum requirements have been met, then the new address should be entered with the Current Owner label.
  - ix. A copy of the change in address, if it applies to records maintained by any other section within the Water Allocation Bureau, shall be sent to the Water Right Permits Section.
  - x. A copy of the changed claim (or recommendation) with the new owner's name should be sent to the seller. If it is known the previous owner is deceased or mail will be undeliverable to the previous owner, it is not necessary to attempt notification of the previous owner. (If the new owner and previous owner share the same address, it is not necessary to send multiple notices.)
- b. Reporting areas for which a director's report has been submitted to the District court and prior to issuance of a partial decree:  
A.O.1 requires all claimants in a reporting area where a director's report has been submitted to the court to give notice of a change in address to IDWR whether the reported claim has an objection or not. Data entry should be handled as in reporting areas for which director's reports have not been filed with one

exception. The district court should be notified by Notice of Completed Administrative Proceeding (NCAP) of any change in address.

## II. Changes in ownership

Section 42-1409(6), Idaho Code, and A.O.1 require a purchaser of a water right during a pending adjudication to file a written notice of change in ownership with IDWR, and further provides that the purchase must submit some evidence of the change in ownership with the notice. Section 42-1401A(10), Idaho Code, and A.O.1 define a purchaser as “any successor in interest of a claimant, whether the interest is acquired by purchase, gift, inheritance or other means.”

- a. Reporting areas for which a director’s report has not been submitted to the district court
  - i. IDWR must receive written notice. It can be on an IDWR form or in a letter.
  - ii. Evidence of the change in ownership must accompany the notice. For a detailed review of what types of documents are acceptable, see Records Memorandum No. 9.
  - iii. The notice should include the water right number, the name of the former claimant(s), the name(s) of the new claimant(s), and the new claimant’s mailing address. The new claimant’s telephone number and the former claimant’s address are desirable but not necessary. An email address may be included.
  - iv. The name(s) on the deed or other acceptable documented conveyance determines the name(s) in IDWR’s database. Contact names should be kept consistent across IDWR’s database. For example, IDWR receives a deed for John Mathew Doe. Existing records show John M. Doe as a right holder. After investigation, IDWR determines John M. Doe and John Mathew Doe are the same person. IDWR should data-enter the change of ownership John M. Doe to be consistent with other records. No new contact should be made. (Note: There may be special circumstances where the name(s) on the deed or other conveyance document will not match the name(s) of the claimant. Consult the Adjudication Section manager for specific instructions.)
  - v. The notice must be signed. The change in ownership form need only be signed by one person. However, data entry will reflect language on the deed. For example, if the deed cites the new owners as “Jack and/or Mary Smith,” IDWR’s database should reflect “Jack and/or Mary Smith.”
  - vi. The ownership change documents are scanned and profiled in IDWR’s database to each of the water right numbers affected. After initial data-entry, the notice should be marked “data-entered” and forwarded to the IDWR office that has the original claim file.

- vii. The notice of change in ownership should be kept in the claim file. If the notice of change in ownership does not meet the minimum requirements, seek further correspondence from the sender, and keep any correspondence in the claim file. Once the minimum requirements have been met, the new owner(s) should be entered with the Current Owner label. A copy of the change in ownership, if it applies to records maintained by any other section within the Water Allocation Bureau, shall be sent to the Water Right Permits section.
      - viii. A copy of the changed claim (or recommendation) with the new owner's name should be sent to the seller. In the case of a split to the water right(s) claimed by the seller(s), the new claimant is to receive the director's report with a Notice of Completed Administrative Proceeding (NCAP).
- b. Reporting areas for which a director's report has been submitted to the district court and prior to issuance of a partial decree:

A.O.1 requires all claimants in a reporting area where a director's report has been submitted to the court to give notice of a change in ownership to IDWR whether the reported claim has an objection or not. Data entry and minimum requirements for form completion are as in reporting areas for which director's reports have not been filed.
- c. Data entry for claim and recommendation records in the Adjudication database:
  - i. The new claimant, if not already existing in the contacts, and new address should be data-entered by the receiving office with a Current Owner code. The initial claimant and old address should remain in the database with a Director's Report Owner code. The Current Owner should match in both the claim and recommendation records. Tracking owners between the initial claimant and the current owner is not required. For previously recorded water rights (licenses, decrees, statutory claims), the owner of that record should be kept as an Original Owner.
  - ii. After a decree for the recommendation is issued, tracking the ownership change in the Adjudication records is no longer necessary and the change of ownership documents should be forwarded to the Water Allocations section. The records are then prepared for the Update Partial Decree Workflow process when the processing of the decree does occur.
- d. Notice of change does not meet minimum requirements:
  - i. If the notice of change in ownership does not meet the minimum requirements, and IDWR is confident the new owner appears to own the place of use, complete the following steps for the claim and recommendation records while waiting for complete documentation:

1. The new claimant should be data-entered with a Present Owner code, and the old claimant and the old address should remain in the database with a Current Owner code.
  2. The ownership change document is scanned and profiled in IDWR's database to each of the water right numbers affected. After initial data-entry, the notice should be marked "data-entered" and forwarded to the IDWR office that has the original claim file.
  3. The notice of change in ownership should be kept in the claim file. Once the minimum requirements have been met, the Present Owner code should be changed to Current Owner and the previous owners should be changed to the Original Owner code.
  4. A copy of the change in ownership, if it applies to records maintained by another section within the Water Allocation Bureau, shall be sent to the Water Right Permits Section.
- ii. If the notice of change in ownership does not include sufficient information to identify the water right as to which ownership has changed, or if there is insufficient information to determine if the new owner is only claiming part of the original notice of claim, seek further correspondence before any data entry.
  - iii. A copy of the changed claim (or recommendation) with the new owner's name should be sent to the seller. In the case of a split to the water right(s) claimed by the seller(s), the new claimant is to receive the director's report with a Notice of Completed Administrative Proceeding (NCAP).

### III. Change in ownership resulting in split notices of claim, and filing fees

- a. Reporting areas for which a director's report has not been submitted to the district court:
  - i. If the property description on the document submitted with the change of ownership does not include all of the property listed as the place of use, then the notice of claim may have to be split. A reviewer of the change in ownership must proceed cautiously, if the split is suspicious, before investing needlessly in data entry for the splits. In the case of a suspicious split, investigate with seller or buyer about the circumstances of the sale before processing the change.
  - ii. If the minimum requirements for a notice of change in ownership have been met, and it can be determined by examining the original claim and the notice of change in ownership how the claim should be split, process the change in ownership.
  - iii. To process the change in ownership, follow the instructions in the Split or Renumber Claim Workflow application. The system will create the corresponding number of new water right records for each of the splits.

The new claims and recommendations are initially mirrors of the parent (original) recommendation. Corresponding data entry will be required to define the water right elements of each split as well as GIS shapefiles for both point of diversion (POD) and place of use (POU). A remark is added automatically in Workflow to both the parent water right describing the splits from it and in each of the new water right numbered splits describing the water right from which it came. The pedigree for the split is also created from the split in Workflow.

- iv. The new notices of claim should be sent to the owners for review. If any corrections are made, the corrected claim should be signed and returned within 30 days. The corrected claim should be processed as an amended notice of claim. If no response is received, it will be assumed the split notices of claim are correct.

NOTE: Although there are now two notices of claim where there was originally only one, no additional flat fee will be due. An additional variable fee may be due from one or the other if the total amount of water claimed, the total amount of acres irrigated, or the total kilowatt capacity of the new claims exceeds the amount on the original claim. The additional fee is to be paid by the claimant who is claiming the additional acreage, water, or kilowatts.

For example, Claimant A owns an 80-acre tract, files a notice of claim for 60 inches for 60 acres, 30 in the first quarter-quarter and 30 in the second. Claimant A sells one forty-acre tract to Claimant B. Two new notices of claim forms are prepared, each 30 inches for 30 acres. Claimant B revises his notice to claim 40 inches for 40 acres but Claimant A resubmits his as prepared. An additional \$10 variable fee is owed because 70 irrigated acres are now being claimed instead of 60. Claimant B owes the extra fee because the extra acreage was claimed on Claimant B's notice of claim form.

In another example, Corporation A files a notice of claim for a 100 cfs water right for commercial purposes and sells part of the water right to Corporation B, and the claimants disagree as to how much of the water right Corp A conveyed to Corp B. (This situation may arise where there is either an express reservation of a portion of the water right by the seller, or an express conveyance of a portion of the water right to the buyer, but the deed is ambiguous as to how much was conveyed.) Corp A is claiming 50 cfs of the 100 cfs water right and Corp B is claiming 60 cfs of the 100 cfs water right. Since Corp A paid full fees at the time the original claim was filed, Corp B must pay the variable fee for the extra 10 cfs.

Note that where a claim is split and there is no increase in the fees, the old claimant will have paid the full fee for both of the new water rights and the new claimant will not have paid for any. If the old claimant thinks they are entitled to some compensation due to this fact, they must work it out with the buyer, not with IDWR.

Data entry of splits for the claims will apply to any applicable recommendations that may be in the working stages of becoming a recommendation in a director's report. The split of the claim produces two new claims and recommendations.

- v. If there is insufficient information to process the split, seek further correspondence with the new claimant. Any correspondence should be kept with the claim file.
- b. Reporting areas for which a director's report has been submitted to the district court and prior to issuance of a partial decree:  
Data entry and minimum requirements for splitting the water right are the same as before submission of the director's report. However, IDWR should notify the district court of the splits via a Notice of Completed Administrative Proceeding (NCAP).
- i. An NCAP with the amended director's report is sent to the court for each water right. The title of the document (caption) includes the parent right number with the subsequent split numbers (children). The attachment for the parent water right is no more than a printout listing the parent and its children. There should be a director's report for each child created by the split. Each parent right requires an NCAP.

## ADJUDICATION MEMORANDUM #19

TO: Adjudication Bureau Staff

FROM: Don Shaff, Adjudication Bureau Chief 

SUBJECT: Filing Fees for Multiple Purpose Claims

REVISED: March 11, 2009

Idaho Administrative Procedures Act (IDAPA) 37.03.01 (also known as the Adjudication rules) provides that if a claimant claims more than one purpose of use on a single claim, the variable fee will be the total of the variable fees payable for each purpose of use. The exception to this rule is that no variable fee is payable for claims or portions of claims for fire-fighting purposes, or for domestic use and/or stockwater (D&S) use that qualify for the D&S form. Some questions have arisen as to application of these rules, as addressed below.

### I. Domestic and/or Stockwater Claims on the D&S Form

Domestic and/or stockwater are the only purposes of use that may be claimed at item 6 of the D&S form. However, those uses may include other uses that are normally given a different purpose of use label. For example, under the definition of stockwater in the adjudication statute, stockwater use can include the use of water for wildlife. As another example, domestic use can include the use of water for a business operated in the home by the occupant of the home. To qualify for the D&S form, these uses (wildlife and commercial in the examples provided) cannot be separately claimed at item 6 of the D&S form. Instead, they should be described in the non-irrigation uses section (section 8) of the D&S form. If the claimant wants to separately claim these purposes of use, the claimant will have to do so on the irrigation & other form and will have to pay the appropriate variable fees.

The same rules apply to uses meeting the definition of domestic use as put forth in Section 42-111(1)(b), Idaho Code. For example, a use that would otherwise be called commercial may meet the domestic definition because the total diversion rate is not more than 0.04 cfs and the total diversion volume is not more than 2500 gallons per day. The use would still have to be described as domestic to be claimed on the D&S form and be subject to the \$25.00 fee, and the use would be further described in section 8. If the claimant wants to claim it as other than domestic at item 6, then the claimant will have to do so on the irrigation & other form and pay the appropriate variable fee.

### II. Stockwater on the Irrigation & Other Claim Form

If the claimant lists stockwater use at item 6 of the irrigation & other form, and the rate or amount of water claimed to be diverted is in excess of the amount that can be claimed on the D&S form, a variable fee must be paid.

III. Public Instream Flows, Lake Level Maintenance, Wildlife, Recreation, and Aesthetic Purposes on the Irrigation & Other Claim Form

For a public agency, the per cfs fee is only charged once for a claim to water for more than one public purpose, with public purpose defined as including public instream flows, lake level maintenance, wildlife, aesthetic, and recreation. If a claimant other than a public agency lists wildlife, recreation, and aesthetic purposes as purposes of use at item 6 of the irrigation & other form, the claimant will be required to pay three per cfs variable fees. However, a private claimant can pick one of the three to list at item 6 of the irrigation & other form, and describe the other two as incidental uses in the non-irrigation uses section (item 8) of the irrigation & other form, and will only have to pay one variable fee.

## ADMINISTRATOR'S MEMORANDUM

**To:** Water Management Division TRANSFERS MEMO #12  
**From:** Norman C. Young ADJUDICATION MEMO #20  
**RE:** TRANSFERS BASED ON ADJUDICATION CLAIMS  
**Date:** April 17, 1989

During the Regional manager's meeting held on February 16 and 17, 1989 in Boise, a lengthy discussion ensued relative to identification numbers assigned to Snake River adjudication claims based on prior decreed or licensed rights or portions thereof.

As a practical matter, it might not be possible to identify the specific portion of a decreed or licensed right being claimed during the short time available while taking a claim, but the claim should reference the "core" number of the original right as should the adjudication data base. The purpose of the references to the original right is for analysis purposes prior to submitting a director's report to the court by determining whether the parts of an original right claimed exceed the whole or whether certain parts of the original right have not been claimed.

The letter designation indicating the specific part of the original right claimed can be determined during the review of the claims in preparation of the Director's report or when a transfer is filed on a claim, whichever occurs first.

Some adjudication claims which are filed will claim the right or portion thereof in a manner different from the licensed or decreed right of record inferring that an unrecorded transfer has occurred in the past. A transfer does not need to be filed to submit the adjudication claim in this manner, since Section 42-1425, Idaho Code, has been enacted.

If, however, a transfer is filed on an adjudication claim which represents an unrecorded transfer, evidence of title to the original right or portion thereof claimed must be shown by the applicant before the transfer can be processed. In addition, the core water right number shown on the adjudication claim (either as the identification number or in remarks) must be further identified with an alpha suffix character if the unrecorded transfer represents a division of an earlier recorded part of the original right. This is particularly important when a number which does not include the core number of the original licensed or decreed right has been assigned to an adjudication claim.

This identification process is necessary to prevent the state office from having to create and maintain additional files based on an assigned adjudication number which does not relate to the original right.

In no case should a transfer, as described above, be advertised showing an identification number which is not related to the original number assigned to the right.

## ADJUDICATION MEMORANDUM #21

TO: Adjudication Bureau Staff

FROM: Don Shaff, Adjudication Bureau Chief 

SUBJECT: Expansions in Critical Ground Water Areas

REVISED: March 18, 2009

Section 42-1416B, Idaho Code, permits a person to file an adjudication claim for an expansion in a critical ground water area if the expansion happened:

- After designation of the critical ground water area,
- Before entry of a commencement order in a general adjudication, and
- Before the date of enactment of this section (March 29, 1989).

For the SRBA, this means an expansion must have taken place before November 19, 1987. In adjudications subsequent to the SRBA, the expansion must have taken place before March 29, 1989. The flow chart included on the next page can provide some assistance with determining validity of the expansion and review of an expansion claim.

The priority date for all such rights decreed shall be June 30, 1985, or the date of the expansion if the expansion happened after June 30, 1985.

