Water Law Handbook

Appendices

By

Christopher H. Meyer, Esq.

Former co-authors (retired):
Jeffrey C. Fereday, Esq.
Michael C. Creamer, Esq.

Givens Pursley LLP
ATTORNEYS AT LAW

601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
208-388-1200
www.givenspursley.com

August 1, 2026

TABLE OF APPENDICES

APPENDIX A :	CONVERSION TABLES	1
APPENDIX B :	UNITS OF MEASURE	4
APPENDIX C :	DEFINITIONS	6
APPENDIX D :	MAPS: ADMINISTRATIVE BASINS, ETC.	18
APPENDIX E :	IDWR, WATER BOARD, AND SRBA ORGANIZATIONAL STRUCTURE	22
APPENDIX F :	STATE WATER PLAN (DEC. 1996, RATIFIED MARCH 1997)	24
APPENDIX G :	MAP OF EASTERN SNAKE PLAIN AND ESPA	56
APPENDIX H :	MAPS OF TRUST WATER AREA	58
APPENDIX I :	FRAMEWORK FOR FINAL RESOLUTION (SWAN FALLS)	60
APPENDIX J :	SWAN FALLS AGREEMENT	72
APPENDIX K :	IDWR MORATORIUMS	104
APPENDIX L :	TRANSFER PROCESSING POLICIES & PROCEDURES (REVISED DEC. 21, 2009)	136
APPENDIX M :	IDWR GUIDANCE ON MUNICIPAL WATER RIGHTS	176
APPENDIX N :	IDWR GUIDANCE ON LAND APPLICATION	242
APPENDIX O :	IDWR GUIDANCE: OTHER MATTERS	248
APPENDIX P :	*ESPA WATER TRANSFERS* MEMORANDUM BY CHRISTOPHER H. MEYER	260
APPENDIX Q :	BUREAU OF RECLAMATION WATER PURCHASES FOR INSTREAM FLOW	270
APPENDIX R :	SUMMARY OF CORPS' NATIONWIDE PERMITS	274
APPENDIX S :	UNPUBLISHED DECISIONS	284
APPENDIX T :	ABOUT THE AUTHORS	340
APPENDIX U :	HANDBOOKS AVAILABLE FROM GIVENS PURSLEY	354

Printed October 5, 2026 (HANDBOOK Appendices - Water Law Handbook (8-1-2026) (current version)(541598.53).doc)

Appendix A: CONVERSION TABLES

Note: Visit "onlineconversion.com" for more conversions

WATER UNIT CONVERSION TABLE (Approx.) A x B = C or C ÷ B = A				
A	x	B	=	C
acre-feet	x	43,560	=	cubic feet
acre-feet	x	435.6	=	ccf (100 cubic feet)
acre-feet	x	325,851	=	gallons
acre-feet	x	1,233.48	=	cubic meters
acre-feet per day	x	0.325851428	=	MGD
acre-feet per year	x	892.7436	=	gallons/day
AF per day	x	325,851	=	gallons/day
cubic feet	x	7.480519	=	gallons
cubic feet	x	62.37	=	pounds of water
Gallons	x	0.13368	=	cubic feet
gallons/minute	x	0.0022282	=	cfs
cfs	x	448.831173401	=	gallons/minute
cfs	x	26,929.87	=	gallons/hour
cfs	x	646,316.889	=	gallons/day
cfs	x	235,905,048	=	gallons/year
cfs	x	1.98347107	=	AF/day
cfs	x	723.966940	=	AF/365 days
cfs	x	724.447923	=	AF/year (leap year adj., based on 365.242 days)
cfs	x	59.5050	=	AF (over 30 day month)
cfs	x	60.3315	=	Acre-feet (over average month = 1/12 year = 30.4167 days)
cfs	x	515.6702	=	AF (3/1 to 11/15 = 260 days)
cfs	x	487.9034	=	AF (3/15 thru 11/15 = 246 days)
cfs	x	424.4363	=	AF (4/1 thru 10/31 = 214 days)
cfs	x	364.9358	=	AF (4/15 thru 10/15 = 184 days)
cfs	x	325.2689	=	AF (4/20 thru 9/30 = 164 days)
cfs	x	50	=	miner's inches (ID, NM, UT, NE)
cfs	x	38.4	=	miner's inches (CO)
cfs	x	40	=	miner's inches (AZ, CA, NV, OR)
miner's inch (ID)	x	8.9766	=	gallons/minute
gallons	x	0.001336805	=	ccf (100 cubic feet)
ccf (100 cubic ft)	x	0.002295684	=	AF
ccf (100 cubic ft)	x	748.0519142	=	gallons
ccf/yr	x	0.001423234	=	gallons/minute
ccf/yr	x	0.000003170944	=	cfs
MGD	x	1.54726907	=	cfs
MGD	x	1,120.3147	=	AF/year
cfs	x	0.6463	=	MGD

WATER UNIT CONVERSION TABLE (Approx.) A x B = C or C ÷ B = A				
A	x	B	=	C
gallons/minute	x	0.004419192	=	AF/day
gallons/minute	x	1.613	=	AF/year
million gallons	x	3.0689	=	AF
million gallons	x	133,681	=	cubic feet
AF/acre/day	x	25.214321	=	miner's inches (ID)
cubic meter per sec.	x	35.31	=	cfs
cubic meter per sec.	x	15,850	=	gallons/minute
gallons	x	3.7854	=	Liters

SEASON OF USE TO NUMBER OF DAYS	
4/15 thru 10/15	184 days
4/1 thru 10/15	198 days
3/1 thru 10/31	245 days
3/15 thru 11/15	246 days
3/1 thru 11/15	260 days
1/1 thru 12/31	365 days

TIME TO FILL OR EVACUATE A RESERVOIR (Approx.) A ÷ B ÷ C = D						
A		B		C		D
AF	÷	cfs	÷	0.0826446	=	hours to fill (or evacuate) that volume

PRICE CONVERSION TABLE	
Price per gallon	**Price per acre-foot**
1 dollar per gallon	$325,850.00 per acre-foot
1 penny per gallon	$3,258.50 per acre-foot
10 cents per 1,000 gallons	$32.59 per acre-foot

WATER CONSUMPTION		
National average domestic water consumption per household (according to a University of Colorado report by Peter Nichols dated 11-15-2001)	179 gallons/day	0.20 AF/year
IDWR's rule of thumb for domestic only consumption per household	535.6 gallons/day	0.60 AF/year
IDWR's rule of thumb for domestic plus irrigation of ½ acre lawn	1,071.3 gallons/day	1.20 AF/year
Appendix IV to IDWR's Water Law Handbook contains a graph relating cfs to in-house domestic use. It is a curve, not a straight line relationship. Beyond 200 homes, however, it is close to a straight line.	Cfs = # homes x 0.0008333 + 0.5	

LAND / PIVOT CONVERSIONS	
1 section of land	Contains 4 quarter sections
	Contains 640 acres
	Is one mile on each side
	Is 5,280 feet on each side
1 quarter section	Contains 4 quarter-quarters
	Contains 160 acres
	Is ½ mile on each side
	Is 2,640 feet on each side
1 quarter-quarter	Contains 40 acres
	Is ¼ mile on each side
	Is 1,320 feet on each side
1 center pivot	Fits within one quarter section
	Would irrigate 125.9 acres if a perfect circle
	Typically irrigate 130 acres or more
	Typically operates on 1,000 gpm well
	If operated 24 hrs /365 days would produce 1,612 af per year (based on 1,000 gpm)
	Would produce 520 af per year (based on 130 acres at 4 af per acre)
	Would produce 351 af per year of consumptive use (transferable water) (based on 130 acres at 2.7 af per acre)
1 acre	= 43,560 square feet
1 square foot	= 0.0000229568 acre

Appendix B: UNITS OF MEASURE

UNITS OF MEASURE	
Term	**Explanation**
Acre-foot ("af")	An acre-foot is the amount of water required to fill an acre of land one foot deep in water. It is equal to 43,560 cubic feet or 325,851 gallons. An acre-foot of water will typically supply the water needs of a family of five for a year. It generally takes three or more acre-feet per season to irrigate a single acre of crop land. One cfs flowing for 24 hours produces 1.98 acre-feet.
Acre-feet per annum	This refers to the number of acre-feet that may be diverted (or consumed) under a given water right in one year. Note: This is sometimes abbreviated to AFA. AFA is also the acronym for "acre-feet per acre." Because of this ambiguity, the reader should be pay attention to the context in which the term is used.
Annual average consumption ("AAC")	This is a measure of the volume of water provided on an annual basis. AAC is often expressed on a per-household basis.
Cubic-feet-per-second ("cfs")	A unit of flow, also known as a "second foot," is equivalent to water passing at the rate of one cubic foot (7.48 gallons) every second. IDAPA 37.03.08.010.07.
Garden hose	One cfs of water is a substantial quantity of water. To put this in perspective, a typical garden hose flows at roughly .02 cfs (one miner's inch), or 9 gallons per minute (based on ½ inch hose, 75 feet long, 40 lbs pressure). Thus it would take 50 such garden hoses to roughly approximate 1 cfs. The Lower Columbia River flows at 200,000 cfs.
Hundred cubic feet ("ccf")	This is a measure of volume commonly employed by municipal suppliers for tracking AAC. One acre-foot contains 435.6 ccf. One hundred cubic feet equals 0.0022957 acre-feet.
Million gallons per day ("MGD")	A flow measure commonly employed by municipalities. 1 MGD equates to a continuous flow of 1.547 cfs or 1,120.147 acre-feet/year.
Miner's inch	This is an older measurement of flow which varies slightly from state to state. (It derives its name from the size of an orifice used as a measuring device.) In Idaho, fifty miner's inches equal one cfs.

Appendix C: DEFINITIONS

DEFINITIONS	
Term	**Explanation**
1996 Act	The 1996 Act refers to the Municipal Water Rights Act of 1996.
Abandonment	This is a common law principle in most Western water law systems (but happens to be statutory in Idaho) whereby a person who stops using his or her water right with the intent to abandon it loses that right permanently. It is different from statutory forfeiture provisions in that intent to abandon must be shown, and no specific period of non-use is required. Abandonment is rarely found.
Adjudication	This refers to a judicial determination of the existence and scope of a water right. See general adjudication.
APODs	Alternative points of diversion, that is, multiple points of diversion associated with a single water right. If their water rights so provide, municipal and other water right holders may divert water under any of their water rights from any of their APODs.
Application	Most Western state water rights systems (Colorado is an exception) require a person seeking a water right to file an application with the state engineer or other officer of the state. The state water authority (in Idaho, the Department of Water Resources) will then conduct studies and hold hearings where opponents may protest the application.
Appropriative right	This is a right to use water recognized in the Western system. It may be contrasted with riparian water rights recognized in the Eastern states.
Aquifer	This is an underground formation of rock, gravel or sand which stores water.
Aquifer storage and recovery ("ASR")	ASR refers to the process of intentionally placing water into an aquifer for purposes of storage so that it may be recovered and used later. The stored water may be either surface water or water from a different aquifer. Such projects may be undertaken on a private basis, in which case a private party stores water, retains ownership in it, and recovers it for its own benefit. Aquifer storage also may be undertaken by an irrigation district or other governmental entity for the benefit of water diverters generally. The authors employ the term "public benefit aquifer recharge" or "PBAR" to describe these projects, though others use the term ASR interchangeably for private and public efforts.
Augmentation plan	This concept first developed under Colorado water law and is now spreading to other states. The idea is that if a new user wishes to take more water from a stream where not enough is left to meet his or her needs as well as those of senior users, the new user may obtain a water right only if he or she submits an acceptable plan to "augment" the stream with a new supply of water. In a typical case, a group of junior tributary ground water pumpers who would otherwise face shutdown by senior direct flow users, might pool their resources in a joint augmentation plan to construct a new reservoir. The augmentation reservoir would satisfy the needs of senior users and enable junior ground water pumping to continue.

DEFINITIONS	
Term	**Explanation**
Beneficial use	This term refers to a set of uses of water which are deemed by law to provide legitimate bases for a water right. Historically, the only beneficial uses recognized were agricultural, industrial, domestic, and municipal. Many Western states, including Idaho, now recognize fish, wildlife, recreation and aesthetics as beneficial uses.
Board	The Idaho Water Resource Board.
Call	When the holder of a senior water right experiences a shortfall in water he or she is entitled to divert, that person may place a call on the river. This means that the state will force junior holders upstream to stop diverting in order to allow more water to reach the senior holder.
Capacity of the System	"Capacity of the system" refers to the diversion rate at which an RAFN water right will be licensed. This quantity is not necessarily limited to the physically constructed system if there is tangible evidence of the applicant's commitment to complete the diversion and delivery system and divert the water to beneficial use during the planning horizon. The rules for quantification of the "capacity of the system" are set out in Application Processing Memo No. 63.
Carey Act company	A canal or ditch company is referred to as a "Carey Act company" if it was created pursuant to the Carey Act, Federal Desert Lands Act (a/k/a the Carey Act), ch. 301 § 4, 28 Stat. 422 (codified at 43 U.S.C. § 641). This is a federal law which provides for the transfer of federal lands to private ownership in order to assist states in developing arid lands. The Carey Act predated federal reclamation statutes, and does not provide for any federal involvement in the project, other than conveyance of lands.
Carriage water	A certain volume of water is required to keep it moving through ditches. That amount which is kept in the ditch solely for purposes of transporting other water to the crops is referred to as "carriage water."
Certificated area	The "certificated area" of a municipal water supplier regulated by the PUC is that area which it is authorized and required to serve. Unlike the more loosely defined "service area" under the Municipal Water Rights Act, the certificated area is precisely defined, and must be amended (with the approval of the PUC) to bring in each new area.
Change/Transfer	The terms "change" and "transfer" are often used interchangeably to describe a change in point of diversion, period of use, nature of use, and/or place of use. The terms can also be used to describe the conveyance of title to a water right - that is, a change or transfer in ownership.
Common law	The "common law" refers to the body of law based on custom, court decisions, and precedent, rather than statutes enacted by the Legislature. Eastern riparian law is based on common law. The West's prior appropriation doctrine is based on a combination of common law and statute which varies from state to state. The common law of England, as it existed in 1864, was adopted by the Idaho Legislature. Idaho Code § 73-116. This is known as the "reception."

DEFINITIONS	
Term	**Explanation**
Compact	A compact is a voluntary agreement adopted by two or more states and approved by the U.S. Congress; in the context of water resources, it allocates water flowing by or through those states. Compacts typically guarantee to more slowly developing states in the headwaters a future right to a fraction of the water when it is needed. By reserving water to future uses, compacts refute the oft-cited argument that up river states must "use it or lose it."
Conserved water	Sometimes referred to as "salvaged water," this is water that is saved through water conservation practices or other techniques. Many Western states do not recognize water rights in conserved water (without loss of priority date) and consequently provide no incentive to conserve. In 2003, the Idaho Legislature adopted a measure protecting conserved water from forfeiture. Idaho Code §§ 42-223(9), 42-250.
Consumptive use	The amount of a diversion that actually is consumed during its application to beneficial use and is removed from the stream system. *See* "evapotranspiration."
Current needs	A municipal provider's portfolio of water rights may be divided, at any given point, into "current needs" and "future needs." "Current needs" refers to that portion of the portfolio which, at the current time, is required to meet peak demand during the peak season. As a municipal provider's customer demand grows over time, water rights (or portions thereof) classified as "future needs" are automatically reclassified as "current need" water rights as they are called into use.
DCMI	This acronym stands for "domestic, commercial, municipal and industrial" water. IDAPA 37.03.08.010.08.
Decree	A court decision confirming water rights.
Director	The Director of the Idaho Department of Water Resources.
Ditch company	A ditch company or canal is a private company which builds and operates a system which delivers irrigation water to farmers. There are various types of ditch companies: unincorporated ditches (in which a group of farmers own a ditch as co-tenants), carrier ditches (run as a for-profit business), and mutual ditches (non-profit carriers in which the shareholders are the recipients of the water).
Diversion	A diversion is a physical structure which removes water from a stream or controls its flow within a stream.
Doctrine	A "doctrine" is a rule, tenet or principle of law developed by the courts. Examples are the reserved rights doctrine and the public trust doctrine.
Duty of water	This is the amount of water customarily required to accomplish the purposes of the water right. One's water right is limited to this duty of water. For example, if people in an area ordinarily use three acre-feet of water per acre per year to irrigate corn, that amount will be declared to be the water duty, and, without specific proof no agricultural water user will be permitted to take more than that amount. The rather odd phrase "duty of water" is understood more easily in the context of the following quotation from an early Idaho case: "It is a cardinal principle established by law and the adjudications of this court that the highest and greatest duty of water be required. The law allows the appropriator only the amount actually necessary for the useful or beneficial purpose to which he applies it." *Munn v. Twin Falls Canal Co.*, 43 Idaho 198, 207, 252 P. 865 (1926).

DEFINITIONS	
Term	**Explanation**
Endangered Species Act ("ESA")	Section 7 of this federal statute, 16 U.S.C. § 1536, requires that the government take no action which may jeopardize the continued existence of any endangered or threatened species or adversely modify its critical habitat. Where the federal government is involved in a water project (either by building it or issuing a section 404 permit), the endangered species act may prohibit the government from proceeding if the loss of water will be harmful to such species. Some states have their own endangered species acts under state law, as well.
Equitable apportionment	When the Supreme Court is called upon to resolve disputes between states as to water, it employs a doctrine called equitable apportionment whereby it weighs the various equities favoring each state before issuing its decree.
Evapotranspiration	This refers to the combined effect of losing water to the air by evaporation and transpiration of plants. Such water is consumptively used in the process of irrigation and will not be returned to the stream as return flow.
Federal Energy Regulatory Commission ("FERC")	The Federal Energy Regulatory Commission, which issues permits and licenses in connection with non-federal hydropower development.
Federal Power Commission ("FPC")	Federal Power Commission, the predecessor to FERC.
Foreign water	Water which is conveyed into a new watershed is termed foreign water. This water is treated differently under the water law of most Western states in that an importer of foreign water is not required to allow the return flow to return to the stream, but may develop it for new uses.
Forfeiture	This is a statutory provision, Idaho Code § 42-222(2), whereby non-use of a water right for a five-year period, regardless of intent, results in loss of the water right. Dovel v. Dobson, 122 Idaho 59, 831 P.2d 527 (1992).
Futile call	Where shutting down upstream users juniors would not result in more water reaching downstream seniors in time to satisfy their needs, the call is said to be futile, and it will not be enforced. This is the only instance in which a junior can receive water while a senior goes dry.
Future needs	A municipal provider's portfolio of water rights may be divided, at any given point, into "current needs" and "future needs." "Future needs" refers to the portion of a water right (or of a portfolio of water rights) that is held to meet reasonably anticipated needs within an approved planning horizon, as provided in the Municipal Water Rights Act. Idaho Code §§ 42-202B(6) (definition of "planning horizon") and Idaho Code § 42-202B(7) (definition of "reasonably anticipated future needs"). As a municipal provider's customer demand grows over time, water rights (or portions thereof) classified as "future needs" are automatically reclassified as "current need" water rights as they are called into use.
Gaining or losing stream	Most streams are either feeding or being fed by ground water, depending on whether they are above or below the water table. A gaining stream will increase its flow as the river moves downstream even in the absence of rainfall or tributaries because it is being fed by ground water. Likewise, a losing stream will lose water to the ground as it moves downstream.

DEFINITIONS	
Term	**Explanation**
General adjudication	This is a special type of adjudication involving not just the relative rights of particular users who chose to litigate but of every person claiming a water right in a particular river or stream. Essentially, the state says, “Everyone who claims a water right—whether it has been determined before or not—must come into court and prove up that right.” Anyone failing to do so, will suffer the loss of his or her water right (or, at least, loss of priority). General adjudications may involve hundreds of litigants and take years to resolve. The Snake River Basin Adjudication in Idaho is an example. (See discussion under McCarran Amendment in this Glossary.)
Ground water	This is water in aquifers beneath the earth’s surface. In Idaho, ground water is subject to the prior appropriation doctrine. Idaho has begun to recognize that ground water is hydraulically connected with surface water.
Ground water mining	This refers to the practice of taking ground water out of an aquifer at a rate faster than it is being replenished by all sources of recharge.
Growing communities doctrine	The "growing communities doctrine" is a common law doctrine that allows traditional municipal providers to acquire and hold water rights to meet the future needs of the community served. The growing communities doctrine pre-dates the 1996 Act. The 1996 Act codified and modified the growing communities doctrine.
Headgates	These are the control devices at the head of an irrigation system. Turning off the headgates means that no irrigation water will be delivered.
Idaho Department of Water Resources (“IDWR” or the “Department”)	This is the Idaho state agency which administers water rights.
IMAP	IMAP stands for “Integrated Municipal Application Package.” This term is not defined by statute or regulation, but has been adopted to describe comprehensive municipal water right transfer applications designed to bring a municipal provider’s entire portfolio of water rights within the 1996 Act.
Injury	It is possible that a change in use or point of diversion by one water user might result in diminished supplies of water to another. This result is called injury. The “no-injury” rule requires that proposed changes be denied where they will result in injury to any other water right holder—junior or senior.
Installed capacity	"Installed capacity" means the maximum system-wide instantaneous diversion capacity (measured as a rate of flow) from all operational diversion facilities within the municipal provider's integrated delivery system. The installed capacity may be different that the sum of the capacities of each of the diversion facilities in the system. Accordingly, it may be necessary to estimate the installed capacity of the system using sound engineering practices. The increase in installed capacity quantified at the time of licensing (see Row 7, Columns C and D) refers to the additional system-wide installed capacity achieved by adding the new POD or PODs associated with the newly licensed right. This increase in installed capacity is the upper limit on the diversion rate for non-RAFN water rights at the time of licensing.

DEFINITIONS	
Term	**Explanation**
Instream flow	This refers simply to water that is left in the stream to satisfy fish, wildlife, recreation, aesthetic, watershed management, and other purposes. Though once viewed as failing the dual tests of “diversion” and “beneficial use,” water rights for instream flows are now recognized under various Western states’ approaches to water law.
License	In Idaho, a license is issued to the holder of a water right permit once the project has been completed and water has been applied to beneficial use. (FERC also issues licenses in connection with hydropower projects.)
Local public interest	Idaho’s water code requires the consideration of the “local public interest” in all water rights applications and water right transfers.
MAF	Million acre-feet
McCarran Amendment	The McCarran Amendment, 43 U.S.C. § 666, is a federal law which waives sovereign immunity and allows the federal government to be brought into state court where general adjudications of water rights are underway. The SRBA is one of these. If the federal government fails to assert water rights, including reserved rights, in the course of such a proceeding, such rights are lost.
MSAD	MSAD is an acronym for a Municipal Service Area Description submitted pursuant to the 1996 Act.
Municipal Provider	The term "municipal provider" is defined by the 1996 Act at Idaho Code § 42-202(B)(5) as follows: "'Municipal provider' means: (a) A municipality that provides water for municipal purposes to its residents and other users within its service area; (b) Any corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area; or (c) A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a "public water supply" as described in section 39-103(12), Idaho Code." The term "municipal provider" includes two types of municipal provider: traditional municipal providers and non-traditional municipal providers.
Municipal Water Rights Act of 1996 (“1996 Act”)	This is the legislative codification of the growing communities doctrine. The full citation is Municipal Water Rights Act of 1996, 1996 Idaho Sess. Laws, ch. 297 (codified at Idaho Code §§ 42-202(2), 42-202B, 42-217(¶4), 42-219(1) & (2), 42-222(1), 42-223(2), 43-335, 43-338).
Natural flow right	The term “natural flow right” is used, particularly in the context of the water supply bank, to contrast with the term “storage right.” It means any water right based on the natural availability of water, as opposed to storage of water. This includes water derived from streams and springs as well as ground water. IDAPA 37.02.03.010.07.

DEFINITIONS	
Term	**Explanation**
Non-potable irrigation ("NPI")	This phrase refers to "non-potable irrigation" systems which deliver *untreated* water for lawn and park irrigation from a non-municipal source, such as an irrigation district. These are sometimes referred to a "pressurized irrigation facilities" or PIF. The term "PIF" is confusing, however, in that most domestic irrigation systems are pressurized, regardless of whether they obtain their water from municipal or untreated non-municipal sources. Consequently, we have employed the term "non-potable irrigation" to describe the systems providing untreated water from non-municipal sources—irrespective of whether it is provided in a pressurized or un-pressurized system.
Non-RAFN rights	"Non-RAFN" refers to municipal water rights (including permits or applications for permit) not obtained pursuant to the planning horizon and RAFN provisions of the 1996 Act. This would include municipal water rights obtained by (1) traditional municipal providers prior to the 1996 Act, (2) traditional municipal providers after the 1996 Act, but without establishing a planning horizon or RAFN, and (3) non-traditional municipal providers after the 1996 Act, but without establishing a planning horizon or RAFN.
Non-traditional municipal provider	"Non-traditional municipal provider" means a corporation, association or state entity that meets the expanded definition of "municipal provider" in the 1996 Act (Idaho Code § 42-202B(5)) but which would not have been treated as municipal provider under the common law. For example, prior to the 1996 Act, subdivision developers could not obtain municipal water rights for their projects. Instead they obtain domestic and irrigation water rights. Under the 1996 Act, the definition of municipal provider was expanded to include most new subdivisions (those regulated as a public water supply under Idaho Code § 39-103(12)). The definition was also expanded to include political subdivisions of the State that provide water for municipal purposes. This might include, for example, water for state universities, state prisons, and highway facilities.
Permit	This is a document, issued by the Idaho Department of Water Resources, which indicates that a user has satisfied all the requirements of state law to obtain a water right. (E.g., water is available, the public interest is satisfied, etc.) The permit secures the holder's priority as of that date, but typically requires completion of the project within five years.
Phreatophytes	These are plants and trees whose roots reach below the water table and which consume a large amount of water through evapotranspiration. Removal of such vegetation along a river may significantly increase streamflow. Cottonwoods are an example.
Planning area	A municipal provider's "planning area" is essentially its best guess as to what its service area will actually be at the end of its planning horizon. However, the Planning Area excludes certain areas now served or likely to be served by the municipal provider, where those areas may conflict with requirements in the 1996 Act regarding coordination of planning among municipal entities. Idaho Code § 42-202B(7) (definition of "reasonably anticipated future needs"). The planning area serves as the geographic basis for demand projections which, in turn, allow the quantification of a municipal provider's "future needs."

DEFINITIONS	
Term	**Explanation**
Planning horizon	"Planning horizon" is defined by the 1996 Act at Idaho Code § 42-202B(7) as follows: "'Planning horizon' refers to the length of time that the department determines is reasonably necessary for a municipal provider to hold water rights to meet reasonably anticipated future needs. The length of the planning horizon may vary according to the needs of the particular municipal provider." The term applies only to municipal providers that establish RAFN under the 1996 Act.
POD	Point of diversion (a well, spring, or surface diversion) used by a water right.
Portfolio of water rights	The term "portfolio of water rights" refers to all water rights, permits and applications for permit held by a municipal provider for an integrated municipal water delivery system. Where a single municipal delivery system is served by water from different sources (e.g., ground water and surface water feeding into the same delivery system), IDWR will determine on a case-by-case basis how to define the portfolio. A municipal provider may have more than one portfolio of rights, permits and applications where it operates separate water delivery systems (e.g., one for potable use and one for irrigation, or non-connected systems serving different geographic areas).
Preemption	Laws of the federal government may preempt (or override) laws of the states where Congress so chooses. For example, federal reserved water rights preempt inconsistent state water law. Congress always has the power to preempt state law. The dispute usually revolves around whether Congress in taking a particular action intended to preempt state law.
Priority date	This is the date attached to all water rights in the Western system indicating when the water right was first obtained. The priority date determines how senior the water right is. The more senior the priority date, the more valuable the water right, because it is less likely to be called out in time of shortage.
Public Benefit Aquifer Recharge	The authors employ the term “public benefit aquifer recharge” or “PBAR” to describe projects undertaken by an irrigation district or other governmental entity for the benefit of water diverters generally. In these projects, ownership of the water is not retained by the recharger. Instead, the recharged water works generally to the benefit of all water right holders in the aquifer. The authors employ the term “aquifer storage and recovery” or “ASR” to describe similar projects undertaken by private parties. In ASR projects, a private party stores water, retains ownership in it, and recovers it for its own benefit. Others use the term ASR to describe both public and private recharge operations.
Public interest	See “Local public interest.”
Public trust doctrine	This doctrine refers to the responsibility of the state to hold certain valuable property rights in trust for the benefit of the citizens of the state. In 1996 the Idaho Legislature expressly declared that the public trust doctrine does <u>not</u> apply to water rights.
Public Utilities Commission	The PUC has regulatory authority over UWID and all other private suppliers of water and power.
Quantification	This refers to the process of determining the exact size of a water right, and can include—usually in an adjudication—an evaluation of the extent to which the right actually has been put to beneficial use. Most federal reserved water rights, are unquantified.

DEFINITIONS	
Term	**Explanation**
Reasonably anticipated future needs ("RAFN")	"Reasonably anticipated future needs" is defined by the 1996 Act at Idaho Code § 42-202B(8) as follows: "'Reasonably anticipated future needs' refers to future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality. Reasonably anticipated future needs shall not include uses of water within areas overlapped by conflicting comprehensive land use plans." Although the growing communities doctrine also embodies the concept of holding water rights to meet future needs, the term "RAFN" as used in this guidance is applicable only to water rights that expressly are appropriated or transferred pursuant to the planning horizon and RAFN provisions of the 1996 Act.
Reserved water rights	These are water rights deemed by the courts to have been reserved to the federal government in conjunction with the reservation of land, even where Congress said nothing explicitly about water. Thus National Forests, National Monuments, and other federal reservations carry with them implicit rights to such water as is necessary to fulfill their primary purposes.
Return flow	"Return flow" is the component of water diverted for a beneficial use which is not consumed and which eventually returns to the stream or aquifer. It includes, for example, seepage water from leaky canals, tail water from irrigation systems, and the water that percolates down from irrigated fields. Once this water reaches the stream or aquifer, it supports (or becomes a part of) all appropriations therein. Ordinarily, one may not reduce or interfere with return flows, without injuring other water users. There are certain circumstances, however, where persons are allowed to do so, *e.g.*, recapture of waste water and foreign water. Note that the definitions of return flow, waste water, seepage, tail water are not always consistently applied in cases and articles. A good rule is not to get too hung up on precise definitions, but focus instead on the meaning of the term within the context of the water law.
Riparian	The term "riparian" refers to land which adjoins a water body. The term also applies to the body of water law prevailing in the Eastern United States which premises the existence of water rights on the ownership of riparian land.
Salvaged water	Synonymous with "conserved water."
Second-foot	This is a measure of flow equal to a cubic foot of water per second of water, or 448.8 gallons per minute. The labels "cfs" and "second-feet" are equivalent.
Section 404	Section 404 of the federal Clean Water Act, 33 U.S.C. § 1344, requires persons or agencies who wish to deposit dredged or fill material into rivers and wetlands to obtain a permit from the U.S. Army Corps of Engineers. Where issuance of the permit is not in the public interest (for example, if it would harm endangered species), the permit must be denied and the project cannot be built.
Seepage water	See discussion under "return flow" and "waste water."

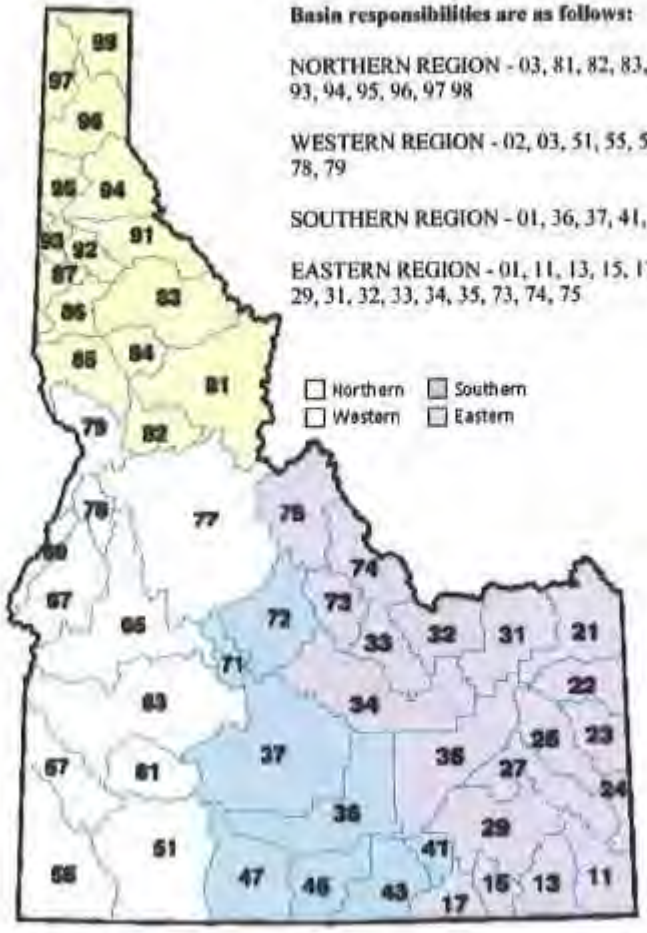
DEFINITIONS	
Term	**Explanation**
Service area	The term “service area” is a term of art under the Municipal Water Rights Act. Idaho Code § 42-202B(8) (definition of “service area”). It refers to the evolving geographic area served by a particular municipal provider. Unlike other water users, municipal providers do not have fixed and precise places of use, but broadly defined service areas which grow and evolve over time. The term “service area” should not be confused with “planning area” or “certificated area” (see those definitions). A municipal provider is required to provide a Municipal Service Area Description (or “MSAD”) to the Department.
Snake River Basin Adjudication (“SRBA”)	The Snake River Basin Adjudication, a general adjudication of water rights now underway in Idaho. Roughly two thirds of the state falls within this basin.
Special district	Idaho has created special units of government with the authority to issue bonds, levy taxes, and use the money to build water projects. These include Drainage Districts, Groundwater Recharge Districts, and Flood Control Districts.
Special master	A special master is an expert appointed by a court to take evidence. When states bring suits in the Supreme Court seeking an equitable apportionment of interstate streams, the Court will appoint a special master to hear the evidence, summarize it, and recommend a ruling to the Court. Sometimes special masters are used in general stream adjudications.
Stub-in practice	The "stub-in" practice refers to IDWR's informal practice of allowing licenses for municipal water rights held by non-RAFN, non-traditional municipal providers to include an additional increment of rate and volume beyond current actual production, but limited to installed capacity, to serve homes or other domestic uses (as defined in Idaho Code § 42-222(1)(a)) that are physically stubbed-in to an operational delivery system (including a service line to each lot) at the time of licensing, even if no homes or other domestic uses have been constructed on the stubbed-in lots. Credit for stubbed-in lots will not be allowed where inappropriate, for example, when a substantial time has passed since permitting and homes or other domestic uses are still not built and it is not evident that the development will be completed.
Stored water	This term refers to any water derived from the storage of water in a reservoir. In some contexts, the term is limited to water from surface reservoirs. E.g., IDAPA 37.02.03.010.10 (water supply bank rules). In other contexts, the term probably ought to include water stored in underground aquifers pursuant to an ASR program.
Subordination	This refers to an agreement between water users that allows one user to step ahead of another’s priority. Thus, if a senior user agreed (as part of a contract, settlement, or whatever) to subordinate his rights to a junior user, the senior would no longer have the right to call out that particular junior. Because subordinations are effective only between the parties entering into them, another senior would still be able to call out the junior. The Swan Falls settlement was built around a broad subordination program.
Surface water	This refers to that water which is found in rivers, lakes, streams, and wetlands. It is distinguished from ground water.
TAF	Thousand acre-feet.
Tail water	See discussion under “return flow.”

DEFINITIONS	
Term	**Explanation**
Traditional municipal provider	"Traditional municipal provider" means those municipal providers that would have been treated as municipalities under the common law growing communities doctrine prior to the 1996 Act. This includes: (1) a city incorporated under Idaho Code § 50-102 that provides water to residents of the city (and sometimes also customers outside of the city), (2) a public utility regulated by the Idaho Public Utilities Commission serving water to customers within a service area that includes an incorporated city, or (3) a water district or water and sewer district established pursuant to Idaho Code §§ 42-3201 to 42-3239 serving customers within a service area that includes an incorporated city.
Tributary	To the layperson, this is a noun describing a smaller stream or river which flows into a larger one. It is also used as an adjective to describe ground water which is similarly connected to a stream. In short, if there is a hydrological connection between ground water and a surface stream, the ground water is said to be "tributary" to the stream, and—at least theoretically— should be administered in priority just as if the user were diverting from the stream.
Trust water	This term "trust water" refers to the body of water rights potentially made available to new appropriation by the subordination of Idaho Power's water rights under the Swan Falls Agreement. The effect of the subordination was to free up a tightly allocated resource to some extent (though not as much as was believed at the time of the Agreement.)
Unappropriated water	This is water flowing in a stream which has not been appropriated or claimed by any person.
USBR	U.S. Bureau of Reclamation. Also known as "the Bureau," "BOR," or "BuRec."
Usufructuary right	This is a right to use something, such as water, despite the fact that one does not own the thing itself. All water rights are deemed usufructuary because no one (except the people of the State) owns the actual molecules of water, but only the right to use the water for a time before it is returned to the system.
Waste water	"Waste water" refers to water which is diverted for beneficial use, but is not consumed, and is released in a way whereby it may be physically captured before it reaches a natural aquifer or stream. This term includes the tail water left at the end of an irrigated field, the seepage water which leaks out of canals, the excess water applied to crops which percolates down into the soil, and waste water generated by an industrial processes or by a municipality. Under certain circumstances, the appropriator who creates waste water has a right to recapture it. Likewise third parties may acquire water rights in the waste water generated by another (but may not force the generator of that waste water to continue to produce it).
Water right	This is a right to use water. Water rights of different types are recognized under both the Eastern riparian system and the Western appropriation system. Under all systems, the water right is usufructuary in nature.
Watershed	This is an area that, because of topographic slope, contributes water to a specified surface water drainage system, such as a stream or river. Under Eastern riparian water law, water must be used within the watershed. Idaho water law allows use outside the watershed.
Weir	A device, usually made of concrete or steel, placed in a stream channel. Weirs are used for various purposes, such as to measure the flow rate or to divert water.

Appendix D: MAPS: ADMINISTRATIVE BASINS, ETC.

Regional Administrative Basins

IDWR has divided the state into more than 50 uniquely numbered administrative basins in order to coordinate water management activities. Each basin is assigned to one of the four IDWR regions.



Basin responsibilities are as follows:

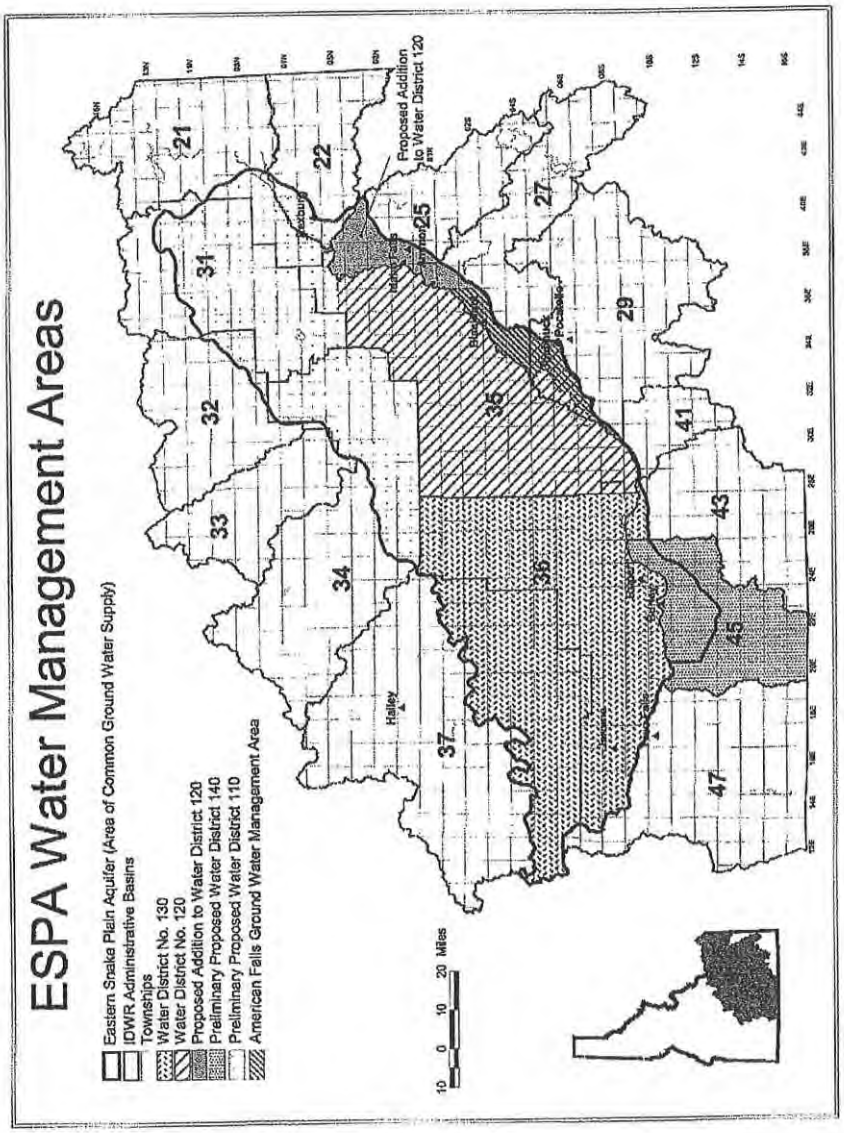
NORTHERN REGION - 03, 81, 82, 83, 84, 851, 86, 87, 91, 92, 93, 94, 95, 96, 97 98

WESTERN REGION - 02, 03, 51, 55, 57, 61, 63, 65, 67, 69, 77, 78, 79

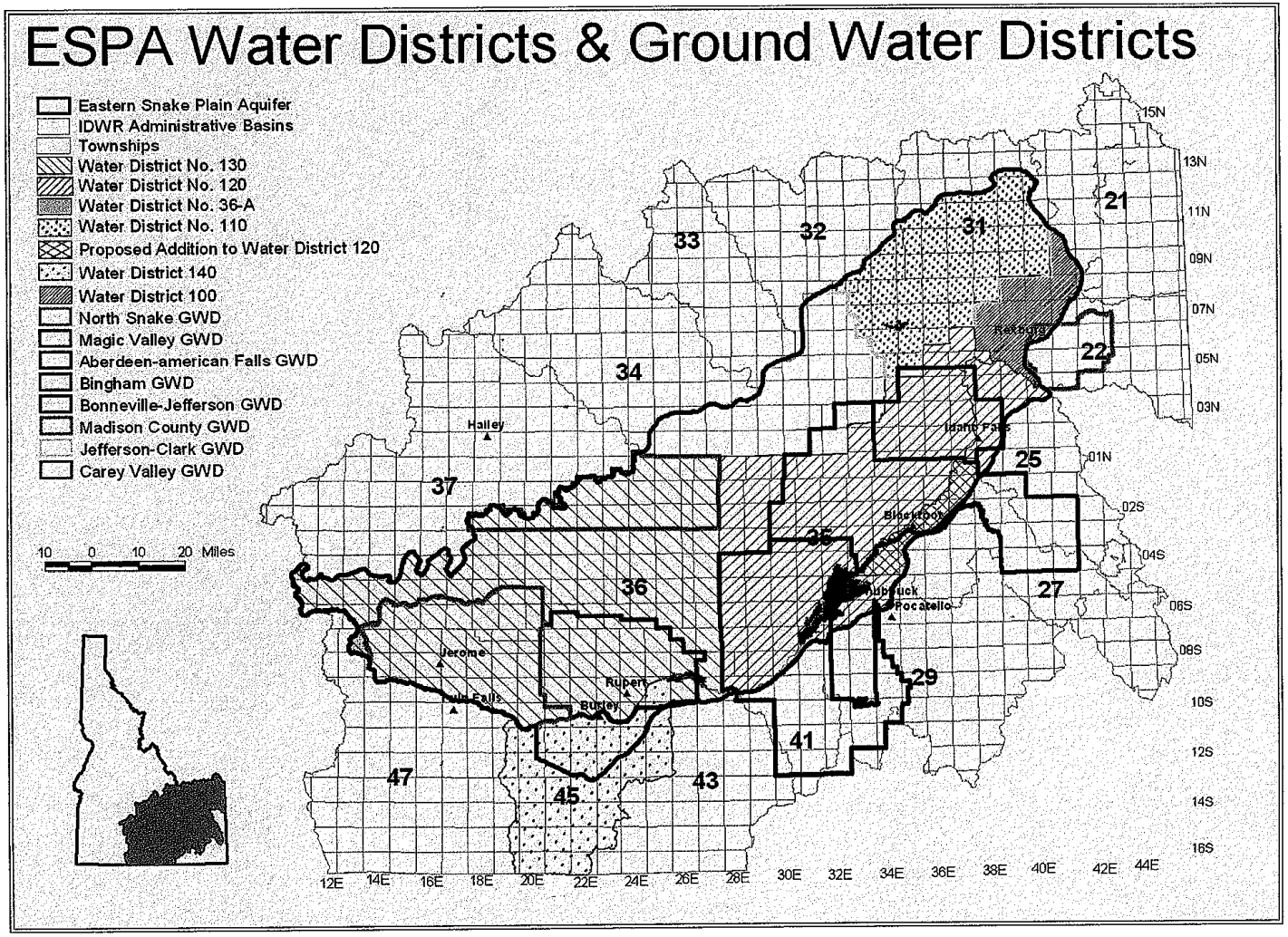
SOUTHERN REGION - 01, 36, 37, 41, 43, 45, 47, 71, 72

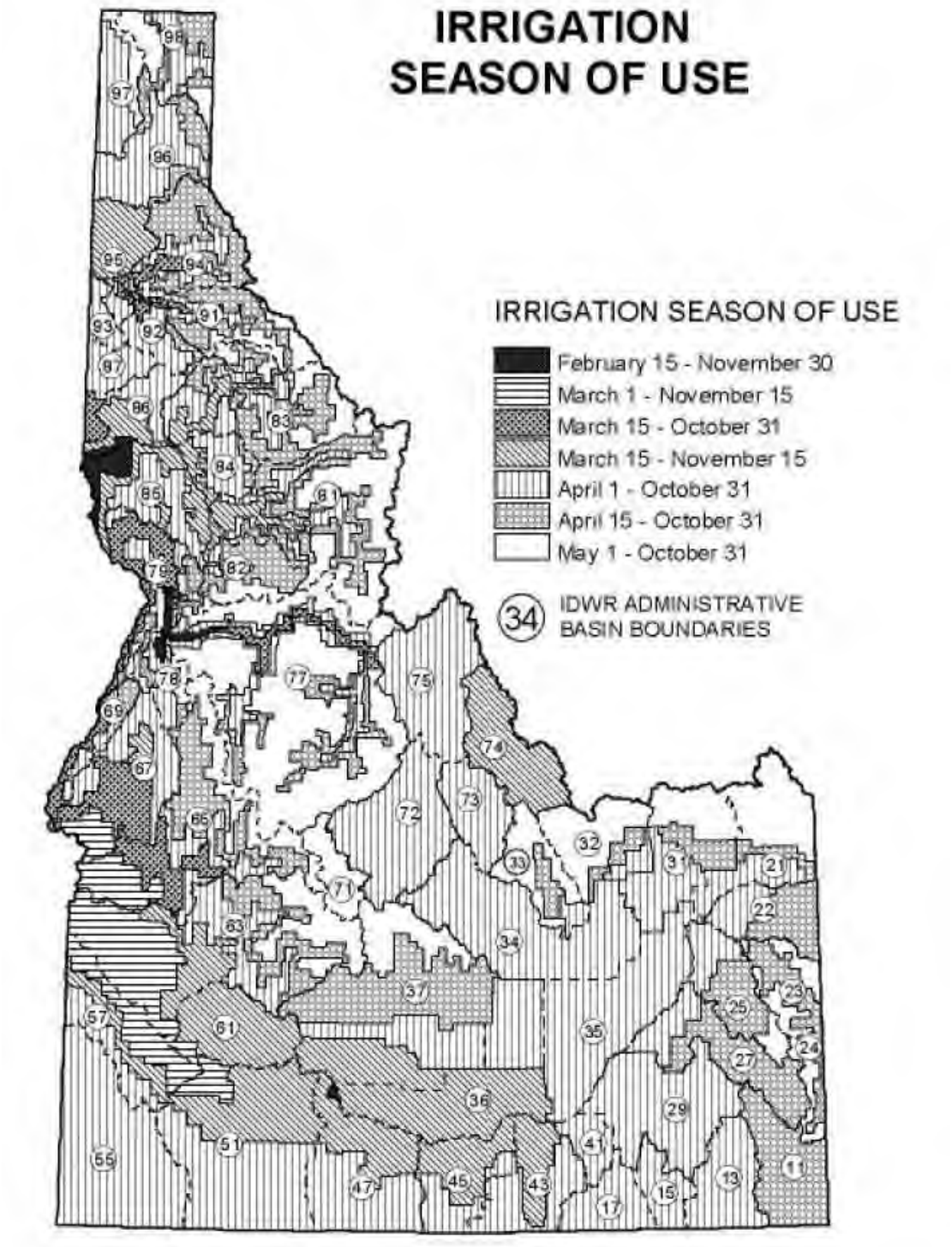
EASTERN REGION - 01, 11, 13, 15, 17, 21, 22, 23, 24, 25, 27, 29, 31, 32, 33, 34, 35, 73, 74, 75

ATTACHMENT A



Order – Page 35


ESPA Water Districts & Ground Water Districts
Eastern Snake Plain Aquifer
IDWR Administrative Basins
Townships
Water District No. 130
Water District No. 120
Water District No. 36-A
Water District No. 110
Proposed Addition to Water District 120
Water District 140
Water District 100
North Snake GWD
Magic Valley GWD
Aberdeen-american Falls GWD
Bingham GWD
Bonneville-Jefferson GWD
Madison County GWD
Jefferson-Clark GWD
Carey Valley GWD
10 0 10 20 Miles
Hailey
Jerome
Twin Falls
Rupert
Burley
Blackfoot
Pocatello
Idaho Falls
Rexburg
15N
13N
11N
09N
07N
05N
03N
01N
02S
04S
06S
08S
10S
12S
14S
16S
12E
14E
16E
18E
20E
22E
24E
26E
28E
30E
32E
34E
36E
38E
40E
42E
44E


IRRIGATION
SEASON OF USE
IRRIGATION SEASON OF USE
February 15 - November 30
March 1 - November 15
March 15 - October 31
March 15 - November 15
April 1 - October 31
April 15 - October 31
May 1 - October 31
34
IDWR ADMINISTRATIVE
BASIN BOUNDARIES

Appendix E: IDWR, WATER BOARD, AND SRBA ORGANIZATIONAL STRUCTURE

The Idaho Department of Water Resources is headed by a Director appointed by the Governor.

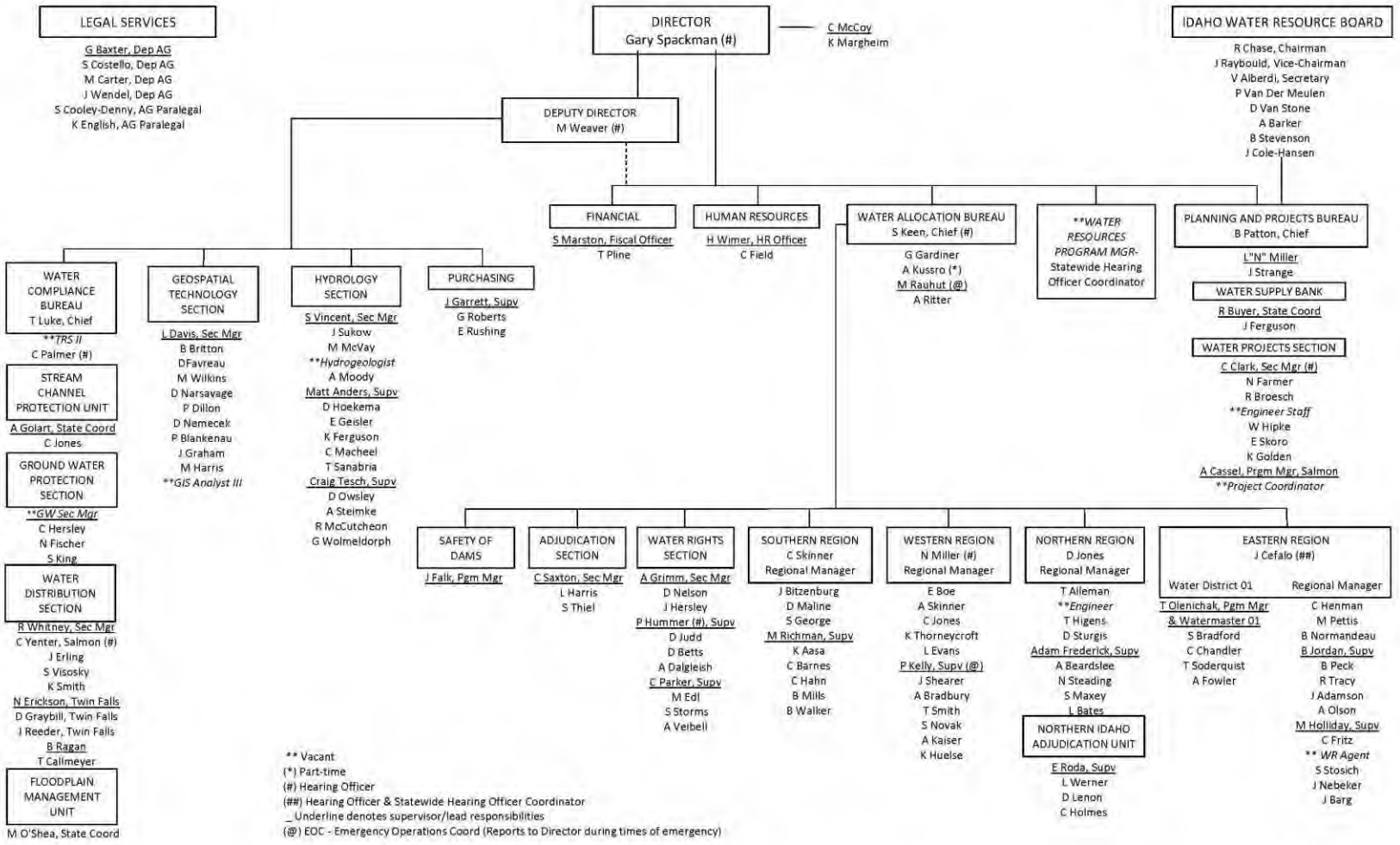
The Idaho Water Resource Board was created by the Idaho Legislature in 1965 following the passage of a constitutional amendment that established the Board. There are eight Board members, appointed by the governor, who serve four-year terms.

The Snake River Basin Adjudication ("SRBA") was commenced on November 19, 1987 by the Fifth Judicial District Court of the State of Idaho in response to a petition filed by the Idaho Department of Water Resources, at the direction of the Legislature.

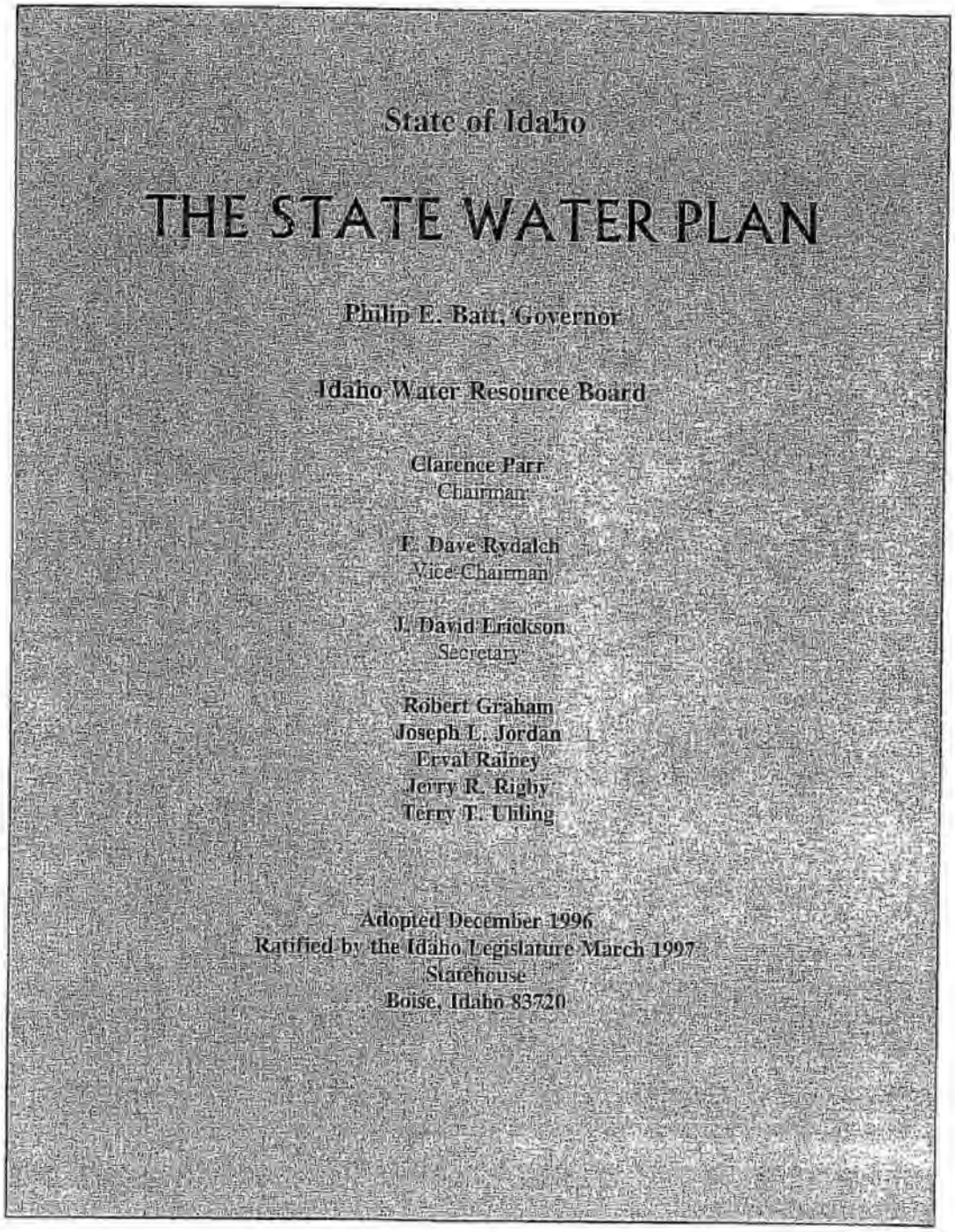
The North Idaho Adjudication includes three separate basin adjudications. The Coeur d'Alene-Spokane River Basin Adjudication ("CSRBA") was commenced on November 12, 2008.

The following table was last updated on July 12, 2014. Visit www.idwr.idaho.gov and www.srba.state.id.us for more up to date information.

Idaho Department of Water Resources
September 1, 2020



Appendix F: STATE WATER PLAN (DEC. 1996, RATIFIED MARCH 1997)



State of Idaho

THE STATE WATER PLAN

Philip E. Batt, Governor

Idaho Water Resource Board

Clarence Parr
Chairman

T. Dave Rydalch
Vice-Chairman

J. David Erickson
Secretary

Robert Graham
Joseph L. Jordan
Erval Rainey
Jerry R. Rigby
Terry T. Uhling

Adopted December 1996
Ratified by the Idaho Legislature March 1997
Statehouse
Boise, Idaho 83720

To the Citizens of Idaho:

This is the fourth time the Idaho Water Resource Board has reviewed, reevaluated, and updated the Idaho State Water Plan. Idaho has seen many changes since the plan was first adopted in 1976. These changes point out the need for periodic update of all state plans.

Central to all the Water Board's planning activities is the recognition that many of the streams and aquifers in the state are highly developed and utilized. This simple fact complicates the task of planning for future water use immeasurably. New users will have to rely on legal changes in nature of use, rentals from recognized water banks, or other innovative approaches to the water supply question.

The Idaho Water Resource Board is placing great emphasis on developing comprehensive plans for basins, waterways, or other geographic areas. Comprehensive planning has been a State Water Plan policy since 1976. In 1988 the Idaho Legislature provided direction and authority for this detailed planning effort. Comprehensive basin and waterway plans approved by the legislature are identified in this State Water Plan.

Public input is an important factor in all Idaho Water Resource Board activity. The Board has appreciated the interest and concern shown by you, the citizens, in the past. We hope your active participation in our activities will continue.

Sincerely,

Clarence Parr

Clarence Parr
Chairman

Former Members of the Idaho Water Resource Board

Robert M. Bandy, Priest River
Brent J. Bell, Rexburg
Mary T. Brooks, Boise
George L. Crookham, Jr., Caldwell
Sally L. Cupan, Sandpoint
Leonard E. Graham, Rigby
Gene M. Gray, Payette
Robert M. Hammes, St. Maries
M. Reed Hansen, Idaho Falls
Kenneth E. Hungerford, Moscow
Franklin Jones, Boise
Evan M. Kackley, Wayan
Donald R. Kramer, Castleford
Ferris M. Kunz, Montpelier
William J. Lanting, Hollister
Charles J. Marshall, Jerome
Herman J. McDevitt, Pocatello
Joseph H. Nettleton, Murphy
Thomas Olmstead, Twin Falls
Arlie L. Parkins, Marsing
William Platts, Boise
Scott W. Reed, Coeur d'Alene
Edward Reichert, Filer
Mike Satterwhite, Lewiston
Edwin C. Schlender, Malta
James Shawver, Eden
LeRoy Stanger, Idaho Falls
John F. Streiff, Lewiston
Richard W. Wagner, Lewiston
J.D. Williams, Preston
George L. Yost, Emmett

BEFORE THE WATER RESOURCE BOARD
OF THE STATE OF IDAHO

IN THE MATTER OF THE STATE WATER PLAN) A RESOLUTION

WHEREAS, the Idaho Water Resource Board (the Board) conducted scoping meetings to gather public input concerning policies contained in the State Water Plan; and

WHEREAS, the Board, based on input from the scoping meetings, has proposed changes to existing policies and suggested new policies; and

WHEREAS, the Board has circulated these proposed changes; and

WHEREAS, the Board has provided a 60-day public comment period and has conducted public meetings and hearings providing opportunities for public input; and

WHEREAS, the Board has reviewed the public record consisting of oral testimony and written comments, and has modified their proposed changes accordingly.

NOW, THEREFORE, BE IT RESOLVED that, having considered the draft amended Plan and the public record, the Board hereby adopts the changes to the State Water Plan specified in Attachments A and B, and directs that these changes be provided to the Idaho State Legislature for their consideration.

PASSED AND APPROVED this 13th day of December, 1996.

Clarence Parr
CLARENCE PARR, Chairman

ATTEST:

David Erickson
J. DAVID ERICKSON, Secretary

ATTACHMENT NO. 7, MEETING 8-96
IDAHO WATER RESOURCE BOARD
December 13, 1996

Table of Contents

WATER PLANNING PROGRAM
- Constitutional Authority . . . 1
- Legislative Authority . . . 1
- State Water Plan Formulation . . . 2
- Idaho Water Resource Board Programs and Duties . . . 3

STATE WATER PLAN
- Objectives . . . 4
- Policies . . . 4
- Water Use Group . . . 5
  - 1A - STATE SOVEREIGNTY . . . 5
  - 1B - PUBLIC INTEREST . . . 5
  - 1C - BENEFICIAL USE OF WATER . . . 5
  - 1D - TRANSFERABILITY OF USE . . . 5
  - 1E - WATER MEASUREMENT . . . 6
  - 1F - CONJUNCTIVE MANAGEMENT . . . 6
  - 1G - REASONABLE USE . . . 6
  - 1H - GROUND WATER WITHDRAWAL . . . 6
  - 1I - WATER SUPPLY BANK . . . 7
  - 1J - RECHARGE . . . 7
  - 1K - SPRING FLOWS . . . 7
  - 1L - WATER QUALITY . . . 7
  - 1M - POLLUTION CONTROL . . . 8
- Conservation Group . . . 8
  - 2A - SPECIES OF CONCERN . . . 8
  - 2B - FEDERALLY LISTED SPECIES . . . 8
  - 2C - LAKE & RESERVOIR MANAGEMENT . . . 9
  - 2D - CLIMATE VARIABILITY . . . 9
- Protection Group . . . 9
  - 3A - INSTREAM FLOW . . . 9
  - 3B - POTENTIAL RESERVOIR SITES . . . 10
  - 3C - STATE NATURAL AND RECREATIONAL RIVER SYSTEM . . . 11
  - 3D - RIPARIAN HABITAT & WETLANDS . . . 11
  - 3E - STREAM CHANNEL REHABILITATION . . . 11
  - 3F - TAILINGS POND REGULATION . . . 11
  - 3G - RADIOACTIVE WASTE MONITORING . . . 12
  - 3H - SAFETY MEASURES PROGRAM . . . 12
  - 3I - FLOOD PRONE AREAS . . . 12
  - 3J - FLOOD CONTROL LEVEE REGULATION . . . 13
- Management Group . . . 13
  - 4A - AGENCY CONSOLIDATION . . . 13
  - 4B - REVIEW OF FEDERAL RESERVOIR WATER ALLOCATION . . . 13
  - 4C - ENERGY PLAN . . . 14
  - 4D - HYDROPOWER LICENSING . . . 14
  - 4E - HYDROPOWER SITING . . . 14
  - 4F - CONSERVANCY DISTRICTS . . . 15
  - 4G - RESEARCH PROGRAM . . . 15
  - 4H - FUNDING PROGRAM . . . 15

4I - PLANNING PROGRAM 16
4J - FEDERAL AND TRIBAL WATER RIGHTS 16
4K - WATER RESOURCE MANAGEMENT 16
River Basins Group 17
5A - SWAN FALLS AGREEMENT 17
5B - SNAKE RIVER MINIMUM FLOWS 17
5C - SNAKE RIVER TRUST WATER 18
5D - SNAKE RIVER BASIN DCMI 18
5E - SNAKE RIVER BASIN AGRICULTURE 19
5F - SNAKE RIVER BASIN HYDROPOWER 19
5G - SNAKE RIVER NAVIGATION 19
5H - SNAKE RIVER BASIN SPRINGS 19
5I - SNAKE RIVER BASIN NEW STORAGE 20
5J - STORAGE ACQUISITION 20
6A - BEAR RIVER COMPACT 20
6B - INTERSTATE WATER DELIVERY 20
6C - BEAR LAKE 21
6D - BEAR RIVER BASIN WATER PROJECTS 21
7A - PANHANDLE BASINS 22
7B - PANHANDLE MINIMUM FLOWS 22
7C - PANHANDLE DCMI 22
7D - PANHANDLE AGRICULTURAL WATER 22
7E - PANHANDLE NAVIGATION 22

IDAHO'S WATER RESOURCES
Climate 23
Surface Water 26
Ground Water 35
Floods and Drought 45
Water Quality 54

WATER USE AND ALLOCATION
Land Use and Ownership 61
Water Allocations 63
Agriculture Water Use 63
Domestic, Commercial, Municipal, and Industrial Water Use 70
Power Generation 71
Geothermal Water Use 75
Navigation 75
Fish and Wildlife 75
Recreation 79
Protection Programs 82

IDAHO'S DEMOGRAPHICS AND ECONOMY
Population Growth 93
Employment and Income 93

THE WATER PLANNING PROGRAM

The Idaho State Water Plan was adopted by the Idaho Water Resource Board to guide the development, management, and use of the state's water and related resources. The plan recognizes past actions, addresses present conflicts and opportunities, and seeks to ensure that future water resource uses will complement and supplement state goals directed toward serving the citizens of Idaho. The plan is a dynamic document, subject to change to reflect citizens desires and to be responsive to new opportunities and needs.

Constitutional Authority

Article XV, Section 7 of the Idaho Constitution provides the authority for the preparation of a State Water Plan. This constitutional amendment was adopted in November 1964 following a statewide referendum and states:

> *There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest; to construct and operate water projects; to issue bonds, without state obligation, to be repaid from revenues of projects; to generate and wholesale hydroelectric power at the site of production; to appropriate public waters as trustee for Agency projects; to acquire, transfer and encumber title to real property for water projects and to have control and administrative authority over state land required for water projects; all under such laws as may be prescribed by the Legislature.*

Article XV, Section 3 of the Idaho Constitution provides for the appropriation and allocation of water. Section 3 provides that:

> *The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes.*
>
> *Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining have preference over those using the same for manufacturing or agriculture purposes.*
>
> *But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.*

Although no legal confrontations have occurred, Section 7 probably tempers Section 3 in that future water development must be guided by the State Water Plan.

Legislative Authority

Article XV, Section 7 of the Idaho Constitution called for the creation of a "Water Resource Agency" but did not establish the agency. In 1965, the 38th Legislature established the Idaho Water Resource Board, and directed that (as amended):

> *The Idaho Water Resource Board shall, subject to legislative approval, progressively formulate, adopt and implement a comprehensive state water plan for conservation, development, manage-*

ment and optimum use of all unappropriated water resources and waterways of this state in the public interest.

Idaho Code 42-1734A(1)

To assist the Idaho Water Resource Board, the Legislature provided for the director of the Department of Water Resources:

To perform administrative duties and such other functions as the Board may from time to time assign to the Director to enable the Board to carry out its powers and duties.

Idaho Code 42-1805(6)

Article XV, Section 7 was amended by the electorate during the general election of November 6, 1984. This modification provides that:

The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law. Thereafter any change in the state water plan shall be submitted to the Legislature of the State of Idaho upon the first day of a regular session following the change and the change shall become effective unless amended or rejected by law within sixty days of its submission to the Legislature.

Legislation in 1988 provided for the development of a "comprehensive state water plan" and authorized designation of highly-valued waterways as state protected rivers. Each comprehensive basin or water body plan becomes a component of Idaho's State Water Plan.

The board may develop a comprehensive state water plan in stages based upon waterways, river basins, drainage areas, river reaches, ground-water aquifers, or other geographic considerations.

Idaho Code 42-1734A(2)

As part of the comprehensive state water plan, the board may designate selected waterways as protected rivers as provided in this chapter.

Idaho Code 42-1734A(1)

The authority to designate "protected rivers" derives from the state's power to regulate activities within a stream bed including stream channel alterations, water diversions, the extraction of minerals or other commodities, and the construction of impoundments.

State Water Plan Formulation

Formulation of a State Water Plan is a dynamic process. Adoption of The State Water Plan - Part One, *The Objectives*, in 1974, and *The State Water Plan* - Part Two in 1976, provided an initial State water policy. Implementing the policies in Part Two required the combined efforts of government agencies, the legislature, private concerns and the public. Consequently, the report delineated those areas where legislative action was required, identified the programs to be pursued by the Board, and described the areas where cooperation of public and private interests was necessary.

The State Water Plan was updated and readopted in 1982, 1986, and 1992. The Plan continues to evolve as an instrument in the adoption and implementation of policies, projects, and programs that develop, utilize, conserve, and protect the state's water supplies. Changes were made in 1985 to reconcile any differences created by the Swan Falls agreement entered into by the State and the Idaho Power Company. The 1986 and 1992 updates involved changes in objectives and policy reorganization.

Legislation in 1988 directed preparation of comprehensive plans for specific geographic areas as components of the State Water Plan [Idaho Code 42-1734A(2)]. These plans are prepared within the framework of the policies established by the overarching State Water Plan.

PLANNING PROCESS

The planning process encompasses five steps:

1. A comprehensive public involvement program to determine public views and desires regarding resource problems, needs, and potentials;

2. An ongoing evaluation of the water and related resource base and an estimate of probable future conditions;

3. An evaluation of beneficial and adverse effects of protection and development programs and projects;

4. Adoption of the State Water Plan by the Idaho Water Resource Board as required by Article XV, Section 7 of the Idaho Constitution;

5. Approval by the Idaho Legislature as provided by law.

Public involvement is an important part of the planning process, and is necessary in assessing viewpoints and conditions. Scoping meetings and formal hearings provided opportunity for public criticism and suggestions.

Idaho Water Resource Board Programs and Duties

In addition to formulating and implementing the State Water Plan, the Idaho Water Resource Board:

1. Provides financial assistance for water development and conservation projects in the form of revenue bonds, loans, and grants.

2. Provides a mechanism for implementing legislative mandates such as the aquifer recharge program established by the 1995 Idaho Legislature.

3. Adopts rules for:

- Well Construction
- Well Drillers Licenses
- Construction and Use of Injection Wells
- Drilling for Geothermal Resources
- Mine Tailings Impoundment Structures
- Safety of Dams
- Stream Channel Alterations

The Department of Water Resources administers these programs.

4. Hears appeals of Department of Water Resources administrative decisions regarding programs administered under Idaho Water Resource Board rules.

5. Administers the Idaho Water Supply Bank.

6. At the request of the Governor, appears on behalf of and represents the state in proceedings, negotiations, or hearings involving the federal government or other states.

7. May file applications and obtain permits to appropriate, store, or use unappropriated waters, and acquire water rights subject to the provisions of applicable law.

8. May investigate, undertake, or promote water projects deemed to be in the public interest.

9. May cooperate and enter into contracts with federal, state and local governmental agencies for water studies, planning, research, or activities.

10. May study water pollution and advise the State board of health and welfare regarding the establishment of water quality criteria.

11. May formulate and recommend legislation for water resource conservation, development, and utilization.

STATE WATER PLAN

The State Water Plan emerges from a vision of Idaho in which water is used efficiently, and is allocated through laws that fully conform to the prior appropriation doctrine. Water resource planning involves the widespread participation of Idaho citizens.

Objectives

The following objectives of the State Water Plan are formulated for the conservation, development, management and optimum use of all unappropriated water resources and waterways of this state in the public interest [Idaho Code 42-1734A].

1. **Water Management** - Encourage and promote the quantification of water use and all water rights within the state. Encourage and promote integrated, coordinated, and adaptable water resource management, and the prudent stewardship of water resources. Encourage state protection of waterways or water bodies with outstanding fish and wildlife, recreation, geologic or aesthetic values where protection should take precedence over development.

2. **Public Interest** - Ensure that the needs and wishes of the public are appropriately considered in decisions involving water resources of the state.

3. **Economic Development** - Encourage optimum economic development of the water resources, with due regard for prior water rights, that promotes the integration and coordination of the use of water, the augmentation of existing supplies, and the protection of designated waterways [Idaho Code 42-1734A(1)(b)].

4. **Environmental Quality** - Maintain, and where possible enhance water quality and water-related habitats. Study and examine the quality of rivers, streams, lakes and ground water [Idaho Code 42-1734(15)], and assure that due consideration is given to the needs of fish, wildlife, and recreation in managing the water resources of the state.

5. **Public Safety** - Encourage and promote programs that will assure life and property within the state are not threatened by the management or use of our water resources.

Policies

State Water Plan policies are directed toward optimum management and utilization of the state's water resources. The policies provide a framework within which private enterprise and government entities can develop and propose water resource projects and water management scenarios. Specific water resource projects and programs are identified in the comprehensive plans developed for defined geographic areas. The Water Resource Board adopts the following policies for the conservation, development, management and optimum use of all the unappropriated water resources and waterways of this state in the public interest [Idaho Code 42-1734A].

State Water Plan Policy 4A
(Adopted, 1/4/00)

4A – AGENCY RESPONSIBILITIES

It is the policy of Idaho that the responsibilities for administration and regulation of water quantity allocations be discharged by the Department of Water Resources separate from the state agency primarily responsible for the administration and regulation of water quality. However, planning for water use and water quality should be integrated among state agencies by the Idaho Water Resource Board to the extend such integrated planning does not compromise the responsibilities of the individual state agencies or state sovereignty over water allocation and use.

Comment: The responsibilities for administering and regulating water quantity allocations and water quality standards are presently divided between state agencies. The Department of Water Resources administers and regulates water allocation and use, while the Division of Environmental Quality is primarily responsible administering and regulating water quality. This separation of responsibilities provides significant advantages to Idaho in maintaining regulatory and administrative authorities at the state level.

However, the quantity of water in a stream, lake, or impoundment can significantly affect water quality. Long-range planning for the use of the state's water and for the protection or improvement of water quality should therefore be integrated provided that federal requirements do not diminish state sovereignty.

Water Use Group

A goal of the State Water Plan is to secure greater productivity, in both monetary and nonmonetary terms, from existing water supplies. Water Use policies are concerned with improvement in practices, procedures, and laws relating to existing water use.

1A - STATE SOVEREIGNTY

It is the policy of Idaho that the state has sovereignty over decisions affecting the development and use of its water resources, and that the state opposes any attempt by the federal government, its management agencies, any other state, or any other entity to usurp the state's role in these areas.

Comment: The Idaho Water Resource Board is responsible for the formulation of state water policy through the State Water Plan. The state's position on existing and proposed federal policies and actions should be coordinated by the Water Board to ensure the state retains its traditional right to control the water resources of the state.

1B - PUBLIC INTEREST

It is the policy of Idaho that water be managed with due regard for the public interest as established by state law.

Comment: The constitution and statutes of the State of Idaho declare all the waters of the state, when flowing in their natural channels, including ground waters, and the waters of all natural springs and lakes within the boundaries of the state, to be public waters [Idaho Code 42-101]. Water allocation and management decisions must consider the public interest as established by state law. The State Water Plan is an expression of the public interest.

1C - BENEFICIAL USE OF WATER

It is the policy of Idaho that beneficial uses include certain nonconsumptive water uses.

Comment: This policy is affirmed by Idaho Code 42-1501 and is reflected in the policies adopted by the Idaho Water Resource Board that "beneficial use" includes, but is not limited to, water required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetics, navigation, water quality, and managed ground water recharge as well as the traditional uses for agriculture, manufacturing, mining, hydropower, and human consumption.

1D - TRANSFERABILITY OF USE

It is the policy of Idaho that changes in the nature of use of a water right be allowed, including changes to nonconsumptive uses, provided other water rights are not injured.

Comment: The demand for water increases every year while the volume of unappropriated water within the state continually decreases. The purpose of allowing transferability of water rights is to provide flexibility in water allocation to meet changing conditions. Idaho Code 42-108 and 42-222 provide for changes in place of diversion, place of use, period of use, and nature of use. Provision is made to protect other water users, the agricultural base of an area, and the local public interest. Priority dates are retained if other water right holders are not injured.

In some instances, it is in the public interest to allow changes from traditional uses to instream flow purposes. In highly developed areas, the potential to protect or restore fish and wildlife, water quality, aesthetic, or recreation resources may depend upon the transferability of water rights. To make such transfers substantive, the priority date of the original water right should be retained if other water rights are not injured. Chapter 15, Title 42, Idaho Code needs to be expanded to enable the Idaho Water Resource Board to apply for a change in the nature of use when a water right is acquired that is best used for minimum or instream flow purposes.

1E - WATER MEASUREMENT

It is the policy of Idaho that the water resources of the state should be quantified and their uses should be measured.

Comment: Planning for the optimum use of the water resources of the state and optimal management requires adequate water supply assessment and water use measurement.

Idaho Code 42-1805 lists as a duty of the Director of the Department of Water Resources preparation of a present and continuing inventory of the water resources of this state. However, stream gaging in the state is sparse and many gaging stations have been abandoned due to rising maintenance costs and reductions in agency funding. The existing stream gaging program should be reviewed and enhanced in the most efficient manner to meet water planning and management needs. Many ground water systems have not been adequately studied. Assessment studies are needed to understand and evaluate the state's ground water resources.

Water use quantification is essential for water resource planning. Chapters six and seven, Title 42, Idaho Code, list authorities for water measurement. The State, through the Department of Water Resources, needs to be actively involved in water use measurement and reporting.

1F - CONJUNCTIVE MANAGEMENT

It is the policy of Idaho that where evidence of hydrologic connection exists between ground and surface waters, they are managed conjunctively in recognition of the interconnection.

Comment: Nearly all ground water aquifers in the state discharge to or are recharged by a surface body of water. Surface water seeps through stream beds, lake beds, and channel banks to aquifers. Aquifers, in turn, serve as underground reservoirs, and can stabilize stream discharge during dry periods. Irrigation practices, ground water pumping, and flood flows impact the relationship.

