Idaho Water Law Handbook

The Acquisition, Use, Transfer, Administration, and Management Of Water Rights in Idaho

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August 7, 2026

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1. INTRODUCTION TO WATER LAW

The prospectors and settlers who traipsed across the plains toward the mountains and valleys of the West more than a century ago encountered a land unlike any they had experienced before. Its soil was rich. Its hills were pregnant with minerals. It was spectacular country. All that was needed to unlock its treasures was water. Water, however, was scarce. Startlingly scarce.

With little more than their own hands, some inspiration, and a stubborn refusal to give in to adversity, they began to change the face of the West. What water they found, they diverted, stored, channeled, pumped, piped, and sprayed in some of the most ingenious and monumental physical undertakings ever conceived. Beginning in the 1860s in Idaho, miners used water for placer and hydraulic mining, milling and other purposes. Mormon settlers devised remarkably elaborate irrigation systems in the upper Snake River Valley. Power companies first harnessed the hydroelectric potential of Idaho's rivers to power mines in 1901. The federal government followed suit with massive dams that powered the nation through World War II and turned the Great American Desert into an irrigated food factory. Idaho's towns and cities grew up where sagebrush once ruled.

In the course of these technological achievements and social transformations, the natural environment has changed dramatically. The hydrology of rivers, streams and aquifers has been altered, fish migration has been disrupted, and pollutants found their way into rivers, lakes, and aquifers. Most Idahoans now experience water's natural scarcity in the West as a byproduct of urban growth. Urban expansion requires water for municipal and industrial uses. Much of this water supply will come from formerly irrigated areas which are now being subdivided, paved over, or otherwise taken out of agricultural production. Today, as urban populations grow, as the environment responds to stress, as economies fluctuate, as politics shift, and as the climate itself threatens global change, the allocation of water grows ever more complicated and controversial.

Growing cities, emerging industries and new coalitions of users flex increasing muscle in a political setting which once knew only agriculture. Fish and wildlife advocates, backed by powerful federal legislation and federal courts, have claimed a seat at the table. Congress seems to run both ways at once—winding down the federal partnership with the states which bankrolled water development for most of this century, while at the same time stepping up its involvement in the regulatory arena. Hydroelectric power generators grapple with the prospect of deregulation, coupled with the challenge of relicensing most of their projects. Farmers and ranchers face tough economic conditions and ponder their future–on the one hand resenting and resisting the market forces which threaten their way of life, and on the other hand wondering what the water market might be capable of doing for them.

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Printed 10/5/2026 10:07 AM

These are changing times for water right holders. Yet the basic principles of allocation today are the same ones devised by the first settlers more than a century ago. The first rules to evolve were simple understandings worked out (and sometimes enforced at the end of a gun) in the early mining camps. Today, the legislatures, courts, and regulatory bodies have taken over the task of writing the law. However, the basic premises remain unaltered. First, water is a public resource, owned by the public. Second, a private right to use the public's water can be acquired, but it is a conditional right that is founded on continuing beneficial use. When proper procedures are followed, the right to continue using water so "appropriated" ripens into a legally enforceable "water right." Third, when there is insufficient water available to fill all of the water rights diverting from the same source, the state's administrative authority can be brought to bear to allocate the available supply on the basis of who first put it to beneficial use, but only as between those right holders who actually are using the water without waste.

Despite water's enormous economic value, rights to this public resource are awarded to the appropriator free of charge. Except for the cost of complying with state rules and some local delivery charges, the appropriator pays nothing to use the water. Only when a water right is sold to a new user does the right fetch a price—perhaps a substantial one.

The spread in value is tremendous. A gallon of bottled water sold for a dollar in a supermarket translates to $325,851 per acre-foot. That same acre-foot, in some circumstances, may be bought from Idaho's Water Supply Bank or the U.S. Bureau of Reclamation for under five dollars. Meanwhile, the price of a permanent supply in Idaho is slowly being driven up by moratoriums and other obstacles to new appropriations. While Idaho likely remains decades away—or longer—from the frenzied water transactions of Nevada, Colorado, Arizona and California, one thing is for sure. The days of simple, routine appropriation of new rights are over. Water markets—public and private—have arrived. Still in their infancy today, they will play a major role in the allocation of water from here on out.