The original right could be a decreed right, a licensed right, or a beneficial use right established prior to the mandatory permit system. The original right could also be a permit approved as of March 29, 1989, or the date of entry of the adjudication commencement order, whichever date is earlier. The original right claimed to have been expanded cannot be a beneficial use right in violation of the mandatory permit statute, or an application for permit approved after March 29, 1989, or the date of entry of the adjudication commencement order, whichever date is earlier.

Expansion includes any increase in irrigated acreage or additional purposes of use. It does not include an increase in the rate of diversion or volume of water diverted.

The statute also contains some provisions as to administration of these water rights once decreed. Even if the right is decreed, water will be deemed unavailable to fill these rights unless the director finds a management program exists which will limit average annual ground water withdrawals to no more than the average annual recharge to the aquifer. The director is required to make this finding within two years after the decree becomes final.



## ADJUDICATION MEMORANDUM #22

TO: Adjudication Bureau Staff

FROM: Don Shaff, Adjudication Bureau Chief 

SUBJECT: Notice of Appearance by Attorney

REVISED: March 18, 2009

### A. Prior to Filing the Director's Report

#### 1. What is the significance of the notice of appearance on the claim form?

When the notice of appearance on the claim form is completed, any communication from IDWR regarding the claim should be directed to the attorney, and not the claimant, unless the attorney indicates otherwise. However, a courtesy copy of any communication can be mailed to the claimant. This includes not only the legal notices IDWR is required to make, but also communications regarding the claim.

One exception to this policy is claimant contact to schedule a field exam, since the claimant's presence is needed at the field exam. In this instance, the attorney should be notified that IDWR will be contacting the claimant to schedule the exam. This will enable the attorney to make arrangements to be present if the attorney so desires.

#### 2. What if a claimant has filed a notice of claim form with a completed notice of appearance, and also one or more other claims, which do not have a notice of appearance section?

Generally speaking, a notice of appearance on one claim does not apply to other claims filed by the same claimant. The attorney for the claimant is responsible for providing IDWR with a list of applicable claim numbers.

#### 3. What does IDWR consider sufficient notice to a) add an attorney to the notice of claim form, b) change the attorney listed on the notice of claim form, or c) remove an attorney listed on a notice of claim form?

- a. A letter signed by an attorney licensed to practice law in Idaho, indicating further notice should be sent to that attorney is sufficient. The letter should list the claimant's name and the claim numbers for which the attorney is appearing.
- b. A letter to IDWR from the attorney requesting change or removal is sufficient to change the attorney of record. If a notice of appearance has been filed with the district court, then that attorney is the attorney of record for the claimant until the

district court grants the attorney leave to withdraw as counsel of record for that claimant. This is true regardless of whether an attorney is listed on the claim form. Notices of appearance filed with the district court are listed on the docket sheet and notice is sent to IDWR.

- c. A letter to IDWR from the attorney requesting change or removal is sufficient to change the attorney of record. An Order Granting Leave to Withdraw, issued by the district court, is sufficient if a notice of appearance was filed with the district court. If the court issues an order granting an attorney leave to withdraw as attorney of record for the claimant, then the attorney's name should be deleted and all notices should go to the claimant. If IDWR receives written communication identifying a new attorney or a new attorney files a notice of appearance with the district court, the records should be updated appropriately.
- d. When a change of ownership is filed during the adjudication and a notice of appearance was filed previously, the attorney for the previous owner is expected to file a notice of appearance for the new owner's claims. Otherwise, the previous attorney is deleted from the adjudication record.

*NOTE: A power of attorney is different from an attorney at law. A power of attorney is a written authorization by the claimant to another person giving the other person the authority to act on the claimant's behalf to the extent specified in the power of attorney (for example, to sign a notice of claim form). A power of attorney can be given to someone who is not a lawyer.*

#### B. After the Director's Report is filed

When a notice of appearance is filed with the court for a claimant (the owner of record, not the objector), the database should be updated. Only the data in the water right numbers or the objection subcase numbers as indicated on the notice of appearance should be updated. The notice of appearance is scanned and profiled to the applicable subcase(s). The original form is filed with the claim.

What if a document other than a notice of appearance is filed with the court by an attorney who is appearing for the first time in the subcase? (No notice of appearance has been filed.)

- a. If the document is an objection or response by the claimant's attorney to the claimant's water right, the database should be updated with the new attorney information for the claimant. If the document is an objection or response filed by an attorney representing someone other than the claimant, the attorney is not data entered in the adjudication record. However, the notice of appearance is scanned and profiled to the applicable subcase(s).
- b. If IDWR receives a document indicating an attorney will represent a party but the district court has not been notified, the attorney should be directed to notify the court

they will appear on behalf of their client. The database should be updated to reflect the attorney's information.

## 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.)

## ADJUDICATION MEMORANDUM #25

TO: Adjudication Bureau Staff

FROM: Don Shaff, Adjudication Bureau Chief 

SUBJECT: Refund Policy

REVISED: April 13, 2009

The practice of processing, identifying, and assessing claim fees that may be refunded requires a clearly stated policy with which all staff are familiar. The purpose of this memo is to identify those conditions under which refunds will be processed, considered, and if approved, submitted for payment by the State Controller's office. Refer also to IDAPA 37.03.01.055 (also known as the Adjudication Rules).

Refunds will fall into two categories: overpayment and withdrawal or relinquishment. Copies of the current turn-around forms for these categories, except overpayment, are attached. Each office will produce the form such that the appropriate office address appears on the form. Correspondence meeting the requirements of the form(s) is acceptable in place of the form(s).

### PROCESSING

When a refund request is initiated, the assisting staff member will attach an explanation and a copy of the receipt to Bureau's refund request form and give it to the Technical Section Manager. The Technical Section Manager will then route the request through the Fiscal Department. The claimant's request for a refund or withdrawal shall be filed with the claim unless the request is for a refund of fees on a claim that was not submitted in an acceptable form, and the claim has been rejected and returned to the claimant.

After the Technical Support Section Manager has reviewed and approved a refund request, the Technical Support Section staff will modify the claim record(s) with a status code withdrawn, including any appropriate comments. Upon approval of the refund request the documents are routed back to the Region for filing in the claim file, and the claim is stamped WITHDRAWN by the Region.

The request for a refund in connection with a withdrawal (Form 25a) (as opposed to an overpayment refund) must be signed by:

1. the person(s) who signed the claim form, or

2. a person who has submitted a power of attorney to act for the claimant, either with the claim or with the refund request.

The staff member putting together the refund request should thoroughly research the refund to avoid duplicative research by other sections.

### OVERPAYMENT

Overpayment refunds obviously apply when the claimant has paid more in fees than were due for the claim(s) as originally submitted. The Bureau's refund request form shall identify the payee's name and address, receipt number(s), and claim number(s). (Note: There is no "overpayment" when an amendment of a claim would result in a smaller fee than the fee determined at the time the claim was originally filed.) The total appropriate fees shall be shown indicating the remainder to refund. Any further explanation of the circumstances regarding the fees would be acceptable.

If overpayment refunds of less than \$1.00 are discovered by staff a refund request will not be prepared or processed. If, however, a claimant requests and is due a refund of less than \$1.00 the refund will be processed as described above.

### WITHDRAWAL

The withdrawal process applies when a claimant indicates in writing or Form 25a a desire to withdraw the claim(s).

Generally, the Department does not initiate a refund automatically upon withdrawal. If an application for permit should have been filed instead of a claim, the claim fees may be applied to the application for permit fee.

If a claimant wishes to withdraw a claim and receive a refund of the claim fee, and the claimant believes there are extenuating circumstances entitling them to a refund, the request must be approved by the Technical Support Section Manager. (The desire to withdraw an invalid claim does not, by itself, represent extenuating circumstances entitling the claimant to a refund.) The claimant's request shall explain in an attachment why the claim is being withdrawn and why the fees should be refunded.

The Bureau's refund request form shall set forth the amount of the fees that will be refunded under the corresponding receipt number(s). (Note: The claimant can always choose to withdraw a claim but the circumstances in which a refund will be granted are limited.)

## RELINQUISHMENT

Use of Form 25c is intended for those circumstances when one claimant inadvertently duplicates the claim of another claimant. In most circumstances the conditions would be:

- 1) Multiple ownership of the property with the same water right claimed by two or some combination of the owners not knowing what the other was filing as claims;
- 2) A claimant mistakenly filing a claim for a water right neither holding nor owning the property to which it is appurtenant.

If the claimant submitting the relinquishment also wants a refund of the filing fees, they must also file a request for refund (Form 25b).

## REFUND TO NON-CLAIMANT

The form Request for Refund (25b) would also be used by an individual, firm or company (e.g. attorney) paying the fees on behalf of the claimants. A refund check can be issued only to the payor of the fees.

REQUEST FOR WITHDRAWAL OF CLAIM

Name of Claimant:

(Please Print) \_\_\_\_\_

Mailing Address: \_\_\_\_\_

Amount: \$ \_\_\_\_\_ Receipt No.: \_\_\_\_\_

County of Water Right: \_\_\_\_\_

Claim No(s): \_\_\_\_\_

I wish to withdraw the Notice(s) of Claim to a Water Right which number(s) appear above and for which I previously paid a filing fee to the Idaho Department of Water Resources. I do \_\_\_ /do not \_\_\_ request a refund of the filing fee. If a refund is requested I have attached an explanation of the justification for granting a refund.

\_\_\_\_\_  
(Signature of Claimant) (Date)

\_\_\_\_\_  
(Signature of Claimant) (Date)

\_\_\_\_\_  
(Signature of Claimant) (Date)

Return to:

Idaho Department of Water Resources  
Adjudication Section

\_\_\_\_\_  
For IDWR Use

Initials Date

Approval Region \_\_\_\_\_

Approval State Office \_\_\_\_\_

Data Entry \_\_\_\_\_

Claim File \_\_\_\_\_

REQUEST FOR REFUND

Name of Payor: (Please Print)

\_\_\_\_\_

Mailing Address: \_\_\_\_\_

Amount: \$ \_\_\_\_\_ Receipt No.: \_\_\_\_\_

County of Water Right:

\_\_\_\_\_

Claim No(s): \_\_\_\_\_

A Request For Withdrawal Of Claim or Relinquishment of Notice of Claim has been submitted for the Notice(s) of Claim to a Water Right which number(s) appear above, if numbers were assigned, and for which I, not the claimant, previously paid a filing fee to the Idaho Department of Water Resources. I request a refund of the filing fee and have attached an explanation of the justification for the refund.

\_\_\_\_\_

(Signature of Payor)

(Date)

Return to:

Idaho Department of Water Resources

Adjudication Section

\_\_\_\_\_

For IDWR Use

Initials Date

Approval Region \_\_\_\_\_

Approval State Office \_\_\_\_\_

Data Entry \_\_\_\_\_

Claim File \_\_\_\_\_

Form 25c

RELINQUISHMENT OF NOTICE OF CLAIM

TO WHOM IT MAY CONCERN:

I \_\_\_\_\_ hereby relinquish and  
Print name(s)

withdraw any and all of my right, title and interest in and to Notice of Claim to a Water  
Right #\_\_ - \_\_\_\_ filed under §42-1409, Idaho Code.  
(Print #)

Signed at \_\_\_\_\_ this \_\_\_\_\_ day  
of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Signature of Claimant

\_\_\_\_\_  
Signature of Claimant

---

For IDWR Use

Initials Date

Data Entry \_\_\_\_\_

Claim File \_\_\_\_\_

## ADJUDICATION MEMORANDUM # 26

TO: Adjudication Bureau Staff

FROM: Don Shaff, Adjudication Bureau Chief 

SUBJECT: Data entry trail for splitting or combining existing water rights

REVISED: April 13, 2009

The process of splitting or combining existing water rights in adjudication claims taking requires a clearly stated policy with which all staff are familiar. The following procedure must be followed whenever a claim splits or combines existing water right(s).

The claim should reference the number of the parent, or base, right(s). When a claim is for a portion of a pre-existing right, it might not be possible to identify the specific portion of a decreed or licensed right being claimed, but every effort should be made to maintain data integrity.

**Splitting an existing water right** (multiple claimants each claiming a previously recorded water right or a portion thereof):

1. Determine the parent (base) water right number from the claim or water right database.
2. If not already completed, create an adjudication claim record for the parent (base) water right number.
3. Follow the instructions in Workflow to split the parent (base) water right. Workflow will automatically update the pedigree in this process and add the appropriate conditions listing parent and new water right numbers.

**Combining two or more water rights** (same priority date and delivery through the same diversion system are required; or if priority dates are different, the claimant is willing to take the most junior of all priorities by combining rights with different priorities):

1. Determine the parent water right numbers from the claim or water right database.
2. If not already completed, create adjudication claim records for the parent water right numbers.
3. Renumber one of the parent water rights to create the new claim number representing the combination of the parent water rights. DO NOT use one of the original numbers for the combined right. Note: This is different from the Water Allocations process.
4. Set the status of the subsequent parent claims to "Parent." The status of the first claim will automatically set to "Parent."

5. Update the pedigree to reflect the combination. This can be counterintuitive to those more familiar with splitting rights than combining them and those attempting it for the first time should see their supervisor.
6. Update the conditions in each parent right to reflect they have been combined into a new water right number. The condition should list the old and new water right numbers. (The reference to the original right can aid in claim analysis during review and recommendation, for example, in determining if the right was overclaimed or underclaimed. After partial decree, this information is beneficial in determining which rights were not claimed but should have been, and which rights have been superseded by partial decrees.)
7. Update the conditions in the child right to reflect its combination of parent rights. The condition should list the old and new water right numbers.

## ADJUDICATION MEMORANDUM #28

TO: Adjudication Bureau Staff

FROM: Don Shaff, Adjudication Bureau Chief 

SUBJECT: Exceptions received prior to the filing of the Director's Report

REVISED: April 20, 2009

This memo addresses when information contrary to the claim is received after a claim is filed but before the Director's Report is issued. Such information is called an exception. The following procedure should be used to process exceptions. Note: This memo does not cover competing claims, where multiple claims are filed appearing to duplicate each other.

The department should acknowledge the exception by writing a letter to the party submitting the exception. A copy of this letter and the exception should be sent to the claimant. The letter should:

- Explain the department is required by statute to review each claim to be sure it is complete and accurate prior to recommending the water right to the court.
- Explain the information in the exception will be considered as part of the review.
- Not commit to accepting or rejecting the information in the exception, but simply acknowledge it has been received and will be considered.
- Highlight the need for filing an objection with the court after the Director's Report is filed if the objector is dissatisfied with the finding for the water right.
- Include a statement or cc to the effect the claimant has been sent a copy.

The entire package, including the exception and the response, and any staff memoranda, should be scanned and profiled so they are available during claim review. Any paper copies, including the original exception, should be kept in the claim file.

The existence of the exception should be noted in the comment field so anyone in the department reviewing file will know the exception exists.

## ADJUDICATION MEMORANDUM #30

TO: Adjudication Bureau Staff

FROM: Don Shaff, Adjudication Bureau Chief 

SUBJECT: Point of Diversion: 10 Acre Tract

REVISED: April 20, 2009

This memo addresses when the point of diversion (POD) has to be determined to the ten-acre tract (QQQ) instead of to the 40-acre tract (QQ).

With the advent of GPS and GIS technology to determine PODs, the department's policy is to determine the POD to the greatest accuracy possible through the use of GIS imagery, claimant information and, where available, GPS technology. The legal description should reflect the Township, Range, Section, and 40-acre tract (QQ) or Government Lot and the department's spatial data will reflect the accurate POD.