The goal of conjunctive management is to protect the holders of prior water rights while allowing for the optimum development and use of the state's water resources. The approval of new water-use applications and the administration of existing water rights must recognize this relationship.

1G - REASONABLE USE

It is the policy of Idaho to promote the reasonable use of water in accordance with state law.

Comment: As water use efficiencies are increased, reduced requirements in one water use sector could provide available water for new demands or help efforts to improve instream flows. State and local planning should consider water efficiency techniques, together with legislation or ordinances, that may help conserve water resources for drought periods and increase water supplies for other needed uses.

1H - GROUND WATER WITHDRAWAL

It is the policy of Idaho that average withdrawals from an aquifer should not exceed the reasonably anticipated rate of future recharge to that aquifer.

Comment: Excessive withdrawals of ground water may cause economic, environmental, and social problems nearly anywhere in the state. The state should seek to correct withdrawal/recharge imbalances in an orderly fashion, attempting to minimize negative impacts.

Idaho Code 42-226 allows full economic development of the state's underground water resources. The Director of the Department of Water Resources can establish reasonable ground water pumping levels when necessary to protect prior appropriations of ground water. It is important that all beneficial uses, including interdependent spring and surface water uses be considered in evaluating the full economic development potential of an aquifer. Section 42-237a provides that the Director may prohibit or limit the withdrawal of water from a well if withdrawal would result in diversion of the ground water

supply at a rate beyond the reasonable anticipated rate of future natural recharge. The director may allow withdrawals to exceed natural recharge if a program exists to increase recharge or decrease withdrawals and senior ground-water rights are protected.

There are areas within the state where withdrawal/recharge imbalances of the ground water resource have been identified by the Department of Water Resources. Idaho Code 42-233a and 233b give the Director of the Department of Water Resources the authority to designate areas as either Ground Water Management Areas or Critical Ground Water Areas. Designation and its associated management options provide a logical step in arresting excessive withdrawals from an aquifer. The Department of Water Resources should also require water-use reporting and the measuring of water levels.

1I - WATER SUPPLY BANK

It is the policy of Idaho that the sale or lease of water is critical to the efficient management of the state's water resources. Use of the State's Water Supply Bank shall be encouraged.

Comment: As the state approaches the situation where little or no water is available for new appropriations, the Water Supply Bank, established by Idaho Code 42-1761, affords an efficient mechanism for the sale or lease of water. By aggregating water available for lease, rental pools operating under the authority of the Water Supply Bank can supply the water needs of many potential users. The Idaho Water Resource Board has adopted rules and regulations governing the sale or lease of water through the Water Supply Bank. The Idaho Water Resource Board has authorized local entities to manage rental pools in Water Districts 01, 63, and 65. The Shoshone-Bannock Tribes are also authorized pursuant to state law, to operate a rental pool.

1J - RECHARGE

It is the policy of Idaho that managed recharge be encouraged, pursuant to state law.

Comment: Managed aquifer recharge may enhance spring flows and maintain desirable aquifer levels. Managed recharge should be monitored to document the beneficial effects on the state's water resources, and to minimize any concerns or issues.

1K - SPRING FLOWS

It is the policy of Idaho that the hydrogeologic relationships between ground water supplies and spring flows continue to be quantified to allow for the determination of optimal development of the water resources.

Comment: Spring flow is part of the natural discharge from an aquifer. Pumped ground water withdrawals from an aquifer change the original recharge-discharge relationship and affect spring flows. Where this relationship exists, it must be sufficiently quantified to allow for optimal utilization of the ground water supply while protecting established senior rights which depend on spring flows discharging from the aquifer. This requires continued funding for studies, such as the Upper Snake River Basin Study completed by the Department of Water Resources in 1996.

1L - WATER QUALITY

It is the policy of Idaho that water be protected against unreasonable contamination or deterioration in quality, thereby maintaining designated beneficial uses.

Comment: It is essential that the quality of Idaho's water resources be protected for public safety and economic stability and growth. The quality of surface and ground water depend in large degree on land-use practices within watersheds. Land managers and local units of government are urged to adequately consider means of reducing nutrient loading,

bacterial contamination, and soil erosion and deposition to protect water quality. Local units of government and special use districts should participate with Basin Advisory and Watershed Advisory Groups in the preparation of water quality management plans.

The Department of Water Resources administers a statewide ambient ground water quality monitoring network and the Environmental Data Management System. Regional and local monitoring networks are managed by the Division of Environmental Quality. The citizens of Idaho will be most efficiently served by cooperative water quality monitoring programs involving appropriate public and private entities, and establishment of an information distribution system for all water quality data.

1M - POLLUTION CONTROL

It is the policy of Idaho that the use of water to dilute pollution is not a substitute for adequate treatment.

Comment: State and federal water quality programs should provide protection for the current high quality of water associated with streams within the state. In most cases, allocation of water for instream flow use should be directed toward meeting fish, wildlife, and recreational needs and not to the dilution of pollution. One way to ensure sufficient water would be to obtain storage rights for water quality maintenance in reservoirs and stream reaches below impoundments.



Conservation Group

The Conservation policies focus on wise use and careful planning to accommodate important values. The purpose of the policies is to manage the use of water resources for the benefit of all Idaho citizens.

2A - SPECIES OF CONCERN

It is the policy of Idaho that the public interests be considered when decisions are made to maintain sustainable populations of plant and animal species whose existence is threatened by mankind's actions.

Comment: The state and federal government have identified species of concern and species that are listed or are candidates for listing as Threatened or Endangered. In most cases, action at the state level can identify management strategies that will insure sustainable populations of these species. The State will consider the public interest in determining its strategies and will encourage local leadership to this end. Exceptions to this policy will be made for efforts to eliminate noxious weeds and other pests.

2B - FEDERALLY LISTED SPECIES

It is the policy of Idaho to cooperate, insofar as allowed by state law, in efforts to conserve and restore plant and animal species listed by the federal government as Threatened or Endangered.

Comment: Actions taken by federal agencies under authorities created by the Endangered Species Act do not modify state law. Efforts by the citizens and agencies of the state to achieve federal goals may be constrained by existing state law, particularly the protection and preservation of state water rights.

The State should take an active role in the listing process. To the extent allowed by federal law, the State should be involved in developing and administering recovery and habitat management plans for species that are listed.

2C - LAKE AND RESERVOIR MANAGEMENT

It is the policy of Idaho that comprehensive management plans for surface use and water quality protection be developed for lakes and reservoirs in the state.

Comment: Idaho is a land of numerous lakes and reservoirs. Many lakes and reservoirs in the state have experienced declining water quality, surface crowding, losses in scenic values, and physical damage to the shoreline. Comprehensive management plans for surface use, relative to public safety, and water quality protection can address these problems.

Each lake or reservoir has its own set of needs and constraints which must be considered. County and city government, the local public, land managers, and user groups of the lake or reservoir and its watershed, must be involved in plan development and implementation. Where federal or private entities have regulatory control over water storage and releases, these entities are encouraged to cooperate in the development of surface use and water quality management plans.

The Idaho Water Resource Board supports implementation of the Clean Lakes Act passed by the Idaho Legislature in 1989 [Chapter 64, Title 39, Idaho Code]. The law provides for the creation of regional councils empowered to develop lake management plans. It further provides for technical advisory groups to support the council in its planning efforts.

2D - CLIMATE VARIABILITY

It is the policy of Idaho that climate variability be considered in planning for and in the management of the state's water resources.

Comment: Regional climate changes are uncertain, however, climate variability should be expected and planned for by the public and its agencies. Possible consequences of regional climate change are important to recognize. Winter snowpack in the mountains may be significantly affected, with consequent effects on water resources available for agriculture, power generation, forestry and fisheries. Even though uncertainties are considerable, we should not wait to put in place policies and procedures that could provide for flexibility and make use of new understanding as it develops.

Protection Group

The Protection policies deal with water and related resources with outstanding social, economic, and environmental values. The purpose of the policies is to safeguard these values and Idaho's citizens, and to provide for minimum stream flows, and the protection and preservation of waterways in accordance with Idaho Code 42-1734A(1)(d).

3A - INSTREAM FLOW

It is the policy of Idaho that when it is in the public interest the Idaho Water Resource Board should seek to appropriate waters in the state for instream flow purposes.

Comment: Instream flows protect many nonconsumptive uses such as fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, hydropower and water quality. Many of these uses have direct effects on the economy while others represent intangible values, and the public interest. Chapter 15, Title 42, Idaho Code, provides the authority and spells out procedures for the Idaho Water Resource Board to appropriate water for minimum stream flows.

The Idaho Water Resource Board supports efforts to obtain storage and natural flow rights to improve and maintain instream flows when in the public interest. Chapter 15, Title 42, Idaho Code, should be expanded to enable the Idaho Water Resource Board to transfer acquired water rights to instream flow water rights. By law [Idaho Code 42-108 and 42-222], provision is made to protect other water users and the agricultural base of an area.

3B - POTENTIAL RESERVOIR SITES

It is the policy of Idaho that potential reservoir sites be protected from significant land use change.

Comment: Future economic development and population growth will bring additional demands on Idaho's water resources. In future years the construction of additional reservoirs may play an important role in managing the water resources of the state. While the State recognizes the rights of existing land owners, improvements and new development within potential reservoir sites, which could increase reservoir costs significantly, should be discouraged.

Table 1 lists current potential reservoir sites which should be protected by the State. Sites will be evaluated or reevaluated for protection during the process of preparing comprehensive plans for basins or waterways.

Table 1. Potential Reservoir Sites

Potential Reservoir	Stream	Size	Purpose
Upper Snake			
Teton	Teton River	236,000 AF	Irrigation, Power, Flood Control
Medicine Lodge	Medicine Lodge	12,000 AF	Irrigation
Birch Creek	Birch Creek	24,000 AF	Irrigation
Boulder Flats	Big Wood River	61,000 AF	Flood Control, Recreation
Southwest Idaho			
Grindstone	Snake River	115,000 AF	Irrigation
Sailor Creek	Snake River	113,000 AF	Irrigation
Gold Fork	Gold Fork Payette River	80,000 AF	Irrigation
Twin Springs	Boise River	410,000 AF	Irrigation, Power, Flood Control
Lost Valley (enlargement)	Lost Valley Creek	30,000 AF	Irrigation
Galloway	Weiser River	1,220,000 AF	Irrigation, Flood Control
Monday Gulch	Little Weiser River	35,000 AF	Irrigation
C. Ben Ross (enlargement)	Little Weiser River	12,450 AF	Irrigation
Goodrich	Weiser River	350,000 AF	Irrigation
Tamarack	Weiser River	30,000 AF	Irrigation
Salmon			
Challis	Challis Creek	10,600 AF	Irrigation
Bear			
Caribou	Bear River	40,000 AF	Irrigation
Plymouth	Malad River	400,000 AF	Irrigation

3C - STATE PROTECTED RIVER SYSTEM

It is the policy of Idaho that a state protected river system be maintained to meet the desires of the citizens of Idaho. The system should provide for the protection of the unique features that exist on various rivers within the state and should provide the necessary authority and funding to protect such rivers and related lands for recreational, scenic, and natural values.

Comment: Idahoans have expressed a desire to retain some rivers or river reaches in a free-flowing condition. Idaho Code 42-1734A(1) authorizes the Idaho Water Resource Board to protect highly-valued waterways as State protected rivers. The authority to designate "protected rivers" derives from the State's power to regulate the beds of navigable streams and the waters within the state. In 1991 the Idaho Legislature approved the first stream reaches for state protection.

Because of the comprehensive scope of state water planning, the Idaho Water Resource Board encourages the federal government to work within the state water planning process rather than independently pursuing federal protection of waters within Idaho. Federal protection adds another layer of bureaucracy to water planning and limits planning flexibility. State water planning provides a means for ensuring coordinated water planning by both federal and state governments.

3D - RIPARIAN HABITAT AND WETLANDS

It is the policy of Idaho to protect the ecological viability of riparian habitat and wetlands within the state in the public interest.

Comment: Riparian lands and wetlands are important components of a watershed. The State of Idaho encourages protection of public riparian lands and wetlands, and the practice of good stewardship in managing private lands. Riparian and wetland protection above the mean high water elevation should be implemented at the watershed level. The authority to control land use is set out in the Local Planning Act of 1975, as amended. The Idaho Stream Channel Protection Act [Idaho Code 42-3801 thru 3812] regulates alteration of stream bed below the mean high water elevation.

3E - STREAM CHANNEL REHABILITATION

It is the policy of Idaho that the costs and benefits of stream channel rehabilitation be evaluated where past activities currently or potentially affect the yield or quality of the state's watersheds.

Comment: Catastrophic flooding is often the outcome of heavy run-off combined with human disturbances, and may result in the destruction of stream channels. The functional loss of impacted channels may threaten public safety, private property, and the overall quality and quantity of water produced in the affected watershed. It is appropriate for the State to take action to rehabilitate impacted stream channels where public safety may be threatened, or where the remedial costs are less than the potential damages.

Many early mining projects have been built and later abandoned. Some of these projects have deteriorated to the extent that public safety and water resource values are threatened. Where liability cannot be established, and public safety may be threatened, the State should take remedial action.

3F - TAILINGS POND REGULATION

It is the policy of Idaho that the construction, operation, and maintenance of mine tailings impoundment structures be regulated by the state.

Comment: Chapter 17, Title 42, Idaho Code makes the regulation of mine tailings impoundment structures a function of the Idaho Department of Water Resources. The health and safety of the citizens of the state and the quality of the state's water resources in many areas depend on the proper construction, operation and maintenance of mine waste tailings ponds. Chapter 1, Title 39, Idaho Code, provides general water quality authorities to the Board of Health and Welfare.

3G - RADIOACTIVE WASTE MONITORING

It is the policy of Idaho to maintain a state program to monitor and regulate the use, handling, and storage of radioactive wastes.

Comment: The Idaho National Engineering Laboratory (INEL), near Arco, sits on top of the Eastern Snake Plain aquifer, the primary drinking water supply to half the state's population and the irrigation water supply for three million acres. Protection of this vital water supply from radioactive contamination is imperative for both the physical health of the population and the economic health of the state.

The State of Idaho INEL Oversight Program, provides independent information about the Idaho National Engineering Laboratory to the citizens of Idaho. In order to verify and complement the monitoring conducted by the U.S. Department of Energy and it's contractors, the Oversight Program has developed an environmental surveillance program to monitor potential impacts on air, water, soil, and biota resulting from activities at the INEL. Some of the monitoring sites are the same as, or are co-located with, federal monitoring locations, while others have been located so as to provide information that would not otherwise be available. Monitoring results are reported quarterly, with an annual summary and assessment of impact on the environment and people of Idaho.

The Division of Environmental Quality is Idaho's lead agency for regulatory control over the use, handling, storage, and disposal of radioactive materials. Regulatory control is also exercised over clean up of sites contaminated with radioactive materials and transportation of nuclear waste and spent fuel in Idaho.

The Idaho Water Resource Board supports the Governor's agreement on radioactive waste storage and removal at INEL, and supports continued negotiations to restrict further importation to Idaho. The transfer of all radioactive waste from Idaho to a designated national repository at the earliest date possible is strongly encouraged.

3H - SAFETY MEASURES PROGRAM

It is the policy of Idaho that a program should be established to assist local units of government in repairing and installing safety structures on or near canals, rivers, lakes, and reservoirs. The program should be established as a cost-sharing cooperative program.

Comment: Each year, numerous fatal accidents occur in the state's waterways because of the lack of preventive safety measures. Accidents are not confined to one area of the state nor one segment of the economy but are scattered throughout the state. Most Idaho cities are built on a water course and subsequently are plagued by hazardous canals, rivers, or shore lands. Fencing, signing, debris removal, covering and other structures should be installed to provide for human safety.

Local units of government should be encouraged to conduct annual public awareness campaigns concerning the dangers and hazardous nature of water bodies in their areas.

3I - FLOOD PRONE AREAS

It is the policy of Idaho to encourage the protection of flood plains and reliance on management rather than structural alternatives in reducing or preventing flood damages.

Comment: Flood damage can be limited by providing sufficient space in the flood plain to accommodate flood waters. Local government is encouraged to plan for floodways and protect flood plains from further development.

Prospective buyers should be made aware of identified flood prone areas. The pressures to develop areas subject to periodic flooding will continue to increase as population increases. Buyers should realize those flood prone areas require special construction provisions to avoid flood losses.

The National Flood Insurance Program should be adopted statewide. This program requires that

local units of government zone and control flood prone areas in order to be eligible for most federal assistance. Floodplain maps prepared for the Federal Emergency Management Agency are available through the Idaho Department of Water Resources.

3J - FLOOD CONTROL LEVEE REGULATION

It is the policy of Idaho that the construction and maintenance of flood control levees be regulated by the State.

Comment: The only standards applicable to the construction of flood control levees in Idaho are in the Rules governing Stream Channel Alterations. These standards apply only when all or part of the levee will be located below the mean high water mark.

Flood control levees are maintained by local entities. There are no maintenance regulations so the degree of maintenance varies with the capability and diligence of the responsible organization. This situation creates a potential hazard in that levees may be deteriorate to the point of being unsafe.

All new flood control levees should be required to be built to standards promulgated by the Department of Water Resources. The Department should also be authorized to develop maintenance criteria for flood control levees and to insure compliance with these criteria through an inspection program.

When a levee is scheduled to be rebuilt, a cost/benefit analysis should be conducted to determine if it is prudent to rebuild the levee in question or buy the property which the levee would protect.



Management Group

The focus of the Management policies is on improvement in the practices, procedures, and laws relating to existing water and energy resource administration and programs. The purpose of the policies is achievement of greater administrative efficiency.

4A - AGENCY CONSOLIDATION

It is the policy of Idaho that the administration of state programs for water allocation, planning, and water quality regulation be consolidated in one agency.

Comment: Planning and administration of water quantity and water quality are presently divided between two state agencies even though they are two directly interrelated properties of the same resource. The Department of Water Resources is primarily responsible for programs relating to water quantity, and the Division of Environmental Quality is responsible for protecting the quality of the state's water. Combining water quantity and water quality programs should reduce confusion and improve service to the public while preserving the goals of both programs.

see new policy adopted 1/4/2000

4B - REVIEW OF FEDERAL RESERVOIR WATER ALLOCATION

It is the policy of Idaho that agreements be established with federal agencies to allow Idaho Water Resource Board review of any proposed water allocation from federal reservoirs in excess of 500 acre-feet annually.

Comment: This policy does not encroach upon the authority of federal agencies to operate their facilities according to congressional authorization, but would help to ensure that their actions occur with state review and concurrence. The Idaho Water Resource Board would be guided in such a review by the conformance of the proposed allocation with the State Water Plan.

Formal agreements are necessary for the State Water Plan to be implemented in a coordinated manner. The Idaho Water Resource Board and the U.S. Bureau of Reclamation reached an agreement in 1988 providing for Board review of proposed reallocations. An agreement should be negotiated with the Corps of Engineers regarding large water releases from their facilities.

4C - ENERGY PLAN

It is the policy of Idaho that the State Energy Plan set forth policies for energy use and development in the state and that the plan be updated at least every five years.

Comment: The Idaho State Energy Plan was finalized in February 1982, and adopted by the Water Resource Board on June 3, 1983. The Idaho Water Resource Board recognized this plan as implementation the original State Water Plan's Policy 13, which called for the formulation of a State Energy Plan.

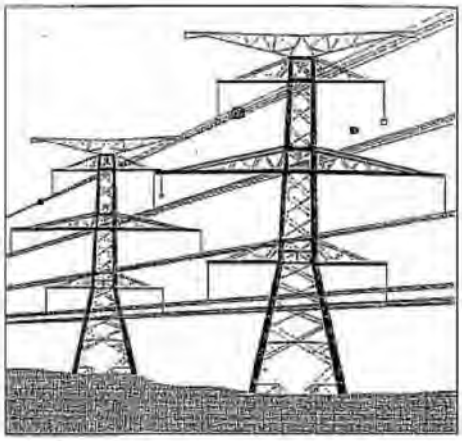
The Energy Plan needs to be updated at least every five years to be effective. This is increasingly important with the current move toward deregulation of the electric utility industry. The Idaho Water Resource Board urges legislative funding for an immediate update of the plan.

4D - HYDROPOWER LICENSING

It is the policy of Idaho to insure that public interest, existing water rights, related settlement agreements, and the future water and energy needs of the State are considered in hydropower licensing.

Comment: Hydropower water rights may be limited to a specific term and subordinated to upstream depletionary uses [Idaho Code, 42-203B(6) and (7)]. Water rights for power purposes may also be defined by agreement as unsubordinated to an established minimum flow [Idaho Code, 42-203B(2)]. Idaho asserts its traditional right to regulate the state's water resources. The federal government, in the hydropower licensing process, must recognize water rights and other constraints on water use established through state law. Hydropower licenses should be compatible with the public interest and outstanding power purchase contracts.

Many hydropower projects in Idaho are or soon will be undergoing relicensing by the Federal Energy Regulatory Commission (FERC). State review of existing water rights should occur in conjunction with the FERC relicensing process.



4E - HYDROPOWER SITING

It is the policy of Idaho that new hydropower developments be in conformance with the State Water Plan and the State Energy Plan.

Comment: The Idaho Water Resource Board is charged with the responsibility for planning for the optimum development of the water resources of the state through policies and water allocations which reflect the public interest. Specific hydropower siting issues are addressed in the Idaho Water Resource Board's comprehensive basin or river plans. The Federal Energy Regulatory Commission must consider State comprehensive plans in making hydropower siting decisions.

As a general policy, the Idaho Water Resource Board believes that energy conservation and efficiency improvements are the most desirable methods

to provide for additional power requirements. The State of Idaho will be best served through conservation and the upgrading of existing energy systems. These measures are attractive because of their low costs, short lead time, and flexibility.

Recognizing the future need for new generating capacity, the Board prefers that new hydropower resources be developed at dams having hydropower potential that do not currently generate power or do not generate at their maximum potential. New structures or projects should be carefully evaluated to insure that the benefits to the state outweigh any negative consequences associated with the proposed development. The Idaho Water Resource Board will evaluate specific hydropower developments in comprehensive plans for river basins or waterways.

4F - CONSERVANCY DISTRICTS

It is the policy of Idaho that where practical, the total water needs of a geographic area be satisfied by a legal entity having the authority and responsibility to address all water needs in a comprehensive manner.

Comment: Under present law the boundaries of irrigation districts, ground water districts, recharge districts, water measurement districts, drainage districts, and flood control districts need not coincide. Since coordinated planning is rarely undertaken, the possibility exists for good faith actions to have adverse impacts or be at cross purposes with the aims of other management entities.

A water conservancy district should have the authority to own and operate storage, diversion, and delivery systems to provide the total water needs of large geographic parts of the state (e.g., river basins, single or multi-county areas). It should have authority to levy taxes on all property benefitted by a program or project and to bond and contract for project construction. Water could be supplied for irrigation, domestic, municipal, industrial, recreation, and other purposes. Such districts could also sponsor ground-water recharge projects, distributing the costs over the affected area. They could also integrate the use of the surface and ground-water resources of a river basin for more efficient use of the total resource.

4G - RESEARCH PROGRAM

It is the policy of Idaho to encourage and conduct research on important water resource topics.

Comment: While water programs in Idaho can incorporate information from research in other states, more research dealing with specific problems in Idaho is needed. Topics that need immediate attention include:

- water use efficiency
- optimum monitoring programs for water use
- ground and surface water relationships specifically with regard to the timing and spacial distribution of pumping and recharge efforts,
- ground water flow models, and
- cooperatively developed system operation modeling techniques for Idaho river basins.

4H - FUNDING PROGRAM

It is the policy of Idaho that state funds be available to support the development, preservation, conservation, and restoration of the water and related resources of the state.

Comment: The Idaho Water Resource Board's Revolving Development Fund, the Water Management Account, and the Conservation and Development Trust are mechanisms for partially achieving the goals of this policy. The funds or accounts rely on the appropriation of moneys from the state's general fund. These programs have provided financial assistance for more than 200 water development, conservation, or system rehabilitation projects and studies. They have not been funded with sufficient moneys to have a highly visible impact on the land, water and related resources of the state.

Idaho Code 42-1734(2) provides that the Idaho Water Resource Board may lend the proceeds of the sale of revenue bonds to a local water project sponsor or sponsors. The issuance of revenue bonds does not constitute a general obligation of the State of Idaho or the Idaho Water Resource Board. Since 1983, $75.7 million has been created by this pro-

gram to fund 147 projects, including $10.6 million to help irrigators switch from flood irrigation to sprinkler irrigation, and $54.3 million to improve municipal water systems. While the revenue bond program was used extensively from 1983 to 1986, the Tax Reform Act of 1986 placed a number of restrictions on the issuance of these bonds, making them practical only for selective large projects. Since 1986, only three projects have been funded through the Revenue Bond program.

The language creating the above funds and accounts should be amended. In most cases it is overly restrictive, providing for the expenditure of moneys primarily for development. Money should be made available for projects that would conserve, preserve, or restore the state's water and related resources

4I - PLANNING PROGRAM

It is the policy of Idaho that water management plans be prepared for the individual river basins.

Comment: Comprehensive planning is necessary to minimize conflicts between competing water uses and to ensure optimal protection of all beneficial uses of water. Detailed water management plans should be prepared for river basins and aquifers within the state to evaluate the specific interrelationship between ground and surface water and provide for the orderly protection and development of the state's water resources.

Idaho Code 42-1734A provides for the development of a "comprehensive state water plan" based upon river basins or other geographic considerations. Each basin or waterway plan becomes a component of the State Water Plan. The following comprehensive plans have been approved by the Idaho Legislature and accepted by the Federal Energy Regulatory Commission:

Priest River Basin
South Fork Boise River Basin
Payette River Reaches
Henrys Fork Basin
Snake River: Milner Dam to King Hill
Upper Boise River Basin
North Fork Clearwater Basin
South Fork Snake River Basin

These plans contain State protected river designations and recommendations concerning other aspects of water use. The positions and policies contained in an approved plan are the State's official position on water use in the affected areas. The plans also assure that the state's interests will be considered in federal management agency decisions.

4J -FEDERAL AND TRIBAL WATER RIGHTS

It is the policy of Idaho to quantify all federal and tribal water rights within the state.

Comment: Federal agency and tribal water rights claims in Idaho must be identified and quantified to plan for continued use of existing water rights and future needs. As a part of each effort to identify and quantify federal agency and tribal water rights, the protection of existing water rights must be considered. The State should seek to negotiate these rights whenever appropriate.

Executive Order No. 91-8 designated the Idaho Water Resource Board as lead agency to coordinate state activities related to the negotiation of reserved water rights with Idaho Tribes. The successful negotiations concluded with the Shoshone-Bannock over the Fort Hall water rights serves as an example of a negotiated settlement.

4K - WATER RESOURCE MANAGEMENT

It is the policy of Idaho that the diversion and use of water occur only in accordance with water rights issued by the state and federal reserved rights established by the courts. Adjudication of water rights through the state courts should be completed where necessary to fully define and quantify the rights.

Comment: The adjudication of water rights is often necessary to sort out overlapping or incomplete claims for the use of surface and ground water resources. These conflicts need to be resolved if the resources are to be managed effectively. Effective programs can then be applied to assure that water is diverted and used in accordance with valid rights.

River Basins Group

The River Basins Group contains resource management policies specific to the state's three major river basin networks: the Snake River Basin, the Bear River Basin in southeast Idaho, and the northern Panhandle river basins.

- *Snake River Basin*

5A - SWAN FALLS AGREEMENT

It is the policy of Idaho that the Swan Falls agreement between the state and Idaho Power Company establishes the framework for water management in the Snake River basin.

Comment: The Swan Falls Agreement was signed in 1985 by the State of Idaho and the Idaho Power Company. The Idaho Water Resource Board is committed to continued implementation of this agreement. Minimum flows in the Snake River are crucial to the Swan Falls Agreement. During portions of low water years, river flows downstream from Milner Dam to Swan Falls Dam consist almost entirely of ground water discharge. The Eastern Snake Plain aquifer which provides this water must therefore be managed conjunctively as an integral part of the river system. This agreement also calls for the adjudication of water rights in the Snake River Basin to enhance the state's water management capabilities.

5B - SNAKE RIVER MINIMUM FLOWS

It is the policy of Idaho that minimum average daily flows at the Murphy gaging station shall not or exceed 3,900 cfs from April 1 to October 31 and 5,600 cfs from November 1 to March 31. The average daily flow measured at the Weiser gage shall not be less than 4,750 cfs. A minimum average daily flow of 5,000 cfs at Johnson's Bar shall be maintained and an average daily flow of 13,000 cfs shall be maintained at Lime Point (river mile 172) a minimum of 95 percent of the time. The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero.

Comment: In licensing the Milner hydropower project, the Federal Energy Regulatory Commission (FERC) specified "target flows" for the Snake River at Milner. The target flow must be satisfied only when water in excess of prior irrigation rights is available. Water for target flows may be acquired from storage or may be leased from the Upper Snake Rental Pool. The State should seek to acquire water whenever it becomes available in order to mitigate the impacts of low flow below the Dam.

The minimum flows established for the Snake River at the Murphy and Weiser gaging stations are management and permitting constraints; they further insure that the State will be able to assure an adequate hydropower resource base and better protect other values recognized by the State such as fish propagation, recreation, and aesthetic interests, all of which would be adversely impacted by an inadequate stream flow.

The minimum flows established for Johnson's Bar and Lime Point are contained in the original Federal Power Commission (now FERC) license for the Hells Canyon hydropower complex. By adopting these flows, the Idaho Water Resource Board recognizes the importance of minimum flows to downstream uses and makes their maintenance a matter of state water policy. Lower flows may be permitted at Lime Point during the months of July, August, and September, during which time the operation of the Hells Canyon dams shall be in the best interest of power and navigation as determined by the Corps of Engineers and Idaho Power Company as owner of the Hells Canyon power facilities.

The Idaho Water Resource Board recognizes that FERC license requirements relate primarily to the provision of water for navigation and power and not to other instream uses. The Board realizes that the state has no authority to require releases of stored water by the power company, but believes the license conditions serve the public interest. When the Hells Canyon hydropower complex is relicensed, the Water Board will reevaluate the public interest.

Snake River flows above the hydropower right at any Idaho Power facility are considered unappropriated and therefore are not held in trust by the state. This distinction is further addressed in Policy 5C.

5C - SNAKE RIVER TRUST WATER

It is the policy of Idaho that water held in trust by the state pursuant to Idaho Code 42-203B be reallocated to new uses in accordance with the criteria established by Idaho Code 42-203A and 42-203C.

Comment: The agreement between the State of Idaho and Idaho Power Company dated October 25, 1984 provides that Idaho Power's claimed water right of 8,400 cubic feet per second (cfs) at the Swan Falls Dam may be reduced to either 3,900 cfs or 5,600 cfs during set periods of the year. The claimed water right of 8,400 cfs is deemed appropriated and the amount above the minimum flow established in Policy 5B up to the 8,400 cfs is held in trust by the state. The trust water area is defined by Rule 30 in the Idaho Department of Water Resources' Rules for Water Appropriation (see also Fig.1).

The agreement further provides that Idaho Power's claimed water rights at facilities upstream from Swan Falls shall be considered satisfied when the company receives the minimum flow specified in Policy 5B at the Murphy gaging station. The 8,400 cfs claim of the power company has not historically been available during summer months.

The 8,400 cfs claimed right at Swan Falls is reduced by the agreement to that flow available after satisfying all applications or claims that demonstrate water was beneficially used prior to Oct. 1, 1984, even if such uses would violate the minimum flows established in Policy 5B. Any remaining water above these minimum flows may be reallocated to new uses by the state providing such use satisfies existing Idaho law.

However, due to continued spring flow decline in the Thousand Springs area since the late 1950s, water availability to satisfy additional beneficial uses is limited. A moratorium, as defined in Idaho Code 42-1806, on further water development has been in place since May 15, 1992.



Figure 1. Snake River Basin Trust Water Area.

5D - SNAKE RIVER BASIN DCMI

It is the policy of Idaho that 150 cfs of the water held in trust by the state above Swan Falls Dam pursuant to Policy 5C be reallocated to meet future domestic, commercial, municipal, and industrial consumptive uses in accordance with state law.

Comment: While most DCMI (Domestic, Commercial, Municipal, and Industrial) water uses are negligibly consumptive, future growth in Idaho's population and commercial and industrial expansion will require an assured supply of water.

A continuous flow of 150 cfs provides approximately 108,600 acre-feet of water per year. This volume of water is assigned to consumptive uses within the basin for domestic, commercial, municipal, and other industrial purposes. Industrial purposes include processing, manufacturing, research and development, and cooling.

During the ten-year period from 1985 to 1995, about 120 cfs was developed for DCMI uses within the trust water area. Adequate records should be kept and reviewed so that this allocation can be modified as necessary. Increases in the DCMI allocation, if necessary, will reduce the amount of water available for agricultural uses. The allocation will be reviewed as part of every Water Plan update.

5E - SNAKE RIVER BASIN AGRICULTURE

It is the policy of Idaho that appropriated water held in trust by the state pursuant to Policy 5C, less the amount of water necessary to provide for present and future DCMI uses as set forth in Policy 5D, shall be available for reallocation to meet new and supplemental irrigation requirements which conform to Idaho Code 42-203A, 203B, 203C, and 203D.

Comment: During the ten-year period from 1985 to 1995, about 45,600 acres of new irrigation development occurred within the trust water area. Data are not available to estimate the number of acres that received supplemental water during this period.

Idaho Code Section 42-203C limits the rate of new development in the basin above the Murphy gaging station to 80,000 acres in any four-year period. Impact on existing water rights, mitigation for the impact of diversions on hydropower generation, and criteria placed on the reallocation of hydropower rights, however, limits the rate of new development.

5F - SNAKE RIVER BASIN HYDROPOWER

It is the policy of Idaho that hydropower use be recognized as a beneficial use of water, and that depletion of flows below the minimum average daily flows set forth in Policy 5B is not in the public interest.

Comment: This policy specifically recognizes hydropower generation as a beneficial use of water and acknowledges the public interest in maintaining the minimum river flow at key points.

By establishing minimum daily flows at Murphy and Weiser, stabilized flows are guaranteed for hydropower generation.

5G - SNAKE RIVER NAVIGATION

It is the policy of Idaho that water sufficient for commercial and recreational navigation is provided by the minimum flows established for the Snake River.

Comment: Commercial navigation en route to Lewiston via the Columbia River and Lower Snake River can be accommodated with the flows leaving Idaho in the Snake River at Lewiston. Above Lewiston, commercial and recreational navigation on the river should be accommodated within the protected flows on the Snake River and tributary streams.

5H - SNAKE RIVER BASIN SPRINGS

It is the policy of Idaho to seek to maintain spring flows in the American Falls and Thousand Springs reaches of the Snake River which will sustain beneficial uses of surface and ground water supplies in accordance with state law.

Comment: Spring discharge in the American Falls and Thousand Springs reaches of the Snake River are vital to the Snake River Basin and Idaho economy. The springs near American Falls provide an important part of Snake River flow appropriated by Magic Valley irrigators. In the Thousand Springs reach, spring flow is the only practical source of water for many of the state's aquaculture facilities.

During portions of low-water years, river flows downstream from Milner Dam to the Murphy gaging station consist almost entirely of ground-water discharge from the Thousand Springs reach. Maintaining these discharges should be the goal of water managers. Managed recharge of the aquifers and continued efforts to efficiently use ground water are two strategies for maintaining spring discharges in these reaches.

5I - SNAKE RIVER BASIN NEW STORAGE

It is the policy of Idaho that applications for large surface storage projects upstream from the Murphy gage be approved subject to the requirement that the use is in the public interest.

Comment: "Large surface storage projects" are those which have the potential for significantly impacting existing uses. Projects for which approval is required under Section 42-1737, Idaho Code, would be such projects. This policy addresses the approval of new surface storage in the basin, but does not apply to already approved projects. Approval of new storage projects that would divert water from the main stem of the Snake River between Milner and the Murphy gaging station during the period November 1 to March 31 should be coupled with provisions that mitigate the impact such depletions would have on the generation of hydropower.

5J - STORAGE ACQUISITION

It is the policy of Idaho that reservoir storage be acquired in the name of the Idaho Water Resource Board to provide management flexibility in assuring the minimum flows designated for the Snake River.

Comment: The Idaho Department of Water Resources is expected to allocate the unappropriated waters and the power rights held in trust by the state in such a manner as to assure minimum flows at designated key points on the Snake River. The impacts of ground water use within the basin on the timing of aquifer discharge to the rivers is such that at some time stored surface water may be necessary to maintain the designated minimum flows.

At this time there is little reservoir storage within the basin which could be acquired by the State. The State should act to acquire any available, feasible reservoir storage in order to provide flexibility for management decisions and provide assurance that the established minimum flows can be maintained. Until such time as these waters are needed for management purposes, they shall be credited to the Water Supply Bank and funds obtained from their lease or sale shall accrue to the Water Management Account. The Board should have priority in acquiring water from the Water Bank, if necessary, to meet the minimum flows established by the Swan Falls Agreement.

Flood control space at Brownlee Reservoir should be considered for salmon flow augmentation. If the 500,000 acre-feet evacuated for flood control purposes downstream could be held and released for flow augmentation during downstream salmon migration, this could replace valuable water supplies taken from the upper Snake River Basin.

Bear River Basin

6A - BEAR RIVER COMPACT

It is the policy of Idaho that water use and management in the Bear River Basin conform to the allocations set forth in the Bear River Compact [Idaho Code 42-3402].

Comment: The Bear River Compact has been in effect since 1958, and water allocations for the entire basin were adopted in 1978. The compact must be reviewed at intervals of not less than twenty years and may be amended during the review process.

The goal of Idaho's representatives on the commission should be to urge conjunctive management of ground and surface water resources within the Bear River Basin and to seek as much of the unconsumed flow entering the Great Salt Lake as possible for Idaho while negotiating in good faith with the other states.

6B - INTERSTATE WATER DELIVERY

It is the policy of Idaho that Idaho water users in the Lower Division of the Bear River Basin must be protected from inequitable water allocation in the event of a water emergency and the scheduling of interstate water deliveries.

Comment: Article 4 of the Bear River Compact provides for the Bear River Commission to declare water emergencies and implement interstate water delivery schedules. If a downstream water user believes the flow of water in the Bear River or an interstate tributary is insufficient to satisfy their water right, due to diversions in an upstream state, that user may file a petition requesting water distribution under the direction of the Commission.

Water emergencies must be determined through comprehensive accounting processes and reflect true emergency conditions. Water emergencies should not be declared on an annual basis with the sole intent of advancing interstate water delivery schedules. Unless water accounting models include as many reaches as necessary to account for incremental changes in natural flows, and accurately reflect water rights as well as contractual arrangements, Idaho water users may be adversely impacted by interstate water delivery scheduling.

6C - BEAR LAKE

It is the policy of Idaho to recognize and preserve the outstanding values of Bear Lake while continuing to meet existing allocations for irrigation and hydroelectric power generation.

Comment: Bear Lake is a regional tourist attraction recognized for its unique water coloration and for its fishery. To protect these values, the Idaho Water Resource Board has obtained a minimum lake level water right for Bear Lake. The water right holds the lake elevation at or above 5902 feet.

The State of Idaho also recognizes and supports the Bear Lake Storage Allocation and Recovery Plan. This plan was approved through the Bear Lake Settlement Agreement of April 1995 as the established guideline for the operation of Bear Lake. This document calls for a portion of the active storage in Bear Lake to be voluntarily retained to enhance recreation and water quality values.

Recent information indicates that the major contaminant problem in Bear Lake is suspended sediment. The primary source of suspended sediment is the Bear River during high flow periods when sediment-laden water enters Bear Lake through Mud Lake. The most effective way to further enhance the water quality of Bear Lake is to reduce the sediment load to the Bear River above Bear Lake.

6D - BEAR RIVER BASIN WATER PROJECTS

It is the policy of Idaho to encourage additional projects for the development of the water resources of the basin without regard to state boundaries.

Comment: The Bear River Compact provides for a signatory state to construct storage facilities in another state. In order to obtain the maximum beneficial use of water within the basin, it may be necessary to ignore state boundaries, providing that water rights generated by such projects comply with the basic allocations of the compact. The State of Idaho should participate with Wyoming and Utah in determining the feasibility of headwater storage projects to provide for additional irrigation and other uses in Idaho.



Panhandle River Basins

7A - PANHANDLE BASINS

It is the policy of Idaho that the ground and surface waters of the Idaho Panhandle be managed to protect the environmental quality of the region.

Comment: While appearing water rich in comparison to the rest of the state, the water resources of the Idaho Panhandle are finite, and in some areas are fully utilized. Water is the key to the continued economic development in the region. The Water Board places a high priority on maintaining the quality of the water resource base.

7B - PANHANDLE MINIMUM FLOWS

It is the policy of Idaho to provide sufficient water to meet the minimum requirements for aquatic life, fish and wildlife, and to provide for recreation in the Panhandle Basins.

Comment: The minimum stream flow program provides the Idaho Water Resource Board with the authorities necessary to appropriate water for the purposes of this policy. Several streams in the Panhandle Basins have been examined and protected with minimum stream flows claimed by the Idaho Water Resource Board. As water consumption increases in the region, the minimum stream flow program will become increasingly important in the administration of water rights within the Panhandle Basins.

7C - PANHANDLE DCMI

It is the policy of Idaho to provide water for new domestic, commercial, municipal and industrial uses. A depletion of 14 cfs is allocated for these purposes.

Comment: The purpose of this policy is to set aside a significant amount of water for future DCMI (Domestic, Commercial, Municipal, and Industrial) development. The Panhandle population is projected to grow by approximately 2.9 percent annually to more than 200,000 people by 2015. This is a 73 percent increase over 1990 population. Based on current water-use data for the region, an allocation of nine million gallons per day or 14 cfs for consumptive use should be sufficient through the year 2015.

7D - PANHANDLE AGRICULTURAL WATER

It is the policy of Idaho that additional water be made available for irrigated agriculture in the Panhandle. A combined net depletion of 200 cfs is allocated for this purpose.

Comment: Agriculture is a major industry of the state, and Idaho provides an important share of the nation's food production. The Idaho Water Resource Board wishes to insure the availability of water for this purpose.

7E - PANHANDLE NAVIGATION

It is the policy of Idaho that water sufficient for commercial and recreational navigation be maintained in the streams and lakes of the Idaho Panhandle.

Comment: Water for navigation is not a significant problem at this time. If such appropriation appeared necessary, the minimum stream flow program can be used to appropriate water to provide a minimum flow or lake level for the protection of navigation and transportation. Navigation interests are further protected in that all new water appropriations must be in the public interest and an adverse effect on navigation would rarely be in the public interest.

IDAHO'S WATER RESOURCES

Overall, Idaho is rich in water resources with hundreds of square miles of lakes, over ninety-thousand miles of rivers and streams, and one of the largest underground reservoirs of water in the world. However, like most places around the globe, Idaho's water resources may be either excessive or scarce depending on time, place, or human activities.

Climate

Idaho's climatic regime is generally characterized by warm dry summers and cold moist winters. Approximately 500 miles inland from the Pacific Ocean and shouldered against the Continental Divide, the state spans seven degrees of latitude between 42° and 49° north. On the eastern flank, the Rocky Mountains protect much of Idaho from the more severe arctic cold spells and destructive summer storms which are prevalent on the Great Plains. Pacific maritime air masses, brought east by mid-latitude cyclonic storms, are the source of nearly all precipitation. However, the Cascade Range in Oregon and Washington is a major orographic barrier to maritime air masses. Consequently, Idaho receives significantly less precipitation than western Oregon and Washington or comparable inland locations such as Ohio or Michigan. Statewide, an average 22 inches of precipitation annually falls on Idaho. Climatic diversity throughout the state is notable, and is principally attributable to air movement direction with respect to latitude and mountain ranges, and to elevation.

Through June, July, and August, a stationary low pressure trough along the west coast of the United States positions a high-pressure ridge and its associated subtropical air over Idaho. This relatively dry air results in only modest rainfall over the state during most summers (Fig. 2). Occasionally, summer thunderstorms develop as moist air from the Gulf of Mexico or subtropical Pacific Ocean is circulated northward, especially in the southeastern part of the state. Salmon, located in the rain-shadow of Idaho's central mountain mass, derives most of its precipitation from spring and summer thunderstorm activity.

By September, intensification of the upper westerly winds results in a more west-to-east air movement aloft. At the same time, eastward migration of the Pacific longwave trough allows frontal systems to move into the state. November, December, and January are generally the wettest months of the year in most Idaho locations. Southward progression of dry polar air masses often results in decreased mid-winter precipitation. However, in the central and northern half of the state a second cycle of precipitation usually occurs during spring, as the polar front returns northward into Canada.

Orographic lift initiates much of Idaho's precipitation. Average annual precipitation in the central Idaho mountains may be as much as 60 inches, much

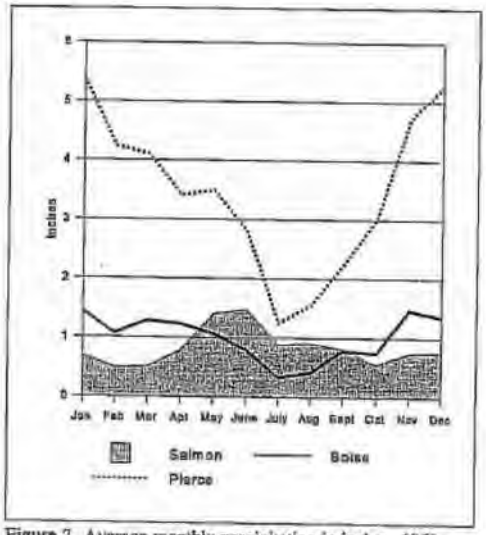


Figure 2. Average monthly precipitation in inches, 1961-1990.

of it as snow, while on the Snake River Plain, in southern Idaho, precipitation averages less than 10 inches (Fig. 3). Winter precipitation is about evenly divided between rain and snow at elevations below 3,000 feet, but above that level most of the precipitation arrives in the form of snow.

Elevations in the state vary from a low of seven hundred feet at Lewiston, where the Snake River leaves the state, to over twelve thousand feet in the Lost River Range. Total winter snowfall ranges from 20 inches or less in southwestern Idaho valleys or in canyon bottoms to perhaps as much as 400 inches in the higher mountains. The greatest normal annual snowfall for which there is actual record is 300 inches at Roland, southwest of Mullan Pass, at an elevation of 4,150 feet.

The highest annual temperature averages are found at the state's lowest elevations. Low altitude stations, such as Riggins and Lewiston, seldom record mean monthly temperatures below 32°F, while monthly means are 32°F or below five months of the year at elevations of 5,000 feet or above. Table 2 summarizes climatological data from several Idaho weather stations.

Lewiston and the valleys of southwestern Idaho have an average frost-free period of more than 140 days, with some of the warmer hillsides reaching 180 to 200 days. In the higher Pocatello-Idaho Falls area and in the lower valleys of extreme northern Idaho, the frost-free period is much shorter — 125 days or less. Frosts and freezes are possible at any time during the growing season in the high mountain valleys.

REFERENCES

Molnau, Myron, and Francis M. Winters, Jr., 1988. Mean Annual Precipitation Map for Idaho. Idaho Water Resources Research Institute, Research Technical Completion Report.

Molnau, Myron, 1992. Mean Annual Precipitation Map for Idaho: a GIS database. Idaho Water Resources Research Institute and the Idaho Agricultural Experiment Station.

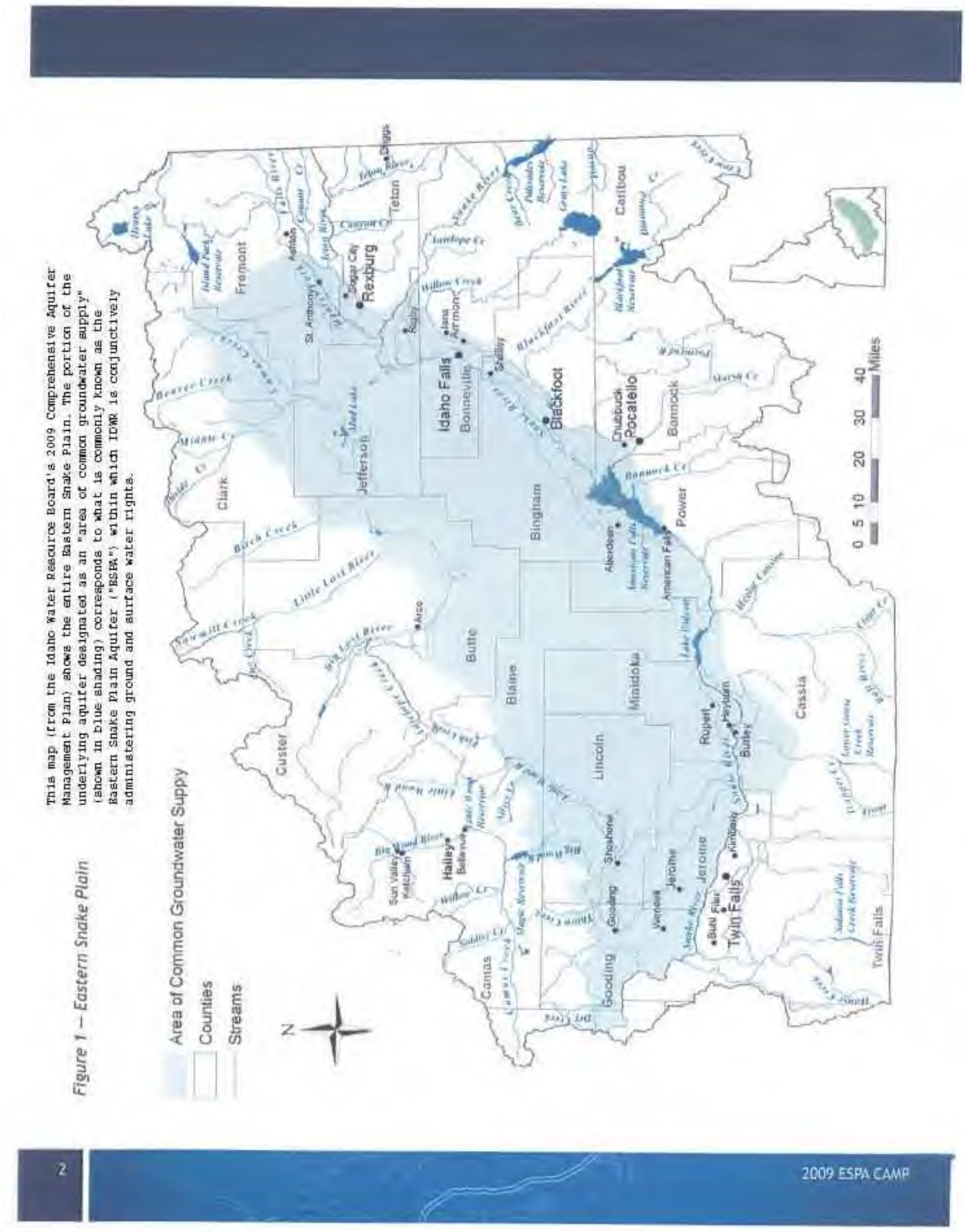
U.S. Geological Survey, 1991. National Water Summary 1988-89. United States Geological Survey Water Supply Paper 2375.

Table 2. Climatological Summary Data 1961-1990

Station	Sandpoint	Lewiston	Pierce	Boise	Hailey	Pocatello	Salmon
Station Elevation (feet)	2100	1436	3190	2838	5306	4454	3930
Annual Precipitation (inches)	33.5	11	42	12	16	12	10
Average January Precipitation	4	1.3	5.4	1.4	2.2	1	0.7
Average July Precipitation	1.3	0.7	1.3	0.4	0.7	0.7	0.9
Avg. January Minimum (°F)	19	28	16	22	9	14	11
Avg. January Maximum	31	40	32	36	30	32	30
Avg. July Minimum	49	59	43	58	49	53	51
Avg. July Maximum	80	89	81	90	84	88	88

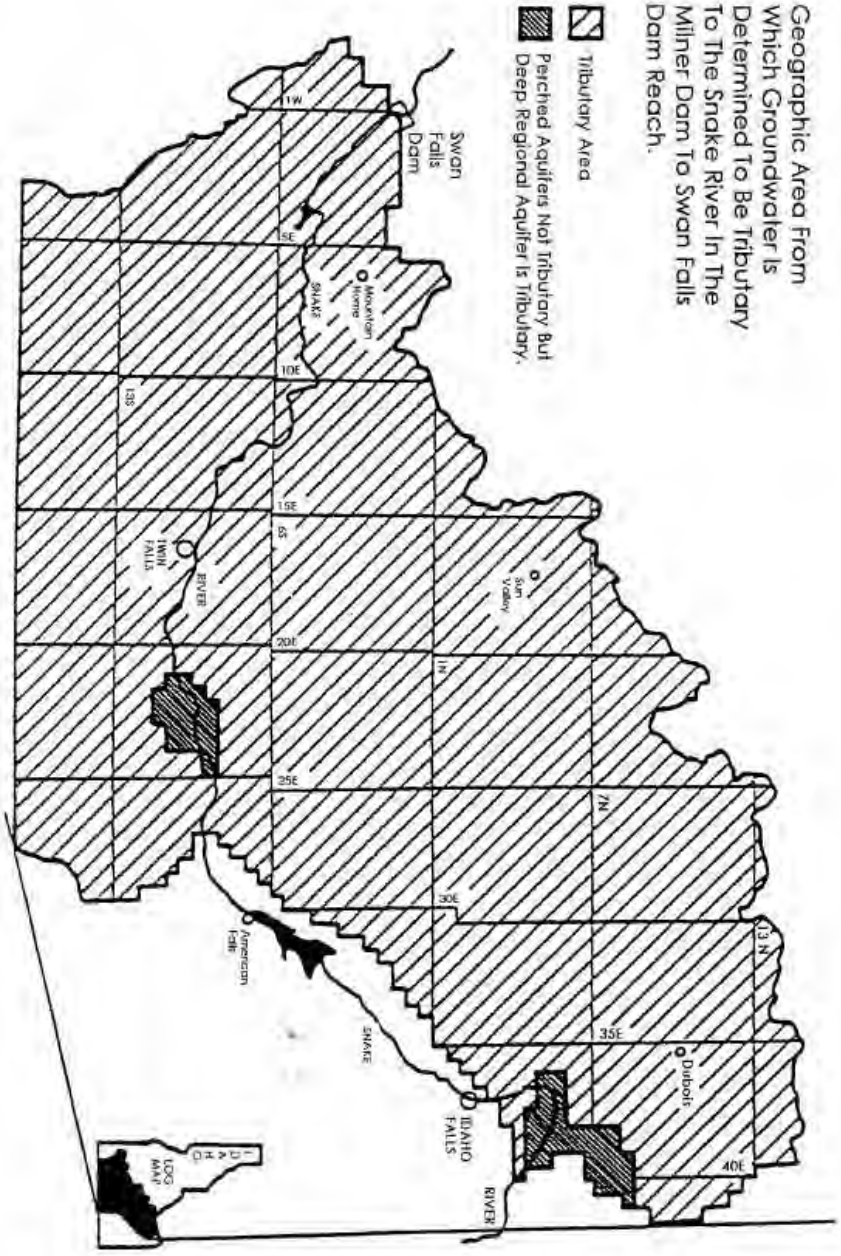
Source: Univeristy of Idaho, State Climate Services.

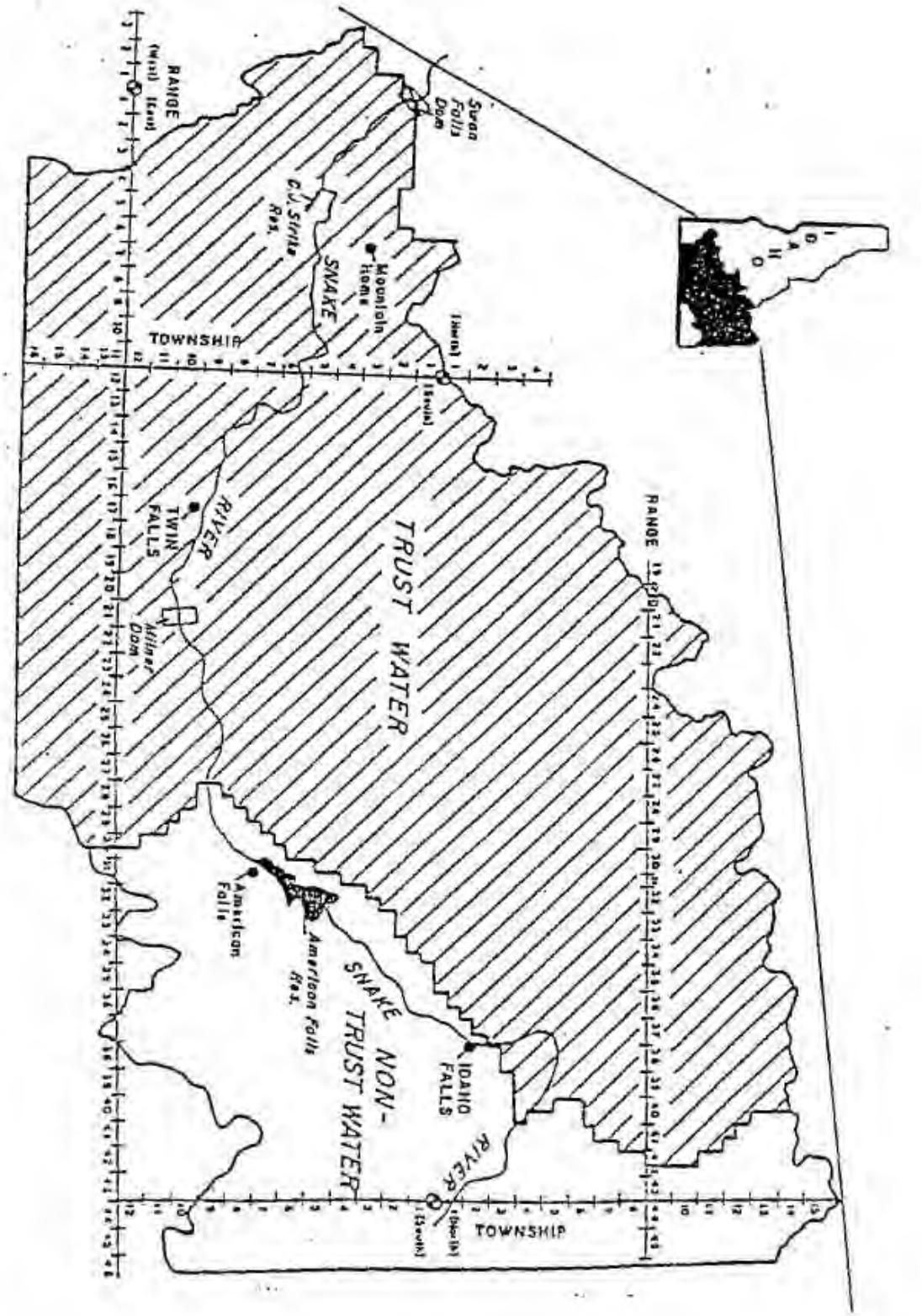
Appendix G: MAP OF EASTERN SNAKE PLAIN AND ESPA



Appendix H: MAPS OF TRUST WATER AREA

APPENDIX A




RANGE
TOWNSHIP
Swan Falls Dam
C.J. Strike Res.
SNAKE
Mountain Home
TWIN FALLS
RIVER
Milner Dam
TRUST WATER
American Falls
American Falls Res.
SNAKE NON-TRUST WATER
IDAHO FALLS
RIVER
TOWNSHIP
RANGE

Appendix I: FRAMEWORK FOR FINAL RESOLUTION (SWAN FALLS)

FRAMEWORK FOR FINAL RESOLUTION

OF SNAKE RIVER WATER RIGHTS CONTROVERSY

INTRODUCTION

The litigation concerning water rights on the Snake River and its tributaries has focused public attention on the relationship between hydro-power generation at facilities such as Swan Falls dam, and upstream water use and development which impacts the availability of water for power generation. While the litigation has been costly to the Idaho Power Company, other water users, and the State of Idaho and has resulted in uncertainty over future availability of water, it has served to stimulate much-needed dialogue and study concerning prudent management of this vital natural resource.

However, Governor John Evans, Attorney General Jim Jones and Idaho Power Chief Executive Officer James Bruce believe we have reached the point of diminishing returns in pursuing further judicial resolution of this water rights controversy. Achieving a proper balance among competing demands for a limited resource such as water in the Snake River system is a fundamental public policy question. Litigation is not the most efficient method to resolve complex public policy questions. Moreover, adversary proceedings may not necessarily yield solutions which reflect the broad public interest as well as the interests of the proceeding's participants.

SNAKE RIVER STREAMFLOWS AT MURPHY GAGE

	STATE WATER PLAN MINIMUM STREAMFLOWS (average daily)	CURRENT ACTUAL MINIMUM STREAMFLOWS (average daily)	IDAHO POWER COMPANY'S CLAIMED WATER RIGHT	PROPOSED NEW MINIMUM FLOWS PER SETTLEMENT AGREEMENT (average daily)
SUMMER	3,300 cfs	4,500 cfs	8,400 cfs	3,900 cfs
WINTER	3,300 cfs	6,800 cfs	8,400 cfs	5,600 cfs

Other provisions:

1. New development subject to public interest criteria.
2. Commence general adjudication.
3. Encourage water markets.
4. Fund economic and hydrologic studies.
5. Proceeds from utility sales of hydropower water rights benefit rate-payers.

10/1/84

© 2020 GIVENS PURSLEY LLP

In order to resolve the controversy and settle the pending litigation, we have identified a series of judicial, legislative and administrative actions which we agree should be taken in the public interest, and which would resolve the outstanding legal issues to our mutual satisfaction.

1. THE MINIMUM STREAMFLOW IN THE STATE WATER PLAN SHOULD BE ADJUSTED TO 3,900 CUBIC FEET PER SECOND AT MURPHY GAGE DURING THE IRRIGATION SEASON AND TO 5,600 CUBIC FEET PER SECOND DURING THE NON-IRRIGATION SEASON.

The State Water Plan currently provides for a minimum streamflow of 3,300 c.f.s. on an average daily basis at Murphy Gage (below Swan Falls Dam). The Plan itself acknowledges that 3,300 c.f.s. is "less than the amount identified as needed for fish, wildlife and recreational purposes at Swan Falls or downstream." The best available hydrologic data indicate that existing uses result in a potential irrigation season low flow of approximately 4,500 c.f.s. at Murphy Gage on an average daily basis. By raising the irrigation season minimum streamflow, the state will be able to assure an adequate hydropower resource base and better protect other values recognized by the State Water Plan such as fish propagation, recreational and aesthetic interests, all of which would be adversely impacted by an inadequate streamflow. Conversely, by setting the irrigation season minimum flow at 600 c.f.s. below the current actual minimum, the state can allow a significant amount of further development of water uses without violating the minimum streamflow.

Non-irrigation season flows are of critical importance to the preservation of a low-cost hydro base, and to the ability of the Idaho Power Company to meet the needs of its customers. Therefore, the State Water Plan should be amended to recognize a seasonal differential in flows.

Implementation of an irrigation season (April through October) minimum flow of 3,900 cfs at the Murphy gage would result, under similar assumptions, in a low flow of 5,600 cfs in the non-irrigation season (November through March). The non-irrigation season minimum flow should be set at that level. While new storage projects which use non-irrigation season flows may serve to make more water available during the summer irrigation season, they may adversely impact generation capacity during winter months. Therefore, the state water plan should be amended to require that before new storage projects are approved by the state, we should require that existing storage facilities be fully utilized. After such time, new non-irrigation season storage in the reach below Milner dam and above Murphy Gage should only be authorized if it can be coupled with provisions which mitigate depletions such storage would cause in hydro-power generation.

The actual amount of development that can take place without violation of these minimum streamflows will depend on the nature and location of each new development, as well as the implementation of new practices to augment the streamflow.

Development of new domestic, commercial, municipal and industrial (DCMI) uses should proceed without further impediment because of their minimal effect on total water supply. Availability of an assured water supply for those purposes is essential for the orderly development of all the State's resources. Therefore, the State Water Plan should be amended to reserve a block of water for future consumptive DCMI development. This will both assure its availability and avoid the necessity of numerous eminent domain cases to acquire water for such uses.

2. BECAUSE ADDITIONAL WATER USE DEVELOPMENT POTENTIAL IS LIMITED, EACH NEW DEVELOPMENT SHOULD BE CAREFULLY SCRUTINIZED AGAINST EXPRESS PUBLIC INTEREST CRITERIA.

The right to develop the remaining water resources on the Snake River system should be allocated in a manner which will maximize long-term economic benefit to all sectors of society. Priority should be given to projects which promote Idaho's family farming tradition and which will create jobs. Because maintenance of inexpensive hydropower resources contributes to a positive economic climate for the creation of new jobs for Idahoans, future water rights allocation decisions should weigh the benefits to be obtained from each development against the probable impact it will have on the Company's hydropower resources.

To this end, the settlement of the pending Swan Falls litigation should be structured in a way which will allow the State to utilize Idaho Power Company's asserted water right to augment the State's existing and proposed legal authority to promote beneficial development and to reject proposed development which it deems to be detrimental to the public interest. This authority should extend to pending undeveloped permits as well as new applications.

In addition, legislation should be adopted which will enunciate state policy regarding the types of water resource development which are deemed to be beneficial, and which expressly recognizes hydropower generation benefits as an element of such public interest determination. The public interest criteria should also address the timing of new development.

The legislation should also clarify the authority of the Department of Water Resources to impose and lift moratoriums on the granting of new water rights permits. The parties envision that the Department can resume processing of pending water rights filings upon adoption of regulations implementing such legislation.

3. THE STATE SHOULD COMMENCE A GENERAL ADJUDICATION OF THE ENTIRE SNAKE RIVER BASIN IN IDAHO.

The key to effective management of the Snake River lies in a comprehensive determination of the nature, extent and priority of all of the outstanding claims to water rights.

Only through a general adjudication will the state be in a position to effectively enforce its minimum streamflow rights, protect other valid water rights, and determine how much water is available for further appropriation. A general adjudication will also result in quantification of federal and Indian water rights which until now have been unresolved. A further benefit of adjudication is that it will enable the establishment of an efficient water market system, which will encourage the highest and best use of our water resources.

Because a general adjudication will take many years to complete, it is essential to initiate the process as soon as possible so that it will be completed before an even more severe water rights crisis is upon us. The costs of the adjudication will be substantial, and legislation should be passed which equitably distributes those costs among water users, ratepayers and other taxpayers. The parties consulted with representatives of affected interests, and will recommend an equitable cost-sharing formula as part of a joint legislative package.

4. THE STATE SHOULD ENCOURAGE THE ESTABLISHMENT OF AN EFFECTIVE WATER MARKETING SYSTEM.

If the actions outlined in this document are taken there should be a significant amount of water available for appropriation in the Snake River Basin. However, such appropriations should be on the terms and conditions referred to in #2 above. The day is also approaching when there will be no further water

available for traditional appropriation. Therefore some provision must be made to enable people to acquire water rights outside of the appropriation process, over and above the amount reserved for DCMI. Private condemnation proceedings generally involve transaction costs which make it an unattractive alternative. The State should make it easier to get willing sellers together with willing buyers, and to facilitate approval of changes in the place of use. Conjunctive use and managment of ground and surface water should also be explored.

5. THE STATE SHOULD FUND HYDROLOGIC AND ECONOMIC STUDIES TO DETERMINE THE MOST COST-EFFECTIVE AND ENVIRONMENTALLY SOUND MEANS TO IMPLEMENT THE STATE WATER PLAN AND TO AUGMENT FLOWS IN THE SNAKE RIVER.

The State Water Plan is the cornerstone of the effective management of the Snake River and its vigorous enforcement is contemplated as a part of the settlement. Much additional information is needed to permit informed management and planning decisions.

A number of methods have been suggested to enhance streamflows in the Snake River, which would benefit both agricultural development and hydro-power generation. Among them are new in-stream storage and aquifer recharge projects. These and other methods deserve study to determine their economic potential, their impact on the environment, and their impact on hydro-power generation.

6. LEGISLATION SHOULD BE ENACTED TO CLARIFY THAT PROCEEDS FROM UTILITY SALES OF HYDROPOWER WATER RIGHTS WILL BENEFIT RATE-PAYERS.

Concern has been expressed that current law could permit a utility to sell its water rights to others. An additional concern is that the proceeds of such a sale would go to stockholders. The parties will propose legislation to address these concerns. Legislation in a draft form has already been discussed at a staff level and should be ready for inclusion in the joint legislative package.

CONCLUSION

The focus of discussion of settlement of the "Swan Falls Controversy" has necessarily been on the claims of right and authority at that site. However, the settlement of those issues necessarily involve putting in place legislation and policies which will govern the rest of the Snake River and other watersheds also.

The ultimate benefit will be to allow informed state policy decisions on future growth and protection of hydropower generation. The definition and implementation of a known and enforceable state policy will make the Swan Falls controversy an asset in the history of the state.

IMPLEMENTATION TIMETABLE

The nature of the controversy surrounding this issue is of such dimensions and affects the actions of so many citizens that the parties have agreed to an implementation timetable to assist the public in understanding when actions may be expected However, it must be emphasized that the nature of the issues raised in this matter are complex and changes should be expected. Every effort will be made to keep the public informed concerning actions of the parties that could affect their interests.

October 1...Release Framework and Public Interest Criterion.

October 15...Execute Settlement Agreement, S.B. 1180 Contract and Stipulation.

November 1...Proposed amendments to the State Water Plan, and proposed legislation providing public interest criteria, authority of the Department of Water Resources to impose moratoriums on new permits, funding for adjudication of the Snake River, establishment of an effective water market system, funding for hydrologic and economic studies to augment Snake River flows and clarifying allocation of proceeds on sales for hydropower water rights released for comment.

November-December...Meetings with legislative committees for briefing and comments on proposed legislation.

January 15, 1985...Presentation of legislative package to State Legislature.

DATED this 1st day of October, 1984.

Governor State of Idaho John V. Evans	Attorney General State of Idaho Jim Jones	Chairman of the Board & C.E.O., Idaho Power Company James E Bruce

PUBLIC INTEREST CRITERIA TO BE INCLUDED IN
SWAN FALLS LEGISLATIVE PACKAGE

42-203B If an applicant contemplates the diversion of water that has been allocated to power use subject to reallocation pursuant to a subordination condition, then the director shall consider in addition to the criteria established in section 42-203A whether the proposed use would significantly reduce the amount of water available to the holder of a water right used for power production and whether the proposed use is in the public interest.

A. The director in making such determinations for purposes of this section shall consider:

i) the potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy

ii) the economic impact the proposed use would have upon electric utility rates in the State of Idaho and the availability, foreseeability and cost of alternative energy sources to ameliorate such impact, to the state and local economy

iii) the promotion of the family farming tradition

iv) the promotion of full economic and multiple use development of the water resources of the State of Idaho

v) the cumulative impact the proposed use would have in relation to other uses

vi) whether the proposed development conforms to a staged development policy of up to 20,000 acres per year or 80,000 acres in any four-year period in the Snake River Basin above the Murphy gauge.

No single factor enumerated above shall be entitled to greater weight by the director in arriving at this determination.

B. The burden of proof shall be on the protestant to prove that the proposed use is not in the public interest.

Appendix J: SWAN FALLS AGREEMENT

AGREEMENT

This Agreement is made and entered into among the State of Idaho, by and through the Governor, hereinafter referred to as "State"; John V. Evans, in his official capacity as Governor of the State of Idaho; Jim Jones, in his official capacity as Attorney General of the State of Idaho; and Idaho Power Company, a corporation hereinafter referred to as "Company".

1. Effective Date

This Agreement shall take effect upon execution, except as to paragraphs 7, 8, and 11.

2. Executive Commitment

When the parties agree on certain actions to be taken by State, it is their intent to commit the executive branch of Idaho state government, subject to constitutional and statutory limitations, to take those actions.

3. Attorney General

Jim Jones is a party to this Agreement solely by reason of his official position as counsel for the State of Idaho and its agencies in Idaho Power Company v. State of Idaho, Ada County Civil Case No. 62237 and Idaho Power Company v. Idaho Department of Water Resources, Ada County Civil Case No. 81375.

4. Good Faith

When the parties agree to jointly recommend a particular piece of legislation or action by another entity, each party agrees to actively and in good faith support such legislation or action.

The State shall enforce the State Water Plan and shall assert the existence of water rights held in trust by the State and that the Snake River is fully appropriated as needed to enforce the State Water Plan. State and Company shall not take any position before the legislature or any court, board or agency which is inconsistent with the terms of this agreement.

5. Stay Of Current Court And Regulatory Action

A. The parties shall file a motion with the court in Ada County Civil Case Numbers 81375 and 62237, seeking a

stay of further proceedings until seven days following the adjournment of the First Regular Session of the 48th Idaho Legislature, except as to preservation of testimony pursuant to the Idaho Rules of Civil Procedure, completion of designated discovery filed by the State of Idaho and dismissal of various defendants by Company. The State shall designate in writing, within fifteen (15) days from the execution of this Agreement, those items of its discovery that must be responded to by Company. The Company shall respond to those items of discovery designated by the State within ninety (90) days from execution of this Agreement.

B. The parties shall request the Federal Energy Regulatory Commission (FERC) to stay any subordination-related decisions in any Company project listed in paragraph 7 licensing or relicensing proceeding pending implementation of this Agreement except as contemplated in paragraph 12 of this Agreement. The parties acknowledge, however, that FERC could independently take action prejudicial to their interests and, in such event, the parties may take reasonable actions necessary to protect their interests. Further, the State shall not file any motions to intervene in Project Numbers 2777 (Upper Salmon) and 2778 (Shoshone Falls); however, by agreeing to this provision, the Company in return waives any defense to the timeliness of a motion to intervene caused by this Agreement in the event this Agreement is not implemented. Company is not agreeing, however, that a motion to intervene would be timely if filed now.

C. The parties shall not attempt to influence any executive agency of the United States to take a particular position regarding subordination in any Company FERC licensing or relicensing proceeding pending implementation of this Agreement.

6. Legislative Program

The parties agree to propose and support the following legislation to implement this Agreement:

A. Enactment of Public Interest Criteria as set forth in Exhibit 1 attached hereto.

B. Funding for a general adjudication of the Snake River Basin generally as set forth in Exhibit 2 attached hereto.

C. Establishment of an effective water marketing system.

D. Funding for hydrologic and economic studies, as set forth in Exhibit 3 attached hereto.

E. Allocation of gains upon sale of utility property as set forth in Exhibit 4 attached hereto.

F. Limitations on IPUC jurisdiction as set forth in Exhibit 5 attached hereto.

G. Rulemaking and moratorium authority for Idaho Department of Water Resources generally as set forth in Exhibit 8 attached hereto.

7. Company's Water Right

State and Company agree that Company's water right shall be as follows (Bracketed names used below refer to Company projects):

A. State Water License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad), 37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs), 02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls) entitle the Company to an unsubordinated right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, both to be measured at the Murphy U.S.G.S. gauging station immediately below Swan Falls. These flows are not subject to depletion. The Murphy gauging station is located at latitude 43° 17' 31", Longitude 116° 25' 12", in NW1/4NE1/4SE1/4 of Section 35 in Township 1 South, Range 1 West, Boise Meridian, Ada County Hydrologic Unit 17050103, on right bank 4.2 miles downstream from Swan Falls Power plant, 7.5 miles NE of Murphy, at river mile 453.5.

B. The Company is also entitled to use the flow of the Snake River at its facilities to the extent of its actual beneficial use but not to exceed those amounts stated in State Water License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad),

37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs),02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls), but such rights in excess of the amounts stated in 7(A) shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A). Company retains its right to contest any appropriation of water in accordance with State law. Company further retains the right to compel State to take reasonable steps to insure the average daily flows established by this Agreement at the Murphy U.S.G.S. gauging station. Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Company facilities shall not be considered in the calculation of the minimum daily stream flows set forth herein. This paragraph shall constitute a subordination condition.

C. The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the contract executed between the State and Company implementing the terms of I.C. §§ 61-539 and 61-540.

D. The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.

E. Company's ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its power plants below Milner Dam shall not be limited by this agreement. Such flows shall be considered fluctuations resulting from operation of Company facilities.

F. Upon implementation of this Agreement, State and Company shall consent to entry of decrees in Ada County Civil Case Nos. 62237 and 81375 that describe the Company's water right as provided in paragraphs 7(A) through 7(E).

8. Damages Waiver

Company waives any claim against the State or its agencies for compensation or damages it may have or that may arise from any diminution in water available to Company at its facilities as a result of this Agreement. Company waives any claim for compensation or damages from any use approved by the state in accordance with paragraph 7B. Company retains its right to seek injunctions, compensation, damages, or other relief from any future appropriator, as defined in paragraph 7(B), whose use of water violates or will violate the Company's water right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, as measured at the Murphy gauging station, and also retains its rights against the state and its agencies as set out in paragraph 7(B).

9. Proposed 1180 Contract

The parties acknowledge that the Governor and the Company have finalized the terms of a contract that would implement the provisions of Senate Bill 1180 of the First Regular Session of the Idaho Legislature, presently codified as §§ 61-539 and 61-540, Idaho Code which is being executed on this date.

10. Agreement Not An Admission

The parties agree that this Agreement represents an attempt to compromise pending litigation, and it shall not be considered an admission, waiver, or abandonment of any issue of fact or law by any party, and no party will assert or contend that paragraphs 7, 8, and 11 have any legal effect until this Agreement is implemented by the accomplishment of the acts described in paragraph 13.

11. Status of State Water Plan

State and Company agree that the resolution of Company's water rights and recognition thereof by State together with the Idaho State Water Plan provide a sound comprehensive plan for the management of the Snake River watershed. Thus, the parties acknowledge that this Agreement provides a plan best adapted to develop, conserve, and utilize the water resources of the region in the public interest. Upon implementation of this agreement, State and Company will present the Idaho State Water Plan and this document to FERC as a comprehensive plan for the management of the Snake River Watershed.

12. Regulatory Approvals

A. Within 45 days of the execution of this Agreement, Company shall file appropriate pleadings or other documents with the Idaho Public Utilities Commission (IPUC), to obtain an order determining that the execution and implementation of this Agreement is in the public interest, and does not constitute an abandonment, relinquishment or transfer of utility property. Such pleadings or other documents shall also provide that the order shall state that any effect upon the Company's hydro generation resulting from execution and implementation of this Agreement shall not be grounds now or in the future for a finding or an order that the Company's rate base or any part thereof is overstated or that any portion of its electrical plant in service is no longer used and useful or not devoted to public service, nor will such effect upon the Company's hydro generation be grounds for a finding or an order reducing the Company's present or future revenue requirement or any present or future rate, tariff, schedule or charge.

In the event the IPUC does not issue an order acceptable to the parties, the parties will seek appropriate remedial legislation.

B. i. Within forty-five (45) days of the execution of this Agreement, the Company shall file with FERC a request for a declaratory ruling that the implementation of this agreement assures a sufficient supply of water for Project Numbers 1975 (Bliss), 2061 (Lower Salmon), 2777 (Upper Salmon), 2055 (C.J. Strike), 2778 (Shoshone Falls), 18 (Twin Falls), 2726 (Upper and Lower Malad), and 503 (Swan Falls).

ii. Within forty-five (45) days of implementation of this Agreement, the Company shall submit this Agreement and the consent decree to FERC in the proceedings for relicensing of Project Numbers 18 (Twin Falls), and 503 (Swan Falls) and the State and Company shall request that FERC recognize this Agreement as a definition of the Company's water rights in those proceedings.

iii. When any project listed in (i) hereof is hereafter due for relicensing proceeding, Company

shall submit this Agreement to FERC in the relicensing proceeding, and the State and Company shall request that FERC recognize this Agreement as a definition of the Company's water right in those proceedings.

C. The Governor and Attorney General on behalf of the State and its agencies shall seek intervention in support of the Company's efforts before the IPUC and FERC, and shall actively support the issuance of acceptable orders by both Commissions, and shall provide authorized witnesses to testify in the proceedings at the request of Company.