The market for water, however, is unlike others. Water is not a simple commodity like apples or coal. It flows; it is used and used again; it is lost, recycled and renewed. To the user, its real value lies in the physical and legal reliability of its source. This leads to the central principle of Western water law—priority. The most commonly described attribute of water rights in the West is the rule that "first in time is first in right."[1] This is

[1] The U.S. Supreme Court used the phrase "first in time, first in right" to summarize the priority doctrine in *California v. Arizona*, 373 U.S. 546, 555 (1963) (Black, J.). These words are also codified in Idaho Code § 42-106. Finally, our Idaho Supreme Court has employed the phrase: "Nearly every session our Legislature has attempted to improve upon its predecessor by so legislating as to improve the former use of water, and an inspection of the various acts plainly shows that the guiding star has always been to so legislate as to protect all users of water in the most useful, beneficial way, keeping in view the rule existing all over the arid region, 'First in

the essence of the prior appropriation doctrine—the governing law in the allocation of water throughout the West. The basic principles of Idaho's water law system are summarized below.

time first in right.'" *Hard v. Boise City Irrigation and Land Co.,* 9 Idaho 589, 594, 76 P. 331, 332 (1904) (Ailshie, J., concurring).

2. RIPARIAN RIGHTS

The prior appropriation doctrine (to which Idaho subscribes) contrasts with the law of "riparian rights" prevalent in the Eastern United States where water is more plentiful. Riparian water rights are based on the principle of equal sharing of water among all riparian (streamside) landowners, without regard to who got there first. "Its fundamental precept is that usufructuary rights in a stream's water are created as an incident of ownership of riparian land." *Baker v. Ore-Ida Foods, Inc*., 95 Idaho 575, 579, 513 P.2d 627, 631 (1973). Nine of the Western states (California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington) mix together elements of prior appropriation and riparian water law. Even in these "dual system" states, however, the principles of prior appropriation dominate.

Idaho's commitment to the prior appropriation doctrine is spelled out in its Constitution: "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." Idaho Const. art. XV, § 3. The prior appropriation doctrine was followed even before Idaho's admission to the Union in 1890. *Malad Valley Irrigating Co. v. Campbell*, 2 Idaho 411, 18 P. 52 (1888). In *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 P. 1059 (1909), the court held that riparian rights are repugnant to the constitution and exist only to the extent they do not conflict with rights acquired through prior appropriation. *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912) (noting that Idaho had rejected the riparian rights system of appropriation). *See also Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973) (rejecting "correlative rights" in ground water).

Curiously, it was not until 2021 that Idaho repealed a statute stating that persons owning riparian land "are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed." H.B. 307, 2021 Idaho Sess. Laws, ch. 250 (repealing Idaho Code § 42-1101). The repealed statute had been on the books (and essentially ignored[2]) since 1887. 1887 Idaho Revised Stat. § 3180. The 2021 Statement of Purpose said that section 42-1101 would be repealed because it "appears to recognize riparian doctrine in Idaho."

[2] The only reference to the statute is the dissent in *Drake v. Earhart*, 2 Idaho 750, 23 P. 541, 546 (1890) (Berry, J., dissenting). The dissent noted that the statute recognized "what are the equivalent to common-law water-rights [i.e., riparian rights]." *Id.* (referring to an 1881 statute, "Section 3180, Rev. St.").

3. A BRIEF IDAHO HISTORY

Water resource development in Idaho has proceeded under four distinct phases.[3] The first was the "easy" phase. It began with the earliest direct diversion of water from the Boise River in 1843. Other direct diversions of natural flow from the Snake River and its tributaries began in earnest in the 1860s, peaking in the 1880s and 1890s. By the turn of the last century, the direct flows, in large part, were fully appropriated.

Thus began phase two, the era of surface storage. Beginning with Milner Dam in the Magic Valley, ditches, canals and reservoirs were constructed by Carey Act companies, the Bureau of Reclamation, irrigation districts and others. Today the reservoir capacity of the Snake River Plain exceeds nine million acre-feet.

This was followed by a quieter, but just as important revolution. The third phase began after World War II, with the intersection of new technologies, low cost power, and burgeoning agricultural demand. This time, irrigators—acting largely on their own—looked down, to the vast Snake Plain Aquifer. Over the last fifty years, the landscape has been transformed once again by the hand line, the sideroll or wheel line, and the center pivot. Today vast aquifers throughout Idaho and across the West compete with the mighty rivers as the foundation for our water-based economies.