Generally, the Adjudication Bureau's policy is not to describe the POD to a 10-acre tract (QQQ) because the increased accuracy and precision of GIS and GPS technology allow for a more precise spatial data point. However, there are licenses and approved transfers where the POD is described to the 10-acre tract, particularly where the source is a spring. For transfers, this is applicable only to approved transfers where the transfer changed the POD. The POD description to the 10-acre tract should be preserved for such licenses and transfers unless the POD is not within the described 10-acre tract and the new legal description can be described as an accomplished transfer.

## DIRECTOR'S MEMORANDUM

TO: Regional Offices, Water Allocation Bureau and Adjudication  
Bureau and Adjudication Bureau

FROM: R. Keith Higginson

RE: Rate of Flow and Volume for Water Rights With Source of  
Ground Water

DATE: November 1, 1990

Application Processing No. 51  
Permit Processing No. 16  
Adjudication Memo No. 31

A review of field examination procedures relative to measurement of rate of flow for diversions from ground water has resulted in the identification of certain water uses for which a theoretical computation is an acceptable substitute for measurement of rate of flow. The purpose of this memorandum is to describe situations where utilization of the theoretical computation is permissible.

The determination of which situations require measurement of rate of flow for a ground water right is outlined in Appendix 1. The procedure for determining rate of flow is described in Appendix 2. This memorandum shall be the authority for removal of flow measurement requirements from water right permits that are shown by Appendix 1 not to require measurement.

This procedure applies to rate of flow determinations for the preparation of water right licenses and adjudication Director's Reports.

**Appendix I** - Flow Chart for Determining if Flow Measurement is  
Required

**Appendix 2** - Procedure for Determining Rate of Flow

### APPENDIX I FLOW CHART FOR DETERMINING IF FLOW MEASUREMENT IS REQUIRED

[Attached](#)

## Appendix 2

### Procedure for Determining Rate of Flow

(Use this procedure in conjunction with Appendix 1)

- A. Measure the rate of flow of the system whenever it is possible at time the examination is conducted, even if it is not required.
- B. The licensed or decreed rate of flow is not always determined by the system capacity. This is the case when the system capacity obviously exceeds the permitted or claimed flow rate. In such cases no significant effort needs to be made to determine system capacity.
- C. An acceptable method of determining a rate of flow for licensing or the director's report for a system not requiring a measurement is as follows:

1. Evaluate whether system capacity is likely to be the limiting factor. If not, base the recommended rate for licensing or decree on the lessor of the permitted or claimed amount or the duty of water.

2. If the system capacity appears to be the limiting factor, make an acceptable estimate by refining the theoretical calculation. Compute the theoretical calculation as described below:

- a. Basic equation:

$$Q = \frac{(8.8) \times (HP) \times (E)}{H}$$

Where Q = rate of flow in cubic feet per second,  
HP = brake horsepower of the pump motor,  
E = pump efficiency, and  
H = total head.

- b. For purposes of field calculations, parameters are determined in the following manner:

1. HP is obtained from the motor nameplate.
2. E is considered to be the highest operating efficiency of the system, which is assumed to be 70% unless a higher efficiency can be demonstrated by the operator.

## Procedure for Determining Rate of Flow (Cont.)

3. H is computed as the sum of the dynamic lift (elevation distance between water surface during pumping and location of pressure reading) and the pressure head at the pump, computed as 2.31 times the pressure in psi.

### c. Procedure:

1. Determine HP from motor nameplate.
2. Determine dynamic pumping level (water level during pumping), based on a **combination** of at least two of the following:
  - a. Discussions with well owner.
  - b. Measurement with a steel tape, pressure tube, or electric well probe (plus a drawdown factor).
  - c. Information from exams conducted on nearby wells, if in a homogeneous aquifer, (including the amount of anticipated drawdown).
  - d. Information provided on a well log, particularly where the well driller shows pump test data with discharge and draw down.
  - e. Information from water level contour maps, such as in the Snake Plain Aquifer.
3. Measure pressure of mainline near the pump, or estimate this pressure based on the type of operating system (high pressure pivot, open discharge, etc.).
4. Compute the theoretical rate of flow.

### d. Example:

An irrigation system is found to have a 50 HP motor, a dynamic depth to water of 100 feet, and a pressure of 80 psi near the pump.

Procedure for Determining Rate of Flow (Cont.)

$$Q = \frac{(8.8) \times (\text{HP}) \times (\text{E})}{H} = \frac{(8.8) \times (50) \times (.70)}{(100 + \{2.31 * 80\})} = 1.08 \text{ cfs}$$

- e. Limitations: There are some situations where use of this equation is not applicable, for example where there is no means of determining even an estimate of the dynamic pumping level, and where artesian pressure creates a flowing well. In these situations either measurement is required or alternate techniques must be used to quantify estimated flow rates. Acceptable measurement techniques for these situations include (1) sprinkler measurements for pressurized systems, (2) timed fills of trapezoidal ditches for gravity flow systems, and measurement with a polysonic measuring device.

4. Refine the theoretical measurement by a variety of techniques, including reading the power meter if the system is operating to determine horsepower actually being used, evaluation of whether friction losses are relevant, review of pump design information to improve the estimate of efficiency, or obtaining information on measurements taken by pump installers, electrical companies, etc.
- D. When developed in conformance with Appendices 1 and 2, the theoretical rate of flow is an acceptable substitute for a measured rate of flow.

ADJUDICATION MEMORANDUM #32B

TO: Adjudication Staff

FROM: Carter Fritschle, Adjudication Section Manager *CF*

SUBJECT: Adding condition codes to adjudication recommendations

REVISED: August 9, 2013

The purpose of this memorandum is to serve as a guide for the use and importance of conditions and standard condition codes.

The Department uses conditions to further define the elements of water rights. Some conditions are unique to specific water rights and may require specific drafting to fit the circumstance (i.e., prior decree, water use agreement, historic practice, etc.).

Most commonly, however, the Department uses standard condition codes. The use of standard condition codes provides for consistent definition of water right elements and allows the Department to search for types of water rights. With standard condition codes, the Department can generate lists that may be used for various purposes. Watermasters and water districts may use the lists for assessment purposes and to determine regulated water rights within their boundaries. The Department depends on standard condition codes to administer water rights and send notices for water districts, water measurement districts, etc. Other areas of the Department, including the Hydrology section, often query standard condition codes to find enlargements and other types of water rights. Standard condition codes help the Department filter deferrable water rights (*de minimis* domestic & stockwater) from lists of water rights. The Department and the District Court also look to these condition codes for consistency in partial decrees.

**Without consistency among codes and in using codes, none of the above can be accomplished with a high level of certainty. The Department queries by the standard condition code, not the text of the condition. With this in mind, agents should use utmost caution in editing conditions.**

Unless the condition language indicates it should be edited (i.e., blanks in the condition language), agents should not edit standard conditions. For example, at the time of this writing, condition code N13 says, “The quantity of water under this right shall not exceed 13,000 gallons per day.” One of the most common changes made to N13 by novice agents is to change the limitation to 2,500 gallons per day. Condition code N06 says, “The quantity of water under this right shall not exceed 2,500 gallons per day.” Agents should not edit one condition when another standard condition is available. If questions arise as to whether a standard condition should be edited, staff should consult the Adjudication Section Manager.

As noted above, some standard conditions should be edited. For example, condition code X04 says, “Domestic use is for <#> homes.” The inclusion of the angle brackets and the lack of a number of homes indicate X04 should be edited to include the number of homes and the angle

brackets should be deleted. If domestic use is only for one home, the agent should use condition code X01. Agents should not edit condition X04 beyond what is indicated by the angle brackets.

If a non-standard condition is needed, staff should consult the Adjudication Section Manager.

This memorandum is divided into several sections to be more helpful. Some sections discuss specific types of water rights (i.e., domestic) and others discuss categories of conditions and why they are important. This memorandum is not meant to be all-inclusive, so agents should consult supervisors or Legal staff with additional questions.

A Workflow menu process, AJ Standard Conditions Export, should be used to generate an Excel spreadsheet of the current Adjudication and Water Right conditions.

**CHECKLIST OF MOST COMMON CONDITIONS**

The following conditions will likely be included on almost all active status recommendations:

Condition Code	Condition Text	Helpful tips
C18	This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.	Is automatically inserted once the recommendation is set to active in the ECVR summary page
PIN	Parcel No. _____	Should be used for all rights whenever possible. Can be modified to accommodate multiple parcels when the recommended place of use includes more than one parcel. Not commonly used for rights covering multiple ownership subdivisions, large irrigation projects or municipal rights but should be used for all other rights.
J01	Property is also known as Lot ____, Block ____, _(subdivision name)_.	Should be used for rights for one or more lots within a subdivision.

**EXPLANATORY V. GENERAL CONDITIONS**

For general purposes, Explanatory conditions will not appear on the face of the partial decree but will remain in the Department’s database. General conditions will appear on the face of the partial decree under “Other provisions necessary for definition or administration of this water right.” If a condition is necessary for water right administration, it should be a General condition as opposed to an Explanatory condition.

## **RECOMMENDING A PERMIT IN AN ADJUDICATION**

There are four steps to recommending a permit in an adjudication:

1. The agent should notify the Water Right Permits section and determine when the license will be issued.
2. If the license will not be issued prior to the Director's Report filing, the agent should set the Basis of the recommendation as permit and include condition A01 on the recommendation. Unless claimed differently than the permit, the recommendation should reflect the permit as closely as possible.
  - a. A01 currently says, "This right is conditioned upon completion of the appropriation in accordance with the statutory procedure for appropriation of water rights. This right remains subject to all conditions set forth in the permit upon which this right is based, and will be subject to all conditions set forth in the license issued by IDWR upon completion of the statutory appropriation process."
3. The agent should notify the Adjudication Section Manager of the recommendation. The Adjudication Section Manager will file a Notice of Administrative Proceeding (NAP) with the District Court.
4. When the license is issued, the Department will file a Notice of Completed Administrative Proceeding (NCAP) with the District Court, which changes the recommendation to match the license.

## **ACCOMPLISHED TRANSFER, ENLARGEMENT AND EXPANSION CONDITIONS**

See Adjudication Memorandum 16C for specific guidance.

## **CARRYING OVER CONDITIONS FROM LICENSES AND PRIOR DECREES**

Many adjudication claims are based on previously determined water rights, such as licenses or decrees. Agents should not remove or alter conditions from the previously determined water right without first consulting the Adjudication Section Manager or appropriate Legal staff. For more discussion, see the section on Explanatory v. General conditions above. The Workflow menu process, AJ Conditions, should be used to generate an Excel spreadsheet of the current Adjudication and Water Right conditions.

Sometimes a claim based on beneficial use will be filed adjacent to a previously determined right. In such cases, it is not uncommon to see more restrictive conditions on the previously recorded right and subsequent recommendation than on the right based on beneficial use. Agents should not apply the licensing conditions to the beneficial use right without consulting the Adjudication Section Manager or appropriate Legal staff. So as a rule of thumb, do not add a Water Right license condition to a beneficial use recommendation, unless the beneficial use right is replacing the licensed right.

## **DISALLOWED WATER RIGHTS**

Select P codes are used for disallowed water rights. Most of the P conditions consist of a General condition and a complimentary Explanatory condition. Both conditions should be included for any recommendation that will disallow the water right. Example: Conditions P01 and P11 (no lawful appropriation shown) should not be used for claims based on a license or

decree. This pair of conditions should be used for disallowing beneficial use rights. Be sure to check the usage description to insure you are applying the appropriate condition.

**DOMESTIC (SINGLE, MULTI-USE AND WELL AGREEMENTS)**

See Adjudication Memorandum 4 for specific guidance. There are specific condition codes that apply to domestic recommendations. These codes are often called the “N codes” because they begin with the letter N.

If the agent has questions as to whether a claim was filed as *de minimis*, he or she should check the receipt to determine if the claimant paid a \$25 claim fee or higher fee. If the claimant paid a \$25 claim fee, the claim should be recommended as *de minimis*. If the claimant paid a fee other than \$25, the claim should be investigated further to determine if the domestic use is *de minimis*.

If there are multiple *de minimis* claims for the same domestic place of use, such as water from more than one source, or if a *de minimis* claim is split, use condition code N19 in place of N13.

**Condition codes that say the recommended use is not a determination of historical beneficial use should only be used on *de minimis* domestic and/or stockwater recommendations.**

The table below lists the most commonly used condition codes for *de minimis* domestic recommendations:

Condition Code	Text	Helpful tips
N11/N13		Used when recommendation is for <i>de minimis</i> domestic. <b>Both should be used together for recommendations based on beneficial use. Both codes should also be used together when recommending <i>de minimis</i> domestic and stockwater on the same recommendation.</b>
N10/N12		Used when recommendation includes <i>de minimis</i> domestic with other uses except <i>de minimis</i> stockwater. <b>Both should be used together for recommendations based on beneficial use.</b>

X01	Domestic use is for 1 home.	Used when recommendation is for domestic use for 1 home.
X04	Domestic use is for <#> homes.	Used when recommendation is for domestic use for <b>more than 1</b> home.
J01	Property is also known as Lot ___, Block ___, _(subdivision name)_.	Should be used when the Department knows the Lot #, Block designation and subdivision name.
PIN	Parcel No. _____	Should be used when the Department knows the parcel number or PIN.

### **FIRE**

Generally there are no specific conditions added to adjudication recommendations, unless there were specific conditions added during licensing or with an approved transfer.

### **FORFEITURE**

The period of non-use must always be documented in the recommendations. Either condition P01 or P31 must be included in the recommendation.

### **IRRIGATION (OVERLAPPING CONDITIONS MOST FREQUENTLY USED)**

E conditions: Use E51 through E54 to limit combined diversion rate and/or diversion volume. Use E55 through E58 to limit combined acreage. If none of these conditions appear appropriate for the recommendation, consult the Adjudication Section Manager or appropriate Legal staff.

K conditions: Use K06 to limit the number of acres that may be irrigated in a single irrigation season under the right (always replace X27 with K06). K06 is always used with a permissible place of use when the original right was for less acres than described for the permissible place of use.

R conditions should be replaced with the appropriate E condition.

### **IRRIGATION RECOMMENDATIONS WITH LARGE POU**

Condition 135 is inserted automatically whenever a large POU is created in the Claims Verification Record. The claim reviewer will need to change “SRBA District Court” to “CSRBA District Court” until the condition template is modified at the completion of the SRBA.

### **MINING**

Generally there are no specific conditions added to adjudication recommendations, unless there were specific conditions added during licensing or with an approved transfer.

## **MUNICIPAL**

Conditions 124 – 128 address the POU for municipal providers. Condition 135 is inserted automatically whenever a large POU is created in the Claims Verification Record. The condition should be deleted for recommendations that only have municipal and/or municipal storage purposes of use.

Conditions 208 – 211 address the accomplished changes in the PODs for municipal providers.

## **PONDS/STORAGE**

Occasionally the volume of storage claimed may exceed the capacity of the storage reservoir or pond due to the historical practice of filling the reservoir or pond multiple times in a single year. If this practice can be verified, Condition 164 should be included in the recommendation to establish the capacity of the storage reservoir or pond independent of the total volume recommended.

## **PURPOSE OF USE CONDITIONS**

Purpose of use conditions are used when non-irrigation uses are included on the recommendation. These frequently are not associated with a specific condition code.