D. Company shall, if necessary, file appropriate pleadings or other documents with the Public Utility Commissioner of Oregon for an order similar to that stated in paragraph 12(A). Such filing, if necessary, shall be done within forty-five (45) days of the execution of this Agreement.

13. Conditions on Effectiveness

A. The provisions of paragraphs 7, 8, and 11 shall not be binding and effective until each of the following conditions have been implemented:

i. Amendment of the State Water Plan to implement the provisions of Exhibit 6;

ii. Enactment of the legislative program outlined in paragraph 6;

iii. Issuance of an appropriate order by IPUC as set forth in paragraph 12(A), or enactment of appropriate legislation by the State of Idaho, as set forth in Exhibit 5;

iv. Issuance of an appropriate order by FERC in a form acceptable to the parties as set out in paragraph 12(B)(i);

v. Dismissal with prejudice of the proceeding pending before the IPUC in Case No. U-1006-124;

vi. Issuance of an appropriate order by the Public Utility Commissioner of Oregon if Company has requested one; and

vii. Enactment by the State of Idaho of subordination legislation, as set forth in Exhibits 7A and 7B attached to this Agreement.

B. In the event any of these conditions are not implemented, or should this Agreement be terminated as provided in paragraph 16, then this Agreement shall be void.

14. Authority of Department of Water Resources and Idaho Water Resource Board Not Affected

This Agreement shall not be construed to limit or interfere with the authority and duty of the Idaho Department of Water Resources or the Idaho Water Resource Board to enforce and administer any of the laws of the state which it is authorized to enforce and administer.

15. Waiver, Modification or Amendment

No waiver, modification, or amendment of this Agreement or of any covenants, conditions, or limitations herein contained shall be valid unless in writing duly executed by the parties and the parties further agree that the provisions of this section may not be waived, modified, or amended except as herein set forth.

16. Termination of Contract

This Agreement shall terminate upon the failure to satisfy any of the conditions stated in paragraph 13. The parties shall meet on May 15, 1985, to determine if the contract shall be continued or terminated.

17. Subsequent Changes In Law

This Agreement is contingent upon certain enactments of law by the State and action by the Idaho Water Resource Board. Thus, within this Agreement, reference is made to state law in defining respective rights and obligations of the parties. Therefore, upon implementation of the conditions contained in paragraph 13, any subsequent final order by a court of competent jurisdiction, legislative enactment or administrative ruling shall not affect the validity of this Agreement.

18. Successors

The provisions of this Agreement shall bind and inure to the benefit of the respective successors and assigns of the parties.

19. Entire Agreement

This Agreement sets forth all the covenants, promises, provisions, agreements, conditions, and understandings between the parties and there are no covenants, provisions, promises, agreements, conditions, or understandings, either oral or written between them other than are herein set forth.

20. Effect of Section Headings

The section headings appearing in this Agreement are not to be construed as interpretations of the text but are inserted for convenience and reference only.

21. Multiple Originals

This Agreement is executed in quadruplicate. Each of the four (4) Agreements with an original signature of each party shall be an original.

IN WITNESS WHEREOF, the parties have executed this Agreement at Boise, Idaho, this 25th day of October, 1984.

STATE OF IDAHO

By: _____
JOHN V. EVANS
Governor of the
State of Idaho

IDAHO POWER COMPANY

By: _____
JAMES E. BRUCE
Chairman of the Board
and Chief Executive
Officer

By: _____
JIM JONES
Attorney General of the
State of Idaho

ATTEST:

Pete T. Cenarrusa (Seal of the State of Idaho)
PETE T. CENARRUSA
Secretary of State

(Corporate Seal of Idaho Power Company)

ATTEST:

Paul L. Jauregui
Secretary of Idaho Power

CERTIFICATE OF SECRETARY

Paul L. Jauregui, as secretary of Idaho Power Company, a Maine Corporation, hereby certifies as follows:

(1) That the corporate seal, or facsimile thereof, affixed to the instrument is in fact the seal of the corporation, or a true facsimile thereof, as the case may be; and

(2) That any officer of the corporation executing the instrument does in fact occupy the official position indicated, that one in such position is duly authorized to execute such instrument on behalf of the corporation, and that the signature of such officer subscribed thereunto is genuine; and

(3) That the execution of the instrument on behalf of the corporation has been duly authorized.

In witness whereof, I, PAUL L. JAUREGUI, as the secretary of Idaho Power Company, a Maine corporation, have executed this certificate and affixed the seal of Idaho Power Company, a Maine Corporation, on this 25th day of October, 1984.

Paul L. Jauregui
Secretary of Idaho Power Company

CERTIFICATE OF SECRETARY OF STATE

OF THE STATE OF IDAHO

PETE T. CENARRUSA, as Secretary of State of the State of Idaho, hereby certifies as follows:

1. That the State of Idaho seal, or facsimile thereof, affixed to the instrument is in fact the seal of the State of Idaho, or a true facsimile thereof, as the case may be; and

2. That the officials of the State of Idaho executing the instrument do in fact occupy the official positions indicated, that they are duly authorized to execute such instrument on behalf of the State of Idaho, and that the signatures of such officials of the State of Idaho subscribed thereunto are genuine; and

3. That the execution of the instrument on behalf of the State has been duly authorized.

IN WITNESS WHEREOF, I, Pete T. Cenarrusa, Secretary of State of the State of Idaho, have executed this Certificate and affixed the seal of the State of Idaho on this 25th day of October, 1984.

PETE T. CENARRUSA
Secretary of State
State of Idaho

STATE OF IDAHO)
) ss.
County of Ada)

On this 25th day of October, 1984, before me, a Notary Public, in and for said County and State, personally appeared JAMES E. BRUCE, and PAUL L. JAUREGUI, known or

identified to me to be the President and Secretary, respectively, of Idaho Power Company, the corporation that executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho

STATE OF IDAHO)
) ss.
County of Ada)

On this 25th day of October 1984, before me, a Notary Public, in and for said County and State, personally appeared JOHN V. EVANS, known or identified to me to be the Governor of the State of Idaho; JIM JONES, known or identified to me to be the Attorney General of the State of Idaho; and PETE T. CENARRUSA, known to me to be the Secretary of the State of Idaho; and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho

Exhibit 1

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

RELATING TO WATER RIGHTS FOR HYDROPOWER PURPOSES; AMENDING SECTION 42-203, IDAHO CODE, BY MAKING CERTAIN ORGANIZATIONAL CHANGES AND BY PROVIDING FOR THE MAILING OF NOTICES TO PAID SUBSCRIBERS; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203C TO PROVIDE THAT THE DEPARTMENT SHALL CONSIDER PUBLIC INTEREST CRITERIA WHEN AN APPLICANT'S APPROPRIATION WOULD SIGNIFICANTLY REDUCE THE AMOUNT OF WATER AVAILABLE FOR A SUBORDINATED POWER USE; AND AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203D TO PROVIDE THAT THE DEPARTMENT SHALL REVIEW ALL PERMITS ISSUED PRIOR TO THIS ACT'S EFFECTIVE DATE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-203, Idaho Code be, and the same is hereby amended to read as follows:

42-203. NOTICE UPON RECEIPT OF APPLICATION -- PROTEST -- HEARING AND FINDINGS -- APPEALS. ~~On and after the passage/ approval and effective date of this section/~~ (1) Upon receipt of an application to appropriate the waters of this state, the department of water resources, shall prepare a notice in such form as the department may prescribe, specifying: (a) the number of the application; ~~and~~ (b) the

date of filing thereof/; (c) the name and post-office address of the applicant/ (d) the source of the water supply/; (e) the amount of water to be appropriated/ (f) in general the nature of the proposed use/ (g) the approximate location of the point of diversion/ (h) and the point of use/. The department shall also stating in said notice that any protest against the approval of such application, in form prescribed by the department, shall be filed with the department within ten (10) days from the last date of publication of such notice.

(2) The director of the department of water resources shall cause the notice to be published in a newspaper printed within the county wherein the point of diversion lies, or in the event no newspaper is printed in said county, then in a newspaper of general circulation therein. When the application proposes a diversion in excess of 20 c.f.s. or 2,000 acre feet, the director shall cause the notice to be published in the newspaper(s) sufficient to achieve statewide circulation. This notice shall be published at least once a week for two (2) successive weeks.

(3) The director of the department shall cause a copy of the notice of application to be sent by ordinary mail to any person who requests in writing to receive any class of notices of application and who pays an annual mailing fee as established by departmental regulation.

(4) Any person, firm, association or corporation concerned in any such application may, within the time allowed in the notice of application, file with said director of the department of water resources a written protest against the approval of such application, which protest shall state the name and address of protestant and shall be signed by him or by his agent or attorney and shall clearly set forth his objections to the approval of such application. Hearing upon the protest so filed shall be held within sixty (60) days from the date such protest is received. Notice of this hearing shall be given by mailing notice not less than ten (10) days before the date of hearing and shall be forwarded to both the applicant and the protestant, or protestants, by certified mail. Such notice shall state the names of the applicant and protestant, or protestants, the time and place fixed for the hearing and such other information as the director of the department of water resources may deem advisable. In the event that no protest is filed, then the director of the department of water resources may forthwith approve the application, providing the same in all respects conforms with the requirements of this chapter, and with the regulations of the department of water resources.

(5) Such hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller [illegible] quantity of water than applied for, or may grant permit upon conditions. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

(6) Any person or corporation who has formally appeared at the hearing, [illegible] aggrieved by the judgment of the director of the department of water resources, may seek judicial review thereof in accordance with section 42-1071A(4), Idaho Code.

SECTION 2. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION to be known and designated as Section 42-203C, Idaho Code, and to read as follows:

42-203C. PUBLIC INTEREST DETERMINATION -- CRITERIA -- WEIGHT -- BURDEN OF PROOF.

(1) If an applicant intends to appropriate water which is or may be available for appropriation by reason of a subordination condition applicable to a water right for power purposes, then the director shall consider, prior to approving the application, the criteria established in section 42-203A, and whether the proposed use would significantly reduce, individually or cumulatively with other uses, the amount of water available to the holder of a water right used for power production and, if so, whether the proposed use is in the public interest.

(2)(a) The director in making such determinations for purposes of this section shall consider:

(i) the potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy;

(ii) the economic impact the proposed use would have upon electric utility rates in the State of Idaho, and the availability, foreseeability and cost of alternative energy sources to ameliorate such impact, to the state and local economy;

(iii) the promotion of the family farming tradition;

(iv) the promotion of full economic and multiple use development of the water resources of the State of Idaho;

(v) whether the proposed development conforms to a staged development policy of up to 20,000 acres per year or 80,000 acres in any four-year period in the Snake River Basin above the Murphy gauge.

No single factor enumerated above shall be entitled to greater weight by the director in arriving at this determination.

(b) The burden of proof under this section shall be on the protestant.

SECTION 3. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION to be known and designated as Section 42-203D, Idaho Code, and to read as follows:

42-203D. REVIEW OF PERMITS -- OPPORTUNITY FOR HEARING. The department shall review all permits issued prior to the effective date of this section, except to the extent a permit has been put to beneficial use prior to July 1, 1985, to determine whether they comply with the provisions of chapter 2, title 42, Idaho Code. If the department finds that the proposed use does not satisfy the criteria of chapter 2, title 42, Idaho Code, then the department shall either cancel the permit or impose the conditions required to bring the permit into compliance with chapter 2, title 42, Idaho Code. If the department finds that the permit satisfies the criteria established by chapter 2, title 42, Idaho Code, then the department shall enter an order continuing the permit.

The department shall provide an opportunity for hearing in accordance with section 1701A, title 42, Idaho Code and sections 5209 through 5215, title 67, Idaho Code, for each holder of a permit that is either cancelled or made subject to new conditions.

Exhibit 2

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

Revise Fee Schedule

AN ACT

RELATING TO THE ADJUDICATION OF WATER RIGHTS, AMENDING CHAPTER 14, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1406A PROVIDING FOR THE COMMENCEMENT OF AN ADJUDICATION OF THE WATER RIGHTS OF THE SNAKE RIVER BASIN; AMENDING SECTION 42-1414, IDAHO CODE, TO MODIFY THE SCHEDULE OF FEES FOR FILING A NOTICE OF CLAIM IN A WATER RIGHTS ADJUDICATION PROCEEDING AND PROVIDING A PROCEDURE FOR COLLECTION OF THE FEES; AMENDING CHAPTER 17, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1777 PROVIDING FOR THE CREATION OF THE WATER RESOURCES ADJUDICATION ACCOUNT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF IDAHO:

SECTION 1. That Chapter 14, Title 42, Idaho Code, be, and the same is hereby amended by the addition of a NEW SECTION, to be known and designated as Section 42-1406A, Idaho Code, and to read as follows:

42-1406A. SNAKE RIVER BASIN ADJUDICATION - COMMENCEMENT. (1) Effective management in the public interest of the waters of the Snake River Basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined. Therefore, the director of the department of water resources on or after July 1, 1985 shall petition the district court of Ada County to commence an adjudication of the water rights of the Snake River Basin either through initiation of a new proceeding or the enlargement of an ongoing adjudication proceeding. The petition shall describe:

(a) the boundaries of the entire system within the state to be adjudicated;

(b) the boundaries of any hydrologic sub-basins within the system for which the director intends to proceed separately with respect to the actions required or authorized to be taken pursuant to sections 42-1408 through 42-1413, Idaho Code; and

(c) the uses of water, if any, within the system that are recommended to be excluded from the adjudication proceeding.

(2) Upon issuance of an order by the district court which:

(a) authorizes the director to commence an investigation and determination of the various water rights existing within the system;

(b) defines the system boundaries;

(c) defines the boundaries of any hydrologic sub-basins within the system for which proceedings may advance separately pursuant to sections 42-1408 through 42-1412, Idaho Code; and

(d) defines any uses of water excluded from the adjudication proceeding;

the adjudication shall proceed in the manner provided by the provisions of chapter 14, title 42, Idaho Code, with the exception of sections 42-1406 and 42-1407.

SECTION 2. That section 42-1414, Idaho Code, be, and the same is hereby amended to read as follows:

42-1414. FEES FOR FILING NOTICE OF CLAIM - In order to provide an adequate and equitable cost-sharing formula for financing the costs of adjudicating water rights Tthe department of water resources shall accept no notice of claim required under the provisions of section 42-4109, Idaho Code, unless such notice of claim is submitted with a filing fee based upon the quantity of water claimed which shall be determined on the same basis as the fee for filing an application for a permit to appropriate the public waters of this state as provided in section 42-221/ Idaho Code/ except that where such claim is in connection with a water right established pursuant to a valid permit or license previously issued by the department of water administration or a water right which has previously been adjudicated by a state or federal court/ the claimant shall pay a filing fee of only

~~ten dollars ($10/00)~~ fee schedule set forth below. Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant. ~~Provided/ however/ that no filing fee shall be required with any notice of claim when proceedings for adjudication involving such claim were under way when this act/ Chapter 153/ Laws of 1971/ was enacted/~~ The fee schedule set forth below applies to adjudication proceedings commenced or enlarged on or after July 1, 1985 and to adjudication proceedings for which a proposed finding of water rights has not been filed with the appropriate district court by the department of water resources prior to July 1, 1985.

A. Flat fee per claim filed:

1. Claims for domestic and/or stock-watering rights $25.00

2. Claims for all other rights. $50.00

B. Additional variable water use fee for each claim filed:

1.	Irrigation use:	$ 1.00 per acre.
2.	Power:	$ 25.00 per c.f.s.
3.	Aquaculture:	$ 10.00 per c.f.s.
4.	Municipal, Industrial, Commercial, Mining, Heating, Cooling:	$100.00 per c.f.s.
5.	Public:	$100.00 per c.f.s.
6.	Miscellaneous:	flat fee only.

C. Payment of a variable water use fee of more than $1,000.00 may be spread out over as many as five annual equal payments with 10 percent interest accruing on the unpaid balance. All fees collected by the department pursuant to this section shall be placed in the water resources adjudication account established by section 42-1777, Idaho Code.

SECTION 3. That Chapter 17, Title 42, Idaho Code, be, and the same is hereby amended by the addition of a NEW SECTION, to be known and designated as Section 42-1777, Idaho Code, and to read as follows:

42-1777. WATER RESOURCES ADJUDICATION ACCOUNT. - A water resource adjudication account is hereby created and established in the agency asset fund. Fee moneys in the account

are to be utilized by the department of water resources, upon appropriation by the legislature, to pay the costs of the department attributable to the Snake River Basin adjudication provided for by section 42-7406A, Idaho Code.

The state treasurer is directed to invest all moneys in the account. All interest or other income accruing from such investment shall accrue to the account.

Exhibit 3

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

APPROPRIATING MONEYS TO THE OFFICE OF THE GOVERNOR FOR THE DIVISION OF FINANCIAL MANAGEMENT, FOR FISCAL YEAR 1986.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. There is hereby appropriated to the Office of the Governor from the general account the amount of $200,000 to be used for the purpose of conducting hydrologic and economic studies of the Snake River Basin. A technical advisory committee named by the Governor shall oversee the studies.

Exhibit 4

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

AMENDING CHAPTER 5, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-502B TO PROVIDE THAT GAIN UPON SALE OF A PUBLIC UTILITY'S WATER RIGHT SHALL ACCRUE TO THE BENEFIT OF THE RATEPAYERS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1 - That Chapter 5, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 61-502B, Idaho Code, and to read as follows:

61-502B. ALLOCATION OF GAIN UPON SALE OF WATER RIGHT.

The gain upon sale of a public utility's water right used for the generation of electricity shall accrue to the benefit of the ratepayers.

Exhibit 5

MEMORANDUM

SUBJECT: PROPOSED LEGISLATION RELATING TO UTILITIES COMMISSION AND ITS JURISDICTION TO REVIEW REVENUE REQUIREMENT AND OTHER REGULATORY IMPLICATIONS OF SWAN FALLS COMPROMISE.

SECTION 1 -- FINDINGS AND STATEMENT OF PURPOSE.--After hearing testimony from the Office of the Governor, the Office of the Attorney General, the Idaho Public Utilities Commission, the Idaho Department of Water Resources, the Idaho Water Resources Board, the Idaho Department of Fish and Game, other governmental entities and other interested groups and individuals of the State of Idaho, the legislature hereby finds that while portions of the testimony differ, the [describe the settlement and stipulation] is in the public interest for all purposes, including but not limited to, all purposes under the Public Utilities Law, as amended. Implementation of the settlement will resolve continuing controversy over electric utility water rights in the Snake River Basin above Murphy U.S.G.S gaging station. That controversy has rendered the amount of the water available for hydropower uncertain, thus placing at risk both the availability of low-cost hydropower to the ratepayers and the state's ability to manage an increasingly scarce resource. This settlement balances all of the parties' concerns and insures that existing hydropower-generating facilities will remain useful, that ratepayers will not be burdened with excessive costs, and that availability of water for additional domestic, manufacturing, and agricultural uses will judiciously expand.

SECTION 2 -- PUBLIC UTILITIES COMMISSION--JURISDICTION.--The Idaho Public Utilities Commission shall have no jurisdiction to consider in any proceeding, whether instituted before or after the effective date of this act, any issue as to whether any electric utility, (including Idaho Power Company), should have or could have preserved, maintained or protected its water rights and hydroelectric generation in a manner inconsistent with [describe the settlement and stipulation].

SECTION 3 -- IPUC--EFFECT OF AGREEMENT.--In any proceeding before the Idaho Public Utilities Commission, including but not limited to a proceeding in which the commission is setting or reviewing the revenue requirement of any electric utility (including Idaho Power Company), the commission shall accept as reasonable and in the public interest for all purposes, the [describe the settlement and stipulation], including without limitation the effects of implementation of such [describe the settlement and stipulation] on the utility's revenue requirements and hydroelectric generation.

SECTION 4 -- EXEMPTION.--Implementation of the [ ] shall not constitute a sale, assignment, conveyance or transfer within the meaning of §§61-327, 61-328, 61-329, 61-330, and 61-331, I.C., to the extent any of those sections may apply.

EXHIBIT 6

The executive branch of the State of Idaho and the Idaho Power Company agree to recommend that the following positions be incorporated into policy 32 of the state water plan.

1. The minimum daily flow at the Murphy gauging station should be increased to 3,900 c.f.s. from April 1 through October 31 and to 5,600 c.f.s from November 1 to March 31.

2. The minimum daily flow at the Milner gauging station shall remain at zero c.f.s.

3. New storage projects upstream from the Murphy gauge should only be approved after it is determined that existing storage above Murphy is fully utilized.

4. The Idaho Water Resource Board should consider reserving a block of water for future DCMI purposes.

5. There should be an express recognition of the adverse effects of diversions for storage from the mainstream of the Snake River between Milner and Murphy on hydropower production from November 1 to March 31. In this regard, approval of any new storage projects that contemplate the diversion of water during the November 1 to March 31 period from the mainstream of the Snake River between Milner Dam and Murphy Gauge should be coupled with provisions that mitigate the impact such depletions would have on the generation of hydropower.

   [The parties are proposing a policy which is neutral on the question of which Company facilities should be considered in mitigation decisions. At any later time the Board considers that question, the parties reserve the right to take any position they deem appropriate.]

Exhibit 7A

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203B, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE AUTHORITY TO SUBORDINATE RIGHTS GRANTED FOR POWER PURPOSES TO SUBSEQUENT UPSTREAM RIGHTS, AND TO LIMIT PERMITS OR LICENSES GRANTED FOR POWER PURPOSES TO A SPECIFIC TERM.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-203B, Idaho Code, and to read as follows:

42-203B. AUTHORITY TO SUBORDINATE RIGHTS -- NATURE OF SUBORDINATED WATER RIGHT AND AUTHORITY TO ESTABLISH A SUBORDINATION CONDITION -- AUTHORITY TO LIMIT TERM OF PERMIT OR LICENSE. The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. The director shall also have the authority to limit a permit or license for power purposes to a specific term.

SECTION 2. This Act does not apply to licenses which have already been issued as of the effective date of this Act.

SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, this Act shall be in full force and effect on and after its passage and approval.

Section 1:

1. The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by Sections 2 and 3 of this act are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes to continue using the water pending approval of depletionary future beneficial uses. [Further findings will be added]

2. A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action shall remain unsubordinated as defined by the agreement. Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the State of Idaho, by and through the Governor, for the use and benefit of the user of the water for power purposes, and of the people of the State of Idaho. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.

3. Water rights for power purposes not defined by agreement with the state shall not be subject to depletion below any applicable minimum stream flow established by state action. Water rights for power purposes in excess of such minimum stream flow shall be held in trust by the State of Idaho, by and through the Governor, for the use and benefit of the users of water for power purposes and of the people of the State of Idaho. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.

4. The user of water for power purposes as beneficiary of the trust established by Sections 2 and 3 shall be entitled to use water available at its facilities to the extent of the water right, and to protect its rights to the use of the water as provided by state law against depletions or claims not in accordance with state law.

5. The Governor or his designee is hereby authorized and empowered to enter into agreements with holders of water rights for power purposes to define that portion of their water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions, and to define such rights in excess thereof as

being held in trust by the State according to Section 2 above. Such agreements shall be subject to ratification by law. The contract entered into by the Governor and the Idaho Power Company on October 24, 1984, is hereby found and declared to be such an agreement, and the legislature hereby ratifies the Governor's authority and power to enter into this agreement.

Section 2: This Act shall not be construed as modifying, amending, or repealing any interstate compact.

Section 3: The provisions of this Act are hereby declared to be severable. If any provision of this Act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this Act.

Section 4: An emergency existing therefor, which emergency is hereby declared to exist, this Act shall be in full force and effect on and after its passage and approval.

Exhibit 8

- -

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

- -

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

AMENDING SECTION 42-1805, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE POWER TO ESTABLISH RULES AND REGULATIONS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-1805, be, and the same is hereby amended to read as follows:

42-1805. ADDITIONAL DUTIES -- In addition to other duties prescribed by law, the director of the department of water resources shall have the following powers and duties:

(1) To represent the state in all matters pertaining to interstate and international water rights affecting Idaho water resources; and to cooperate with all agencies, now existing or hereafter to be formed, within the state or within other jurisdictions, in matters affecting the development of the water resources of this state.

(2) To prepare a present and continuing inventory of the water resources of this state, ascertain means and methods of conserving and augmenting these and determine as accurately as possible the most effective means by which these water resources may be applied for the benefit of the people of this state.

--1--

(3) To conduct surveys, tests, investigations, research, examinations, studies, and estimates of cost relating to availability of unappropriated water, effective use of existing supply, conservation, storage, distribution and use of water.

(4) To prepare and compile information and data obtained and to make the same available to interested individuals or agencies.

(5) To cooperate with and coordinate activities with the administrator of the division of environmental protection of the department of health and welfare as such activities relate to the functions of either or both departments concerning water quality. Such cooperation and coordination shall specifically require that:

(a) The director meet at least quarterly with the administrator and his staff to discuss water quality programs. A copy of the minutes of such meeting shall be transmitted to the governor.

(b) The director transmit to the administrator, reports and information prepared by him pertaining to water quality programs, and proposed rules and regulations pertaining to water quality programs.

(c) The director shall make available to the administrator and the administrator shall make available to the director all notices of hearings relating to the promulgation of rules and regulations relating to water quality, waste discharge permits, and stream channel alteration, as such directly affect water quality, and notice of any other hearings and meetings which relate to water quality.

(6) To perform administrative duties and such other functions as the board may from time to time assign to the director to enable the board to carry out its powers and duties.

(7) To suspend the issuance of licenses or permits of a defined class or in a defined geographic area, as necessary to protect existing uses, ensure compliance with state law or implement the State Water Plan.

(8) To promulgate, adopt, modify, repeal and enforce rules and regulations implementing or effectuating the powers and duties of the department.

Appendix K: IDWR MORATORIUMS

SUMMARY OF PRINCIPAL MORATORIUM ORDERS, LEGISLATION AND POLICY STATEMENTS

This summary traces the history of the 1992 Moratorium Order originally covering the entire Snake Plain Basin. The reader is referred to IDWR's web site for information on additional specialized moratoriums, including the Twin Falls Geothermal GWMA Moratoriums, the Salmon and Clearwater Basins Moratorium, the Big Lost River Drainage Moratorium, the Mud Lake Area Moratorium and the Wilderness Water Rights Moratorium.

Date / Type	Geographic Area	Scope	Current Status
Jan. 22, 1980 IDWR Memorandum	Boise River and tributaries upstream from Lucky Peak Reservoir	All new and pending applications for consumptive use, surface water permits diversion during for irrigation season (6-15 to 11-1).	Still in effect as an expression of departmental policy. However, this is not a true moratorium order.
May 15, 1992 Order	The entire Snake River Basin upstream of the Weiser Gage (essentially the entire basin).	All new and pending applications for consumptive use of surface or ground water. Domestic rights and supplemental irrigation rights were excepted.	Amended by January 6, 1993 order. Superceded by April 30, 1993 order.
Jan. 6, 1993 Order	Eliminated the non-trust water area from the 1992 moratorium. Thus, the May 15, 1992 order now applies only to the trust water area.	No other change in scope.	Superceded by April 30, 1993 order.
Jan. 6, 1993 Order	New moratorium applicable only to non-trust water area. Unlike other moratoriums, limited to five years.	Essentially same scope as May 15, 1992, with some modification of supplemental water exception. Imposed a five-year moratorium on the non-trust water area while studies are undertaken.	Expired Dec. 31. 1997.
Apr. 30, 1993 Order	(1) Eastern Snake Plain Area and tributaries thereto (defined as the trust water area upstream of King Hill), and (2) the Boise River Drainage Area (defined as basin no. 63).	Essentially same scope as in May 15, 1992 order, except no exception for supplemental rights, and new exceptions for "public interest" and "no effect."	Amended by May 3, 1995 order. Rescinded prior moratorium orders on Mud Lake area and Big Lost River Drainage.
Apr. 11, 1994 1994 Idaho Sess. Laws. ch. 449, § 1, p. 1433 (formerly codified at Idaho Code § 42-1806)	In 1994, the Legislature adopted a statute preventing the Director from removing that portion of April 1993 amended moratorium applicable to the Eastern Snake Plain Aquifer prior to December 31, 1997.	No change in scope.	The act has now expired, but the Department's moratorium remains in effect.

SUMMARY OF PRINCIPAL MORATORIUM ORDERS, LEGISLATION AND POLICY STATEMENTS

This summary traces the history of the 1992 Moratorium Order originally covering the entire Snake Plain Basin. The reader is referred to IDWR's web site for information on additional specialized moratoriums, including the Twin Falls Geothermal GWMA Moratoriums, the Salmon and Clearwater Basins Moratorium, the Big Lost River Drainage Moratorium, the Mud Lake Area Moratorium and the Wilderness Water Rights Moratorium.

Date / Type	Geographic Area	Scope	Current Status
May 3, 1995 Order	Removed Boise River Drainage Area from moratorium. However, the order provides that applications for the use of surface water upstream of the Star Bridge on the Boise River will be denied unless mitigated to avoid injury. The practical effect of this provision is simply to limit new appropriations to flood water, which would be the case anyway.	Imposed some additional processing guidelines for applications within the Boise River Drainage Area.	Processing instructions provided by Administrator's Memorandum of June 20, 1996.
June 20, 1996 Administrator's Memorandum	Lower Boise River Basin (from Lucky Peak Reservoir to the mouth of the Boise River).	Applies to consumptive use ground water applications only, domestics excepted. Exceptions provided for "public interest" and "no effect."	In effect
SUMMARY OF CURRENT STATUS	The April 30, 1993 moratorium remains in effect only for the trust water area of the Eastern Snake River Plain area. Certain processing restrictions were imposed by the May 3, 1995 Order on the Boise River Drainage Area. In addition, an informal moratorium (via Administrator's Memorandum) remains in effect for the Lower Boise River Basin, below Lucky Peak Dam.	The April 30, 1993 moratorium applicable to the Eastern Snake River Plain applies to both ground and surface water. Certain restrictions under the May 3, 1995 order apply only to surface water upstream of the Star Bridge in the Boise River Drainage Area. The June 20, 1996 memorandum applicable to the Lower Boise River Basin applies only to ground water. All of the above are limited to consumptive use permit applications and provide a domestic exception.	In effect

State of Idaho
DEPARTMENT OF WATER RESOURCES
STATE OFFICE, 450 W. State Street, Boise, Idaho

JOHN V. EVANS
Governor

C. STEPHEN ALLRED
Director

Mailing address:
Statehouse
Boise, Idaho 83720
(208) 334-4440

TO: Staff

January 22, 1980

FROM: C. Stephen Allred

RE: Boise River Appropriations.
This memo supercedes my memo of July 11, 1977.

Effective immediately, no additional water right permits for consumptive use* of water during the period of June 15 to November 1 will be issued on the Boise River and tributaries in the reach upstream from Lucky Peak Reservoir.

The water in this reach of the river has been determined to be fully appropriated by the existing waterusers, and therefore, no water is available for any additional consumptive uses.

Persons wishing to file applications for permit in this area should be advised of the limited season of use and possible denial of the permit.

Applications for permit downstream from Lucky Peak must still be evaluated individually to determine whether water is available.

*For purposes of this memo, the consumptiveness of a use must be evaluated on a case-by-case basis. Irrigation and municipal uses are always consumptive, but industrial, commercial, mining, stockwater, recreation, wildlife, fish propagation, power, heating, cooling and aesthetics may or may not be consumptive depending on the circumstances of the use. Domestic can be considered to be non-consumptive, but a condition will be added that no water can be used for irrigation, lawn or garden watering as a part of the domestic water right.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR PERMITS FOR DIVERSION AND USE OF SURFACE AND GROUND WATER WITHIN THE SNAKE RIVER BASIN UPSTREAM FROM THE USGS GAUGE ON THE SNAKE RIVER NEAR WEISER	MORATORIUM ORDER

The Director of the Department of Water Resources, having responsibility for administration of the appropriation of the water of the State of Idaho, the protection of rights to the use of water within the state, the protection of the public interest in the waters of the state and the conservation of the water resources of the state, enters the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. The Snake River Basin in Idaho is experiencing the sixth consecutive year of drought.

2. Flows of many streams, springs, and rivers in the Snake River Basin are anticipated to be at or near record low levels because of the cumulative effect of the extended drought, the record low snow pack in the mountain watersheds of the basin during the winter of 1991-1992, and the unusually early runoff caused by record setting spring temperatures. As a result, water will not be available to fill many existing water rights that normally have an adequate supply. There will also be difficulty in providing for minimum streamflow rights, particularly the flow of 4750 cfs established by Idaho law for the Snake River at Weiser, Idaho.

3. Ground water aquifers are being stressed by the reduction in natural recharge, from reduced recharge due to changes in diversion and use of surface waters throughout the basin and by the increased volume of pumping occurring to augment scarce surface water supplies. The lowered water levels in the aquifers across much of the Snake River Basin in southern Idaho have resulted in numerous wells, often those used for domestic and municipal water supply purposes, becoming unusable. Lowered ground water levels also reduce spring discharge needed to maintain stream and river flows.

4. The need to supplement or replace inadequate surface supplies has prompted many waterusers to pursue ground water as an alternate source of supply. Many more users are likely to seek to do likewise in response to continuing drought and water supply conditions.

5. The department has received petitions, letters and telephone inquiries expressing the need for tightened administration during the drought.

CONCLUSIONS OF LAW

1. The Director of the Department of Water Resources is responsible for administration of the appropriation and use of the water of the State of Idaho. Section 42-202, Idaho Code, reads, in pertinent part,

> For the purpose of regulating the use of the public waters and of establishing by direct means the priority right to such use, any person, association or corporation hereafter intending to acquire

the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho, shall, before commencing of the construction, enlargement or extension of the ditch, canal, well, or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of water resources for a permit to make such appropriation.

2. The Director of the Department of Water Resources is responsible for supervision of water distribution in the state of Idaho. Section 42-602, Idaho Code, reads, in pertinent part,

> It shall be the duty of the department of water resources to have immediate direction and control of the distribution of water from all of the streams to the canals and ditches diverting therefrom. The department must execute the laws relative to the distribution of water in accordance with rights of prior appropriation.

3. Section 42-1805(7), Idaho Code, authorizes the Director of the Department of Water Resources as follows:

> After notice, to suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of minimum flow provisions of the state water plan.

4. Rule 7.1. of the Department of Water Resources Rules and Regulations for Water Appropriation provides that a moratorium on processing of applications for permit shall be entered by issuance of an order of the Director of the Department of Water Resources. Notice of the order shall be by certified mail to affected applicants and permit holders and by publishing a legal notice in newspapers of general circulation in the area.

5. A moratorium on issuance of permits to divert and use water from the Snake River Basin upstream from the USGS gauging station on the Snake River near Weiser for new consumptive uses should be established to protect existing water rights and established minimum stream flows.

ORDER

IT IS, THEREFORE, HEREBY ORDERED THAT a moratorium is established on the processing and approval of presently-pending and new applications for permits to appropriate water from all surface and ground water sources within the Snake River Basin upstream from the USGS gaging station on the Snake River near Weiser, Idaho. The following provisions apply to administration of the moratorium:

1. The moratorium shall be in effect on and after its entry and shall remain in effect until withdrawn or modified by order of the Director.

2. The moratorium includes applications filed on all public water sources located in the Snake River Basin upstream from the USGS gauging station on the Snake River near Weiser, located in Section 31, Township 11 North, Range 5 West, Boise Meridian.

3. The moratorium applies to all applications proposing a consumptive use of water filed after the date of the order and to all applications filed prior to the entry of the order for which approval has not been given, except as herein provided.

4. The moratorium does not affect the authorization to continue development of any existing approved application (permit).

5. The moratorium does not apply to any application for domestic purposes as such term is defined in Section 42-111, Idaho Code. For the purposes of this exception, applications for ground water permits seeking water for multiple ownership subdivisions or mobile home parks will be considered provided each unit satisfies the definition for the exception of requirement to file an application for permit as described in said section.

6. The moratorium does not apply to any application proposing a nonconsumptive use of water as that term is used in Section 42-605A, Idaho Code.

7. The moratorium does not apply to applications seeking to appropriate ground water as a supplemental water supply for irrigation or other use on lands which have an existing normally-full water right from a surface water source. Approval of such applications, when otherwise in conformance with the requirements of Section 42-203, Idaho Code, will be conditioned to allow use only when the appurtenant surface sources are not available due to drought conditions, to allow only the amount of ground water to be diverted necessary for the ordinary use of the land using accepted conservation practices, to require, as the director determines necessary, monitoring of the effect of pumping of proposed new wells on nearby domestic wells, if any, and to require mitigation or compensation for any changes that such wells or their associated pumping equipment require because of use of the new supplemental supply well.

8. The moratorium does not apply to applications for drilling permits to replace or deepen existing wells having valid existing water rights nor to applications for transfer of existing water rights.

9. The moratorium does not change or affect the administration of any area that has been previously designated as a critical ground water area pursuant to Section 42-233a, Idaho Code, a ground water management area pursuant to Section 42-233b, Idaho Code, or a moratorium area pursuant to Section 42-1805(7), Idaho Code.

Dated this 15TH day of May, 1992.

R. KEITH HIGGINSON
Director

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR PERMITS FOR DIVERSION AND USE OF SURFACE AND GROUND WATER WITHIN THE SNAKE RIVER BASIN UPSTREAM FROM MILNER DAM	)	MORATORIUM ORDER

The Director of the Department of Water Resources, having responsibility for administration of the appropriation of the water of the State of Idaho, the protection of rights to the use of water within the state, the protection of the public interest in the waters of the state and the conservation of the water resources of the state, enters the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. The Snake River Basin in Idaho has experienced six consecutive years of drought, and a drought emergency exists within the Snake River Basin.

2. The Director entered on May 15, 1992 a Moratorium Order regarding applications for permits for diversion and use of surface and ground water within the Snake River Basin upstream from the USGS gauge on the Snake River near Weiser in response to the drought emergency.

3. The term "nontrust water area" means that area depicted as such on Exhibit "A" attached hereto and by this reference incorporated herein.

4. The Director entered on January 6, 1993 an Order Amending Moratorium Order Dated May 15, 1992 to exclude the non-trust water area from its geographic scope. This present Moratorium Order is entered to replace the May 15, 1992 Moratorium Order for the non-trust water area.

5. During the 1992 irrigation season, flows in many streams, springs and rivers in the non-trust water area were at or near record low levels.

6. Ground water aquifers have been stressed by the reduction in natural recharge, from reduced recharge due to changes in diversion and use of surface waters throughout the basin and by the increased volume of pumping. As a consequence, ground water levels have fallen. The lowered water levels in the aquifers of the non-trust water area have resulted in numerous wells, often used for domestic and municipal water supply

purposes, becoming unusable. Lowered ground water levels also reduce spring discharge needed to maintain stream and river flows.

7. In order to supplement or replace inadequate surface supplies, many waterusers have been prompted to pursue ground water as an alternate source of supply. Many more users are likely to seek to do likewise in response to continuing drought and competition for water supplies.

8. The Twin Falls Canal Company and the North Side Canal Company filed a COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION in *Twin Falls Canal Company and the North Side Canal Company v. The Idaho Department of Water Resources, an agency of the State of Idaho* on July 24, 1992. This Complaint, in part, requested:

> That the District Court issue a preliminary injunction pursuant to Idaho Rule of Civil Procedure 65, ordering the IDWR, its officers, agents, employees, successors, attorneys, and all those in active concert or participation with IDWR to refrain immediately, pending final hearing in determination of this action, from taking any action that would impact the natural flow or storage rights of the TFCC [Twin Falls Canal Company] and NSCC [North Side Canal Company], including, but not limited to, the processing, approval or issuance of or action upon presently pending and new permit applications for ground or surface waters for other than domestic, commercial, municipal or industrial use ("DCMI") in the non-trust water area of the Snake Plain Aquifer . . . ."

Complaint at 11.

9. The position of the IDWR is that it can approve additional permits within the non-trust water area without injury to the claimed water rights of TFCC and NSCC.

10. Both parties recognize that a substantial factual dispute exists and that additional technical studies are needed to resolve this dispute.

11. Both parties agree that a study period of up to five years would be sufficient to complete the necessary studies, if adequately funded.

12. The parties agree that the criteria set forth in paragraph 9 of the order sets a procedure for approval of water diversions which minimizes the potential injury to the water rights of TFCC and NSCC.

13. The IDWR held public information meetings on the proposed settlement agreement and draft moratoriums on December 21, 22, 1992 in Twin Falls, Pocatello, and Rexburg.

CONCLUSIONS OF LAW

1. The Director of the Department of Water Resources is responsible for administration of the appropriation and use of the water of the State of Idaho. Section 42-202, Idaho Code, reads, in pertinent part:

> For the purpose of regulating the use of the public waters and of establishing by direct means the priority right to such use, any person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho, shall, before commencing of the construction, enlargement or extension of the ditch, canal, well, or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of water resources for a permit to make such appropriation.

2. Section 42-237a, Idaho Code, provides, in part, as follows:

> g. To supervise and control the exercise and administration of all rights hereafter acquired to the use of ground waters and in the exercise of this power he may by summary order, prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated rate of future natural recharge. However, the director may allow withdrawal at a rate exceeding the reasonably anticipated rate of future natural recharge if the

director finds it is in the public interest and if it satisfies the following criteria:

1. A program exists or likely will exist which will increase recharge or decrease withdrawals within a time period acceptable to the director to bring withdrawals into balance with recharge.

2. Holders of senior rights to use ground water will not be caused thereby to pump water from below the established reasonable pumping level or levels.

In connection with his supervision and control of the exercise of ground water rights the director of the department of water resources shall also have the power to determine what areas of the state have a common ground water supply and whenever it is determined that any area has a ground water supply which affects the flow of water in any stream or streams in an organized water district, to incorporate such area in said water district . . . . The administration of water rights within water districts created or enlarged pursuant to this act shall be carried out in accordance with the provisions of title 42, Idaho Code, as the same have been or may hereafter be amended . . . .

3. The Director of the Department of Water Resources is responsible for supervision of water distribution in the state of Idaho. Section 42-602, Idaho Code, reads, in pertinent part:

It shall be the duty of the department of water resources to have immediate direction and control of the distribution of water from all of the streams to the canals and ditches diverting therefrom. The department must execute the laws relative to the distribution of water in accordance with rights of prior appropriation.

4. Section 42-1805(7), Idaho Code, authorizes the Director of the Department of Water Resources as follows:

After notice, to suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of minimum flow provisions of the state water plan.

5. Rules 7,1 and 7,1,2,1 of the Department of Water Resources Rules and Regulations for Water Appropriation provide that a moratorium on processing of applications for permit shall be entered by issuance of an order of the Director of the Department of Water Resources. Notice of the order shall be sent

by certified mail to affected applicants by publishing a legal notice in newspapers of general circulation in the area.

6. A moratorium on issuance of permits to divert and use water from the Snake River Basin upstream from Milner Dam in the non-trust water area for new consumptive uses should be established to protect existing water rights and established minimum stream flows because of the need to conduct studies regarding the interrelationship between the Snake Plain Aquifer and the Snake River and because of the present drought emergency.

ORDER

IT IS, THEREFORE, HEREBY ORDERED THAT a moratorium is established on the processing and approval of presently-pending and new applications for permits to appropriate water from all surface and ground water sources in the non-trust water area. The following provisions apply to administration of the moratorium:

1. The moratorium shall be in effect on and after its entry and shall remain in effect until December 31, 1997.

2. The moratorium includes applications filed on all public water sources, including surface and ground water, located in the non-trust water area.

3. The moratorium applies to all applications proposing a consumptive use of water filed after the date of the order and to all applications filed prior to the entry of the order for which approval has not been given, except as herein provided.

4. The moratorium does not affect the authorization to continue development of any existing approved application (permit).

5. The moratorium does not apply to any application for domestic purposes as such term is defined in Section 42-111, Idaho Code. For the purposes of this exception, applications for ground water permits seeking water for multiple ownership subdivisions or mobile home parks will be considered a domestic use provided each unit satisfies the definition for the exception to the requirement to file an application for permit as described in said code section.

6. The moratorium does not apply to any application proposing a nonconsumptive use of water as that term is used in Section 42-605A, Idaho Code.

7. The moratorium does not apply to applications for drilling permits to replace or deepen existing wells having valid existing water rights, to applications for transfer of existing water rights, or to applications for amendments to permits.

8(a). The moratorium does not apply to applications to appropriate ground water as a supplemental water supply for irrigation or other consumptive beneficial use on lands which have an existing normally-full water supply from a surface water source. Approval of such applications, which also comply with Idaho Code Section 42-203, will be conditioned:

(1) To allow the use of the water only when and to the extent that the original sources are not available due to drought conditions;

(2) To allow the diversion of only the amount of ground water necessary for the customary use on the land, after the application of accepted conservation practices;

(3) To require, as the director determines necessary, monitoring of the effect of pumping of the new well or wells on nearby domestic wells, if any;

(4) To require mitigation or compensation as necessary for such affected domestic wells;

(5) To expire at the conclusion of the irrigation season for which such approval was given; and

(6). To not exceed the annual limitation contained in Paragraph 9(a).

(b) The provisions of paragraph 8(a) shall apply until the Director has issued an Order declaring an end to the drought emergency for the Snake River Basin upstream from the USGS gauge on the Snake River near Weiser.

9. After the Director has issued an Order declaring an end to the drought emergency for the Snake River Basin upstream from the USGS gauge on the Snake River near Weiser, the following criteria shall apply to approval of applications to appropriate ground water for any consumptive use, except for domestic uses, from the non-trust water area:

a. The amount annually authorized by approved applications for consumptive use will not exceed 10,000 acre feet in any one year. In the event that the annual amount approved for new consumptive use is less than 10,000 acre feet in any one year, the difference between the amount authorized for consumptive use and 10,000 acre feet shall not carry over into subsequent years so as to exceed the annual allotment authorized for consumptive use in any one calendar year.

b. The IDWR will submit an annual report to the TFCC and NSCC of the number of permits issued and amount of water authorized for diversion.

10. The moratorium does not change or affect the administration of any area that has been previously designated as a critical ground water area pursuant to Section 42-233a, Idaho

Code or a ground water management area pursuant to Section 42-233b, Idaho Code.

Dated this 6th day of January, 1993.

R. KEITH HIGGINSON
Director

A2317NBC

MORATORIUM - PAGE 7

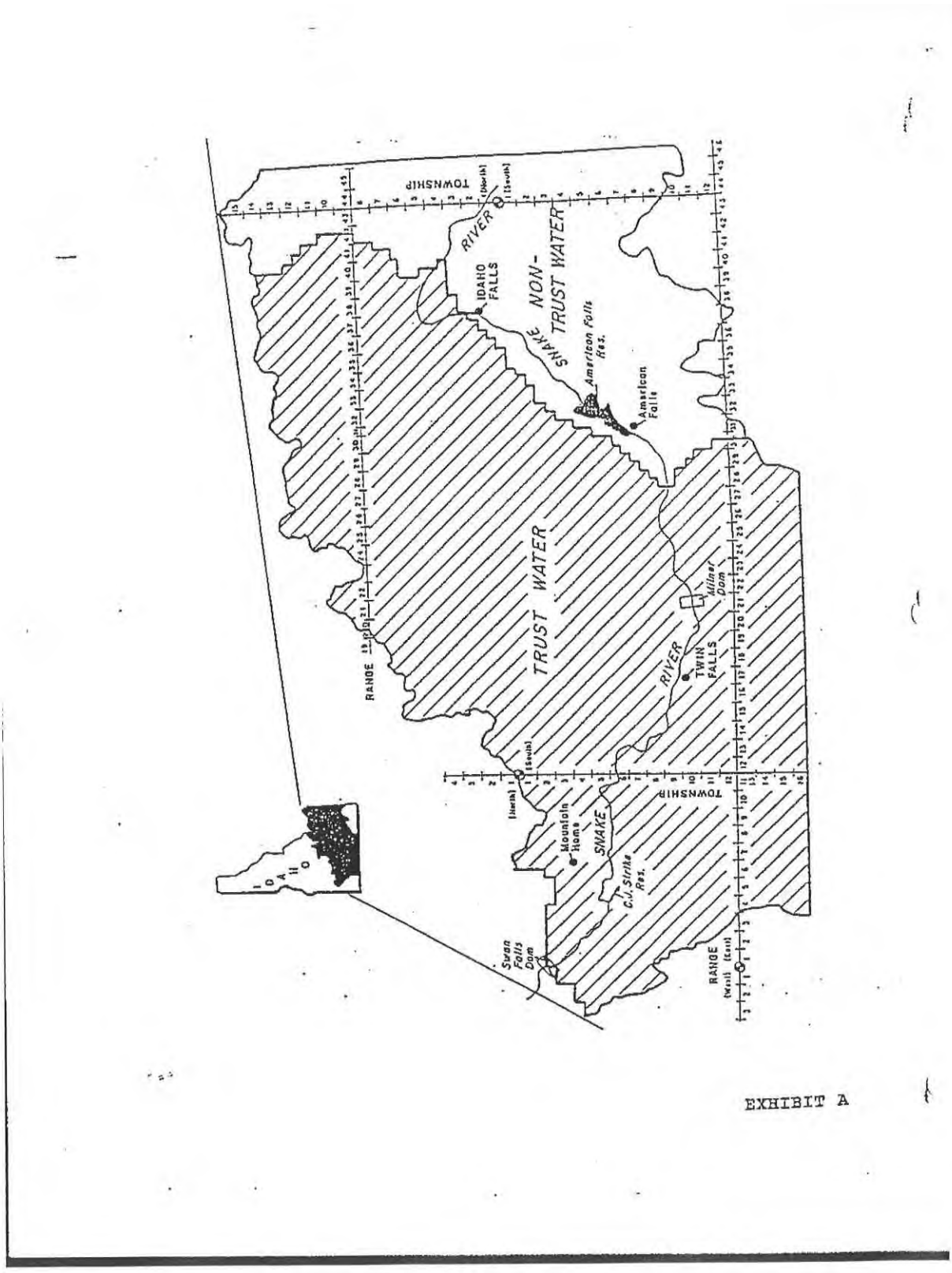

TOWNSHIP
RIVER
IDAHO FALLS
SNAKE NON-TRUST WATER
American Falls Res.
American Falls
RANGE
TRUST WATER
Milner Dam
RIVER
TWIN FALLS
TOWNSHIP
Mountain Home
SNAKE
C.J. Strike Res.
Swan Falls Dam
RANGE
IDAHO

EXHIBIT A

Jan 6, 1993

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR PERMITS FOR DIVERSION AND USE OF SURFACE AND GROUND WATER WITHIN THE SNAKE RIVER BASIN UPSTREAM FROM THE USGS GAUGE ON THE SNAKE RIVER NEAR WEISER	ORDER AMENDING MORATORIUM ORDER DATED MAY 15, 1992

The Moratorium Order dated May 15, 1992 is amended as follows:

1. The FINDINGS OF FACT are modified by deleting existing paragraph 1 and by adding a new paragraph 1 as follows:

> 1. The Snake River Basin in Idaho has experienced six consecutive years of drought, and a drought emergency exists within the Snake River Basin.

2. The FINDINGS OF FACT are further modified by adding the following new paragraphs 6 and 7.

> 6. The term "non-trust water area" means that area depicted as such on Exhibit "A" attached hereto and by this reference incorporated herein.
>
> 7. The Department entered a new Moratorium Order for the non-trust water area on January 6, 1993. The portion of the Snake River basin that is the subject of the new Moratorium Order needs to be eliminated from the geographic scope of this Moratorium Order dated May 15, 1992.

3. The CONCLUSIONS OF LAW are modified by deleting existing paragraph 6 and by adding a new paragraph 6 as follows:

> 6. A moratorium on issuance of permits to divert and use water from the Snake River Basin upstream from the USGS gauging station on the Snake River near Weiser should be established to protect existing water rights and established minimum stream flows, except that the non-trust water area should be eliminated from the geographic scope of this Moratorium Order dated May 15, 1992.

4. The existing preamble to the Order is deleted and a new preamble is added as follows:

> IT IS, THEREFORE HEREBY ORDERED THAT a moratorium is established on the processing and approval of presently-pending and new applications for permits to appropriate

water from all surface and ground water sources within that portion of the Snake River Basin upstream from the USGS gauging station on the Snake River near Weiser, except that the non-trust water area is excluded from the geographic scope of this order. The following provisions apply to administration of the moratorium:

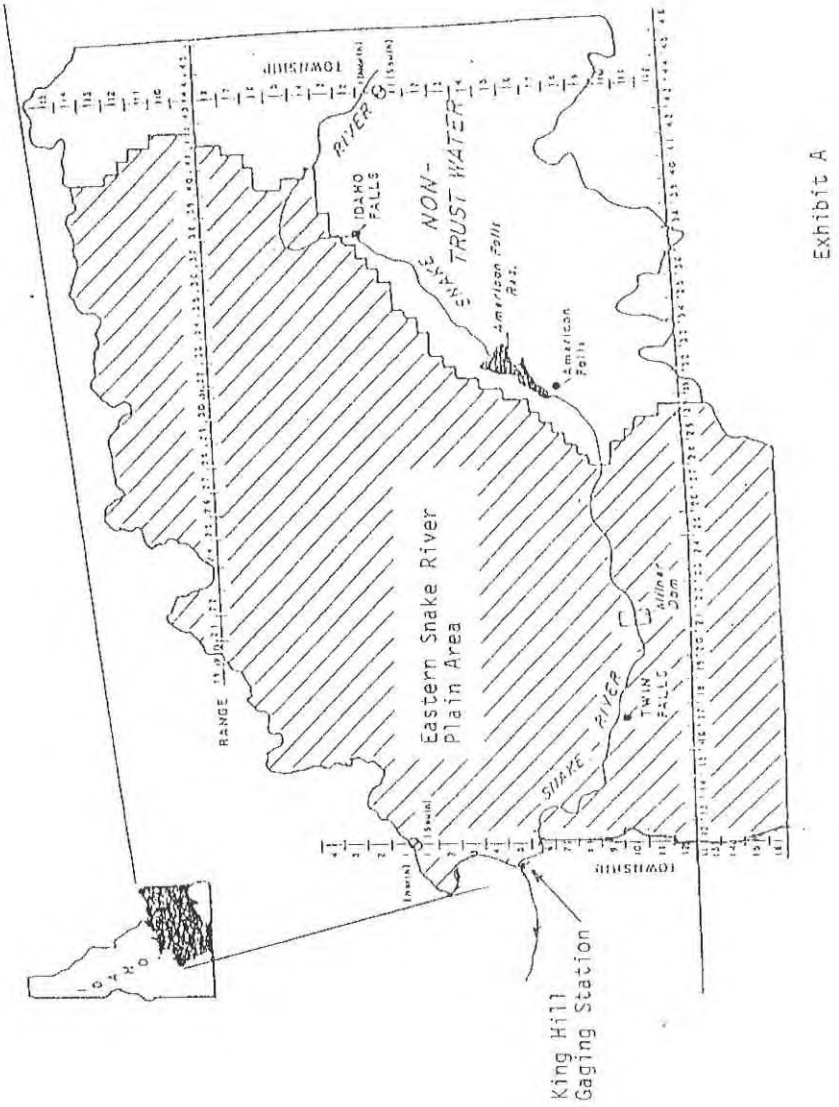
5. The existing paragraph 2 of the ORDER is deleted and a new paragraph 2 is added as follows:

2. The moratorium includes applications filed on all public water sources within that portion of the Snake River Basin tributary to the Snake River upstream from the USGS gauging station on the Snake River near Weiser, located in Section 31, Township 11 North, Range 5 West, Boise Meridian, except that the non-trust water area is excluded from the operation of this Moratorium Order.

6. The remaining portions of the Moratorium Order entered on May 15, 1992 shall remain in full force and effect.

Dated this 6th day of January 1993.

R. KEITH HIGGINSON
Director


Exhibit A
TOWNSHIP
RIVER
IDAHO FALLS
NON-TRUST WATER
American Falls
Eastern Snake River Plain Area
RANGE
SNAKE RIVER
TWIN FALLS
Milner Dam
TOWNSHIP
IDAHO
King Hill Gaging Station

BEFORE THE DEPARMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR)
PERMITS FOR THE DIVERSION AND USE)
OF SURFACE AND GROUND WATER WITHIN)
THE EASTERN SNAKE RIVER PLAIN AREA)
AND THE BOISE RIVER DRAINAGE AREA)
_____)

AMENDED
MORATORIUM ORDER

The Director of the Department of Water Resources, having responsibility for the administration of the appropriation of the water of the state of Idaho, the protection of rights to the use of water within the state, the protection of the public interest in the waters of the state, and the conservation of the water resources of the state, enters the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On May 15, 1992, the Director of the department issued a moratorium order against the approval of certain new applications in the Snake River Basin upstream from the USGS gaging station at Weiser, Idaho. On January 6, 1993, the Director amended the moratorium order to eliminate the non-trust water area from the scope of the May 15, 1992 moratorium order. Conditions have since changed making further amendment of the May 15, 1992 order appropriate.

2. The Snake River Basin in Idaho has experienced six consecutive years of drought, and while the snowpack and precipitation are now near or above average across much of southern Idaho, residual effects of the drought are still evident in ground water levels, spring flows and anticipated stream flows.

3. Ground water aquifers have become stressed by the reduction in natural recharge due to changes in diversion and use of surface waters throughout the basin and by the increased volume of pumping occurring to augment scarce surface water supplies during the drought period. The lowered water levels in the

aquifers across much of the Snake River Basin in southern Idaho have resulted in numerous wells, often those used for domestic and municipal water supply purposes becoming unusable. Lowered ground water levels also reduce spring and base flow discharge needed to maintain stream and river flows.

4. The need to supplement or replace inadequate surface supplies has prompted many waterusers to pursue ground water as an alternative source of supply.

5. Many wells throughout the Snake River Basin, including domestic wells in the Boise River Area, have either been replaced or drilled deeper during the duration of the drought.

6. The 1993 Idaho legislature authorized a three year study to determine the relationship between the Snake Plain Aquifer and the flow of the Snake River.

7. Even though the water supplies in the state are approaching normal for the 1993 irrigation season, ground water levels which have been declining will not fully recover in 1993.

8. The term "non-trust water area" means that area depicted as such on Exhibit "A" attached hereto and by this reference incorporated herein.

9. The term "Eastern Snake River Plain Area" means the trust water area of the Snake Plain Aquifer upstream from the USGS gaging station on the Snake River at King Hill. To further define the western boundary of this area, department designated hydrologic basin nos. 37 and 47, among other basins, are included in the area and hydrologic basin nos. 51 and 61, among other basins, are not included in the area.

10. The term "Boise River Drainage Area" means hydrologic basin no. 63 as designated in department records.

11. This Amended Moratorium Order does not pertain to the non-trust water area.

12. The Snake River Basin Moratorium Order issued by the department on May 15, 1992 and amended on January 6, 1993, includes and overlaps both the Big Lost River drainage for which the department has previously issued a moratorium order on August 7,

1990 and the Mud Lake and Vicinity Area for which the department issued a moratorium order on December 1, 1989.

CONCLUSIONS OF LAW

1. The Director of the Department of Water Resources is responsible for administration of the appropriation and use of the water of the state of Idaho. Section 42-202, Idaho Code, reads in pertinent part:

> For the purpose of regulating the use of the public waters and of establishing by direct means the priority right to such use, any person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho, shall, before commencing of the construction, enlargement or extension of the ditch, canal, well, or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of water resources for a permit to make such appropriation.

2. The Director of the Department of Water Resources is responsible for supervision of water distribution in the state of Idaho. Section 42-602, Idaho Code, reads, in pertinent part,

> It shall be the duty of the department of water resources to have immediate direction and control of the distribution of water from all of the streams to the canals and ditches diverting therefrom. The department must execute the laws relative to the distribution of water in accordance with rights of prior appropriation.

3. The Director of the Department of Water Resources is authorized under the provisions of Section 42-1805(7), Idaho Code, as follows:

> After notice, to suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of the minimum flow provisions of the state water plan.

4. Rule 7,1. of the Department of Water Resources Rules and Regulations for Water Appropriation provides that a moratorium on processing of applications for permit shall be entered by issuance of an order of the Director of the Department of Water Resources.

Notice of the order shall be by certified mail to affected applicants and permit holders and by publishing a legal notice in newspapers of general circulation in the area.

5. A moratorium on issuance of permits to divert and use surface and ground water from the Eastern Snake River Plain Area and tributary drainages and the Boise River Drainage Area should be established to protect existing water rights.

6. The department should rescind the moratorium order issued on August 7, 1990 for the Big Lost River drainage and the moratorium order issued on December 1, 1989 for the Mud Lake and Vicinity Area to remove the duplicate effect associated with this Amended Moratorium Order.

7. This amended moratorium order is not intended to affect the provisions of the moratorium order issued by the department on January 6, 1993 in the non-trust water area.

ORDER

IT IS, THEREFORE HEREBY ORDERED that prior order of the department dated May 15, 1992 and amended January 6, 1993 in connection with the Snake River Basin upstream from the USGS gaging station at Weiser, Idaho is superceded by this Amended Moratorium Order.

IT IS, FURTHER HEREBY ORDERED that a moratorium is established on the processing and approval of presently pending and new applications for permits to appropriate water from all surface and ground water sources within the Eastern Snake River Plain Area and all tributaries thereto and within the Boise River Drainage Area. The following provisions apply to the administration of the moratorium:

1. The moratorium shall be in effect on and after its entry and shall remain in effect until withdrawn or modified by order of the Director.

2. The moratorium includes applications filed on all public water sources within the Eastern Snake River Plain Area and all tributaries thereto and within the Boise River Drainage Area.

3. The moratorium applies to all applications proposing a

consumptive use of water filed after the date of the order and to all applications filed prior to the entry of the order for which approval has not been given, except as herein provided.

4. The moratorium does not affect the authorization to continue development of any existing approved application (permit).

5. The moratorium does not apply to any application for domestic purposes as such term is defined in Section 42-111, Idaho Code. For the purposes of this exception, applications for ground water permits seeking water for multiple ownership subdivisions or mobile home parks will be considered provided each unit satisfies the definition for the exception of requirement to file an application for permit as described in said section.

6. The moratorium does not apply to any application proposing a non-consumptive use of water as the term is used in Section 42-605A, Idaho Code.

7. The moratorium does not apply to applications for drilling permits to replace or deepen existing wells having valid existing water rights nor to applications for transfer of existing water rights.

8. This moratorium does not change or affect the administration of any area that has been previously designated as a critical ground water area, pursuant to Section 42-233a, Idaho Code, or a ground water management area pursuant to Section 42-233b, Idaho Code.

9. The moratorium does not prevent the Director from reviewing for approval on a case-by-case basis an application which otherwise would not be approved under terms of this moratorium if,

a) Protection and furtherance of the public interest as determined by the Director, requires consideration and approval of the application irrespective of the general drought related moratorium; or

b) The Director determines that the development and use of the water pursuant to an application will have no effect on prior surface and ground water rights because of its location, insignificant consumption of water or mitigation provided by the applicant to offset injury to other rights.

10. This moratorium does not change or supercede any of the

provisions of the moratorium order issued by the department on January 6, 1993 in the non-trust water area of the Snake River Basin and shall not be interpreted as declaring an end to the drought emergency as referenced in provision 8(b) of the moratorium order for the non-trust water area.

11. This moratorium supercedes and rescinds the Moratorium Order issued on December 1, 1989 for the Mud Lake and Vicinity Area. Pending applications for permit or applications for transfer will be treated under the terms of this amended moratorium order.

12. This moratorium supercedes and rescinds the Final Order of the department issued on August 7, 1990 which established a moratorium on the issuance of new permits within the Big Lost River drainage. Pending applications for permit or applications for transfer will be treated under terms of this amended moratorium order and may be considered for approval by the department in connection with proposed mitigation or compensation for prior water rights.

Dated this 30TH day of APRIL, 1993.

R. KEITH HIGGINSON
Director

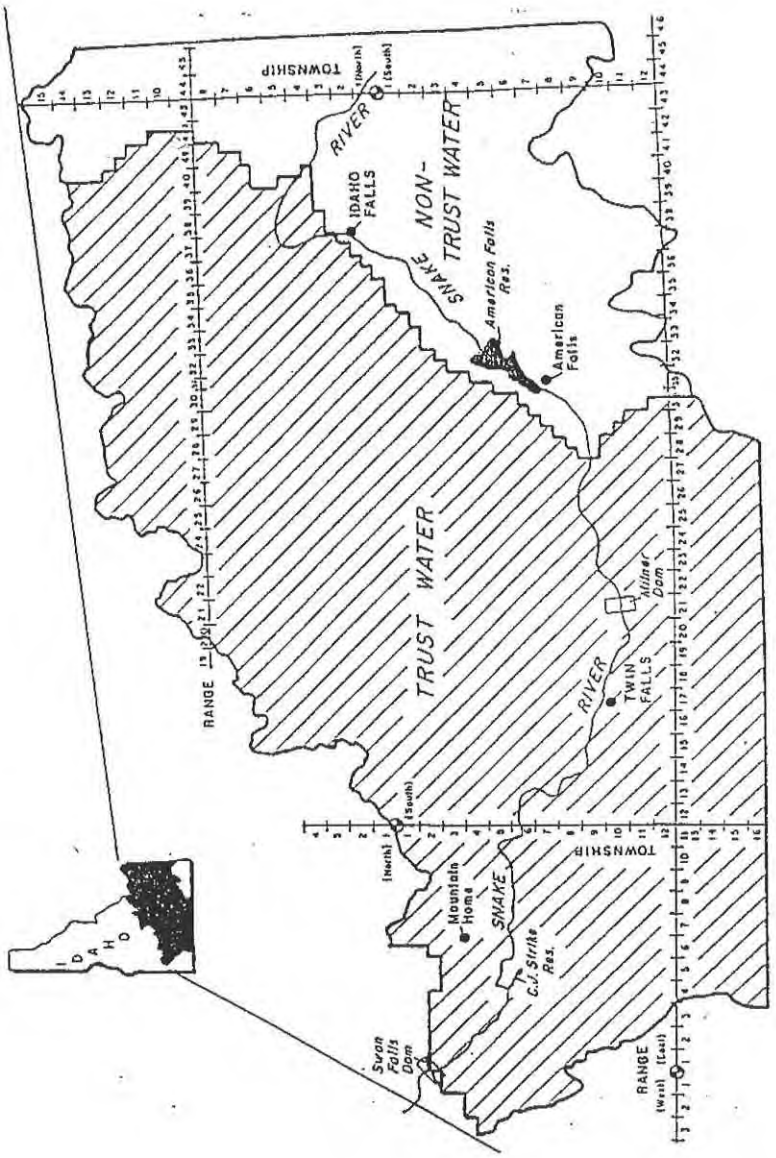

TOWNSHIP
RIVER
IDAHO FALLS
SNAKE
NON-TRUST WATER
American Falls Res.
American Falls
TRUST WATER
Milner Dam
RIVER
TWIN FALLS
RANGE
TOWNSHIP
Mountain Home
SNAKE
C.J. Strike Res.
Swan Falls Dam
RANGE
I D A H O

EXHIBIT A

CHAPTER 449
(H.B. No. 982)

AN ACT

RELATING TO WATER RIGHTS; AMENDING CHAPTER 18, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1806, IDAHO CODE, TO PROVIDE A MORATORIUM ON APPROVAL OF APPLICATIONS TO APPROPRIATE WATER FOR CERTAIN WATER RIGHTS IN THE SNAKE RIVER BASIN; DECLARING AN EMER-

GENCY AND PROVIDING A SUNSET CLAUSE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 18, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-1806, Idaho Code, and to read as follows:

42-1806. MORATORIUM ON APPROVAL OF APPLICATIONS TO APPROPRIATE WATER. (1) Findings. On April 30, 1993, the director of the Idaho department of water resources adopted an amended moratorium order "In the Matter of Applications for Permits for the Diversion and Use of Surface and Ground Water within the Eastern Snake River Plain Area and the Boise River Drainage Area." This moratorium was adopted because of the continuing effect of a long-term drought. The effects of this drought continue to exist. In addition, changed irrigation practices have resulted in a reduction in the recharge of the aquifer. These factors have caused concerns regarding the water supply for water rights in some areas of the Snake Plain aquifer. In order to address the long-term management of the Snake Plain aquifer, the legislature has authorized a study to examine the implications of these changes. This study is expected to last two (2) years. Continuation of the current moratorium for the Eastern Snake Plain area is appropriate while these studies are undertaken.

(2) The portion of the director's moratorium entitled "In the Matter of Applications for Permits for the Diversion and Use of Surface and Ground Water within the Eastern Snake River Plain Area and the Boise River Drainage Area," dated April 30, 1993, relating to the Eastern Snake River Plain area is hereby approved and confirmed and shall continue in effect until December 31, 1997.

(3) Except as provided in subsection (2) of this section, nothing in this act shall preclude the director from maintaining or modifying the requirements of any existing moratoriums or initiating any new, more restrictive moratoriums relating to water resource administration of the state.

SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after passage and approval, and shall be null, void and of no force and effect on and after December 31, 1997.

Approved April 11, 1994.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR PERMITS FOR THE DIVERSION AND USE OF SURFACE AND GROUND WATER WITHIN THE BOISE RIVER DRAINAGE AREA	)))))	AMENDED MORATORIUM ORDER

The Director of the Department of Water Resources, having responsibility for the administration of the appropriation of the water of the state of Idaho, the protection of rights to the use of water within the state, the protection of the public interest in the waters of the state, and the conservation of the water resources of the state, enters the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. On May 15, 1992, the Director issued a moratorium order under the authority of Section 42-1805, Idaho Code, against the approval of new appropriations of water in the Snake River Basin upstream from the U.S.G.S. gaging station at Weiser, Idaho. On January 6, 1993, the Director amended the moratorium order to eliminate the non-trust water area from which water is tributary to the Snake River upstream from Milner Dam from the scope of the May 15, 1992 moratorium order. On April 30, 1993, the Director again amended the moratorium order to remove some additional river basins and areas from the moratorium. Conditions have since changed making further amendment of the April 30, 1993 order appropriate.

2. The term "Boise River Drainage Area" means hydrologic basin No. 63 as designated in department records.

3. The department has conducted an extensive evaluation of the surface and ground water supplies of the Boise River Drainage Area and has found that water supplies appear adequate to allow further appropriations. Public interest surveys demonstrate that while the public desires a continuation of water supply studies, monitoring and water quality protection, most people sense that water supplies within the area are not being fully utilized.

4. Within the Boise River Drainage Area, the department has identified the following specific areas where water supplies are limited: the Boise Front Low Temperature Geothermal Ground Water Management Area, the Southeast Boise Ground Water Management Area, and the surface water system upstream from Lucky Peak Dam. In addition some streams and aquifers

have limited water supplies during specified periods or in specified locations.

5. Standard application processing provides that each new application for a water right permit is advertised to allow public scrutiny, and is reviewed for adequacy by department staff. Applications, which propose to divert from limited water sources or in excessive quantities, can be either denied or restricted on a case-by-case basis.

CONCLUSIONS OF LAW

1. The Director of the Department of Water Resources is responsible for administration of the appropriation and use of the water of the state of Idaho. Section 42-202, Idaho Code, reads in pertinent part:

> For the purpose of regulating the use of the public waters and of establishing by direct means the priority right to such use, any person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho, shall, before commencing of the construction, enlargement or extension of the ditch, canal, well, or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of water resources for a permit to make such appropriation.

2. The Director of the Department of Water Resources is authorized under the provisions of Section 42-1805(7), Idaho Code, as follows:

> After notice, to suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of the minimum flow provisions of the state water plan.

3. Rule 55. of the Water Appropriation Rules of the Department of Water Resources provides that a moratorium on processing of applications for permit shall be entered by issuance of an order of the Director of the Department of Water Resources, IDAPA 37.03.080.55. Notice of the order shall be sent by certified mail to affected applicants and permit holders and by publishing a legal notice in newspapers of general circulation in the area.

4. The department should amend the moratorium order issued on April 30, 1993, to remove the Boise River Drainage Area from the moratorium, subject to conditions designed to provide protection to existing water users within the basin, and ensure that water quality factors are fully considered.

ORDER

IT IS, THEREFORE HEREBY ORDERED that the prior order of the department dated May 15, 1992, as amended January 6, 1993, and April 30, 1993, in connection with the Snake River Basin upstream from the U.S.G.S. gaging station at Weiser, Idaho is modified by this Amended Moratorium Order.

IT IS, FURTHER HEREBY ORDERED that the moratorium is removed from the Boise River Drainage Area, and that applications for permit filed within this area shall be subject to the following provisions:

1. This moratorium removal does not change or affect the administration of any area within the Boise River Drainage Area that has been previously designated as a ground water management area pursuant to Section 42-233b, Idaho Code.

2. Processing of applications for permit within the Boise River Drainage Area that had been withheld by the moratorium shall proceed at a rate not to exceed thirty (30) applications for permit per month, in priority date order. All applications for which the applicants desire to proceed shall be advertised, or readvertised if notice has previously been made. The advertisement for each application which indicates the intended water source to be ground water shall include an indication of the proposed depth interval from which the applicant proposes to withdraw water by means of a well.

3. Applications, which indicate the intended source to be ground water, shall be further reviewed and screened within the department. During this review, the water right application shall be considered along with the well drilling application, if applicable. The review may result in conditions of approval to: (a) prevent development and use of water from any known water-limited aquifers, (b) prevent material injury to prior surface and ground water rights, (c) encourage use of lower-quality water for irrigation and higher-quality water for domestic purposes, (d) enhance protection of water quality in the aquifer, (e) ensure that subdivision proposals for presently irrigated land consider the need for the continuation of aquifer recharge, (f) require wells to be constructed to a sufficient depth to withstand expected fluctuations in the ground water level caused by drought, conservation or other factors, and (g) well location (spacing) requirements to prevent direct lowering of water levels in nearby existing wells.

4. Applications which propose use of surface water upstream from the Star Bridge will be denied unless the applicant files an acceptable plan to mitigate or avoid any material injury to existing water rights.

5. Applications that are protested shall be processed in accordance with the Rules of Procedure of the Department of Water Resources, IDAPA 37.01.01.

IT IS FURTHER ORDERED that this order shall not affect the moratorium on appropriation of surface and ground water within the Eastern Snake Plain Aquifer, which moratorium was extended by legislative action through December 31, 1997, and all requirements of the April 30, 1993 order with respect to the Eastern Snake Plain Aquifer remain fully in effect until modified by subsequent order of the Director of the Idaho Department of Water Resources.

Dated this 30th day of May, 1995.

R. KEITH HIGGINSON
Director

ADMINISTRATOR'S MEMORANDUM

To: Water Management Division

From: Norman C. Young NCY

APPLICATION PROCESSING No. 59

RE: **PROCESSING OF APPLICATIONS TO APPROPRIATE WATER IN THE LOWER BOISE RIVER BASIN (BASIN 63)**

Date: June 20, 1996

On May 5, 1995, Director Higginson issued an Amended Moratorium Order which removed the moratorium on processing most applications for new appropriations of public water proposing a consumptive use in the Boise River Basin. As a result of the May 5, 1995 Amended Moratorium Order, the department has subsequently approved approximately 80 water right applications proposing irrigation use. The approvals were essentially limited to the use of "drought wells" which were constructed in 1992 under temporary approvals issued by the department.

There are approximately 170 additional applications proposing consumptive ground water use in the Lower Boise River Basin which extends downstream from Lucky Peak Reservoir to the mouth of the Boise River near Parma, Idaho.

During the 1995-1996 legislative session, the legislature appropriated $300,000 for a study of ground water availability (study) in the Lower Boise River Basin. The appropriation was matched by United Water Idaho to make a total of $600,000 available for the first year of the study. The study is expected to take approximately five (5) years to complete, although preliminary data concerning water availability is expected to be available within one (1) year.

Within the Boise River Basin two aquifers have been designated as having limited water supplies, i.e. the Boise Front Low Temperature Geothermal Ground Water Management Area and the Southeast Boise Ground Water Management Area.

Even though the moratorium has been lifted by the May 5, 1995, Amended Moratorium Order, the department should withhold approvals of most consumptive use applications in the Lower Boise River Basin until preliminary data from the study is available to be reasonably sure there is sufficient water for appropriation without injury to prior water rights.

Until further instructions are given, the following provisions apply to the processing of applications for ground water in Basin 63 downstream from Lucky Peak Dam:

1. All applications proposing a consumptive use of ground water, whether now pending or filed in the future are to be held without further processing except as herein provided.

2. These instructions do not affect the authorization to continue development of any existing approved application (permit).

3. These instructions do not apply to any application for domestic purposes as such term is defined in Section 42-111, Idaho Code. Applications for ground water permits seeking water for multiple ownership subdivisions or mobile home parks will be processed provided each unit satisfies the definition for the exemption of requirement to file an application for permit as described in said section.

4. These instructions do not apply to any application proposing a non-consumptive use of water as the term is used in Section 42-605A, Idaho Code.

5. These instructions to not apply to applications for drilling permits to replace or deepen existing wells having valid existing water rights nor to applications for transfer of existing water rights.

6. These instructions do not change or affect the administration of any area within the Boise River Basin that has been previously designated as a ground water management area pursuant to Section 42-233b, Idaho Code.

7. These instructions do not prevent the Director from reviewing for approval on a case-by-case basis an application which otherwise would not be processed at this time if,

a) Protection and furtherance of the public interest as determined by the Director, requires immediate consideration and approval of the application;

b) The Director determines that the development and use of the water pursuant to an application will have no effect on prior surface and ground water rights because of its location, insignificant consumption of water or mitigation provided by the applicant to offset injury to other rights.

Appendix L: TRANSFER PROCESSING POLICIES & PROCEDURES (REVISED DEC. 21, 2009)

(Superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024))

ADMINISTRATOR'S MEMORANDUM

Transfer Processing No. 24

To: Water Management Division Staff

From: Jeff Peppersack

RE: **TRANSFER PROCESSING POLICIES & PROCEDURES**

Date: December 21, 2009

This memorandum supersedes Transfer Processing Memorandum No. 24 dated January 21, 2009.

The purpose of this memorandum is to provide policy guidance for processing applications for transfers of water rights pursuant to Section 42-222, *Idaho Code*, and other applicable law. The revisions to the October 30, 2002 memorandum are provided to recognize statewide application of this memorandum, to clarify the guidance based on updates to statutes and Department policy, and to streamline transfer processing to reduce application processing time and existing application backlogs. These policies and procedures are to be followed until rescinded or amended, or superseded by statute or rule or court decision, to assure that applications are processed efficiently and with consistency.

Regardless of whether or not an application for transfer is protested, Section 42-222, *Idaho Code*, requires that the department evaluate whether there would be injury to other water rights, there would be an enlargement in use of the original right, the proposed use would be a beneficial use, the proposed use would be in the local public interest, the proposed use would be consistent with the conservation of water resources within the State of Idaho, and whether the proposed change would impact the agricultural base of the local area. In the case where the place of use is outside of the watershed or local area where the source of water originates, the department must also evaluate whether the change would adversely impact the local economy of the watershed or local area. The department must also evaluate the validity of the right (or part thereof) being changed and must assure that the applicant owns the right or otherwise has the authority to apply for the transfer.

Rev. 8.3 1

1. When a Transfer is Required.

Section 42-222, *Idaho Code*, requires the holder of a water right to obtain approval from the department prior to changing: (1) the point of diversion, (2) the place of use, (3) the period of use, or (4) the nature of use of an established water right. An established water right is a licensed right, a decreed right, or a right established by diversion and beneficial use. Approval is sought by filing an application for transfer with the department. A claim in an adjudication or a statutory claim must be filed to allow a transfer application to be processed for a right based upon diversion and beneficial use.

Changes to Elements of a Water Right. An application for transfer is required if a proposed change would alter any of the four elements of the water right listed above that can be changed pursuant to Section 42-222, *Idaho Code*, as recorded with the department or by decree. Conditions or other provisions of a water right may further define or limit a recorded element of a water right; an application for transfer is required for a proposed change that could alter such a condition. For example, a proposed change of use under a water right for an industrial use, which includes a condition limiting the quantity of water that can be consumptively used, to a different industrial use that would increase the quantity of water that would be consumptively used can not be made unless enlargement is prevented.

