

POLICY MEMORANDUM

TO: Appropriation Staff
Distribution Staff
SW Region Staff
Attorney General's Office / DNR
FROM: Robert L. Morgan, P.E., State Engineer
DATE: July 9, 2001
RE: **Quantification of Water Rights Deriving from Beaver River Decree**

On November 13, 1931, a Decree was entered by the Fifth Judicial District Court over the signature of Judge LeRoy H. Cox in a case entitled *W.L. Hardy et.al. vs. Beaver County Irrigation Company, et.al.* (Civil No. 625). This Decree and its several amendments issued by the Court over the ensuing years have come to be known locally as the Beaver River Decree (herein referenced as "BRD").

The individual awards in the BRD typically consisted of two or three parts:

Part (a) generally had a priority of 1870, set forth a quantity of irrigated acreage, a specific flow of water, a point of diversion, a description of the conveyance works, and a location of the irrigated acreage by 40-acre tracts.

Part (b) typically assigned a priority of 1890, repeated the same quantity of irrigated acreage, specified a flow amount (generally about 70-80% of the Part (a) flow), with a comment, "Said water to be diverted and conveyed and used for supplemental irrigation as described and upon the lands set forth in paragraph 'a' above."

Part (c) usually specified an 1870 priority and a specific flow amount for stock watering. Not all awards included a Part (c).

The gist of the problem heretofore has been related to the proper interpretation of the Parts (a) and (b). Two alternative approaches have been adopted at various times:

Alternative 1 – Pro Rata Division

Under this interpretation, the two flow amounts specified in Parts (a) and (b) have been used to divide the acreage. Part (a) has been assigned a sole supply amount based on the relationship of the flow in Part (a) to the sum of the flows in Parts (a) and (b). Part (b) was likewise assigned a sole supply amount for the remainder of the acreage.

Alternative 2 - Primary / Auxiliary Designation

This interpretation holds that the entire acreage under a given award is to be designated as a sole supply under Part (a), the "primary right". Part (b) represents only an "auxiliary right" which has no sole supply assigned and cannot be used in any manner apart from its "primary" counterpart.

In examining the history and probable intent of the BRD, a conclusion has been reached that the second alternative interpretation is the most correct. This conclusion is based on the evident acknowledgment in the BRD that all the acreage typically described in Part (a) of any given award was being beneficially irrigated at the time of the earlier priority. Part (b) appears to represent a right to take additional water during higher flows to "flood" the irrigated fields to build up soil moisture storage. Use of this "supplemental" water would likely have been substantially inefficient with much of the water percolating past the root zone of the crop or running off the fields as tailwater, but some limited benefit would no doubt have been derived.

We have also examined the Proposed Determinations of Water Rights ("PD's") for the Beaver River distributed in 1969 and the Indian Creek PD distributed in 1991. Both of these books contain the water rights deriving from Award 123 of the BRD and both appear to have defined these rights using the Pro Rata Division interpretation of the decree. Those who worked on the preparation of the 1991 Indian Creek PD were apparently oblivious to the issue and merely reproduced those elements from the earlier PD. In addition, we have re-examined the change application and the State Engineer's Memorandum Decision approving that change application (77-598, a16250) which led to litigation (*Beaumont, et..ux. vs. Morgan, et.al., Civil No. 92-040*). Both the application and the decision were also based on the Pro Rata Division¹. The court case did not directly address the Pro Rata Division vs. Primary / Auxiliary interpretations of the decree. The meaning of the word "supplemental" in Part (b) of the decree was the subject of some testimony, but it is important to keep in mind that the division of the rights under Award 123 had been spelled out in the 1969 Beaver River PD for about 22 years before the change application was filed. We likely had no choice in selecting an alternative interpretation as to those particular water rights at that late date. Neither the "Findings of Fact and Conclusions of Law" nor the "Judgement" rendered in the aforementioned litigation (*Civil No. 92-040*) give clear guidance in this regard but appear to defer the interpretation to the ongoing general adjudication.

Examination of other rights in the two PD's which are derived from awards in the BRD has revealed no indication that the Pro Rata Division interpretation had been applied anywhere else except as related to Award 123. The other rights were generally grouped in "supplemental" pairs reflecting flows and acreages representative of proportional amounts of the decree awards owned by various parties. Although we can only speculate as to the considerations that led to using the Pro Rata Division to define the Award 123 rights in the 1969 PD, we are bound to stay with that interpretation only for those rights until and unless directed otherwise by the court.

¹Under this application, Brown proposed to change rights covering 2/3 of the flow of Award 123 (a), being 0.66 cfs out of a total of 1.0 cfs from Indian Creek, but to move only 1/3 of the total acreage, being 21.67 acres out of a total of 65 acres. The Memorandum Decision prohibited Brown from continuing to irrigate the historic 21.67 acres, but did not prohibit any party from the continued irrigation of the remaining 2/3 of the acreage (43.33 acres) using the unchanged rights under Award 123 (a) or 123 (b). Beaumont owned the remaining 1/3 of 123 (a); Brown, Beaumont and Baldwin each owned 1/3 of 123 (b)

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Therefore, the following policy is adopted effective as of the date of this memorandum:

1. All future interpretations of awards in the BRD will be based on the Primary / Auxiliary interpretation of the decree. Part (a) will be considered a primary right providing a sole supply for the full amount of the acreage described under the right. Part (b) will be considered as an auxiliary right which cannot be used for any purpose apart from its primary counterpart or portion thereof.
2. All prior quantifications and change application approvals which have been rendered using the Pro Rata Division interpretation will be left in place and will be administered according to the Memorandum Decisions under which the approvals were granted. Applicants/owners desiring to take advantage of the Primary/Auxiliary interpretation may file additional or replacement change applications at their initiative.
3. For previously approved applications based on the Pro Rata division interpretation, the Distribution Commissioner will be instructed to distribute the unchanged Part (b) counterparts of the changed rights in accordance with their 1890 priorities to the best of his ability. As long as the irrigated acreage abandonment portion of the prior approvals is properly observed, any impairments to other users should be minimal.

Specific procedures for implementation of this policy shall be coordinated with the Regional Engineer and the Assistant State Engineers for Appropriation and for Distribution.

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