## **SEASON OF USE CONDITIONS (ALSO CALLED SHOULDER REMARKS)**

Sometimes the standard season of use for an irrigation water right has changed and the Department now recognizes a longer season than previously recorded. In that case, the recommended season of use should reflect the original right's season of use, but include a so-called "shoulder remark" to reflect the currently recognized season of use. The shoulder conditions are: S35, S37-S42, S46 and S47.

## **SPLIT WATER RIGHTS**

Condition P21 should be included in the recommendation for the child rights created by a split of a water right or claim (i.e., the parent right or claim).

Condition P22 should be included in the Parent record of a claim that has been split.

## **STOCKWATER**

See Adjudication Memorandum 4 for specific guidance.

If the agent has questions as to whether a claim was filed as *de minimis*, he or she should check the receipt to determine if the claimant paid a \$25 claim fee or higher fee. If the claimant paid a \$25 claim fee, the claim should be recommended as *de minimis*. If the claimant paid a fee other than \$25, the claim should be investigated further to determine if the stockwater use is *de minimis*.

There is a special condition code for instream stockwater. Condition code N18 is used for all non-diverted stockwater rights.

**Condition codes that say the recommended use is not a determination of historical beneficial use should only be used on *de minimis* domestic and/or stockwater recommendations.**

The table below lists the most commonly used stockwater condition codes:

Condition Code	Text	Helpful tips
N11/N13		Used when recommendation is for <i>de minimis</i> stockwater. <b>Both should be used together for recommendations based on beneficial use.</b> <b>Both codes should also be used together when recommending <i>de minimis</i> domestic and stockwater on the same recommendation.</b>
N05/N08		Used when recommendation includes <i>de minimis</i> stockwater with other uses except <i>de minimis</i> domestic. <b>Both should be used together for recommendations based on beneficial use.</b>
X02	Stockwater use is for <10 range cattle>.	Used to describe number and type of stock.
J01	Property is also known as Lot ____, Block ____, _(subdivision name)_.	Should be used when the Department knows the Lot #, Block designation and subdivision name.
PIN	Parcel No. _____	Should be used when the Department knows the parcel number or PIN.

Note: All claims in which only a \$25.00 filing was paid require a condition limiting the right to either 13,000 gallons per day for Idaho Code § 42-111(a) domestic uses or 2,500 gallons per day for Idaho Code § 42-111(b) domestic uses. This applies to claims based on licenses and/or decrees as well as beneficial use claims.

## ADMINISTRATOR'S MEMORANDUM

**TO:** WATER MANAGEMENT DIVISION STAFF

**FROM:** NORMAN C. YOUNG

Transfer Processing No. 15  
Adjudication Memo No. 33

**DATE:** JUNE 3, 1991

**RE:** TRANSFER APPLICATION PROCESSING & SRBA CLAIM AMENDMENTS

=====

This memo provides direction for amending adjudication claims and filing transfer applications related to both statutory rights (decreed rights, licenses and statutory claims) and Snake River Basin Adjudication (SRBA claims).

When a statutory right is changed by an approved transfer, the adjudication claim that has been filed on the same statutory right must be amended. Section 42-1409(4), Idaho Code states in part:

“...with respect to any water right for which a change was approved by the director pursuant to sections 42-211 or 42-222, Idaho Code, after filing the notice of claim and prior to filing of the director's report, the claimant shall amend the notice of claim consistent with the determination of the director on the change.”

Transfers involving both statutory rights and adjudication claims may fall within one of the following broad categories or scenarios:

- 1) Transfer filed for proposed change or changes made after commencement of adjudication and after filing of adjudication claim, where the adjudication claim matches the statutory right before making the change;
- 2) Transfer filed for a proposed change or changes made after the commencement of adjudication and after filing of adjudication claim, but the adjudication claim does not match the statutory right before making the change;
- 3) Transfer filed on an adjudication claim based on beneficial use (i.e.; there is no existing statutory right).

### PROCESSING OF TRANSFER APPLICATIONS

In example no. 1, a transfer application does not need to describe the adjudication claim. However, item A.1. of part 2 of the application should at least reference the adjudication claim number if one has been filed. **The regional office shall attach a copy of the appropriate adjudication claim proof report when forwarding the transfer**

**application to the state office.** The remarks section of part 1 of the transfer application can be used to describe the relationship between the statutory right and adjudication claim.

In example no. 2, where the transfer proposes changes to a statutory right that is recorded differently by an adjudication claim, the transfer application should describe both the statutory right and the adjudication claim. The legal notice must also show the right as recorded by the original decreed/statutory right as well as the adjudication claim. An example of this advertising format is provided as attachment A. This procedure for filing and advertising transfers should also apply to those situations whereby the adjudication filing(s) claim an expansion of the statutory right based on one or more presumption clauses of Section 42-1416, Idaho Code. However, the Department will not approve a transfer for the expanded portion of a right since Section 42-222, Idaho Code does not authorize the Department to approve changes which constitute an enlargement of the original right.

In example no. 3 above, where a change is proposed that is documented only by an adjudication claim, field examinations must be conducted by the regions to confirm the use claimed prior to making final recommendations and forwarding the transfer to the state office.

**The Water Allocation Bureau shall forward a copy of each transfer within the SRBA to the Adjudication Bureau upon final approval or decision of the application.**

#### ADJUDICATION CLAIM AMENDMENTS

In order to satisfy the requirements of Section 42-1409(4), Idaho Code and simplify the procedure for amending adjudication claims, each approved application for transfer will be treated as the Department's notice of an amendment to the adjudication claim. The Department therefore will not require transfer applicants to file separate adjudication claim amendments.

#### NOTICE OF PROPOSED CHANGE OF WATER RIGHT NO. 37-0900

Notice is hereby given that John Doe of Somewhere, ID has applied to the Department of Water Resources to change the following described water right(s) pursuant to section 42-222 of Idaho Code.

**WATER RIGHT AS RECORDED**

Water Right No. 37-0900

Basis of Right: Decree to J. Jones in case of Jones vs. Smith, dated 12/9/1910 in 1st District

Court, Idaho County.

Source: Snake River tributary to Columbia River

Priority Date:

Amount of Water:

Use:

Points of Diversion: SWSW, S22, TIN, R23E

Place of Use: 160 acres in

**WATER RIGHT CLAIMED IN SNAKE RIVER BASIN**

**ADJUDICATION:**

Water Right No. A37-0900

Name: A. Jackson

Basis of Right: Decreed Right 37-0900

Source: Snake River tributary to Columbia River Priority Date:

Amount of Water:

Use:

Points of Diversion: SWSE, S22, TIN, R18E

Place of Use: 160 acres in NENE, NWNE, SWNE, NENW,  
S28, TIN, R18E.

**WATER RIGHT NO. 37-0900 & ADJUDICATION CLAIM NO.  
A37-0900 TO BE CHANGED AS FOLLOWS:**

Points of diversion: SWSE, SESE, S22, TIN, R18E

Place of Use: 150 acres in NENE, NENW, S28 TIN R18E;  
SWSW, SESW, S22, TIN R18E.

## ADJUDICATION MEMO 34

TO: Adjudications Staff  
FROM: Dave Tuthill  
DATE: October 22, 2002  
RE: Diversion Volumes in Director's Reports

### 1. Ground water rights

All rights recommended with a source of ground water are to include annual diversion volume, except for ground water rights or portions of ground water rights used solely for:

- a. small D&S purposes as defined by Idaho Code §§ 42-111 or 42-1401A (5) and (12), in which a diversion volume has not been previously determined.
- b. municipal purposes,
- c. fire protection purposes.

### 2. Other rights

All other rights to be recommended based on a license or decree that stated an annual diversion volume limitation are to include annual diversion volume.

### 3. Storage

Amounts for storage rights should be determined as described in the administrator's memorandum, application processing #14.

## ADJUDICATION MEMO #36

**TO:** Adjudication Staff  
**FROM:** Marci Sterling  
**RE:** Water Use for Dairies  
**DATE:** May 12, 1992

The need has arisen for quantification of the diversion rate and volume for dairy claims and the consumptive use volume for those exceeding the 13,000 gallon per day domestic and stock limitation. Some information has been collected to assist in making a determination and those ideas will be presented here.

A LOTUS 123 spreadsheet has been developed which, provided with the necessary information, will analyze the inputted values and supply the user with approximations of several elements of the water right. The spreadsheet will calculate the stockwater diversion rate, diversion volume, and consumptive use volume, along with the commercial diversion volume and consumptive use volume. These values are merely estimates and should be used only if no method of measurement is available. The spreadsheet may be found on Node 1.

### **DIVERSION RATE**

Stockwater diversion rate estimates given on the spreadsheet for both milking and nonmilking cattle were taken directly from the administrative memo, Application Processing Memo #3. Commercial diversion rates must be determined by some other method.

The horsepower equation, which has been supplied on the spreadsheet, may be useful for determining the diversion rate of the commercial portion of the right(s). The information necessary for the equation must be supplied by the user. The maximum flow rate which can be expected for the existing system, assuming the pumping plant is 70% efficient, will then be calculated. The maximum diversion volume based upon that flow rate will be computed also, presuming the pump is allowed to run continuously all year. Caution should be used when applying this equation. A good understanding of the system is necessary to ensure that the equation is being used properly. Small holding tanks are often used along with booster pumps to supply the necessary water to systems. The booster pump is not the correct pump to be analyzing with the horsepower equation. In cases where multiple pumps are being used and each serves a specific, identifiable purpose, the spreadsheet allows the equation to be used to analyze each individual pump.

## **DIVERSION VOLUME**

The water used to wash tanks, floors, and cattle prior to milking is all taken into account when the commercial diversion volume is calculated. The cattle washing may be done using one of three techniques: manual, automatic, or sprinklers in the holding pen, which also serve to flush the holding pen. The source of the information for approximating these volumes is Bulletin No. 694 by the University of Idaho Cooperative Extension Service, "Dairy Waste Management: System Planning - Estimating Storage" by Dean E. Falk and Robert M. Ohlensehln. Some information was also obtained through phone conversations with Dean Falk. Stockwater diversion volume estimates were taken from the same administrative memo as the stockwater diversion rates.

In the spreadsheet, the number of cattle is multiplied by a factor, resulting in a total diversion volume or rate. In addition, a line was added which will round the number of cattle up so that the volumes and rates calculated will match those given in the table from the administrative memo. This was done so that consistency can be maintained between the spreadsheet and licensing procedures in the past.

## **CONSUMPTIVE USE**

Consumptive use is a factor that must be dealt with in the operation of dairies. If a dairy is claiming only a stockwater use with a limiting volume of 13,000 gallons per day, consumptive use may be assumed to be de minimus. For larger dairies, the consumptive use must be determined.

The water contained in the milk that leaves the dairy is consumptively used, so it must be accounted for in the consumptive use volume. Using information supplied by the University of Idaho Cooperative Extension Service for the average annual milk production per dairy cow in 1989 and their estimate that a cow's milk is 87% water, a consumptive use of 0.0058 ac-ft/yr per dairy cow was calculated. This means that approximately 172 dairy cattle would consumptively use 1 ac-ft/yr of their drinking water for milk production. Estimates of the amount of water which is consumptively used by a particular number of dairy cows for the production of milk may be found in the attached table or in the LOTUS spreadsheet. For example, if a dairy farm in Jerome has 550 dairy cattle, the consumptive use from the milk production would be 3.50 ac-ft/yr.

A little water is lost through evaporation from the wastewater lagoons for dairies. These evaporation losses must be considered in estimating consumptive use volumes for the wastewater systems. Ideally, the amount lost due to evaporation could be defined by the number of head of dairy cattle contained on the property. However, because individual waste handling systems are designed differently, that amount may vary somewhat for dairies of equal size.

Certain types of lagoons lose very little of the water stored in them to evaporation, no matter what their size. There are two major types of waste lagoons: aerobic and anaerobic.

Aerobic lagoons depend on interaction with air to provide the oxygen necessary to support the bacteria which digest the waste material. Because of the need for oxygen, they are designed to be shallow (between 3 and 5 feet) and to have a large surface area. Anaerobic lagoons do not use oxygen in the chemical process to break down the organic matter. Because of this, they can be deeper (from 12 to 20 feet) and can have smaller surface areas. They also characteristically form a crust on the surface which prevents reactions with the air, including evaporation. Evaporation from a lagoon only becomes significant if the lagoon has a surface area of at least half an acre. If you encounter one which is at least that size, you should attempt to determine whether it is aerobic or anaerobic from these brief descriptions and consider evaporation for aerobic lagoons only.

The use of lagoons and manure stacks is the most common method of waste disposal. The amount of evaporation from a manure stack would be fairly small and very difficult to determine, so it will not be considered here. If a lagoon is half an acre or larger, the portion of the consumptive use volume due to evaporation will be about equal to the evapotranspiration (ET) value for alfalfa (or about 80% of the reference ET) for that area multiplied by the number of acres of surface area. This conclusion was made using information found in the report, Monthly Shallow Pond Evaporation in Idaho, by Myron Molnau and Kojo C.S. Kporde, and using evapotranspiration data from the 1983 report, Estimating Consumptive Irrigation Requirements For Crops In Idaho, by R.G. Allen and C.E. Brockway.

To simplify the determination of the consumptive use due to evaporation, a map supplying the necessary information has been provided with this memo. The state has been divided into different climatological regions and each has been given a particular per acre consumptive use value. Those figures were determined using the reference evapotranspirations given in the Allen & Brockway report. For each of the 98 stations in the state, the reference ET was multiplied by 0.80 and the result was transferred to the map. All those within a particular region were averaged and rounded up to the nearest 0.5 acre-feet per acre. The boundaries between regions are the same as those from the Department's 1991 Consumptive Irrigation Requirement, Field Headgate Requirement, & Season of Use map. Once you determine the region in which a dairy is located, the figure found on the map for that region may be multiplied by the surface area of the sewage lagoon. The result would be the total annual consumptive use volume due to evaporation. The spreadsheet will also provide that information. If the dairy farm described above has a sewage lagoon with a surface area of 3/4 acre, the annual consumptive use due to evaporation would be:  $(0.75 \text{ ac}) \times (4.0 \text{ ac-ft/ac-yr}) = 3.0 \text{ ac-ft/yr}$ .

There is some inconsistency in the way water use for dairies has been claimed in the adjudication. The manner in which the consumptive use should be recommended will not

be as variable. Below are the possible scenarios and how to handle the consumptive use for each:

1. For stockwater claims under 13,000 gpd, no consumptive use volume is required.
2. If both stockwater and commercial uses have been claimed on a single claim, the consumptive use volume for each portion should be determined using the information supplied here and the total consumptive use volume should be assigned to the claim.
3. If the stockwater and commercial uses for a dairy have been claimed on separate claims, the consumptive use for each component should be determined separately. The consumptive use volume due to the milk production should be assigned to the stockwater claim, and the consumptive use volume caused by the lagoon evaporation should be assigned to the commercial claim.
4. If only a commercial use has been claimed and that claim is known to include the stockwater use also, the facility should still be analyzed as if both stockwater and commercial uses have been claimed and the consumptive use for each component should be determined. When the right is recommended, a stockwater component should be added to the right, along with its respective consumptive use. An amendment to the claim and an additional fee will not be necessary.

To summarize, there are two main consumptive uses of water for dairies. They consist of the portion of the drinking water which is contained in the milk and the water lost due to evaporation from sewage lagoons. The amount of water which is consumptively used for the production of milk can be found in the attached table. The consumptive use volume for evaporation from any aerobic lagoons may be obtained using the attached map and the method described above. Both volumes may also be found using the spreadsheet described above. If the lagoon is large enough to be considered, its consumptive use volume should be added to the amount used for milk production. The total annual consumptive use for the dairy farm in the example would be 6.50 ac-ft/yr.