If a proposed change has the potential to injure other rights or the potential to enlarge the right, even when there would be no change in any of the recorded elements of the right, an application for transfer should be filed to provide for evaluation of injury and enlargement issues before the change is made. For example, if the point of diversion from a fully appropriated creek is proposed to be moved where additional water would be available for diversion or if the proposed point of diversion as changed would move upstream of the points of diversion for other rights, the change can not be made unless other conditions are imposed, such as mitigation, to prevent injury.

Changes to Points of Diversion. If a point of diversion is proposed to be moved to a different tract than described as an element under an established water right, then a transfer application is required. This includes a change from one 10-acre legal subdivision to another if the point of diversion has been previously described as a 10-acre legal subdivision. An application for transfer is also required when a point of diversion is proposed to be added for a water right, even when the existing authorized point of diversion is recorded as a 10-acre legal subdivision and the additional diversion would be within the same 10-acre legal subdivision.

If a point of diversion is proposed to be moved from a tributary to a location downstream from the confluence of the tributary and the surface water stream to which the tributary is joined, then an application for transfer is required. If a point of diversion is proposed to be moved from a stream to the stream to which it is tributary at a location upstream of the confluence between them, or moved from one tributary to another tributary, an application for exchange is required pursuant to Section 42-240, *Idaho Code* rather than an application for transfer.

Changes in Place of Use. An application for transfer is required if a change in the location of use between 40-acre legal subdivisions is proposed that would result in an increase in the number of acres within a 40-acre legal subdivision or in use of water at a new 40-acre legal subdivision that is not included within the recorded place of use element for the right. An application for transfer is also required for a proposed change in location of use under a water right for irrigation to a location outside of prescribed boundaries such as those provided under Section 42-219, *Idaho Code*, with or without a proposed change in purpose of use, except for those rights held by irrigation districts or municipal providers, even when the change in location would be included within the same 40-acre legal subdivisions existing prior to the proposed change. A proposed change to any water right held for irrigation involving a change in the number of irrigated acres of less than one acre at the original place of use or at a proposed new place of use is not approvable unless the proposed change involves a new purpose of use within the original place of use or the applicant provides a verification procedure approved by the Director that can be practically administered to prevent injury or enlargement.

Consolidation of Acreage. An application for transfer is required for proposed consolidation of water use for irrigation by permanently reducing the number of acres authorized for irrigation under a water right, while maintaining the original diversion rate or annual diversion volume.

Land Application of Wastewater. An application for transfer is required for a proposed change in the place of use under a water right for uses such as industrial, dairy, or confined animal feeding operations that would allow land application of wastewater from that use or change the location of lands used for application of wastewater, when there is not a full existing water right for irrigation of the place of use receiving wastewater.[1]

Correction of Errors. An application for transfer may also be required to correct errors in licenses or decrees. For example, a transfer application may be required to correct the location of the place of use of a water right decreed by a court if the decree is later determined to be in error. However, a transfer action is not always required to correct such errors. For example, if a water right claim is determined to be in error, the claim can be amended to correct the error. Similarly, some clerical errors in a license or decree may be corrected by issuance of an amended license or decree (by the jurisdictional court) without using the transfer process. Also, a change to a description of the location of the place of use or point of diversion, as used by the department for administration of water rights, resulting from improved methodology does not require an application for transfer, as described below. In addition, conditions that are no longer applicable may be modified or removed from a license without a transfer, provided other rights are not materially affected. For decrees, conditions that are no longer applicable should be noted in comments on the department's electronic record for the right. However, a change to any element of a decreed water right requires filing an application for transfer, unless the appropriate court makes the change by amending the decree.

[1] The guidance provided here effectively revises the guidance to staff for filing an application for transfer as provided in Application Processing Memorandum No. 61 concerning wastewater from industrial uses.

2. When a Transfer is not Required.

An application for transfer is not required if a proposed change will not alter any of the elements of a water right as licensed or decreed, except that even when the recorded elements of a water right are not changed an application should be filed under such circumstances described in Section 1 above. In addition, an application for transfer is not needed when an accomplished change to a water right or an enlargement of a right has been claimed in an adjudication in accordance with the provisions of Sections 42-1425 or 42-1426, *Idaho Code*.

Changes in Consumptive Use. Consumptive use of water under a water right is not, by itself, an element of the water right subject to the requirements to file an application for transfer. Unless there is a specific condition of the water right limiting the amount of consumptive use, changes in water use under a water right for the authorized purpose of use that simply change the amount of consumptive use do not require an application for transfer provided that no element of the water right is changed. However, when determining the amount of water that can be transferred pursuant to an application for transfer proposing to change the nature or purpose of use, and for certain other circumstances as described herein, historical consumptive use is considered.

Change in Ownership. An application for transfer is not required to change the owner of record for a water right or address of record for a right holder. Changes in ownership or address are to be filed in accordance with Section 42-248, *Idaho Code*, or for adjudication claims in accordance with Section 42-1409(6), *Idaho Code*. However, a transfer application filed pursuant to Section 42-222, *Idaho Code*, accompanied by evidence documenting a change in ownership for a water right, or showing a change in the address of the owner of a water right, satisfies the requirements of Section 42-248, *Idaho Code*.

An application for transfer is not required to change the owner of record of one or more water rights, or portions thereof, that are part of a larger group of water rights authorized for use within and appurtenant to a permissible place of use[2] if the conveyance documents provide evidence of the change in ownership and appurtenance of each of the rights and if other elements of the rights will not be changed.

An application for transfer is not required to eliminate one or more points of diversion authorized under a water right through a change in ownership if the conveyance

[2] A permissible place of use is defined as a legal description of the authorized location where water may be applied under a water right for irrigation use, but the use in any year is limited to a specified number of acres which is less than the larger described location. For example, a water right may describe a permissible place of use as four 40-acre legal subdivisions totaling 160 acres, but the water right also limits the acreage that may be irrigated to 40 acres. The water right owner cannot irrigate more than 40 acres in a given year under the right. A permissible place of use is typically, but not always, irrigated by multiple rights with separate acreage limitations that, when used together, provide for irrigation of the entire permissible place of use in the same year.

documents provide evidence of the limitation and if other elements of the rights will not be changed.

Partial Relinquishment. An application for transfer is not required to relinquish a portion of a water right such as elimination of a purpose of use or a point of diversion or a reduction in acres and proportional rate. The water right owner should provide a notarized statement of relinquishment including specific identification of the water right(s) and the specific reduction(s).

Split Rights. An application for transfer is not required when a water right for irrigation is proposed to be split, with notice to the department pursuant to the provisions of Section 42-248, *Idaho Code*, such that a disproportionate per acre share of the right would be conveyed to another party provided that the resulting diversion rates do not exceed 0.02 cfs per acre, the amount of water historically applied per acre, or the amount of water diverted at a particular point of diversion, whichever is greater, for that part of the right conveyed or retained, and provided no other changes are made.

Changes to Points of Diversion within Recorded Location. An application for transfer is not required if a change in point of diversion is proposed to be moved to a location within the same legal public land survey subdivision as currently recorded on the water right and the change will not enlarge the right or injure other rights (if within a recorded legal public land survey subdivision, a transfer is required if injury is likely when moving the point of diversion to bypass another point of diversion or when moving a well significantly closer to another well or surface water source).

An application for transfer is not required for the situation described in the preceding paragraph, even when the point of diversion is described by a shapefile in the department's GIS database. The department will not initiate an enforcement action against the water right owner due to a discrepancy between the department's shape file and the physical location of use within the recorded legal subdivision if the discrepancy is limited to the situation described in the preceding paragraph. The department may update the shapefile in its GIS database from its own information or information provided by the water right owner.

Replacement of Point of Diversion. An application for transfer is not required to replace a point of diversion if the new point of diversion is constructed at the same location as described in the license or decree for the water right, and the change will not enlarge the right or injure other rights.

Refined Descriptions. An application for transfer is not required when a change in the description of the location of the point of diversion or place of use is only the result of improved methodology for referencing and displaying the location, which results in a more accurate description of the same physical location. The department will not initiate an enforcement action against the water right owner due to the discrepancy between the water right record and the referenced location if the discrepancy is created by better methodology and is not due to a change in the physical location. However, if the water right owner wishes to correct the water right record, an application for transfer

or an appropriate amendment will be required, as previously described for correction of errors.

Changes in Place of Use within Recorded Location. An application for transfer is not required if a change in the location of use within 40-acre legal subdivisions is proposed that would not result in an increase in the number of acres within any 40-acre legal subdivision nor use of water at a new 40-acre legal subdivision (except for a proposed change in location outside of prescribed boundaries such as those provided for irrigation use under Section 42-219, *Idaho Code* or by court decree, even when the change in location would be included within the same 40-acre legal subdivisions existing prior to the proposed change).

An application for transfer is not required for the situation described in the preceding paragraph, even when the place of use is described by a shapefile in the department's GIS database. The department will not initiate an enforcement action against the water right owner due to a discrepancy between the department's shape file and the physical location of use within the 40-acre legal subdivisions if the discrepancy is limited to the situation described in the preceding paragraph. The department may update the shapefile in its GIS database from its own information or information provided by the water right owner.

Generally Described Place of Use. As provided in Section 42-219, *Idaho Code*, an application for transfer is not required to change the place of use within a generally described place of use. A generally described place of use may be by court decree or as provided in Section 42-219(5) and (6). Pursuant to Section 42-219(7), any change within a generally described place of use can not result in an increase in the diversion rate, or in the total number of acres irrigated under the water right, and can not cause injury to other water rights. Any change to the boundaries of a generally described place of use requires an application for transfer, except for a municipal provider as described below or for an irrigation district where changes in boundaries must be documented by a map of the revised boundaries filed with the department in accordance with Section 43-323(2), *Idaho Code*.

Municipal Places of Use. An application for transfer is not required to change or add a place of use for "municipal purposes" within the "service area" of a "municipal provider." See Sections 42-202B and 42-222(1), *Idaho Code*, for appropriate definitions and provisions governing use of municipal water rights. The ownership of a portion of a municipal water right held by a municipal provider for reasonably anticipated future needs can be changed to a different municipal provider subject to the provisions of Section 42-248, *Idaho Code*. However, the right can not be changed to a place of use outside the service area of a municipal provider or to a new nature of use, and an application filed for such a change is to be returned and any associated application fee refunded.

In-stream Stock Watering. An application for transfer is not required to divert water away from a stream for stock watering purposes provided the diversion is added and used in conjunction with an in-stream stockwater right and provided the diversion meets

certain conditions pursuant to Section 42-113(3), *Idaho Code*. See guidance memorandum for in-stream stock diversions dated June 26, 2000, for additional information.

Intensified Use of Water. An application for transfer is not required to increase production under an authorized use of water, unless the proposed change would also result in a change to one or more of the elements of the water right(s) as licensed or decreed. For example, an application for transfer is not required to increase the number or volume of raceways in a fish propagation facility, increase the number of cows at a dairy, change irrigation to a more water consumptive crop, or increase the generating capacity of hydroelectric generators, so long as none of the elements of the associated water rights are changed.

Mitigation Through Non-Use of a Right. An application for transfer is not required to mitigate for the diversion and use of water under another right if the mitigation is accomplished through non-use of water under an existing valid water right, except under specific circumstances where a transfer is required as part of the Department's approval of the mitigation plan (see Section 42-223 (10), *Idaho Code* for reference to mitigation approvals where non-use of water may apply).

Land Application of Wastewater to Replace Existing Supply. An application for transfer is not required for a proposed change in the place of use under a water right for uses such as industrial, dairy, or confined animal feeding operations that would allow land application of wastewater from that use or change the location of lands used for application of wastewater, when there is a full existing water right for irrigation of the place of use receiving wastewater.[1]

3. Requirements for an Acceptable Application for Transfer.

The department is a public service oriented agency, and department employees traditionally have helped applicants complete transfer application forms. The existing transfer backlog, together with the increasing number and complexity of new applications for transfer, requires that staff focus their time on processing existing acceptable applications. Department employees are encouraged to provide general assistance to applicants but should refrain from completing application forms on behalf of applicants.

An applicant or qualified consultant must prepare and submit an application for transfer in accordance with the minimum requirements enumerated below to be acceptable for initiating the processing of the application by the department. An application that does not comply with these minimum requirements is to be considered incomplete and is to be returned to the applicant along with a letter or checklist identifying the deficiencies. The letter shall state that unless the application is resubmitted within 30 days of its return, the application fee will be refunded. An application for transfer that satisfies the minimum requirements will be processed in accordance with Section 5, Information Needed to Complete Processing of a Transfer Application.

(1) Application Forms. An application for transfer must be submitted on a current form provided by the department entitled, "Application for Transfer of Water Right." The current form is available from the department's Internet homepage at:

http://www.idwr.idaho.gov/water/rights/water_rights_forms.htm

(2) Name and Address. An application for transfer must include the name and address of the applicant. In addition, the application must include the name and address of any new right holder(s) for the water rights (or parts thereof) being transferred, if different than the applicant. The applicant's name must match the department's current record of ownership for the water rights (or parts thereof) being transferred. Otherwise, adequate documentation must be included to show that a change in ownership or authority to make the change has legally occurred. Adequate documentation can be a warranty or other deed, title policy, contract of sale or option for purchase by applicant (if the contract or option allows the transfer), or other similar document confirming ownership of the water right(s) or the authority to change the water right. See Records Memorandum No. 9 for additional guidance on water right ownership documentation.

A transfer application filed to change a right (or part thereof) claimed in a pending adjudication, where the claimed place of use is based on an accomplished transfer pursuant to Section 42-1425, *Idaho Code*, must include adequate documentation demonstrating the applicant's ownership of the right or authority to make the change.

(3) List of Water Rights to be Changed. An application for transfer must list all water rights for use in a common system of diversion and distribution for which the point of diversion, place of use, period of use, or nature of use are proposed to be changed (the water rights to be transferred). Proposed changes which involve separate diversion and distribution systems must be filed as separate applications. A proposed change to the remaining portion of an existing water right subsequent to a proposed transfer requires a separate application for transfer.

(4) Associated Water Rights or Water Supply. The application must include a separate list of individual water rights, other than those proposed to be changed, and a description of water supplied by a canal company, irrigation district, or municipality, that provide water currently used in the same diversion system or at the same place of use as the right(s) proposed to be transferred (associated water rights or water supply). In addition, the application must include a separate list of associated water rights or water supply proposed to be used in the same system or at a new place of use. If the associated water rights or water supply are not owned by the applicant and changes to conditions

for those rights are necessary, documentation must be submitted confirming that the applicant has the legal authority to make such changes on behalf of the current owner of the other rights.

Changes to conditions or remarks for associated water rights that are necessary as a result of an approved transfer and that do not affect the rights of other persons or entities can be made without a separate transfer application or process. Such changes usually result from a division in ownership and should be included in the transfer approval document.

(5) Reason for Change. The application must list the purpose for and a general statement of the reason for the proposed change.

(6) Description of Proposed Change. The application must describe in writing the proposed changes, which must include the following:

a. The right number(s) assigned by the department for the right(s) proposed to be changed must be identified. If the right was established by a beneficial use for which a claim has not been filed, a claim must be filed before or together with the transfer application. If the right is represented by a decree and the department has not assigned a number to the right, a copy of the decree must be included with a description of the right that is proposed to be changed.

b. The amount of water proposed to be diverted, as a rate of flow in cubic feet per second and as acre-feet per year, if the transferred water right has a volume limitation, for natural flow and ground water rights must be set forth. The amount of any stored water involved in a transfer must be identified in terms of acre-feet per year for each purpose of use listed.

c. The proposed nature or purpose of use must be stated. For non-irrigation uses such as "industrial" or "commercial," a more detailed description of the proposed use(s) must be provided under the "Remarks" section of the application, or as an attachment to the application. For applications proposing to change the nature of use to municipal purposes for reasonably anticipated future needs (RAFN), the applicant shall provide information to establish that the applicant qualifies as a municipal provider and that the RAFN, service area, and planning horizon are consistent with the definitions and requirements specified in Section 42-202B, *Idaho Code*.

d. The period of each year during which water is proposed to be diverted, or diverted and stored, and beneficially used must be set forth for each use listed.

e. The source of water for the proposed changes must be listed. An application proposing a diversion, injection, and re-diversion of water must list the source for the original diversion as the source for the injection and re-diversion. An application proposing to change the point of diversion to a location resulting in a change from ground water to surface water or from surface water to ground water shall include an analysis confirming a direct and immediate hydraulic connection (at least 50 percent depletion in original source from depletion at proposed point of diversion in one day). See Section 5c. (7) for further details.

f. The legal description of the point(s) of diversion must be described. The description must be to the nearest 40–acre subdivision or U. S. Government Lot of the Public Land Survey System. Existing point(s) of diversion should be described to the nearest 10-acre tract, if based on a previously recorded 10-acre description or other accurate means such as GPS or a detailed and accurate map. Proposed point(s) of diversion need only be described to the nearest 40-acre tract. The location of springs must be described to the nearest 10–acre tract. Subdivision names, lot and block numbers, and any name in common usage for the point of diversion should be included in the "Remarks" section of the application form.

g. Except as provided herein, the legal description of the place of use must be set forth to the nearest 40-acre subdivision or U. S. Government Lot of the Public Land Survey System. Subdivision names, block and lot numbers, and any name in common usage for the place of use should be included in the "Remarks" section of the application form. For water rights held by irrigation districts, municipal providers, and others included under the provisions of Sections 42-202B or 42-219, *Idaho Code*, the place of use may be generally described even if previously described to the nearest 40-acre subdivision or government lot.

   i. If irrigation is a purpose of use, the number of acres in each 40-acre tract of the place of use or within a generally described place of use must be shown. The location of uses, other than for municipal providers or

for irrigation, must be identified in the appropriate 40-acre tract(s).

ii. Except for wastewater when there is a full existing water right for irrigation of the place of use receiving wastewater, if a proposed change includes disposal or use of wastewater by land application to growing crops the application must identify the location of the waste disposal area by legal description under the use from which the wastewater originates.

h. An adequate description of the proposed diversion, delivery and application system(s) must be provided. This may include preliminary sizes and dimensions of pumps, pipelines, headgates, ditches, dams, impoundments, and application equipment. The type and location of measuring devices might also be required for applications providing for measurement of water to address specific injury or enlargement concerns. For large existing systems, such as those owned by municipal providers, irrigation districts, and canal companies, only those features proposed to be added or modified need to be described.

(7) Map of System. A map corresponding to the written description above must be included showing the location of points of diversion, reservoirs, dams, canals, ditches, pipelines, and other works proposed to be used in the diversion and conveyance of water. The map must clearly show the location of the place of use including lands to be irrigated, if any. If only a part of the water right(s) is proposed to be changed, the map must include the location of the part of the existing recorded right(s) proposed to be removed (or changed). Legal descriptions including townships, ranges, sections, quarter-quarters, and government lots must be evident or labeled unless other reference information is evident on the map to identify the specific location. In lieu of creating a map, a copy of a published map, such as a U. S. Geological Survey quadrangle map, or an aerial photograph, can be attached to the application with the required identification shown thereon. For large existing systems, such as those owned by municipal providers, irrigation districts, and canal companies, only those features proposed to be added or modified need to be shown.

(8) Response to Questions on the Form. The application for transfer must include responses to the questions on the application form concerning the validity of the right, the proposed use of the land from which the right is proposed to be removed (if applicable) and the existence of mortgages or liens. In addition, the application should address any agreements or commitments not to divert water under the right(s)

proposed for transfer such as a lease to the water supply bank (WSB), enrollment in the federal Conservation Reserve Enhancement Program (CREP) or dedication of the right(s) for mitigation purposes.

(9) Changes to Part of a Right. If only a part of a right is being changed, the application for transfer must define that part by describing each of the elements, as currently licensed or decreed or otherwise recorded, for the part of the right being changed.

(10) Signature. The application for transfer must include the signature of the applicant or the applicant's authorized representative. If a representative signs the application, evidence of authority to sign for the applicant must accompany the application. An application in more than one name must be signed by each applicant unless the right is held in the name of one joint owner "or" other joint owner(s), or the right is held in the name of one joint owner "and/or" other joint owner(s).

(11) Filing Fee. The filing fee provided in Section 42-221, *Idaho Code*, must be submitted with the application for transfer. If the applicant is a governmental agency, a purchase order for the required amount is acceptable. (See the memorandum titled "Guidance on SB 1337 Amending Section 42-221, I.C.," dated June 26, 2000, and Transfer Processing Memorandum No. 23 for further guidance on application fees.)

(12) Changes to Point of Diversion from Eastern Snake Plain Aquifer. Except as provided below, if the application for transfer proposes to move the point of diversion for a water right to divert and use ground water from one location to another within the Eastern Snake Plain Aquifer (ESPA) including any modeled tributary aquifers, the applicant must submit an attachment with the application that sets forth the time series of calculated depletions (transient to steady-state) to reaches of the Snake River that are hydraulically-connected to the ESPA using or based on the department's current ground water model for the ESPA, or other equivalent analysis acceptable to the department. When using results from or based on the department's ground water model, the time series of calculated depletions must be for the cells containing the points of diversion both before and after the proposed transfer (initiating at the date of priority of the water right and ending at future steady state condition). If the cells are the same, the attachment is not required except as described below. A copy of the department's ESPA ground water model, or associated transfer spreadsheet[3] can be obtained by contacting the department or visiting the department's web site.

[3] The Department's ESPA transfer spreadsheet has a fixed 150-year analysis period which may not reach a true steady-state condition in all instances; however, the analysis period provided by the spreadsheet is acceptable to the Department for purposes of the required attachment. For purposes of this

The purpose of the time series of depletion attachment is to provide a basis for evaluating whether the proposed transfer will increase depletions to hydraulically-connected reaches of the Snake River.[4] Increases in such depletions are presumed to cause injury to existing water rights because all of the hydraulically-connected reaches of the Snake River (including tributary springs) have water rights that are not fully satisfied at certain times. Increased depletions greater than 10 percent for any reach are presumed to cause injury and must be fully mitigated such that there are no increases in depletion to those reaches except as described below.[5]

Increased depletions greater than 10% in any reach are considered insignificant under either of the following conditions and will not require mitigation for the proposed transfer to be approvable:

a. Increased depletions (transient to steady-state) to the reach are two acre-feet or less per trimester; or

b. The reach, at steady-state conditions, will not be depleted by an amount greater than 10% of the total depletion to all reaches caused by the diversion under the proposed transfer.[6]

Where mitigation is necessary for increased transient-state depletions, variance from the requirement for full mitigation during the transient state is allowed to provide for periods of static mitigation within the period of change. Mitigation for increased transient-state depletion to a reach is acceptable if the resultant depletion to a reach is no more than 5% over the simulated pre-transfer depletion to the reach and any deficient mitigation is approximately the same as excess mitigation during the transient state.

If the application for transfer proposes to move or add a point of diversion within or adjacent to the model cell for the existing point(s) of diversion, the attachment described above is not required when the application is submitted. However, if the department determines that the proposed change may significantly increase depletions to a

---

memorandum, the transient state is the initial period of significant change to calculated depletions prior to approaching steady-state conditions.

[4] Increased depletions are based on the depletion volume that will be transferred through the change in point of diversion (i.e. not to include any volume for unchanged portions of rights or other associated rights not part of the change in point of diversion).

[5] This 10% threshold for mitigation reflects overall model uncertainty, of which one factor is the inherent error associated with measuring flows of water used as input to the model.

[6] This exclusion from the mitigation requirement is consistent with the Department standard in various delivery calls against ground water users diverting water from the ESPA that establishes a minimum percentage of 10% below which ground water users are not required to mitigate or replace simulated depletions to the reach.

hydraulically-connected reach of the Snake River (including tributary springs), the attachment will be required to complete processing of the application for transfer. See the Department's August 13, 2007 memo entitled, "ESPA Transfer Spreadsheet Version 3.1 – Implementation and Use" for further guidelines on use of the ESPA transfer spreadsheet.[7]

If the applicant offers reduced ground water withdrawals as mitigation, any proposed schedule for adjusting reduced withdrawals must also be set forth in the application for transfer.

Increased reach gains from other proposed ESPA transfers (offsetting transfers) can be used to provide part or all of the mitigation necessary for reaches requiring mitigation due to increased depletions (as determined by a stand-alone analysis of each individual transfer as described above). If the applicant offers offsetting transfers as mitigation, the transfer applications shall be submitted together as part of a plan to mitigate the individual transfer effects.

(13) Historic Beneficial Use. If the application for transfer proposes to change the nature or purpose of use or the season of use, the applicant must include an attachment documenting the historic extent of beneficial use under the right. For a transfer seeking to change a water right from irrigation, the attachment must provide sufficient data and information to determine historic consumptive water use. This can be satisfied by submitting records of cropping pattern or rotation, or records of water diverted and system efficiency, for at least the most recent, five consecutive years as described in Sections 5d.(5) and (6). If the application for transfer proposes to change the place of use for a supplemental water right, the applicant must include information to demonstrate that the supplemental right will not be enlarged (see Sections 5d.(3), (4) and (5) for definition and further discussion of supplemental rights).

(14) Electronic Shape Files or Photographs Documenting Place of Use Changes. If the application for transfer proposes to change the purpose of use for a water right from irrigation to another use, or change the place of use for a water right for irrigation to another location, either of which requires the drying up of acres at the original place of use, the applicant must submit an attachment to the application for transfer. The attachment must provide a clear delineation of the location and extent of the irrigated acres prior to the proposed transfer, and must also

[7] This memorandum supersedes portions of the Department's August 13, 2007 memo entitled, "ESPA Transfer Spreadsheet Version 3.1 – Implementation and Use" related to mitigation within 5 percent for transient and steady-state increases. The changes are being implemented to be consistent with use of the current ground water model for administration of water delivery calls in the ESPA. The remaining portions of the memo are still applicable.

provide a clear delineation of the location and extent of the irrigated acres, if any, after the transfer, if it is approved. This attachment may either consist of two electronic shape files in a format that is compatible with the department's GIS system or aerial photographs of sufficient detail acceptable to the department with the boundaries of the irrigated areas clearly shown and referenced to the Public Land Survey System. If a place of use involved with the application for transfer currently consists of a permissible place of use or a generally described place of use (see section 3(6)g above), then the applicable attachment is not required provided the application contains a clear statement that the boundaries for that place of use are not proposed to be changed by the transfer and the total number of irrigated acres within the place of use before and after the transfer is clearly set forth.

(15) Applications Involving Water Rights for Domestic Purposes. An application for transfer involving multiple water rights for domestic purposes as defined in Section 42-111, *Idaho Code*, even when evidenced by a decree, that proposes to establish a use, which itself would not be included within the scope of the definition for domestic purposes in Section 42-111, *Idaho Code*, is not approvable except as provided below. *Idaho Code* specifically prohibits the diversion and use of water under a combination of domestic uses 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 appropriating a right to the use of water pursuant to Chapter 2, Title 42, *Idaho Code*. An application for transfer filed for such a change is to be returned together and any associated application fee refunded.

An application for transfer involving multiple water rights for domestic purposes that is not proposing to change the nature of use or place of use may be approvable if the individual domestic uses will remain in place and the transfer is only intended to connect individual wells into a common system. Such transfer application may also include addition of a non-domestic right to add a use so long as the existing domestic uses will remain in place and will not be enlarged as a result of the transfer.

4. Changes to Applications for Transfer.

Amendment of Application. An applicant may revise or amend an acceptable application for transfer to clarify or correct information on the application. Significant changes to the place, period, or nature of the proposed use, amount of water, method or location of diversion, or other substantial changes from those shown on a pending application for transfer, will require filing a new application for transfer to replace the original application. If the revisions are not substantial, the application may be revised or amended with an initialed, dated endorsement by the applicant, or by the applicant's representative, on the original application, or by a letter describing the amendments in

sufficient detail. Changes initialed or signed by the applicant's representative must be accompanied by evidence providing authority to sign for the applicant if not previously provided. Changes to the application or supporting information are not to be made by staff under any circumstances. A replacement application must be identified as "changed," "amended" or "revised" on its face so that it can be distinguished from the original application, and the original application must be marked as "superseded." An additional filing fee may be required if the revised or replacement application involves more water than proposed in the original application for transfer. A re-advertisement fee, as provided in Section 42-221F, *Idaho Code*, will be required if notice of the original application has been published and changes to the original application are significant and warrant re-notice. (See Transfer Processing Memorandum No. 20 for additional information regarding changes to applications.)

Assignment of Application. An applicant may assign, in writing (must be notarized), an application for transfer to another entity while the application is pending before the department. An assignment does not require additional notice of the application to be published, and there is no fee for an assignment of an application. The assignment will change the name of the transfer applicant, but ownership of the water right(s) involved in the transfer cannot be changed without proper notice and documentation. Section 42-248, *Idaho Code*, provides that a transfer application can substitute for a notice of change in water right ownership if adequate documentation is provided with the application.

5. Processing an Application for Transfer Prior to Hearing.

Processing of an application for transfer consists of the steps outlined below. Flexibility is provided for some steps with the intent to streamline or expedite processing of routine or non-complex applications. Regional Managers have been delegated authority to sign routine water right approvals and denials and should continue to implement their signature authority as outlined in the Department's June 7, 2007 memo entitled "Delegation of Authority for Water Right Approval/Denial" and other delegation that may be provided.

(1) Initiating Processing – Data Entry. Once an application has been accepted and the application fee receipted pursuant to Section 3, Requirements for an Acceptable Application for Transfer, the Regional Office shall complete data entry of the basic information contained in the application and initiate working in parallel with the State Office to process non-routine or complex applications.

(2) Additional Information. For those applications to be processed in parallel, the Regional Office and the State Office will determine what, if any, additional information is necessary to complete or supplement the application. For all applications, the Regional Office will correspond with the applicant to obtain the additional information, obtain watermaster recommendation as described below, and perform any field review that is also necessary in coordination with staff from the

Adjudication Bureau if the water right is claimed in a pending adjudication.

(3) Administrative, Hydrologic, and Legal Review. For those applications to be processed in parallel, the Regional and State Offices will complete a review of all information submitted, in coordination with the Adjudication Bureau as needed, and forward appropriate information to the Hydrology Section and Administration for additional hydrologic, policy, and legal review as necessary.

(4) Preparation of Staff Memorandum. Once the review is complete, the Regional Office will prepare a memorandum, with the concurrence of the State Office if necessary for parallel review, that documents the review and evaluation of the sufficiency of the information submitted and whether processing of the application can continue because there is no clear inconsistency with the criteria set forth in Section 42-222, *Idaho Code*. If it is determined that processing of the application can continue, the Regional Office will complete necessary GIS descriptions, finalize data entry, and draft conditions for entry into Work Flow.

(5) Rejection or Denial of Application. If it is determined that the application for transfer should be rejected or can not be approved pursuant to Section 42-222, *Idaho Code*, the Regional Office or State Office (for parallel review) will prepare and issue a preliminary order rejecting or denying the application. An application for transfer may be rejected if the applicant fails to provide additional or adequate information pursuant to the requirements in this Section 5. An application for transfer that clearly does not satisfy the criteria set forth in Section 42-222, *Idaho Code*, must be denied. A rejected application may be re-filed when adequate information can be provided; a denied application can not generally be re-filed for substantially the same proposed transfer, unless a showing is made that substantial changes have subsequently occurred such that the criteria set forth in Section 42-222, *Idaho Code*, can potentially be satisfied. In either case, application fees will be retained. Note that notice of a rejected or denied application shall be sent to the applicant by certified mail pursuant to Section 42-222, *Idaho Code*.

(6) Applicant Contest of Rejection or Denial. If the applicant contests the preliminary order rejecting or denying the application and requests a hearing pursuant to Section 42-1701A, *Idaho Code*, the Regional Office will publish notice of the application for transfer pursuant to Section 42-222, *Idaho Code*, including notice of the contested case, and provide opportunity to protest the application and intervene in the contested case unless published notice is not required for the application as described below.

(7) Public Notice. If it is determined that processing of the application can continue consistent with the criteria set forth in Section 42-222, *Idaho Code*, the Regional Office will publish notice of the application for transfer. In some cases, published notice of the application may not be required. Pursuant to Section 42-222, *Idaho Code*, the Department has discretion to provide notice as deemed appropriate for applications proposing to change only the point of diversion or place of use in a manner that will not change the effect on the original or hydraulically-connected source or affect other water rights.

The timing of the public notice in these steps should remain flexible in order to streamline or expedite processing of the application. For example, processing time may be reduced by preparation of draft documents during the notice period. However, notice should not be provided prior to determining that the application meets the minimum requirements described in Section 3 and that there is a clear understanding by staff regarding the purpose of the transfer. Premature notice could result in the requirement to republish notice due to changes to an application or could result in unnecessary publication costs where an application is likely to be rejected or denied.

(8) Preparation of Approval Document. If no protest to the application for transfer is filed under step (7) above, or all protests filed are withdrawn prior to hearing, the Regional Office will finalize an electronic approval document and issue an approved transfer, subject to appropriate conditions, as a preliminary order and complete data updates in Work Flow. For those applications processed in parallel, the Regional office will finalize an electronic approval document and forward the document to the State Office for final approval and data updates.

(9) Contested Case Proceedings. If protest to the application for transfer is filed under either step (6) or (7) above, a contested case process will be completed. The hearing officer will forward electronically any final order that results from the contested case to appropriate staff to complete data updates in Work Flow.

Gathering Information Needed for Processing. In completing the steps outlined above, additional information may be needed for clarification of the purpose and intent of the proposed change, to further document the information on the application, or to provide a sufficient basis for determining whether the proposed change satisfies the statutory criteria for approval. **The applicant bears the burden of providing sufficient information.** However, staff should locate and assemble information available in the department's records that does not require compilation, interpretation, or analysis by an engineer, geologist, or other technical specialist.

Requests for Additional Information. Correspondence shall be prepared requesting any additional information needed and providing a reasonable period of time for response

(generally 30 days). When additional information is requested from the applicant, the applicant shall be informed of the need for a timely response to avoid delays in processing. The applicant shall also be informed that the application may be rejected if the additional information requested from the applicant is not timely received or is inadequate. The department can grant additional time to submit the required information if the applicant submits a written request for additional time and sufficient justification is provided.

Watermaster Recommendation. Section 42-222, *Idaho Code*, requires that the department shall advise the watermaster of any water district in which the water is used of any proposed change. The department shall not take final action on an application for transfer until the watermaster's recommendation has been received and considered.

Delays or non-response from watermasters results in delays in processing applications. The watermaster shall be informed that a non-response will be considered by the department to be the watermaster's recommendation not objecting to approval of the proposed transfer. Department staff should ensure that all watermasters understand their responsibility to provide recommendations.

Staff to Exercise Judgment. **Department staff has discretion to adapt the requirements set forth herein according to the nature and complexity of a proposed transfer.** While it is important that the information and documentation requirements are consistently applied, **staff is to use sound judgment to avoid asking the applicant for unnecessary information or seeking unnecessary review and comment from other state or local governmental entities as these guidelines are applied.**

5a. Evaluation of Authority to File an Application for Transfer.

(1) Presumption Based Upon Department Ownership Records. For any application for transfer, the department must have sufficient information to determine that the applicant has the authority to seek the proposed change in use of the water right(s). The department can presume, absent information to the contrary, that the applicant is the owner of the right(s) if the department's ownership records maintained pursuant to Sections 42-248 or 42-1409(6), *Idaho Code*, list the applicant as the current owner. The department may need to seek documentation regarding ownership if there is reason to believe that the department's ownership records may be inaccurate. One situation where the department's records may not confirm current ownership is described below.

A transfer application filed to change a right (or part thereof) claimed in a pending adjudication, where the claimed place of use is based on an accomplished transfer pursuant to Section 42-1425, *Idaho Code*, must include adequate documentation demonstrating the applicant's ownership of the right or authority to make the change.

(2) Other Acceptable Documentation. If the applicant's name does not match the name in the department's records for the current owner of the right(s) sought to be transferred, the applicant must provide evidence of current ownership or authority to make the proposed change(s). Adequate documentation can be a warranty or other deed, title policy, contract of sale or option for purchase by applicant (if contract or option allows the transfer), or other similar document confirming ownership of the water right(s) or the authority to change the water right. See Records Memorandum No. 9 for additional guidance on water right ownership documentation.

(3) Applicant Does Not Own New Place of Use. If the application for transfer proposes to change the place of use authorized under the water right(s), and the applicant does not own the land at the proposed new place of use, then the applicant must provide documentation that authorizes the change on behalf of the current owner of the proposed new place of use, except when the applicant is a municipal provider, irrigation district, canal company, or other similar entity. Such entities may only need to provide evidence of their authority to provide water for the proposed place of use in instances where evidence of such authority is necessary.

(4) Conditions on Associated Rights. If an application for transfer proposes a change from or to a system where there is an associated water right that is not listed on the application as a right being transferred, a change to conditions for that right is required (other than changes to conditions resulting from an ownership split), and that right is not owned by the applicant, then the applicant must provide documentation authorizing the change on behalf of the current owner of the associated right.

(5) Authority to Sign on Behalf of an Applicant. If the application for transfer is signed by someone other than the applicant(s) as listed on the application, documentation is needed to establish that the signatory is a representative of the applicant and is authorized to sign on the applicant's behalf. The documentation can be a copy of a current "power of attorney" authorizing signature on behalf of the applicant, or other similar documentation. An application could also be signed by an officer of a corporation or company, an elected official of a municipality, or any individual authorized by an organization to sign the application for a corporation, company, or municipality (if accompanied by documentation confirming authorization). The signatory's title must be shown with the signature.

(6) Corporation, Partnership, Joint Venture, Association, or other Business Entity. If the application for transfer is in the name of a corporation,

partnership, joint venture, association, or other business entity, department staff must verify that the organization is a viable and legally recognizable entity. Department staff will conduct a Business Entity Search at the Idaho Secretary of State's website: http://www.sos.idaho.gov/. If the Business Entity Search does not confirm that the corporation, partnership, joint venture, association, or other business entity is properly registered in the State of Idaho, department staff will request further clarification from the applicant. The intent of this search is to ensure that the organization is properly identified, including identification of individuals with signature authority and responsibility to conduct the organization's activity. Department staff may utilize other available resources to obtain the necessary information.

(7) Approval of Irrigation Entity or Legislature. Section 42-108, *Idaho Code*, requires that if the right(s), diversion works, or irrigation system is represented by shares in a corporation, or owned by an irrigation district, no change can be made without the consent of such corporation or irrigation district. This includes the use of such right(s), diversion works, or irrigation system for mitigation purposes related to a proposed transfer. Any permanent or temporary change in period of use or nature of use, in or out-of-state, involving a quantity of water greater than fifty (50) cfs or a storage volume greater than five thousand (5,000) acre-feet must also be approved by the legislature if approved by the department, except that any temporary change within the State of Idaho for a period of less than three (3) years does not require legislative approval.

(8) Liens, Mortgages, or Contract Restrictions. The department is required to provide notice to the holder of a security interest in any water right(s) proposed to be changed if the security interest holder has filed a request for notice pursuant to Section 42-248(6), *Idaho Code.* If the transfer proposes a change that might impact the value of the land such as moving the place of use or diversion facility to other land or changing the nature of use and the land from which the water right is proposed to be transferred is subject to liens, mortgages, or other contract restrictions affecting the right to transfer the water, a notarized statement or a statement on official letterhead signed by an authorized representative of a mortgage company or similar entity is required from the holder of each such lien, mortgage, or contract (see Transfer Processing Memorandum No. 10).

(9) Municipal Provider. If an application for transfer proposes to change the nature of use of a water right to municipal purposes in the name of a municipal provider for reasonably anticipated future needs, the applicant must provide documentation to establish its qualifications as a municipal provider as defined in Section 42-202B, *Idaho Code.*

(10) Agreement not to Divert. The applicant must describe any agreement or commitment not to divert water under the right(s) proposed for transfer such as a lease to the water supply bank (WSB), enrollment in the federal Conservation Reserve Enhancement Program (CREP) or dedication of the right for mitigation purposes.

5b. Evaluation of Water Right Validity.

For any application for transfer, the department must determine the validity of the water right(s), or part thereof, proposed to be changed. The following factors must be considered when processing an application for transfer and may require additional information from the applicant.

(1) Department Records. For any application for transfer, the department must determine that a right, or part thereof, proposed to be transferred is valid and has not been lost by forfeiture or partial forfeiture. The department will presume, absent other information indicating forfeiture, that the right has not been forfeited if the department's water measurement records, aerial photography, remote sensing, or other information, shows use of water during the previous, consecutive, five-year period. The department will also presume that the right has not been forfeited when it is claimed in a pending adjudication or initially decreed in an adjudication within the previous five-year period. If staff makes a field inspection (all transfers seeking a change to a right evidenced only by a claim are to be field inspected or otherwise reviewed, see Transfer Processing Memorandum No. 1 as revised in Section 5b.(4) below), information must be gathered concerning the current status of diversion and delivery facilities and the apparent recent use of water.

(2) Other Acceptable Documentation. If the records available to the department do not establish that a right has been used within the previous, consecutive, five-year period (except as provided in (1) above or for a right held by a municipal provider for reasonably anticipated future needs pursuant to Section 42-223(2), *Idaho Code*), the applicant must be asked to provide written documentation demonstrating that the right has been used within that time period. Examples of appropriate documentation include power records for pumps used to divert water under the right, Farm Service Agency (FSA) crop production records, receipts or other evidence of expenditures or revenue from the use of water under the right, and adequate affidavits of objective persons having actual knowledge of the uses of water under the right. Alternatively, if the right has not been used within the previous, consecutive, five-year period, then the applicant must be asked to provide information showing that exceptions or defenses to forfeiture are applicable. Exceptions or defenses to forfeiture include those set

forth in Section 42-223, *Idaho Code*; extensions provided for in Section 42-222, *Idaho Code*; and case law relating to factors such as resumption of use, unavailability of water when needed, or non-use when other water is available. Note that filing an application for transfer does not toll the statutory period for forfeiture of a water right due to non-use.

(3) Validity of Unchanged Parts of a Water Right. For applications for transfer proposing to change part of a water right or rights, the remaining part(s) of the right(s) that are not involved in the proposed transfer are generally not subject to a finding of forfeiture as part of the transfer action by the department.[8] In addition, the remaining part(s) of the right(s) are generally not subject to any additional conditions beyond the requirements of the original right(s). However, in some circumstances, department staff may be required to perform a comprehensive forfeiture analysis for the remaining part(s) of the right(s) to determine if a transfer can be approved. For example, a transfer application proposing to change part of the irrigated acres within a permissible place of use may require a comprehensive review of all the acres within the permissible place of use to determine if there are sufficient acres available to be transferred. When there has not been a comprehensive forfeiture analysis performed for the remaining, unchanged part(s) of the right(s), a remark will be included for any remaining part(s) of the right(s) to indicate that an approved transfer does not confirm the validity of the remaining, unchanged part(s) of the right(s).

(4) Statutory or Beneficial Use Claims. Applications for transfer proposing to change a water right based on a statutory or beneficial use claim must be reviewed to determine the validity, priority date, and extent of beneficial use established under the claimed right. Review must include field verification or other means to verify the right. This memo effectively revises the means of verification as required in Transfer Processing Memorandum No. 1. In addition, the applicant must be asked to provide information confirming the priority date of the claim. Adjudication staff must also be consulted for questions regarding review of the priority date if the claim is filed in a pending adjudication. A transfer approval for the water right (or part thereof) based on a claim shall incorporate the department's findings regarding the validity of the right. If a statutory or beneficial use claim is the basis for a pending claim in an adjudication, adjudication staff shall be notified of the results of the validity review, and the claimant shall be informed of the findings.

[8] Section 42-350, Idaho Code provides a process for revocation of a license at any time after issuance of the license upon a finding by the Director that the water has not been put to beneficial use for a period of five years.

5c. Injury to Other Water Rights

For any application for transfer, the department must determine whether the proposed change will injure any other rights, whether junior or senior in priority to the right being changed. The following factors must be considered when processing a transfer and may require additional information from the applicant.

(1) Reduction in Quantity of Water Available to Other Water Rights. Whether the amount of water available under an existing water right, senior or junior in priority, will be reduced below the amount recorded by permit, license, decree, or valid claim, or the historical amount beneficially used by the right holder, whichever is less. Consideration of this factor may require an analysis of the timing and location of return flows both before and after a proposed change to determine if the change will reduce the supply available to other water rights.

(2) Rotation. Whether a proposed change in the point of diversion of a water right that has been delivered in rotation with delivery of other water rights will result in significant additional losses borne by the water rights remaining in rotation.

(3) Unreasonable Effort or Expense. Whether the holder of an existing water right will be forced to an unreasonable effort or expense to divert water under the existing water right.

Existing ground water rights are subject to reasonable pumping level provisions of Section 42-226, *Idaho Code*, as well as applicable court decisions (e.g., Parker v. Wallentine, 103 Idaho 506, 650 P.2d 648 (1982), regarding in part the obligation to pay increased costs to divert an existing right).

An application for transfer that is approved to provide alternate points of diversion from ground water under one or more municipal water rights to develop or expand a common delivery system shall include conditions of approval to identify the point(s) of diversion authorized under each right prior to the transfer. The purpose of the condition is to provide for future administration of water rights in situations where increased municipal pumping over time is determined to cause injury through interference with other nearby wells.

(4) Unusable Water Quality. Whether the quality of water available to the holder of an existing water right would be made unusable for the purposes of the existing right.

(5) Mitigation. Whether mitigation would be needed to prevent injury to an existing water right that would be injured otherwise.

Unless agreed to in writing by the holder of an existing right, the only mitigation that can be considered acceptable by the department is the provision of replacement water in the full amount of the injury, at the same time injury would otherwise occur, and of acceptable water quality at the point of diversion for the existing right.

For applications that propose to move the point of diversion for a water right to divert and use ground water from one location to another within the ESPA, including any modeled tributary aquifers, mitigation is required for transfer approval when all of the following conditions occur: (a) the transfer would result in increased depletions (transient or steady state) greater than 10%, to any hydraulically-connected reach of the Snake River; (b) the increased depletion (transient or steady state) to the reach is greater than 2 acre-feet per trimester; and (c) the depletion, at steady-state conditions, to the reach is greater than 10% of the total depletion to all reaches resulting from the diversion under the proposed transfer. When greater increases in such depletions would occur, acceptable mitigation includes reduction in the quantity of ground water diverted and depleted such that there is no increase in depletions (for transient-state increases, no more than 5 percent over pre-transfer depletions so long as de ficient mitigation is approximately equal to excess mitigation) for each hydraulically-connected reach of the Snake River requiring mitigation. When this form of mitigation is proposed, the quantity of ground water diverted may be increased periodically (no more frequently than annually) if supported by an analysis of the timing of calculated depletions (transient to steady-state) to reaches of the Snake River that are hydraulically-connected to the ESPA for the points of diversion both before and after the proposed transfer. However, the proposed schedule for increased diversions must be set forth in the application for transfer.[9] See Section 3(12) for additional guidance.

Increased reach gains from other proposed ESPA transfers (offsetting transfers) can be used to provide part or all of the mitigation necessary for reaches requiring mitigation due to increased depletions (as determined by a stand-alone analysis of each individual transfer as described above). If approved, the transfers will not require mutual dependence for ongoing mitigation. However, any approval issued on the basis of offsetting transfers shall include conditions of approval to address future changes back to the original point(s) of diversion or future changes to a new location. In addition, conditions of approval

[9] If the transfer is approved with mitigation by reducing the amount of ground water withdrawn, and as a result the reach gains to one or more other hydraulically-connected reaches of the Snake River increase, then the applicant shall retain the right to receive credit for the increased reach gains. Such credits can not currently be used because there is no administrative system in place to recognize such credits. In the event that an administrative system is created in the future whereby such credits available at that time can be recognized, the applicant shall retain the right to the possible future use of such credits, which shall be reflected in a condition of approval for the transfer.

shall be included to address changes that would result in increased impacts to reaches of the Snake River due to differences in priority date between the rights involved in the offsetting transfers. Such changes could result in injury to surface water rights in connected reaches of the Snake River in the event of a curtailment order affecting ground water rights in the ESPA. See the Department's August 13, 2007 memo entitled, "ESPA Transfer Spreadsheet Version 3.1 – Implementation and Use" for further guidance.

(6) Ground Water Management Area or Critical Ground Water Area. Whether the point of diversion for a ground water right would move from outside the boundaries of a critical ground water area (CGWA) or ground water management area (GWMA) to within the boundaries of a CGWA or GWMA, or whether the point of diversion would move from within the boundaries of a GWMA to within the boundaries of a CGWA.

An application for transfer proposing such a change in the location of the point of diversion for a ground water right is not approvable unless the applicant proposes acceptable mitigation to prevent injury to other water rights. For cold water (85° F or less) GWMAs over the ESPA, mitigation beyond that satisfying condition (4) above will not be required at this time as a condition of approval, unless injury would occur to a water right to divert ground water or injury would occur to a water right to divert surface water that has not been offset by stipulated agreement or through a mitigation plan approved by the department,

(7) Change of Source. Whether the source would be changed from ground water to surface water, or from surface water to ground water.

Section 42-222, *Idaho Code* does not provide for a change from a ground water to surface water source, or from a surface water to ground water source. An application for transfer proposing such a change in source is not approvable unless the ground water and surface water sources are so interconnected that they constitute the same source for purposes of a proposed change in point of diversion. The ground water and surface water sources must have a direct and immediate hydraulic connection (at least 50 percent depletion in original source from depletion at proposed point of diversion in one day). The existing point of diversion and proposed point of diversion must be proximate such that diversion and use of water from the proposed point of diversion would have substantially the same effect on the hydraulically-connected source as diversion and use of water from the original point of diversion. If such application for transfer is approved, the changed water right shall be administered no differently than any other water right from the surface water source. If approved, the source for a change from a surface water source to a ground water source should be listed as ground water tributary to the surface water source.

(8) Changing Aquifer Source. Whether a proposed change in point of diversion for a ground water right is from one aquifer to another aquifer.

An application for transfer proposing to change the point of diversion from one distinct aquifer to a totally separate aquifer is not approvable, just as an application for transfer proposing to change the point of diversion for a surface water right from one distinct surface water source to a totally separate surface water source is not approvable.

(9) Conveyance Losses. Whether the proposed change would move part or all of a right from a canal impacting conveyance losses associated with the delivery of multiple water rights in the canal.

If such application for transfer is otherwise approvable, the approval must require that the applicant retain an appropriate amount of water in the canal to prevent any additional reduction in the amount of water available from the canal to fill other water rights because of the portion of the conveyance losses that, prior to the transfer, were attributable to the right being transferred.

Additional Considerations. In addition to the considerations above, the following information may be needed to evaluate injury involving an application for transfer for a ground water right, depending on the specific circumstances of the proposed transfer. If the information is not available in the department's records, the applicant must provide the following information that department staff determines is necessary:

(1) Location of Nearby Wells. The location of the nearest production well, including domestic wells, to the proposed point of diversion, and if different, the nearest production well down gradient from the proposed point of diversion (the location of other nearby production wells may also be required);

(2) Location of Nearby Springs. The location of nearby springs from which water is diverted under existing rights, including domestic uses, that could be affected by ground water diversions from the proposed point of diversion;

(3) Ground Water Levels. The depth to water, the stability of ground water levels, or the stability of confined aquifer pressures, in the area of the proposed point of diversion; and

(4) Water-Bearing Zones. The depth and thickness of water-bearing zones, including identification of the zone or zones sought for the proposed use.

5d. Enlargement of Use

For any application for transfer, the department must determine whether the proposed change will enlarge the use of water under the water right(s). Enlargement will occur if the total diversion rate, annual diversion volume, or extent of beneficial use (except for nonconsumptive water rights), exceeds the amounts or beneficial use authorized under the water right(s) prior to the proposed transfer. The following factors must be considered when processing an application for transfer, which may require that additional information be provided by the applicant:

(1) Diversion Rate, Annual Diversion Volume, and Number of Acres Licensed or Decreed. The authorized diversion rate, annual diversion volume (ground water rights only and certain surface water rights), and number of acres authorized for irrigation (if applicable), as licensed or decreed for the water right, shall not be increased. If the annual diversion volume is not specifically stated on the license or decree for a ground water right, then the amount will be based on the most current standards adopted by the department unless the applicant can show a larger amount has been reasonably diverted and beneficially used.

(2) Beneficial Use. An application for transfer proposing to change the place of use or nature of use for all or part of a water right or water rights, which change would not result in an equivalent reduction in beneficial use under the original right(s), will be presumed to enlarge the water right(s). For example, hydropower use cannot be added to a right used for irrigation, even though no additional water would be diverted for the hydropower use. The irrigation use, or part thereof, could be changed to hydropower use by reducing the irrigation use by an equivalent amount, or the new use could be provided without reducing the irrigation use by obtaining a new permit to appropriate water for hydropower use.

(3) Stacked Water Rights. Water rights are "stacked" when two or more water rights, generally of different priorities and often from different sources, are used for the same use and overlie the same place of use. Water rights for irrigating a permissible place of use are not necessarily stacked when the water rights in total provide for irrigating up to the maximum acreage authorized within a permissible place of use. An application for transfer proposing to "unstack" one or more water rights used for irrigation or other use, without changing all the rights for the same use, is presumed to enlarge the water right. However, the place of use for a supplemental irrigation right may be changed for continued use as a supplemental irrigation right at a different place of use without, by definition, enlarging the original right or the supplemental right proposed for transfer, so long as the primary rights at the original and proposed places of use provide comparable water supplies. In other words, use of the supplemental right at the proposed place of use can

not materially exceed use of the supplemental right at the current place of use.

(4) Changing Supplemental Right to Primary Water Right. A supplemental irrigation right is a stacked water right authorizing the diversion of water for irrigation from a secondary source to provide a full supply for crops when used in combination with a primary right. A supplemental right can provide additional water in conjunction with a primary source, or at times when the primary source is unavailable. The use of a supplemental right is dependent on the supply available under the associated primary right and can be highly variable from year to year. An application for transfer proposing to change a supplemental irrigation right to a use as a primary water right for irrigation or other use will be presumed to enlarge the supplemental right. An exception is when the applicant can clearly demonstrate, using historic diversion records for the supplemental right as described in (5) below, or other convincing water use information, that there would be no enlargement of the water right being changed or other related water rights. Evidence of the quantity of water beneficially used under the primary right must be accompanied by some evidence of the quantity of water used under the supplemental right to qualify as "convincing water use information." The supplemental right must have been used on a regular basis (used more than 50 percent of the time). Insufficient data will be grounds to reject the application because the department will not be able to ascertain if the right will be enlarged.

If an application proposes to change only a portion of a supplemental irrigation right to a use as a primary water right, the application is not approvable unless the extent of beneficial use under all associated rights prior to the transfer will be proportionately reduced or transferred to another place of use to avoid enlargement of the remaining portion of the supplemental right. The associated right(s) will not need to be reduced if the entire supplemental right will be changed through the transfer.

A general exception to the presumption of enlargement when changing a supplemental right to a primary right applies when the supplemental right is a storage right. Section 42-222(1), *Idaho Code*, provides that a transfer of a water right for the use of stored water for irrigation purposes does not constitute an enlargement in the use of the original water right, even when more acres are irrigated, provided that no other water rights are injured.

(5) Historic Beneficial Use. For an application for transfer seeking to change the nature or purpose of use, or season of use, including for a supplemental water right, the historic extent of beneficial use under the right must not be enlarged. The extent of historic beneficial use may

also have to be considered for other proposed changes in the place of use under some circumstances when there are other sources of water, such as natural subirrigation, even when the purpose of use or period of use are not proposed to be changed. For a transfer seeking to change a water right for irrigation, the consumptive water use based on the cropping pattern or rotation, or estimated from records of water diverted and system efficiency, for the most recent, five consecutive years is presumed to provide a reasonable basis to establish historic use under the water right proposed for transfer, unless information provided by the applicant supports using a longer historic period. Exceptions or defenses to forfeiture may also justify extending the time period considered in establishing the historic use prior to the proposed transfer. The highest-year historic consumptive use (i.e. highest-use crop rotation using a climatic average for crop water use estimates), except for supplemental rights, will be the basis for the annual volume of consumptive use available for transfer. When it is necessary to determine the historic consumptive use under a supplemental right, the average annual historic consumptive use, over an appropriately representative time period not less than five years but that may require greater than five years, will be the basis for the volume available for transfer. For supplemental irrigation rights, a representative time period will include years with both good and bad surface water supplies for the area. In some rare instances, the diversion rate, the annual diversion volume, and season of use could also be limited based on the extent of historic use.

For an application for transfer seeking to change the place of use under a supplemental water right for use in conjunction with a different primary right, the historic extent of beneficial use under the right must not be enlarged. For such changes, information regarding the historic availability or reliability of supply of the rights being supplemented (primary rights), both before and after the proposed change, is presumed to provide a reasonable basis to establish historic use under the supplemental right proposed for transfer.

(6) Period of Use. An application for transfer, which proposes an increased period of use in connection with a changed nature of use for ground water, is presumed not to be an enlargement in use if the rate of diversion, total annual volume diverted, and annual volume of consumptive use are not increased. However, a change to an increased period of use for a surface water right is presumed to be an enlargement and would cause injury where there are junior priority rights that rely on surface water during the time period outside of the historic period of use for the right proposed to be changed.

(7) Confined Animal Feeding Operations. For the purpose of quantifying the amount of water needed or used in connection with a confined

animal feeding operation, such as a feedlot or dairy, the water use will be considered fully (100 percent) consumptive.

(8) Fish Propagation. An application for transfer, which proposes to increase the number or volume of raceways in a fish propagation facility, will not be presumed to be an enlargement of the water right, unless the diversion rate or annual volume of water diverted are proposed to be increased.

(9) Disposal of Waste Water. An application for transfer filed to provide for the disposal of wastewater, by land application on cultivated fields or other beneficial use disposing of the wastewater, resulting from use of water under non-irrigation uses such as a dairy or other confined animal feeding operation, or "municipal" or "industrial" water rights where the use of water is considered to be fully consumptive, is not considered an enlargement of the commercial, municipal, or industrial water right. While not an enlargement of the water right, such use of wastewater must not injure other water rights (see Application Processing Memorandum No. 61 as revised under Section 1 of this memorandum) and must comply with best management practices required by the Idaho Department of Environmental Quality, the U. S. Environmental Protection Agency, or other state or federal agency having regulatory jurisdiction.

(10) Enhanced Water Supply. An application for transfer, which proposes to change a point of diversion from a surface water source to a new location where the water available is greater or more reliable, such as moving from the tributary of a stream downstream to the mainstem of the stream, is presumed to enlarge the water right, unless the proposed change is subject to conditions limiting diversion of water at the proposed new point of diversion to times when water is available and in priority at the original point of diversion.

(11) Water Held for Reasonably Anticipated Future Needs. Section 42-222, *Idaho Code*, provides that when a water right, or part thereof, to be changed is held by a municipal provider for municipal purposes, that portion of the right held for reasonably anticipated future needs can not be changed to a new place of use outside the service area of the municipal provider or to a new nature of use. See Section 42-202B, *Idaho Code* for applicable definitions related to municipal water use.

(12) Changing the Purpose of Use for a Water Right to Municipal Purposes. An application for transfer, which proposes to convey an established water right to a municipal provider and change the nature of use to municipal purposes, as defined in Section 42-202B, *Idaho Code*, shall not be approved without limiting the volume of water divertible under the right to the historic consumptive use under the water right prior to the

proposed change. If the proposed transfer involves a surface water right, the transfer shall not be approved without also limiting the right to the historic period of use under the right prior to the proposed change.

(13) Historic Use Recognized for Municipal Purposes. An application for transfer, which proposes to change the nature of use to municipal purposes for a water right established and held by a municipality that lists the purpose(s) of use as some combination of domestic, commercial, industrial, or irrigation, where those uses have historically been essentially for municipal purposes, as defined in Section 42-202B, *Idaho Code*, will not be presumed to be an enlargement of the right and will not require limitation to the historic consumptive use under the right. However, the change will be subject to the annual diversion volume, if specifically stated on the water right license or decree.

(14) Stored Water. Section 42-222(1), *Idaho Code*, provides that a transfer of a water right for the use of stored water for irrigation purposes does not constitute an enlargement in the use of the original water right, even when more acres are irrigated, provided that no other water rights are injured.

(15) Conveyance Losses. An application for transfer, which proposes to change the purpose of use for a portion of a water right covering conveyance losses to a use that would provide for irrigating additional acres, or other additional use, is presumed to be an enlargement of the water right.

(16) Measuring Requirements for Ground Water Diversions in the ESPA and Modeled Tributaries. Any water right transfer authorizing one or more changes to the diversion and use of ground water approved subsequent to the date of this memorandum shall include a condition of approval that requires the installation and maintenance of one or more measuring devices or means of measurement approved by the department. Until and unless changed pursuant to Section 42-701, *Idaho Code*, the following flow meter installation is required for the transferred right prior to diverting and using ground water under the transferred right:

a. One or more magnetic flow meters shall be installed, as required by the department, having an accuracy of 0.5 percent of rate of flow for flow velocities between 0.1 and 33 ft/sec in pipe sizes up to 4 inches in diameter and for flow velocities between 0.1 and 20 ft/sec in pipe sizes greater than 4 inches in diameter;

b. Each magnetic flow meter must be installed and maintained in accordance with the manufacture's specifications and

equipped with an LCD backlit display unit that displays instantaneous flow rate and total volume of water diverted in accordance with the department's requirements;

c. Each magnetic flow meter must provide analog output for flow rate, scaled pulse frequency for total volume of water diverted, and an RS232 port for communications.

In any transfer approval, the department may require, prior to diversion under the approved transfer, that each magnetic flow meter must be equipped with a data logger specified by the department and capable of storing 120 days of data including dates and cumulative volume of ground water diverted updated daily, as a minimum. If installation of a data logger is not required at the time of transfer approval, the department will condition the transfer approval that installation of a data logger may be required in the future.

Detailed specifications for the above requirements will be provided by the Water Distribution Section of the department upon request. A municipal provider subject to other measurement provisions that satisfy the department's measuring and reporting requirements are exempt from the above condition. Wells used solely for domestic use as defined under Section 42-111, *Idaho Code* or stockwater use under Section 42-1401A, *Idaho Code* are also exempt from the above condition. Water use for domestic and/or stockwater purposes in addition to any other purpose (e.g. commercial use) in a common system is not exempt from the above condition. Holders of ground water rights seeking approval of a transfer for diversion through existing systems or for irrigation systems m ay request a variance from the above requirements (at any time before or after approval), which may or may not be granted.

5e. Local Public Interest

For any application for transfer, the department must consider whether the proposed change(s) are in the local public interest as defined in Section 42-202B(3), *Idaho Code*. Consistent with earlier guidance herein regarding use of discretion and sound judgment, department staff is to address pertinent items from the following list, as well as other issues that are pertinent to specific circumstances, in considering whether sufficient information has been provided regarding local public interest issues and effects on the public water resource. When there are one or more significant questions about whether a particular transfer would be in the local public interest, additional information from the applicant or comments from other state or local governmental entities that have germane expertise on local public interest issues must be sought. In most cases, the applicant should gather the information and submit it to the department rather than department staff sending a form letter to other agencies seeking comment, unless the

local agency requests direct contact with the department. Staff should inform the applicant of their responsibility to provide the information to the department.

(1) Recreation, Fish, and Wildlife Impacts. The effect the proposed transfer could have on the public water resource in relation to recreation, fish, and wildlife resources in the local area that would be affected by the proposed change (Transfer Processing Memoranda Nos. 19 and 21 provide guidance related to state protected river reaches and minimum stream flow reaches);

(2) Water, and Hazardous Substance Standards. Whether the proposed transfer would comply with applicable water and hazardous substance standards designed to protect the public water resource;

(3) Local and State Requirements. Whether the proposed transfer would comply with local government and state government, if any, planning and zoning ordinances, regulations, records of decisions, or policies affecting the public water resource (e.g. requirement of a local government to use surface water for irrigation for developments involving land use changes pursuant to Section 67-6537, *Idaho Code* is considered an expression of local public interest);

(4) Neighboring Jurisdictions. Whether the proposed transfer would comply with existing requirements for land use and other uses of natural resources affecting the public water resource, if any, adjacent to the place of use proposed by the transfer but beyond the jurisdiction of the local government having authority or control over the proposed place of use; and

(5) State Water Plan. Whether the proposed transfer would be compatible with the objectives and policies of the State Water Plan pertaining to the local public interest.

5f. Beneficial Use and Conservation of Water Resources

For any application for transfer, the department must consider whether the proposed use of water is a beneficial use consistent with the conservation of water resources within the State of Idaho. The following factors must be considered when processing a transfer and may require additional information from the applicant:

(1) Efficiency of Diversion and Use. Whether the water delivery and distribution/application systems for the use proposed by the transfer would be consistent with contemporary standards for reasonably efficient use of water.

(2) Diversion Rates for Irrigation Use. Whether the proposed transfer, if involving irrigation, proposes a diversion rate in excess of 0.02 cfs per

acre of land irrigated (see Section 42-220, *Idaho Code*), and if the application for transfer proposes a higher diversion rate, whether the higher rate would be justified based on soils, crop types, irrigation system, climate, and reasonable conveyance losses from the point of diversion to the place of use. A higher diversion rate may also be justified for irrigating lands that because of public access can only be irrigated during certain times of the day (see Application Processing Memorandum No. 60). For the irrigation of five acres or less, justification is not necessary for a diversion rate of up to 0.03 cfs per acre (see Application Processing Memorandum No. 17). If the right proposed for transfer is based on a decree or license authorizing a diversion rate greater than 0.02 cfs per acre, then additional justification is not necessary unless:

a. The proposed transfer would change the place of use to a new place of use, rather than simply rearranging acreage at the general location of the existing place of use;

b. The proposed transfer would change the point of diversion with the intent to abandon the existing conveyance system and replace it with a new conveyance system that would reduce conveyance losses; or

c. The proposed transfer would add additional rights to an existing place of use from the same source as the existing water right(s) at the place of use.

(3) State Water Plan. Whether the proposed transfer would be compatible with the objectives and policies of the State Water Plan pertaining to beneficial use and conservation of water resources.

5g. Effect on Economy of Local Area

In the case where the proposed place of use is outside of the watershed or local area where the source of water originates, the department must consider whether the overall effects of the change proposed by the transfer would adversely impact the economy of the watershed or local area. The economic effect of the proposed transfer should be measured by assessing the following factors resulting from the change in use of water:

(1) Changes in Employment. Estimated changes in current and projected short-term and long-term employment;

(2) Changes in Economic Activity. Estimated changes to short-term and long-term changes in economic activity; and

(3) Stability of Economic Activity.

5h. Effect on Agricultural Base of the Local Area

Section 42-222(1), *Idaho Code*, provides that a change in nature of use from agricultural use shall not be approved if it would significantly affect the agricultural base of the local area. Department staff should presume the phrase "change in nature of use from agricultural use" can only be significant if the application for transfer proposes a change in nature of use for irrigation rights. Other water rights may authorize use in a process that is related to agriculture, such as commercial use for a dairy or an industrial use for a potato processing plant, but these uses are usually small enough compared to irrigation uses that a proposed change in these uses is presumed to not be significant. It is possible that a change in nature of use of a fish propagation water right authorizing diversion of a large flow rate might invoke this provision if fish propagation is interpreted to be an agricultural use.

The boundaries of the "local area" may be determined by considering one or any combination of the following:

(1) the boundaries of local government or the combined boundaries of local governments that cooperatively share plans for transportation, recreation, environmental quality, and similar water uses;

(2) the boundaries of any taxing entities or districts created, including school districts, that rely directly upon tax receipts for businesses that might be affected by a reduction in agricultural production;

(3) areas of common socio-economic values and operations, including those created by a) water delivery entities, b) similar agricultural crops grown, or c) the areas where agricultural processing facilities derive the agricultural products processed, or;

(4) natural geographic features that separate various areas, particularly hydrologic basin separations.

Whether the change would significantly affect the local agricultural base may be determined by considering one or any of the following factors:

(1) Financial Impacts on Local Governments. The financial impact the change will have on local governments, combinations of local governments, taxing entities, or districts within the local area that derived income from the agricultural use;

(2) Financial Impacts on Others. The financial impact the change will have on water delivery entities, the ability of farmers to continue to grow and harvest the crops previously grown, and the ability of processors of agricultural products to obtain the products necessary for business viability;

(3) Agricultural Job Displacement. The degree to which those working in agriculture will be displaced or will lose income resulting from the proposed change;

(4) Agrarian Lands. The degree to which agrarian lands are taken out of production; or

(5) Financial Impact on Overall Economy. The financial impact on the overall agricultural economy of a local area.

acceptable application 7-15
accomplished change 4, 8, 19
additional information requirements 16, 18-35
adjudication 2, 4, 8, 17, 19, 22-23
agricultural base 1, 36-37
amendment of application 15-16
approval document 9, 18
assignment of application 16
associated water rights 7-9, 13, 20, 29
authority to file application 1, 8-9, 12, 16, 19-21
beneficial use 1, 9, 35
beneficial use, historic 4-5, 14, 24, 28-32
business entity 20-21
canal company 8, 11, 20
claim to a water right 2-4, 8-9, 17, 19, 22-24
conditions of approval 2-4, 8-9, 17-18, 20, 23-26, 31-33
confined animal feeding operation, CAFO 3, 7, 30-31
conservation of water 1, 34-35
Conservation Reserve Enhancement Program, CREP 12, 22
consolidation of acreage 3
consumptive use 2, 4, 7, 14, 30-32
contested case 17-18
conveyance loss 27, 32-33, 35
correction of errors 3, 6
critical ground water area or ground water management area, CGWA or GWMA 26
data entry of application/approval 16-18
denial of application 16-18
diversion rate for irrigation use 3, 5, 28, 34-35
diversion, delivery and application system 6, 8, 10-11, 15, 21-22, 24, 33-35
domestic use 15, 27, 32-33
economy 1, 35, 37
efficiency of water use 14, 30, 34-35
elements of a right 2-5, 7, 12
employment 35
enforcement 5-6
enhanced water supply 31
enlargement of right 1-5, 11, 14-15, 28-33
error correction 3, 6
ESPA depletion 12-14, 25-26, 32-33
ESPA spreadsheet 12, 14, 26
exchange 2
filing fee 7, 12, 15-17
fish propagation 7, 31, 36
forfeiture 22-23, 30
generally described place of use 6, 10, 15
ground water 10, 12-14, 24-30, 32-33
ground water management area or critical ground water area, GWMA or CGWA 26
historic beneficial use 4-5, 14, 24, 28-32
in-stream stock water 6-7
injury 1-3, 5-6, 11, 13, 24-27, 30
intensified use of water 7
interference 24
irrigation district 3, 6, 8, 10-11, 20-21
land application of wastewater 3, 7, 11, 31

legal description 2-6, 10-11
legislative approval 21
lien, mortgage 11, 21
local government 19, 33-34, 36
local public interest 1, 33
map 6, 10-11
measurement 11, 22, 32-33
memorandum, staff 17
minimum requirements for application 7-15
mitigation 2, 7, 13-14, 21-22, 24-26
mortgage, lien 11, 21
municipal 3, 6, 8-11, 20-22, 24, 31-33
notice 16, 18
offsetting transfers 14, 25-26
ownership 4-5, 8-9, 12, 16, 19-20
parallel processing 16-19
period or season of use 2, 8, 10, 14, 21, 29-30
permissible place of use 4, 15, 23, 28
prescribed boundaries 3, 6
primary water right 28-30
protest 1, 17-18
public interest 1, 33
public notice 16, 18
reasonable pumping level 24
reasonably anticipated future needs, RAFN 6, 9, 21-22, 31
recreation, fish and wildlife 34, 36
refined description 5
refund 6-7, 15
rejection or denial of application 16-19, 29
relinquishment 5
replacement of point of diversion 5
season or period of use 2, 8, 10, 14, 21, 29-30
security interest 21
signature 12, 16, 20-21
source of water 1, 10, 18, 26-30, 35
split rights 5, 20
spreadsheet, ESPA 12, 14, 26
stacked water rights 28
staff judgment 19
staff memorandum 17
State Water Plan 34-35
stock water 6-7, 33
storage right 21, 29, 32
supplemental right 14, 28-30
surface water 2, 5, 10, 26-28, 30-32
validity of right 1, 11, 22-23
wastewater 3, 7, 11, 31
water quality 24-25, 34
Water Supply Bank 12, 22
watermaster recommendation 16, 19

Licensing Sec. 1

Note: This is indeed as "Administrator's Memorandum - Licensing No. 1" It has been superseded by the guidance issued on October 19, 2009.

April 7, 1975

MUNICIPAL

OPERATIONS DIVISION
ADMINISTRATOR'S MEMORANDUM

TO: District Engineers
FROM: A. Kenneth Dunn
SUBJECT: Licensing Procedures

The following policy should be followed in preparing the licenses for the municipal use of water. The growth of a city should be recognized in recommending the rate of diversion for which a license is issued. Therefore, normally the rate of diversion recommended should be that of the capacity of the system unless it exceeds the permitted amount. The annual use in "acre feet per year" should also be omitted from the license for municipal use.

Permits for fire protection will also be licensed without an "acre foot per year" limitation since the volume used for this purpose varies and it is meaningless to simply multiply rate x 1.98 x days per year to determine an annual volume.

Please advise personnel in your office of this policy and change any license drafts you may have before sending them to us. If you have any questions or suggestion, please let us know.

A. Kenneth Dunn

RECEIVED
JUL 0 5 1994
Givens, Pursley & Huntley

State of Idaho
DEPARTMENT OF WATER RESOURCES
STATE OFFICE, 373 W. Franklin Street, Boise, Idaho

JOHN V. EVANS
Governor

C. STEPHEN ALLRED
Director

Mailing address:
Statehouse
Boise, Idaho 83720
(208) 384-2215

MEMORANDUM

TO: Dave Tuthill

FROM: Phil Rassier PJR

DATE: May 7, 1979

RE: Municipal Water Rights - Statutory Background

The general law regarding the quantity of a municipal water right appears to be that a city may acquire a preferred right to store or appropriate more water than is immediately needed, thus allowing for growth of the city.

This position was adopted by the Idaho court in the case of Beus v. City of Soda Springs 62 Idaho 1, 107 P.2d 154 (1940). However, in that case the court relied principally upon the provisions of Idaho Code Ann § 49-1132 (1932) which was repealed by 1951 Sess. Laws. Ch. 47, § 17, P. 57. The text of former I.C.A. 49-1132 stated:

> "49-1132. Water, light, and power plants--Acquisition and operation--Charges for service.--Acquire by purchase, or otherwise, waterworks systems or plants, and also light and power plants, or any parts or portions thereof, and construct, enlarge, extend, repair, alter and improve such plants or either of them, or any parts thereof, and to supply the municipality and the inhabitants thereof with water, light and power, or either, and to charge private persons and corporations therefor; to supply any excess water, light and power, or either, to persons (including municipal and private corporations) without the limits of the municipality, and to charge therefor; but all such charges, rates or revenues shall be reasonable and shall be uniform and equal to all alike and based upon the service supply and proportionately, without discrimination in favor or against any person or persons whatsoever.
>
> "In fixing said charges, rates or revenues, said municipal corporation shall have the right to take into consideration and include, in addition to all of its other expenses and costs incurred in the operation of said plants, any or all of the following items; any interest on any bonded or other indebtedness created in order

to acquire, construct, enlarge, extend, repair, alter and improve such plants, or any of them; a sinking fund to meet said indebtedness; and a fund to meet and provide for any depreciation on said plants, and to provide for extensions or equipment necessary to meet the needs of the community served."

The closest comparable provision presently existing in the Idaho Code is §50-323 (1967) which is as follows:

"50-323. Domestic water systems.--Cities are hereby empowered to: establish, create, develop, maintain and operate domestic water systems; provide for domestic water from wells, streams, water sheds or any other source; provide for storage, treatment and transmission of the same to the inhabitants of the city; and to do all things necessary to protect the source of water from contamination. [1967, ch. 429, §20, p. 1249.]"

Because I.C.A. 49-1132 was repealed subsequent to the decision in Beus v. City of Soda Springs a question naturally arises as to whether the holding of the case is still good law. The answer may appear in the case of Village of Peck v. Denison 92 Idaho 747, 450 P.2d 340 (1969). In that case the court indicated by way of dictum at footnote 4, page 751, that Idaho will probably continue to follow the preferred right theory for municipal water rights. The dictum states:

"[A]lthough the Village of Peck became a municipality only after the events giving rise to this litigation, we would have found it difficult not to allow the appropriation of some excess water (had there been any in fact) under I.C. §50-323 and its predecessors and Beus v. City of Soda Springs, 62 Idaho 1, 107 P.2d 151 (1940)."

While there is no longer hard authority recognizing preferred municipal water rights in Idaho it appears safe, in light of Village of Peck, to assume that the court is prepared to rule that municipals can obtain and hold such rights.

/8

State of Idaho
DEPARTMENT OF WATER RESOURCES
STATE OFFICE, 373 W. Franklin Street, Boise, Idaho

JOHN V. EVANS
Governor

C. STEPHEN ALLRED
Director

Mailing address:
Statehouse
Boise, Idaho 83720
(208) 384-2215

Note: This is indexed as "Administrator's Memorandum – Application Processing No. 18."

It has been superseded by the guidance issued on October 19, 2009.

ADMINISTRATOR'S MEMORANDUM

TO: Regional Offices and Water Allocation Section

FROM: Norman Young NCY

DATE: November 5, 1979

RE: Definition of "Municipal"

"Municipal" as defined relative to beneficial use for the establishment of a water right includes domestic, irrigation, stockwater, fire protection, recreation, commercial, industrial, and any other water use incidential to the functioning of a city. The term identifies a "preferred" right in three ways:

1) A municipal right should not be quantified by rate of flow beneficially used at the time of examination, but rather by the capacity of the diversion works.*

2) A municipal right should not be limited by volume.

3) A sufficient description of place of use is: "Place of use within city limits of CITY NAME." Note that as city limits are changed, the place of use of the municipal right would change, requiring no water right transactions.

These three preferences allow the city to increase water use under an existing right. A city need apply for an additional right only when the diversion rate capacity is increased above the existing right.

Due to the preferred nature of a municipal right, its use is restricted to the corporate limits of the municipality. This limitation is derived from the statutory basis of the preferred right concept. Only the city or its delivery agent, for example Boise Water Corporation, can obtain a municipal water right. Unincorporated cities, subdivisions outside of city limits and other users of common water systems must identify the separate uses of domestic, irrigation, commercial, etc., and identify the specific place of use.

*This quantification must be limited to a "reasonable" extent. For example, the diversion of an entire stream when only a small portion is beneficially used may not be reasonable.

MEMORANDUM

To: Water Allocation Bureau
Adjudication Bureau
Regional Offices

From: L. Glen Saxton

RE: WATER RIGHTS FOR MUNICIPAL USE

Date: March 18, 1998

Amendments enacted in 1996 provided for entities meeting the definition of a municipal provider to obtain and hold water rights for reasonably anticipated future needs (RAFN) for a planning horizon (PH). Changes relative to municipal use appear in several code sections including 42-202, 42-202B, 42-217, 42-219 and 42-222, Idaho Code. The purpose of this memo is to provide general guidance for processing municipal use applications and permits and to address two questions concerning the application of these concepts to existing permits.

In the past, municipal water right holders generally have already utilized the benefits offered by the amended code sections, since the department has issued municipal water rights which provide for future development up to the volume of water capable of being produced by the installed diverting works. An effect of the amendments is to include additional entities under the term municipal provider who have not previously been included.

The state office has received applications which propose municipal use but do not describe whether the applicant proposes development which will be accommodated during the permit development period or whether the applicant intends to include RAFN/PH in the application. In order to clarify the intent of an applicant, the regional office should determine the following:

a) That the applicant qualifies as a municipal provider. Any questionable application for municipal use needs to be accompanied by appropriate supporting information.

b) The intent of the applicant prior to advertisement of an application. If the application is filed to accommodate RAFN, the applicant needs to describe the service area, the planning horizon, the type and quantity of use in connection with future needs. The length of the planning horizon may vary according to specific needs of a given municipal provider. If the extent of proposed development will be completed during the permit development period, the applicant does not need to provide the additional information relative to RAFN/PH.

Two specific questions have been raised concerning the 1996 amendments as follows:

Question 1. Can a municipal provider apply the concepts to an existing permit?