The fourth phase, beginning in the 1960s, again focused on surface water. This is the era of efficiency. Flood irrigation gave way in many parts of Idaho to sprinkler and laser-leveled fields—technologies developed for ground water pumping and adapted for surface water. Lined ditches yielded further gains, and gated pipe delivered water more efficiently to the remaining furrow irrigation operations. Meanwhile, the high-lift pump came on the scene, enabling the irrigation of vast areas of former desert with water pumped from the Snake River as much as 600 feet below. The extent of the change is unmistakable from the air: Circles of green stretching across the horizon. Or from the road: Evening sunlight refracted through the spray of countless pivots and siderolls.

Now, at the turn of the century, we are—perhaps—about to embark upon the fifth phase–reallocation of existing water supplies. This may be accomplished through a variety of means, from simple transfers of water rights, to more complex exchanges, and finally to creative new undertakings such as aquifer storage and recovery (or "ASR") and public betterment aquifer recharge ("PBAR").

[3] *See* Jeffrey C. Fereday & Michael C. 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).

4. THE FUNDAMENTALS OF WATER RIGHTS

A. A usufructuary right—a right to use

A water right is created and maintained by "appropriating" it, that is, exerting control over a flow or volume of water and putting it to beneficial use. Idaho, like most Western states, requires that one seeking a water right first must follow an administrative process involving an application to make the appropriation, which, if accepted, results in a permit. Provided its conditions are met, the permit then ripens into a license. The license is the certificate showing the existence of the water right. The appropriator pays nothing to acquire the water right, other than nominal application filing fees.[4] Once obtained, the water right is valuable property.

Although a water right is a property right, the owner does not own the water itself. The owner merely owns the right to use the water for a specific beneficial purpose consistent with various conditions and constraints. The water resource itself is owned by the people of Idaho.[5] In a technical sense, it can be said that once an appropriator diverts public water from a stream or aquifer, or impounds it in a reservoir, it becomes the appropriator's property, simply by virtue of the direct control the appropriator exerts over it. But even then, the water remains "impressed with the public trust to apply it to a beneficial use."[6] Water rights, therefore, often are described by lawyers as "usufructuary," meaning a right to *use* a thing, not ownership of the thing itself. Usufructuary rights are nevertheless property rights—a type of real estate.[7]

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[4] Current filing fees are set out in Idaho Code § 42-221. Other fees associated with general adjudications are codified at Idaho Code § 42-1414. From time to time, proposals are made for a "severance tax" or other use fee to be paid by private parties when they use a public water resource. Such proposals have not been adopted. The same fees apply to changes in point of diversion and other elements of a water right.

[5] The State's ownership of water resources is in its sovereign capacity "for the purpose of guaranteeing that the common rights of all shall be equally protected and that no one shall be denied his proper use and benefit of this common necessity." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 64 (1960), quoting *Walbridge v. Robinson*, 22 Idaho 236, 242, 125 P. 812, 814 (1912).

[6] *Washington Cnty. Irr. Dist. v. Talboy*, 55 Idaho 382, 385, 43 P.2d 943, 945 (1935); *see also Glavin v. Salmon River Canal Co.*, 44 Idaho 583, 588-89, 258 P. 532, 534 (1927); *American Falls Reservoir District No. 2 v. IDWR* ("*AFRD*"), 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.).

[7] Idaho Code § 55-101(1) (definition of real property); *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918); *In re: Robinson*, 61 Idaho 462, 103 P.2d 693 (1940); *Anderson v. Cummings*, 81 Idaho 327, 334, 340 P.2d 1111, 1115 (1959); *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916

A water right may be sold, donated, mortgaged, deeded, leased, devised or otherwise treated in most ways like any other real estate. In Idaho a water right will pass to the purchaser of land any time title to land is transferred, unless the right is specifically reserved in the deed.

Because they are property, water rights are subject to the U.S. (and State) Constitution's prohibition against uncompensated takings.[8] This does not mean that any government interference with a person's water right constitutes a compensable taking. However, the law of takings continues to develop.[9] Generally speaking, any physical invasion or a regulation that completely destroys the economic value of the water right probably constitutes a taking.[10]

(1984). As discussed in section 11.A(1) at page 173, permits are deemed personal property, not real property.

[8] The government is required to pay compensation if its action results in a "taking" of property under the Fifth Amendment. U.S. Const. amend. V (takings clause). The Fourteenth Amendment makes the takings clause applicable to actions by state government as well. U.S. Const. amend. XIV.