## **RECOMMENDED CONSUMPTIVE USE FOR MILK PRODUCTION DAIRIES**

### **Number Consumptive of head Use (afa)**

0-10 0.1

11-25 0.1

26-50 0.3

51-100 0.6

101-200 1.2

201-300 1.7

301-400 2.3

401-500 2.9

501-600 3.5

601-700 4.1

701-800 4.6

801-900 5.2

901-1000 5.8

If there are more than 1000 head of stock, round the number of head to the next highest 100 and multiply by 0.0058.

**NOTE:**

\* If applicable, determine the consumptive use volume due to evaporation losses in the wastewater lagoon(s), then add those figures to the appropriate ones above.

## ADMINISTRATOR'S MEMORANDUM

To: Water Management Division  
Adjudication Bureau

Application Processing Memo #52  
Licensing Memo #9  
Transfer Processing Memo #16  
Adjudication Memo #39

From: Norman C. Young

Re: STANDARDS FOR IRRIGATION CONSUMPTIVE USE REQUIREMENTS,  
IRRIGATION FIELD HEADGATE REQUIREMENTS, AND IRRIGATION SEASON OF  
USE

Date: October 12, 1999

A new 1:1,000,000 scale map of the "Irrigation Season of Use" (map at end of memo) presents a new standard for use in water right adjudication and water right licenses, permits, and transfers. A reduced reproduction of the map is attached to this memo; the reduced reproduction is for illustrative purpose only. The official version of the map is in digital format and can be accessed by contacting the Adjudication Bureau. A full-size copy of the map is available in the SRBA map case.

The 1:1,000,000 scale map of the state of Idaho dated December 1991 and entitled "Consumptive Irrigation Requirement, Field Headgate Requirement and Season of Use" (map at end of memo) is still necessary for the Consumptive Irrigation and Field Headgate Requirements. A reduced reproduction of the map is also attached to this memo; the reduced reproduction is for illustrative purpose only. An official copy of the map is available in the SRBA map case.

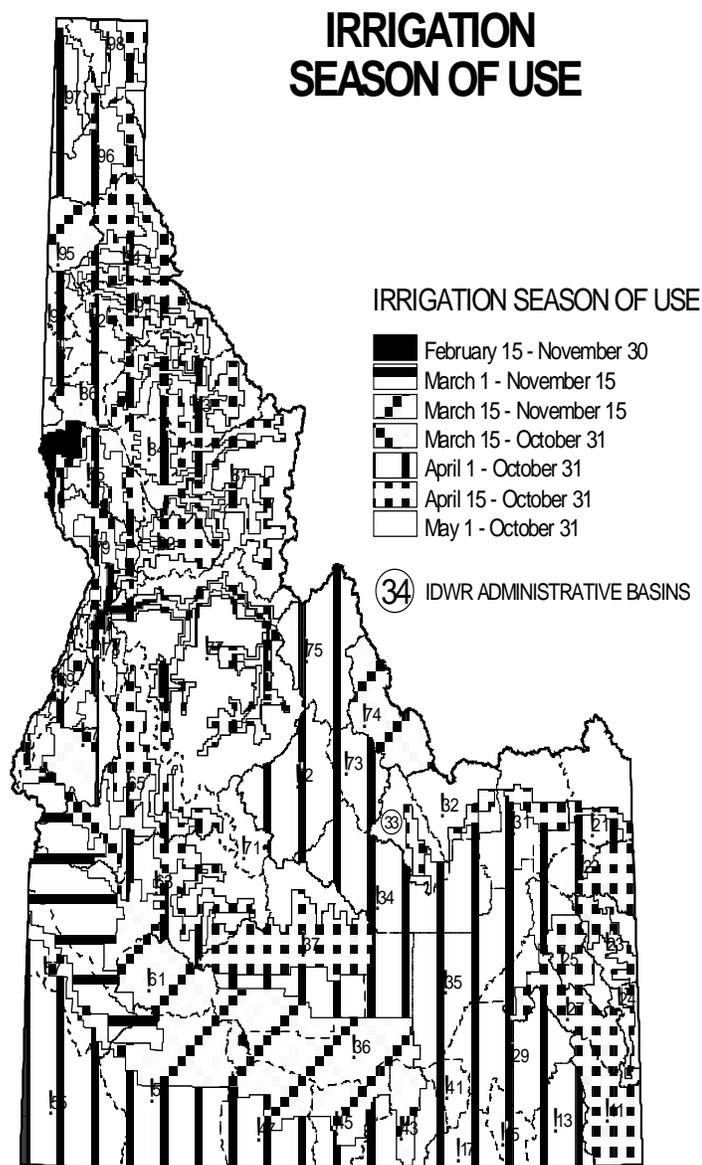
The purpose of these maps is to provide consistent standards in a simple format. Further information concerning the foundation for these standards is available from Jeff Peppersack.

The standard season from the new map is to be used for a new permit regardless of the season stated on the application unless it can be shown to the satisfaction of the director that a different season of use is necessary. Likewise, the standard season from the new map is to be used for a new license regardless of the season stated on the permit unless it can be shown to the satisfaction of the director that a different season of use is necessary.

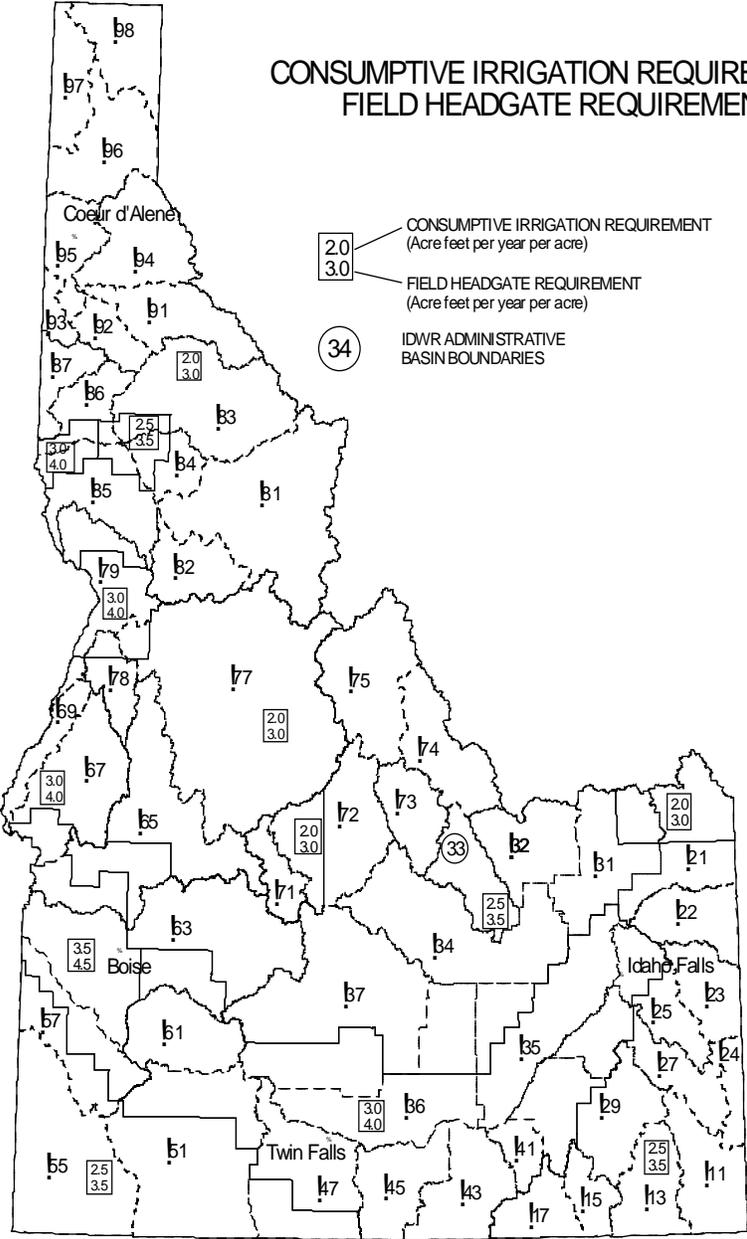
For a transfer of a license or decreed water right, the transfer approval should retain the licensed or decreed season. However, when the new standard season is longer than the licensed or decreed season, an approval condition like the following may be added:

The period of use for the irrigation described in this approval may be extended to a beginning date of new standard and an ending date of new standard provided that beneficial use of the water can be shown and other elements of the right are not exceeded. The use of water before licensed or decreed date and after licensed or decreed date is subordinate to all water rights having no subordinated early or late irrigation use and a priority date earlier than the date of this approval.

The standard season from the new map is to be used for recommendations in the SRBA as described in the Claim Investigation Handbook.



# CONSUMPTIVE IRRIGATION REQUIREMENT, FIELD HEADGATE REQUIREMENT



## ADJUDICATION MEMORANDUM #40A

TO: Adjudication Section Staff

FROM: Carter Fritschle, Adjudication Section Manager *CF*

SUBJECT: Notice of Error Procedure

REVISED: March 2, 2015

The filing of the Preliminary Director's Report with opportunity for the claimants to submit a Notice of Error reply to the Department is a courtesy, and it is not a requirement for current adjudications as it was at the beginning of the Snake River Basin Adjudication. However, IDWR found the process useful in identifying and correcting errors in the recommendations prior to filing the Director's Report with the court. Therefore, the practice has continued and the following guidelines should be followed to ensure the success of the process.

All returned Notices of Error should be scanned and ultimately placed in the claim file. Notices of Error in which the claimant agrees with the recommendation require no further action.

Any Notice of Error reply in which the claimant disagrees with IDWR's preliminary recommendation should be reviewed by the agent who made the recommendation if that is reasonably possible. If the agent who made the recommendation is not able to review the Notice of Error, another agent should be assigned to the review.

If the changes requested by the claimant are indeed errors that occurred during the recommendation process, the agent should make the requested changes and notify the claimant that the changes have been made. Notification can be by email, phone call or letter, and must be documented in the claim file.

In some circumstances, the requested changes can only be made if the claimant amends their claim. If an amended claim is necessary, the agent should offer to draft an amended claim and send it to the claimant for signature. If additional claim fees are required as a result of the amended claim, those fees must be returned with the amended claim in order to make the requested changes.

If the Notice of Error reply requests changes that challenge IDWR's policies or the statutes that govern the adjudication process, the agent should contact the attorney assigned to the adjudication and the adjudication section manager. The attorney and section manager will work with the agent to determine the appropriate response.

If the requested changes cannot be made, the claimant should be notified that IDWR cannot change the recommendation as requested, and that the claimant will need to address the issues with the objection process. It is generally best to notify the claimant by letter; however, notification by email or phone call is acceptable as long as the notification is documented in the claim file.

Note: If the claimant files the Notice of Error reply agreeing with the recommendation, but later changes his/her mind and files an objection, the filing of a Notice of Error in agreement with the recommendation is not binding on the claimant.

## ADJUDICATION MEMORANDUM #41

TO: Adjudication Bureau Staff

FROM: Don Shaff, Adjudication Bureau Chief 

SUBJECT: Finality of Administrative Decisions for Licenses and Transfers

REVISED: July 7, 2009

This memo seeks to answer the question, "Can IDWR recommend the adjudication claim differently than the administrative decision (license or transfer) for the claimed water right?"

Generally, IDWR must recommend the adjudication claim consistent with a previous administrative decision, such as a license or transfer on a licensed or decreed water right. However, a water right can be recommended differently than stated on a license or transfer if a subsequent administrative action has modified the previous water right record, or:

- a) The right is forfeited or abandoned, in whole, or in part,
- b) The difference can be deemed an accomplished transfer (See Section 42-1425, Idaho Code, for applicable dates),
- c) The descriptions on the license or transfer are incomplete (See Section 42-1427, Idaho Code), or
- d) The license or transfer was issued with a source of ground water but no annual diversion volume limit (See Adjudication Memorandum #34).

If the options above do not resolve a discrepancy on the license or transfer, adjudication staff should request the Water Allocation Bureau Chief consider amending the license or transfer. Adjudication staff should route the request through the Adjudication Bureau Chief to allow monitoring of the submitted requests. The Water Allocation Bureau Chief will determine if a subsequent change in the license or transfer is warranted based on the individual case. If a change is warranted, IDWR will issue an amended license or transfer.

Questions have arisen regarding the finality of transfers where elements of the water right are copied from the existing record without review. Finality of the transfer is generally only applicable to those elements specifically addressed in the transfer. For example, a claim filed for an accomplished change in place of use can still be recommended with the change in POU if the transfer only addressed point of diversion.

This can also apply to transfers on statutory claims. For example, if a statutory claim had a priority date of 1902 and a transfer was approved only for POU, the recommended priority date would be the date supported by the evidence submitted. Here again, the finality of the transfer is applicable only to those elements specifically addressed in the transfer.

See the Adjudication Bureau Chief for additional guidance on specific situations that deviate from these general conditions.

## ADJUDICATION MEMO #42

To: Adjudication Staff

From: Jeff Peppersack

Date: May 5, 1995

Approved: NCY DBS

Re: Irrigation Diversion Rate Calculations - Peak Consumptive Use

This memo is notification of a change in our standard procedure to calculate irrigation diversion rates as described in the EVALUATION WORKBOOK FOR IRRIGATION DIVERSION RATES and GUIDELINES FOR THE EVALUATION OF IRRIGATION DIVERSION RATES by Hubble Engineering, Inc. and Associated Earth Sciences Inc. This change will affect the application of consumptive use values from the Allen and Brockway tables.

The design capacity of an irrigation system is generally based on the peak consumptive use of the expected cropping pattern for the period between irrigations. Since peak consumptive use data is not widely available for crops in Idaho, the Hubble workbook and guidelines direct you to use average monthly consumptive use values for the most water consumptive crop in the area or in the rotation. This method may underestimate diversion requirements, especially in cases where a single crop is grown.

A method of estimating peak consumptive use rates from monthly estimates is available from the ASAE publication entitled, DESIGN AND OPERATION OF FARM IRRIGATION SYSTEMS by Marvin Jensen, 1983. The table below was derived from Figure 6.6 (page 223) of that publication. These table values will be used in conjunction with the Allen and Brockway consumptive use tables.

### Estimating Peak Consumptive Use From Monthly Estimates

Irrigation Application Depth	Ratio of Peak CU to Monthly CU
1	1.14
2	1.11
3	1.09
4	1.07
5	1.05
6	1.04
7	1.03

Irrigation application depth, the amount applied during an irrigation, is calculated for each crop using Table 4 in the Hubble workbook.

Table 1 in the Hubble workbook requires input of the crop's "AVE IR", for each month, from the Allen and Brockway tables. The "AVE IR 11 represents the average monthly consumptive irrigation requirement for each crop. The monthly values should be multiplied by the appropriate ratio from the table above. The results are estimates of the crop's peak consumptive irrigation requirement for each month. These values are entered into Table I of the Hubble workbook. This must be done for the most water-consumptive cropping pattern, or mix of crops in the crop rotation, instead of just the most water consumptive crop as was done in the past.

Example: A farmer in Aberdeen grows grain and alfalfa hay on a 100-acre farm. The crop rotation practiced never allows more than 75 acres of either crop in any given year. From Table 4 in the Hubble workbook you calculate a MAD (irrigation application depth) of 2.4 inches for the grain and 3.1 inches for the alfalfa. From the table above you choose a ratio of 1.11 for the grain and 1.09 for the alfalfa. The attached sheets show the calculations using the Allen and Brockway table for the Aberdeen station and the entries into Table 1 of the Hubble workbook.