An existing permit, held by an entity that qualifies as a municipal provider under Section 42-202B(3), Idaho Code, can be amended to provide for RAFN over a PH if the permit was issued prior to the effective date of the municipal provider amendments and proof of beneficial use of water has not been submitted for the permit. Permits issued after the effective date of the amendments may not be amended because the permit holder had the opportunity to use the provisions when the permit was obtained.

Question 2. Will the department issue a license for a diversion rate larger than has actually been installed if the permit was issued or subsequently amended to provide for RAFN/PH.

No. Section 42-219(1), Idaho Code provides in pertinent part as follows:

> A license may be issued to a municipal provider for an amount up to the full capacity of the system constructed or used in accordance with the original permit provided that the director determines that the amount is reasonably necessary to provide for the existing uses and reasonably anticipated future uses within the service area and otherwise satisfies the definitions and requirements specified in this chapter for such use. (Emphasis added).

This section should not be interpreted to mean that the director will issue a license for a diversion rate larger than the installed capacity of the diversion works as determined during the license examination.

c: Norman C. Young

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098
Phone: (208) 327-7900 FAX: (208) 327-7866

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

ADMINISTRATIVE MEMORANDUM

Application Processing No. 63

To: Distribution List

From: L. Glen Saxton, P.E.

RE: MUNICIPAL WATER RIGHTS

Date: June 15, 1999

This guidance was replaced by Application Processing No. 74.

Attached is the Director's June 14, 1999, letter to Christopher H. Meyer in connection with municipal water rights. This letter provides guidance how the department will treat system capacity and other aspects of municipal uses.

Please discard my prior memo dated March 18, 1998, in connection with municipal use.

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098
Phone: (208) 327-7900 FAX: (208) 327-7866 www.idwr.state.id.us/idwr/idwrhome.htm

DIRK KEMPTHORNE
Governor
KARL J. DREHER
Director

June 14, 1999

Mr. Christopher H. Meyer
Givens Pursley LLP
Suite 200
277 North 6th Street
P. O. Box 2720
Boise, ID 83701

Re: Municipal Water Rights

Dear Chris:

I have finally been able to focus on the issues you framed in your various letters dating back to January 25, 1999, regarding municipal water rights under the 1996 Municipal Water Rights Act (Idaho Code §§ 42-202, 42-202B, 42-217, 42-219, and 42-222). I very much appreciate your patience in waiting for me to have sufficient time to respond to these issues, even though this matter is of some urgency for one of your clients, United Water Idaho ("United Water"). My response is divided into three general topics: (1) System-Wide Change Application; (2) System Capacity; and (3) Forfeiture of Municipal Water Rights.

System-Wide Change Application.

It is my understanding that when an existing well in United Water's system suffered reduced production over a period of time or when a well was damaged, United Water obtained new water rights to divert ground water from new wells. As a result, United Water holds water rights that authorize the diversion of more ground water than the current system of wells has the capacity to produce. As I suggested in our meeting on October 21, 1998, the difference between the total quantity of ground water authorized for diversion and use by all of the water rights held by United Water, versus the total capacity of the current system of wells, could be considered a portion of the amount of water necessary for United Water to provide for "reasonably anticipated future needs" within its service area. This could require meeting all of the conditions set forth in Idaho Code § 42-202B as well as the "capacity of the system" limitation in § 42-219(1).

To initiate the process through which a determination can be made whether a portion of the water rights held by United Water could be considered necessary to provide for reasonably anticipated future needs, United Water could file an application under Idaho Code § 42-222 to change the point of diversion authorized under each water right for ground water to include as

alternate points of diversion some or most of the wells in United Water's system that are currently operated as production wells. The location of each well to be used as an alternate point of diversion would have to be specifically identified. Together with identifying each well location by quarter-quarter section, it would be helpful if the longitude-latitude or geographic coordinates for each well could be provided as well. Similarly, for those water rights wherein the place of use is defined differently than the service area of United Water, the application could also propose to change the place of use for those water rights to the service area.

If United Water chooses to file a system-wide change application, notice of the application would be provided and the application processed as set forth in Idaho Code § 42-222. If the application is approved, the approval would be conditioned to prevent enlargement of the water rights and injury to other water rights. Conditions of approval would likely include limiting the diversion rate from each well to the diversion rate authorized by the original water right established at each well and setting forth the priority date of the original water right at each well as the effective implementation date of the alternate point of diversion. The effective implementation dates would be used in resolving any future claims of well interference by other well owners, but would not be viewed as secondary priority dates. Another condition that would be considered would not allow wells in ground water management areas to be used as alternate points of diversion for water rights established outside of those areas.

System Capacity

As we have previously discussed and as noted in your January 25 letter, Idaho Code § 42-219(1) was modified by the 1996 Municipal Water Rights Act to allow the issuance of a water right license to a municipal provider for "an amount up to the full capacity of the system constructed or used in accordance with the original permit . . . ." Some might construe this limitation to require that a municipal provider fully construct the system used to divert or deliver water associated with a water right for an amount "reasonably necessary to provide for the existing uses and reasonably anticipated future needs within the service area . . . ." However, such interpretation would not be consistent with the intent of the 1996 Municipal Water Rights Act.

The purpose of the language in Idaho Code § 42-219(1) that refers to "an amount up to the full capacity of the system constructed or used in accordance with the original permit" is to define the beneficial use requirement for a municipal water right which includes "reasonably anticipated future needs." If a municipal provider is limited to the amount of water which is actually diverted and used under a permit, then there would never be any amount of water included under a water right for reasonably anticipated future needs. Similarly, if a municipal provider is required to fully construct the system used to divert or deliver water for reasonably anticipated future needs, the provider would not have any flexibility in its water supply/distribution system to make adjustments as the reasonably anticipated future needs become reality. Such inflexibility would likely result in system modifications that would be inefficient and increase consumer costs; a result that would be incompatible with the objective of encouraging municipal providers to implement well-planned, efficient water supply/distribution systems. Consequently, the beneficial use requirement of "the full capacity of the system constructed or used in accordance with the original permit" for a municipal water

right which includes an amount of water for "reasonably anticipated future needs" must lie between the one extreme of fully constructing the system used to divert or deliver water for reasonably anticipated future needs and the other extreme of simply intending to construct the system at some future date.

The appropriate criteria for determining whether "the full capacity of the system [has been] constructed or used in accordance with the original permit" are the degree to which the full capacity of the system has been constructed and the consistency of the constructed capacity with a definitive plan for fully constructing the system, both of which can only be evaluated on a case by case basis. To provide some guidance as to how these criteria should be applied, the following hypothetical examples are offered.

Consider the case of a municipal water provider with a permit to appropriate an amount of surface water for "reasonably anticipated future needs." If the municipal provider fully constructed the necessary water treatment plant and the distribution mains needed to deliver the full amount of water under the water right, the "full capacity of the system" requirement (termed herein as the "full beneficial use requirement") would clearly be satisfied, whether or not water lines for individual users were connected to the distribution mains. But less constructed capacity could also satisfy the full beneficial use requirement. For example, if the municipal provider constructed only a portion of the necessary water treatment plant and only a portion of the distribution mains, and those constructed portions of the system were shown to be significant, integral parts of a detailed plan or design to provide the full capacity of the system, the full beneficial use requirement could still be satisfied provided a substantial investment in the unconstructed capacity of the total system had been made. However, if the municipal water provider constructed a water treatment plant with limited potential for expansion which could treat only a small portion of the water authorized under the permit to appropriate water, constructed an isolated portion of the distribution mains needed to deliver the full amount of water, or otherwise made only a small investment in the unconstructed capacity of the planned system, the water right license might appropriately be issued for an amount of water less than the amount authorized by the permit or the planned full capacity of the system.

For a municipal provider with a permit to appropriate an amount of ground water for reasonably anticipated future needs, construction of the well or wells and the distribution mains needed to divert and deliver the full amount of ground water authorized under the permit should clearly satisfy the full beneficial use requirement. But like the hypothetical provider of treated surface water, less constructed capacity for a ground water system could also satisfy the requirement if the constructed portions of the system were shown to be significant, integral phases of implementing a detailed plan to provide the full capacity of the system and there was substantial planning, design, and investment in the unconstructed capacity of the complete system. Documentation that could be used to demonstrate substantial planning, design, and investment in the unconstructed capacity of the complete system includes the following:

- provision of an overall detailed design of the full capacity system for meeting reasonably anticipated future needs;
- financing plan demonstrating ability to fully pay the costs of constructing the full capacity system needed to meet reasonably anticipated needs;

- completed environmental studies needed to satisfy legal or permitting requirements for some unconstructed portion or for all of the full capacity system;
- acquisition of lands needed for future wells, pumping stations, and other facilities consistent with the overall design for the full capacity system;
- substantial construction of distribution mains shown to be essential and integral portions of the full capacity system through water distribution network analysis;
- construction of distribution system or regulatory storage consistent with the overall design of the full capacity system; and
- development of operations protocol and infrastructure needed to operate the full capacity system consistent with the overall system design.

There may be other information that a municipal water provider could also provide to demonstrate that constructed portions of the system were significant phases of implementing a detailed plan to construct the full capacity of the system and that substantial investment had been made in the unconstructed capacity of the complete system. However, any single factor alone probably would not be sufficient to demonstrate that the full beneficial use requirement for a municipal water right had been satisfied. Rather, constructed capacity and all of the information used to demonstrate substantial planning, design, and investment in unconstructed capacity of the complete system would be weighed as a whole in determining whether the beneficial use requirement had been met.

The type of information outlined above that could be used to satisfy the full beneficial use requirement for a municipal water right is similar to the information required in Colorado to establish and maintain a conditional water right. In fact, under the 1996 Municipal Water Rights Act, that portion of a municipal water right in Idaho that includes an amount of water for reasonably anticipated future needs could be viewed as somewhat analogous to a conditional water right in Colorado.

Please note that I have not attempted to outline the type of information that should be considered in supporting the "reasonably anticipated future needs" that a municipal water provider might claim. However, Idaho Code § 42-202B(5) describes in general the information that would be required to support an appropriation of water for "reasonably anticipated future needs."

Forfeiture of Municipal Water Rights

In your recent letter dated June 3, 1999, you provided some information that could be interpreted to suggest that a water right held by a municipal corporation, or another municipal provider as defined by the 1996 Municipal Water Rights Act, may not generally be subject to

forfeiture. Although the basis for forfeiture is different for a municipal water right, just as the standard for beneficial use is different as discussed above, I would disagree with a conclusion that municipal water rights are immune from forfeiture.

When a municipal provider is granted a permit to appropriate water for "reasonably anticipated future needs" within the planning horizon for the municipality, the permit will be conditioned to require that the full system capacity needed to provide water for the reasonably anticipated future needs be constructed by the end of the municipality's planning horizon. The municipal provider will then be required to submit proof of beneficial use evidenced by construction of system capacity and substantial planning, design, and investment in the unconstructed capacity of the complete system by the end of the permit development period. If proof is not submitted and an extension to the permit development period has not been granted, as provided under Idaho Code § 42-204, the municipal provider shall be deemed to have lost all rights under its permit.

If sufficient proof of beneficial use is submitted before the end of the permit development period and the municipal water right is licensed for an amount of water for "reasonably anticipated future needs," the requirement that the full system capacity needed to provide water for the reasonably anticipated future needs be constructed by the end of the municipality's planning horizon will continue as a condition of the license. If the municipal provider fails to construct the full system capacity needed to provide water for the reasonably anticipated future needs by the end of the planning horizon for the municipality, or the anticipated future needs do not materialize by the end of the planning horizon, the quantity of water under the license may be reduced to the capacity of the constructed system or the amount of water required to meet the needs that actually exist at the end of the planning horizon. Although a municipal provider can revise the planning horizon and amend its projections of reasonably anticipated future needs subsequent to the water right license being issued, provided the criteria in Idaho Code § 42-202B(5) are fully satisfied, the water right remains subject to being reduced or forfeited if actual use of the water does not occur. Municipal water rights established prior to the 1996 Municipal Water Rights Act might also be subject to common law abandonment or forfeiture if the rights are not required to satisfy reasonable future needs of the municipality.

I hope these thoughts on the issues you raised are helpful to you and your clients. I intend to have these concepts incorporated in a guidance memorandum for staff of the Department of Water Resources so that the 1996 Municipal Water Rights Act is implemented uniformly. If you have additional questions or would like to discuss these issues or others further, we can arrange to meet again.

Sincerely,

Karl J. Dreher
Director

cc: IDWR Water Management Division
Ed Squires / Scott Rhead – United Water

ADMINISTRATOR'S MEMORANDUM

To: Regional Offices
Water Allocation Bureau

App. Processing No. 18
Licensing No. 1

From: Jeff Peppersack

Re: **PROCESSING APPLICATIONS AND AMENDMENTS AND DETERMINING BENEFICIAL USE FOR NON-RAFN MUNICIPAL WATER RIGHTS**

Date: October 19, 2009

This memorandum supersedes Application Processing Memo No. 18 dated November 5, 1979 and Licensing Memo No. 1 dated April 7, 1975.

The 1996 Municipal Water Rights Act recognized common law practices (case law) for growing communities to provide for a municipal water supply for reasonably anticipated future needs (RAFN). There are times when a municipal provider will choose to file an application to appropriate water solely for water needed in the short-term without the burden of demonstrating future needs over an established planning horizon. This memorandum provides guidance to Department staff when permitting and determining the extent of beneficial use for licensing purposes for non-RAFN municipal water right permits.

This guidance provided in this memo pertains to the review and processing of permits to be issued after the date of this memorandum. Existing permits issued prior to the date of this memorandum should be handled on a case-by-case basis when determining beneficial use for licensing purposes. Determination of beneficial use for permits pre-dating this memorandum may depend on the date the permit was issued in relation to the 1996 Municipal Water Rights Act and/or any specific intent to limit the beneficial use that could be developed under the permit at the time it was issued.

PAST DEPARTMENT POLICY AND PRACTICE

Prior to the 1996 Municipal Water Rights Act, the Department acknowledged the need for some flexibility in licensing water rights due to the growth of municipalities and other small communities under two concepts as described below.

Installed Capacity for Municipalities

An incorporated city or a municipal provider serving an incorporated city could perfect a water right based on the maximum instantaneous diversion rate for the pumping system that was installed and operational during the development period of the permit (limited by the permitted amount), even if the city did not beneficially use the entire capacity during the development period of the permit. Note that even though a municipal system may have included multiple wells and pumps, the Department typically licensed a water right based on the diversion capacity of an individual well and pump listed as a single point of diversion on the water right. The Department typically did not review the overall

system capacity and evaluate the new well as an additional increment of diversion capacity or beneficial use under the entire system due to that point of diversion.

When licensing a municipal water right, the Department did not include an annual volume limit on the license. In addition, the place of use was described as the city limits and was allowed to change as the city limits expanded. A city's water use under a license could expand over time as demand for water increased by pumping the maximum rate over longer periods that may have included storage tanks to provide for higher peak demands.

Stub-in Practice for Subdivisions

For unincorporated cities and other small communities that did not qualify as municipalities, and therefore could not obtain a municipal water right, the Department could only license water rights for domestic and associated irrigation, commercial and other uses based on actual diversion and application of the water to beneficial use accomplished during the authorized development period of the permit. The Department provided some flexibility in determining beneficial use for domestic purposes in subdivision developments under the "stub-in" practice. Under the "stub-in" practice, the Department issued water right licenses for domestic purposes in subdivisions if the water diversion and distribution systems were in place, including a service line to each lot, even if water had not yet been put to beneficial use on all the buildable lots. The Department's stub-in practice recognized that the full build out of a subdivision can take longer than the number of years the Department could authorize for completion of a water appropriation project. By issuing a water right license for domestic uses that were yet to be completed, the Department avoided a parade of individual water right filings as each lot was sold. The stub-in practice also helped subdivision developers obtain financing by providing some assurance to lending institutions that a development project would not fail due to water right availability issues that may have arisen as the individual lots were built out over time. The Department's stub-in practice was applied to each home that would individually qualify as a domestic use as defined in Section 42-111(1)(a), Idaho Code.

The stub-in practice was not applied in all subdivision development situations. For example, suppose the Department issued a permit for development of 100 homes in a subdivision and proof was submitted for 100 homes based on the stub-in practice. Many years later, the Department completes an exam and finds only 20 homes were built and using water. The remaining lots remained vacant and undeveloped except for the stubbed-in service line. The Department would only issue a license based on the actual diversion and use of water because sufficient time would have passed to complete development of the subdivision.

1996 MUNICIPAL WATER RIGHTS ACT

The 1996 Municipal Water Rights Act allows municipal providers to obtain water rights for RAFN. Full completion of diversion works and beneficial use is not required during the development period of the permit, under specific conditions (see Application Processing Memo No. 63). The Municipal Water Rights Act also expanded the types of entities that can qualify for municipal water rights and defined expanding service areas for those entities. See Section 42-202B, Idaho Code for definitions.

To appropriate water for RAFN, the municipal provider carries an extra evidentiary burden to establish a planning horizon and to submit population and other planning data in support of the anticipated needs within the planning horizon. If a municipal provider seeks a water right for RAFN, the planning horizon and supporting data cannot be inconsistent with its comprehensive land use plans.

Furthermore, water rights for RAFN cannot be granted to a municipal provider in areas overlapped by conflicting comprehensive land use plans.

Municipal providers can receive the full benefit of the 1996 Municipal Water Rights Act if they file an application for RAFN and demonstrate future needs over an established planning horizon consistent with requirements in Chapter 2, Title 42, Idaho Code. The intent of a municipal provider to seek water for RAFN must be documented with the application for municipal use.

There are times when a municipal provider will choose to file an application to appropriate water solely for use to meet needs in the short-term (limited up to 5 years with possible extension up to an additional 5 years pursuant to Section 42-204, Idaho Code) without the burden of demonstrating future needs over an established planning horizon. The Department considers the definitions for "municipality," "municipal provider," "municipal purposes," and "service area" from the 1996 Municipal Water Rights Act to apply to non-RAFN permits. The following sections provide guidance to Department staff when permitting and determining the extent of beneficial use for licensing purposes for non-RAFN municipal water right permits. Note that some small community water systems (less than 10 homes) do not qualify as municipal providers and would still be subject to licensing under the past stub-in practices described above as a domestic use.

INCORPORATED CITIES AND MUNICIPAL PROVIDERS SERVING INCORPORATED CITIES

Incorporated cities, or municipal providers serving incorporated cities ("city" or "cities") have historically benefitted from common law practices allowing for appropriation of water and acquisition of water rights for long-term growth. Municipal providers in this category may include a city incorporated under Section 50-102, Idaho Code, an entity regulated by the Public Utilities Commission serving water to an incorporated city, or a Water District or Water and Sewer District established pursuant to Chapter 32, Title 42, Idaho Code serving an incorporated city. The 1996 Municipal Water Rights Act does not prohibit the Department from issuing a non-RAFN permit or license to a city without a volume limitation. Issuing a permit and license without a volume limitation would provide for some limited growth, consistent with pre-existing common law practices for municipalities.

Application for Permit

An applicant for a non-RAFN municipal application must demonstrate short-term needs to justify the amount of water required for appropriation. This information should be requested pursuant to the additional information requirements provided under Water Appropriation Rule 40.05.d.i:

> Information shall be submitted on the water requirements of the proposed project, including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that water is required, and the volume of water that will be consumptively used per year.

The applicant must also demonstrate that the new appropriation is not intended for RAFN by providing total system capacity and existing demand within the municipal service area and comparing that capacity and demand to the entire municipal portfolio of water rights. If existing municipal water rights exceed existing demand and short-term needs, then an application for RAFN would be necessary for an additional appropriation of water. If the applicant desires additional points of diversion without

the need for a new appropriation of water, then an application for transfer to change existing rights would be appropriate.

An applicant for a permit not proposing municipal use for RAFN cannot later amend the application to gain the benefits of a RAFN permit without first demonstrating future needs over an established planning horizon consistent with requirements in Chapter 2, Title 42, Idaho Code. Pursuant to Section 42-211, Idaho Code, an amendment to an application to gain the benefits of a RAFN permit shall be republished and the priority date shall be changed to the date of the application for amendment.

Permit

The permit should not be limited by volume except under circumstances where a volume limitation is necessary to protect the water source or, in the case of an amendment of permit, when the original permit was issued or intended for a use other than municipal. The rate of flow must be reasonable when considered against the water flows available from the source (e.g., it may not be in the public interest to dewater a stream to satisfy the municipal needs). The place of use can be described generally for the service area as defined under Section 42-202B, Idaho Code.

A non-RAFN application for municipal use that includes additional rate justified for fire protection purposes should not be permitted for that additional rate under a municipal use, particularly where the applicant has not sought water for RAFN and offered no evidence to support the future appropriation and use of additional water. Doing so would allow the additional rate to be used for flows that may be required for future long-term growth of the municipality. Additional rate solely for fire protection should be listed as a separate use on the water right or permit to ensure that the rate, if approved, does not create a de facto water right for RAFN.[1]

As an example, suppose an application for permit is submitted by a municipality for a non-RAFN municipal use and the application indicates that 3 cfs is required for the regular and continuous needs of the city and an additional 7 cfs is required to provide water for fire protection on an as-needed basis. The Department should not issue a permit for municipal use for 10 cfs, which would allow for additional rate to be used by the city in the future to meet the regular and continuous needs of the city. Instead, if the application is otherwise approvable, the Department should issue a permit for municipal use in the amount of 3 cfs and for fire protection in the amount of 7 cfs.

The complexity of some municipal systems makes it difficult to ascertain, at the time of a field exam, if an additional increment of beneficial use has been developed pursuant to a permit. To facilitate future licensing, the permit should include a condition requiring the permit holder to submit a report in connection with proof of beneficial use that describes how the water diverted under the permit provides an additional increment of capacity for the municipal water system as opposed to an alternate point of diversion for existing municipal water rights. In addition, the report should describe how the beneficial use intended under the permit (i.e. the reason used to justify the new appropriation of water) was accomplished.

---

[1] Permits and licenses issued for fire protection purposes to fight an existing fire do not require a volume limitation since the volume would be variable and unpredictable for firefighting purposes. A volume limitation is required for fire protection storage where water is stored to fight a future fire.

A permit issued to a municipal provider that does not provide for RAFN cannot be later amended to gain the benefits of an RAFN permit.

License

When licensing a permit for municipal use for an entity serving an incorporated city, the extent of beneficial use established under a non-RAFN permit should be determined based on the installed capacity developed and operational during the development period of the permit and cannot exceed the amount permitted. However, beneficial use may be further limited if the intended use described in the application as justification for the permit was not accomplished. The license should not be limited by volume except under circumstances where the permit was limited for reasons described above. The place of use listed on the license can be described generally for the service area as defined under Section 42-202B, Idaho Code.

When determining the installed capacity for licensing purposes, the entire municipal portfolio of water rights must be considered to determine the actual increase in installed capacity provided by the permit for the municipal use. Note that the installed capacity of the system is not necessarily the sum of the individual capacities for each pump or diversion into the system.

In situations where a new point of diversion authorized under the permit is developed, but an additional increment of capacity or beneficial use is not developed for the municipal system, a license may be issued limiting the diversion rate in combination with other rights in the municipal system to the existing capacity of the municipal system.

OTHER MUNICIPAL PROVIDERS

Municipal providers that do not serve incorporated cities can receive the full benefit of the 1996 Municipal Water Rights Act if they file an application for RAFN, provide qualifications as a municipal provider, and demonstrate future needs over an established planning horizon consistent with requirements in Chapter 2, Title 42, Idaho Code. For such municipal providers, if they choose not to file an application for an RAFN permit, the ability of the municipal provider to acquire a water right for municipal purposes is limited to the amount that can be diverted and beneficially used based on development during the period authorized under a non-RAFN permit, as described below.

Application for Permit

For an application for permit seeking to divert water for domestic use or some combination of domestic and other uses for a subdivision or other multiple ownership service area, the use would be more properly described as municipal use within the service area if the uses fall under the definition of municipal purposes and the applicant would also qualify as a municipal provider pursuant to Section 42-202B, Idaho Code. An exception would be the use of water for fire protection. Additional rate for fire protection should be listed as a separate use to ensure that the rate, if approved, does not become part of the flows under the permit that may be required for future use of the municipal provider (see fire protection discussion above for permits under Incorporated Cities).

An applicant for a non-RAFN municipal application must demonstrate short-term needs to justify the amount of water required for appropriation. This information should be requested pursuant to the additional information requirements provided under Water Appropriation Rule 40.05.d.i:

> Information shall be submitted on the water requirements of the proposed project, including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that water is required, and the volume of water that will be consumptively used per year.

The applicant must also demonstrate that the new appropriation is not intended for RAFN by providing total system capacity and existing demand within the municipal service area and comparing to the entire municipal portfolio of water rights. If existing municipal water rights exceed existing demand and short-term needs, then an application for RAFN would be necessary for an additional appropriation of water. If the applicant desires additional points of diversion without the need for a new appropriation of water, then an application for transfer to change existing rights would be appropriate.

An applicant for a permit not proposing municipal use for RAFN cannot later amend the application to gain the benefits of a RAFN permit without first providing qualifications as a municipal provider and demonstrating future needs over an established planning horizon consistent with requirements in Chapter 2, Title 42, Idaho Code. Pursuant to Section 42-211, Idaho Code, an amendment to an application to gain the benefits of a RAFN permit shall be republished and the priority date shall be changed to the date of the application for amendment.

Permit

The permit, if approved, shall include both a rate of flow and an annual volume limitation for the municipal use based on the amount justified. As described above, additional rate justified solely for fire protection should be listed as a separate use on the permit to ensure that the rate, if approved, does not create a de facto water right for RAFN.[1] The place of use can be described generally for the service area as defined under Section 42-202B, Idaho Code.

A permit issued to a municipal provider that does not provide for RAFN cannot be later amended to gain the benefits of an RAFN permit.

License

When licensing a permit for municipal use for a municipal provider that does not serve an incorporated city, the extent of beneficial use established under a non-RAFN permit should be described with both a rate of flow and a volume limitation.[2] Beneficial use shall be based on development within the service area during the authorized development period of the permit and shall include stubbed-in lots for domestic purposes (i.e. a service line is available for each lot to hook up to the municipal delivery system). The rate should be determined based on the installed capacity if reasonable to serve the needs

[2] Beneficial Use Rule 35.01.j indicates that "[t]he field examiner does not need to show total volume of water for municipal and fire protection uses on the field report unless the project works provide for storage of water." Although not required on the field exam, any license issued to a municipal provider that does not serve an incorporated city for a non-RAFN municipal use shall include an annual volume limitation based on the amount justified and approved under the permit and beneficially used as described in this memorandum.

within the established service area.[3] The annual volume limitation should be determined based on the water requirements for the established service area (including stub-ins). The place of use listed on the license can be described generally for the service area as defined under Section 42-202B, Idaho Code.

As described above for municipal providers serving incorporated cities, when determining the installed capacity for licensing purposes, the entire municipal portfolio of water rights must be considered to determine the actual increase in installed capacity provided by the permit for the municipal use.

In situations where a new point of diversion authorized under the permit is developed, but an additional increment of capacity or beneficial use is not developed for the municipal system, a license may be issued limiting the diversion rate in combination with other rights in the municipal system to the existing capacity of the municipal system.

[3] The installed capacity may not represent beneficial use if significantly greater than the diversion required to meet the needs of the developed service area (including stub-ins), even if it does not exceed the amount permitted. For example, if fewer lots are stubbed-in than permitted, the required diversion rate would likely be smaller than the permitted rate.

This Administrative Memorandum is not new law but is an agency interpretation of existing law. For more information or to provide input on this document, please contact the Idaho Department of Water Resources at (208) 287-4800. (Feb. 2020)

MEMORANDUM

TO: Regional Offices
Water Allocation Bureau

FROM: Shelley W. Keen SWK

RE: Recommendations for the Processing of Reasonably Anticipated Future Needs (RAFN) Municipal Water Rights at the Time of Application, Licensing, and Transfer

DATE: October 1, 2021

Application Processing No. 74
Permit Processing No. 20
License Processing No. 13
Transfer Processing No. 29

See attached RAFN Municipal Water Right Handbook (Amended October 2021)

IDAHO DEPARTMENT OF WATER RESOURCES

Recommendations for Processing Reasonably Anticipated Future Needs (RAFN) Municipal Water Rights at the Time of Permitting, Licensing, and Transfer

October 2021

Table of Contents

1. **Introduction** 4
   - RAFN vs. non-RAFN 4
   - Types of Municipal Providers 5
2. **Evaluating Reasonably Anticipated Future Needs** 6
   - Service Area 6
   - Planning Horizon 9
   - Population Projection within the Planning Horizon 11
   - Water Demand 12
     - Residential Water Demand Forecasting Methodologies 13
     - Per Capita Requirements Method 14
     - Non-Residential Forecasting 19
3. **Permitting RAFN Water Rights** 20
   - Existing Water Rights Portfolio 20
   - Final Determination of RAFN Permit Diversion Rate (Gap Analysis) 21
   - Final Determination of RAFN Permit Volume 22
   - Incremental Statements of Completion 22
   - RAFN Permit Approval Conditioning 22
   - Amending a permit from non-RAFN to RAFN is not authorized 23
4. **Licensing RAFN Water Rights** 23
   - Final Determination of RAFN License Volume 24
   - RAFN License Approval Conditioning 24
5. **Transfer of Existing Water Rights to RAFN** 24
   - Final Determination of RAFN Transfer Volume 25
   - RAFN Transfer Approval Conditioning 25

Appendix **26**
- **Item 1)** Bibliography – Summary of Reference Citations 26

Item 2) Illustrative Example of Delineation of Maximum Allowable RAFN Service Area 28
Item 3) Presentation and comparison of DEQ and IDWR methodologies for estimating residential use 29
Item 4) Summary of Average Daily Non-Residential Water Demand Values 33
Item 5) Municipal Water Right Application Checklist 35
Item 6) Example Determination of RAFN for a Small Rural Municipality 37

1. Introduction

This document is intended to guide and support Idaho Department of Water Resources (Department) staff in evaluating and processing applications for reasonably anticipated future needs (RAFN) water rights and can be used to aid applicants seeking RAFN water rights throughout the application, permit, license, and transfer processes. Guidance does not have the force and effect of law. Rather, it is designed to serve as a primary reference tool to assist Department staff and to assist those impacted by Department actions to comply with the law. The appendix includes a number of resources and support items related to RAFN analysis including the following: "Municipal Water Right Application checklist" (Item 5), which is a required component of the application form for proposed municipal uses and can help guide the applicant when applying for RAFN water rights; methods for estimating residential demand (Item 3); and a detailed example of RAFN determination for a small community that implements the methodology described in this document (Item 6).

Deputy Director Mat Weaver issued the prior versions of this document, and it has been popularly nicknamed "the Weaver memo." The 2021 version maintains most of Mat's guidance. The updates result from the passage of Senate Bill 1316 by the 2020 Idaho Legislature. Senate Bill 1316 amended I.C. §§ 42-204, 42-217, 42-218a, and 42-219 to change the process for showing proof of beneficial use for a RAFN permit. The 2021 updates also include changes to Tables 2 and 3 and to the population growth statistics cited in the "Population Projection within the Planning Horizon" section.

RAFN vs. non-RAFN

Prior to 1996, common law practices allowed municipalities to establish water rights greater than immediate needs. The 1996 Municipal Water Rights Act ("1996 Act") provided a statutory process for establishing a municipal water right for reasonably anticipated future needs (RAFN). The 1996 Act was codified in Idaho Statutes in the form of amendments to I.C. § 42-202, the addition of I.C. § 42-202B, amendments to I.C. § 42-217, amendments to I.C. § 42-219, and amendments to I.C. § 42-222. Under the 1996 Act, a key distinction of the RAFN right was the allowance of components of the water right, namely the diversion rate, to be perfected without physically completing diversion and use in establishing beneficial use during the development period of the permit. As noted above, the 2020 Idaho Legislature passed Senate Bill 1316 amending I.C. §§ 42-204, 42-217, 42-218a, and 42-219 to change the RAFN appropriation process. The key effect of Senate Bill 1316 was to extend the development period for RAFN permits so that the ensuing water right licenses are based on actual water use rather than based on estimated system capacity.

There are times when a municipal provider will choose to file an application to appropriate water solely to meet needs in the near-term (up to five years) without the burden of demonstrating future needs over an established planning horizon. This type of municipal water right has been termed a non-RAFN municipal right. Municipal water rights that are not defined as RAFN in conditional language are by default non-RAFN water rights. Application Processing Memo #18 presents and discusses the distinctions between both types of municipal water rights and provides guidance to Department staff for processing permits and determining extent of beneficial use for licensing of non-RAFN municipal water right permits. It is not the intent of this document to repeat or duplicate the material presented in AP Memo #18. The focus of this document will be on RAFN municipal water rights. When a water right

application has been determined to be for a non-RAFN municipal beneficial use, Department staff should consult AP Memo #18 for processing guidance.

In addition to water rights with a designated municipal beneficial use, municipal providers may also own water rights for non-municipal uses such as domestic, irrigation, commercial, etc. These water rights are often associated with uses such as parks, golf courses, cemeteries, and buildings that are not directly connected to a municipal provider's municipal water delivery system. The municipal provider may have acquired these water rights from previous non-municipal water right holders with or without the acquisition of land. In other instances, they may have been developed directly by the municipal provider for a demand not distributed throughout the entire existing water service area, or not otherwise qualified as a municipal use. When conducting a review of a municipal provider's suite of water rights, these water rights should be considered along with any existing water rights used for municipal needs, and any evaluation of RAFN should take into consideration beneficial use already being met by these types of water rights.

Types of Municipal Providers

I.C. § 42-202 provides, in relevant part:

> An application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied by sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter.

I.C. § 42-202B(5) defines three types of municipal providers:

a) A municipality that provides water for municipal purposes to its residents and other users within its service area (e.g. incorporated cities);

b) Any corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area (e.g. Water and Sewer Districts; SUEZ Water Idaho, a private company that supplies public drinking water to much of Ada County); or

c) A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a "public water supply" as described in I.C. § 39-103(12), Idaho Code. (e.g., developers; subdivision homeowner associations).

As set forth in M3 Eagle Final Amended Order[1] ("M3 Final Amended Order") a corporation or association seeking to qualify as a municipal provider under subsection I.C. § 42-202B(5)(c) for RAFN must qualify as a municipal provider at the time application is considered by the Department. In other words, at the time of application, the applicant must already supply water for municipal purposes through a water system that is regulated by the state of Idaho as a public water supply. It is insufficient for the applicant to merely be "ready, willing, and able" to be a municipal provider once the permit is issued.

2. Evaluating Reasonably Anticipated Future Needs

This section outlines and develops a fundamental protocol for evaluating reasonably anticipated future water needs for qualified municipal providers.

As discussed above, Idaho law allows a municipal provider to secure water rights for RAFN purposes without establishing beneficial use within five years. For a qualified municipal provider, a RAFN estimate has four fundamental components:

1. Service Area (I.C. § 42-202B (9)),
2. Planning Horizon (I.C. § 42-202B (7)),
3. Population Projections within the Planning Horizon, and
4. Water Demand (necessary to serve the population during the planning horizon throughout the service area)

This protocol explains each of these four components in order, and then describes how they should be used to evaluate a qualified municipal provider's RAFN.

It is important to recognize at the outset that a conservative standard may be appropriate in estimating future needs to justify a RAFN water right, especially in instances where there is a weighing of public interest in an area of recognized limited water supply. There may be a difference between the supply of water sufficient to sustain an urban population and the supply desirable to keep future operating costs low or to provide aesthetic amenities.

Service Area

A RAFN service area is a proposed future service area for the municipal provider. Idaho Code § 42-202B (9) defines the service area for a municipal provider as follows:

> "Service area" means that area within which a municipal provider is or becomes entitled or obligated to provide water for municipal purposes. For a municipality, the service area shall correspond to its corporate limits, or other recognized boundaries, including changes therein, after the permit or license is issued. The service area for a municipality may also include areas outside its corporate limits, or other recognized boundaries, that are within the municipality's established planning area if the constructed delivery system for the area shares a common

[1] Amended Final Order of the Department in the matter of application to appropriate water no. 63-32573 In the name of M3 Eagle LLC dated January 25, 2010.

water distribution system with lands located within the corporate limits. For a municipal provider that is not a municipality, the service area shall correspond to the area that it is authorized or obligated to serve, including changes therein after the permit or license is issued.

Idaho Code § 42-202B(8) defines RAFN as follows:

> "Reasonably anticipated future needs" refers to future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality. Reasonably anticipated future needs shall not include uses of water within areas overlapped by conflicting comprehensive land use plans.

For a municipality (as defined in I.C. § 42-202B(5)(a)), Idaho code requires the RAFN service area to be contained within the municipality's "established planning area" (I.C. § 42-202B (9)) minus "areas overlapped by conflicting comprehensive land use plans" (I.C. § 42-202B (8)).

For smaller, widely separated cities, the concern of overlapping comprehensive land use plans is not typically an issue. For these cities to justify a proposed future service area, the applicant should provide evidence of existing "corporate limits" and "other recognized boundaries" (I.C. § 42-202B (9)). Idaho Code §50-102 requires the establishment of corporate limits (recorded metes and bounds description of the incorporated area) in association with the incorporation of a city. These limits are established with the counties within which the city is located. Where the applicant is a city, copies of corporate limits should be provided by the applicant. As necessary, staff can cross check corporate limits by obtaining the boundary directly from the city, governing counties, or the state. In addition, the Department maintains a spatial data layer delineating all incorporated cities and their respective city limits within the State of Idaho. This data layer is based on U.S. Census data that is updated every ten years. This data layer can be a good place to start in determining corporate limits, but there is a chance it may not represent the most current boundary, and, when the applicant is a city, staff should always obtain a current delineation of the corporate limits from the RAFN applicant or permit holder at the time of permitting and licensing. The purpose of this current boundary information is to facilitate the Department's review of the proposed RAFN service area.

Other recognized boundaries can include areas of impact, utility service planning areas, or other unique planning areas, provided they have been legitimately adopted by the municipality with verifiable records, as "established planning area[s]" consistent with I.C. § 42-202B (9). Idaho Code §67-6526 in the Local Land Use Planning statutes requires that incorporated cities provide a map "identifying an area of city impact within the unincorporated area of the county." In addition, I.C. §67-6508 requires the creation, adoption, and ongoing update of a comprehensive plan for any incorporated city. The comprehensive plan will typically include maps identifying incorporated limits, areas of city impact, and other legitimate planning boundaries.

For municipal providers as defined in I.C. § 42-202B(5)(b) and (c), the "established planning area(s)" language does not apply. Rather, the applicant may submit an approved preliminary plat or other approved planning type documents, Public Utility Commission approval documents, Idaho Department of Environmental Quality public drinking water system approval documents, irrigation district and water

and sewer district annexation plan, or other official documents which demonstrate a RAFN service area within which the applicant has the authority or obligation to provide water. However, Idaho Code § 42-202B(8) establishes that, in order to obtain a municipal water right for RAFN, the municipal provider must have a service area that includes a municipality within the service area.

I.C. § 42-202B (8) states, "Reasonably anticipated future needs shall not include uses of water within areas overlapped by conflicting comprehensive land use plans." When evaluating a proposed RAFN service area where two or more municipal providers abut one another, the applicant should research adjacent community planning areas to confirm that overlaps in competing planning areas specific to water service do not exist. If overlaps in comprehensive land use planning areas specific to water service do exist between two different municipal providers, the area of overlap cannot be included in the proposed RAFN service area under consideration. As an example, if a subdivision intersects the planning boundaries of two separate municipal providers, and both entities indicate in their comprehensive land use plans the intent to serve the same subdivision with water, then neither entity can include the subdivision in a proposed RAFN water service area until the conflict has been resolved and one of the two entities relinquishes water service to the other. However, in another example, if an overlap exists in the comprehensive land use plans of two municipal providers, but only one plan addresses water service, and the other plan acknowledges that water service is provided by the other entity, then the area of overlap can be included in the RAFN service area of the entity providing water service.

When the applicant is a municipality with multiple municipal water service providers within its city limits or area of impact, the applicant should normally exclude the existing service areas of other municipal providers from the RAFN service area under consideration. However, if the RAFN applicant presents a sound argument and supporting evidence for the inclusion of competing existing water service areas within its own RAFN service area, Department staff may include them in the final RAFN service area delineation. As an example, if the systems of two water service providers are cross connected to allow for one system to provide water to the other during times of emergency, during periods of routine maintenance, or in support of peak water demands, it would be appropriate to include this demand in the RAFN analysis of the municipality that is providing water to the second water service provider, provided the established need is not already covered by an existing water right. If the established need is covered by an existing water right, a unique combined used limitation condition detailing the water supply relationship should be considered.

In conclusion, RAFN service areas should include all existing contiguous and non-contiguous areas of water service (assuming they are combined) and adjacent areas poised for development and likely to occur within the established planning horizon time period. However, the proposed RAFN service area cannot include areas where the applicant does not provide water at the time of application if the proposed RAFN service area is overlapped by adjacent land use planning boundaries or is already included within the existing service area of a municipal water provider other than the applicant. In addition, where the applicant is a municipality, the proposed RAFN service area cannot include areas outside the municipality's currently adopted planning area. The appendix includes an example of a visual delineation of a RAFN service area based on underlying appurtenant boundaries (appendix Item 2).

Planning Horizon

Idaho Code § 42-202B(7) defines the planning horizon for a municipal provider as follows:

> "Planning horizon" refers to the length of time that the department determines is reasonable for a municipal provider to hold water rights to meet reasonably anticipated future needs. The length of the planning horizon may vary according to the needs of the particular municipal provider.

A municipal provider's planning horizon is the term of years over which it projects its population change and makes water service decisions based on its projection. At the time of application for RAFN municipal water use, the applicant will present a planning horizon time period, including a specified ending year. Department staff must evaluate, among other things, whether the proposed planning horizon is reasonable. Some additional items to consider include:

- The customary standards of practice for water infrastructure planning
- The planning period identified in any applicable Comprehensive Plan
- Planning periods identified by other applicable planning documents
- Regional planning studies

It is important to note that the maximum development period for beneficial use associated with a non-RAFN water right is five years, which can be extended an additional five to ten years for a total of ten to fifteen years. Therefore, a planning horizon of less than five years would not warrant a RAFN water right. The following table (Table 1) summarizes planning horizon durations as published in six water planning references.

Table 1 - Summary of Published Planning Horizon Periods

Published Reference*	Planning Horizon (years)
Fair 1971	10 - 50
Prasifka 1988	10 - 100
Dzurik 1996	< 50
Boumann 1998	< 50
Stephenson 2003	10 - 20
AWWA 2007	20 - 40

*Refer to Bibliography (Appendix Item 1) for reference details.

Table 2 summarizes planning horizons associated with actual water resource planning documents in the State of Idaho. The references summarized in Table 2 represent a variety of planning documents with unique objectives and planning areas. Some of the values are more applicable than others for use in comparison to proposed RAFN planning periods.

Table 2 - Summary of Actual Water Planning Documents and their Respective Adopted Planning Horizon Periods

Planning Area	Planning Horizon (years)	Planning Document Type
Ada & Canyon Counties	25	IDWR Water Demand Study
City of Coeur d'Alene	20	Comprehensive Water Plan
City of Lewiston	20	Master Water Plan
City of Meridian	50	Master Water Plan
City of Nampa	20	Master Water Plan
City of Pocatello	10	Master Water Plan
City of Rexburg	50	2008 Water System Tech. Memo
City of Twin Falls	30	Water Supply Improvement Plan
Rathdrum Prairie Aq	50	CAMP Water Demand Projections Study
Treasure Valley	50	CAMP Future Water Demand Study
United Water Idaho	55	Water Demand Study
City of Eagle	30	Reasonably Anticipated Future Needs Water Right
City of Plummer	35	Reasonably Anticipated Future Needs Report

The data presented in Tables 1 and 2 suggest that planning horizons between 10 and 55 years are the standard amongst the planning profession and in the actual adoption of planning documents within the State of Idaho.

The Department must guard against over-appropriation of the resource and against speculative water right filings. Longer planning horizons increase the level of uncertainty associated with predicted values and must be considered by the Department with greater caution. Planning horizons of 15-20 years are generally reasonable and require little scrutiny unless there is substantiated competition for the resource or some other justification for additional scrutiny arises. Planning horizons greater than 20 years can be considered by the Department, but when proposed they should be supported by long-term planning documents such as those listed in Table 2 and by professionally prepared demographic studies substantiating the duration of the planning horizon period.

Idaho Code § 42-202B (8) provides additional guidance regarding the evaluation of planning horizons:

> "Reasonably anticipated future needs" refers to future uses of water...reasonably expected to be required within the planning horizon of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality.

As a final measure, the planning horizon period proposed by the applicant must not only be reasonable, but also consistent with the adopted comprehensive plan of the city. This can be interpreted to mean no greater in length than the planning horizon period associated with the comprehensive plan, if no other pertinent planning documents exist. When another pertinent planning document exists, such as a

master water plan, then the planning document should be consistent with the master plan for the coincident period of time shared between the planning horizons of both documents.

Population Projection within the Planning Horizon[2]

Idaho Code § 42-202B(8) states that RAFN should be based on "population and other planning data." To establish its RAFN, a municipal provider must estimate its future population within its service area at the end of the planning horizon. For most municipalities, planning and demographic studies of one type or another have been completed, and often multiple relevant studies exist. At a minimum, comprehensive plans usually address population growth in some form as required by I.C. § 67-6508(b). The U.S. Census Bureau also provides population and demographic data for most municipalities in Idaho in a variety of formats. For communities where appropriate data exists, Department staff should expect the following components and considerations regarding population forecasts to be addressed and discussed in detail by the applicant.

1. A critical survey of existing contemporary population studies applicable to the local area to establish likely upper and lower boundaries for population growth.
2. Project population using standard technical methods, such as regression, extrapolation, or cohort survival models. To make extrapolation appropriate, one should account for geography, resource constraints, economic conditions, and other limiting factors or anticipated events, such as relocation of a commercial or industrial use.
3. Compare the results of the population projections from step 2 to the results of the critical survey from step 1 and apply professional judgment to evaluate whether the population projections are likely to occur within the planning horizon and are, therefore, reasonable.

Department staff should scrutinize population growth rates and projections that fall near or outside the upper boundary established in the critical survey. Staff should also scrutinize results based on short term trends in population growth. Where sufficient data exists, population forecasts should be based on a minimum of thirty years of population data. The U.S. Census Bureau provides decadal populations for every county in Idaho. From 1970 through 2016 the population growth rate of the entire state of Idaho was 1.91%. The maximum growth rate in that time was 3.72% in Teton County and the minimum growth rate was -1.20% in Shoshone County. From 1970 through 2016, growth rates exceeding 3.00% were only realized in five counties. Growth rates in excess of 2.50% were realized by fewer than 14% of Idaho counties. From 2016 through 2020, the growth rate for the entire state of Idaho ranged from 1.88% to 2.12% annually. Because annual growth rates exceeding 2.5% are rare, applicants should provide extra justification for requested growth rates in excess of 2.50% annually.

In some instances when a municipal provider is serving water to a rural or unincorporated community, existing population data specific to the community might be difficult to acquire or may simply not exist. In other instances the applicant may lack sufficient experience and/or expertise to forecast populations without assistance. In these select cases, the applicant may rely on a population forecasting tool that

---

[2] The 'Population Projection within the Planning Horizon' section of the RAFN handbook was prepared in conjunction with and under the review of Don Reading, Ph.D., a consulting economist with Ben Johnson Associates, Inc.

has been developed by the Department in Microsoft Excel to assist in population forecasting.[3] The tool summarizes dynamic ranges of U.S. Census Bureau population data by county and supports the regression of exponential and linear growth type models to the county census data to allow for the projection or forecasting of future populations. In addition, the spreadsheet tool allows for the development of exponential and linear population growth rate models based on user input population data. Forecasting conducted with this tool is only appropriate as a means of last resort and should not be used for communities where specific data and/or population and demographic studies already exist. The tool may also be useful directly to Department staff as a means of roughly evaluating whether the applicant's population forecasts are reasonable.

For communities starting from zero or a very small base population, the method of relying on historical or analogous growth rates may not be applicable. In these instances, the Department may consider reliable growth or build-out projections provided by the applicant.

Water Demand

Water demand is the final component of a RAFN that must be considered and evaluated by Department staff. Water demand represents the future projected water use in a community. Water use can broadly be placed into two categories: (1) non-residential use and (2) residential use. Non-residential use consists of irrigation of open common spaces (parks, golf courses, etc.), public facility use, industrial use, commercial use, and all other municipal purposes. Residential use can be further broken down into in-home use, out of home use (landscape irrigation, car washing, etc.), and fire protection.

To prevent over-appropriation of water, fire protection flow requirements should not be used as justification for water demand as part of a RAFN application. Per Idaho Code § 42-201(3), "Water may be diverted and used at any time, with or without a water right: (a) to extinguish an existing fire on private or public lands, structures, or equipment, or to prevent an existing fire from spreading to private or public lands, structures, or equipment endangered by an existing fire." If the Department were to allow fire protection flows to be included in estimating RAFN water demand for municipal purposes, it would result in a water right for municipal purposes in excess of the demonstrated continuous future needs. Water flow rates required solely for fire protection may be listed as a separate use on a RAFN application.

Like fire protection flows, an additional ground water point of diversion used to provide redundant supply to a water distribution system should not be considered as justification for water demand on a RAFN application. The Idaho Rules for Public Drinking Water Systems require new community systems served by ground water to have a minimum of two points of diversion if they are intended to serve more than twenty-five connections (IDAPA 58.01.08.501.17). Though the Department recognizes the necessity and value of redundant ground water points of diversion, additional capacity associated with the redundant point of diversion does not constitute an additional increment of beneficial use, justifying a water right. The inclusion of the diversion capacity associated with a redundant point of diversion in

---

[3] The Microsoft Excel file is titled "PopForecastTool.xlsx" and is available to the applicant from the Department upon request.

the estimation of RAFN water demand results in a water right for municipal purposes in excess of the demonstrated continuous future needs.

Unaccounted for water ("UAW") makes up a third category of water. UAW is considered the difference between a water utility's production and its water sales to consumers. Often municipal water providers authorize some types of UAW, including unmetered uses from fire hydrants, street washing, main flushing, sewer cleaning and storm drain flushing, authorized unmetered connections, and reservoir seepage and evaporation. Examples of unauthorized UAW include water distribution system leakage, unauthorized use by theft, abandoned services, and inaccurate or incorrectly read meters. For typical public water supply systems some engineering references estimate a minimum of 2.0% UAW can be anticipated (Prasifka 1988). In 2009 United Water Idaho (now Suez Water Idaho) reported monthly accounting of non-revenue water with values typically between 3.0-5.0% (Carr 2009). California Department of Water Resources' Urban Water Use in California Bulletin 166-3 reports that the largest percentage of cooperating agencies reported approximately 10.0% UAW in their water supply systems (CDWR 1994). For existing facilities, UAW values greater than 10% should only be approved by the Department as part of a water demand analysis, when the application includes historical diversion records and a technical engineering discussion of the above normal UAW values. For new systems, UAW values greater than 10% are not acceptable. Planning for UAW values in excess of 10% for a new system is contrary to the requirement for conservation of the water resources of the state.

Residential Water Demand Forecasting Methodologies

There are a number of standard recognized approaches for forecasting residential water demand (i.e. RAFN), including judgment based prediction, time extrapolation, disaggregate requirements analysis, single coefficient model development, multi-coefficient model development, econometric demand model development, or a hybrid of one or more of these approaches. Of these approaches, judgment-based predictions or water demand based on time extrapolation forecasts are generally viewed as inadequate forecast approaches. Judgment based predictions are simply forecasts of water demand based on the recommendation of an "expert" familiar with the system, who in theory has an "intuitive" feel for water demand specific to the municipal system through prolonged experience with the system. Time extrapolation relies on the prediction of water demand where the only predicting variable is time. For example, 100,000 GPD were needed in the first 10 years, 200,000 GPD were needed in the second 10-year period, and therefore 300,000 GPD will be needed in the third 10-year period. Both forecasting techniques lack a technical rigor that is appropriate and necessary when evaluating RAFN water right applications.

Of the remaining methods, one of the most widely implemented approaches, and the one that is presented in detail in this document, is the per capita requirements method, which is a form of the single coefficient model approach. To determine RAFN utilizing this method projected per capita or per household water demand must be applied to the estimated future population within the service area at the end of the planning horizon.

Per Capita Requirements Method

Municipal water demand is often considered a function of population and per-capita consumption[4] (Prasifika 1988). The per capita requirements method relies on the following components to estimate future water demand: (1) projected future number of people or residential services, (1a) if necessary, a conversion factor between people and residences[5], (2) average historical water use per capita, and (3) peaking factor(s). A combined future water demand is equal to the product of historical per capita demand, the total number of people or connections, and an appropriate peaking factor.

Per Capita Water Demand

Per-capita water consumption is highly variable from region to region and even from one system to another within the same region. Factors that affect per capita water consumption include metering, lot size, climate, age of system, residential irrigation demand, fire protection demand, water rate structure[6], and physical characteristics of the system. Table 3 summarizes various published values for estimating per capita consumption.

Table 3 – Summary of Published Values of Average Residential Daily Consumption

Published Reference*	Avg. Daily Consumption per Person (GPD)	Avg. Daily Consumption per Home (GPD)
Linaweaver 1967	100	400
Fair 1971	100 – 150	–
Stephenson 2003	50 – 80	150 – 800
Boumann 1998	–	200
Cook 2001	–	194
Water Research Foundation 2016	59	138
Dieter 2018	82	–

*Refer to Bibliography (Appendix Item 1) for reference details.

In 2015, households in Idaho had the highest per capita water use in the nation. The 2015 statewide average was 184 gallons per person per day, exceeding the national average by 102 gallons per person

[4] Strictly speaking the "per capita" metric refers to water use per individual person per unit time. The strict and rigorous use of this "per capita" definition is not always in evidence by water right applicants. Sometimes municipalities do not know how many people are served and thus employ the potentially more useful "per dwelling unit" metric. The terms "single family residence", "single family service connection", "single family dwelling unit" and "equivalent residential unit" can be synonymous with the term dwelling unit. An essential detail of the RAFN application should be the precise definition of the base water demand metric employed by the municipality.

[5] Population forecasts always predict a future population. Depending on whether the city is forecasting water demand by person or by service connection, the applicant will need to know the number of people per home in order to convert forecast population values into forecast service connections. The U.S. Census Bureau provides data on "persons per household" in their State and County QuickFacts data sets.

[6] Water rate structures are the framework in which municipal water providers set the prices for their retail water sales. Examples include flat rate and increasing block rate structures. In a flat rate structure, the water user is charged a flat rate regardless of how much water is used. In an increasing block rate structure, the unit price for water increases as the volume consumed increases, with prices being set for each block of water use. An increasing block rate structure is much more likely to communicate the value of water and encourage the efficient use of water amongst the users.

per day. This can partly be attributed to dry climates, which leads to more household water used for lawn and garden irrigation. In 2015, domestic per capita water use was at or below the national average of 82 gallons per person per day in only five counties in Idaho: Bear Lake, Bingham, Bonner, Boundary, and Gem Counties (Dieter and Maupin, 2017).

Residential irrigation can have a dramatic effect on per capita water demand. The EPA estimates that nationally about 30% of water per household is used for watering lawns (EPA, 2017). By some estimates water demand to meet peak residential irrigation needs can be 700% of average daily water demand without irrigation (Linaweaver 1967). Many municipal systems provide residential irrigation. However, a growing number of communities and municipalities do not support residential irrigation or have a separate utility specific to irrigation. It is important when evaluating the reasonableness of water demand values to know for certain whether residential irrigation is included in the demand.

Whenever possible, design flows for community water systems (municipal, community, or residential subdivisions) should be based on historical records or studies of similar water use in the area to be served—ideally historical records within the same system will be used. For established municipalities, historical records should be the primary means of evaluating and determining per capita requirements. When a wealth of historical records is available to draw upon, the applicant should rely on the most contemporary values, as they are most likely to reflect future water usage practices.

Frequently, recent data reflect lower per capita usage than older data. This decreasing trend evident in Idaho communities is consistent with national trends over the past three decades and is primarily due to a declining number of residents per household and an increasing pervasiveness of water-conserving (low flow) appliances in the home.[7]

It is not always possible, especially for newer communities, to estimate design flow from historical records as described above. On a case-by-case basis, the Department can accept calculated estimates for individual systems. There are several "per capita" estimation methods outlining practices and guidelines for estimating domestic design flows currently supported by the Idaho Department of Environmental Quality and the Department. Item 3 of the appendix includes a discussion and comparison of the various methodologies. Item 3 also describes and recommends a method than can be relied upon by the applicant to estimate demand as a last resort when actual historical data does not exist. It is worth emphasizing that the preference in determining per capita demand is always given to

---

[7] For national trends see: Rockaway, P.A. et. al. Residential water use trends in North America. Journal AWWA, 103:2, February 2011. In Idaho, United Water Idaho (now Suez Water Idaho) reported that from 2003 to 2011, the average Boise and southwest Ada County customer's water usage has fallen nearly 23 percent. Greg Wyatt, United Water Idaho Vice President and General Manager, attributed the reduced consumption to "successful implementation of a conservation program, as well as weather patterns, plumbing codes and the economy" (United Water 2011). In addition, the City of Meridian has seen not only a reduction in per capita demand, but also in total potable water demand since 2007, despite a rising population. Research conducted for the City's Water Master Plan showed that residents served surface water for irrigation used about 112 gpcpd of potable water while residents that use potable water for irrigation used about 224 gpcpd of potable water (both figures based on ADD). Because all new customers will be served using surface water for irrigation, the overall per capita demand should continue to drop without conservation measures (City of Meridian 2011).

actual historical records and that it is only in rare instances that relying upon an artificial means of estimating water demand by the methodology presented in appendix Item 4 is appropriate.

Peaking Factors

In the long term, water demand requirements can vary widely, increasing and decreasing in direct correlation with changes to the population base that is served. Wide variation in water demand occurs in the short term as well. Based upon the transient needs of a static population base, water demand will vary seasonally, daily, and hourly. For example, water demand may be greater during the irrigation season as opposed to the non-irrigation season. Daily in-home demand also increases during times of high use at the start and end of the workday, with daily lows occurring during the middle of the night and early morning. These fluctuations in demand are normally estimated in terms of peaking factors or multipliers, which are often expressed as a percent of average demand.

In general, distribution systems are traditionally designed to carry peak hour flows that typically amount to 200-300 percent of the average day demand, with higher rates usually associated with smaller systems (Robinson and Blair 1984).

When discussing peaking factors, it is important to distinguish between average daily demand (ADD), maximum day demand (MDD), maximum monthly average day demand (MMAD), peak hourly demand (PHD), and peak instantaneous demand (PID). All or some of these terms will often be used in the discussion of a municipal water supply system and as they are used by the Department these terms are defined below. Table 4 summarizes several published ranges of values for residential peaking factors.

Table 4: Summary of Published Peaking Factor Values

Published Reference*	MDD: ADD	PHD: ADD
Dewberry 2002	1.5 - 3.0: 1	2.25 - 4.50: 1
Fair 1971	1.5 - 3.5: 1	1.5 - 3.5: 1
Harberg 1997	1.4 - 1.7: 1	2.0 - 4.0: 1
Linaweaver 1967	2.0: 1	5.0 - 7.0: 1
Lindeburg 1999	1.5 - 1.8: 1	2.0 - 3.0: 1
Mays 2000	1.5 - 3.5: 1	2.0 - 7.0: 1

*Refer to Bibliography (Appendix Item 1) for reference details.

Average Daily Demand (ADD):

The average daily demand is the average of the daily volumes for a continuous 12-month design period expressed as a volume per unit time (typically gallons per day). Often municipal records will only contain monthly or yearly diversion values. In these instances, average daily demand for the system is equal to annual diversion volume or the sum of the monthly diversion volumes for one year divided by the number of days in the year.

Maximum Month Average Daily Demand (MMAD):

The maximum monthly average daily demand is the average daily demand from the peak demand month, which is typically July or August when out of home residential water use is at its peak. This value can only be calculated when municipal records contain monthly diversion data. It is obtained by dividing the monthly diversion volume by the number of days in the month, for each month, and selecting the largest monthly value.

Maximum Day Demand (MDD):
The design maximum day flow is the largest volume of flow to be received during a continuous 24-hour period in a calendar year, expressed as a volume per unit time. In order to determine this value, diversion records must have a daily recording interval. Often daily records are not available. In these instances, MDD values can be estimated by multiplying ADD or MMAD values by an appropriate peaking factor. If storage is used by the

water provider to meet peak demands, then the MDD value represents the maximum diversion rate that should be authorized by the RAFN water right permit.

Peak Hourly Demand (PHD):
The design peak hourly flow is the largest volume of flow to be received during a one-hour period expressed as a volume per unit time. In order to determine this value, diversion records must have an hourly recording interval. Municipal data with an hourly recording interval usually does not exist for the entire water system and may only exist for a representative sample of the existing service area for the specific requirement of determining peaking factors. In instances where hourly data does not exist at all, an alternative means of estimating the peaking factor must be employed. If storage is not used by the water provider, then the PHD value represents the maximum diversion rate that should be authorized by the RAFN water right permit.

Peak InstantaneousDemand (PID):
The peak instantaneous demand is a municipal water supply system's anticipated maximum instantaneous water flow. PID is typically met through a combination of direct diversion from surface water and/or wells and the release of storage water. PID should not be confused with the maximum diversion capacity of some or all points of diversion associated with a municipal water supply system (flow into the system), which is an altogether different value that has historically been used by the Department during field examinations as a quantification of beneficial use. In municipal systems PID usually exceeds diversion capacity, with storage releases making up the difference. The PID design value can be appropriate in the sizing of water mains, storage capacity, and other appurtenances associated with a municipal water supply system, but it is not typically recognized in the field of water supply planning and forecasting as an appropriate design standard for projecting future system demand. As such, the use of PID in establishing a diversion rate in association with a RAFN application is generally considered unsound and unlikely to be approved by the Department. This position is consistent with the Idaho Rules for Public Drinking Water Systems, which require that public drinking water system be designed to provide either PHD or the MDD plus equalization storage (IDAPA 58.01.08 501.03).

Ideally, an engineering report or comprehensive plan should be submitted to the Department, which includes the records, studies, and considerations used in arriving at design flows, including all relevant peaking factors. In the absence of historical data or studies, the peaking factor(s) used to determine the diversion rate of the RAFN permit could be estimated from an analogous system. To be considered analogous, water systems should have similar characteristics including demographics, housing sizes, lot sizes, climate, water rate structure, conservation practices, use restrictions, and soils and landscaping. If neither historical data nor an analogous system can be found to estimate peaking factors, then the default peaking factors summarized in Table 5 may be used by the applicant.

Table 5 - Department Standard Default Peaking Factors (PF)

Ratio	PF
MDD:ADD	2.0
MDD:MMAD	1.3
PHD:ADD	3.0

As an example on how to use the peaking factors in Table 5, if the applicant has a known ADD value, the MDD value can be determined by multiplying the ADD value by two. For peaking factors greater than described in Table 5, the applicant will need to provide a technical engineering discussion supporting the numbers. It is insufficient for an applicant to simply reference a published value or claim a value as a standard of engineering practice in defense of values greater than those presented in Table 5.

Storage and the Effects of Storage on Peaking Factors

Municipal water systems can apply a number of strategies to meet the system's peak demand. Some municipal providers rely exclusively on direct diversions from the source (surface water diversions and/or wells and booster pumps) to meet peak demand, while other municipalities may rely on a combination of direct diversions from the source and storage facilities to meet peak demand. Storage is a component of a municipal system consisting of tanks and reservoirs that physically store water to provide water pressure, equalize pumping rates, equalize supply and demand during periods of high consumption, and provide water for firefighting and other emergencies during periods of power outages.[8] In some places, authorities overseeing water system design mandate that storage be included in a water supply system and that peak demands be met partially by storage. As an example, the Washington State Department of Health requires that demands in excess of the MDD (i.e., PHD and PID) be met by storage (WSDOH 2009). In Idaho, the Idaho Department of Environmental Quality (DEQ) requires storage if source capacity is less than PHD, in these instances storage is required such that the difference between source demand and PHD is made up by equalization storage.[9] Some references consider it poor engineering practice for a public drinking water system to provide no storage capacity whatsoever (Lindeburg 1999).

It is important for the Department to identify to what extent storage will be utilized by a municipality to meet demand. The diversion rate associated with a RAFN application should reflect whether source alone will meet PHD or whether a combination of source and storage will meet PHD.

---

[8] The storage being discussed should not be confused with a seasonal storage component of a water right, which is water stored for use at some time in the future and is described on the water right as storage.

[9] Design File Note: Reservoir Sizing – Public Water Systems (April 30, 1998) states, *"The source capacity of a water supply must at least equal [MDD]...If the source capacity is equal to or greater [than] [PHD], then no storage is needed other than pressure tanks to prevent frequent cycling. If the source capacity lies between [MDD] and [PHD], then storage is required as defined in this Guidance."*

Per Capita Demand Conclusion

In conclusion, the following steps can be used to forecast the residential water demand utilizing the per capita demand forecasting approach:

1. Establish the ADD per capita water demand unit (person or residence) and quantity, preferably from historical diversion records.
2. Select the design demand value, typically PHD when source alone will meet the demand or MDD when a combination of source and storage will meet demand.
3. Multiply the ADD by the appropriate peaking factor to establish the per capita water demand design value.
4. Establish the projected future total population.
5. If needed divide the population projection by the "persons per home" value to arrive at the total number of residences to be served.
6. Multiply the total number of people or residences by the per capita water demand design value to determine the total system-wide residential demand.
7. Apply necessary unit conversions to obtain the permitted rate units of cubic feet per second (CFS)

Non-Residential Forecasting

For many municipal systems residential water demand makes up most of the total demand. As such, many water supply systems, especially smaller systems, are designed mostly to serve single family residences. If non-residential water is identified as being a significant portion of total demand it can be taken into consideration when establishing RAFN. Described below are two methods for estimating this demand.

The first method utilizes the concept of an equivalent residential unit (ERU). An ERU is a unit of measure used to represent the amount of water consumed by a typical full-time single-family residence (WSDOH 2009). ERUs are synonymous with equivalent dwelling units (EDU) as defined by the Idaho Department of Environmental Quality (IDAPA 58.01.08 003.43). ERUs can be used to equate non-residential uses and/or multi-family residential uses to the amount used by a single-family residence. ERUs associated with all non-residential uses are determined and added to the ERU count derived from actual single-family residences to arrive at a total demand.

The disaggregate requirements forecasting technique is another common approach to estimating non-residential water demand. In disaggregate forecasting the water user identifies the demand of water associated with any non-residential uses such as irrigation, commercial facilities, industrial facilities, public facilities, recreation uses, etc. and sums them to arrive at a total non-residential water use demand. Historical records are often the best source, and the source preferred by the Department, for estimating the demand associated with non-residential uses. A qualified analogous system can be another recognized source of information for estimating disaggregate water demands.

A tabular summary of average daily demands for a variety of disaggregate uses (Table 6) is presented in Appendix Item 4. Table 6 has been adapted from several sources and does not represent the final authority on the water demand values presented. It should be noted that the values in Table 6 are average daily values. It may be necessary to apply a peaking factor or multiplier to the values to obtain a MDD or PHD equivalent value.

Other sources of disaggregated water demand values that may provide additional guidance include individual engineering references, individual water demand studies, the Uniform Plumbing Code, the American Water Works Association, and the Idaho Department of Environmental Quality. When properly referenced and applied, all the sources previously described can be used if historical or analogous data are missing.

Regarding RAFN demand for the irrigation of lawns within community open spaces, parks, golf courses, cemeteries, etc., and the evaporative loss of water associated with decorative and aesthetic ponds, demand can be established by the appropriate evapotranspiration (ET) values as published by ETIdaho (Allen and Robison 2017). In recognition of the contribution of precipitation to irrigation requirement it is appropriate to use the precipitation deficit (P_{def}) values in place of actual ET (ET_{act}). Appropriate values would include utilizing data from the nearest ETIdaho station and as available, using the categories of "Precipitation Deficit (Grass – Turf (lawns) – Irrigated)" for P_{def} associated with lawns and grass and "Precipitation Deficit (Open water-shallow systems (ponds, streams))" for P_{def} associated with municipal ponds and water features. When estimating diversion rates associated with P_{def} it is appropriate to use the 20% exceedance (80th percentile) 3-day moving average rate from the month with the largest ET rates. Considering the conservative methods allowed in determining P_{def}, quantification of the demand associated with ET loss from lawns and open water bodies should not include the use of peaking factors or multipliers.

3. Permitting RAFN Water Rights

To be accepted by the Department, a RAFN request must include a current application correctly and completely filled out, a completed municipal water right application checklist[10], and payment of the statutory filing fee. To be complete, the municipal water right application checklist must include one or more attachments explaining the methods used to determine the four basic components of RAFN -- service area, planning horizon, population projection, and water demand -- as identified in Section 2 of this document. The municipal water right application checklist may also require an attachment listing the applicant's portfolio of existing water rights. Lastly, the municipal water right application checklist requires a gap analysis of the difference (gap) between the water that will be needed at the end of the planning horizon and what is currently provided by the existing water rights portfolio.

Existing Water Rights Portfolio

For an applicant to formulate a RAFN proposal, understanding of the future demand is only half the equation. The applicant must also understand the existing supply of water available to it. Therefore, an evaluation or accounting of all existing water right permits, licenses, decrees, and claims is needed to establish the water supply authorized on paper. This includes the review of water right permits and water rights authorized for the applicant's municipal use, as well as the applicant's existing permits and

[10] A copy of the municipal water right application checklist is included in the appendix as Item 5.

water rights for other beneficial uses that fall under the contemporary "municipal purposes" umbrella as defined in I.C. § 42-202B(6).

In addition, the municipal provider's water rights evaluation or accounting may also include any of the following:

- Rights held by the municipal provider for other purposes, such as irrigation
- Rights held by other entities, such as homeowners' associations, for municipal use within the proposed RAFN service area
- Rights held by other entities -- such as agricultural irrigators, homeowners' associations, or industrial plants -- for non-municipal uses within the proposed RAFN service area

The RAFN applicant should explain the assumptions regarding the inclusion or exclusion of water rights in the categories listed above. If the water rights will be used for future municipal demand within the proposed RAFN service area, regardless of ownership, the rights should be counted among the water rights available to meet the reasonably anticipated future needs.

Final Determination of RAFN Permit Diversion Rate (Gap Analysis)

An application for RAFN should contain completed analyses of the future water demand (residential, non-residential, and UAW) and the existing water right portfolio. The future water demand calculations should not include current or future fire flow requirements, as Idaho Code does not require a water right to engage in firefighting activities (§ 42-201). Neither should the requirement of redundant groundwater points of diversion be used as justification for an additional increment of future beneficial use.[11] The final RAFN water right permit diversion rate is typically calculated by taking the combined projected demand of residential and non-residential water use, multiplied by a factor to account for UAW, less the total diversion rate of water already provided in the applicant's current water rights portfolio.[12]

(*Municipal Demand in Ending Year*) x (*UAW Factor*) - (*Existing WR Diversion Rate*)
= (*RAFN Permit Diversion Rate*)

Item 6 of the Appendix is a detailed example of the determination of RAFN for a hypothetical RAFN application, including analysis of RAFN service area, planning horizon, population projection, water demand, and existing water right portfolio.

---

[11] Each point of diversion, including alternate points of diversion to provide a redundant supply, requires authorization under a valid water right.

[12] Alternatively, some municipal water systems with mixed sources of water supply divert water under the authority of water rights with late water right priority dates. This leaves the municipal provider susceptible to curtailment, a regulation based on water right priority date. In such a case, when the curtailment of water rights associated with one source (ex. surface water) do not limit the exercise of water rights diverting from a second source (ex. ground water), the Department may find the municipal provider will use its RAFN water right as an alternative supply. This would result in combined flow limits between the existing municipal water rights and a RAFN permit.

Final Determination of RAFN Permit Volume

RAFN water right permits should not be limited by volume except in those instances where a volume limitation is necessary to protect the water supply source.

Incremental Statements of Completion

With the passage of Senate Bill 1316 in 2020, I.C. § 42-204(4) now states that a RAFN permit holder "shall periodically submit to the department incremental statements of completion showing proof of beneficial use." I.C. § 42-204(4) goes on to state that the Department "shall set and may later adjust the duration of any reporting interval for any permit . . . to any duration not shorter than five (5) years." Incremental statements of completion accomplish two primary purposes. First, they establish a record of the pace at which beneficial use of water is being developed pursuant to the RAFN permit. This record can assist other water users and the Department in evaluating applications for additional appropriations from the RAFN permit's water source. Second, they afford the opportunity to issue incremental water right licenses when it is useful to confirm the extent of the established water right before full build-out, such as when the RAFN water right holder is seeking financing to continue development or wants to establish the extent of injury in a delivery call proceeding.

When setting reporting intervals, the Department should consider the length of the planning horizon and the extent of competition for the water resource. In general, the longer the planning horizon and the greater the pressure on the resource, the more important knowing the pace and extent of development will be when making water management decisions. When weighing these factors, the Department must also remember that there are costs to the permit holder of hiring a certified water rights examiner (CWRE) to conduct incremental beneficial use field reports. There are also costs to the Department of receiving, evaluating, and storing the incremental statements of completion. In many cases, five-year or even ten-year incremental proofs would be expensive for the permit holder and the Department while adding little significant new information to the record of water use. Given that holders of large non-RAFN permits can apply to extend their permit development periods to fifteen years, the Department should not set the intervals for incremental statements of completion to less than fifteen years without substantial reasons to do so. For RAFN permits with a planning horizon of 20 years or less in an area with little competition for the resource, the Department may only require proof of beneficial use at the end of the planning horizon.

RAFN Permit Approval Conditioning

When issuing a RAFN water right permit the Department will include standard approval conditional language accomplishing the following:

- Identifying the permit as being for reasonably anticipated future needs. (The Department will consider all permits that do not have a condition designating RAFN status to be non-RAFN permits.)
- Stating the end date of the planning horizon.
- Requiring proof of beneficial use to be filed at the end of the planning horizon. (This should be the standard "proof due date" condition appearing as no. 1 on all permits).
- Specifying the dates, if any, that the permit holder shall submit incremental statements of completion to the Department.

- Requiring the proof of beneficial use statement to be accompanied by a beneficial use field report prepared by a CWRE and a description of the permit holder's current service area.
- Excluding the capacity installed for redundancy or for fire protection when quantifying the amount of water developed for municipal purposes.

Amending a permit from non-RAFN to RAFN is not authorized

Consistent with Application Processing Memo #18 (Administrative Memo adopted October 19, 2009), a permit issued to a municipal provider that does not provide for RAFN cannot be later amended to gain the benefits of a RAFN permit.

4. Licensing RAFN Water Rights

Pursuant to I.C. § 42-204(4), the development period for a RAFN permit may not be extended. If an incremental statement of completion or the final proof statement for a RAFN permit is not submitted by the due date, the permit shall lapse and be of no further force nor effect as required under I.C. § 42-218a, except that lapsing "shall not apply to any portion of the permit that has been previously licensed or for which an incremental statement of completion showing proof of beneficial use has been submitted." As stated in I.C. § 42-204(6), when a RAFN permit lapses, "the permit holder shall be deemed to have relinquished all rights under any portion of the permit that has not been previously licensed or for which an incremental statement of completion showing proof of beneficial use has not been submitted." Lapsed RAFN permits are eligible for reinstatement pursuant to I.C. § 42-218a.

When submitting an incremental proof statement or final proof of beneficial use for a RAFN water right permit, the permit holder is required to submit a beneficial use field report completed by a CWRE (I.C. § 42-204) and a description of the RAFN permit holder's current service area. The beneficial use field report is not required if the permit holder is not asserting that an additional increment of beneficial use has been developed during the reporting interval.

Pursuant to I.C. § 42-219(1), the Department "may" issue a license for the beneficial use demonstrated by each incremental statement of completion in addition to the license issued for the beneficial use established at the end of the full development period/planning horizon. Whether or not to issue incremental licenses is left to the discretion of the Department. If the Department chooses to issue an incremental license, the Department should simultaneously issue an order reducing the RAFN permit by the amount licensed. Reducing the RAFN permit will prevent the Department, watermasters, and others from misinterpreting (by double counting) the amount of water the municipal provider is authorized to divert and use.

Because 2020 Senate Bill 1316 changed the RAFN permit development period "to correspond to the planning horizon authorized by the permit" (I.C. § 42-204(4)), at the time of licensing IDWR no longer needs to evaluate system capacity to estimate the beneficial use that would likely occur by the end of the planning horizon. Instead, Idaho Code § 42-219(1) states that licensing of RAFN permits will be based on the extent of beneficial use established prior to the date of the incremental or final proof statement.

Final Determination of RAFN License Volume

RAFN water right licenses should not be limited by volume except in those instances where a volume limitation is necessary to protect the water supply source.

RAFN License Approval Conditioning

When issuing a RAFN water right license, the Department does not need to identify the water right as being for RAFN because Idaho Code § 42-219(1) states that the license will be for beneficial use of water that has been established prior to the license being issued. The Department will include standard approval conditional language stating that the right shall not be changed to a location outside of the service area.[13]

5. Transfer of Existing Water Rights to RAFN

Idaho Code § 42-222 governs the transfer of existing water rights to and from RAFN status. The portion of any water right described with a beneficial use of RAFN cannot be transferred or modified to have a beneficial use other than RAFN.[14] However, water rights with beneficial uses other than RAFN can be transferred to a RAFN use.

When a transfer proposes changing the nature of use of a water right to municipal purposes for RAFN, the municipal provider shall provide to the Department sufficient information and documentation to establish the transfer applicant qualifies as a municipal provider at the time of application, is providing water to a municipality or municipalities, and that the RAFN, the service area, and the planning horizon are consistent with Idaho Code.[15] Supporting documentation must be included with the transfer application including the same RAFN support material that would be submitted with an RAFN permit application as outlined and described in Section 2 of this document. As discussed in Section 3, a gap analysis including a current portfolio of existing water rights must also be included with the transfer application. A transfer application proposing to use a RAFN water right as an alternate source in times of curtailment should include justification for the proposal with the application.

---

[13] To comply with the last sentence of Idaho Code § 42-219(1), the Department will include an approval conditional stating that the right shall not be changed to a location outside of the service area. However, the Department does not need to include a condition prohibiting the right from being changed to a new use because no portion of the licensed right is for RAFN.

[14] Before the passage of Senate Bill 1316 by the 2020 Idaho Legislature, RAFN water rights could be licensed before the end of the planning horizon. For those water rights, if some of the anticipated future water use had not yet been realized, the licenses were identified as RAFN water rights. Going forward, only permits and water rights transferred from some other use to RAFN municipal purposes will be identified as being for RAFN.

[15] As stated above, "As set forth in M3 Eagle Final Amended Order (M3 Final Amended Order) a corporation or association seeking to qualify as a municipal provider under subsection c above for RAFN must qualify as a municipal provider at the time application is considered by the Department. In other words, at the time of application, the applicant must already supply water for municipal purposes through a water system that is regulated by the state of Idaho as a public water supply. It is insufficient for the applicant to merely be "*ready, willing, and able*" to be a municipal provider once the permit [or transfer] is issued."

Water rights or portions of water rights that identify RAFN as the beneficial use shall not be changed to a place of use outside the RAFN service area or to a new nature of use (I.C. § 42-222). As stated in I.C. § 42-202B(9), the service area for a municipal provider includes changes "after the permit or license is issued." Because a transferred water right is already established by license or decree, IDWR interprets I.C. § 42-202B(9) to authorize service area changes to water rights transferred to RAFN. The effect of this statutory language eliminates the modification of a RAFN water right by transfer for anything other than the addition or change of a point or points of diversion.

Final Determination of RAFN Transfer Volume

RAFN water rights created by transfer from an existing non-RAFN municipal right should not be limited by volume except where a volume limitation existed in connection with the water right's use prior to the transfer. A transfer to change the nature of use of an established water right from non-municipal to municipal purposes for RAFN shall limit the volume of water to the historical consumptive use established prior to the change.

RAFN Transfer Approval Conditioning

When issuing a RAFN water right transfer, the Department will include standard approval condition language identifying the water right as being for reasonably anticipated future needs. All transferred water rights that do not have a condition designating RAFN status will be deemed as non-RAFN water rights by the Department. All RAFN transfers shall also include an approval condition requiring that the system must be fully constructed and used by the end of the planning horizon. Finally, all RAFN transfers shall include an approval condition limiting the RAFN water right to use within the service area and restricting a change in the purpose of use.

Appendix

Item 1) Bibliography – Summary of Reference Citations

Allen, Richard G. and Clarence W. Robison, 2017. Evapotranspiration and Consumptive Irrigation Water Requirements for Idaho: Supplement updating the Time Series through December 2016, Research Technical Completion Report, Kimberly Research and Extension Center, University of Idaho, Moscow, ID.

Ameen, Joseph S. Community Water Systems Source Book. 3rd Edition. North Carolina, U.S.: Technical Proceedings, 1965.

AWWA. Water Resources Planning AWWA Manual M50. 2nd Edition. American Water Works Association, 2007.

Boumann, Duane D. et al. Urban Water Management and Planning. United States: McGraw-Hill Companies, 1998.

California Department of Water Resources. Bulletin 166-4, Urban Water Uses in California, August 1994.

Carr, David, 2009. Personal correspondence with David Carr Production Line Manager of United Water.

City of Meridian. Analysis of Historical and Projected Water Demand. 2011 Water Conservation Plan, July 2011.

Cook, Z. et al. Domestic, Commercial, Municipal and Industrial Water Demand Assessment and Forecast in Ada and Canyon Counties, Idaho. Idaho Department of Water Resources, 2001.DEQ. Design File Note: Design Flows – Public Water Systems. Idaho Department of Environmental Quality, December 2005.

Dieter, C.A. et al., 2018, Estimated Use of Water in the United States County-Level Data for 2015 (ver. 2.0, June 2018): U.S. Geological Survey data release, https://doi.org/10.5066/F7TB15V5.

Dieter, C.A., and Maupin, M.A., 2017, Public supply and domestic water use in the United States, 2015: U.S. Geological Survey Open-File Report 2017–1131, 6 p., https:// doi.org/10.3133/ofr20171131

EPA, 2017 Outdoor Water Use in the United States.

https://19january2017snapshot.epa.gov/www3/watersense/pubs/outdoor.html

Dewberry, S. O. Land Development Handbook Planning Engineering, & Surveying. 2nd Ed. New York, U.S.: McGraw-Hill, 2002.

Fair, Gordon M. Elements of Water Supply and Wastewater Disposal. 2nd Edition. New York, U.S.: John Wiley & Sons Inc, 1971.

FHA. Minimum Design Standards for Community Water Supply Systems, Federal Housing Administration, July 1965.

Harberg, R. J. Planning and Managing Reliable Urban Water Systems - American Water Works Association, 1997.

Linaweaver, F. P., et al. (1967) A Study of Residential Water Use. Johns Hopkins University, for the Federal Housing Administration and the Department of Housing and Urban Development.

Lindeburg, Michael R. Civil Engineering Reference Manual. 7th Edition. California, U.S.: Professional Publications, Inc, 1999.

Mays, Larry. Water Distribution Systems Handbook. New York, U.S.: McGraw-Hill, 2000.

Moyer, E.E., 1985. Economics of Leak detection: A Case Study Approach. Denver: AWWA.

Prasifka, D. W. Current Trends in Water Supply Planning. Van Nostrand Reinhold Company Inc., 1988.

Robinson, M.P., Blair, E.R., Jr., Pump Station Design: the benefits of computer modeling. Journal of the American Water Works Association (AWWA) 76(7): 70-77.

Rockaway, P.A. et. al. Residential water use trends in North America. Journal AWWA, 103:2, February 2011.

SPF et al. Rathdrum Prairie Aquifer Water Demand Projections. Submitted by SPF Water Engineering, LLC, AMEC Earth and Environmental, John Church, Idaho Economics, and Taunton Consulting for the Idaho Water Resources Board, April 9, 2010.

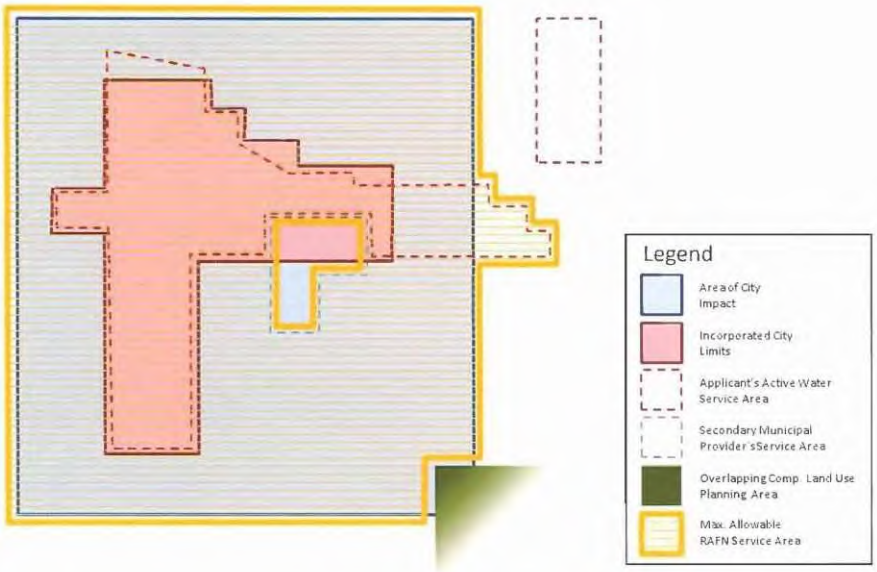
Stephenson, David. Water Resources Management. The Netherlands: Krips the Print Force, 2003.

United Water. United Water Idaho Files Rate Request with PUC. United Water Idaho About Us, August 2011.

Water Research Foundation. Residential End Uses of Water, Version 2 Executive Report. Water Research Foundation, 2016.

WSDOH. Water System Design Manual. DOH 331-123. Washington State Department of Health, December 2009.

Item 2) Illustrative Example of Delineation of Maximum Allowable RAFN Service Area



Appendix Item 2 - Illustrative Example of Delineation of Maximum Allowable RAFN Service Area

Item 3) Presentation and comparison of DEQ and IDWR methodologies for estimating residential use

Comparison of the Idaho Department of Water Resources and the Idaho Department of Environmental Quality Methodologies for Quantifying Residential In-Home Use

The Department's Administrative Memorandum Application Processing #22 (AP22) dated June 4, 1980, addresses the 'Definition of Domestic' and provides guidance, in the form of a chart (Figure 1), for quantifying the rate of flow necessary for the in-house culinary use for multi-household systems. The memo states, "The flow identified on this graph should be used as a guideline in determining and reviewing domestic use rates of flow on applications for permit with more than one hookup. Greater flow can be accepted if justified." Figure 1 is titled "Maximum Instantaneous Water Requirements for Domestic Use" and depicts a power function relationship between the number of houses served (N) and the water demand (Q) in cubic feet per second (CFS). The following equation represents the relationship depicted on Figure 1 of AP22 and allows for the calculation of Q strictly as a function of N.

Eqn. 1: $Q\ (CFS) = 0.0473*(N)^{0.4817}$

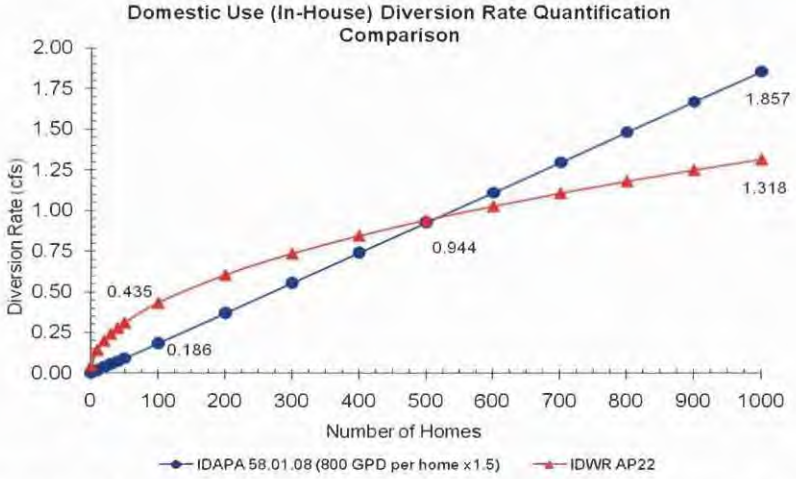
AP22 does not make clear whether "maximum instantaneous water requirement" is equivalent to peak hour demand (PHD), peak instantaneous demand (PID), or some other value. Nonetheless, for communities ranging from 2 to 1,000 homes this has historically been the equation Department staff has used to quantify the permitted diversion flow rate specific to in-home domestic use when no other rate was justified. It does not account for demand associated with out-of-home uses, namely irrigation.

The Idaho Rules for Public Drinking Water Systems administered by DEQ mandate the capacity of public drinking water systems to be a minimum of 800 gallons per day (GPD) per residence (IDAPA 58.01.08 552-01(a)). This is equivalent to 0.6 gallons per minute (GPM) and 0.001 CFS. The rules define this amount as the "design maximum day demand" (MDD) exclusive of irrigation and fire flow requirements (IDAPA 58.01.08 552-01(a.i)). The rules go on to say that the MDD may be "less than 800 GPD if the water system owner provides information that demonstrates to the [Department of Environmental Quality's] satisfaction the maximum day demand for the system, exclusive of irrigation and fire flows, is less than 800 GPD per residence". The value of 800 GPD per residence was likely initially derived from the Federal Housing Administration's minimum design standards (FHA 1965). The rules do not address peaking factors. However, if we use the standard values from Table 5 we can determine a PHD of 1,200 GPD per residence (PHD = 1.5*MDD). The following figure compares the water demand functions for 1 to 1,000 homes as derived from AP22 and the Idaho Rules for Public Drinking Water Systems.

At first glance it appears there is a conflict between AP22 and the Idaho Rules for Public Drinking Water Systems. This conflict could potentially lead to a deficient municipal water supply system with a combined water right diversion rate less than the diversion rate mandated by the Idaho Rules for Public Drinking Water Systems. However, such a conflict does not exist for two reasons. First, the Idaho Rules for Public Drinking Water Systems address the concept of "storage" and the ability of equalization storage, in sufficient quantity, to compensate for differences between a water system's maximum

pumping capacity and peak hour demand. Furthermore, the rules also address the ability of equalization storage plus fire suppression storage, both in sufficient quantity, to compensate for the difference between a water system's maximum pumping capacity and peak demand plus fire flow, in those systems that provide fire flow (IDAPA 58.01.08 003-71). Secondly, the 800 GPD in-home use value is only valid when MDD flows in the system are equal to or greater than 800 GPD. If actual MDD flows are less than 800 GPD they can be recognized as a valid demand for the system (IDAPA 58.01.08 552-01(a.iii)).

One obvious deficiency in both methods is their lack in quantifying an irrigation demand component, leaving the task of determining total residential demand only partially completed. Another deficiency in the Idaho Rules for Public Drinking Water System is their treatment of demand as a linear function, as it is commonly accepted that for larger communities, demand is not linear with respect to number of homes (Ameen 1965).



It is desirable for the Department to have a single recommended method for quantifying residential demand that addresses both in-home and out of home uses including irrigation. Such a method was developed by the U.S. Department of Housing and Urban Development (DHUD) in their publication titled A Study of Residential Water Use (Linaweaver 1967). This method has the added advantage of being currently adopted and under implementation by the Idaho Department of Environmental Quality (DEQ 2005). The DHUD method is presented below in detail, and it is recommended that this method be used by applicants and the Department in determining residential demand for those communities for which actual historical demand data does not exist.

The DHUD method calculates the maximum daily demand (Q_{MDD}) and peak hourly demand (Q_{PHD}) as functions of average daily in-home use (Q_{ADD}), consumptive use associated with residential irrigation, and the variability associated with the magnitude of the input factors influencing the demand and the diversity effect associated with the number of dwelling units or residences. The following equations

(equations 2 through 8) have been derived from the DHUD publication with some modifications specific to Idaho and the Department. The following equations express the steps necessary to determine values for Q_{MDD} and/or Q_{PHD}.

Eqn. 2: $Q_{MDD} = Q_{ADD} + C*(L_S)*(P_{def}) + 2*(\sigma_{MDD})$, where

Q_{MDD}: maximum daily demand (GPD)

Q_{ADD}: average daily in-home demand per residence (GPD)

C: unit conversion constant

L_S: average irrigable area in acres per unit

P_{def}: precipitation deficit for irrigated turf grass, i.e., lawn (inches)

σ_{MDD}: variability in magnitude of factors and the number of dwelling units

Equation 3 allows for the calculation of Q_{ADD} as a function of average home value from 1965. Equation 4 is used to adjust contemporary home values by inflation to determine historical home values from 1965. When desired for simplicity or lack of data, a Q_{ADD} value of 250 GPD can be substituted for the results of Equation 3 if desired by the applicant.

Eqn. 3: $Q_{ADD} = 3.46*V_{1965} + 157$, where

V_{1965}: average market value in $1000 per residential lot in 1965.

Eqn. 4: $V_{1965} = V_{2010}/(1.044)^{46}$, where

V_{2010}: average market value in $1000 per residential lot in 2010.

Equation 5 is used to calculate the average irrigable area term (L_S) and assumes that irrigation practices are uniform across the entire community. If a source other than the municipal water system is used for irrigation (i.e. surface water irrigation water rights) the L_S term should equal zero.

Eqn. 5: $L_S = 0.803*(W^{)-1.26}$, where

W = gross housing density in dwelling units per acre

Equation 6 is used to calculate the variability term, σMDD.

Eqn. 6: $\sigma_{MDD} = [(1{,}090 + 166{,}000*L_S^2) + (5{,}480{,}000/n)]^{1/2}$, where

n: number of residences or residential lots

The method presented herein also supports the calculation of a Q_{PHD} as a function of the Q_{MDD} value previously determined. The following equation allows for the calculation of Q_{PHD}.

Eqn. 7: $Q_{PHD} = 2.02*(Q_{MDD}) + 334 + 2*\sigma_{PHD}$, where

σ_{PHD}: variability in magnitude of factors and the number of dwelling units

Equation 8 is used to calculate the variability term, σ_{PHD}.

Eqn. 8: $\sigma_{PHD} = [(2.02*(1{,}090 + 166{,}000*L_S^2)) + (12{,}300{,}000/n)]^{1/2}$, where

n: number of residences or residential lots

The method presented and described above is automated in a spreadsheet tool prepared by the Department titled "ResidentialDemandCalculator.xlsx" and is available from the Department upon request.

Item 4) Summary of Average Daily Non-Residential Water Demand Values

Table 6 - Summary of Average Daily Non-Residential Water Uses

Description of Water Use	Water Consumption	Units
Airport (per passenger)	3-5	GPD
Apartment, multiple family (per residence)	50	GPD
Bank (per SF)	0.05	GPD
Barbershop (per chair)	55	GPD
Bathhouse (per bather)	10	GPD
Beauty Salon (per station)	95	GPD
Boardinghouse (per boarder)	50	GPD
Camp:		
Construction, semi-permanent (per worker)	50	GPD
Day, no meals served (per camper)	15	GPD
Luxury (per camper)	100-150	GPD
Resort, day and night (per camper)	50	GPD
Tourist, central bath and toilet (per person)	35	GPD
Car Wash (per SF)	4.9	GPD
Cottage, seasonal occupancy (per resident)	50	GPD
Club		
Country (per resident member)	100	GPD
Country (per nonresident member present)	25	GPD
Highway Rest Area (per person)	5	
Hotel		
Private baths (2 persons per room)	50-68	GPD
No private baths (per person)	50	GPD
Institution other than hospital (per person)	75-125	GPD
Hospital (per bed)	200-400	GPD
Laundry/Laundromat		
Self-serviced (gallons per customer)	50	GPD
Self-serviced (gallons per machine)	400-500	GPD
Livestock Drinking (per animal)		
Beef, yearlings	20	GPD
Brood sows, nursing	6	GPD
Cattle or steers	12	GPD
Dairy	20	GPD
Dry cows and Heifers	15	GPD
Goat or sheep	2	GPD
Hogs/swine	4	GPD
Horse or mules	12	GPD
Livestock Facilities		
Dairy Sanitation (milk room)	500	GPD
Floor flushing (per 100 SF)	10	GPD
Sanitary Hog Wallow	100	GPD
Motel		
Bath, toilet, and kitchen (per bed space)	65-100	GPD
Bed and toilet (per bed space)	50	GPD

Table 6 Continued - Summary of Average Daily Non-Residential Water Uses

Description of Water Use	Water Consumption	Units
Parks		
Overnight, flush toilets (per camper)	25	GPD
Trailer, individual bath units, no sewer connection (per trailer)	25	GPD
Trailer, individual baths, connected to sewer (per person)	50	GPD
Picnic Ground		
Bathhouses, showers, and toilets (per picnicker)	20	GPD
Toilet facilities only (gallons per picnicker)	10	GPD
Poultry (per 100 birds)		
Chicken	5-10	GPD
Ducks	22	GPD
Turkeys	10-25	GPD
Restaurant		
Toilet facilities (per patron)	7-10	GPD
No toilet facilities (per patron)	2.5-3	GPD
Bar and cocktail lounge (add. quantity per patron)	2	GPD
Toilet facilities (per seat/chair)	24-50	GPD
School		
Boarding (per pupil)	75-100	GPD
Community college (per student and faculty)	15	GPD
Day, cafeteria, gym, and showers (per pupil)	25	GPD
Day, cafeteria, no gym or showers (per pupil)	20	GPD
Day, no cafeteria, gym, or showers (per pupil)	15	GPD
Service Station		
Service Station (per vehicle)	10	GPD
Service Station (per SF)	0.18	GPD
Store/Retail		
Department, no food service (per SF)	0.04	GPD
General (per bathroom stall)	400	GPD
General (per SF)	0.05	GPD
Shopping Center/Malls (per SF)	0.25	GPD
Swimming pool (per swimmer) maintenance (per 100 SF)	10	GPD
Theater		
Drive-in (per car space)	5	GPD
Movie (per auditorium seat)	5	GPD
Worker		
Construction (per person per shift)	50	GPD
Day (school or offices per person per shift)	15	GPD
Factory (gallons per person per shift)	15-35	GPD

Table 6 has been adapted from the following sources: Dewberry 2002, Prasifka 1988, and WSDOH 2009.

Item 5) Municipal Water Right Application Checklist

Rev. 9/2021 Water Right No. or App. ID _____

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

MUNICIPAL WATER RIGHT APPLICATION CHECKLIST

This checklist must be completed and submitted with an application to appropriate water for municipal purposes. There are two types of permits for municipal water use. The first type of municipal permit provides water for reasonably anticipated future needs **(RAFN)** over a defined planning horizon.[1] The second type of municipal permit, called **non-RAFN**, provides water solely for use to meet needs that will arise in the near-term (five years).[2] Each type of municipal water use has a distinct set of review requirements.

Applicant Name: _____

1. Type of Municipal Provider. Applicant must qualify as a Municipal Provider to obtain a water right for municipal purposes. See Idaho Code § 42-202B(5). Check one:

☐ Type 1 - Municipality
☐ Type 2 - Franchise or political subdivision supplying water for municipal purposes
☐ Type 3 - Corporation or association regulated as a "public water supply" system by IDEQ

☐ Attach documentation of qualification as a Municipal Provider. See Idaho Code § 42-202(2).
☐ Check here if you are a Type 3 provider proposing to develop a new municipal system but have not yet received recognition as a Public Water Supply by Idaho DEQ.

2a. List existing water rights (permits, licenses, decrees, and beneficial use claims) available to the applicant for municipal needs. These rights may or may not have a purpose of use expressly defined as "municipal." Explain the inclusion or exclusion of water rights used within the service area, but not currently owned by the applicant. Include a separate attachment as needed.

Right Number	Nature of Use	Diversion Rate (cfs)	Annual Volume (acre-feet)	Service Area
	Total	_____*	_____*	

* Be sure to account for any combined volume and/or diversion rate limits in the approval conditions of each right listed.

2b. List any overlapping water providers within your service area, such as irrigation districts, canal companies, or municipal providers:

_____

3a. Currently or within five years will your municipal water system demand exceed the total diversion rate or annual volume authorized by the water rights listed in item #2a?

☐ Yes, see item #4

☐ No, see item #3b

3b. Are you planning to replace an existing point of diversion, but will not develop a new water source nor exceed the total authorized diversion rate and volume of your current water rights?

☐ Yes. Please file an Application for Transfer of Water Right *instead* of an Application for Permit.

☐ No, I am filing this Application for Permit for reasonably anticipated future needs (RAFN) pursuant to Idaho Code § 42-202B(8). See item #4.

[1] For a thorough discussion of RAFN water rights, see IDWR's *Recommendations for the Processing of Reasonably Anticipated Future Needs (RAFN) Municipal Water Rights at the Time of Application, Licensing, and Transfer* (Application Processing Memorandum No. 74).
[2] For a thorough discussion of non-RAFN water rights, see IDWR's Application Processing Memorandum No. 18.

4. Please specify the term for which you are making an application for permit. See Idaho Code § 42-202B(7). Check one:
   - ☐ Non-RAFN: (planned water system improvements and beneficial use of the entire quantity of water will occur within 5 years). Go to item #5.
   - ☐ RAFN (Full water usage will occur over a planning horizon longer than five years). Specify planning horizon:_____years. Ending year of planning horizon: 20____. Skip to item #6.

5. Non-RAFN application. Per Water Appropriation Rule 40.05.d.i, attach a water requirement narrative to your application. It should include the following information:
   - ☐ Attach a map of the municipal water service area defined by Idaho Code §42-202B(9). If applicable, map should delineate neighboring service areas associated with other municipal water providers.
   - ☐ Current water demand within the municipal service area expressed in average day demand, maximum day demand, and peak hour demand.
   - ☐ The required diversion rate during the peak and the average use period at the end of your project (5 years maximum). Typically, these values would be average day demand, maximum day demand, peakhour demand, and supporting information. State the capacity of any reservoirs which will be used to meet peak demand. Do not include demand solely for fire protection. If your fire protection demand exceeds your other municipal needs, you may request an appropriation for fire protection as a separate beneficial use.
   - ☐ Proposed future annual diversion volume needed by the end of your project (required only for providers not serving an incorporated municipality). Include a copy of your approved preliminary plat and the calculation method used to reach the requested volume.
   - ☐ Current and proposed capacity of entire diversion system (pumps).
   - ☐ If you are a Type 3 municipal provider, do you have a plan for assigning ownership of the water right permit to a subdivision HOA or other local entity? If so, attach a relevant excerpt from your CC&Rs or a description of the ownership change agreement between the HOA and the developer.

6. RAFN application.
   - ☐ Attach a map of the current municipal water service area and the service area as it will be at the end of the planning horizon. Provide justification for inclusion of areas currently served by another municipal provider or by large industrial, commercial, or domestic water systems. Areas overlapped by conflicting comprehensive land use plans may not be included. See Idaho Code §§ 42-202(2) and 42-202B(9).
   - ☐ Attach justification for the proposed planning horizon. The planning horizon should be consistent with water infrastructure planning standards and current land use planning documents for the service area. See Idaho Code §§ 42-202(2) and 42-202B(7).
   - ☐ Attach a population projection within the service area over the planning horizon. The population projection should be based on planning and demographic studies, standard statistical methods, and evaluation of geography and other limiting factors. See Idaho Code §§ 42-202(2) and 42-202B(8).
   - ☐ Attach an evaluation of the water demand within the service area at the end of the planning horizon. Evaluate unaccounted for water (UAW) separate from municipal use. Do not include demand solely for fire protection. See Idaho Code §§ 42-202(2) and 42-202B(8). If your fire protection demand exceeds your other municipal needs, you may request an appropriation for fire protection as a separate beneficial use.
   - ☐ Attach a gap analysis: [Municipal Demand in Ending Year] x [UAW Factor] – [Sum of Existing WR Diversion Rates] = RAFN Application Diversion Rate.

Item 6) Example Determination of RAFN for a Small Rural Municipality

Description of Municipality

Gem City is in the process of acquiring grant money to create a master water plan and expand their existing municipal water system. It has taken this opportunity to apply for a permit for RAFN water rights by conducting a thorough analysis of the future projected demands and their existing water right portfolio. Gem City is located in Benewah County. Gem City currently uses storage to meet demands in excess of their maximum day demand (MDD) and plans to continue this practice into the future. Gem City has recently updated their comprehensive plan (comp plan) including updates to their incorporated city limits and their area of city impact as depicted in Appendix Item 3. The planning horizon associated with the recently adopted comp plan is 20 years. Gem City does not have a current master water plan.

Gem City has rigorously defined their non-residential water use as follows: one hospital (20 beds), one barber shop (5 chairs), one beauty salon (5 stations), one car wash (1,000 square feet (SF)), one Laundromat (10 wash machines), one motel (30 bed spaces), three restaurants (combined seating 80), one elementary school with cafeteria and no gym or showers (100 students), one middle school with cafeteria, gym, and showers (60), and one high school with cafeteria, gym, and showers (60 students), one service station (1,000 SF), and 45,000 square feet of existing retail space. For the next 20 years Gem City has projected an additional development of 30,000 SF of retail space and two factories, each employing 30 people per shift per day. Gem City has a single 2-acre park within the city limits and a 10-acre cemetery outside the city limits.

U.S. Census Bureau data for Gem City for the last four censuses conducted is summarized in the following table. The U.S. Census Bureau also reports average persons per household for Gem City at 3.14 in the year 2000 and 2.81 in the year 2010.

Gem City, ID

Year	Population*
1980	610
1990	804
2000	990
2010	1044

*US Census Data

Gem City's monthly municipal water system diversion volumes for years 2005 and 2010 are summarized in the following figure. Gem City does not have a separate irrigation utility and all residential irrigation is provided for by the municipal water system. Gem City does not have diversion data with a finer recording interval than monthly. They have no understanding of their MDD:ADD or PHD:ADD peaking factors, nor adequate data to support the analysis and derivation of these values.



The following table summarizes Gem City's existing water rights portfolio.

Gem City Water Right Portfolio

WR No.	Beneficial Use Desc.	Diversion Rate (cfs)	Annual Diversion Vol. (AF)
95-123	Municipal	0.20	N/A
95-1234	Municipal	0.20	N/A

Analysis – Service Area

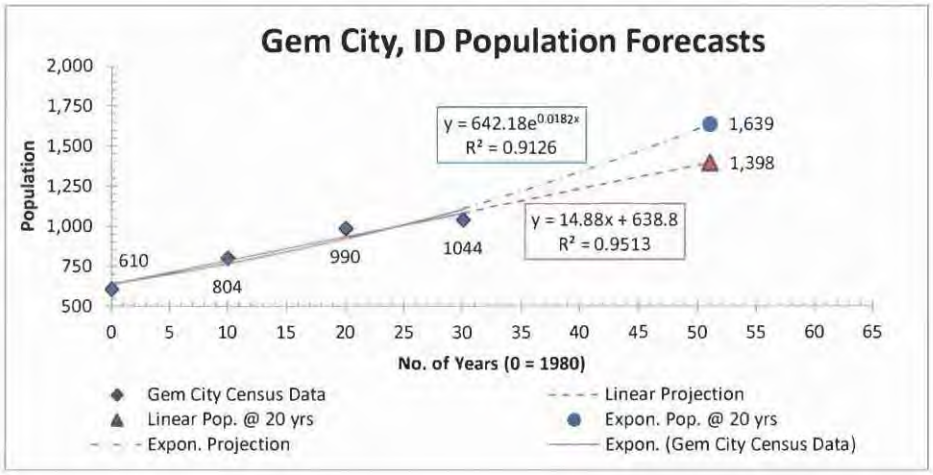
Gem City's proposed RAFN service area can include all areas within the existing area of city impact (largest planning boundary that has been adopted by the city). It can include areas outside of the city's area of impact where water service is currently provided through interconnection. It cannot include proposed service areas outside the area of city impact where water service is not already provided. In addition, it cannot include the service area of other municipal water providers and it cannot include areas included in an overlapping comprehensive land use planning area as adopted by another municipality. For the sake of the example, we will assume that appendix Item 2 illustrates the service area for the RAFN.

Analysis – Planning Horizon

Gem City has recently adopted a new comp plan with a 20-year planning horizon associated with the document. There are no other appurtenant planning documents such as a master water plan from which to reference an alternative planning horizon. Since a RAFN planning horizon cannot be inconsistent with comprehensive land use plans adopted by the city, the planning horizon is limited to 20 years. In addition, 20 years is consistent with the values presented in Tables 2 and 3 further confirming it as an appropriate value for use with this RAFN proposal.

Analysis – Population Projections within the Planning Horizon

Gem City does not have any studies of population growth or demographics specific for their community. Therefore, U.S. Census Data represents the only available data regarding the population and demographics of Gem City. To avoid skewing population predictions to ephemeral trends within the census data, it is appropriate to look at a minimum of three decades worth of census data. The following figure is an x-y scatter plot of Gem City population data and years (blue diamonds). Exponential (blue line) and linear (red line) relationships have been molded to the census data and are depicted on the figure illustrating two different models between population and time.



Statistically speaking both models can be considered highly significant with coefficient of determination (R2) values of 0.9513 for the linear model and 0.9282 for the exponential model. Presented independently either model could be considered reasonable. However, when the two models are presented together, allowing for comparison, the linear model establishes a better fit. As such, the linear relationship should be selected to forecast future populations. Since application for RAFN is being made in 2011 and the planning horizon has been established at 20 years, we are interested in

forecasting the population for the year 2031 (or year 51 when 1980 = year 0). The following calculation establishes the future population at the end of the planning horizon.

P_{2031} = 14.88*(51) + 638.8 = 1,398 people

Analysis – Water Demand

Gem City has presented data for two different water service years, 2005 and 2010. Consistent with statewide and national trends, even though the service population of the town went up from 2005 to 2010, the demand went down, slightly. Since 2010 best captures existing demand characteristics, which are most likely to translate forward in time, it is appropriate to use data from 2010 to establish water demand.

Gem City has presented total diversion records and a breakdown of non-residential demand. They have not provided a breakdown of residential demand exclusive of non-residential demand nor have they presented data on unaccounted for water (UAW). Without a breakdown of residential demand, it is hard to make use of the non-residential demands. From the total diversion data, it is possible to derive a per capita water use, but this value will incorporate or carry with it the non-residential demand component. Because of the lack of data exclusive to residential demand the applicant should not utilize the non-residential data in forecasting water demand.

The following table summarizes monthly water demand diversions for 2010. It also summarizes per capita monthly average daily demand, which was calculated by assuming a static population over the entire course of the year of 1,044 people.

Gem City 2010 Municipal Water Supply System Diversion Records

Month	No. Days	2010 Monthly Div. (gal)	Monthly ADD (GPD)	Monthly ADD per Capita (GPD)
Jan	31	5,354,690	172,732	165
Feb	28	3,547,730	126,705	121
Mar	31	3,771,120	121,649	117
Apr	30	5,102,560	166,752	160
May	31	4,259,420	137,401	132
Jun	30	6,009,070	200,302	192
Jul	31	7,014,390	226,271	217
Aug	31	9,285,620	299,536	**287**
Sep	30	6,216,640	207,221	198
Oct	31	5,737,530	185,082	177
Nov	30	5,507,040	183,568	176
Dec	31	5,151,590	166,180	159
Annual	365	66,957,400	--	--

From this data we can calculate the average daily demand (ADD) per capita by dividing the total diversions (66,957,400 gallons) by 365 days by 1,044 people. For 2010 ADD equals 176 gallons per day

(GPD) per capita. We can also determine the maximum monthly average daily demand (MMAD) per capita by dividing monthly total diversions by the number of days in the month by 1,044 people and selecting the largest value. For 2010 we can see that the MMAD is equal to 287 GPD per capita and this value occurred in August, which is logical, as this is the month likely to necessitate the greatest irrigation demand on the system. Sufficient data does not exist to calculate maximum day demand (MDD) or peak hourly demand (PHD). Therefore, to determine these values, in consideration of the fact that historical data and analogous systems are insufficient to derive actual values for this example, we will rely upon the peaking factor values presented in Table 3. Utilizing values from Table 3 we can calculate MDD from MMAD by multiplying MMAD by 1.3, this calculation yields a MDD per capita value of 373 GPD. Alternatively, we could calculate MDD from ADD by multiplying ADD by 2.0, this calculation yields a MDD per capita value of 352 GPD.

To calculate the total projected future water demand we must multiply the future population at the end of planning horizon (1,398 people) by the selected per capita demand value. Since Gem City relies on storage to meet peak hourly demand, the maximum day demand represents the design demand value for forecasting future water demand. Since estimations of MDD from ADD and MMAD are both valid approaches it is appropriate to use the larger of the two values. With these considerations in mind the projected future MDD water demand is equal to 362 gallons per minute (GPM) or 0.81 cubic feet per second (CFS). Gem City does not have any data on UAW. In this event we can use a maximum UAW value of 10% of total diversions. Therefore, after accounting for UAW the projected future MDD water demand can be adjusted to 0.91 CFS (0.83 + 0.10*0.83).

Review of Gem City's existing water right portfolio indicates that the city already has 0.40 cfs of diversion rate. This value must be subtracted from the projected future MDD water demand to determine the diversion rate value that will be included on the new RAFN water right, in this instance the final RAFN diversion rate value will be 0.51 CFS (0.91 – 0.40).

Gem City's proposed RAFN service area will include a municipal water right for 0.20 cfs currently owned by a homeowner's association within the proposed service area. The disposition of this water right should be addressed in the RAFN application.

Summary of IDWR's guidance on RAFN and Non-RAFN Rights

Based on Mat Weaver Memo of 3/16/2015 and Jeff Peppersack Memo of 10/19/2009.
Last edit: 2/3/2021

History of this spreadsheet:
This spreadsheet was developed by Chris Meyer shortly after the 2009 and 2015 guidance was released.
On 1/27/2021, revisions were made by Chris Meyer to cell 10-D of tab "Guidance Summary" based on discussions with Dan Nelson of IDWR. This revision addressed and clarified the potental additional increment added to the quantity based on future use of currently stubbed-in units.
On the same day (1/27/2021), Chris Meyer also edited cells 8-B/C/D/ and 11-B/C/D of tab "Guidance Summary" to clarify that a volume limit may be added based on 24/7/365 diversions.

567953_14.xls

Version Information: Page 1 of 1

DEFINED TERMS

Defined Terms	Definition
1996 Act	"1996 Act" refers to the Municipal Water Rights Act, 1996 Idaho Sess. Laws, ch. 297 (codified as amended at Idaho Code §§ 42-202(2), 42 202B, 42-217(¶4), 42-219(1) & (2), 42-222(1), 42-223(2), 43-335, 43-338)
Growing communities doctrine	The "growing communities doctrine" is a common law doctrine that allows traditional municipal providers to acquire and hold water rights to meet the future needs of the community served. The growing communities doctrine pre-dates the 1996 Act. The 1996 Act codified and modified the growing communities doctrine.
Municipal provider	The term "municipal provider" is defined by the 1996 Act at Idaho Code § 42-202(B)(5) as follows: "'Municipal provider' means: (a) A municipality that provides water for municipal purposes to its residents and other users within its service area; (b) Any corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water for municipal purposes to users within its service area, or (c) A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a "public water supply" as described in section 39-103(12), Idaho Code." Under this guidance, the term "municipal provider" is divided into two types of municipal provider: traditional municipal providers and non-traditional municipal providers, as defined below.
Traditional municipal provider	"Traditional municipal provider" means those municipal providers that would have been treated as municipalities under the common law growing communities doctrine prior to the 1996 Act. This includes: (1) a city incorporated under Idaho Code § 50-102 that provides water to residents of the city (and sometimes also customers outside of the city), (2) a public utility regulated by the Idaho Public Utilities Commission serving water to customers within a service area that includes an incorporated city, or (3) a water district or water and sewer district established pursuant to Idaho Code §§ 42-3201 to 42-3239 serving customers within a service area that includes an incorporated city.
Non-traditional municipal provider	"Non-traditional municipal provider" means a corporation, association or state entity that meets the expanded definition of "municipal provider" in the 1996 Act (Idaho Code § 42-202B(5)) but which would not have been treated as municipal provider under the common law. For example, prior to the 1996 Act, subdivision developers could not obtain municipal water rights for their projects. Instead they obtain domestic and irrigation water rights. Under the 1996 Act, the definition of municipal provider was expanded to include most new subdivisions (those regulated as a public water supply under Idaho Code § 39-103(12)). The definition was also expanded to include political subdivisions of the State that provide water for municipal purposes. This might include, for example, water for state universities, state prisons, and highway facilities.
Planning horizon	"Planning horizon" is defined by the 1996 Act at Idaho Code § 42-202B(7) as follows: "'Planning horizon' refers to the length of time that the department determines is reasonably necessary for a municipal provider to hold water rights to meet reasonably anticipated future needs. The length of the planning horizon may vary according to the needs of the particular municipal provider." The term applies only to municipal providers that establish RAFN under the 1996 Act.
Reasonably anticipated future needs ("RAFN")	"Reasonably anticipated future needs" is defined by the 1996 Act at Idaho Code § 42-202B(8) as follows: "'Reasonably anticipated future needs' refers to future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality. Reasonably anticipated future needs shall not include uses of water within areas overlapped by conflicting comprehensive land use plans." Although the growing communities doctrine also embodies the concept of holding water rights to meet future needs, the term "RAFN" as used in this guidance is applicable only to water rights that expressly are appropriated or transferred pursuant to the planning horizon and RAFN provisions of the 1996 Act.

DEFINED TERMS	
Defined Terms	**Definition**
Non-RAFN	"Non-RAFN" refers to municipal water rights (including permits or applications for permit) not obtained pursuant to the planning horizon and RAFN provisions of the 1996 Act. This would include municipal water rights obtained by (1) traditional municipal providers prior to the 1996 Act, (2) traditional municipal providers after the 1996 Act, but without establishing a planning horizon or RAFN, and (3) non-traditional municipal providers after the 1996 Act, but without establishing a planning horizon or RAFN.
Portfolio of water rights	The term "portfolio of water rights" refers to all water rights, permits and applications for permit held by a municipal provider for an integrated municipal water delivery system. Where a single municipal delivery system is served by water from different sources (e.g., ground water and surface water feeding into the same delivery system), IDWR will determine on a case-by-case basis how to define the portfolio. A municipal provider may have more than one portfolio of rights, permits and applications where it operates separate water delivery systems (e.g., one for potable use and one for irrigation, or non-connected systems serving different geographic areas).
Capacity of the system	"Capacity of the system" refers to the diversion rate at which an RAFN water right will be licensed (see Row 7, Columns A and B of the guidance). This quantity is not necessarily limited to the physically constructed system if there is tangible evidence of the applicant's commitment to complete the diversion and delivery system and divert the water to beneficial use during the planning horizon. The rules for quantification of the "capacity of the system" are set out in Application Processing Memo No. 63 and are incorporated herein by this reference.
Installed capacity	"Installed capacity" means the maximum system-wide instantaneous diversion capacity (measured as a rate of flow) from all operational diversion facilities within the municipal provider's integrated delivery system. The installed capacity may be different that the sum of the capacities of each of the diversion facilities in the system. Accordingly, it may be necessary to estimate the installed capacity of the system using sound engineering practices. The increase in installed capacity quantified at the time of licensing refers to the additional system-wide installed capacity achieved by adding the new POD or PODs associated with the newly licensed right. The "increment" in installed capacity also includes authorization under the new permit or license to divert using existing installed capacity that, for one reason or another, is not covered by any prior water right, permit, or decree. This increment in installed capacity is the upper limit on the diversion rate for non-RAFN water rights at the time of licensing.
Stub-in practice	The "stub-in" practice refers to IDWR's informal practice of allowing licenses for municipal water rights held by non-RAFN, non-traditional municipal providers to include an additional increment of rate and volume beyond current actual production, but limited to installed capacity, to serve homes or other domestic uses (as defined in Idaho Code § 42-222(1)(a)) that are physically stubbed-in to an operational delivery system (including a service line to each lot) at the time of licensing, even if no homes or other domestic uses have been constructed on the stubbed-in lots. Credit for stubbed-in lots will not be allowed where inappropriate, for example, when a substantial time has passed since permitting and homes or other domestic uses are still not built and it is not evident that the development will be completed.
Acronyms	**Definition**
IDWR	Idaho Department of Water Resources
POD	Point of diversion (which may be either a well or surface diversion)
RAFN	Reasonably anticipated future needs (see definition above)

RAFN & NON-RAFN GUIDANCE SUMMARY

	Based on Administrator's Memorandum, App. Processing No. 74 (Weaver Memo, revised on 3-16-2015)		Based on Administrator's Memorandum, App. Processing No. 18, Licensing No. 1 (Peppersack Memo of 10-19-2009)	
	RAFN Traditional Municipal Providers	**RAFN Non-Traditional Municipal Providers**	**Non-RAFN Traditional Municipal Providers**	**Non-RAFN Non-Traditional Municipal Providers**
Service area:	All holders of municipal water rights are entitled to a flexible, growing service area. This common law flexibility was codified under the 1996 Act at Idaho Code § 42-202B(9) for all municipal providers. Boundaries of the service area may change without approval of IDWR or transfer of water right.			
Documentation required for new permit:	Per Water Appropriation Rule (IDAPA 37.03.08.40.05.d.i): "Information shall be submitted on the water requirements of the proposed project, including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that water is required, and the volume of water that will be consumptively used per year." In addition, the permit applicant must show that it is qualified as a municipal provider, and it must submit information sufficient to establish a planning horizon and RAFN consistent with non-overlapping comprehensive plans. The applicant must show that its existing portfolio of water rights (if any) plus the new permit do not exceed RAFN.		Per Water Appropriation Rule (IDAPA 37.03.08.40.05.d.i): "Information shall be submitted on the water requirements of the proposed project, including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that water is required, and the volume of water that will be consumptively used per year." In addition, the permit applicant must submit information sufficient to demonstrate that the additional water supply under the permit is needed in the short term, i.e., that its current portfolio of water rights (if any) is insufficient to meet current demand plus additional demand expected during the five-year permit period. If this cannot be shown, then the provider should apply instead to add additional points of diversion to its existing water rights.	
New POD:	If a municipal provider applicant wishes to add a POD to a water delivery system and cannot demonstrate that an additional water right is needed (as in the "Documentation" Row), the applicant should seek a transfer (or amendment) of one or more of its existing water rights (or permits) to add the POD.			
Diversion rate in permit:	The diversion rate may not exceed the quantity determined by the "gap analysis" – that is, future demand at the end of the planning horizon minus the quantity of authorized diversions under the applicant's existing portfolio corresponding the relevant service area.		The diversion rate for the permit may not exceed the anticipated increment of new system-wide diversion capacity (compared to the existing system-wide diversion capacity in place and authorized by prior rights, permits, or decrees before the new permit) shown to be necessary to serve needs during the five-year development period of the permit. This increment of new capacity includes both new capacity that will be built during the development period of the permit and existing capacity that, for one reason or another, is not covered by existing rights, permits, or decrees. Although the language of the guidance references both system capacity and demand (which are entirely different things), the Department looks primarily to a showing that short term customer demand (not physical diversion capacity) is or will very soon be in excess of authority to divert under the applicant's existing rights. System capacity comes into play more prominently at the licensing stage. The diversion rate may be further limited as necessary to protect the local public interest or to address other special circumstances.	
Annual volume in permit:	A new permit will not contain an annual volume limit except as necessary to protect the water source pursuant to the local public interest (e.g., it may not be in the public interest to dewater a stream) or to address other special circumstances. In the case of an amendment of an existing non-municipal permit, any volume limitation shall be retained. If there is no volume limit, the permit/right holder may grow into year-round use of the permit/right at the full authorized diversion rate as part of its base load municipal supply. The municipal provider may increase peak delivery beyond the stated diversion rate by employing storage tanks. Where desired by the water user, the Department may impose a volume limit where none would ordinarily be imposed corresponding to the volume of water produced if water was diverted 24/7/365 at the authorized diversion rate. These volume limits (which are really no limit at all) are convenient for quantifying system-diversion authority on a volumetric basis.			The Department will limit the annual volume under the permit to the quantity required to meet anticipated diversion demand at the time of proof, as quantified in the far right column of the Row labeled "Annual volume in license." The volume may be further limited as necessary to protect the local public interest or to address other special circumstances.
Time of proof:	5 years (with possible 10 year extension).			

RAFN & NON-RAFN GUIDANCE SUMMARY

	Based on Administrator's Memorandum, App. Processing No. 74 (Weaver Memo, revised on 3-16-2015)		Based on Administrator's Memorandum, App. Processing No. 18, Licensing No. 1 (Peppersack Memo of 10-19-2009)	
	RAFN Traditional Municipal Providers	**RAFN Non-Traditional Municipal Providers**	**Non-RAFN Traditional Municipal Providers**	**Non-RAFN Non-Traditional Municipal Providers**
Diversion rate in license:	Idaho Code § 42-219(1) provides: "A license may be issued to a municipal provider for an amount up to the full capacity of the system constructed or used in accordance with the original permit provided that the director determines that the amount is reasonably necessary to provide for the existing uses and reasonably anticipated future needs within the service area and otherwise satisfies the definitions and requirements specified in this chapter for such use." The diversion rate in the license was previously quantified under IDWR's "capacity of the system" guidance in Application Processing Memo No. 63. The quantification is now governed by Application Processing Memo No. 74, which reads the "capacity of the system" requirement more conservatively. It requires that wells or surface diversions as well as trunk lines be in place at the time of licensing. The Weaver Memo further provides: "As required by I.C. § 42-217, the statement of completion for proof of beneficial use shall include a description of the extent of use and a revised estimate of RAFN, containing a revised description of the RAFN service area, a revised planning horizon, and appropriate supporting documentation. Appropriate supporting documentation means a revised analysis of the same RAFN support material submitted at the time of application reflecting the system as it exists at the end of the permit development period. Also included should be a revised gap analysis including an updated portfolio of existing water rights." In any event, the licensed diversion rate may not exceed the quantity in the permit.		The diversion rate in the license will ordinarily be set to reflect the incremental "installed capacity" (see definition) developed and operational at the time of licensing (but not to exceed the quantity stated in the permit). However, IDWR has the discretion to adjust this quantity downward where the system-wide installed capacity substantially and unreasonably exceeds the actual peak system-wide demand because the intended use described in the application as justification for the permit was not accomplished. Thus, if peak system-wide production plus the quantity needed to serve currently stubbed-in future development–less the quantity of diversion authorized by all other rights serving the system–is less than the incremental installed capacity, the license may be issued with a condition limiting the combined diversion rate for all water rights in the system to a total quantity that includes no increment (or a reduced increment) for the new license. Similarly, if no incremental "installed capacity" is developed, the license may be issued with a condition limiting the diversion rate in combination with other rights in the provider's portfolio for the interconnected system to the then existing capacity of the municipal system. This is referred to informally as the "Tuthill Compromise" where the combined use condition allowing no additional system-wide increment of diversion is used to authorize diversion from a new well or wells without going through the transfer process.	The diversion rate in the license may not exceed the lesser of the incremental "installed capacity" (see definition) or the amount stated in the permit. The quantity will be adjusted downward if the system-wide installed capacity exceeds the amount reasonably necessary to serve the needs within the service area based on existing peak diversion to beneficial use plus allowance under the "stub-in practice" (see definition). If no incremental "installed capacity" is developed, the license may be issued with a condition limiting the diversion rate in combination with other rights in the provider's portfolio to the then existing capacity of the of the municipal system.
Annual volume in license:	The license will not contain an annual volume limit (unless (a) such a limit was included in the permit, in which case the license volume shall not exceed the permit volume or (b) in the event of a downward adjustment for a Non-RAFN Traditional Municipal Provider as described in the Row labeled "Diversion rate in license." If there is no volume limit, the right holder may grow into year-round use of the water right at the full authorized diversion rate as part of its base load municipal supply. The municipal provider may increase peak delivery beyond the stated diversion rate by employing storage tanks. Where desired by the water user, the Department may impose a volume limit where none would ordinarily be imposed corresponding to the volume of water produced if water was diverted 24/7/365 at the authorized diversion rate. These volume limits (which are really no limit at all) are convenient for quantifying system-diversion authority on a volumetric basis.			Unlike other municipal water rights, all licenses for Non-RAFN Non-Traditional Municipal Providers will contain an annual volume limit. Ordinarily this volume will be determined on the basis of the installed capacity, but will be adjusted downward if that significantly exceeds the actual production at the time of licensing plus credit given under the "stub-in practice" (see definition). The licensed diversion volume may not exceed the quantity in the permit.
Fire flows as part of municipal right (permits & licenses):	The quantity of water required to meet fire flows may be included in the quantification of the municipal water right.		The quantification of water rights held for municipal purposes shall not include water needed solely for fire flows. To the extent the applicant seeks a water right for fire flows, that quantity must be listed as a separate use and be separately quantified, and such water may not later be changed to municipal use.	

RAFN & NON-RAFN GUIDANCE SUMMARY

	Based on Administrator's Memorandum, App. Processing No. 74 (Weaver Memo, revised on 3-16-2015)		Based on Administrator's Memorandum, App. Processing No. 18, Licensing No. 1 (Peppersack Memo of 10-19-2009)	
	RAFN Traditional Municipal Providers	**RAFN Non-Traditional Municipal Providers**	**Non-RAFN Traditional Municipal Providers**	**Non-RAFN Non-Traditional Municipal Providers**
Fire flows - volume limitation (permits & licenses):	Permits and licenses issued for fire protection purposes to fight an existing fire doe not require a volume limitation since the volume would be variable and unpredictable for firefighting purposes. A volume limitation is required for fire protection storage where water is stored to fight a future fire			
Amendment of permit application to add RAFN:	Not applicable.		A non-RAFN permit application may be amended to allow water to be held for RAFN purposes (which will require meeting all requirements for an RAFN permit application). However, it must be re-advertised, and the priority date will be advanced to the date of the amendment.	
Amendment of existing permit or license to add RAFN:	Not applicable.		A non-RAFN permit or license may not be amended to allow water to be held for RAFN. Instead, the municipal provider must seek a new appropriation or transfer of other water rights for RAFN. Post-1996 non-RAFN municipal water rights may be not transferred to convert them to RAFN purposes.	
Retroactive applicability of guidance to permits issued prior to guidance:	Existing permits issued prior to the date of this memorandum should be handled on a case-by-case basis when determining beneficial use for licensing purposes. Determination of beneficial use for permits pre-dating this memorandum [of 10-19-2009] may depend on the date the permit was issued in relation to the 1996 Municipal Water Rights Act and/or any specific intent to limit the beneficial use that could be developed under the permit at the time it was issued.			

Appendix N: IDWR GUIDANCE ON LAND APPLICATION

MEMORANDUM

TO: Norm Young

FROM: Phil Rassier PJR

RE: Land Application of Industrial Effluent

DATE: September 5, 1996

You have asked for legal guidance regarding the water right implications created when a private industrial water user elects to land apply its industrial effluent because the company is required by environmental constraints to prohibit its waste water effluent from continuing to reach a public water source. The water rights issue created when an industrial water user adopts a land-application method of disposing of its effluent is whether the change results in an impermissible enlargement of its underlying water right by increasing the amount of water consumptively used. Previously, some percent of the water in the effluent was returned to a public stream or allowed to percolate into the ground water. The goal of land application of the effluent is that it all will be absorbed by the growing crops or evaporated to the atmosphere. The use of water under the industrial water right thus becomes 100 percent consumptive where before it was not.

The case law addressing this issue appears to deal almost exclusively with the disposal of municipal effluent. In the case of municipalities, the majority view is that the proper disposal of effluent from waste treatment facilities comes within the parameters of the beneficial use of a municipal water right. One of the most frequently cited cases is *Arizona Public Service Co. v. Long*, 773 P.2d 988 (Ariz. 1989). In this case, the owners of downstream junior water rights that had historically used the effluent for irrigation following upstream discharge sued the City of Phoenix alleging that the city had no right to contract with a utility for the transport and use of the effluent in the cooling towers of a nuclear power plant. The court upheld the contract, holding that sewage effluent was neither surface water nor ground water, but was simply a noxious by-product which the city must dispose of without endangering the public health and without violating any federal or state pollution laws. In reaching it decision, the Arizona Court quoted from a much earlier Wyoming decision which upheld the sale by a city of effluent discharged directly into the buyer's ditch, but also held that effluent discharged into a stream became public water subject to appropriation. *Wyoming Hereford Ranch v. Hammond Packing Co.*, 236 P.2d 764 (Wy. 1925). The *Arizona Public Service* case generally holds that cities may put their sewage effluent to any reasonable use that would allow them to maximize their use of the appropriated water and dispose of it in an economically feasible manner. Beck, *Waters and Water Rights*, § 16.04(c)(6) (1991).

In an even more recent Arizona case, the court upheld a city contract for the disposal of its effluent noting that the effluent from the city of Bisbee delivered to Phelps Dodge for copper leaching operations was not useable for drinking water, irrigation, or fire protection purposes and

that it was only useful for the leaching operation. The city contract had been challenged by the local water utility that otherwise would have provided water for the leaching operation.

Other cases reviewed have reached results similar to that in Arizona for municipal entities without as much emphasis on the distinct character of effluent. In a more recent Wyoming case, the court held that the City of Roswell could recapture its sewage effluent before it is discharged as waste or drainage and reuse it for municipal purposes. *Reynolds v. City of Roswell*, 654 P.2d 537 (Wy. 1982). The court characterized sewage effluent as artificial water and therefore primarily private and subject to beneficial use by the owner and developer thereof because treated sewage effluent depends upon the acts of man.

In the early Colorado case of *Pulaski Irrigation Ditch Co., et al v. City of Trinidad, et al*,203 P. 681 (Colo. 1922), the court held that where a city had voluntarily chosen to treat its effluent in a manner that produced surplus water, it did not have the right to sell its purified water. The court went on to recognize, however, that where there is no other practicable method of disposing of the sewage, public policy might permit its disposal by the evaporation of the water. 203 P. at 683. A more recent Colorado case, *Metropolitan Denver Sewage Disposal District No. 1 v. Farmers Reservoir & Irrigation Co.*, 499 P.2d 1190 (Colo. 1972) merely holds that changes in the points of return of waste water to a stream are not governed by the same rules as changes of points of diversion and that there is no vested right in downstream appropriators to maintenance of the same point of return of irrigation waste water or effluent from a municipality or a sanitation district. In *Barrack v. City of Lafayette*, 829 P.2d 424 (Colo. App. 1992), the court held that impossibility of performance relieved the city from any obligation to deliver effluent to plaintiffs after state regulation made such delivery illegal. The court concluded that plaintiffs had no property right to the delivery of untreated water that could no longer be legally delivered.

In 1991, Nevada and Oregon each enacted legislation addressing the reuse of effluent or reclaimed water. The Oregon statute defines "reclaimed water" as "water that has been used for municipal purposes and after such use has been treated in a sewage treatment system and that, as a result of treatment, is suitable for a direct beneficial purpose or a controlled use that could not otherwise occur. OR. REV. STAT. § 537.131. The new legislation requires any person who is using or intends to use reclaimed water to file a Reclaimed Water Registration form with the Oregon Water Resources Department. The statute provides the circumstances under which potentially affected water users must be notified of the proposal and of their rights of preference to the use of the water under certain circumstances. The Nevada statute, by contrast, merely provides a statement of legislature policy encouraging and promoting the use of effluent, where that use is not contrary to the public health, safety or welfare, and where that use does not interfere with federal obligations to deliver water of the Colorado River. N.R.S. § 533.024.

The review of existing case law provides significant guidance with respect to the handling

of municipal effluent. None of the reported cases I have reviewed, however, address whether the same or some different analysis should be applied when the effluent is produced by a private industrial user rather than by a municipality. This issue was raised but not addressed in *Wyoming, et al v. Husky Oil Company*, 575 P.2d 262 (Wy. 1978). The case arose as an action for declaratory relief by Husky Oil seeking a determination that its plan to impound and evaporate effluent water rather than continue to discharge it to a natural stream was not subject to the jurisdiction of the State Engineer and did not infringe upon any rights of downstream water appropriators. The majority of the Court voted to remand the case to the trial court for a full factual trial and to join other indispensable parties to the action. A lengthy dissent, however, proceeded to analyze the merits of the case. The dissent characterized the proposed change as an expansion of the original industrial water right for the refining process to now include the additional use of pollution abatement. The dissent concluded that Husky should be required to apply to the State Engineer for a permit for the additional use.

Before the Department, we have the precedence of issuing waste water permit nos. 29-7437 and 29-7431 to the J.R. Simplot Company and to the City of Pocatello respectively in 1978. The two permits were for the use of waste water from the city's sewage treatment plant and from the Simplot Fertilizer Plant at Pocatello. The waste water from both facilities was previously discharged to the Portneuf River. The applications specified 3,124 acres of land on which the water would be used for irrigation. Some 1,613 of these acres were not owned by the city or the J.R. Simplot Company but were covered by user agreements with the owners of the land. The decision does not address any concern that may have existed about discontinuing the practice of discharging the effluent to the river. The concerns with the project revolved more around the health and safety implications of the project.

Existing law in Idaho does not provide strong guidance as to whether the land application of industrial effluent initiated to comply with water quality requirements should be considered to come within the original purpose of use of the industrial water right, or should be treated as an added beneficial use of the water requiring a new water right to be obtained or established. If the Department determines that a new separate water right should be required, the option of allowing the user to appropriate the industrial waste water for the new purpose of pollution abatement through land application of the effluent should be considered. This approach is consistent with that taken by the Department in 1978 with the City of Pocatello and J. R. Simplot filings.

Please let me know if you desire further review or discussion of these issues.

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000
Phone: (208) 327-7900 FAX: (208) 327-7866

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

ADMINISTRATOR'S MEMORANDUM

APPLICATION PROCESSING MEMORANDUM NO. 61

TO: WATER ALLOCATION BUREAU, ADJUDICATION BUREAU AND REGIONAL OFFICES

FROM: NORM YOUNG

SUBJECT: WATER RIGHT FILING REQUIREMENTS FOR INDUSTRIAL WASTE WATER USE AND TREATMENT (INTERIM POLICY)

DATE: September 27, 1996

PURPOSE OF MEMORANDUM

Because much of southern Idaho is included within areas covered by moratoriums or other designations that prevent or limit approval of new applications to appropriate water, water users are seeking innovative ways of using water for new and expanded projects. The waste water from industrial processes is one source of water for such uses. In addition, more restrictive water quality requirements are causing industrial water users to implement land disposal methods, create wetlands, capture and reuse waste water, and to provide for on-site containment of waste water.

The administrative requirements addressing the use of industrial waste water have not been clearly set forth. Direction is needed to guide staff and water users concerning the types of applications, if any, that need to be made, the criteria for considering such applications, and conditions that may be appropriate for approved applications. This memorandum addresses the water right filing requirements for the treatment of waste water and the reuse of waste water from industrial processes.

This memorandum provides interim guidance pending additional determination of policy and requirements through changes to law, adoption of rules or court rulings. Because a basic premise of this memorandum is that the consumptive use authorized by a water right for industrial purposes can be 100% of the amount diverted, depending on particular factual issues, this memorandum does not apply to waste water from uses which could not be 100% consumptive.

For purposes of this memorandum "waste water" is effluent, treated or untreated, from authorized beneficial uses under an industrial or other potentially 100% consumptive water right, prior to its being returned to a public water source. Waste water may contain solid waste and other contaminates, but for purposes of this memorandum it is a liquid, fluid enough to flow in an open channel or unpressurized pipeline.

AN EXAMPLE OF A TYPICAL SITUATION

An industrial user has for many years disposed of waste water diverted from the aquifer under a licensed right through a series of ponds which evaporate part of the water with the remainder seeping to the regional aquifer. In this instance, DEQ is requiring that water not be allowed to seep to the aquifer and has suggested land application. The land available for disposing of the waste is in sagebrush and does not have an irrigation water right. Each gallon of waste water land applied will have to be diluted with 3 to 4 gallons of fresh water. The net depletion from the aquifer will be increased 400 af/yr by the new water treatment requirements. Are water right related approvals required from IDWR to authorize surface disposal of the waste water?

LEGAL PRINCIPLES

The continuum of options for considering this mattter is bounded by two principles. At one end of the continuum, the treatment necessary to comply with water quality requirements may be a part of the diversion and beneficial use authorized under the industrial water right. If the industrial right is a fully consumptive right, then as water quality requirements require a change in treatment, the amount of the water consumed can be increased. However, the diversion rate, annual volume diverted, and season of use established under the right cannot be increased. Any fresh water needed to dilute the waste water must be within the quantity elements of the industrial right or be covered by another water right.

At the other end of the continuum, the industrial right may be construed to authorize only the beneficial use established and historically used under the industrial right. Any increase in consumptive use (or other element of the right) would require a new water right. Depending upon the availability of water for appropriation, this may require the holder of the industrial right to mitigate injury to other users or obtain an existing right to cover the expanded consumption.

A brief review of the legal and administrative precedents (see Phil Rassier's attached memorandum) indicates that the existing law in Idaho does not provide strong guidance as to whether the land application of industrial waste water initiated to comply with water quality requirements should be considered to come within the original purpose of use of the industrial right, whether it should be treated as an added beneficial use of the water requiring a new water right, or whether some intermediate consideration should be used.

APPLICATION OF PRINCIPLES

IDWR will apply the following policies until or unless further guidance is provided:

1. Waste water treatment necessary to meet adopted state water quality requirements will be considered to be a part of the use authorized under the industrial right. The method of treatment must be "reasonable." IDWR will consider a treatment method to be reasonable if it is in accordance with best management practices recognized by Idaho Division of Environmental Quality, the U.S. Environmental Protection Agency, or other responsible state or federal agency.

2. Consumptive use can increase up to the amount determined to be consistent with the original water right as reasonably necessary to meet treatment requirements. Diversion rate, annual volume diverted, and season of use cannot exceed the permitted, licensed or decreed amounts for these parameters.

3. If the treatment method for industrial waste water is changed to land application on cultivated fields or any other method that beneficially uses the water, the industrial right must be changed to include the new use. This will require a transfer application to be filed, processed and approved in accordance with Section 42-222, Idaho Code, to include a new location for a waste treatment practice, such as land application, and other conditions of approval that may be necessary to prevent injury to other valid water rights.

4. For new uses of industrial waste water that are not necessary to meet water quality requirements, an application for permit to appropriate water should be filed as required by Section 42-107, Idaho Code.

5. Fresh water required to dilute the waste water for treatments such as land application must be diverted in accordance with a water right. This can be the industrial right if adequate rate and volume are available under the right. If not, another right must be provided. In areas where new allocations are limited or prevented by moratorium orders or other designations, establishment of a new right will require appropriate provisions to mitigate the depletion from the source.

Attachment: P. Rassier's Memorandum

ADMINISTRATOR'S MEMORANDUM

Application Processing No. 67

TO: WATER MANAGEMENT DIVISION

FROM: NORMAN C. YOUNG, ADMINISTRATOR NCY

RE: PERMITTING REQUIREMENTS FOR PONDS

DATE: February 28, 2003

This memorandum provides general guidance on the permitting requirements for impounding and using water in a pond. Its primary focus is to describe circumstance for which a water right is needed to retain and use water while impounded in a pond. This narrow focus is appropriate because it is generally understood and accepted that a water right is needed to divert water to a pond for beneficial use in the pond or to divert water from a pond for a beneficial use outside of the pond.

The direction provided in this memorandum is intended to clarify the Department's policy regarding ponds constructed or proposed to be constructed after the date of this memorandum and to changes in use of existing ponds, where the change in use occurs or is proposed to occur after the date of this memorandum. It is not intended to direct Department staff to initiate investigative or regulatory action for ponds existing prior to the date of this memorandum or to address the need for a claim to be filed in an ongoing adjudication of water rights. If a written complaint is filed with the Department showing probable injury to an existing water right where the injury is alleged to be related to the use of a pond developed prior to the date of this memorandum, staff is instructed to forward the complaint to the division administrator for case-by-case guidance.

A simple "yes" or "no" answer to the question "Is a permit needed?" often cannot be given because of the variety of circumstances associated with construction and use of ponds. Whether or not a permit is needed or can be issued is to be determined on a case-by-case basis by applying the concepts discussed in this memorandum.

1

GENERAL CONSIDERATIONS

A water right is required to use public water if: (1) it is diverted, (2) a beneficial use is made of the water and (3), traditionally, the diverter intends to protect the right to divert and use the water against later-in-time diversion and use from the source. However, the third parameter for requiring a water right is not now strictly applicable in Idaho because Section 42-201, Idaho Code, makes it unlawful to divert or use public water without a valid water right. Public water sources must be regulated to assure diversion occurs only in accordance with a valid water right. Excavation or other activities, incidental to the purposes of an activity, can create ponds or enlarge existing ponds resulting in the impoundment of water which the developer or owner does not intend to beneficially use and does not intend to defend their continued access to this water against subsequent appropriators. Even so, in accordance with Section 42-201, Idaho Code, a water right is needed for such incidental ponds or timely action must be taken to avoid impounding water.

CONSTRUCTED PONDS

Generally, a water right is needed to beneficially use water in a constructed pond. This is true for ponds constructed by: (1) excavation to create a basin that fills naturally with water, (2) excavation that is filled by physical action to divert water into the basin, (3) or by constructing an embankment or other structure to create a reservoir that fills or is filled with water. Prior to beginning construction of a pond, the developer must file an application for and receive a permit to appropriate water or file an application and receive an approval to transfer an existing water right for the purpose of pond. Water Appropriation Rule 35.03b (IDAPA 37.03.08) provides that the annual storage volume shown on an application shall not exceed the storage capacity of the structure unless the application describes a plan for refilling the reservoir. This would include any plan to replace water lost from a constructed pond due to evaporation and/or seepage. The application fee is based on the annual storage volume proposed in the application, which should include any proposed refills.

An application for a pond to be constructed by excavation below the ground water level to be filled naturally from ground water must include the annual volume required to replace evaporation losses in addition to the volume to be stored in the pond. Ponds constructed in this manner should list ground water as the source on the permit.

Off-stream storage ponds requiring additional flow-through water to maintain water quality require a flow component in addition to a the diversion-to-storage and storage components on the permit. For applications including uses quantified as a combination of rate and volume, the application fee is based on the amount providing the greater fee.

There are several circumstances that can alter the general statement that a water right is needed and can be issued to store water in a constructed pond. Some examples are described below.

Incidental Ponds

An excavation made for another purpose (e.g. gravel or mineral extraction) that fills naturally with water does not require a permit if the excavation will be filled in or otherwise reclaimed to obliterate the pond within a reasonable time. A permit is required if the resulting pond will be retained for aesthetics, recreation or other beneficial uses. For gravel or mineral extractions, a reclamation plan filed with the Department of Lands can provide information on the intended disposition of the excavation.

Diffused Surface Water

A water right permit is not required to construct and use a pond with diffused surface water as its sole source (see Adjudication Memo No. 11 for a detailed discussion of diffused surface water). Diffused surface water is not considered to be public water and is therefore not subject to appropriation. Diffused surface water is water on the surface of the land from precipitation and snowmelt prior to entering a natural watercourse. One example of the capture of diffused surface water is an excavation or embankment constructed to capture rainwater or snowmelt runoff from a subdivision or parking lot prior to the runoff entering a natural watercourse. A landowner is entitled to capture and use diffused surface water before it enters a natural stream, lake or other public source. However, if the diffused surface water is a source of supply to a natural watercourse and the landowner's use significantly depletes that supply, it may cause injury to a senior appropriator who may seek to enjoin the use.

Regulation/Distribution Ponds

A water right permit is not required to construct and use a pond or ponds that are part of a system used to distribute and use water in accordance with a valid water right if the pond or ponds do not impound a larger volume of water than authorized for diversion within a 24-hour period under the water right or rights associated with the project. One example would be a pond constructed as part of an irrigation system to provide a higher rate of flow over a short period of time as required in some border irrigation systems.

Similarly, a water right permit is not required to construct and use a pond or ponds to collect and re-use irrigation runoff as long as the water is used on the lands from which the runoff occurred for the use authorized under an existing right. Collection must occur prior to the runoff entering a natural watercourse where it becomes available for public appropriation. The principal use of the pond or ponds in these cases must be for purposes of distributing and using or

re-using the water under the existing right. If the principal use is some other beneficial use, a water right for storage in the pond is required.

Wastewater Treatment

Based upon the concepts in the Department's interim industrial waste water policy (see Application Processing Memo No. 61 dated September 27, 1996), a water right permit is not needed to construct and use a pond that is necessary to comply with water quality standards and treatment requirements for a beneficial use that already has a water right. The policy does not include a restriction on pond size.

Domestic Exemption

A water right permit is not required to construct and use a pond that meets the statutory requirements for exemption for domestic uses (Sections 42-111 and 42-227, Idaho Code). If the pond is excavated and fills naturally with ground water or is constructed in any manner and is filled by pumping ground water, the total use of the pond and the other domestic uses exempted from permitting must not exceed 13,000 gallons per day for uses under part (1)(a) of Section 42-111, Idaho Code or 0.04 cubic feet per second and 2,500 gallons per day for uses under part (1)(b). Determination of the water use for a pond should take into account the fill rate of the pond (for ponds not filled naturally with ground water), evaporation and seepage from the pond, flow-through water to refresh the pond, and any other water used or discharged from the pond. Evaporation should be based upon a typical maximum daily evaporation rate rather than an annual average rate.

The attached spreadsheet was developed to estimate domestic water use to help determine an allowable pond size for domestic exemptions (**Note that the allowable surface area for a pond exempt from the water right permit requirement is determined by application of this spreadsheet and is not necessarily ½ acre**). The spreadsheet calculates a maximum daily water use in gallons per day by accounting for in-house, lawn and garden, pond, and other related domestic uses.

If a water user desires to file an application for permit for a pond even though the use meets the statutory requirements for exemption for domestic uses, the use would normally be approved as a domestic use with a standard diversion rate and no storage component. The application fee would be based on the diversion rate. An application for permit for a use complying in all respects with the requirements to be exempt from permitting under the domestic exemption may be processed unless otherwise provided in the management plan adopted for a ground water management area, critical ground water area or moratorium area.

Other Considerations

Ponds constructed and beneficially used prior to the mandatory permit dates can claim a beneficial use right. A beneficial use right could also have been established if the claimant can show that the right was commenced before the mandatory permit dates and the appropriation was completed with due diligence after the mandatory dates (see Adjudication Memo No. 23). For example, if a pond was excavated for gravel extraction prior to 1963, but was not used for aesthetics or recreation until after that date, a right could have been established as long as the use was completed in a reasonable period of time.. The priority date of such rights is the date the appropriation was completed.

Approval is required under the Safety of Dams Act (Section 42-1709, *et. seq.*, Idaho Code, if the impoundment meets the requirements to be classified as a dam (Ref. Dam Safety Rule 10.06, IDAPA 37.03.06).

The Department should actively investigate citizen complaints concerning new construction and use of ponds. If the pond is not exempt from permitting requirements, the Department should seek an appropriate application for permit or transfer of an existing water right if processing of an application for permit cannot proceed because of a moratorium order or other designation affecting the area. The owner of the pond may be required to provide appropriate mitigation to offset reduction in water available to prior rights.

NATURAL PONDS

Generally, a water right is not needed and cannot be issued to protect, in place, the waters of a natural pond. Natural ponds include those formed and existing under natural conditions and those that were created when natural basins filled with seepage or return flows from water lost by irrigation and other development projects. Because a physical diversion does not occur when a beneficial use is made of water in a natural pond, a water right is not needed and cannot be issued.

There are several circumstances that result in an answer different from the general statement that a water right is not needed and cannot be issued. First, under Chapter 15, Title 42, Idaho Code, the Water Resource Board is authorized to obtain a right (exempt from filing fees) for a minimum lake level without the need to divert the water. This provision can be used to appropriate, in place, the waters of a natural pond. If a pond is characterized as "private water" under Section 42-212, Idaho Code, the appropriation can only be made with the permission of the owner of the land on which the pond is located.

A second circumstance that could require a water right permit is expansion of the water holding capacity of a natural pond by excavating to deepen it or increase its surface area or by constructing an embankment or other structure to raise the

water level in the pond. A water right permit is required for the additional increment of water contained in the pond. The water right permit can only be issued for the additional storage created, not the entire volume of the pond. The application fee would be based on the volume added to the pond and any refills as proposed in the application. If a water right permit is not obtained, a stream alteration permit or lake protection permit is required for the excavation or other work done in the pond.

A similar circumstance arises from excavation of a stream channel either to deepen or widen it or by adding a check structure in the stream to create a pond. If the purpose is to provide for beneficial use of the ponded water, including uses such as aesthetics or recreation, a water right permit is needed for the increment of water (including any proposed refills) added by the excavation or structure. If a water right permit is not obtained, a stream alteration permit may be required.

Water Appropriation Rule 35.01c (IDAPA 37.03.08) provides that the use of a natural lake (or pond) for watering livestock without the use of a constructed diversion works is exempt from permitting requirements. If a water user desires to file an application for permit even though the use is exempt from permitting requirements under this rule, the use would normally be approved as stockwater with an appropriate diversion rate and no storage component. The application fee would be based on the diversion rate.

This Guidance Document is not new law but is an agency interpretation of existing law. For more information or to provide input on the document, please contact the Water Rights Section Manager at 208-287-4800. (Feb 2020)

ADMINISTRATOR'S MEMORANDUM

To: Regional Offices,
Water Allocation Bureau

Application Processing No. 73
Licensing No. 12
Transfer Processing No. 28

From: Jeff Peppersack

Re: UTILIZATION OF THE 24-HOUR FILL ALLOWANCE FOR IMPOUNDMENTS

Date: April 18, 2013

Department practices and policies have recognized the use of the 24-hour fill allowance (aka the "24-hour rule") in establishing the maximum impoundment volume allowed in association with a water right permit, license, or decree, for which a storage component identified as an element of the water right is not required (AP Memo 67[1]). The Department has not provided additional guidance for implementation of this policy; consequently, the 24-hour fill allowance has been implemented by staff in a variety of ways. Additional guidance is necessary to avoid a proliferation of ponds on new or existing water diversion systems that may result in additional consumptive use and lack of control of the water to the detriment of other water users. It is important to note that this memo does not represent promulgated rules, but is instead a statement of the policy and practical implementation of the 24-hour fill allowance that has historically been used by the Department.

The guidance provided in this memo is intended to provide clarity, consistency, and detail in the implementation and use of the 24-hour fill allowance for ponds constructed or proposed to be constructed after the date of this memorandum and to changes in use of existing ponds, where the change in use occurs or is proposed to occur after the date of this memorandum. It is not intended to direct Department staff to initiate investigative or regulatory action for ponds existing prior to the date of this memorandum, that otherwise met past interpretations of the 24-hour fill allowance, or to address the need for a claim to be filed in an ongoing adjudication of water rights. If a written complaint is filed with the Department showing probable injury to an existing water right where the injury is alleged to be related to the use of a pond developed prior to the date of this memorandum, staff is instructed to forward the complaint to the division administrator for case-by-case guidance.

[1] Application Processing Memorandum No. 67 Permitting Requirements for Ponds, signed by Norm Young on February 28, 2003, states in part "A water right permit is not required to construct and use a pond or ponds that are part of a system used to distribute and use water in accordance with a valid water right if the pond or ponds do not impound a larger volume of water than authorized for diversion within a 24-hour period under the water right or rights associated with the project."

Historic utilization of the 24-hour fill allowance came about as recognition that many diversion structures will incidentally impound a certain amount of water to either raise the water level or otherwise facilitate diversion into a canal or other conveyance or distribution system, or to provide for short-term detention (24-hours) to facilitate operation of the distribution system for the purpose of use authorized under the water right. An example of the first case is creation of a small pool of water to ensure proper submergence of the suction piping in a pumping system. An example of the second case is detention of water in a small pond to provide a delayed, adjusted rate of diversion for night-time irrigation of a golf course or other facility where continuous irrigation during the day is not practical. Recognition of the 24-hour fill allowance for such uses is beneficial to the Department and water users because it eliminates the need to describe a storage component on a large number of water rights, allowing for faster processing of water right applications.

Further application of the 24-hour fill allowance by Department staff over time included its use for aesthetic, wildlife and/or recreation ponds. However, such application goes beyond the original intent of the 24-hour fill allowance because the pond is the end use of the water and the water right should include a storage component to properly describe the use. A storage component as part of the water right is necessary for such uses to ensure that the Department can address consumptive use associated with the pond and to describe any quantities, period of use or conditions necessary to limit the use to avoid injury to other water users.

Due to the lack of formal resources addressing the 24-hour fill allowance, questions are often raised by Department staff regarding its implementation. The following explanation and scenarios are intended to illustrate proper use of the 24-hour fill allowance and to prevent future misunderstandings of the policy by Department staff and water users.

DIVERSION RATE USED TO CALCULATE THE 24-HOUR FILL ALLOWANCE

The volume of water provided under the 24-hour fill allowance is calculated by multiplying the diversion rate by a 24-hour time period. As a simple example, if a water right recognizes a diversion rate of 1 cfs for irrigation, an impoundment volume less than or equal to 1.98 ac-ft used to facilitate pumping would not require a storage component on the water right.[2] Conversely, for the same water right, an impoundment volume greater than 1.98 ac-ft would require that the water right contain an element describing the entire storage component consistent with Water Appropriation Rule 35.03 (b) iv and v (*IDAPA 37.03.08)*.

When applying the 24-hour fill allowance to calculate the maximum volume of a pond, series of ponds, reservoir, or series of reservoirs (henceforth referred to as a pond) associated with a specific water right, the diversion rate used in the calculation is limited to the authorized diversion rate associated with the water right and is further limited by the available water supply or the capacity of the works at the inlet to the pond. Regardless of availability of water, diversion rates in excess of that authorized on the water right

[2] 1.98 ac-ft = (1 ft^3/s)*(86,400 s/day)*(1 ac/43,560 ft^2). This conversion is simplified as 1.984 ac-ft per cfs per day.

or rights, specifically utilizing the pond in question, are inappropriate for use in the 24-hour fill allowance calculation.

An example of inappropriate diversion rate includes a natural stream flow rate for an on-stream pond—an extreme variant of this is relying on the peak stream flow rate for analysis and pond sizing. This can be encountered when reviewing on-stream hydropower water rights. In such instances, the 24-hour fill allowance should be limited to the volume derived from the authorized diversion rate of the water right, and consideration of any excess available natural flow rates associated with the stream channel is inappropriate. Another example of a diversion rate that is inappropriate for consideration includes a diversion rate in a delivery system associated with other unrelated water rights for which the pond does not facilitate operation. This may include downstream water rights that use the system for conveyance (e.g. downstream irrigators), or water rights with additional beneficial uses that are not facilitated by the pond (e.g. stockwater used above the irrigation works in the system).

The appropriate diversion rate used to calculate the 24-hour fill allowance volume cannot exceed the fully authorized diversion rate associated with a specific water right; however, oftentimes the actual diverted (measured) rate is something less than the fully authorized rate. In these instances it is the rate that is actually being diverted, not the authorized diversion rate, that should be used in the calculation to determine the 24-hour fill allowance volume. For example, if an irrigation water right authorizes 5 cfs of diversion, but in actuality only 3 cfs of the total rate is conveyed into a part of the system incorporating the pond under consideration, and the remaining diversion rate is used in a separate part of the system, then the 24-hour fill allowance calculation is limited to a diversion rate of 3 cfs.

Combination of Beneficial Uses and/or Multiple Water Rights

It has been the Department's practice to allow for a combined pond volume based on the 24-hour fill allowance calculation of multiple beneficial uses under the same water right, and/or multiple water rights associated with the same system. As an example of the first case, if a golf course resort plans to develop a water right that includes a pond to facilitate a golf course irrigation component (2.5 cfs) and a commercial (equipment washing) component (1.2 cfs for two hours), the appropriate combined 24-hour fill allowance volume is 5.16 ac-ft.[3] As an example of the second case, if an irrigation system includes a pond and has two water rights associated with the system for 2 cfs and 3 cfs respectively, then the appropriate combined 24-hour fill allowance volume is 9.92 ac-ft.[4] Note, both examples are contingent upon the diversion or operation being facilitated by the pond.