## ADJUDICATION MEMO # 43

TO: Adjudication Staff Approved: NCY

From: Jeff Peppersack DBS

Date: July 27, 1995

Re: Irrigation Diversion Rate Calculations - Weighted Averages

This memo is notification of a change in our standard procedure to calculate irrigation diversion rates as described in the EVALUATION WORKBOOK FOR IRRIGATION DIVERSION RATES by Hubble Engineering, Inc. and Associated Earth Sciences Inc. This change will affect the calculation procedure described for Table 1 of the report.

Table 1 requires calculation of a weighted average for efficiency and net irrigation requirement based on acreages of each crop. These "summary" values are used in the next step which requires selection of the largest summary monthly value of net irrigation requirement to divide by the summary efficiency which results in the field requirement.

The change to this procedure is described as follows: After entering each crop's net irrigation requirement for each month (see Adjudication Memo #42), divide by the efficiency of the individual system for each crop. The result will be the crop's peak field requirement or the gross application amount for each month. Next, calculate a weighted average (based on crop acreages) of the gross application amount for each month. Select the largest summary value of gross application amount and convert to cfs/acre as described in the Hubble workbook.

A new spreadsheet has been developed to aid in the calculations required for Table 1 of the Hubble workbook (see example attached). This spreadsheet also incorporates the changes to the Hubble methodology described in Adjudication Memo #42. Average irrigation requirement values can be entered directly from the Allen and Brockway tables. Peak consumptive irrigation requirement values will be calculated automatically in the spreadsheet.

Please discontinue using all past spreadsheets using the old methodology. Copies of the new spreadsheet can be obtained from Jeff Peppersack.

**ADMINISTRATOR'S MEMORANDUM**  
**Application Processing Memo#60**  
**Adjudication Memo # 44**

To: Water Management Division  
Adjudication Bureau

From: Norman C. Young

Re: Irrigation Diversion Rate for Turf Grass in Public Areas

Date: August 15, 1996

Irrigation of turf grass in public areas such as golf courses, parks, schools, and cemeteries often requires that the irrigation occur during the night or early morning hours. Since water cannot be applied continuously over a 24-hour period, the irrigation diversion rate is often higher than the statutory standard of 0.02 cfs per acre.

In some cases, a holding pond or regulation pond may eliminate the necessity of diverting a higher rate from the source. A holding pond is used to store the daily requirements of the irrigation system. The diversion rate from the source to the holding pond is based on the continuous-use irrigation requirement and the diversion rate from the pond to the irrigation system is based on the actual hours of operation of the system.

In situations where a holding pond is not practical, a higher rate is considered reasonable and necessary. The diversion rate for a new water right should be based on the requirements of a modern irrigation system with proper management. In an adjudication of water rights, the diversion rate recommended cannot exceed the historical diversion rate nor the amount determined to be reasonably necessary using acceptable irrigation practices. In both cases, a condition is required that limits the daily volume of water diverted.

To calculate the irrigation diversion rate for turf grass for irrigation systems that can not apply water continuously, divide the diversion rate based on continuous operation by the ratio of actual hours of operation per day to 24 hours per day.

Example: A golf course irrigates every day from 10 p.m. to 6 a.m. (eight hours per day) . Based on an analysis of the irrigation diversion requirements, the irrigation diversion rate is calculated to be 0.02 cfs per acre under continuous operation. The diversion rate based on the reduced operation time would be 0.06 cfs per acre (0.02 divided by 8/24) . The diversion rate of 0.06 cfs per acre is considered reasonable and necessary due to the

operation time limitations of the system. This water right must include a condition which limits the daily volume of water diverted.

## ADJUDICATION MEMORANDUM #45

**TO:** Adjudication Staff  
**FROM:** Don Shaff, Adjudication Bureau Chief   
**SUBJECT:** Corrections to Partial Decrees  
**REVISED:** August 31, 2009

This memorandum describes the procedure for correcting errors in partial decrees.

### **Corrections to Name and Address Only**

If the right holder identifies a clerical error in a name or address in the partial decree, two paths can be taken:

- The department will update its data entry via an address change form received from the right holder. In this case, the court's records will not be modified with the correct information.
- If it is important to the right holder the change be reflected in the partial decree, it is their responsibility to contact the court directly.

### **Corrections to Other Elements**

Requests for changes to elements other than name and address should be referred to the court. If the right holder identifies the error to the department, the claimant should be advised to contact the court. If the department identifies the error, department staff should prepare a letter to the court and provide copies to the right holder and claim file. In some cases where the right holder identifies the error and the department sees just cause, the department will initiate contact with the court.

## ADJUDICATION MEMO #46

TO: Adjudication Staff  
FROM: Dave Tuthill  
DATE: Updated March 1, 2002

Approved by: NCY

RE: Claims For Purposes of Use Other Than Wildlife Based Upon "D-Permits"

Questions have arisen recently concerning recommendations for claims based on "D-Permits." Specifically, many "D-Permits" upon which these claims are based include purposes of use other than stockwater even though § 42-501, the statute upon which "D-Permits" are based, specifically limits the purpose of use to stockwater. Most commonly, uses for wildlife, firefighting, and domestic purposes appear on the permits. The Department will not recommend "D-Permit" claims in the SRBA for uses other than stockwater. However, the holders of "D-Permits" containing purposes of use other than stockwater may have acquired a beneficial use right for the other listed purposes of use, and the Department will recommend a separate split right for these other purposes of use according to the following guidelines:

1. Stockwater is the only purpose of use that will be recommended for "D-Permit" claims.
2. Any purpose of use other than stockwater will be recommended as a beneficial use claim.
3. Where a claim based upon a "D-Permit" contains stockwater in addition to another purpose of use, the claim will be split into two separate recommendations.
  - The first split right will be for the stockwater purpose of use. The elements of the water right should be recommended as they appear on the permit.
  - The second split right will be for the other purposes of use with elements of the right identical to the first split right recommendation, with the exception of purpose of use and basis of claim. The basis of claim for the second split right will be beneficial use.
4. When a split is created, each recommendation should contain a standard combined diversion remark which limits the quantity used (diversion rate or storage volume) to the quantity shown on the face of the "D permit." (ie. Use of this right with right number \_\_\_\_\_ is limited to a total combined diversion rate of \_\_\_\_\_ cfs).

ADJUDICATION MEMO #47

TO: Adjudication Staff Approved: DRT

FROM: Dave Tuthill NCY

DATE: February 7, 2000

RE: Accomplished Transfers and Enlargements in Basin 74

Prior to Sara Denniston's departure, she was presented the question as to whether claimants whose rights were decreed in the Lemhi decree (Basin 74) may claim enlargements or accomplished transfers in the SRBA. It was her opinion that Lemhi adjudication claimants are entitled to claim accomplished transfers and enlargements in the SRBA.

The following is a chronology of events:

- Aug. 13, 1970     The Lemhi Adjudication was initiated.
- Jul. 9, 1974     The Department filed proposed findings on all waters rights in the Lemhi River Basin as of April 1, 1972.
- Dec. 30, 1982    The district judge entered a partial decree in the Lemhi Adjudication.
- Oct. 14, 1992    The district court ruled that the partial decree be considered final.

Thus, the question is whether the fact that the decree was not made final until 1992 prevent the Lemhi basin water users from claiming pre-1987 accomplished transfers and enlargements. The director's report and the partial decree were based on the state of the water rights as they existed prior to 1982. The partial decree was deemed final in 1992 apparently without any further factual investigation. Therefore, factually it is quite possible that accomplished transfers or enlargements may have occurred in the Lemhi basin prior to 1987.

Furthermore, the accomplished transfer and enlargement statutes did not exist in the early 1970s when the Department conducted investigations on the Lemhi basin. Therefore, the Department could not consider any transfers not approved under 42-222 in making its recommendations in the Lemhi adjudication. Thus, the Lemhi decree is not binding as to the existence of any accomplished transfers or enlargements.

The accomplished transfer and enlargement statutes merely refer to transfers having occurred "prior to the commencement of the Snake River basin adjudication." This language seems to indicate that the Legislature intended to give its retroactive approval to *all* (non-injury causing) transfers that occurred prior to 1987. It would appear to defeat the Legislature's intent to deprive a certain group of people the benefit of these statutes merely because the timing of the court's paperwork.

## ADJUDICATION MEMO # 48

TO: Adjudication Staff  
FROM: Dave Tuthill  
DATE: December 29, 2000  
RE: Guidance for Recommendations in Basin 43

This memorandum provides guidance for adjudication recommendations in Basin 43.

### **A. Situations where Raft River water rights are claimed to be diverted via wells:**

Some claimants in Basin 43 have identified well heads as points of diversion for Raft River water rights, based on the theory that pumpage of wells in the basin has in some cases depleted flows of the river. Because the ground water source is not the same as the Raft River source, IDWR will not consider a change from the original point of diversion on the river to a well head to have occurred via an accomplished transfer.

However, IDWR will make a recommendation in the SRBA for a Raft River water right even though it has not been used for many years, if the reason for non-use is unavailability of water. Thus, a claimant could file a claim for ground water from a well, using as a basis of the water right a ground water license, or beneficial use (if the use began prior to March 25, 1963). In addition, the claimant may file a claim for Raft River water, identifying the last-used point of diversion from the river.

In the situation where the original source of the water right was the Raft River, the IDWR recommendation will take the following form:

1. Source: Raft River.
2. P/D: Show the original p/d from the Raft River, unless the diversion was moved to another location by an administrative or accomplished transfer.
3. P/U: Limited to P/U in decree or license. (Use caution in allowing accomplished places of use – just the fact that a  $\frac{1}{4}$   $\frac{1}{4}$  is identified in the decree does not indicate that 40 acres were originally irrigated there.) In some situations it is possible that an accomplished transfer has occurred without enlargement.
4. Rate of flow: Limited to rate of flow in decree or license.
5. Volume: None.

If the point of diversion from Raft River has not been used in many years, it might be appropriate for the examiner to include the following remark:

The point of diversion described above represents an unused facility due to infrequent availability of water. Before water may be diverted under this water right, the wateruser must file a transfer to establish an active point of diversion, or show that an easement and means to convey water from the diversion to the place of use exists.

## **B. Guidance for Critical Ground Water Area Expansion Claims:**

1. Eligibility for a recommendation as valid:
  - a. Base water right is valid.
  - b. Acreage has increased.
  - c. Expanded acreage is identified in a separate claim.
  - d. Do not recommend when:
    - Not irrigated prior to 1987.
  
2. Form of Recommendation:
  - a. Source: Ground water
  - b. Date of Priority: June 30, 1985
  - c. P/D: Wellhead location.
  - d. P/U: Limited to enlarged acres within the POU.
  - e. Rate of flow: Pro rata flow rate for the additional acres.
  - f. Remarks: Combined rate of flow limitation limits to the original rate of flow – no additional flow rate allowed by this right.
  - g. Volume: Limited to volume for original acres.
  - h. Note: Pursuant to Section 42-1416b, Idaho Code, water rights decreed under this provision must conform to the following:
    1. Water shall be deemed unavailable to fill the rights for expanded use, even if decreed in the adjudication, unless the director finds that a management program exists which will, within a time period acceptable to the director, limit the average annual water withdrawals from the aquifer designated in the critical ground water area to no more than the average annual recharge to the aquifer.
    2. Within two (2) years after a decree determining the water rights within a critical ground water area becomes final, but not sooner than four (4) years from the date of enactment of this section, the director of the department of water resources shall make a finding as to whether an adequate management program exists to bring withdrawals into balance with recharge.
    3. If the director finds that an adequate management program to bring withdrawals into balance with recharge does not exist, the director shall order all holders of rights to expanded use of ground water within the area to cease or reduce withdrawal of water until such time as the director determines that withdrawals have been brought into balance with recharge and sufficient ground water is available to resume or increase withdrawals. The director's order shall be issued before September 1 and shall be effective beginning with the following growing season.

MEMORANDUM

(Adjudication Memo No. 49)

TO: WATER MANAGEMENT DIVISION STAFF

FROM: NORM YOUNG

RE: 1) ADJUDICATION CLAIMS TOLLING FORFEITURE  
2) FISH PROPAGATION FACILITY VOLUME

DATE: MARCH 24, 2000

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On December 29, 1999, the Snake River Basin Adjudication (SRBA) district court issued its *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, Subcase Nos. 36-02708, et al., In Re SRBA, Case No. 39576. In that decision the SRBA district court determined, among other things that:

1. "Once a claimant files a claim in the SRBA, for a particular water right, the forfeiture provisions of I.C. § 42-222(2) are also tolled for purposes of establishing forfeiture, so long as the claimant continues to prosecute the claim to a partial decree."

2. Facility volume is not an element of a water right for fish propagation. While a facility volume condition could be carried over from a license into a partial decree, an additional remark would be added to the partial decree indicating that the condition has no effect on the use of the right.

Water Management Division will implement this decision as follows:

**Adjudication Bureau:**

1. Agents investigating water use in the SRBA shall only investigate water use prior to the date the water right claim was filed with IDWR for purposes of determining whether forfeiture has occurred. Field examinations made, photographs taken, or other evidence of non-use of a water right after the date a claim was filed with IDWR shall not be used in preparing the recommendation on the claim for the Director's Report.

2. Facility volume conditions will not be included in the Director's Report for fish propagation claims whether or not the claim is based upon an existing license that includes the facility volume condition.

**Water Allocation Bureau:**

1. Filing a claim and participating in the SRBA does not prevent a water user from making use of his/her water right. Therefore, in the context of transfer or other applicable administrative proceedings, IDWR will continue to consider nonuse of water after the filing of an SRBA claim as relevant to whether forfeiture has occurred.

2. Facility volume conditions will not be included in new permits for fish propagation and will not be carried over from a permit to the resulting license. IDWR will not, on its own initiative, endeavor to enforce a facility volume condition associated with any existing right.

Except as specifically discussed in this memorandum, IDWR standards regarding the investigation of SRBA water right claims and the processing of administrative applications remains unchanged.

## MEMORANDUM

FROM: Dave Tuthill  
TO: SRBA Staff  
DATE: December 2, 2002  
RE: DAILY MAIL REVIEW PROTOCOL Adjudication Memo No. 51

The following guidelines are intended to provide a uniform method to deal with the daily scanned mail. State Office staff currently accomplishes an effort to compare Partial Decrees of contested subcase rights with Active-version Recommendations. Don Shaff is presently embarked on a three part effort to get SRBA decreed rights moved; they are: 1) Uncontested PD, 2) Contested PD prior to April, 2002 when mail scanning was begun, and 3) Contested PD after mail scanning began.