Seepage & Evaporation in Conjunction with the 24-Hour Fill Allowance

When calculating the 24-hour fill allowance volume, no consideration should be given to gains and losses to the pond volume associated with precipitation, evaporation, or seepage. The volume calculation is based solely on the product of the appropriate diversion rate associated with the water right and a 24-hour diversion period. No adjustments up or down should be made to the diversion rate or allowable pond volume to reflect actual water balance conditions.

[3] 5.16 ac-ft = (2.5 cfs)*(1.984 ac-ft/cfs/day) + (1.2 cfs)*(2 hrs)/(24 hrs/day)*(1.984 ac-ft/cfs/day)
[4] 9.92 ac-ft = (2 + 3 cfs)*(1.984 ac-ft/cfs/day)

TYPES OF IMPOUNDMENTS

Off-Stream Impoundments to Facilitate Diversion or Operation of the Distribution System

Application of the 24-hour fill allowance to address off-stream impoundments is appropriate when the impoundment is used to facilitate the diversion of water or operation of a distribution system for the authorized purpose of use. Such impoundments may include sumps for pumping systems or short-term detention ponds for irrigation systems.

Off-Stream Impoundments for Recreation, Wildlife and Aesthetic Uses

As a general rule, it is not appropriate to utilize the 24-hour fill allowance for off-stream impoundments where the impoundment represents the end use of the water such as aesthetics, recreation and or wildlife uses.[5] Such impoundments, which may include wide meanders and/or pools within the conveyance channel, must include a storage component as part of the water right authorizing the use.

On-Stream Impoundments to Facilitate Diversion or Operation of the Distribution System

Application of the 24-hour fill allowance to address on-stream impoundments is limited to impoundments that facilitate diversion of water or operation of a distribution system for the authorized purpose of use. Such impoundments may include use for on-stream hydropower facilities or on-stream diversions for authorized off-stream water uses.

In regards to run-of-the-river (ROR) hydroelectric water uses, application of the 24-hour fill allowance to support incidental on-stream impoundment is an acceptable application. ROR hydroelectric projects are those with small or no reservoir capacity. In the strictest sense of the definition, this implies that water passing through the facility must be used at that moment, or must be allowed to bypass the dam. Oftentimes in practice ROR facilities are actually operated in a "load following" manner. Load following indicates a practice where power output is adjusted to meet the fluctuating demand throughout a 24-hour period. Load following requires that a small amount of storage occur upstream of the dam to provide water releases to meet the peak daily demand for electrical generation. The Lower Salmon Falls Hydroelectric facility is one such example. Traditionally the Department has not required a storage water right in association with ROR facilities if the volume of water impounded upstream of the dam in support of a load following operation satisfies the 24-hour fill allowance calculation. Note that conditions of a hydropower water right, or conditions of other permits associated with the use (e.g. a FERC license) may preclude such practice.

On-Stream Impoundments for Recreation, Wildlife and Aesthetic Uses

Similar to off-stream impoundments for such uses, it is not appropriate to utilize the 24-hour fill allowance for on-stream impoundments where the impoundment represents the end use of the water such as aesthetics, recreation and or wildlife uses. Furthermore, such use would constitute a minimum in-stream

[5] A storage component may not be necessary if the total use falls within the statutory definition of a domestic or stockwater right.

flow because the water right quantity would be described as a flow rate, and consistent with Idaho Code Title 42, Chapter 15, Minimum Stream Flow, only the Idaho Water Resource Board (IWRB) can file an application and hold a minimum stream flow water right.

OTHER CONSIDERATIONS

Water Tanks

Many water users incorporate tanks or cisterns in their distribution system. Such features are generally not considered storage and are not required to be covered under a specific storage water right. Some circumstances, especially where a tank or cistern is added to an established non-municipal water right, may raise injury and/or enlargement concerns and may require a storage component.

Timing of Fill

The diversion of water to a pond where impoundment is only allowed by implementation of the 24-hour fill allowance, and where no storage component is identified on the water right, can only occur during the season of use described on the water right. As an example, if an irrigation water right includes a pond with a volume established by the 24-hour fill allowance, diversion of water to fill that pond can occur no earlier than the first day of the irrigation season of use. It would be an illegal diversion of water if the pond were filled when the water right is out of season, to take advantage of water availability (i.e. early season runoff).

Drainage of Pond

Once diverted, water impounded to facilitate diversion or operation is considered beneficially used and water users are not expected to drain the pond or return the water to the source at the end of the season or when the water is off due to a priority cut. However, significant amounts of water routinely held at the end of the period of use may raise questions regarding the intent of the pond or impoundment and may result in the need for a water right for an alternate use such as aesthetics or recreation storage.

Appendix P: *ESPA WATER TRANSFERS* MEMORANDUM BY CHRISTOPHER H. MEYER

LAW OFFICES

GIVENS PURSLEY LLP

MEMORANDUM

TO: Interested Persons

FROM: Christopher H. Meyer

RE: ESPA Water Transfers

DATE: October 16, 2002

I. Introduction

This memorandum summarizes and explains a new methodology for quantifying mitigation required for transfers of ground water rights in the Eastern Snake Plain Aquifer. It implements new guidance now being developed by the Idaho Department of Water Resources on water transfers. That new guidance sets out many new requirements and procedures to ensure that transfers are rigorously scrutinized and efficiently processed, and that other water users are protected.

In particular, the Department's draft memorandum lays the foundation for mitigation of ground water transfers within the Eastern Snake Plain Aquifer ("ESPA"). However, it does not provide a detailed description of how the mitigation will be quantified and implemented.

The purpose of this memorandum is outline a specific approach. This approach reflects efforts of various parties and the Department over the course of the last several months.

II. Hydrological Background

The ESPA and the Snake River have a direct hydrological connection. All water that enters the ESPA (and is not diverted or naturally consumed) eventually leaves the aquifer and enters the Snake River. This occurs via contributions to springs and other

tributaries, as well as underground gains to the river itself. Consequently, every consumptive diversion of water from the ESPA will result in a corresponding reduction in flows in the Snake River.[1]

The depletion effect of a new well, however, will not be fully felt for some time, due to travel time within the aquifer. Eventually, however, a "steady state" will be achieved, at which point the impact of a particular diversion will remain constant.

The effect of any particular diversion of water from the ESPA will be felt differently in various reaches of the Snake River. For instance (once a steady state is reached), the diversion of 100 acre-feet of water per year from a new well might reduce flows in the uppermost reach of the Snake by just five acre-feet, while reducing flows in springs and tributaries in the lowest affected reach by 70 acre-feet. The remaining 25 acre-feet will be lost to the Snake somewhere in between. In all cases, the sum of impacts in each affected reach of the Snake will equal the volume of the consumptive diversion from the aquifer. Again, this will be true only once a steady state is reached.

Consequently, when someone proposes to transfer water from one point of diversion to another at some distance within the ESPA, the total impact on the river will be unchanged (once steady state is reached), but the impact will be redistributed among the reaches.

III. Basics of the Mitigation Analysis

For instance, if the original well site (we will call this the "FROM well") were situated in the upper-eastern portion of the ESPA, its effect might be felt primarily in the upper reaches of the Snake. Transferring that well to the other side of the aquifer (closer to Thousand Springs) would likely result in improved flows in the upper reaches of the Snake and reduced flows in the lower reaches (including tributary springs). In other words, the overall resource base is unaffected, but the depletion effect would be redistributed. As a consequence, if there were no mitigation, individual water users could be significantly impacted by the change.

In order to evaluate the impact of a proposed change, it is necessary to establish a baseline or status quo. The baseline reflects the depletion effects on the various river reaches resulting from operation of the FROM well, as if the FROM well continued to pump. These effects must then be compared with the depletion effects on each reach caused by the new well, which we will call the TO well, combined with the any residual effect continuing to be felt from the curtailed FROM well. If the TO well increases the

[1] Obviously, the presence of return flows would modify (and partially offset) the effect of any new depletion from the aquifer. This memorandum does not address the complicating factor of return flows, because the proposed new diversions at issue here are all assumed to be one hundred percent consumptive. The concepts discussed here would apply equally to diversions involving return flows, however, so long as appropriate adjustments were made.

depletion effect on a particular reach, then that effect must be mitigated in order to avoid injury.

The mitigation explored in this memorandum focuses on impacts of the transfer on the Milner to King Hill reach of the river (the Thousand Springs area). This is because this is the reach in which net depletion effects of the proposed transfers will be most severe. Consequently, if the Milner to King Hill reach is protected from injury through mitigation in the form of reduced pumping, all other reaches will be protected, too. The methodology describe here would work just as well, however, for any other reach of the river.

IV. Transitional Effects

As noted above, the effects of a change in point of diversion are not felt immediately. The new depletion at the TO well will gradually radiate out from the well and eventually will be fully felt in the various river reaches. Likewise the elimination of the depletion effects at the FROM well will not immediately benefit the various reaches. It may take years before the change in water rights results in a new steady state.

Consequently, it may be necessary to re-calculate the required mitigation at several points throughout the transition period, in order to avoid any increased depletion for any year. The Applicant will attempt to achieve this result wherever practical.

If this proves impractical for a particular transfer, the Applicant may propose a mitigation strategy which provides zero net depletion over a period of years, containing individual years in which net impacts are positive and years in which net impacts are negative. In any case, such a proposal will be subject to review by the Protestant and must be approved by the Department.

V. Use of the "Hydrological Effects Spreadsheet"

A group of water transfer applicants have retained Dr. Charles Brockway of Brockway Engineering, P.L.L.C. to develop a methodology and ground water model to accomplish this quantification based on use of the *Eastern Snake River Plain Hydrologic Effects Spreadsheet.* The Spreadsheet was developed by Donna M. Cosgrove and Gary Johnson of the Idaho Water Resources Research Institute, University of Idaho with support from the U.S. Bureau of Reclamation's Snake River Resources Review Project (June 2000). This Spreadsheet is available to the public at http://www.if.uidaho.edu/~johnson/ifiwrri/effects.html.

By employing this Spreadsheet, Dr. Brockway was able to compare the depletion effects for each FROM well and each TO well, over time, using the response functions

for single nodes.[2] For each transfer, this analysis was repeated for each of the relevant reaches of the Snake River, producing a separate graph for each reach.

In each graph, the horizontal axis displays time, shown in years. It extends back in time to the point when pumping was initiated on the FROM well. The horizontal axis continues out at for fifty years from that point.[3]

The vertical axis shows the quantity of depletion effect in a given year. Depletions are shown as a percentage of the quantity pumped. Depletions are displayed, starting with zero at the top of the graph, with increasingly large negative numbers running toward the bottom of the graph. This way, the lower the curve reaches, the greater the negative (or depletion) impact on the reach.

Each graph will display several curves. One of the curves will reflect the depletion effects of the FROM well. This curve will trace the increasing level of depletion effects over time, until a steady state is achieved.

In the year in which the depletion at the FROM well is ended or reduced under the terms of the transfer,[4] the curve will begin to rise (reflecting incremental reductions in depletion effect). We call this the "residual effects curve." Eventually, it will reach a new steady state of zero depletion (where it intersects with the line at the top of the graph). But that may take decades, depending on proximity and transmisivity.

The graph also displays a hypothetical extension of the curve for the FROM well into the future. This is called the "baseline curve." This shows what the effects of pumping would have been had the transfer not have taken place and the FROM well had continued to be pumped as before. This curve constitutes the status quo or baseline against which mitigation requirements will be measured.

If the FROM well had been pumped a long time, and a steady state achieved, then the "baseline curve" would become horizontal. If the FROM well had not yet achieved a steady state impact at the time it was cut off (or reduced), then the "baseline curve" will show the increasing depletions which would have been experienced had the well continued to be pumped at the prior rate.

---

[2] Initially there was some concern that an individual "node-to-node" analysis would overstate peculiarities of the particular nodes. In order to test this concern, Dr. Brockway ran various tests using groups of five, nine, and thirteen cell analyses, comparing them with single-cell results (also known as node-to-node). The results were identical for all practical purposes. Consequently, it was determined that there was no point in undertaking the more complicated multiple-cell analysis.

[3] This is sufficient to show a steady state (or near steady state) in the currently pending transfers. Eventually, we expect that the State of Idaho will extend the spreadsheet out a hundred years, in order to enable more accurate modeling of long term effects.

[4] Typically, the *FROM well* is shut down or reduced in the same year that the *to well* is turned on, that is, the year of the transfer. In some cases, the *FROM well* may have been cut back for a year or more prior to the transfer. This will be reflected in the modeling.

Another curve on the graph reflects the depletion effect of the TO well. This will begin as a horizontal line at the "zero" level across the top of the graph. This horizontal component corresponds to the years before the well was pumped. In the year in which pumping of the TO well is initiated, the curve will drop off, demonstrating the increasing depletion effect over time. Eventually, it will level off, reflecting a new steady state.

A third curve, known as the "combined effects curve," represents the sum of the depletion effects of the FROM well and the TO well. Until the time of transfer, this will be the same as the curve for the FROM well. In the year that the TO well is added, the "combined effects curve" will depart, reflecting the fact that the river reach is beginning to experience new depletion effects at the TO well together with some residual depletion effects at the FROM well.

The next step in the analysis is to determine the net effect of the transfer on the reach. Remember, the "baseline curve" reflects the status quo depletion, as if there had been no transfer. The net effect is determined simply by comparing the "combined effects curve" with the "baseline curve" in each relevant time period after the transfer. If the "combined effects curve" drops below the path of the "baseline curve," that means that the increased pumping at the TO well has not been fully offset by the decreased pumping at the FROM well. In other instances, the "combined effects curve" may rise where it departs from the "baseline curve." This occurs when the net effect of the transfer is positive for that reach.

Mitigation is required when the "combined effects curve" drops below the "baseline curve." The amount of mitigation will vary from year to year, and will always correspond to the difference between the relevant point on the "combined effects curve" and the "baseline curve."

VI. Quantification of Make-Up Water

To maintain the status quo, the annual volume of depletion (for a specified time period, on the relevant reach) must remain unchanged. One may determine the shortfall, that is, the amount of "make-up water," by comparing the difference in projected depletions before and after the transfer (based on no change in pumping volumes). This is the same as the difference between the "baseline curve" and the "combined effects curve."

To facilitate this discussion, we begin by defining several variables. Variables with capital letters are used for volume amounts:

F = total pre-transfer annual volume of pumping at the "FROM well" (in other words, the annual volume to be transferred)

T = total remaining volume pumped at "TO well" after mitigation (in other words, the post-transfer annual volume)

M = "make-up water" – total depletion shortfall which must be mitigated (this is the difference between "before" and "after" the transfer assuming the full original quantity was pumped at the "TO well."

R = "reduced pumping" – the quantity of pumping which must be reduced in order to produce the required make-up water in the particular reach. This pumping reduction is the "mitigation" which will be required.

Intuitively, "F = T + R." That is, the amount pumped originally at the FROM well will be equal to the amount ultimately allowed to be pumped at the TO well, less the amount of pumping reduction required as mitigation. "F" is a fixed amount. "T" and "R" may vary from year to year, with more mitigation required in some years than others. In any given year, however, "T + R" will equal "F." "M" (the amount of "make-up water" will typically be less than "R." This reflects the fact that in order to produce an acre-foot of reduced depletions at Thousand Springs, one would need to reduce pumping by more than an acre-foot at a point of diversion some miles away from Thousand Springs. This is discussed more thoroughly in Part VII below.

Variables with small letters represent various depletion effects on the Milner to Spring Hill reach, expressed as a percentage of the amount pumped:

b = baseline depletion effect (if the "FROM well" had continued to be pumped)

t = depletion effect from "TO well"

r = residual depletion effect of "FROM well" after curtailment

Note that these three "small letter" variables correspond to a particular point in time on the corresponding depletion effect curve. Thus, if we wanted to calculate the mitigation required ten years after the transfer, we would select the values for "b," "t" and "r" at that point in time on their respective curves.

As noted above, the required make-up water is equal to the quantity of depletion shown by the point on the baseline curve (***Fb***) minus the corresponding point on the "combined effects curve" (***Ft + Fr***). Recall that the combined effects curve is simply the sum of the corresponding point on the "TO well curve" (***Ft***) and the "residual effects curve" (***Fr***). Thus:

M = Fb – (Ft + Fr)

An example might help illustrate. Let us imagine a transfer in which we calculate the required mitigation for a particular point in time, let's say ten years after the transfer.[5]

Let us assign the following values for this hypothetical, as explained in the following paragraphs:

F = 100 (acre-feet per year)
b = 50 %
r = 30 %
t = 60 %

Let us first suppose the FROM well was pumped at the rate of 100 acre-feet per year until the transfer, and will be completely shut off as a result of the transfer. We will further assume that the FROM well had not yet achieved a steady state. We will specify that, at the time of the transfer, it was depleting the Milner to King Hill reach at the rate of 45 acre-feet per 100 acre-feet pumped. We will further specify that ten years after the transfer, the FROM well would have depleted flows in that reach at the rate of 50 acre-feet out of 100 pumped. That is, the 100 acre-feet pumped prior to transfer would have resulted in total depletions of 50 acre-feet per year at the Milner to King Hill Reach at the relevant point in time.

Once diversion at the FROM well is ended, depletions in the Milner to King Hill reach will begin to taper off. This is reflected in the "residual effects curve." Let us assume that ten years after the transfer, the FROM well is still depleting flows in the Milner to King Hill reach, now at the reduced rate of 30 acre-feet out the 100 previously pumped.

Let us also suppose that ten years after the transfer, the TO well will deplete flows in the reach by 60 acre-feet for every 100 pumped.

The impact on the reach will be shown on the "combined effects curve," reflecting the sum of the "residual effects curve" and the "TO well curve." At ten years out, the "combined effects curve" will show 90 acre-feet of depletion per 100 acre-feet pumped (30 at the FROM well, plus 60 at the TO well).

Obviously, this calls for mitigation. If a transfer were allowed to proceed without mitigation (allowing 100 acre-feet to be pumped from the TO well), the total depletion effect on the same reach would increase from 50 to 90 acre-feet, thus injuring the reach to the extent of 40 acre-feet per year.

---

[5] Recall that each of the graphs will display the depletion effect as a percentage—that is, the amount of depletion in the specified reach for each 100 acre-feet pumped. Note also that, for purposes of mitigation calculation, the depletion effect needs to be expressed on an annual basis. Some of the graphs may display the depletion effect for a third of a year (reflecting the length of the irrigation season).

We get the same result using the formula above:

$$M = Fb - (Ft + Fr)$$
$$M = 100 * .50 - (100 * .60 + 100 * .30)$$
$$M = 50 - (60 + 30)$$
$$M = 50 - 90$$
$$M = -40$$

In sum, using the approach outlined above, it is easy to determine the amount of "make-up" water which must be replaced in the affected reach. The negative number reflects that the reach is short by 40 acre-feet.

VII. Calculating the Quantity of Reduced Pumping at the "TO well"

Having determined how much water must be "made up" in the Milner to King Hill reach, the next step is to determine how much the Applicant will need to reduce pumping in the TO well to achieve that result. This part is a little trickier.

We know that it will take something more than a gallon-for-gallon reduction, because reduced pumping at the TO well will be felt to some extent throughout the Snake River. Only part of that reduced pumping will be felt in the Milner to King Hill reach.

Ultimately, we will need to re-run the model with the appropriate reduced pumping levels to show that the "after" depletion effect is the same as the "before" depletion effect.

However, a good estimate of the required reduction in pumping can be made with the following formula. It is based on the fact that the amount of reduced pumping at the TO well (*R*) times the depletion effect at the TO well (*t*) must equal the required makeup water (*M*). Thus,

$$Rt = M$$
$$R = M/t$$
$$R = -40 / .6$$
$$R = -66.67$$

In other words, in this example, if 100 acre-feet of water is transferred from the FROM well, it will be necessary to restrict pumping at the TO well to 33.33 acre-feet—a reduction of 66.67 acre-feet. That reduction in pumping of 66.67 acre-feet will reduce depletions in the Milner to King Hill reach by 40 acre-feet. This fits, because 66.67 acre-feet times 60 percent (the depletion effect at the TO well) yields 40 acre-feet.

This calculation is only for a particular point in time. Consequently it serves only

as a starting point in developing a mitigation strategy. Further modeling runs may be required to develop a multi-year mitigation package which will bring the "baseline" and "combined" curves (that is, "before" and "after") as close together as practicable, while ensuring no net loss over the long run.

VIII. Other Forms of Mitigation

The form of mitigation described here is based solely on reductions in pumping at the TO well. Nothing in this memorandum is intended to suggest that this is the only appropriate form of mitigation. Obviously there are many other possible approaches to mitigation. These are not discussed here, simply because the Applicants in the proposed transfers prefer this approach.

IX. Reopening of the Mitigation Calculation

The parties recognize that the science of modeling ground and surface water interaction in the ESPA is a new and rapidly evolving one. Undoubtedly, more accurate predictions will be possible in the years ahead.

Consequently, the parties agree that the mitigation calculations made herein may be re-opened at any time in the future by the Applicant or the Protestant. The party seeking to reopen the matter will have the duty of funding and undertaking a new analysis and proposing new mitigation conditions (either higher or lower). The other party (and the Department) will be free, of course, to contest the proposal and offer their own analyses. The Department will make the final determination in accordance with then current law.

X. Proximity to Snake River

The Hydrological Effects Spreadsheet cannot be used to accurately predict depletion effects if the transfer involves points of diversion very close to the Snake River. The Department has not yet determined what "very close" means. It is a safe guess, however, that less than a mile is too close. This memorandum addresses transfers involving points of diversion several miles or more from the rim.

XI. Credit for Benefited Reaches

As noted above, for every reach of the Snake River adversely impacted by a transfer, other reaches will be correspondingly benefited. The Department's new guidance recognizes this effect. Consequently, the Director has noted the need for an appropriate credit to be assigned to the Applicant corresponding to the positive impact on other reaches.

To date, there is no mechanism for transferring or using these credits. Conceptually, however, these credits might be used to serve as mitigation, either for other transfers or in the context of an area-wide curtailment. It is premature to provide more detail on how such a credit might be quantified or implemented. At this point, the Department has simply recognized the appropriateness of the principle, giving current transfer applicants a "place holder" for the eventual recognition of such credits.

CHM:kdt

Appendix Q: BUREAU OF RECLAMATION WATER PURCHASES FOR INSTREAM FLOW

Bureau of Reclamation
January 26, 2004

WATER PROVIDED FOR FLOW AUGMENTATION
1991-2003
ALL VALUES IN ACRE-FEET

Year	Total Provided	USBR Space (in 1995)	Acquired by USBR	Multi-Year Rentals	Annual Rentals
1991	201,525	43,874			157,651
1992	90,000	90,000			
1993	424,588	324,617			99,971
1994	428,112	383,788			44,325
1995	427,235	119,242	26,396		285,597
1996	422,141	98,000	57,396		266,745
1997	437,281	98,000	75,045		264,236
1998	427,000	98,554	77,923		250,523
1999	427,000	98,554	76,851	38,000	213,595
2000	427,000	98,554	77,923	38,000	212,325
2001	90,288	30,000	22,366	36,724	1,198
2002	286,534	170,198	17,649	0	98,687
2003	282,029	170,000	17,649	0	94,380

Jun-03

Water for Flow Augmentation
Bureau of Reclamation

	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	Projected 2003
Upper Snake													
USBR Space	15,000	0	206,617	285,954	22,396	22,396	22,396	22,896	21,824	22,896	4,717	0	0
Rentals-- WD1	84,000	0	65,000	44,325	232,839	194,667	202,104	200,325	148,397	162,325	0	0	0
Rentals-- Tribes		0	0	0	0	0	0	0	38,000	38,000	36,724	0	0
Subtotal	99,000	0	271,617	330,279	255,235	217,063	224,500	223,221	208,221	223,221	41,441	0	0
Payette													
USBR Space	28,874	90,000	95,000	61,883	94,242	95,000	95,000	95,000	95,000	95,000	30,000	110,000	110,000
Rentals	73,651	0	34,971	0	50,758	56,300	60,000	50,000	65,000	50,000	0	50,000	50,000
Subtotal	102,525	90,000	129,971	61,883	145,000	151,300	155,000	145,000	160,000	145,000	30,000	160,000	160,000
Boise													
USBR Space	0	0	23,000	35,950	25,000	38,000	38,000	40,932	40,932	40,932	0	60,198	60,000
Rentals	0	0	0	0	2,000	0	2,000	0	0	0	0	0	0
Subtotal	0	0	23,000	35,950	27,000	38,000	40,000	40,932	40,932	40,932	0	60,198	60,000
Snake River High Lift Pumpers													
Idaho Rentals	0	0	0	0	0	0	0	0	0	0	0	37,889	43,182
Oregon Rentals	0	0	0	0	0	0	0	0	0	0	0	9,600	0
Subtotal	0	0	0	0	0	0	0	0	0	0	0	47,489	43,182
Lemhi													
Rentals	0	0	0	0	0	0	0	0	0	0	1,000	1,000	1,000
Oregon													
Skyline Farms	0	0	0	0	0	15,714	17,649	17,649	17,649	17,649	17,649	17,649	17,649
Oregon Water Trust	0	0	0	0	0	64	132	198	198	198	198	198	198
Subtotal	0	0	0	0	0	15,778	17,781	17,847	17,847	17,847	17,847	17,847	17,847
Grand Total	201,525	90,000	424,588	428,112	427,235	422,141	437,281	427,000	427,000	427,000	90,288	286,534	282,029

© 2017 GIVENS PURSLEY LLP

Jun-03

Water for Flow Augmentation

Reclamation Space	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	Projected 2003
Upper Snake											
American Falls	0	0	8,951	8,951	8,951	8,951	8,884	8,951	4,717	0	0
Jackson	0	0	3,923	3,923	3,923	3,923	3,795	3,923	0	0	0
Palisades	13,615	15,754	9,522	9,522	9,522	10,022	9,145	10,022	0	0	0
Palisades Power Head	18,794	153,530	0	0	0	0	0	0	0	0	0
Minidoka Power Head	95,575	99,240	0	0	0	0	0	0	0	0	0
Ririe	78,633	17,430	0	0	0	0	0	0	0	0	0
Total Upper Snake	206,617	285,954	22,396	22,396	22,396	22,896	21,824	22,896	4,717	0	0
Payette											
Cascade	69,600	26,845	68,842	69,600	69,600	69,600	69,600	69,600	0	69,600	69,600
Deadwood	25,400	35,038	25,400	25,400	25,400	25,400	25,400	25,400	30,000	40,400	40,400
Total Payette	95,000	61,883	94,242	95,000	95,000	95,000	95,000	95,000	30,000	110,000	110,000
Boise											
Anderson Ranch	0	0	3,000	3,000	3,000	0	0	0	0	0	0
A. R. Inactive Space	20,000	10,950	0	0	0	0	0	0	0	36,260	36,260
Lucky Peak	3,000	25,000	22,000	35,000	35,000	40,932	40,932	40,932	0	23,938	23,740
Total Boise	23,000	35,950	25,000	38,000	38,000	40,932	40,932	40,932	0	60,198	60,000
Or Natural Flows	0	0	0	15,714	17,649	17,649	17,649	17,649	17,649	17,649	17,649

© 2017 GIVENS PURSLEY LLP

2003 Comments:

1. Boise system projection includes ~10 kaf from last to fill space dedicated to augmentation, 14 kaf from Boise River instream flow account, and 36.2 kaf from Anderson Ranch inactive space. These figures are preliminary and may change significantly. Flows will begin on June 13.
2. Payette system will begin releases by approximately June 20.
3. Snake River High Lift Pumpers: BOR entered into agreement with IDWR to rent natural flows from high lift pumpers between Milner Dam and King Hill, at a cost of $50.00 per acre foot. IDWR will monitor compliance to ensure that crops are taken out of production. Final volumes are still being verified by IDWR.

July 25, 2002

Issue Date: 1/15/2002
Effective Date: 3/18/2002

2002 Nationwide Permits Summary

Expiration Date: 3/18/2007[2]

#	Title – Description	Section 10	Section 404	GC 13 Notification (PCN)[1]	½ acre upper limit	Linear Ft. limit	San Francisco District Regional Conditions[1]
1	*Aids to Navigation*	X					
2	*Structures in Artificial Canals*	X					
3	*Maintenance Activities* (i) Repair, rehabilitation, or replacement of currently serviceable structure or fill. (ii) Discharges related to sediment removal/debris & placement of riprap. (iii) Discharges related to restoring uplands damaged by storms/floods.	X	X	(ii) & (iii)		(ii) >200= IP	• Work from upland area to extent practicable. • (ii) Special aquatic site to be avoided or minimize impacts.
		(i) PCN not required. (ii) Removal of sediments limited to minimum necessary to restore waterway to the approximate dimensions when the structure was built, but cannot extend further than 200 ft from any direction from the structure. (iii) PCN w/in 12 months from date of damage; work to commence or under contract to commence within 2 yrs; 50 cy limit on dredging. (iii) Cannot combine w/ NWP 18 or NWP 19.					
4	*Fish and Wildlife Harvesting Devices*	X	X				
5	*Scientific Measurement Devices*	X	X	X*			
		• *PCN required for discharges between 10-25 cys.					
6	*Survey Activities*	X	X				

[1] PCN is required for **all** NWPs in the San Francisco diked baylands, Essential Fish Habitat, and in eel grass beds.

[2]

Other Expiration dates:
Activities permitted by NWPs issued on **12/13/96** that have commenced or under contract to commence by **2/11/02** will have until **2/11/03** to complete the activity.
Activities permitted by NWPs issued on **03/09/00** that have commenced or under contract to commence by **3/18/02** will have until **3/18/03** to complete the activity.

© 2017 GIVENS PURSLEY LLP

Issue Date: 1/15/2002
Effective Date: 3/18/2002

2002 Nationwide Permits Summary

Expiration Date: 3/18/2007[2]

#	Title – Description	Section 10	Section 404	GC 13 Notification (PCN)[1]	½ acre upper limit	Linear Ft. limit	San Francisco District Regional Conditions[1]
7	*Outfall Structures and Maintenance* (i) Construction. (ii) Maintenance excavation of accumulated sediments.	X	X	X			• Work from upland area to extent practicable.
		(ii) Amount dredged must be minimum necessary to restore to original design capacity & configuration.					
8	*Oil and Gas Structures*	X					
9	*Structures in Fleeting and Anchorage Areas*	X					
10	*Mooring Buoys*	X					
11	*Temporary Recreational Structures*	X		SF			• PCN only if wetlands or vegetated shallow water areas impacted. • Temp. structures to be removed w/in 6 months.
12	*Utility Line Activities* (i) Utility lines: Construction, maintenance, or repair provided no change in preconstruction contours. Other conditions. (ii) Substations: Construction, maintenance, or expansion. (iii) Foundations for overhead utility lines (iv) Access Roads - Construction	X	X	X*	X	*(i), (iv) >500	
		(ii) & (iv) limited to non-tidal waters of the US but not authorized in non-tidal wetlands adjacent to tidal waters . *(iv) PCN required if >1/10 ac. or if road constructed w/ impervious material. ▪ *PCN required in Sec. 10 waters. ▪ Other conditions.					•Upper 12" of trench to backfilled w/ native material. •Excess material to be disposed upland. •PCN for the Santa Rosa Plain, even for less than 1/10 ac. •(ii) is revoked. •(iv) PCN if road >200 ft; >15 ft wide. •(iv) BMPs

WATER LAW HANDBOOK – APPENDICES
HANDBOOK Appendices - Water Law Handbook (8-1-2026) (current version)(541598.53).doc
© 2017 GIVENS PURSLEY LLP

Issue Date: 1/15/2002 Effective Date: 3/18/2002	**2002 Nationwide Permits Summary**				Expiration Date: 3/18/2007[2]	
#	**Title – Description**	**Section 10**	**Section 404**	**GC 13 Notification (PCN)[1]**	**½ acre upper limit**	**Linear Ft. limit**	**San Francisco District Regional Conditions[1]**
13	*Bank Stabilization*	X	X	X*		*>500	
		• 1cy per running ft. • No fill in special aquatic sites. • Single & complete project. • >500 ft or > 1 cy per running ft may be authorized if DE determines effects are minimal, & terms & conditions will be complied with. • Other conditions.					• PCN if remove greater than 1/10 ac. of aquatic vascular plants. • Design bank stabilization to benefit fish & wildlife to max. extent practicable. • Address effects of bank stabilization.
14	*Linear Transportation Projects* Construction, or improvement of linear transportation crossings (e.g., highways, railways, trails, airport runways, and taxiways).	X	X	X*	X		• New airport runways & taxiways not authorized. • Design bank stabilization to benefit fish & wildlife to max. extent practicable. •PCN for the Santa Rosa Plain, even for less than 1/10 ac.
		• No loss of greater than 1/2-acre non-tidal waters. • No loss of greater than 1/3-acre tidal waters. • *PCN required for special aquatic sites. • Compensatory mitigation generally required. • Other conditions. • Cannot be combined w/ NWP 29. • Farm and forest roads, and temp. mining roads might be exempt.					
15	*U.S. Coast Guard Approved Bridges*		X				
		• Causeways & approach fills not authorized.					
16	*Return Water from Upland Contained Disposal Areas*		X				

© 2017 GIVENS PURSLEY LLP

Issue Date: 1/15/2002 Effective Date: 3/18/2002	**2002 Nationwide Permits Summary**					Expiration Date: 3/18/2007[2]
#	**Title – Description**	**Section 10**	**Section 404**	**GC 13 Notification (PCN)[1]**	**½ acre upper limit**	**Linear Ft. limit**	**San Francisco District Regional Conditions[1]**
17	*Hydropower Projects* (<5000 kW)		X	X			
18	*Minor Discharges*	X	X	X* (>10 cys)			
		• Cannot exceed 25 cys. • No loss > 1/10-acre of a special aquatic site. • *PCN required special aquatic sites. • Single & complete project. • Cannot be combined w/ NWP 3(iii) or NWP 29.					
19	*Minor Dredging*	X	X				
		• Cannot exceed 25 cys. • Does not authorize degradation of submerged aquatic vegetation, anadromous fish spawning areas, or wetlands. • Does not authorize connection of canals or other artificial waterways to navigable waters of the U.S. • Cannot be combined w/ NWP 3(iii).					
20	*Oil Spill Cleanup*	X	X				
21	*Surface Coal Mining Activities*	X	X	X			
22	*Removal of Vessels*	X	X	X*			
		• *PCN required if vessel is listed or determined to be eligible for listing on the Nat. Register of Historic Places. • Does not authorize maint. dredging, shoal removal or riverbank snagging.					
23	*Approved Categorical Exclusions*	X	X	SF			
24	*State Administered Section 404 Programs*	X					
25	*Structural Discharges*		X				

WATER LAW HANDBOOK – APPENDICES
HANDBOOK Appendices - Water Law Handbook (8-1-2026) (current version)[541598.53].doc
© 2017 GIVENS PURSLEY LLP

Issue Date: 1/15/2002
Effective Date: 3/18/2002

2002 Nationwide Permits Summary

Expiration Date: 3/18/2007[2]

#	Title – Description	Section 10	Section 404	GC 13 Notification (PCN)[1]	½ acre upper limit	Linear Ft. limit	San Francisco District Regional Conditions[1]
26	*Reserved*						
27	*Stream and Wetland Restoration Activities* Restoration of former waters, the creation of, or enhancement of degraded, tidal and non-tidal wetlands and riparian areas, and the restoration and enhancement of non-tidal streams and non-tidal open water areas.	X	X	X*			
		• *PCN required if activities are not on Non-Federal public or private lands under certain conditions. • Other conditions.					
28	*Modifications of Existing Marinas*	X					
29	*Single-Family Housing*	X	X	X			
		• Limited to non-tidal waters, including non-tidal wetlands. • Cannot exceed ¼ ac • Single & complete project. • Limited to personal residence. • Can only be used once per parcel. • Cannot be used w/ NWP 14 or NWP 18. • Vegetation buffers adjacent to open water.					
30	*Moist Soil Management for Wildlife*		X				
		• Does not authorize converting wetlands to uplands, impoundments or other open water bodies.					
31	*Maintenance of Existing Flood Control Facilities* Maintenance includes existing debris basins, retention /detention basins, and channels.	X	X	X			
		• Limited to activities w/in "maintenance baseline." • Does not authorize removal of sediment & associated vegetation from natural water courses except to the extent that these are included in the maintenance baseline.					

WATER LAW HANDBOOK – APPENDICES
HANDBOOK Appendices - Water Law Handbook (8-1-2026) (current version)(541598.53).doc
© 2017 GIVENS PURSLEY LLP

Issue Date: 1/15/2002
Effective Date: 3/18/2002

2002 Nationwide Permits Summary

Expiration Date: 3/18/2007[2]

#	Title – Description	Section 10	Section 404	GC 13 Notification (PCN)[1]	½ acre upper limit	Linear Ft. limit	San Francisco District Regional Conditions[1]
32	*Completed Enforcement Actions*	X	X	X			
		Non-judicial settlement agreement, or final Federal court decision, consent decree or settlement agreement required.					
33	*Temporary Construction, Access, and Dewatering* Temporary structures including cofferdams, necessary for construction activities, access fills or dewatering of construction sites.	X	X	X			
		• Affected areas must be restored to the pre-project conditions. • Restoration plan required. • Maintain flows. • Temp. fills must be removed. • Other conditions.					
34	*Cranberry Production Activities*	X	X	X			
35	*Maintenance Dredging of Existing Basins* Sediment removal for maintenance of marina basins.	X	X	SF			•Location of disposal site required. •Notify USCG.
36	*Boat Ramps*	X	X				
		• Discharge cannot exceed 50 cys. • Boat ramp cannot exceed 20 ft in width. • No discharge into special aquatic sites. • Other conditions.					
37	*Emergency Watershed Protection and Habilitation*	X	X	X			
38	*Cleanup of Hazardous and Toxic Waste*	X	X	X			

WATER LAW HANDBOOK – APPENDICES
HANDBOOK Appendices - Water Law Handbook (8-1-2026) (current version)(541598.53).doc
© 2017 GIVENS PURSLEY LLP

Issue Date: 1/15/2002
Effective Date: 3/18/2002

2002 Nationwide Permits Summary

Expiration Date: 3/18/2007[2]

#	Title – Description	Section 10	Section 404	GC 13 Notification (PCN)[1]	½ acre upper limit	Linear Ft. limit	San Francisco District Regional Conditions[1]
39	*Residential, Commercial and Institutional Developments* Including construction or expansion of institutional building (maintenance yard, rest area) foundations and building pads	X	X	X* (>1/10 ac)	X	>300 = IP unless waived by DE	• PCN required in the Santa Rosa Plain even for <1/10 ac. • PCN required for loss of any open waters, including ephemeral streams. • Ephemeral streams included in the 300 feet of intermittent stream beds.
		•Limited to non-tidal waters of U.S., but not authorized in non-tidal wetlands adjacent to tidal waters. • *Discharge causes loss of any open waters, including perennial or intermittent streams. • *Discharge causes loss of >300 ft of intermittent stream bed. • For <1/10 ac. loss must report w/in 30 days of completion of work. • Upland vegetation buffers to max. extent practicable. • Compensatory mitigation normally required. • Permanent above-grade fills in waters w/in the mapped 100-yr floodplain below the headwaters (5 cfs) not authorized (GC 26). • Permanent above grade fills in waters w/in FEMA or locally mapped floodway above the headwaters not authorized (GC 26). • Other conditions.					
40	*Agricultural Activities*		X	X* (>1/10 ac)	X	>300=IP unless waived by DE	• PCN required in the Santa Rosa Plain even for <1/10 ac. • Cannot discharge into channel of perennial or intermittent watercourse that could impede high flows. • Ephemeral streams included in the 300 feet of intermittent stream beds.
		•Limited to non-tidal waters of U.S., but not authorized in non-tidal wetlands adjacent to tidal waters. • Certain conditions for USDA program participants. • Must include compensatory mitigation. • Permanent above-grade fills in waters w/in the mapped 100-yr floodplain below the headwaters (5 cfs) not authorized (GC 26). • Permanent above grade fills in waters w/in FEMA or locally mapped floodway above the headwaters not authorized (GC 26). •Other conditions.					

© 2017 GIVENS PURSLEY LLP

Issue Date: 1/15/2002
Effective Date: 3/18/2002

2002 Nationwide Permits Summary

Expiration Date: 3/18/2007[2]

#	Title – Description	Section 10	Section 404	GC 13 Notification (PCN)[1]	½ acre upper limit	Linear Ft. limit	San Francisco District Regional Conditions[1]
41	*Reshaping Existing Drainage Ditches* Modify the cross-sectional configuration of drainage ditches.		X	X*		*>500	• Compensatory mitigation may be required if there will be detrimental impacts to aquatic habitat. •PCN required if the proposal includes regrading, filling, installing channel lining , or redepositing fill material. • PCN required in the Santa Rosa Plain even for <1/10 ac.
		•Limited to non-tidal waters of U.S., but not authorized in non-tidal wetlands adjacent to tidal waters. •Cannot increase drainage capacity beyond the original design & cannot expand drainage area. •Temp. sidecasting is allowed. •Does not authorize relocation of drainage ditches constructed in waters of the U.S., stream channelization or stream relocation projects.					
42	*Recreational Activities*		X	X* (>1/10 ac)	X	*>300 = IP unless waived by DE	• Golf courses and ski areas not authorized. • For buildings in waters/wetlands, must demonstrate no on-site practicable alternatives available. • PCN required in the Santa Rosa Plain even for <1/10 ac. • PCN required for loss of any open waters, including ephemeral streams. • Ephemeral streams included in the 300 feet of intermittent stream beds.
		•Limited to non-tidal waters of U.S., but not authorized in non-tidal wetlands adjacent to tidal waters. • PCN required if >300 ft • Compensatory mitigation normally required. • Other conditions. • Permanent above-grade fills in waters w/in the mapped 100-yr floodplain below the headwaters (5 cfs) not authorized (GC 26). • Permanent above grade fills in waters w/in FEMA or locally mapped floodway above the headwaters not authorized (GC 26).					

WATER LAW HANDBOOK – APPENDICES © 2017 GIVENS PURSLEY LLP
HANDBOOK Appendices - Water Law Handbook (8-1-2026) (current version)(541598.53).doc

Issue Date: 1/15/2002
Effective Date: 3/18/2002

2002 Nationwide Permits Summary

Expiration Date: 3/18/2007[2]

#	Title – Description	Section 10	Section 404	GC 13 Notification (PCN)[1]	½ acre upper limit	Linear Ft. limit	San Francisco District Regional Conditions[1]
43	*Storm water Management Facilities* For the construction and maintenance of facilities, including excavation of stormwater ponds, detention/ retention basins; the installation and maintenance of water control structures, outfall structures and emergency spillways.		X	X*	X*	*>300 = IP unless waived by DE	• PCN required in the Santa Rosa Plain even for <1/10 ac. • Ephemeral streams included in the 300 feet of intermittent stream beds.
		• Limited to non-tidal waters of U.S., but not authorized in non-tidal wetlands adjacent to tidal waters. • *Construction of new facilities. • Construction of new facilities not authorized in perennial streams. • Compensatory mitigation required. • Other conditions. • Permanent above-grade fills in waters w/in the mapped 100-yr floodplain below the headwaters (5 cfs) not authorized (GC 26).					
44	*Mining Activities*	X	X	X	X		• Revoked

[1] PCN is required for **all** NWPs in the San Francisco diked baylands, Essential Fish Habitat, and in eel grass beds.

2

Other Expiration dates:
Activities permitted by NWPs issued on **12/13/96** that have commenced or under contract to commence by **2/11/02** will have until **2/11/03** to complete the activity.
Activities permitted by NWPs issued on **03/09/00** that have commenced or under contract to commence by **3/18/02** will have until **3/18/03** to complete the activity.

WATER LAW HANDBOOK – APPENDICES
HANDBOOK Appendices - Water Law Handbook (8-1-2026) (current version)(541598.53).doc
© 2017 GIVENS PURSLEY LLP
Page 282

Appendix S: UNPUBLISHED DECISIONS

RECEIVED
NOV 1 1 2009
Givens Pursley, LLP

DISTRICT COURT - SRBA
TWIN FALLS CO. IDAHO
FILED
2009 NOV 9 PM 1 04

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	)	
	)	**Subcase Nos. 29-00271, *et al.***
Case No. 39576	)	**(See Attached Exhibit A)**
	)	
	)	**MEMORANDUM DECISION AND**
	)	**ORDER ON CHALLENGE**
	)	**(City of Pocatello)**
	)	

Ruling: Order of the Special Master is **affirmed.**

I.
APPEARANCES

JOSEPHINE P. BEEMAN, Beeman & Associates, P.C., Boise, Idaho, on behalf of Challenger City of Pocatello ("Pocatello").

SHASTA KILMINSTER-HADLEY, Deputy Attorney General, Boise, Idaho, on behalf of Respondent State of Idaho.

CHRISTOPHER H. MEYER AND JOHN M. MARSHALL, Givens Pursley, LLP, Boise, Idaho, appearing *amici curiae* on behalf of United Water Idaho, City of Nampa, and the City of Blackfoot ("Municipal Providers or Providers").

JOHN M. MELANSON, Presiding Judge of the SRBA, presiding.

II.

PROCEDURAL BACKGROUND

1. The above-captioned water rights were claimed in the SRBA by the City of Pocatello.[1] Pocatello filed *Objections* to the recommendations contained in the *Director's Reports* issued by the Idaho Department of Water Resources ("IDWR"). The State of Idaho filed responses to Pocatello's *Objections*.

2. Following summary judgment proceedings and a trial, the Special Master issued a ***Master's Report and Recommendation and Order on Motion to Reconsider*** on October 2, 2007. The Special Master recommended that 1) the ground water wells could not be included as alternative points of diversion for Pocatello's surface water rights; 2) a remark identifying the location, date, and quantity of the original right was necessary for the interconnected well system where multiple points of diversion were established under the accomplished transfer provisions of Idaho Code § 42-1425 to prevent injury to existing water rights; 3) water rights 29-7118 and 29-7119 should be decreed with a municipal purpose of use, while water right 29-7770 should be decreed with an irrigation purpose of use; and 4) the priority date for 29-13558 should be July 16, 1924, as recommended in the *Director's Report*, while the priority date for 29-13639 should be October 21, 1952, which is one day earlier than the date recommended in the *Director's Report*.

3. On October 30, 2007, the Special Master issued an ***Amended Master's Report and Recommendation and Order on Motion to Reconsider***, which amended the Place of Use description for Pocatello's municipal rights.

4. On May 28, 2008, the Special Master issued an ***Order Denying Motion to Alter or Amend***.

---

[1] The claims are based on state law. Pocatello also claimed the use of the water pursuant to federal law under a single water right claim. The federal law basis for the water was resolved in a separate proceeding.

5. On June 11, 2008, Pocatello timely filed a *Notice of Challenge* to the ***Master's Report and Recommendation***. Also on June 11, 2008, Pocatello filed a *Motion to Stay Proceedings*, due to Pocatello's pending *Petition for Certiorari* before the United States Supreme Court on the federal law basis for these claims. After a hearing, this Court granted Pocatello's *Motion to Stay Proceedings*. However, *certiorari* was later denied. On December 18, 2009, the Court issued a ***Challenge Scheduling Order***, initiating the resumption of the *Challenge* proceedings.

6. On April 10, 2009, United Water of Idaho, City of Nampa, and City of Blackfoot filed a *Motion for Leave to Participate or to Participate as Amici Curiae*. After a hearing, the Court granted the *Motion to Participate as Amici Curiae*.

III.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument on *Challenge* occurred August 13, 2009. The Court granted Pocatello's request for additional briefing. The final post-hearing brief was filed September 18, 2009. Therefore, this matter is deemed fully submitted for decision the next business day, or September 19, 2009.

IV.
BRIEF STATEMENT OF MATERIAL FACTS

At issue are thirty state-law based claims filed by the City of Pocatello.[2] The water rights are used to provide municipal water service to residents and water users

[2] The water rights include: 29-00271, 29-00272, 29-00273, 29-2274, 29-2338, 29-2401, 29-2499, 29-4221, 29-1222, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7118, 29-7119, 29-7322, 29-7375, 29-7450, 29-7770, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637, 29-13638, and 29-13639. Pocatello filed a total of thirty-nine claims in the SRBA. In addition to the thirty claims at issue Pocatello also has eight water rights that have been decreed and one federal claim that was disallowed. Those claims are not at issue.

within Pocatello's in-town service area and to its airport facility. The two water services are independent of each other. Water for the in-town service area is provided through an interconnected system supplied by twenty-one ground water rights delivered through twenty-two wells.[3] The wells were developed at different times and are located throughout the in-town service area. Pocatello claimed the wells as alternative points of diversion for each of the twenty-one ground water rights, meaning Pocatello would be authorized to withdraw water under its most senior priority right from any well location. Pocatello also holds four surface rights diverted from Mink and Gibson Jack Creeks, both tributary to the Portneuf River and the Lower Portneuf River Valley Aquifer.[4] The Lower Portneuf River Valley Aquifer provides the source for the ground water rights. The surface rights carry the most senior priorities. Pocatello also claimed the twenty-two ground water wells as alternative points of diversion for the surface water rights meaning Pocatello would be authorized to withdraw water for its surface rights from any well location.

Water service for the airport is provided through a smaller separate interconnected system supplied by three ground water rights associated with three wells. Pocatello claimed two of the wells as alternative points of diversion for each other. Pocatello relies on the accomplished transfer provisions of Idaho Code § 42-1425 for establishing the wells as alternative points of diversion for each other and for its surface rights. The interconnected water systems for both the in-town service area and airport were in existence and in operation prior to the commencement of the SRBA on November 19, 1987, as required by Idaho Code § 42-1425.

IDWR recommended the wells as alternative points of diversion for the ground water rights as claimed based on the application of Idaho Code § 42-1425, with one exception. In order to prevent injury to existing ground water rights of third parties IDWR recommended that the following condition or remark appear in the face of the

---

[3] The system is supplied by twenty-three (23) water rights but only twenty-one of the ground water rights are at issue: 29-2274, 29-2338, 29-2401, 29-2499, 29-4221, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7322, 29-7375, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637 and 29-13639.

[4] Mink Creek rights: 29-271, 29-272, and 29-273; Gibson Jack Creek right: 29-4222.

Partial Decree for eighteen of the water rights in the in-town service area[5] and for two of the three water rights supplying water to the airport.[6]

> 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 Pocatello well [description] in the amount of ___ cfs.

IDWR's basis for recommending the condition was twofold, "number one, well interference that could happen in the future as a result of increased pumping at wells and, secondly, conjunctive administration concerns relative to diversion from one location as compare [sic] with diversion from another location." ***Amended Master's Report and Recommendation and Order on Motion to Reconsider*** at 17 (quoting Tuthill testimony). IDWR did not recommend the ground water wells as alternative points of diversion for the surface rights. Pocatello objected to the inclusion of the conditions and to IDWR's recommendation that the ground water wells not be decreed as alternative points of diversion for the surface rights. No third party ground water right holder filed an *Objection* or *Response* to IDWR's recommendation.

Water right 29-7770 was licensed with an "irrigation" purpose of use in 2003. Pocatello asserts that an accomplished transfer has changed the purpose of use for this licensed right from "irrigation" to "municipal." IDWR recommended 29-7770 with an "irrigation" purpose of use in its *Director's Report* consistent with the license.

Finally, Pocatello claimed a priority date of June 30, 1905 for water right 29-13558, based in part on newspaper articles about the early history of the cities of Pocatello and Alameda. However, the *Director's Report* for 29-13558 recommended a priority date of July 16, 1924, which is one day before the City of Alameda was founded. Similarly, Pocatello claimed a priority date of December 31, 1940 for water right 29-13639. The *Director's Report* for 29-13639 recommended a priority date of October 22, 1952, based on an application for a permit for the right. The Special Master concluded

---

[5] Three of Pocatello's groundwater rights (29-2274, 29-2338, and 29-7375) were recommended without the condition because those rights were subject to administrative transfer No. 5452, which did not include the condition and occurred after 1987.

[6] Water rights 29-7450 and 29-13638 were recommended with the condition.

that the priority date should be one day earlier than recommended in the *Director's Report*, or October 21, 1952.

V.
ISSUES RAISED ON CHALLENGE

The City of Pocatello raises a number of issues on Challenge. The Court summarizes the issues as follows:

1. Whether the Special Master erred in applying the amnesty provisions of I.C. § 42-1425 by conducting a hearing on injury in the absence of an objection by a third party?

2. Whether the Special Master erred in recommending a condition on certain ground water rights used for Pocatello's interconnected well system in order to prevent injury to existing rights?

3. Whether the Special Master erred in not listing interconnected ground water wells as alternative points of diversion for the Pocatello's surface water rights?

4. Whether the Special master erred in striking an affidavit filed by Pocatello in conjunction with its post-trial brief?

5. Whether the Special Master erred in recommending water right 29-7770 with an irrigation instead of a municipal purpose of use?

6. Whether the Special Master erred in recommending certain priority dates for water rights 29-13558 and 29-13639?

VI.

STANDARD OF REVIEW OF SPECIAL MASTER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of fact of a special master.

In Idaho, the district court is required to adopt a special master's findings of fact unless they are clearly erroneous. ***AOI***, section 13f; I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). Exactly what is meant by the phrase "clearly erroneous," or how to measure it, is not always easy to discern. The United States Supreme Court has stated that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). A federal court of appeals stated as follows:

> It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.

U.S. v. Aluminum Co. of America, 148 F.2d 416, 433 (2nd Cir. 1945) (L. Hand, J.).

A special master's findings, which a district court adopts in a non-jury action, are considered to be the findings of the district court. I.R.C.P. 52(a); *Higley*, 124 Idaho at 534, 861 P.2d at 104. Consequently, a district court's standard for reviewing a special

master's findings of fact is to determine whether they are supported by substantial,[7] although perhaps conflicting, evidence. *Higley*, 124 Idaho at 534, 861 P.2d at 104.

B. Conclusions of law of a special master.

A special master's conclusions of law are not binding upon a district court, but they are expected to be persuasive. I.C. § 42-1412(5); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 740, 947 P.2d 409, 413 (1997). To the degree that the district court adopts the special master's conclusions of law, those conclusions become those of the court. *Id.* at 740, 947 P.2d at 413; *Oakley Valley Stone* 120 Idaho at 378, 816 P.2d at 334. This permits a district court to adopt a special master's conclusions of law only to the extent they correctly state the law. *Id.* Stated another way, the conclusions of law of a special master are not protected by or cloaked with the "clearly erroneous" standard. Further, the label put on a determination by a special master is not decisive. If a finding is designated as one of fact, but is in reality a conclusion of law, it is freely reviewable. Wright and Miller, Federal Practice and Procedure § 2588 (1995); *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1975).

The bottom line is that findings of fact supported by competent and substantial evidence, and conclusions of law correctly applying legal principles to the facts found will be sustained on challenge or review. *MH&H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 881, 702 P.2d 917, 919 (Ct. App. 1985).

---

[7] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding -- whether it be by a jury, trial judge, or special master -- was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they *could* conclude. Therefore, a special master's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusion the special master reached. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993). Substantial evidence is defined "as such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla but less than a preponderance." *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 765, 40 P.3d 119, 123 (2002).

VII.
DISCUSSION

A. The Special Master did not err procedurally by conducting a hearing on injury in the absence of a third-party objection to Pocatello's accomplished transfer claim.

Pocatello argues the Special Master erred procedurally by conducting a hearing on injury despite the absence of a third-party objection to its accomplished transfer claim. Pocatello argues Idaho Code § 42-1425 limits inquiry into injury to existing rights only to situations where an existing water right holder (other than the claimant) objects to the accomplished transfer. This Court disagrees. A plain reading of the statutory language provides just the opposite.

Idaho Code § 42-1425 specifically provides a mechanism for memorializing in the SRBA previously unauthorized transfers. I.C. § 42-1425 (2). While the statute waives the otherwise mandatory administrative transfer requirements of Idaho Code §§ 42-108 and 42-222, it does not waive the rest of the SRBA procedures for processing a claim. Accordingly, the statute should be read in the context of the rest of the SRBA adjudication processes. The statute does not eliminate the Director's authority and statutory duty to investigate the claim and file a *Director's Report*. *See* Idaho Code 42-1410 and 42-1411. The statute contemplates the filing of an initial *Director's Report*. In the event an objection is filed to a claim for an accomplished transfer then IDWR is required to file a "supplemental report." (i.e. *supplemental* to the initial report.) I.C. § 42-1425 (2) (a). A *Director's Report* necessarily includes the authorization to determine "conditions on the exercise of any water right included in any decree, license, or approved transfer application" and "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." I.C. § 42-1411 (2) (i) and (j).

Idaho Code § 42-1425 (1)(c) provides that "the legislature further finds and declares that examination of these changes by the director through the procedures of section 42-222, Idaho Code, would be impractical and unduly burdensome. The *more limited examination of these changes provided for in this section, constitutes a*

reasonable procedure for an expeditious review by the director while ensuring that the changes do not injure other existing rights or constitutes an enlargement of use of the original right." I.C. § 42-1425(1)(c) (emphasis added). Idaho Code § 42-1425 (2) sets forth the criteria required to qualify for an accomplished transfer under the statute. Injury to existing rights is not the only inquiry into whether a claim qualifies under the statute. In addition, the subsequent changes to the original right as claimed must have occurred prior to the commencement date of the SRBA; the changes to the original right are limited to the elements provided for in the statute, and the transfer cannot result in an enlargement of the original water right. *See* I.C. § 42-1425 (2). Nowhere does the statute require IDWR to accept Pocatello's claim as a *prima facie* showing of compliance with the statutory criteria nor does Idaho Code § 42-1425(2) limit these criteria to the circumstance where an objection is filed by a third party.[8] This would potentially eliminate any review by the Director as contemplated by I.C. § 42-1425 (1)(c). Rather, in the event an objection is filed to the accomplished transfer then Idaho Code § 42-1425 requires additional measures and procedures including a supplemental report filed by the Director. I.C. § 41-1425 (2)(a). In this case an objection was filed by Pocatello thereby appropriately triggering an inquiry into injury.

A similar issue presented itself in the context of an administrative transfer in *Barron v. IDWR*, 135 Idaho 414, 18 P.3d 219 (2001). In *Barron*, the Idaho Supreme Court rejected transfer applicant's argument that because no party came forward to protest the proposed transfer, IDWR was required to accept the applicant's showing of non-injury, non-enlargement and favorable public interest without an examination. *Id.* at 441, 18 P.3d at 226. Although the amnesty provisions of I.C. § 42-1425 waive the application of the formal transfer requirements, the purpose of the statute is not to put the claimant in a better position than had the transfer requirements been followed by overlooking whether the transfer results in injury or enlargement in the absence of an objection by a third party. Accordingly, the Special Master did not err in inquiring into the issue of injury to existing water rights.

---

[8] For example, the statute is not applicable to a claim based on an enlargement of use irrespective of whether or not an objection is filed. I.C. § 42-1425(c)(2)(b). Accordingly, the only way in which the existence of an enlargement can be determined is through an investigation by IDWR.

B. The Special Master did not err in recommending the condition in order to prevent injury to existing water rights of third parties.

Pocatello argues the Special Master erred in concluding that the interconnected system of wells could not be decreed as alternate points of diversion under the provisions of the accomplished transfer statute without also including a condition specifying the date and particular well from which each water right was first established. For the reasons set forth below this Court affirms the ruling of the Special Master.

Idaho Code § 42-1425 authorizes changes to the place of use, point of diversion, nature or purpose of use, or period of use elements of a water right made prior to the commencement date of the SRBA (November 19, 1987) where the water right holder failed to comply with the statutorily defined transfer requirements.[9] *See* I.C. § 42-

---

[9] Idaho Code § 42-1425 provided as follows:

> **Accomplished transfers.** – (1) Legislative findings regarding accomplished transfers and the public interest.
> (a) 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.
> (b) 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.
> (c) The legislature further finds and declares that examination of these changes by the director through the procedures of section 42-222, Idaho Code, would be impractical and unduly burdensome. The more limited examination of these changes provided for in this section, constitutes a reasonable procedure for an expeditious review by the director while ensuring that the changes do not injure other existing water rights or constitute an enlargement of use of the original right.
> (2) Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication, may be claimed in a general

1425(2). The statute authorizes the change only where no existing water right is injured at the time of change or where the change does not result in an enlargement of the original water right. *Id.* The statute does not expressly define what constitutes "injury" to existing water rights. Pocatello argues that IDWR's reasoning in support of the condition incorrectly takes into account future injury as opposed to injury that occurred at the time of the change to the water right. This Court disagrees. Pocatello's argument incorrectly assumes that the concept of "injury" is limited to immediate physical interference with the existing right of another at the time the change to the water right was made. The SRBA Court previously rejected that same argument in the context of a contest made to the application of the other amnesty statute, Idaho Code § 42-1426, with respect to enlargement claims.

At issue in ***Order on Challenge (A & B Irrigation District)*** Subcase Nos. 36-02080 *et. al.* (April 25, 2003) (Hon. R. Burdick) was a contest to a subordination condition recommended by IDWR with respect to enlargement claims where the claimant failed to provide mitigation for the injury as required by statute. The claimant in protesting the subordination condition argued that there was no injury to other water users. The SRBA Court disagreed and held that to the extent an enlargement claim is

---

> adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right. Except for the consent requirements of section 42-108, Idaho Code, all requirements of sections 42-108 and 42-222, Idaho Code, are hereby waived in accordance with the following procedures:
> (a) If an objection is filed to a claim for accomplished change of place of use, point of diversion, nature or purpose of use or period of use, the district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right. After a hearing, the director shall submit a supplemental report to the district court setting forth his findings and conclusions. If the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director's determination, they may seek review before the district court. If the change is disallowed, the claimant shall be entitled to resume use of the original water right, provided such resumption of use will not cause injury or can be mitigated to prevent injury to existing water rights. The unapproved change shall not be deemed a forfeiture or abandonment of the original water right.
> (b) This section is not applicable to any claim based upon an enlargement of use. [I.C., § 42-1425, as added by 1994, ch. 454, § 31, p. 1443; am. 1996, ch. 186 § 7, p. 584.]

The statute was amended in 2006 to address the northern Idaho adjudications but remains the same in substance.

given priority over an existing right on the same source without mitigation, the injury to the existing water right is *per se* even though at the time the enlargement was established there was sufficient water to satisfy both the enlargement claim as well as the rights of existing water right holders. The SRBA Court's analysis focused on the injury to the priority dates of existing rights on the same source in times of shortage. The SRBA Court relied on the Idaho Supreme Court's analysis of injury in *Fremont-Madison Irr. Dist v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996):

> In *Fremont-Madison*, the Idaho Supreme Court held that the enlargement provision of I.C. § 42-1426 (2) was constitutional only because of the mitigation provision, the Court held:
>
> > [S]ome injury from an enlargement can be identified if the enlargement takes priority over a validly established water right held by a so-called junior appropriator. The junior appropriator will not receive the water that he/she would have received but for the enlargement **if there is not enough water to serve all water users. It is difficult, if not impossible, to perceive of a situation in which an enlargement would not injure an appropriator who had an established right if the enlargement receives priority**. However, there is at least the possibility that an appropriator seeking an enlargement of one water right may accept a diminution of another water right held by the same appropriator to assure that the enlargement of the one water right will not reduce the total volume available to the junior appropriator.
>
> *Fremont-Madison* at 461. Implicit in the [Idaho Supreme] Court's reasoning is that to the extent a previously unauthorized enlargement claim is retroactively given senior priority over an existing right on the same source, without mitigation (i.e. a substitute source of water), **the injury is essentially *per se* because the priority of the affected right on the system has been diminished. At the time an enlargement occurs the affect on other appropriators may not be physically apparent or apparent because there may be sufficient enough water supply at the time to satisfy all rights on the system as well as the enlargement. However, the relative priority dates on a system only become significant when there is not enough water to supply all of the rights on the system. Hence, the essence and value of a water right in a prior appropriation system is the priority date. To the extent a claimant is entitled to retroactively receive a valid water right with a priority date**

> **senior to other appropriators on the same source the juniors are *per se* injured irrespective of the extent of the water supply.** The mitigation provision preserves the order of priorities on a system by preventing the available water supply to juniors from being diminished as a result of the new or enlarged right.
>
> . . .
>
> **The inclusion of the subordination remark satisfies the constitutional concerns raised in *Fremont-Madison* by protecting the order of priorities of existing rights while at the same time permitting previously unauthorized enlargements to be decreed with the priority date as of the date of the enlargement subject to being subordinated to any junior rights existing as of the date of the enactment of I.C. § 42-1426(2), if any. The standardized remark allows the provisions of I.C. § 42-1426(2) to be applied and implemented without identifying each and every affected water right.**

Order on Challenge (A & B Irrigation District) at 25-26 (emphasis added). On appeal, the reasoning and decision of the SRBA Court was affirmed by the Idaho Supreme Court. *A & B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005).

Although the issues in the instant case do not involve enlargement claims or the application of Idaho Code § 42-1426, the reasoning regarding injury to existing water rights is equally applicable. Specifically, injury to an existing water right is not limited to the circumstance where immediate physical interference occurs between water rights as of the date of the change. Injury also includes the diminished effect on the priority dates of existing water rights in anticipation of there being insufficient water to satisfy all rights on a source (or in this case a discrete region of the aquifer) and priority administration is sought. Even though the priority administration may occur at some point in the future, injury to the priority date occurs at the time the accomplished transfer is approved. The Special Master correctly acknowledged this principle: "Where a change or transfer would undermine a priority date, the injury is real and material even if the damage is not immediately manifest. In a prior appropriation system, undermining a priority date is a seminal injury. Thus, the condition appears to correctly protect juniors from injury to their priorities." ***Amended Master's Report and Recommendation and Order on Motion to Reconsider*** at 19.

Contrary to Pocatello's assertion this is neither future injury nor is the injury speculative. To the extent Pocatello is authorized to transfer a point of diversion for a water right from a well or wells located in vicinity where there is no significant hydraulic connection with wells of existing water users, to a different well developed subsequent to existing rights where there is a significant connection and the right being transferred is senior to existing rights, the injury to the schedule of priority dates of existing users is *per se*. But for the transfer of the alternate point of diversion existing users would have the more senior priorities in the vicinity. Pocatello's argument ignores the very purpose and significance of the priority dates of existing users. The purpose of a priority date is to provide for administration in time of scarcity. At the time the alternative point of diversion was established there may well have been sufficient water to satisfy all rights. Hence, it would not be necessary to regulate according to a priority schedule.

Even though the "source" of all water rights involved is "ground water" and all rights are supplied from the same aquifer, the aquifer may not be homogenous as between the discrete regions where the wells are located. The closer wells are in proximity to one another the greater the potential for well interference over time or in times of shortage. It is erroneous to assume that the relative affects from ground water pumping between wells is uniform throughout the aquifer just because the "source" of all of the rights is labeled "ground water." The condition eliminates the need to establish the highly complex facts that relate to the specific interrelationships or degree of connectivity between specific rights until such time as priority administration becomes necessary. Pocatello correctly points out that such a determination is typically beyond the scope of the SRBA proceedings and is a determination more appropriately associated with delivery calls. *See American Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 877, 154 P.3d 433, 448 (2006) (partial decree need not contain information on how each water right on a source physically interacts or affects other rights on the same source.) However, if and when that determination is necessary the condition eliminates any injury to the priorities of existing rights.

The condition in no way prevents Pocatello from using its wells as alternative points of diversion for each other. The condition only has significance in the event of priority administration at which time the senior priorities of existing users are protected.

The very fact that Pocatello contests the condition is an acknowledgment that without the condition the priorities of existing water rights will be diminished in favor of the alternative point of diversion for one of Pocatello's more senior rights. i.e injury. If however, the wells from which the alternative points of diversion never result in interference with the wells of existing users then priority administration between wells will not be triggered and the condition will not pose any limitation on Pocatello's rights. The Special Master also acknowledged this point - "[i]f, as Pocatello argues, the alternative points of diversion cause no injury to juniors, then the condition should not affect Pocatello's rights." ***Amended Master's Report and Recommendation and Order on Motion to Reconsider*** at 19. Therefore, the Court concludes that the inclusion of the condition is necessary to define Pocatello's rights. The recommendation of the Special Master is affirmed on this issue.

1. The Scenarios provided by the Municipal Providers illustrate why the condition is necessary to protect existing rights. The Court concurs with the Provider's assessment of the application of the condition.

The Municipal Providers briefed three different scenarios illustrating the circumstances under which the recommended condition would apply. The Providers seek clarification of the application of the provision over concern that the Special Master's recommendation could be interpreted too broadly. The Court has included the scenarios in the footnote because they aptly illustrate the adverse affect to the priorities of existing water users absent a condition. [10] The Providers assert that the Special Master's

---

[10] The Provider's presented three different scenarios to illustrate under what circumstances the condition would come into play.

A. First scenario: local well interference.

> Suppose a city owns four wells, each with a water right for 1,000 gpm; and suppose the priority dates are 1920, 1945, 1970 and 1985, respectively. Assume that the wells are part of an integrated diversion and delivery system. Assume that, based on accomplished transfer, the city obtained partial decrees for each water right identifying all four wells as alternative points of diversion for each other, subject to the condition quoted above in Part I. The alternative points of diversion provision would allow the city to pump any water right, or any combination of water rights, from any well. For example, if the 1920 well caved in and the city were able to improve production from the

1985 well, it could pump both the 1920 water right and the 1985 water right from the newer well – without seeking a transfer.

Suppose, however, that doubling the production out of the 1985 well interfered with a nearby 1950-priority well owned by a person we will call Mrs. Smith. In other words, going from 1,000 to 2,000 gpm expanded the cone of depression around the city's 1985 well, which, in turn, impaired production at Mrs. Smith's well. If the city's water had alternative points of diversion subject to no conditions, the city would be within its rights and Mrs. Smith could not complain about additional water, under a 1920 water right, now being diverted out of the city's 1985 well. The effect of the condition, however, is to retain a record of the original well and priority date for each water right in order to preserve Mrs. Smith's right to complain of injury from this change in how the 1920 water is pumped. In short, without the condition, Mrs. Smith loses. With the condition, Mrs. Smith wins.

B. Second scenario: broad, regional administration

The "regional administration" scenario lies at the other end of the spectrum. Suppose now that there is no Mrs. Smith and no local well interference problem, but that the city has the same four wells as described above. Suppose further that IDWR imposes region-wide administration covering the entire valley, including all of the city's service area. This might be due to a conjunctive administration delivery call. It might be due to declining aquifer levels throughout the region (as opposed to interference from a discrete neighboring well through an expanded cone of depression, like the first scenario). For whatever the reason, IDWR orders the curtailment of all water rights in the valley junior to 1980. At this point, the city can no longer pump its 1985 water right, but it can still pump 3,000 gpm from its three more senior water rights. Due to the alternative points of diversion provision in its partial decrees, the city has the ability to select from which well or wells to pump that 3,000 gpm. It might pump 750 gpm out of each of the four wells. It might shut down the 1920 well, while pumping the full 1,000 gpm out its three more recently installed wells. Or it might select any other combination that added up to 3,000 gmp. The point is that the condition does not come into play and does not restrict the city's choices in any way (so long as the change does not create some new injury), despite the fact that there is aquifer-wide administration of the city's water rights.

The reason is simple: In this situation, the water shortage is regional (encompassing the municipal provider's entire water system). The administration is not limited to specific well locations. Accordingly, it does not matter from which well the city pumps its 3,000 gpm. Pumping from each of the wells has the same effect on the regional water supply.

Likewise, if the city provided mitigation for the curtailed 1985 water right, it would be allowed to pump any of its four water rights from any of its wells – just as if there were no administration.

C. Third scenario: small, geographically-limited administration

The third example is in between the first two. Suppose IDWR imposed administration within a small area, such as within a ground water management area that covers only half the city's water system. Suppose that within the curtailment zone, all wells junior to 1980 were curtailed. Suppose further that the 1920 and 1985 wells were located within the curtailment zone, and the 1945 and 1970 wells were located outside it. The city, again, loses 1,000 gpm under its 1985 right.

Under this situation, the condition would come into play. It would prevent the city from pumping the 1945 or 1970 water (associated with wells outside the curtailment area) from the 1985 well. That would be improper, because the effect would be to bring

determination could be read too broadly to preclude under any circumstances the use of alternative points of diversion any time priority administration is implicated. The Court concurs that in a circumstance involving regional priority administration a municipal provider may still be able to exercise alternative points of diversion within the region undergoing administration so long as the well under which the original right was established is also located within the region subject to the administration. However, a water right originating from a well located outside the region of administration with a priority date senior the priorities being regulated could not be diverted from wells within the area of administration in an effort to avoid regulation within the region of administration.

2. The three scenarios apply to Pocatello's rights despite the volume limitations place on Pocatello's wells.

Pocatello argues that the situations presented in the three scenarios are distinguishable and do not apply to its circumstances because Pocatello has already stipulated with the Surface Water Coalition to not increase the volumes beyond historical amounts in use at the time the accomplished transfers were established in 1987. *See Stipulation and Agreement Between Pocatello and Surface water Coalition in Pocatello's SRBA Subcases 29-271 et. seq.* (filed Feb 26, 2007). Pocatello argues that there is no injury to other water rights because the volume of water pumped from each well would

---

water rights from outside the curtailment area into the curtailment area, thereby undermining the purpose of the curtailment.

However, even here the city would have some flexibility under its alternative points of diversion. The city could decide from which of the wells within the curtailment area it wants to pump 1,000 gpm under the 1920 right. It might pump 500 gpm from each, or it might prefer to take the entire 1,000 gpm out of its newest well. Likewise, if it chose, the city could be free to take the 1920 water right (associated with a well within the curtailment area) and pump it from a well outside the curtailment area. And, of course, the city would be free to pump its water rights associated with wells outside the curtailment area from any of its wells outside the curtailment area (again, assuming no local well interference or other injury resulted).

The reason is the same as in the second scenario. It makes no difference whether the 1920 water is pumped from the 1920 well or the 1985 well. Both have the same effect on the ground water management area. But moving senior rights in from outside an administration zone will not be allowed under the condition, because that would defeat the purpose of administration, thus requiring IDWR to further constrain pumping, and thus injuring other water right holders.

not exceed beyond what was established on the date of commencement. Pocatello's argument misses the point. To the extent the use of the alternative point of diversion interferes with the well of a pre-existing senior water right the priority of senior right is injured — irrespective of the reason for the interference. Further, the fact that the volume pumped may not increase does not address the issue of avoiding a regional administration by pumping a senior right originally located outside of the area of administration from an alternative point of diversion inside the area of administration in order to avoid being regulated.

3. The fact that some of the original wells referenced in the condition are no longer in operation does not constrain Pocatello's use of the water right.

Pocatello argues the condition for some of its rights lists wells no longer in operation preventing effective operation of its interconnected system of wells. Pocatello argues because in times of priority administration when it is most dependent on its senior rights the portion of the rights associated with such wells would not be able to be diverted because the wells no longer exist.

Pocatello's argument does not provide a legal defense. However, the condition only comes into play in times of priority administration. To the extent Pocatello's use of the right through an alternative point of diversion interferes with the well of an existing right then Pocatello has still has the option of diverting from other wells not causing interference. This is no different than with Pocatello's other rights. In the event of regional administration, Pocatello could still divert from alternative points of diversion within the region subject to administration, provided the original well no longer in operation is also located within that same region and is senior to the priority being regulated. This is also no different than with any of Pocatello's other rights. Pocatello is correct that to the extent the well no longer in operation is located outside of the area of regulation, Pocatello would not be able to revert back to the original well to avoid regulation as the well is no longer in operation. Pocatello would still be able to divert the right from alternative wells, if any, located outside of the area of regulation.

4. The recommendation that the condition apply to alternative points of diversion, where the condition was not previously imposed on water rights diverting from the same wells, does not constitute a collateral attack on the transfer proceedings.

Three of Pocatello's rights on its system underwent a formal transfer in 1999 approving alternative points of diversion. The alternative points of diversion for these rights share the same wells claimed as alternative points of diversion for the rights at issue. The alternative points of diversion for the three rights were not conditioned. Pocatello argues diverting both conditioned and unconditioned rights from the same wells causes confusion and complicates administration of the water rights. Pocatello also argues that by adding the condition "to wells" that were previously unconditioned constitutes an impermissible collateral attack on the formal transfer.

This Court disagrees. First, it is routine in the SRBA for multiple rights to be decreed from a single well with different restrictions, limitations and priority dates. The situation in this case is no different. Next, the condition applies to the water right not the well.

5. The Special Master did not err in striking the *Affidavit of Josephine Beeman in Support of Pocatello's Post-Trial Brief*.

The parties filed post-trial briefs. Pocatello also filed the *Affidavit of Josephine P. Beeman in Support of Pocatello's Post-Trial Brief* which includes 11 exhibits. This Court has reviewed the *Affidavit*. The various exhibits include briefing filed in other cases (*Freemont-Madison v. IGWA* and *American Falls Reservoir Dist. #2 et.al.*); a letter dated July 11, 2001 from IDWR regarding "*Continued Negotiations of General Water Management Rules, IDAPA Docket No. 37-0313-9701*"; "*Draft Statewide Water Management Rules*" to name a few. The State moved to strike the *Affidavit* on the basis that the presentation of evidence had closed. The Special Master granted the State's motion but held that she would consider it legal argument. In the past IDWR recommended municipal rights as alternative points of diversion as claimed without imposing any limiting condition.

Pocatello argues that the *Affidavit* was submitted as legal argument to demonstrate that IDWR has changed its position with respect to conditioning municipal water rights. Pocatello states in its post-trial brief:

> This brief addresses all of the issues presented in the Court's six-day trial of Pocatello's 38 state-law SRBA claims. Perhaps the most consistently reoccurring theme is that the Idaho Department of water resources (IDWR) has changed its position with respect to Pocatello's municipal water rights from IDWR's prior investigation and recommendation of similar municipal rights in the SRBA.

Pocatello's Post-Trial Brief at 1. Idaho Rule of Evidence 401 defines "relevant evidence" as evidence having the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable without the evidence." I.R.E. 401. Clearly the *Affidavit* was submitted as evidence in support of the factual allegation that IDWR has changed its position with respect to recommending municipal right. To the extent the contents of the *Affidavit* were previously admitted into evidence Pocatello could appropriately refer to the contents in the brief. To the extent the contents were not previously admitted into evidence then the Special Master appropriately found the *Affidavit* to be "additional evidence." Pocatello's labeling of the *Affidavit* as legal argument is not binding on the Court. Accordingly, the Special Master did not err in considering the *Affidavit* a legal argument only.

Finally, the Special Master's ruling did not result in prejudice to Pocatello. Apparently, IDWR admitted at trial changing its position after gaining a better understanding how conjunctive management is to be implemented and the relative affects conjunctive management has on existing rights. Pocatello states: "At trial, IDWR explained that it purposely changed its position in 2003 because the Department had evolved in its understanding of conjunctive administration since the mid-1990's." *Pocatello's Opening Brief* at 11. IDWR's change is position would be expected. The ruling of the Special Master is affirmed.

C. The Special Master did not err in recommending that Pocatello's ground water wells not be decreed as alternative points of diversion for its senior surface rights.

Pocatello claimed its ground water wells as alternative points of diversion for its senior surface rights diverting from Gibson Jack and Mink Creek. The Special Master recommended that the accomplished transfer claim be disallowed. The Special Master concluded that the provisions of I.C. § 42-1425 do not authorize a change in the source element of a water right. The Special Master also found that although Gibson Jack and Mink Creeks contribute to the Lower Portneuf River Valley Aquifer (LPRVA) from which the ground water rights are pumped the two are not the same source. The Special Master found that although the two creeks contribute to the LPRVA, the LPRVA derives a significant supply of its water from other sources. This Court affirms.

1. Idaho Code § 42-1425 does not expressly authorize an accomplished transfer to the change in source element.

Idaho Code § 42-1411 sets forth the elements required for defining a water right. The "source" of the right is one of the enumerated elements. I.C. § 42-1411 (2)(b). The accomplished transfer provisions of Idaho Code § 42-1425 authorize changes to the "place of use, point of diversion, nature or purpose of use or period of use" but does not expressly authorize a change to the source element. Presumably for the very reason that the injury to the water rights of existing water users on the "new" source is *per se*. A change in source is essentially the appropriation of a new water right. However, in the case of a new appropriation the priority date is junior to those of existing users on the new source while a transferred right retains its original priority thereby shifting the schedule of existing priorities on the new source resulting in injury to existing priorities.