- 1.) On their appointed office day, or as arranged by the regional Adjudication Unit Supervisor, the individual needs to look at a day's scanned mail. For example, mail review may be delegated to each AJ agent and the previous day's scanned mail designated to be processed (since scanning may be completed late in the afternoon and there may be a lot of content).
- 2.) Look at all Stipulations and SF-5s and compare them with the database, except in recently reported basins (e.g. B43 or B63 Pt1) that will likely have numerous filings.
  - a.) In these "active" basins please send, by email attachment, to the agent assigned the claim.
  - b.) Where the Stipulation needs to be reflected in the database and isn't and where the SF-5 is not reflected in the database the agent needs to work with paralegal and representative for IDWR that initialed the document. Data entry may need to be completed by the mail review individual. Add comment about what was done and why. Concurrent ArcView work is essential.
  - c.) D&S SF-5s are sometimes also amended claims and need to be on the docket for a time. Once the Special Master Report and Recommendations (SMR) comes out, be sure that the data is reflected in the database (see #3 below).
- 3.) Look at all SMRs and compare with the database. All SMRs need to be reflected in the database. If not, then coordinate with the assigned paralegal. If data entry is completed, then add a comment about what was done and why. Concurrent ArcView work is essential.
- 4.) PDs in older reported basins and all D&S contested-right PDs are being compared with the database at the SO. Region staff do not need to do this.
- 5.) If generating an Amended DR for an SF-5, either make changes to the highest version or create a new version, but leave the status of the new version blank. When it is filed the agent can set the status to Active. Electronic comments and ArcView work are essential.
- 6.) Material of general interest (e.g. SRBA digest, court decisions, etc.) is to be attached to an email to the rest of the staff.

## MEMORANDUM

TO: SRBA Staff

FROM: Dave Tuthill

DATE: June 30, 2004

RE: Document Repository Requirements Adjudication Memo No. 52

According to SRBA Administrative Order No. 1 (AO1), IDWR's regional offices are required to serve as record repositories for the SRBA. AO1 provides that IDWR's regional offices maintain copies of objections, responses and supporting documents for all water rights reported in that region. The documents are to be available for inspection and copying during normal business hours.

With the advent of the Internet and electronic filing systems, this information is much more accessible to the public. When a member of the public visits a regional office to view historic records or files, the information can often be reproduced from our electronic document management system.

Each regional office may use the option of storing paper copies of their files in records warehouses, thus freeing office space for other needs. Electronic copies of the stored information will be kept and made available at the regional offices.

If a party to the SRBA needs historic information that is not readily available in the regional office, Danni Smith is a primary contact for providing assistance in securing the information.

## MEMORANDUM

TO: Adjudication Bureau Staff Adjudication Memo No. 53

FROM: Dave Tuthill

DATE: Amended September 30, 2005

RE: Adjudication Recommendations for Out-of-State Diversions or Places of Use

For an out-of-state diversion with place of use in Idaho, prepare recommendations for all elements of the water right.

For point of diversion use the location where the conveyance system enters Idaho. To clarify the point of diversion use this condition:

The point of diversion for this water right is in [state], [PLS, including meridian]. The point of diversion shown above is where the conveyance system enters Idaho.

To clarify the priority date use this condition:

The priority date for this water right must be determined by the state of [\_\_\_\_\_]. The listing of this element is for informational purposes only.

To clarify the quantity use this condition:

The quantity for this water right must be determined by the state of [\_\_\_\_\_]. The listing of this element is for informational purposes only.

Notes:

1. Digitize the POD at the location where the conveyance enters the state. This location is useful for spatial queries. Place the actual POD in the SpatialData layer.
2. As the recommendation for an out-of-state diversion is forwarded to the SRBA Court, the format will be changed in the State Office to conform with previous similar submittals.

For an in-state diversion with the place of use out-of-state, prepare recommendations for all elements except place of use. To clarify the place of use, use this condition:

The place of use for this water right is in [state], and includes [x] acres described as [PLS, including meridian].

ADMINISTRATIVE MEMORANDUM

Adjudication No. 54  
Application Processing No. 69  
Well Construction No. 7

DATE: February 26, 2010

TO: Water Management Division

FROM: Jeff Peppersack 

RE: Permitting Requirements for Low Temperature Geothermal Wells Used for Domestic Purposes

This memo supersedes Adjudication No. 54, Application Processing No. 69 and Well Construction No. 7 dated August 5, 2008.

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On April 17, 2008, the Director extended a five-year moratorium for a portion of the Twin Falls Ground Water Management Area (TFGWMA). The moratorium order prohibits approval of applications to appropriate water and limits development under existing permits to divert and use water from the artesian, thermal ground water aquifer. In addition to extending the moratorium, the Director ordered that the moratorium applies to domestic purposes as defined by Section 42-111, Idaho Code based on the following conclusions:

A domestic ground water right from low temperature geothermal water cannot be perfected by beneficial use, but must be established by the filing of an application with the Department and subsequent approval by the Department as a water right.

Low temperature geothermal water rights must be represented by an approved water right, and the Director has authority to refuse to process applications to appropriate low temperature geothermal water for domestic use.

The conclusions from the order are based on requirements in Section 42-233, Idaho Code. Section 42-233 recognizes the validity of domestic water rights for use of low temperature geothermal water perfected by beneficial use prior to July 1, 1987. Section 42-233 requires the filing and approval of a domestic water right for low temperature geothermal water when the use of water was completed after July 1, 1987.

This memo is intended to inform staff of the requirements for filing an application for permit to appropriate water from a low temperature geothermal well for domestic purposes. In the past, the Department has issued well drilling permits for low temperature geothermal wells to be used for domestic purposes without a water right permit, based on the exception provided under Section 42-227, Idaho Code. Staff should work with owners of those domestic wells constructed after July 1, 1987 to ensure that they file an application for permit to appropriate water if the use is not authorized by an existing water right. In addition, the Department should notify the general public through news releases, the Department's website and/or other available means of the requirement to file an application.

For low-temperature geothermal wells, the following shall apply for domestic uses statewide:

- A valid water right permit, license or decree is required to divert and use water from any low temperature geothermal well, except for rights based on beneficial use established prior to July 1, 1987. Note that deferrable domestic uses not claimed in the Snake River Basin Adjudication (“SRBA”) qualify for the exception; however, deferrable uses were limited to those currently defined under Section 42-111(1a), Idaho Code.
- Domestic rights from low temperature geothermal wells that were decreed in the SRBA are valid rights decreed by the court; however, the Department should no longer recommend domestic water rights from low temperature geothermal wells based on beneficial use established on or after July 1, 1987.
- An application to appropriate water from a low temperature geothermal well shall include documentation to demonstrate that the use will be primarily for heat value pursuant to Section 42-233, Idaho Code, or shall include a request to exempt the proposed use with documentation demonstrating that the exemption is warranted based on the statutory criteria.
- Water right or permit holders authorized to divert and use water from a well in a cold water aquifer, who “un-intentionally” encounter a low temperature geothermal resource during construction, modification, or replacement of a well, must cease construction of the well and seek further instruction from the Department regarding measures to protect the resource while any water right issues are pending. Except for those measures required to protect the resource, the water right or permit holder may only resume construction after obtaining authorization to appropriate water from the low temperature geothermal resource or an exemption from the requirement to use the water primarily for heat value pursuant to Section 42-233, Idaho Code.
- A valid water right or permit authorizing a well for diversion and use of a low temperature geothermal resource must exist prior to issuance of a well drilling permit to construct a new well or modify or replace an existing well. Bonding and typically more stringent well construction provisions are applicable for construction for low temperature geothermal wells pursuant to Section 42-233, Idaho Code and Rule 30 of IDAPA 37.03.09.
- Start cards are not valid to construct, modify or replace a well seeking to appropriate a low temperature geothermal resource, or encountering a low temperature geothermal resource during construction. In addition, use of start cards may be prohibited for specific areas that may encounter low temperature geothermal resource as designated by the Department. An incidental or unintentional encounter of low temperature geothermal water while drilling a well authorized by a start card will require the filing of a new drilling permit application. A drilling permit upgrade fee of \$125 must accompany the drilling permit application.

Applications to appropriate water from a well using a low temperature geothermal resource for domestic purposes within a moratorium area or other area limiting or prohibiting further development of the resource can only be approved in accordance with the order governing the designated area. An exception will be provided for moratorium areas or other areas limiting or prohibiting further development of the resource that were established or are actively extended or modified by order dated prior to April 17, 2008. In those restricted areas, for situations where development of a domestic use

was commenced prior to April 17, 2008, the Department will only consider a new application to appropriate water from a low temperature geothermal well provided that each of the following requirements are met:

- Development of the domestic use proposed under the new application was commenced prior to April 17, 2008 (for example, this may include a situation where a well was drilled just prior to April 17 and development has continued uninterrupted even though water was not diverted and used from the well for domestic purposes until shortly after April 17; however, it would not include a situation where the domestic use was not at least in initial stages of construction prior to April 17)
- The use is limited to domestic use as defined in Section 42-111, Idaho Code; the domestic use must be primarily for heat value and within the limits of parts A or B of the domestic definition, unless the domestic use qualifies for an exemption from the heating requirements pursuant to Section 42-233, Idaho Code.
- The well complies with drilling permit requirements for wells drilled on or after July 1, 1987

Applications that meet these requirements and are otherwise acceptable for processing shall be advertised and may be approved if the criteria in Section 42-203A, Idaho Code are satisfied. Note that current moratorium areas prohibiting further development of a low temperature geothermal resource may also be subject to other moratoriums or restrictions such as the Eastern Snake River Plain moratorium area; however, those areas may provide exceptions for domestic purposes and will require review on a case by case basis for applications in each area.

Any low temperature geothermal water use or well construction for domestic purposes, not authorized by a water right permit, license or decree (unless right based on beneficial use established prior to July 1, 1987) and/or well drilling permit shall be subject to an administrative enforcement action and/or abandonment of the well pursuant to Chapter 2, Title 42, Idaho Code and Rules of the Department. Department staff are instructed to work with water users to ensure that the appropriate applications are filed to obtain permits or authorization for existing uses.

## 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:

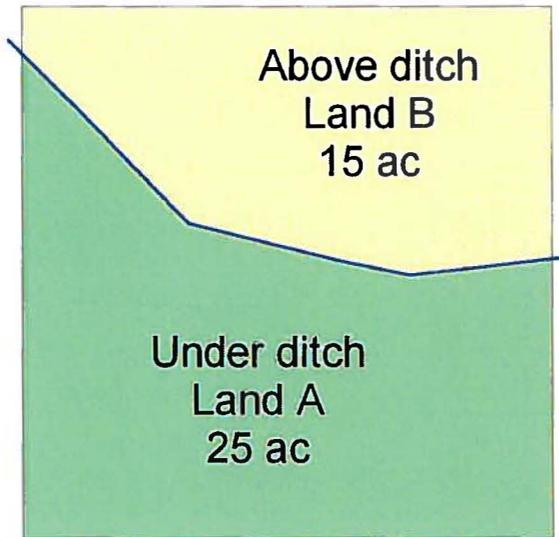
1. The reviewing agent should specifically look at the duty of water allowed by the original decree or license to determine if a second claim is necessary. If the duty of water is clearly stated as one miner's inch per acre, the number of acres would equal the number of miner's inches decreed or licensed.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

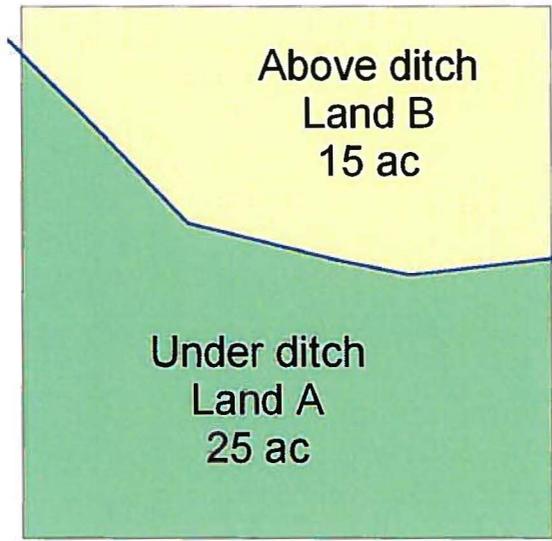
1. Where the location of the original ditch is certain:



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 date<sup>1</sup>
- 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).

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<sup>1</sup> 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.

ADJUDICATION MEMORANDUM #58

TO: Adjudication Staff

FROM: Carter Fritschle, Adjudication Section Manager *CF*

SUBJECT: Diversion Rates for *de minimis* Stockwater Rights

REVISED: November 6, 2011

The purpose of this memorandum is to serve as a guide for recommending *de minimis* stockwater rights. This memorandum also specifically provides guidance for the implementation of Snake River Basin Adjudication (SRBA) District Court's decision in Basin Wide Issue 12.

This memorandum does not apply to non-*de minimis* stockwater uses claimed on the Irrigation & Other claim form where the appropriate filing fees are paid.

*De minimis* stockwater rights in general

All *de minimis* stockwater rights require a condition limiting the diversion volume to 13,000 gallons per day.

For *de minimis* stockwater rights in which the water is diverted continuously 24 hours per day, the recommendation should be for no more than 0.020 cfs and include a condition limiting the diversion volume to 13,000 gallons per day.

If the water is diverted less than 24 hours per day, the diversion rate can exceed 0.020 cfs provided the daily diversion volume does not exceed 13,000 gallons per day. For guidance on stockwater diversion rates based on water being diverted for two hours per day, see Appendix 1.

Since much of the time stockwater diversion is through an irrigation ditch, condition N15 is often added to compensate for the ditch loss that allows the 0.02 cfs to reach the place of use, which states, "The appropriator is entitled to the quantity of water described for stockwater purposes at a point of measurement where the delivery ditch enters the place of use described."<sup>1</sup>

If the annual diversion volume of stockwater use was not previously determined by a court or IDWR, the recommendation should include a condition such as N11, which states, "The quantity of water decreed for this water right is not a determination of historical beneficial use."

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<sup>1</sup> Historical note: Condition N01 "The appropriator is entitled to the quantity of water described for stockwater purposes at a point of measurement where the delivery ditch enters the place of use described, so long as the quantity diverted at the point of diversion does not constitute unreasonable waste," was used initially in the SRBA Test Basins (primarily in Basin 34). However, the SRBA District Court generally did strike the following portion of the condition: "so long as the quantity diverted at the point of diversion does not constitute unreasonable waste." Therefore, condition N15 was created to replace condition N01 in order update IDWR's database to match the Court's partial decrees.

De minimis instream stockwater rights (Basin Wide Issue 12)

In Basin Wide 12, the Court determined *de minimis* instream stockwater rights cannot exceed 13,000 gallons per day. A copy of Basin Wide 12 is attached as Appendix 2.

For *de minimis* instream stockwater rights, the maximum diversion rate cannot exceed 0.02 cfs. A condition limiting the right to 13,000 gallons per day must be included in the recommendations for all *de minimis* rights (at this time, this condition is N13). This is because a diversion rate greater than 0.020 cfs results in a 24-hour diversion volume that exceeds 13,000 gallons. NOTE: IDWR's policy is to round the diversion rate to the nearest hundredth of a cfs. If the claim is based on a license where more than 13,000 gallons per day was authorized, the recommended diversion volume should mirror the license.

If an instream stockwater right is claimed in excess of 13,000 gallons per day, the claimant must file on the appropriate form (the Irrigation & Other claim form), pay the appropriate fees, and provide all the required supporting evidence, including evidence of the priority date.

**Appendix 1. Suggested Stockwater Diversion Rates Based on Water Being Diverted for Two Hours per Day**

RECOMMENDED DIVERSION RATES FOR STOCKWATER

No. of head	In cubic feet per second (cfs)			
	Dairy cows	Other cattle, horses & mules	Hogs	Sheep & goats
0 - 25	0.02	0.02	0.02	0.02
26 - 50	0.04	0.02	0.02	0.02
51 - 100	0.07	0.03	0.02	0.02
101 - 200	0.13	0.05	0.02	0.02
201 - 300	0.20	0.07	0.02	0.02
301 - 400	0.26	0.09	0.03	0.02
401 - 500	0.33	0.12	0.04	0.02
501 - 600	0.39	0.14	0.05	0.03
601 - 700	0.46	0.16	0.05	0.03
701 - 800	0.52	0.19	0.06	0.03
801 - 900	0.58	0.20	0.07	0.04
901 - 1000	0.65	0.23	0.08	0.04

For chickens, round to the next highest 100 and multiply this number by 0.0000018.  
 For turkeys, round to the next highest 100 and multiply this number by 0.0000033.

If you have more than 1000 head of stock (other than poultry), round the number of head to the next highest 100, and multiply this number by one of the following factors:

- For dairy cows, multiply by 0.00065
- For other cattle, horses, or mules, multiply by 0.00022
- For hogs, multiply by 0.000074
- For sheep or goats, multiply by 0.000037

Round the amount you calculate to the nearest 0.01 cfs and enter this amount in the appropriate space on your claim. You may claim 0.01 cfs even if your calculated amount is less than 0.01 cfs.

MAIL 5285



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OFFICE OF THE ATTORNEY GENERAL 2 13

Appendix 2

DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	91-00012
	)	
Case No. 39576	)	MEMORANDUM DECISION AND ORDER RE: BASIN-WIDE ISSUE 12
_____	)	

Lee Leininger, United States Department of Justice, for the United States  
David Barber, Idaho Attorney General's Office, for the State of Idaho  
Shawn Del Ysursa, for the J.R. Simplot Company

I. PROCEDURAL HISTORY

Basin-Wide Issue 12 was designated by the court and referred to Special Master Fritz X. Haemmerle as follows:

- 1) What constitutes a *de minimis* stock water right and may the annual consumptive use volume for such rights be described as "*de minimis*"?
- 2) Is a statement of combined usage necessary for the definition or administration of a *de minimis* water right and, if so, where should it appear in the decree?
- 3) Is it necessary to include the number of head of cattle allowed to describe or administer a *de minimis* water right and, if so, where should it appear in the decree?
- 4) Should the quantity used in cubic feet per second for a *de minimis* water right be based on a 24-hour rate, a 2-hour rate or a set constant based on a 13,000-gallons-per-day rate?

- 5) Does a water right with a stock watering purpose of use include use for wildlife?
- 6) Whether a single water right can be decreed with both a state and federal basis?

## II. DECISION

The only challenge before the court is to issue no. 5 (Section IV, Subsection E) of the Special Master's *Second Amended Recommendation Re: Basin-Wide Issue 12* (August 12, 1996). Initially, the court adopts as its own Section I, Scope of Review; Section II, Procedural Background; and Section III, Standard of Review, of the Special Master's *Second Amended Recommendation Re: Basin-Wide Issue 12*.

To clarify the record, the recommendations contained in Section IV, subsections A - F are adopted by this court as follows:

**A. Annual Volume of Consumptive Use for *De Minimis* Water Rights is Not Required to be Decreed.**

The recommendation in Section IV.A. is adopted in its entirety.

**B. A Statement of Combined Usage for the Definition or Administration of a *De Minimis* Water Right is Not Necessary.**

The recommendation in Section IV.B. is adopted in its entirety.

**C. It is Not Necessary to Include the Number of Cattle in *De Minimis* Claims.**

The recommendation in Section IV.C. is adopted in its entirety.

**D. The Quantity Used in Cubic Feet Per Second for a *De Minimis* Claim Under I.C. § 42-1407A(12) Involving a Diversion May be Based on Any Hourly Rate so Long as the Amount is Capped to a Quantity Not to Exceed 13,000 Gallons Per Day.**

The recommendation in Section IV.D. is adopted in its entirety.

**E. Under a State-Based Appropriation, a Water Right Which Includes Wildlife as a Purpose of Use Can Be Perfected Only Where There is a Diversion Accompanied with an Intent to Use the Water for Wildlife Purposes.**

This recommendation is adopted, in part, and stricken, in part.

The issue addressed by the Special Master in this subsection is set forth in the order of referral as:

- 5) Does a water right with a stock watering purpose of use include use for wildlife?

*Order Designating Basin-Wide Issue 12, Referring Matter to Special Master Huemmerle and Setting Hearing (April 5, 1996).*

Through briefing and hearing, the question was presented by the parties to the Special Master as 1) whether a wildlife use can exist without a diversion and 2) whether a wildlife purpose of use exists as an incidental use to any stock water claim. In response to the parties' question, the Special Master ruled that 1) a wildlife use can only exist where there has been a diversion and 2) a wildlife use does not exist as an incidental use to a stock water claim under I.C. § 42-1401A(12).

Because the requirement of a diversion to perfect a wildlife use was neither referred to the Special Master nor is its resolution necessary to answer the matter referred, that portion of the recommendation dealing with diversion (page 9, Section E, second paragraph, "the first inquiry . . .," through the second full paragraph on page 10) is stricken as beyond the scope of the referral.<sup>1</sup>

This court adopts the Special Master's recommendation in Part E resolving the "second inquiry" (page 10, last paragraph, through page 11).

The United States alleges that the language of I.C. § 42-1401A(12) grants it a wildlife purpose of use as an incident or part of any stock water right. It relies on the statutory language that "[s]tock watering use' means the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day." I.C. § 42-1401A(12). Reading the statute in the conjunctive, the United States claims entitlement to a wildlife use as part of each stock watering right. Primary principles of statutory construction require the court to reject the United States' interpretation.<sup>2</sup>

Using the plain and ordinary meaning of the words in the statute, the word "or" requires reading the act in the disjunctive. Had the legislature meant the statute to be read in the conjunctive, it would have used the word "and." It is unreasonable to read the statute otherwise.

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<sup>1</sup> Basin-Wide Issue 12 does not raise the issue of a diversion requirement for instream wildlife uses. This decision neither addresses nor resolves the issue. It has been raised directly in a subcase before a Special Master and is on challenge to this court. It will be resolved in that subcase only.

<sup>2</sup> The standard used by this court for statutory interpretation is set forth in *Rim View Trout Farms v. Higginson*, 121 Idaho 819, 822 (1992).

Giving effect to all the words used in I.C. § 42-1401A(12) further supports the Special Master's recommendation. This definition of a *de minimis* stock watering and wildlife uses is limited to "the use of water solely for livestock or wildlife . . ." I.C. §42-1401A(12) (emphasis added). The correct parsing of the sentence reveals that "solely" modifies both "uses" (livestock and wildlife). Therefore, the correct interpretation of the sentence is that the term "stock watering use" includes uses solely for livestock or solely for wildlife. Solely means only or exclusively. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1387 (College ed. 1962). It does not mean together, part of, or incidental to as suggested by the United States. The plain and ordinary meaning of the terms used does not render wildlife use incidental to or as a part of a stock watering use.

The Special Master insightfully found, and this court has adopted, the correct interplay between the two statutes reviewed as part of this basin-wide issue: I.C. § 42-1401A(12) and I.C. § 42-113. The former defines the term "stock watering use" in the Snake River Basin Adjudication (SRBA) as that class of claims where the diverted use is solely for stock watering or solely for wildlife and where the diversion is 13,000 gallons per day or less. The definition of this class of claims does not eliminate accepted statutory stock watering instream uses which do not require a diversion. I.C. § 42-113. For purposes of the SRBA, the legislature did not include instream stock watering uses in the defined class set by I.C. § 42-1401A(12). Just as with instream stock watering uses, I.C. § 42-1401A(12) is not a legislative pronouncement on instream wildlife claims. I.C. § 42-1401A(12) simply defines a particular class of diverted uses for stock watering or wildlife which falls under 13,000 gallons per day. The statute, by its terms, does not address instream uses.

I.C. § 42-1401A(12) defines a class of *de minimis* water rights for treatment in the SRBA. The class includes small rights (13,000 gallons per day or less) diverted solely for stock water or solely for wildlife. The definition does not include lawful instream uses. Similarly, it does not address those single water rights which allow multiple uses.

To clarify, instream stock water rights will be treated the same as diverted stock water rights; that is, as "*de minimis*" (13,000 gallons per day or less) unless the claimant proves a greater quantity and pays the required filing fee for an amount of water in excess of 13,000 gallons per day.

Additionally, claimants may be decreed a water right for more than one use where there is proof of intent as to each of the claimed uses. No right can be decreed for multiple uses where one use is claimed as mere incident of another use.

The recommendation of the Special Master that I.C. § 42-1401A(12) does not allow a wildlife use incidental to a diverted stock water use is adopted. The recommendation that I.C. § 42-113 does not allow a wildlife use incidental to an instream stock watering use is also adopted. A wildlife use requires the intent to put water to that beneficial use and cannot be incidental to a stock watering use. Neither I.C. § 42-1401A(12) nor I.C. § 43-113 dispenses with the intent requirement when perfecting a water right.

The Special Master's recommendation that instream wildlife claims require a diversion is not adopted and is stricken as beyond the call of the question referred.<sup>3</sup>

**F. A Single Water Right Cannot Be Decreed with Both a State and Federal Basis.**

This recommendation is adopted in its entirety.

Section V, Summary, is adopted with the exception of Part 5 as discussed above.

**III. CONCLUSION**

This *Memorandum Decision and Order* constitutes the court's Findings of Fact and Conclusions of Law on Basin-Wide Issue 12.

IT IS SO ORDERED.

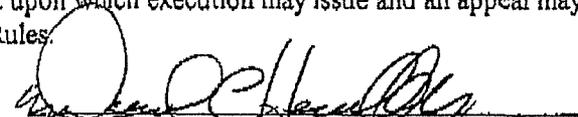
DATED April 25, 1997.

  
DANIEL C. HURLBUTT, JR.  
Presiding Judge  
Snake River Basin Adjudication

**RULE 54(B) CERTIFICATE**

With respect to the issues determined by the above judgment or order, it is hereby certified, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED April 25, 1997.

  
DANIEL C. HURLBUTT, JR.  
Presiding Judge  
Snake River Basin Adjudication

<sup>3</sup> This court again reiterates that this decision leaves open the question of whether a wildlife use requires a diversion or may be instream which will be decided in the challenge in subcase 36-15452.

## Adjudication Memorandum #60

TO: Adjudication Staff  
FROM: Meghan Carter, Deputy Attorney General *MC*  
SUBJECT: I.C. § 42-223(11) – mining exception to forfeiture  
DATE: March 2, 2015

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This memo is to provide guidance on evaluating the mining exception to forfeiture in I.C. § 42-223(11) when making recommendations. The memo will break down the statute into factors and provide information on how to evaluate the factors and other relevant law.

### A. Threshold Questions

There are two questions that need to be answered prior to analyzing whether an exception to forfeiture applies. The first, has the claimant submitted sufficient evidence showing that a water right was established? Second, has there been at least 5 consecutive years of non-use? If both answers are yes then you may proceed to evaluate if the mining exception to forfeiture applies.

### B. Does the claim qualify for the exception?

Idaho Code § 42-223(11) provides an exception to forfeiture if:

- 1) The beneficial use is related to mining, mineral processing or milling,
- 2) Nonuse of the water was due to mineral prices,
- 3) The mining property has a valuable mineral **–and–**
- 4) The water right owner has maintained the property & mineral rights for potential future mineral production.

Each factor must be established in order to recommend the right. Below is a discussion of each factor and the type of evidence needed to establish it.

#### The beneficial use is related to mining, mineral processing or milling.

If during your analysis of the water right claim you determine the beneficial use is mining, mineral processing or milling (“mining practices”) no further investigation for this factor must be done. However if the beneficial use is for something other than mining practices the claimant must show a link to the claimed beneficial use and mining practices.

For example a claim for stockwater would likely not be related to mining practices. However, a claim for power generation could be related to mining practices if the claimant can show the power was to run some aspect of the mining operation.

The mining property has a valuable mineral.

The claimant must establish that the property has a valuable mineral as defined in I.C. § 47-1205. That statute states a valuable mineral shall “include not only gold, silver, copper, lead, zinc, coal, phosphate and limestone, but also any other substance not gaseous or liquid in its natural state, which makes real property more valuable by reason of its presence . . . provided, however, that sand and gravel are not included in this definition.”

Nonuse of the water was due to mineral prices.

Once the presence of a valuable mineral has been settled, nonuse due to mineral prices must be established. In *Lemhi Gold*<sup>1</sup>, the claimant presented a mining history and evidence of historical gold prices to establish the nonuse of water was due to mineral prices.

The water right owner has maintained the property & mineral rights for potential future mineral production.

The most difficult factor presented in this exception is whether the property and mineral rights were maintained for potential future mineral production. There are two sources that lend some insight but they are by no means comprehensive. It is best to look at all of the evidence as a whole to make a determination.

The first source is the the legislative committee minutes from the hearing on the bill adding the mining exception to I.C. § 42-223.<sup>2</sup> The committee minutes mention the following activities that could lend to finding the property had been maintained for future mineral production:

- the property has not been put to some use incompatible with mining;
- maintenance of lease rights;
- payment of claim maintenance fees;
- assuring that any surface use of the property is free of encumbrances that would preclude mining practices;
- maintenance of shafts and adits (even if blocked for public safety);
- maintenance of access to the property for future development.

The *Lemhi Gold* case also offers guidance on this issue. Language from the court states: “Over the years, assorted mining companies spent millions of dollars confirming the property contains valuable minerals worth extracting as the price of gold rose. Their continuing efforts show the current water right owner and its predecessors in interest ‘maintained the property and mineral rights for potential future mineral production.’” The practices that led to the court’s conclusion are:

- As the price of gold began to rise various mining activities were conducted on the property throughout the years.
  - 1973, hauled ore by hand;

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<sup>1</sup> *Memorandum Decision and Order on Challenge, Final Order Disallowing Water Right Claim, Subcase No. 75-10117(Lemhi Gold Trust LLC)* (Nov. 12, 2014).

<sup>2</sup> Senate Resources & Environment Committee Minutes, SB 1348 (February 15, 2008).

- 1984-1991, geophysical surveys and drilled test holes;
- 1991-1996, more test hole and feasibility studies;
- 2001, commenced an exploration and drilling program, water and environmental monitoring in preparation of an EIS and permitting.
- Claimant and its predecessors spent \$3 million on drilling and exploration.

### **C. Is there an intervening water use?**

Once it has been established that the mining exception to forfeiture applies there is one more analysis that must be done prior to recommending the claim. Per *Lemhi Gold*, if the following are true, application of the exemption would be unconstitutional:

- A five year period of non-use occurs prior to March 25, 2008;
- Prior to March 25, 2008, a water right was established during or after five years of non-use;
- The new water right would be injured if the exempted water right resumed.

Given the complicated nature of this analysis once you have determined that there has been an intervening right established during or after the period of non-use prior to March 25, 2008, you should consult legal to aid in your determination of injury. If it is determined that an intervening water right would be injured if the exempted water right resumed, the claim must be disallowed.

### **D. Condition Codes.**

Once you have determined whether or not the claim will be recommended you will need to use a condition code. Condition K11 should be used if the claim is being recommended. K11 states: "Water was used under this right for \_\_\_\_\_ at the \_\_\_\_\_ mine <and mill site>. This right is recommended pursuant to Section 42-223(11), Idaho Code." The appropriate case specific information will need to be added.

Condition P38 should be used if the claim is being disallowed. P38 states: "Right cannot be recommended due to injury to other rights. See *Memorandum Decision and Order on Challenge, Final Order Disallowing Water Right Claim, SRBA Subcase No. 75-10117(Lemhi Gold Trust LLC)* (Nov. 12, 2014)."