This Court acknowledges and Pocatello has argued that ***Partial Decrees*** have been issued which refer to accomplished transfer to source. The Court responds as follows. First, the source element listed in a license or prior decree is not dispositive of the issue as a source can be described generally or in more specific terms. Two sources can share such a significant connection that the affect of a transfer from one source to another would have no affect on the priorities of existing users; i.e. diverting from either "source" has exactly the same affect on the rights of existing users. Second, the rights described by Pocatello were investigated by IDWR insuring that no injury resulted to

existing rights. For example if a right is transferred to a different source and there are either no rights diverting from the new source or the right being transferred is the most junior then there is no injury to existing rights. Lastly, the accomplished transfer claims were uncontested so any precedential value is limited based on the absence of a meaningful record. In this case, despite ruling that I.C. § 42-1425 did not authorize changes in source, the Special Master nonetheless appropriately allowed Pocatello the opportunity to prove the absence of injury to existing users.

2. The evidence does not support that the surface and ground water rights are diverted from the same source.

The Special Master heard conflicting testimony on the degree of interconnectedness between the surface and ground water sources and determined the two to be connected but separate. The Court has reviewed the testimony of Pocatello's expert Greg Sullivan and concludes that the evidence overwhelming supports the Special Master's finding. Mr. Sullivan testified that "roughly at least half the supply, if not more is coming from these tributaries. So that would be half the supply of the Lower Portneuf River Valley Aquifer comes from Mink Creek – or primarily comes from Mink Creek and Gibson Jack Creek with some other coming from other tributaries." TR. Vol. IV pp. 801-02. Mr. Sullivan then concludes that because of the existence of this hydraulic connection, Mink Creek, Gibson Jack Creek and the LPRVA are essentially the same source. TR. Vol. IV pp. 802-03. The testimony does not support the conclusion. The Court will not disturb the Special Master's finding.

By allowing the transfer the injury to the priority dates of existing ground pumpers would be unavoidable. The two sources are sufficiently disconnected such that ground water pumping has no affect on the surface sources. While evidence was presented that the two creeks contribute to the aquifer no evidence was presented supporting that the aquifers contribute to the creeks. As such, Pocatello could not seek regulation of ground water rights to satisfy its surface rights as the rights presently exist. However, by approving an accomplished transfer, Pocatello would be able to divert its surface rights from ground water wells and thereby seek regulation of existing wells

where no such right previously existed. Pocatello fails to address the issue of the water it would receive from sources other than Mink or Gibson Jack Creek which contribute to roughly the other half of the supply of the aquifer. The finding of the Special Master is affirmed.

D. The Special Master did not err in recommending water right 29-7770 with an irrigation purpose of use.

Pocatello claimed a "municipal" purpose of use for water right 29-7770. The *Director's Report* recommended the purpose of use as "irrigation." Pocatello holds three water rights (29-7118, 29-7119 and 29-7770) used exclusively for a biosolid waste treatment process. Biosolids generated in conjunction with Pocatello's sewage treatment process are applied to specific crops which absorb the waste as fertilizer. The three water rights were originally licensed with irrigation purposes of use. Licenses were issued for water rights 29-7118 and 29-7119 in 1975. Pocatello implemented the biosolids treatment program in 1981 and thereafter began using the rights in conjunction with the program ever since. Although the *Director's Report* recommended the purpose of use for the two rights as originally licensed (i.e. irrigation, the Special Master concluded that Pocatello successfully changed the purpose of use for 29-7118 and 29-7119 from irrigation to municipal based on the application of I.C. § 42-1425).

Water right 29-7770 does not share the same procedural posture. A license was issued for 29-7770 in 2003 with an irrigation purpose of use. The Special Master concluded that the provisions of the accomplished transfer statute were inapplicable because the license was issued after the commencement date of the SRBA and recommended the right with an irrigation purpose of use. This Court affirms.

In this case the license is controlling. This Court has long held that the SRBA cannot be used as a mechanism for reconditioning or collaterally attacking a license. The Court also addressed this issue as applied to these same claims in the context of Pocatello's alternative legal theory based on federal law. In ***Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law***, Subcase No. 29-11609 (City of Pocatello—Federal Law Claims) (Oct. 6, 2006), *affm'd*

on other grounds, Pocatello v. State, 145 Idaho 497, 180 P. 3d 1048 (2008), this Court held:

> Licenses are and have been consistently treated in the SRBA the same as prior decrees for purposes of binding the parties and their privies. In ***Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue***, subcases 36-02708 *et al.* (Dec. 29, 1999), the SRBA Court affirmed a special master's ruling that the SRBA was not the appropriate forum for collaterally attacking licenses previously issued through administrative proceedings.
>
> > The SRBA cannot serve as a second opportunity for IDWR to recondition a license which it had a full opportunity to condition when the license was originally issued. *See e.g., Matter of Hidden Springs Trout Ranch, Inc., v. Alred.* Having determined that I.C. § 42-220 binds the state to licensed rights, those same licenses are also binding on the license holder. If a party is aggrieved by any aspect of a license, that party's remedy is to seek an administrative review and then, if necessary, a judicial review of the license. I.C. §§ 42-1701(A) and 67-5270; *Hardy v. Higgenson*, 123 Idaho 485, 849 P.2d 946 (1997). If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license. [footnote 5 cited]. *See e.g., Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844 693 P.2d 1046 (1984).
>
> *Id.* (quoting ***Supplemental Findings of Fact and Conclusions of Law*** (Facility Volume) (July 31, 1998); *see also* ***Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge***, subcase 36-08099 (Jan 11, 2000) upholding subordination remark contained in a license for hydropower water right claim).
>
> Like a prior decree, a licensed right is not conclusive as to the extent of the water right, since a license does not insulate a claimant from practices occurring after the license was issued such as abandonment or forfeiture. However, unlike a prior decree, the binding effect of a license extends beyond the parties to the administrative proceeding and their privies. The Idaho legislature also acknowledged the binding effect of prior licenses and decrees in enacting Idaho Code § 42-1427 which provides a mechanism for defining elements of water rights not described

in prior decrees or licenses. Accordingly, the City is also bound by its prior license for water right claim 29-07431.

> The bottom-line is that a party cannot have its water use adjudicated or administratively determined in one proceeding and then re-adjudicate the right under a more favorable legal theory in a subsequent proceeding.

Memorandum Decision and Order on Challenge and Order Disallowing Water right Based on Federal Law at 12-13. (footnotes omitted). The significance of the permit and licensing method of appropriating a water right was not intended as a procedure for "registering" a pre-existing water use appropriated under the constitutional method. Rather it is a separate means of acquiring a water right. *Crane Falls Power & Irr. Co. v. Snake River Irr. Co.*, 24 Idaho 63, 82, 133 P.655, 674 (1913) (citing *Neilson v. Parker*, 19 Idaho 727, 115 Pac. 488 (1911)). Accordingly, Pocatello's redress should have been through the administrative licensing process. Ironically, Pocatello states in its opening brief that it "requested the irrigation designation in order to expedite the long overdue licensing of 29-7770." *Pocatello's Opening Brief on Challenge at 15.* Apparently Pocatello received the exact purpose of use for which it applied.

Pocatello argues that IDWR erred as a matter of law in designating the purpose of use as irrigation instead of municipal because the water has always been used in conjunction with the biosolids program and in exactly the same manner as 29-7118 and 29-7119. This Court does not find the irrigation purpose of use designation inconsistent with the manner in which the water right is beneficially used. The designation of municipal is a more general purpose of use encompassing various purposes of use required of a municipal provider. Idaho Code § 42-202B (6) defines municipal purposes as "residential, commercial, industrial, irrigation of parks and open space, and related purposes." While the irrigation of crops in conjunction with waste treatment could fall under the broader definition of municipal it could also fall under the more specific designation of irrigation. The water right is used to "irrigate" crops, which is entirely consistent with an irrigation purpose of use, albeit the designation does not have the same broad scope and flexibility as a municipal designation. In the event Pocatello wishes to use the water right for a different specific purpose that would otherwise also fall under

the broader definition of municipal, it will have to proceed with a formal transfer proceeding. The ruling of the Special Master is affirmed

E. The Priority Dates for 29-13558 and 29-13639.

1. The Special Master did not err in recommending a July 17, 1924, priority date for water right 29-13558.

Water right claim 29-13558 is based on beneficial use. Pocatello claimed a priority date of June 30, 1905. The *Director's Report* recommended a priority date of July 16, 1924. Following a trial on the merits, the Special Master held that the evidence presented by Pocatello in support of the claimed priority date was insufficient to rebut presumptive weight of the *Director's Report*. The water right was associated with the first well used by the City of Alameda. The *Director's Report* recommended a priority date of one day prior to the founding of Alameda on July 17, 1924. The recommendation relied on a historic newspaper article submitted by Pocatello in support of its claim. The article states that the City of Alameda was founded July 17, 1924, and that the depth of the well was increased during the term of Alameda's first mayor. The logical inference being that the well was in existence prior to the establishment of Alameda, however, the article does not state when the well was drilled. The Special Master found that the only evidence connecting the well to Pocatello's claimed priority of 1905 was a showing that an early resident moved into the area sometime in 1905. The Special Master concluded that Pocatello's showing was insufficient to rebut the presumption created by the *Director's Report*. On *Challenge* Pocatello argues that it offered evidence from multiple sources that the well was in place and diverting water by June 30, 1905. Pocatello does not cite to specific facts in the record supporting that the well was drilled and in use in 1905.

The *Director's Report* is considered to be *prima facie* evidence of the nature and extent of a water right. I.C. § 42-1411; *State v. Hagerman Water Right Owners*, 130 Idaho 736, 745, 947 P.2d 409, 418 (1997). The *prima facie* status constitutes a rebuttable

evidentiary presumption governed by Idaho Rule of Evidence 301. *McKray v. Rosenkrance*, 135 Idaho 509, 514, 20 P.3d 693, 698 (2000) (citing *State v. Hagerman Water Right Owners*). The presumption shifts only the burden of production not the burden of persuasion. *McKray* at 514, 20 P.3d at 698. The claimant of a water right has the ultimate burden of persuasion for each element of a water right. I.C. § 42-1411(5). The presumption is rebutted by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. I.R.E. 301; *Bongiovi v. Jamison*, 110 Idaho 734, 718 P.2d 1172 (1986) (fact presumed until opponent introduces "substantial evidence" of nonexistence of fact); *Krebs v. Krebs*, 114 Idaho 571, 759 P.2d 77 (Ct. App. 1988). Substantial evidence is defined "as such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla but less than a preponderance." *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 764, 40 P.3d 119, 122 (2002). If rebutted, the presumption disappears and the facts on which the presumption is based are weighed together with all other relevant facts. *Id.* The trier of fact has primary responsibility for weighing the evidence and determining whether the required burden of proof on an issue has been met. *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 765, 40 P.3d 119, 123 (2002). The Court shall adopt the findings of fact of the Special Master unless clearly erroneous.[11] I.R.C.P. 53(e)(2).

The Special Master, after weighing the evidence, determined "although the evidence has some probative value, by itself does not rebut the *Director's Report* conclusion that priority is July 16, 1924." The Special Master's findings are not clearly erroneous. The evidence supports a finding that the well was in existence prior to the founding of the City of Alameda. However, this Court concurs that insufficient evidence was presented to establish a more specific priority date. Accordingly, the earliest priority the evidence supports is a priority of one day earlier than the founding of Alameda. The finding of the Special Master is affirmed.

2. The Special Master's recommendation of a priority date one day earlier than the licensed priority for water right 29-13639 is affirmed.

[11] *See supra* standard of review of findings of fact of Special Master.

The Special Master found that water right 29-13639 is based on prior license 29-2324. The prior license covered Alameda wells 1, 2 and 3. Water right 29-13639 relates to well number 3. The licensed priority date for 29-13639 is October 22, 1952. The *Director's Report* recommended a priority of October 22, 1952, based on the prior license. Pocatello claimed a priority of December 31, 1940, based on beneficial use. The Special Master determined that although Pocatello presented evidence regarding Pocatello's population growth, the evidence was insufficient to establish a specific priority date including the claimed priority of December 31, 1940. The Special Master made the finding that the permit and license support that the wells pre-existed October 22, 1952, and therefore concluded that the priority should be advanced one day prior of October 21, 1952. This Court disagrees.

Water right 29-13639 is based on a former license. Pocatello's claim is not to the use of additional water from the well not previously covered under the license. Pocatello's claim is for an earlier priority for a previously licensed water right. For the reasons discussed above, the Court finds this to be a collateral attack on a previously licensed right and concludes that the priority date should be consistent with the license or October 22, 1952. However, the State did not contest the Special Master's recommended priority for this right. The State argued that the priority should not be any earlier than the priority date recommended. Even disregarding the former license, the evidence does not support an earlier priority. The Court thereby affirms the recommendation of the Special Master.

VIII.
CONCLUSION AND ORDER

Pursuant to I.R.C.P. 53(e)(2) and ***AOI*** section 13f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the ***Special Master's Report and Recommendation*** and wholly adopts them as its own.

Therefore, IT IS ORDERED that the *Challenge* is **denied**. ***Partial Decrees*** for the above-captioned order will be entered pursuant to a separate order consistent with this ***Memorandum Decision***.

IX.

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 November 19, 2009

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

EXHIBIT A

Subcase Nos:

29-00271
29-00272
29-00273
29-02274
29-02338
29-02401
29-02499
29-04221
29-04222
29-04223
29-04224
29-04225
29-04226
29-07106
29-07118
29-07119
29-07322
29-07375
29-07450
29-07770
29-11339
29-11348
29-13558
29-13559
29-13560
29-13561
29-13562
29-13637
29-13638
29-13639

(Subcase list: BEEMANGP)
11/04/09

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON CHALLENGE (CITY OF POCATELLO) was mailed on November 09, 2009, with sufficient first-class postage to the following:

CITY OF POCATELLO
Represented by:
A. DEAN TRANMER
CITY OF POCATELLO
PO BOX 4169
POCATELLO, ID 83201
Phone: 208-234-6148

AMERICAN FALLS RESERVOIR
Represented by:
C THOMAS ARKOOSH
301 MAIN ST
PO BOX 32
GOODING, ID 83330
Phone: 208-934-8872

CITY OF BLACKFOOT
CITY OF NAMPA
UNITED WATER IDAHO
Represented by:
CHRISTOPHER H MEYER
601 W BANNOCK ST
PO BOX 2720
BOISE, ID 83701-2720
Phone: 208-388-1200

AMERICAN FALLS RESERVOIR
Represented by:
DAVID HEIDA
301 MAIN ST
PO BOX 32
GOODING, ID 83330
Phone: 208-934-8872

CITY OF POCATELLO
Represented by:
JOSEPHINE P BEEMAN
409 W JEFFERSON ST
BOISE, ID 83702
Phone: 208-331-0950

STATE OF IDAHO
Represented by:
NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

A & B IRRIGATION DISTRICT
BURLEY IRRIGATION DISTRICT
Represented by:
ROGER D LING
615 H ST
PO BOX 396
RUPERT, ID 83350-0396
Phone: 208-436-4717

CITY OF POCATELLO
Represented by:
SARAH A KLAHN
WHITE & JANKOWSKI LLP
KITTREDGE BUILDING
511 16TH ST STE 500
DENVER, CO 80202
Phone: 303-595-9441

MILNER IRRIGATION DISTRICT
NORTH SIDE CANAL CO LTD
NORTH SIDE CANAL COMPANY
TWIN FALLS CANAL COMPANY
Represented by:
TRAVIS L THOMPSON
113 MAIN AVE W, STE 303
PO BOX 485
TWIN FALLS, ID 83303-0485
Phone: 208-733-0700

UNITED STATE OF AMERICA
UNITED STATES OF AMERICA
Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

(Certificate of mailing continued)

MINIDOKA IRRIGATION DISTRICT
Represented by:
W KENT FLETCHER
1200 OVERLAND AVE
PO BOX 248
BURLEY, ID 83318
Phone: 208-678-3250

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

UNITED STATES OF AMERICA
US DEPT OF JUSTICE, ENRD
550 W FORT ST MSC 033
BOISE, ID 83724

ORDER
Page 2 11/04/09 FILE COPY FOR 00153 Deputy Clerk Julie Murphy

RECEIVED
APR 13 2010
Givens Pursley, LLP

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
APR 12 2010
By _____ Clerk
Deputy Clerk

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	**Subcase Nos. 29-00271, *et al.***
	(See Attached Exhibit A)
Case No. 39576	
	ORDER ON MOTION TO ALTER OR AMEND
	(City of Pocatello)

Ruling: Motion to Alter or Amend the Judgment, **Denied**.

I.
APPEARANCES

JOSEPHINE P. BEEMAN, Beeman & Associates, P.C., Boise, Idaho, on behalf of Challenger City of Pocatello.

SHASTA KILMINSTER-HADLEY, Deputy Attorney General, Boise, Idaho, on behalf of Respondent State of Idaho.

CHRISTOPHER H. MEYER AND JOHN M. MARSHALL, Givens Pursley, LLP, Boise, Idaho, appearing *amici curiae* on behalf of United Water Idaho, City of Nampa, and the City of Blackfoot.

JOHN M. MELANSON, Presiding Judge of the SRBA, *pro tem*, presiding.

II.
BRIEF PROCEDURAL BACKGROUND

On November 9, 2009, this Court issued its ***Memorandum Decision and Order on Challenge (City of Pocatello)*** ("***Order***"). The facts and procedural history of the *Challenge* are explained in the Court's ***Order*** and are incorporated herein by reference.

30-142 & 4628-2

On November 23, 2009, the City of Pocatello ("Pocatello") filed a *Motion to Alter or Amend* the Court's ***Order***, pursuant to I.R.C.P. 59(e).[1] On December 10, 2009, Pocatello filed its *Brief in Support of Motion to Alter or Amend* ("*Brief*"). On January 15, 2010, the State of Idaho ("the State") filed a *Response to the City of Pocatello's Motion to Alter or Amend* ("*Response*").

III.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on March 22, 2010. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, the matter is deemed fully submitted for decision on the next business day, or March 23, 2010.

IV.
ISSUES

A. Issues Raised by the City of Pocatello.

Pocatello raised a number of issues in its *Motion to Alter or Amend*. The Court summarizes the issues as follows:

1. Whether this Court erred by failing to enumerate specific findings of fact and conclusions of law in its previous ***Order***?
2. Whether I.C. § 42-1425 authorizes IDWR to engage in an injury analysis when no third parties objected to the claims?
3. Whether I.C. § 42-1425 applies to transfers accomplished prior to May 26, 1969?
4. Whether Pocatello presented sufficient evidence to rebut the *Director's Report*'s allegations of injury and lack of connectivity between Pocatello's surface and ground water sources?

---

[1] As distinguished from a *Motion to Alter or Amend a Special Master's Recommendation*, pursuant to ***SRBA Administrative Order 1*** § 13(a).

5. Whether a specific legal standard exists to determine whether a sufficient degree of connectivity establishes that surface and ground water points of diversion occur on the same source?

6. Whether I.C. § 42-1425 prohibits accomplished transfers of source?

7. Whether injury to a priority date is injury *per se* under I.C. § 42-1425?

8. Whether IDWR improperly changed its position regarding the administration of municipal rights?

9. Whether the Providers' scenarios are based on facts in the record and whether this Court could consider such scenarios in reaching its decision?

10. Whether water right 29-7770 was properly recommended with an "irrigation" purpose of use?

11. Whether Pocatello's claim of an earlier priority date is a collateral attack on the license issued for water right 29-13639?

B. Issues raised by the State of Idaho.

The State raises only one issue in its *Response to the City of Pocatello's Motion to Alter or Amend*. The Court summarizes the issue as follows:

1. Whether the State should be awarded costs and attorney fees pursuant to I.C. § 12-117?

V.
DISCUSSION

For the reasons already stated in this Court's previous ***Order***, Pocatello's *Motion to Alter or Amend* is **denied**. In its *Motion* and *Brief*, Pocatello repeats many of the same arguments made in its previous motions and briefings to this Court. However, each of the arguments raised by Pocatello will be addressed below.

A. Pocatello's *Motion* is properly framed as a *Motion to Alter or Amend* under I.R.C.P. 59(e).

In its *Motion to Alter or Amend*, Pocatello stated:

> The City of Pocatello ... hereby moves this court to alter or amend the District Court's November 9, 2009 Memorandum Decision and Order pursuant to I.R.C.P. 7(b)(1), 7(b)(3), and 59(e), or, in the alternative, to reconsider the Memorandum Decision and Order on Challenge pursuant to I.R.C.P. 11(a)(2).

In its *Response*, the State argued that this Court should treat Pocatello's *Motion* as a motion to alter or amend, because a motion for reconsideration should only be utilized to reconsider interlocutory orders. In addition, the State asserted that Pocatello has raised new legal theories and claims that were not raised in the *Notice of Challenge*, in violation of Idaho Rule of Civil Procedure 59(e).

Rule 11(a)(2)(B) governs motions for reconsideration. It provides that "a motion for reconsideration of any **interlocutory orders** of the trial court may be made at any time before the entry of final judgment, but not later than fourteen (14) days after entry of the final judgment." (Emphasis added). A Rule 11(a)(2)(B) motion for reconsideration is addressed to the discretion of the court. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001).

Rule 59(e) governs motions to alter or amend a judgment. It provides that "a motion to alter or amend the judgment shall be served not later than fourteen (14) days after entry of the judgment." Pursuant to Rule 59(e), "a district court can correct legal and factual errors in proceedings before it." *Straub v. Smith*, 145 Idaho 65, 71, 175 P.3d 754, 760 (2007). A Rule 59(e) "motion to amend a judgment is addressed to the discretion of the court." *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct. App. 1982).

The distinction between a motion for reconsideration and motion to alter or amend a judgment is significant in that Rule 11(a)(2)(B) permits a party to present new evidence in conjunction with a motion to reconsider, whereas new evidence may not be presented under Rule 59(e) in conjunction with a motion to alter or amend. *Johnson v. Lambros*, 143 Idaho 468, 472, 147 P.3d 100, 104 (Ct. App. 2006).

In this case, the Court's ***Order*** contained a Rule 54(b) certificate, providing that:

> 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.

Order, p. 30. (Emphasis added). Since the ***Order*** is deemed a final judgment by the Rule 54(b) certificate, it is no longer an interlocutory order. As such, a motion to reconsider under Rule 11(a)(2), which only applies to "interlocutory orders of the trial court," is not appropriate.

Rule 59(e), which is applicable to judgments, is available to Pocatello to request that the Court alter or amend the ***Order***. However, Pocatello is precluded from attempting to present any new evidence. The State argues that Pocatello has attempted to introduce new evidence and legal theories in its *Motion* and *Brief*. Specifically, the State asserts that Pocatello never briefed or argued the issue of whether pre-1969 water rights are exempt from the Director's review under I.C. § 42-1425, prior to filing its *Motion*. This Court agrees.

At oral argument on the *Motion*, Pocatello cited a portion of the subcase record in 2006 where the State raised a similar argument during briefing on summary judgment. In addition, Pocatello cited another portion of the record in 2007, where the Special Master allowed Pocatello to provide evidence of its pre-1969 transfers. Pocatello also presented the Court with a document at oral argument that cited a portion of Pocatello's *Response Brief on Summary Judgment* from 2006. In its *Response Brief on Summary Judgment*, Pocatello argued that the city was not required to file a transfer application for any wells that began operating prior to 1969. This Court has reviewed the record in detail and was unable to locate where in the record Pocatello establishes a date certain that the interconnected wells were in place. Rather, arguments raised by Pocatello only refer to the fact that the system was in place prior to 1987. Moreover, while this issue may have arguably been raised briefly by the State and Pocatello, and impliedly by the Special Master on summary judgment, Pocatello did not raise this issue before this Court on

Challenge. Nonetheless, this Court will address Pocatello's pre-1969 argument further in Section D, below.

B. On Challenge, this Court does not make enumerated findings of fact.

Pocatello argues that this Court erred by failing to provide enumerated findings of fact and conclusions of law. Under ***Administrative Order 1*** (***"AO1"***), this Court "shall accept the Special Master's findings of fact unless clearly erroneous." ***AO1*** § 13(f). Upon a *Notice of Challenge*, the presiding judge reviews a *Special Master's Recommendation* and may "in whole or in part, adopt, modify, reject, receive further evidence, or remand it with instructions." *Id.*; I.R.C.P. 53(e)(2). This Court is not the finder-of-fact, and in these circumstances, is not required to list enumerated findings of facts or conclusions of law. Regardless, Pocatello requests that this Court accept seven proposed modifications to the Court's recitation of material facts in its previous ***Order***.

The Court will amend its previous decision to include four charts provided in Pocatello's proposed findings of fact numbers (1) and (2).[2] These charts clarify and further describe the water rights at issue and provide a more understandable record. However, Pocatello also requests the Court to amend its previous decision to clarify which of Pocatello's water rights were developed prior to May 26, 1969.[3] Pocatello argues that this date should be included because I.C. § 42-1425 (also referred to as the accomplished transfer statute) does not apply to transfers occurring before that date. Therefore, Pocatello contends that I.C. § 42-1425 cannot be used as a justification for placing a condition on a transfer that occurred prior to May 26, 1969. This Court acknowledges that some of Pocatello's rights were developed prior to 1969. However, as this Court will explain in further detail below, the distinction between a pre-1969 right

---

[2] Four charts entitled, "The 21 Water Rights for Pocatello's In-Town Interconnected System," "The 22 Interconnected Wells for Pocatello's In-Town System," "The 2 Water Rights for Pocatello's Interconnected Airport System," and "The 2 Interconnected Wells for Pocatello's Airport System" are attached to this decision as exhibits.

[3] On May 26, 1969, the Idaho legislature repealed and reenacted I.C. § 42-222, which set out new procedures for obtaining a change to a water right. Also on that same date, I.C. § 42-108 was amended to state that "[a]fter the effective date of this act, no person shall be authorized to change the point of diversion or place of use of water unless he has first applied for and received approval of the department of reclamation under the provisions of section 42-222." 1969 Idaho Sess. Laws ch. 303, § 1, p 906.

and one developed after 1969 is insignificant, because any transfer occurring prior to the May 26, 1969 adoption of I.C. § 42-222 was still subject to the earlier statutory transfer requirements for points of diversion, as codified as I.C.A. § 41-216 as early as 1943, as well as the common-law "no injury" rule. The procedures set out in I.C. § 42-222 (and the earlier I.C. § 41-216) codified the common law rule that senior water users could not change the place of use or point of diversion, if such a change would injure other rights. Further, injury to a priority date is *per se* (see Section F below). As such, this Court declines to amend its previous decision to include modifications in Pocatello's proposed findings of fact numbers (3), (4), (5), and (6).

Finally, this Court declines to amend its previous decision to define what constitutes "interference" in Director Tuthill's testimony, as requested by Pocatello in its proposed finding of fact number (7). However, this Court will amend its previous decision to clarify the record regarding Pocatello's argument that IDWR made an error of law in recommending its purpose of use for water right 29-7770 as "irrigation," pursuant Pocatello's proposed finding of fact number (8).

C. A plain reading of the transfer statutes allows the Director to engage in an injury analysis absent a third-party objection.

Idaho Code § 42-1425 allows the Director to approve water right claims for claimants who failed to follow the transfer procedures set out in I.C. § 42-222, provided that such transfers do not injure other water users and do not result in an enlargement of the original water right. In order to allow such claims, the Director must perform an "expeditious review" of the transfer to determine if injury or an enlargement has occurred. I.C. § 42-1425 (1) (c).

Pocatello argues that the Director's authority to perform this review does not include the power to place an injury-related condition on a water right claimed under I.C. § 42-1425. As explained in the Court's previous ***Order***, the Director's authority to process a water right claim in the SRBA is not waived by I.C. § 42-1425. Rather, I.C. § 42-1425 exempts both the Director and the water right claimant from following the more "burdensome" procedures set out in I.C. § 42-222, and prevents the Director from dismissing a water right claim for a failure to follow such procedures. However, the

accomplished transfer statute does not preclude the Director from investigating water right claims in accordance with his other statutory duties. For instance, I.C. § 42-1411 defines the broad power of the Director to determine the elements of a water right "to the extent that the director deems appropriate and proper, to define **and administer** the water rights acquired under state law." I.C. § 42-1411(2) (Emphasis added). In addition, the Director shall include "such remarks and other matters as are necessary for the definition of the right, for clarification of any element of a right or **for administration of the right** by the director." I.C. § 42-1411(2) (j) (Emphasis added). Such power and authority still applies during the Director's "expeditious" review to ensure that the accomplished transfer does not injure other existing rights. While the Director is not required to follow the procedures set out in I.C. § 42-222, the Director **must** investigate any injury that may have occurred to other water rights, regardless of whether a third party files an objection. As stated in the Court's ***Order***, the Director is not required to accept Pocatello's water right claim as a *prima facie* showing that no injury to other water rights has occurred. Further, the condition imposed in this case only applies through the administration of water rights during times of shortage, and does not affect the appropriation or right to use the water rights at issue. As discussed in this Court's prior decision, the transfer of ground water rights adds complexities not otherwise present in transfers related to surface water sources.

Therefore, this Court will not disturb its earlier determination that the Director has the authority to investigate injury and impose an injury-based condition on a water right claimed under I.C. § 42-1425 in the absence of a third-party objection. As such, the Special Master did not err by inquiring into injury to existing water rights.

D. Pre-1969 transfers.

The tenor of Pocatello's argument in its *Opening Brief on Challenge* was that the water rights at issue were a part of the city's interconnected well system, which had "been in operation since before November 19, 1987." *Opening Brief* at 5. *See also Opening Brief* at 10 ("Pocatello's interconnected well system has been in operation since before the commencement of the SRBA..."). Because Pocatello did not specify a date when the well system was developed, this Court appropriately focused on the application

of the accomplished transfer statute to these pre-1987 rights in its earlier decision. Now, Pocatello argues that the accomplished transfer statute does not apply to water right transfers accomplished prior to May 26, 1969.[4] In essence, Pocatello contends that the Director cannot justify placing a condition on the pre-1969 rights by relying on I.C. § 42-1425, because prior to 1969, the Director had no authority to approve such a transfer. In other words, Pocatello asserts that prior to the enactment of I.C. § 42-222 in 1969, water users were not required to follow **any** procedures to transfer a point of diversion, and therefore, I.C. § 42-1425 does not apply to those pre-1969 rights. However, this is not a correct statement of the law. The requirement to file an application for a change in point of diversion became mandatory in 1943. *See* 1943 Idaho Sess. Laws ch. 53, p. 101. *See also* SRBA Court's ***Order on Challenge (A & B Irrigation District)*** Subcase Nos. 36-02080 *et. al.* (April 25, 2003) (Hon. R. Burdick) at 20, *aff'd sub nom. A & B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005). Further, this Court is unable to find in the record any indication that Pocatello's interconnected well system was developed prior to 1943 and was somehow exempted from this requirement. In addition, it appears that only 6 of the 21 ground water wells at issue have priority dates earlier than 1943. Therefore, Pocatello's pre-1969 argument is irrelevant, unless Pocatello can demonstrate that the city's interconnected well system was established prior to 1943. Even then, the argument would at best only apply to six wells.

Moreover, Pocatello's argument that no mandatory transfer procedures existed prior to 1969 is not dispositive of the issue before this Court, because the "no-injury" rule was in place at the time the pre-1969 transfers allegedly took place. The common law prior to 1969 made clear that a water user may not change a point of diversion, if such a change would injure other water rights. *See First Security Bank v. State*, 49 Idaho 740, 745, 291 P. 1064, 1066 (1930) (holding that in an action involving a change in place of diversion, the reasons why the change will or will not injure other appropriators may be considered). Idaho Code § 42-222 and its predecessors codified this "no-injury rule,"

[4] While this argument may have been addressed by the State and Pocatello at summary judgment in 2006, the issue of what transfer procedures were in place prior to 1969 was not fully briefed to this Court on *Challenge*. Further, it does not appear that the Special Master addressed this specific legal question, either.

beginning in 1899 with the passage of House Bill 183, which stated in part that "[t]he person entitled to the use of water may change the place of diversion, if others are not injured by such change ..." 1899 Idaho Sess. Laws §11, p. 381. As explained below and in the previous ***Order***, injury to the priority date of a water right is injury *per se*. This concept was established in *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 545, 461, 926 P.2d 1301, 1308 (1996), and in this Court's ***Order on Challenge (A & B Irrigation District)***. These cases were decided after the adoption of the amnesty statutes. IDWR, consistent with the holdings of the Supreme Court, has included remarks to allow the statutes to operate as intended, while protecting the priorities of junior water users in times of administration. Further, since the Director has engaged in conjunctive management, the concept of injury has broadened beyond what was previously understood. In this case, the Director found such an injury, yet still allowed Pocatello to claim the alternative points of diversion, so long as a mitigating condition was included. At the time a claimant files a claim in the SRBA, the Director still maintains the authority to examine such transfers for injury to other water rights, especially since the "no injury" rule has been well-established for over 100 years.

E. Separate source issues.

Pocatello argues that the Special Master and this Court erred by disallowing ground water wells on the Lower Portneuf River Valley Aquifer ("LPRVA") as alternative points of diversion for senior surface rights diverting from Gibson Jack and Mink Creek. Pocatello asserts that (1) Pocatello presented sufficient evidence to rebut the allegations of injury and lack of interconnection between Pocatello's surface and ground water sources; (2) no specific legal standard exists to determine whether a sufficient degree of interconnection exists between surface and ground water points of diversion; and (3) I.C. § 42-1425 does not prohibit accomplished transfers of source.

Under I.R.C.P. 53(e)(2), this Court shall accept the Special Master's findings of fact unless they are clearly erroneous. As the trier-of-fact, the Special Master has the responsibility for weighing the evidence presented and determining whether the required burden of proof has been met. *Clear Springs Foods, Inc. v. Clear Lakes*, 136 Idaho 761, 765, 40 P.3d 119, 123 (2002). After taking testimony and weighing the evidence

presented, the Special Master determined that the creeks and aquifer were two separate sources. The evidence presented included testimony from IDWR, a *Supplemental Director's Report*, and Pocatello's expert testimony demonstrating that the creeks contributed significantly to the LPRVA. The Special Master, however, was not convinced that the creeks' contribution to the aquifer was significant enough to demonstrate that the creeks and the aquifer were the same source. This finding was not clearly erroneous because it was supported by substantial and competent evidence. This Court also cited portions of the record where Pocatello's own expert testified that the LPRVA is supplied from sources other than Gibson Jack and Mink Creek.

Pocatello also argues that the Special Master's decision to rely on the testimony of IDWR and the *Supplemental Director's Report* is arbitrary, because no specific legal standard exists to determine the degree of interconnectedness between surface and ground water points of diversion. The connectivity between the creeks and the aquifer is a factual question. The legal standard that the Special Master must apply is whether Pocatello presented sufficient evidence to rebut the *Supplemental Director's Report* as to the elements of its claimed water rights (including source). As mentioned above, and in the previous decision, Special Master correctly applied this legal standard and determined that Pocatello had not met its burden.

Finally, Pocatello argues that I.C. § 42-1425 does not prohibit accomplished transfers of source. As mentioned in the previous ***Order***, I.C. § 42-1425 only authorizes changes to the "place of use, point of diversion, nature or purpose of use, or period of use." The accomplished transfer statute does not expressly allow changes in source, presumably because the injury to water users on the new source is *per se* (see section F below). A change in source is essentially the appropriation of a new water right. For example, if a water user with a 1939 priority date wishes to change from Source A to Source B, water users on Source B with junior priority dates would not be put on notice that the new demand on the source is senior to their water rights. The expectation would be that this is a new water right junior to existing water rights on the source. In other words, the senior water user, through an accomplished transfer of source, shifts the schedule of priority on Source B without ever putting the existing users on notice by following statutory transfer procedures, during which existing users would have the

opportunity to object. However, in the event of a new appropriation on Source B, the new appropriator acquires a water right junior to existing users on the source, and all users on that source are on notice of the appropriation of this new, junior right. However, if that new appropriator is instead deemed to have an accomplished transfer pursuant to I.C. § 42-1425, that user usurps the existing priority scheme on that source, without providing proper notice to existing users. For the reasons mentioned above and in the previous ***Order***, I.C. § 42-1425 does not authorize transfers of source. This Court acknowledges that there may be rare circumstances were a water table could be so high that ground and surface water sources could be indistinguishable, in which case the application of I.C. § 42-1425 may fall into a grey area. However, this is not one of those circumstances.

F. Injury to a priority date is injury *per se*.

Pocatello argues that I.C. § 42-1425 does not have an injury *per se* rule. Specifically, Pocatello repeats its earlier arguments that the Special Master applied the wrong legal standard by concluding that injury to a priority date is *per se*. Therefore, Pocatello argues, the condition to mitigate for such injury should not be included on the face of Pocatello's rights. As this Court stated in its previous ***Order***, the Special Master's ruling on this issue is affirmed.

Relying on the reasoning in this Court's ***Order on Challenge (A & B Irrigation District)***, and the Idaho Supreme Court's reasoning in *Fremont-Madision Irr. Dist. v. Idaho Ground Water Appropriators, Inc*, 129 Idaho 454, 461, 926 P.2d 1301, 1308 (1996), this Court determined that injury to an existing water right is not limited to the circumstance where immediate physical interference occurs between water rights as of the date of the change. Injury also includes the diminished effect on the priority dates of existing water rights in times of shortage. As demonstrated by the example in Section E, above, an accomplished transfer from Source A to Source B may not immediately affect the existing users on Source B. However, during times of shortage, the transferred senior water right on Source B would take priority over rights that had been on that source long before the accomplished transfer. To allow such a transfer would result in injury to the

existing users' priority dates **at the time the change is made**, regardless if there is enough water to satisfy all the users on the source at that time. At the time the "transfer" took place, the expectation of existing users would be that a new right is being appropriated, not the transfer of an existing water right to a new source has occurred. Hence, there would be no reason for junior users to protest. As demonstrated by this example, such an injury to a priority date in a prior appropriation system is a seminal injury. Therefore, a mitigating condition is proper to protect existing users.

Further, the same is true when the source for all of the rights is listed as "ground water." As the Court explained in its previous ***Order***:

> Even though the "source" of all water rights involved is "ground water" and all rights are supplied from the same aquifer, the aquifer may not be homogenous as between the discrete regions where the wells are located. The closer wells are in proximity to one another the greater the potential for well interference over time or in times of shortage. It is erroneous to assume that the relative effects from ground water pumping between wells is uniform throughout the aquifer just because the "source" of all of the rights is labeled "ground water." The condition eliminates the need to establish the highly complex facts that relate to the specific interrelationships or degree of connectivity between specific rights until such a time as priority administration becomes necessary.

Order at 15. In such a situation, IDWR utilizes the ground water model to determine the amount of possible well interference, in order to protect existing users. The condition placed on Pocatello's right does not prevent any of the accomplished transfers from taking place. Instead, the condition properly protects existing users, in order to avoid injury. If it is true, as Pocatello claims, that no injury would ever result from decreeing these alternative points of diversion, then the condition would never come into effect and Pocatello's use of such alternative points of diversion would not be altered. However, Pocatello's argument that the remark a places a limitation on its rights during administration is a tacit acknowledgement of injury to existing users.

Pocatello also argues that the Special Master did not have substantial evidence to support the determination of injury to priority dates as *per se*. This Court disagrees. The Special Master's determination was supported by substantial evidence and is therefore not clearly erroneous.

G. IDWR changed its position regarding the administration of ground water rights.

Pocatello argues that IDWR has improperly changed its position regarding the administration of ground water rights. As stated in the previous ***Order***, IDWR acknowledged a change in position, because IDWR's understanding of conjunctive administration had evolved, due to developments in the conjunctive management rules, and decisions by this Court and the Idaho Supreme Court. Pocatello argues that placing a condition like the one at issue in this case is a change in position that requires IDWR to follow the rule-making procedures of the Idaho Administrative Procedures Act ("IDAPA"). However, it appears that the "change in position" that Pocatello refers to is a better understanding of conjunctive management and aquifer resources in the State of Idaho. This understanding affects what the Director deems as "necessary for the administration" of ground water rights within his authority under I.C. § 42-1411(2). The Department should not be hindered by prior misconceptions or misunderstandings of such a quickly evolving area of the law.

H. The Providers' scenarios were utilized by the Court for illustrative purposes.

Pocatello argues that the Providers' scenarios were not based on facts in the record, and do not apply to the rights at issue in this case, because Pocatello has agreed not to increase the rate of diversion in its individual interconnected wells beyond what existed at the commencement of the SRBA. This Court acknowledges that the scenarios were not based on facts in the record. Rather, the scenarios were properly considered by this Court to illustrate effectively the adverse effects to the priorities of existing water users, absent the inclusion of a condition.

I. The Special Master did not err in recommending water right 29-7770 with an irrigation purpose of use, or recommending the priority date for 29-13639.

Pocatello argues that evidence presented at trial demonstrates that water right 29-7770 was never intended as an "irrigation" water right.[5] In essence, Pocatello repeats its previous argument that the Special Master erred by recommending water right 29-7770 with an "irrigation" purpose of use, because the disposal of biosolids waste is a "municipal" use. However, as the Court stated in its previous ***Order***, water right 29-7770 was licensed in 2003 with an "irrigation" purpose of use. In addition, Pocatello claimed this water right with an "irrigation" purpose of use in order to expedite the right's long overdue licensing. *See Pocatello's Opening Brief on Challenge* at 15.

The Special Master concluded that the provisions of I.C. § 42-1425 were inapplicable to this water right because the license was issued after the commencement of the SRBA, and recommended 29-7770 as licensed. Pocatello had ample opportunity to object to the "irrigation" purpose of use during the proceedings on the license. Therefore, Pocatello may not use the proceedings on the subcase to collaterally attack the license for this right. Further, biosolids waste disposal is consistent with an "irrigation" purpose of use, because the water is used to irrigate crops.

Pocatello also argues that it was an error of law for this Court to find that Pocatello's claimed priority date for water right 29-13639 is also an impermissible collateral attack on a previously issued license. Water right 29-13639 is based on a prior license, with a priority date of October 22, 1952. Pocatello claimed an earlier 1940 priority date. Again, for the reasons stated above, this Court finds this to be a collateral attack on a previously issued license. As such, this Court affirms the decision of the Special Master.

J. The State of Idaho will not be awarded costs and attorney fees.

In its *Response*, the State requests that this Court award the State costs and attorney fees, pursuant to I.C. § 12-117. The State argues that Pocatello improperly raised new legal theories on the *Motion to Alter or Amend* that were not raised on *Challenge*. The State also asserts that Pocatello is inappropriately repeating its earlier

---

[5] In its *Brief*, Pocatello refers to water right no. 29-2770. However, that water right was not at issue in this subcase. The Court assumes that Pocatello meant to refer to water right no. 29-7770.

argument to this Court. While this Court agrees that many of the issues raised on the *Motion* were decided and explained in its previous ***Order***, and that Pocatello has not prevailed, this Court does not find that Pocatello filed its *Motion* without a reasonable basis in fact or in law. As such, the State will not be awarded costs and attorney fees.

VI.
CONCLUSION AND ORDER

Therefore, for the reasons mentioned above, and for the reasons already stated in this Court's previous ***Order***, IT IS HEREBY ORDERED that Pocatello's *Motion to Alter or Amend* is **Denied**.

VII.
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 the 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 my issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Dated: April 12, 2010.

JOHN M. MELANSON
Presiding Judge, *pro tem*
Snake River Basin Adjudication

EXHIBIT A

Subcase Nos:

29-00271
29-00272
29-00273
29-02274
29-02338
29-02401
29-02499
29-04221
29-04222
29-04223
29-04224
29-04225
29-04226
29-07106
29-07118
29-07119
29-07322
29-07375
29-07450
29-07770
29-11339
29-11348
29-13558
29-13559
29-13560
29-13561
29-13562
29-13637
29-13638
29-13639

(Subcase list: BEEMANGP)
4/12/10

The charts below should be included in the November 9 Decision to identify the dates the City's 21 ground water rights and 22 associated wells were developed for the interconnected municipal system in-town.

THE 21 WATER RIGHTS FOR POCATELLO'S IN-TOWN INTERCONNECTED SYSTEM

Water Right No.	Priority Date
29-2274	6/15/1948
29-2338	9/1/1953
29-2401	10/16/1958
29-2499	12/10/1964
29-4221	8/2/1943
29-4223	10/1/1962
29-4224	9/15/1955
29-4225	8/15/1956
29-4226	12/31/1955
29-7106	11/6/1972
29-7322	4/25/1976
29-7375	2/24/1977
29-11339	12/31/1961
29-11348	8/31/1951
29-13558	7/16/1924
29-13559	12/31/1925
29-13560	12/31/1926
29-13561	8/31/1931
29-13562	12/31/1936
29-13637	12/31/1940
29-13639	10/22/1952

THE 22 INTERCONNECTED WELLS FOR POCATELLO'S IN-TOWN SYSTEM

Well #	Date drilled\ redrilled	Township	Range	Section	QQ
2	12/31/1926	7S	34E	1	NWNE
2	6/15/1948				
3	12/31/1926	7S	34E	1	SWNE
7	12/31/1940	6S	34E	35	NWNE
10	6/15/1948	6S	34E	26	NENW
12	9/1/1953	6S	34E	35	SENE
13	9/1/1953	7S	34E	1	SESE
13	10/16/1958				

EXHIBIT 1 of 3

14	12/31/1955	7S	35E	7	NESW
15	9/1/1953	7S	35E	6	NWSE
15	2/24/1977				
16	10/16/1958	6S	34E	26	SWSE
18	10/16/1958	6S	34E	15	NENW
21	9/15/1955	6S	34E	23	SWNE
22	10/22/1952	6S	34E	23	SENW
23	8/15/1956	6S	34E	23	NWNE
26	6/1/1945	6S	34E	15	NWNE
27	12/10/1964	6S	34E	14	NWNW
28	8/31/1951	7S	34E	1	NESE
29	11/6/1972	6S	34E	23	NESW
30	4/25/1976	6S	34E	35	NWNE
31	4/25/1976	6S	34E	15	NESE
32	4/25/1976	6S	34E	16	NENE
33	10/1/1962	7S	35E	18	SENE
34	2/18/1985	6S	34E	15	NESE

(2) "Water service for the airport is provided through a smaller separate interconnected system supplied by three ground water rights associated with three wells. Pocatello claimed two of the wells as alternative points of diversion for each other."[1]

It should be explained that the airport has an interconnected system supplied by ground water rights 29-7450 and 29-13638 delivered through interconnected wells 35 and 39. A third water right at the airport, 29-11344, is diverted through well 40 which is not interconnected with wells 35 or 39. IDWR Exh. 1 (description of airport system); Pocatello Exh. 181 (29-7450, 29-13638, 29-11344), and the Special Master's Report and Recommendation for 29-7450, 29-13638, and 29-1134.

The charts below should be included in the November 9 Decision to identify the dates the City's 2 ground water rights and 2 associated wells were developed for the interconnected airport system.

THE 2 WATER RIGHTS FOR POCATELLO'S INTERCONNECTED AIRPORT SYSTEM

Water Right No.	Priority Date
29-7450	6/13/1978
29-13638	12/31/1940

[1] The two wells are claimed as alternate points of diversion for specific water rights. The wells are not claimed as alternate points of diversion "for each other."

EXHIBIT 2 of 3

THE 2 INTERCONNNECTED WELLS FOR
POCATELLO'S AIRPORT SYSTEM

Well # Airport System	Date drilled and redrilled	Township	Range	Section	QQ
35	6/13/1978	6S	33E	10	NESE
39	12/31/1940	6S	33E	15	SWNE

EXHIBIT 3 of 3

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION TO ALTER OR AMEND (CITY OF POCATELLO) was mailed on April 12, 2010, with sufficient first-class postage to the following:

CITY OF POCATELLO
Represented by:
A. DEAN TRANMER
CITY OF POCATELLO
PO BOX 4169
POCATELLO, ID 83201
Phone: 208-234-6148

AMERICAN FALLS RESERVOIR
Represented by:
C THOMAS ARKOOSH
CAPITOL LAW GROUP, PLLC
301 MAIN ST
PO BOX 32
GOODING, ID 83330
Phone: 208-934-8872

CITY OF BLACKFOOT
CITY OF NAMPA
UNITED WATER IDAHO
Represented by:
CHRISTOPHER H MEYER
601 W BANNOCK ST
PO BOX 2720
BOISE, ID 83701-2720
Phone: 208-388-1200

AMERICAN FALLS RESERVOIR
Represented by:
DAVID HEIDA
301 MAIN ST
PO BOX 32
GOODING, ID 83330
Phone: 208-934-8872

CITY OF POCATELLO
Represented by:
JOSEPHINE P BEEMAN
409 W JEFFERSON ST
BOISE, ID 83702
Phone: 208-331-0950

STATE OF IDAHO
Represented by:
NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

A & B IRRIGATION DISTRICT
BURLEY IRRIGATION DISTRICT
Represented by:
ROGER D LING
615 H ST
PO BOX 396
RUPERT, ID 83350-0396
Phone: 208-436-4717

CITY OF POCATELLO
Represented by:
SARAH A KLAHN
WHITE & JANKOWSKI LLP
KITTREDGE BUILDING
511 16TH ST STE 500
DENVER, CO 80202
Phone: 303-595-9441

MILNER IRRIGATION DISTRICT
NORTH SIDE CANAL CO LTD
NORTH SIDE CANAL COMPANY
TWIN FALLS CANAL COMPANY
Represented by:
TRAVIS L THOMPSON
113 MAIN AVE W, STE 303
PO BOX 485
TWIN FALLS, ID 83303-0485
Phone: 208-733-0700

UNITED STATE OF AMERICA
UNITED STATES OF AMERICA
Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

(Certificate of mailing continued)

MINIDOKA IRRIGATION DISTRICT
Represented by:
W KENT FLETCHER
1200 OVERLAND AVE
PO BOX 248
BURLEY, ID 83318
Phone: 208-678-3250

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

UNITED STATES OF AMERICA
US DEPT OF JUSTICE, ENRD
550 W FORT ST MSC 033
BOISE, ID 83724

ORDER
Page 2 4/12/10 FILE COPY FOR 00153 Deputy Clerk

Appendix T: ABOUT THE AUTHORS

BIOGRAPHICAL SKETCHES OF

JEFFREY C. FEREDAY
CHRISTOPHER H. MEYER
MICHAEL C. CREAMER

JEFFREY C. FEREDAY



- J.D. Northwestern School of Law, Lewis & Clark College 1980
- B.A. Political Science, Columbia University 1972
- Bar Admissions: Washington State 1980; Idaho 1981; Colorado 1981; U.S. District Court (Idaho) 1981; U.S. District Court (Colorado) 1981; U.S. Court of Appeals (10th Circuit 1982; 9th Circuit 1987); U.S. Supreme Court (1999).

Jeff is a senior practitioner in Givens Pursley's natural resources, environmental and energy group. Jeff practices chiefly in the areas of environmental law, water rights, endangered species, wetlands, mining and public lands.

In 1980 and 1981, Jeff served as an attorney in the Honors Program at the Office of the Solicitor, U.S. Department of the Interior, where he worked primarily in the areas of public lands, mining, and water law. He then joined a large Denver law firm where he practiced in these areas through 1984.

Jeff moved back to his hometown to join Givens Pursley LLP in 1985, where he has continued to build his practice in these fields, representing municipal water suppliers, industrial clients, irrigators, land developers, mining companies and non-profit organizations.

In February 2001, the Northwestern School of Law of Lewis and Clark College conferred upon Jeff the law school's Distinguished Environmental Law Graduate Award. The award is presented to those graduates who have made significant contributions in the fields of environmental and natural resources law. He received the Idaho State Bar Association's Pro Bono Service Award for 1991. He is named in Best Lawyers in America in the fields of Environmental and Natural Resources Law.

Jeff is a frequent lecturer to business, government, and professional groups in the areas of water law, environmental law, and natural resources policy. He has published several articles in these fields. His professional and civic activities include: former Trustee, Rocky Mountain Mineral Law Foundation and currently Idaho Reporter for the Foundation=s Mineral Law and Water Law Newsletters; past president water law section of the Idaho State Bar; Board member and officer of the Sawtooth Society; Board member of Boise Contemporary Theater.

RESUME OF THE PRINCIPAL AUTHOR

CHRISTOPHER H. MEYER



Chris Meyer is a partner at Givens Pursley LLP in Boise, Idaho.

For over four decades, Chris has been a leader in the fields of water law, land use law, natural resources law, constitutional law, and road and public access law. He has extensive litigation experience at the administrative, district court and appellate levels (including 21 Idaho Supreme Court cases).

Best Lawyers in America has named him "Lawyer of the Year" 11 times in the fields of water, land use, and natural resources. Three times, Super Lawyers placed Chris in the "Top 100 Lawyers" list for the Mountain West. Chris has played a significant role in shaping legislation and is described in the *Idaho Yearbook Directory* as "centrally located in the world of Idaho public affairs" and "a key figure in Idaho water law."

Chris serves on the Board of Advisors to the National Judicial College's "Dividing the Waters" water law program for judges. For two decades, he served as President of the Idaho Environmental Forum. He served for five years on the Board of Directors of Opera Idaho. His clients include cities, counties, private municipal water providers, Fortune Ten companies, energy companies, food producers, mining companies, and land developers.

Before joining Givens Pursley in 1991, Chris practiced natural resources law with the National Wildlife Federation in Washington, D.C. and later taught water law and negotiation at the University of Colorado Law School's environmental law clinic. Chris earned his law degree, cum laude, from the University of Michigan in 1981. He earned is A.B. degree from the same university with high honors in economics, Phi Beta Kappa, James B. Angell Scholar, and Osterweil Prize in Economics.

LEGAL EMPLOYMENT

GIVENS PURSLEY LLP, Boise, Idaho.
Partner. August 1991 to present.

UNIVERSITY OF COLORADO LAW SCHOOL, Boulder, Colorado.
Associate Professor Adjoint. August 1984 through July 1991. Held this teaching position while serving as counsel to NWF Natural Resources Clinic. Taught seminars in advanced water law, environmental law, and negotiation.

NATIONAL WILDLIFE FEDERATION, Washington, D.C.
Counsel. May 1981 to July 1984.

EDUCATION

University of Michigan, School of Law
Juris Doctor, 1981
- cum laude

University of Michigan
Degree in economics, 1977
- High distinction (magna cum laude)
- Phi Beta Kappa
- James B. Angell Scholar

567969.32

- Honors program in economics, class honors
- Osterweil Prize in Economics

PROFESSIONAL RECOGNITION

Best Lawyers in America (www.bestlawyers.com)
Listed since 2006 in four categories: water law, land use & zoning law, natural resources, and environmental law.
Named "Lawyer of the Year" in Boise, Idaho 11 times:

- 2024 – top water lawyer in Idaho
- 2024 – top natural resources lawyer in Idaho
- 2022 – top natural resources lawyer in Idaho
- 2021 – top land use and zoning lawyer in Idaho
- 2019 – top natural resources lawyer in Idaho
- 2018 – top land use and zoning lawyer in Idaho
- 2017 – top water lawyer in Idaho
- 2015 – top land use and zoning lawyer in Idaho
- 2014 – top natural resources lawyer in Idaho
- 2013 – top environmental lawyer in Idaho
- 2011 – top natural resources lawyer

Chambers USA (https://chambers.com/lawyer/christopher-meyer-usa-5:268527)
Listed since 2008 in Band 1 (highest ranking) for natural resources and environmental law.

Mountain States Super Lawyers (www.superlawyers.com)
Named to "Top 100 Lawyers" in the Mountain West in 2019, 2022, 2021.
Listed since 2007 for energy and natural resources law.

The Lawyer Network (www.thelawyer-network.com)
2023 – Named lawyer of the year in Idaho for land use and zoning law

Litigation Counsel of America (www.litcounsel.org)
Inducted in 2010 as fellow in honorary society composed of less than one-half of one percent of American lawyers.

Marquis' Who's Who in the World, Who's Who in America, and Who's Who in American Law (www.marquiswhoswho.com)

Martindale-Hubbell (www.martindale.com)
Listed since 1996 with highest ranking (AV).

Idaho Yearbook Directory (2001) (www.ridenbaugh.com/catalog.htm)
Described as a "key figure in Idaho water law" and "centrally located in the world of Idaho public affairs."
Listed among top 100 most influential Idahoans.

Dividing the Waters, the National Judicial College (https://www.judges.org/dividing_the_waters/about-dtw/)
Joined Board of Advisors to this water law training program for judges.

567969.32

LITIGATION

City of Middleton v. City of Star, Case No. CV14-21-10560 (Idaho Dist. Ct.) (Mar. 7, 2022) (Whiting, J.) (successful defense of motion to dismiss in case involving annexation into another city's area of city impact).

Riverside Irr. Dist. v. IDWR, Case No. CV14-21-05008 (Idaho Dist. Ct.) (Dec. 28, 2021) (Wildman, J) (successful defense of City of Nampa's wastewater reuse program).

Nemeth v. Shoshone County, 453 P.3d 844 (Idaho 2019) (Moeller, J.) (authority of Idaho counties to validate roads on federal lands).

N. Idaho Bldg. Contractors Ass'n v. City of Hayden, 432 P.3d 976 (Idaho 2018) (Bevan, J.) (constitutionality of sewer capitalization fees).

Black Canyon Irrigation Dist. v. State, 408 P.3d 899 (Idaho 2018) (Burdick, C.J.) (defending district court's rejection of late claims for refill water).

United States v. Black Canyon Irrigation Dist., 408 P.3d 52 (Idaho 2017) (Burdick, C.J.) (defending district court's rejection of late claims for refill water).

Greater Boise Auditorium Dist. v. Frazier, 360 P.3d 275 (Idaho 2015) (W. Jones, J.; Eismann, J., concurring) (defended district in constitutional challenge to government financing).

In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63, Idaho Department of Water Resources (Oct. 15, 2015) (Spackman, Director) (defended IDWR's accounting system for storage rights).

N. Idaho Bldg. Contractors Ass'n v. City of Hayden, 343 P.3d 1086 (Idaho 2015) (Eismann, J.; J. Jones, J., concurring) (constitutionality of sewer capitalization fees).

Washington County v. Bilbao, Case No. CV-2014-1854 (Idaho, Third Judicial Dist., Dec. 8, 2014) (successfully represented Washington County in public access litigation).

County of Shoshone v. United States, 589 Fed. Appx. 834 (9th Cir. 2014) (per curium) (road law).

A&B Irrigation Dist. v. State, 336 P.3d 792 (Idaho 2014) (Burdick, C.J.) (water rights—single fill rule—Basin-Wide Issue No. 17).

In the Matter of Certified Question of Law – White Cloud v. Valley County, 320 P.3d 1236 (Idaho 2014) (J. Jones, J.) (defended county in challenge to road development fees).

Hehr v. City of McCall, 305 P.3d 536 (Idaho 2013) (Burdick, C.J.) (defended city in action involving impact fees – the Greystone Village case).

Alpine Village Co. v. City of McCall, 303 P.3d 617 (Idaho 2013) (Burdick, C.J.) (defended city in action involving impact fees).

Buckskin Properties, Inc. v. Valley County, 300 P.3d 18 (Idaho 2013) (J. Jones, J.) (defended county in constitutional challenge to development impact fees).

Idaho Conservation League v. U.S. Forest Service, 2012 WL 3758161 (Aug. 29, 2012) (Lodge, J.) (NEPA and forest management litigation involving mining exploration).

Sopatyk v. Lemhi County, 264 P.3d 916 (Idaho 2011) (W. Jones, J.) (defended county's validation of Anderson Creek Road as a public road).

White Cloud v. Valley County, 2011 WL 4583846 (D. Idaho Sept. 30, 2011) (Lodge, J.); *White Cloud v. Valley County*, 2012 WL 13018504 (D. Idaho Aug. 8, 2012) (Lodge, J.) (defended county in challenge to road development fees). Subsequent to this decision, the surviving state law question was certified to the Idaho Supreme Court, which ruled in Valley County's favor, *In the Matter of Certified Question of Law – White Cloud v. Valley County*, 156 Idaho 77, 320 P.3d 1236 (2014) (J. Jones, J.), and the federal case was dismissed with prejudice (Case 1:09-cv-00494-EJL-CWD Document 162).

Alpine Village Co. v. City of McCall, 2011 WL 3758118 (D. Idaho 2011) (Winmill, C.J.) (defended city in action involving housing fees). The city sought removal to federal court. On remand, the city prevailed in *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.).

Mann v. Peters, Case No. CV-2011-57 (Idaho, Fifth Judicial Dist., Aug. 11, 2011) (upholding right to develop an "accessory dwelling unit" on property).

American Independence Mines and Minerals Co. v. USDA, 733 F. Supp. 2d 1241 (D. Idaho 2010) (Lodge, J.) (NEPA, standing, and road law issues).

In Re SRBA, Case No. 39576, Subcase Nos. 63-02779 et al. (Idaho, Fifth Judicial Dist., June 3, 2009), Subcase Nos. 63-02449 et al. (Fifth Judicial Dist., May 20, 2009) (secured partial decrees for each of the City of Nampa's water rights).

In Re SRBA, Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (Melanson, J.), *aff'd, City of Pocatello v. State*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) (upholding position of *amici curiae* regarding alternative points of diversion in City of Pocatello municipal water rights litigation).

Galli v. Idaho County, 191 P.3d 233 (Idaho 2008) (W. Jones, J.; J. Jones, J., concurring) (amicus brief in public access case).

Cove Springs Development, Inc. v. Blaine County, Case No. CV2008-22 (Idaho, Fifth Judicial Dist., June 3, 2008) (Robert J. Elgee, D.J.) (declaring unlawful and unconstitutional various exaction and comprehensive plan ordinance provisions).

Schaefer v. City of Sun Valley, Case No. CV-06-882 (Idaho, Fifth Judicial Dist. July 3, 2007) (Robert J. Elgee, D.J.) (declaring unconstitutional Sun Valley's affordable housing fee).

American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources, 154 P.3d 433 (Idaho 2007) (Trout, J.) (conjunctive management of ground and surface water).

Chisholm v. Idaho Department of Water Resources, 125 P.3d 515 (Idaho 2005) (Burdick, J.) (water rights—local public interest).

Davisco Foods Int'l, Inc. v. Gooding County, 118 P.3d 116 (Idaho 2005) (Schroeder, J.; J. Jones, dissenting) (land use).

Colorado Water Conservation Bd. v. City of Central, 125 P.3d 424 (Colo. 2005) (Martinez, J.) (article by Christopher Meyer cited by court).

Farrell v. Bd. of County Comm'rs of Lemhi County, 64 P.3d 304 (Idaho 2002) (Schroeder, J.) (public road access—the Indian Creek Road case).

Potlatch Corp. v. United States, 12 P.3d 1260 (Idaho 2000) (Schroeder, J.) (rejecting federal reserved water rights for wilderness).

State v. Hagerman Water Right Owners, Inc., 947 P.2d 400 (Idaho 1997) (Schroeder, J.) (partial forfeiture water rights case).

567969.32

Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc., 926 P.2d 1301 (Idaho 1996) (Schroeder, J.) (interpretation of water right amnesty statute).

The Klamath Tribes, 135 I.B.L.A. 192, 1996 WL 518742 (Apr. 12, 1996) (prevailed in defending challenge by Indian tribe to cultural resource use permit).

State, ex rel. Higginson v. United States, 912 P.2d 614 (Idaho 1995) (McDevitt, C.J.) (constitutionality of SRBA amendments—water law).

Nebraska v. Rural Electrification Administration, 23 F.3d 1336 (8th Cir. 1994) (Heaney, J.), aff'g, 1993 WL 662353 (D. Neb 1993) (scope of environmental trust's authority to litigate).

Sierra Club v. Yeutter, 911 F.2d 1405 (10th Cir. 1990) (Tacha, J.) (federal reserved water rights – amicus brief).

State v. Morros, 766 P.2d 263 (Nev. 1988) (per curiam) (prevailed in establishing recognition of instream flows under state law).

Catherland Reclamation Dist. v. Lower Platte North Natural Resources Dist., 433 N.W.2d 161 (Neb. 1988) (Fahrnbruch, J.) (water rights and state endangered species act).

Hitchcock and Red Willow Irrigation Dist. v. Lower Platte North Natural Resources Dist., 410 N.W.2d 101 (Neb. 1987) (Hastings, J.) (right to build water project).

Tulalip Tribes of Washington v. FERC, 732 F.2d 1451 (9th Cir. 1985) (East, J.) (hydropower licensing).

Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984) (mitigation for hydroelectric developments on public lands) (White, J.) (amicus curiae brief).

National Wildlife Fed'n v. Marsh, 568 F. Supp. 985 (D.D.C. 1983) (Parker, J.) (administrative law under NEPA).

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) (Stevens, J.) (ban on water export in violation of commerce clause) (amicus curiae brief available at 1982 WL 608572).

LEGISLATION

RAFN Amendments (facilitating licensing of municipal water rights for reasonably anticipated future needs), S.B. 1316 (2020 Idaho Sess. Laws ch. 164).

H.B. 1 (2019) (subordination of certain water storage rights, facilitating settlement of many years of litigation over refill of storage rights).

Tax Deed Amendments of 2016 (easements), S.B. 1388.

Highway Funding and Detachment Amendments of 2014 (road law), H.B. 619a, 2014 Idaho Sess. Laws ch. 214, codified at Idaho Code §§ 40-709, 40-709A.

Public Access Amendments of 2013 (road law), H.B. 321, 2013 Idaho Sess. Laws ch. 239, codified at Idaho Code §§ 40-114, 40-202, 40-203, 40-208, 40-2312.

Exemption from water rights for land application of municipal effluent (water rights), H.B. 608, 2012 Idaho Sess. Laws ch. 218, codified at Idaho Code §§ 42-201(8), 42-221(P).

Local Public Interest Amendments (water rights), 2003 Idaho Sess. Laws ch. 298, codified at Idaho Code §§ 42-202B(3), 42-203A(5), 42-222(1), 42-240(5), 42-1763.

Municipal Water Rights Act of 1996 (water rights), 1996 Idaho Sess. Laws ch. 297, codified at Idaho Code §§ 42-202(2), 42-202B, 42-217("4."), 42-219(1) & (2), 42-222(1), 42-223(2), 43-335, 43-338.

567969.32

Idaho Administrative Procedure Act (logical outgrowth rule), 1992 Idaho Sess. Laws ch. 263, codified at Idaho Code § 67-5227.

PUBLICATIONS

Allen, Meyer, Nelson & Lee, *Idaho Land Use Planning Handbook*, Givens Pursley (2023).

Meyer, *Water Law Handbook: The Acquisition, Use, Transfer, Administration, and Management of Water Rights in Idaho*, Givens Pursley (2023).

Meyer, *Road Law Handbook: Road Creation and Abandonment Law in Idaho*, Givens Pursley (2023).

Meyer, *Ethics Handbook: Ethical Considerations for the Client and Lawyer in Idaho*, Givens Pursley (2023).

Spooner, *The Legal Climate of Climate Change - Water*, Michigan Law Quadrangle Notes (Spring/Summer 2018) (featuring Reed Benson, Chris Meyer, and Gary Ballestros).

Meyer, *Urban Growth, Land Use Planning, and Water Rights in Idaho* (the Idaho Chapter of a publication by the National Judicial Council) (2017).

Fereday & Meyer, *What is the Federal Reserved Water Rights Doctrine, Really? Answering this Question in Idaho's Snake River Basin Adjudication*, 51 Idaho L. Rev. 341 (2016).

Meyer, *Cap Fee Basics and News from the Legal Front*, Association of Idaho Cities (2016).

Meyer, *The Non-Appropriation Lease After Greater Boise Auditorium District v. Frazier*, Idaho Association of Counties (2015).

Meyer, *Mitigation of Injury to Water Rights: Law & Strategy in Idaho*, The Water Report, at 14 (Dec. 2015).

Meyer, *Planning for Future Needs Under the Municipal Water Rights Act of 1996*, Association of Idaho Cities Conference on Municipal Issues (2011).

Meyer, *Municipal Water Rights and the Growing Communities Doctrine*, The Water Report at 1 (Mar. 15, 2010).

Meyer, "*Development, Codification, and Application of the Growing Communities Doctrine in Idaho*," presented at American Bar Association, Section of Environment, Energy, and Resources, 28th Annual Water Law Conference: Whose Spigot Is It? (Feb. 18-19, 2010).

Meyer, *An Introduction to the Law of Interstate Water Allocation: From Compacts to Common Sense*, Law Seminars International (2009).

Meyer, *Interstate Water Allocation*, The Water Report (Aug. 15, 2007).

Meyer, Idaho Chapter Author for *Brownfields Law and Practice*, Matthew Bender & Co., Inc. (2004) (named *Best Law Book of the Year* by the American Association of Publishers).

Meyer, *A Comprehensive Guide to Redeveloping Contaminated Property* (Idaho Chapter), American Bar Association (2002).

Meyer, *The Federal Reserved Water Rights Doctrine in a Skeptical Age*, 39 American Law Institute – American Bar Assn. 219 (2001) (Westlaw: SG039 ALI-ABA 219).

Meyer, *All I Really Need To Know About Legal Ethics I Learned in Law School*, 43 The Advocate (Idaho Bar Assn.) 15 (2000).

Allen, Himberger, Honhorst & Meyer, *Land Use Law in Idaho*, National Business Institute (1999).

Meyer, *Aquifer Storage and Recovery in Idaho*, University of Idaho (1999).

567969.32

Meyer, *Complying with Environmental and Special Use Regulations*, in LAND USE LAW IN IDAHO, National Business Institute (1999).

Meyer, *Municipal Water Rights in Idaho: The Growing Communities Doctrine and Its Recent Codification*, Northwest Water Law & Policy Project (1996).

Meyer, *Small Handles on Big Projects: The Federalization of Private Undertakings*, 41 Rocky Mountain Mineral Law Institute 5-1 (1995).

Meyer, *Instream Flows: Integrating New Uses and New Players into the Prior Appropriation System*, in INSTREAM FLOW PROTECTION IN THE WEST, Natural Resource Law Center (1993).

Meyer, *Water Conservation: Looks Can Deceive*, in RIVER VOICES (1993).

Meyer, *Instream Flows: Coming of Age in America*, in PROCEEDINGS OF THE WESTERN REGIONAL INSTREAM FLOW CONFERENCE (1989).

Meyer, *Western Water Law: The New Frontier*, in AUDUBON WILDLIFE REPORT (1989).

Meyer, *New Developments in Water Rights on Public Lands: Federal Rights and State Interests*, paper presented at conference sponsored by the Natural Resource Law Center, University of Colorado School of Law, Water as a Public Resource: Emerging Rights and Obligations (1987).

Meyer, *Navigating the Wetlands Jurisdiction of the Army Corps of Engineers*, 9 Resource L. Notes 3, Natural Resources Law Center (1986).

Meyer, Two papers published in *Winning Strategies for Rivers: Proceedings of the Tenth Annual National Conference on Rivers*, American Rivers Conservation Council (1985).

Osann, Campbell, Meyer, & Allemang, *Shortchanging the Treasury: The Failure of the Department of the Interior to Comply with the Inspector General's Audit Recommendations to Recover the Costs of Federal Water Projects*, National Wildlife Federation (1984).

Anderson, Campbell & Meyer, *Solving the Water Crisis*, V-7 Policy Report 9, the Cato Institute (1983).

Meyer, *Sporhase v. Nebraska: A Spur to Better Water Resource Management*, 1 Envtl. Forum 28, Environmental Law Institute (1983).

Burwell & Meyer, *A Citizen's Guide to Clean Air and Transportation: Implications for Urban Revitalization*, U.S. Environmental Protection Agency (1980).

Meyer, *The Effects of Labor Organization on the Functional Distribution of Income in Manufacturing Industries in the United States for the Years 1948 through 1972*, Senior Honors Thesis, University of Michigan (1978).

BAR MEMBERSHIPS

Member of the bars of Idaho, Colorado, and the District of Columbia.
Admitted to practice in federal courts in the District of Columbia, Eighth, Ninth, and Tenth Circuits.

567969.32

PERSONAL

Born September 29, 1952, in Springfield, Missouri.
Married to Karen A. Meyer. One child, C. Andrew Meyer (graduate of Tulane Law School now practicing in Boulder, Colorado).
Chris has made his home in Boise, Idaho since 1991. He has lived in fifteen cities in thirteen states: Arkansas, Colorado, Florida, Idaho, Indiana, Iowa, Maryland, Michigan, Missouri, New York, Virginia, Washington, D.C., and Florence, Italy. He has lived in Boise for the last 32 years.

CONTACT INFORMATION

Christopher H. Meyer
GIVENS PURSLEY LLP
601 W. Bannock Street
Boise, Idaho 83702

208-388-1236
chrismeyer@givenspursley.com
www.givenspursley.com

567969.32

GIVENS PURSLEY LLP 601 W Bannock St, Boise, ID 83702 | (208) 388-1200 | info@givenspursley.com



Michael C. Creamer

Partner

mcc@givenspursley.com
(208) 388-1247

Michael looks for practical and cost effective strategies to achieve his client's diverse goals in natural resource, real estate and public utilities matters. He has earned a strong reputation as an attorney who consistently and successfully advances his clients' interests with civility and candor.

Practice Areas

- Administrative and Regulatory Law
- Environmental Law
- Natural Resources
- Real Estate and Land Use
- Water Rights

Industries

- Agriculture
- Energy and Utilities
- Food Processing and Manufacturing
- Oil and Gas

Over the past 25 years Michael has developed a strong practice and reputation in the areas of natural resources, environmental and public utilities law. Michael is sought out for his counsel in developing, acquiring and transferring water rights for municipal, commercial, farming and ranching operations throughout Idaho. He also has been actively involved in negotiating surface use agreements and oil and gas leases on behalf of land and mineral owners in the recent southwestern Idaho oil and gas play. Michael represents several independent Idaho telecommunications companies as well as hydropower, co-gen and wind energy generators before the Idaho Public Utilities Commission and in their permitting, rights-of-way acquisitions and contract negotiations. He routinely works with other Givens Pursley attorneys to advise clients concerning environmental and public land law issues that affect their projects. Michael also has broad experience in real estate transactions and telecommunications financing. He has been recognized by his peers in Best Lawyers in America for the past ten years.

Before entering law school, Michael worked as a wildlife biologist with the Colorado Cooperative Wildlife Research Unit on a multi-year project beginning in 1978 that successfully reintroduced moose into the northern Colorado Rockies. He also worked as a law enforcement officer with the Wyoming Game and Fish Department and served for seven years as a District Wildlife Manager with the Colorado Division of Wildlife. Michael is a frequent lecturer and writer on natural resources and environmental issues. He served as Vice-Chair (1996-1998) and as Chair (1998-2000) of the Water Law Section of the Idaho State Bar.

Michael is an avid outdoorsman who enjoys backpacking, mountaineering and white-water rafting. He has led expeditions on many of the rivers in the western U.S. and in the arctic. In addition to rock and ice climbing in the U.S. and in the Swiss and French Alps, Michael has climbed Denali, Mt. Foraker and Mt. Crosson in the Alaska Range and Ama Dablam in the Khumbu Himal of northern Nepal.

Recognition

- Boise Best Lawyers Water Law Lawyer of the Year (2018)

- Boise Best Lawyers Natural Resources Law Lawyer of the Year (2015)
- Boise Best Lawyers Water Law Lawyer of the Year (2014)
- Boise Best Lawyers Natural Resources Law Lawyer of the Year (2013)
- Best Lawyers in America (Environmental Law, Natural Resources Law, and Water Law)
- Chambers USA, America's Leading Lawyers for Business (Natural Resources/Environment)
- Martindale-Hubbell - Highest Ranking (AV)
- Mountain States Super Lawyers (Energy & Natural Resources)

Education

- J.D. University of Colorado 1989
- B.S. Wildlife Biology, Colorado State University 1979

Admissions

- Idaho
- Wyoming
- U.S. District Court (Idaho)
- 9th Circuit Court of Appeals

Experience

Litigation

- Morgan v. Walter, 728 F. Supp 1483 (1990) (federal NEPA and Clean Water Act claims)
- Fremont-Madison Irrig. Dist. v. Idaho Ground Water Appropriators, 129 Idaho 454, 926 P.2d 1301 (1996) (Snake River Basin Adjudication Basinwide Issue)
- State v. Hagerman Water Right Owners, 130 Idaho 727, 947 P.2d 400 (1997) (Snake River Basin Adjudication Basinwide Issue)
- State v. Hagerman Water Right Owners, 130 Idaho 736, 947 P.2d 409 (1997) (Snake River Basin Adjudication Basinwide Issue)
- A&B Irrig. Dist. v. Idaho Conservation League, 131 Idaho 411, 958 P.2d 568 (1997) (Snake River Basin Adjudication Basinwide Issue)
- Sagewillow, Inc. v. Idaho Dept. of Water Resources, 135 Idaho 24, 13 P.3d 855 (2000) (water rights forfeiture, abandonment and resumption of use)
- Sagewillow, Inc. v. Idaho Dept. of Water Resources, 138 Idaho 831, 70 P.3d 669 (2003) (water rights forfeiture, abandonment and resumption of use)
- American Falls Reserv. Dist. No. 2 v. Idaho Dept. of Water Resources, 154 P.3d 433 (2007) (conjunctive management of ground and surface water rights)
- Building Contractors Ass'n of Southwest Idaho v. Idaho Public Utilities Comm'n, 151 Idaho 10, 253 P.3d 684 (2011) (challenging Idaho Public Utilities Commission decision on Idaho Power Company's line extension tariff)
- Brown v. Greenheart, 335 P.3d 1, 2014 (water rights as an

appurtenance in real estate conveyances and deed reformation)

Publications

- Fereday, Meyer & Creamer, Water Law Handbook: The Acquisition, Use, Transfer, Administration, and Management of Water Rights in Idaho, Givens Pursley (2013)
- Geothermal Development in the Greater Yellowstone Area: Law and Policy in Perspective University of Colorado School of Law (1989)
- Contributor: Water Supplies to Promote Juvenile Anadromous Fish Migration in the Snake River Basin, Report to National Marine Fisheries Service (1991)
- Fereday & Creamer, Swan Falls in 3-D: A New Look at the Historical, Legal and Practical Dimensions of Idaho's Biggest Water Rights Controversy, 28 Idaho L. Rev. 573 (1992)
- Creamer, The Endangered Species Act - Law and Policy, CLE International Conference on the Endangered Species Act (1993)
- Baird & Creamer, Changing Regulation of Surface and Ground Water Resources in the Hard Rock Mining Industry, 40 Rocky Mtn. Min. L. Inst. 11-1 (1994)
- Creamer, Idaho Water Transfers, An Update on Idaho's Water Transfer Policies and Issues, The Water Report (July 2009)
- Fereday & Creamer, The Maximum Use Doctrine and its Relevance to Water Rights Administration in Idaho's Lower Boise River Basin, 47 Idaho L. Rev. 67 (2011)

Appendix U: HANDBOOKS AVAILABLE FROM GIVENS PURSLEY

Copies of these publications may be ordered by returning this form by mail, faxing it to 208-388-1300, by sending an e-mail to handbooks@givenspursley.com, or by calling 208-388-1227.

- ❑ ***Water Law Handbook: ($60.00)***
  The Acquisition, Use, Transfer, Administration, and Management of Water Rights in Idaho

- ❑ ***Land Use Handbook: ($50.00)***
  The Law of Planning, Zoning, and Property Rights in Idaho

- ❑ ***Road Law Handbook: ($30.00)***
  Road Creation and Abandonment Law in Idaho

- ❑ ***Ethics Handbook: ($20.00)***
  Ethical Considerations for the Client and Lawyer in Idaho

- ❑ ***CD Containing All Four Handbooks: ($5.00)***

Name: _____

Title: _____

Organization: _____

Address: _____

City/State/Zip: _____

E-mail Address (*optional*): _____

(Price Includes Shipping) ☐ Check Enclosed ☐ Please Bill Me

Note: Price for hard copies reflects costs of production and mailing.

Electronic versions of all our handbooks are also available for free download at www.GivensPursley.com under Publications.