[9] Traditionally the courts have given wide latitude to regulatory bodies, but the rules for what constitutes a taking remain mushy. *See, e.g.*, *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (land use regulation will be a taking only "if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.") No doubt, the courts will be called upon to provide further guidance on this issue. The lower courts do not appear to be applying the rules consistently. *See, e.g.*, *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982) (denial of a section 404 permit did not constitute a compensable taking), *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *on remand*, 21 Cl. Ct. 161 (1990) (to determine whether there is a complete diminution in value the court must consider the value of the land as sold to speculators), *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990) (regulatory taking found in denial of section 404 permit).

[10] To further complicate matters, a doctrine known as the "navigation servitude" exempts the federal government from the obligation to pay compensation for federal actions which would otherwise constitute compensable takings when the federal action is taken pursuant to the navigation power. *Arizona v. California*, 283 U.S. 423 (1931). Recent U.S. Supreme Court decisions make clear, however, that even the navigation servitude is not a complete defense. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (proposed regulation to require public access to pond newly connected to a bay amounted to a taking); *Vaughn v. Vermillion Corp.*, 444 U.S. 206 (1979) (proposed regulation to require public access to waterbody amounted to a taking).

B. The elements of a water right

Every water right is described by seven specific "elements" that define and limit its use.[11] Those elements are: source, quantity (either in annual volume or rate of flow, or both), priority date, point(s) of diversion, purpose(s) of use, period of use, and place of use. *See City of Blackfoot v. Spackman*, 162 Idaho 302 (2017) (Burdick, C.J.); *Olsen v. IDWR*, 105 Idaho 98, 666 P.2d 188 (1983).

Most elements may be changed, subject to administrative approval. A few elements, however, may not be changed. For instance, a water right user may not change the source of a water right, increase its quantity, or make its priority date earlier. For those elements that are changeable, a water right holder has the legal right to change them, but only where injury to other water users is avoided and other legal standards are met. Any change to an element of a water right requires the approval of the Idaho Department of Water Resources ("Department" or "IDWR") in a transfer proceeding. (See discussion in section 15 at page 223.).

(1) Source

The source of the water supply simply identifies the body of water from which the water is to be appropriated or diverted. In the case of a surface right, the particular stream, spring, or lake is named. In the case of ground water, the source is typically simply labeled "ground water."

Generally, the larger the water source the more secure the right because it will be more likely to provide water during periods of extended drought. Availability of water to satisfy a particular water right is dependent, as well, upon the number and size of any senior water rights from the same source.

Ordinarily the water user may not change the source of a water right, but must instead obtain a new water right in the new source. However, the Department will allow a change in one tributary to another tributary of the same source, if doing so does not result in injury.

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[11] The various elements of a water right are identified in various locations of Idaho's water code (Title 42, Idaho Code) dealing with appropriation and transfer of water rights. E.g., Idaho Code §§ 42-203A, 42-217, 42-219 and 42-222. The elements are also set out in the a relatively modern statute describing the Director's Report to be submitted on each water right to the SRBA. Idaho Code § 42-1411(2). Note that the SRBA statutes originally called for quantification of the "consumptive use" as an element of a water right. This requirement was repealed in 1997. 1997 Idaho Sess. Laws, ch. 374. In addition to the elements listed above, Idaho Code § 42-1411(2) lists (1) the name and address of the claimant, (2) conditions, and (3) remarks. Although important, these are not generally understood to constitute "elements" of the water right.

All waters of the state when flowing in their natural channels, including springs, lakes and ground water are available for appropriation.[12] However, the Idaho Department of Water Resources is prohibited from issuing a permit to appropriate the water of any lake not exceeding five acres in surface area or any pond, pool or spring located entirely on the lands of a single owner except to the landowner, or if to another, with the acknowledged written permission of the landowner. These are inaccurately referred to as "private waters."

(2) Point of diversion

The point (or points) of diversion refers to a legal description of the location where the water is diverted from a stream, an aquifer, a lake or other water source. Any change in point of diversion requires approval of a transfer application by the Department.

For an instream flow water right, the beginning and ending points of the stream reach are described.

(3) Priority

Early water users are referred to as "senior," while those who come later are called "junior." A senior water right holder is entitled to have his right filled completely before any junior right holder is entitled to divert at all. (See Appropriation Example 1 below.) This is the principle of "first in time is first in right" that is set forth in Article XV, § 3 of the Idaho Constitution.[13]

The date on which a person (or his predecessor) first began to use the water is known as the user's priority date. Priority, as well as amount, is confirmed in license or a decree. During drought conditions, only senior users on a particular stream (say, with priority dates of 1890 or earlier) might be allowed to divert. Thus, the more senior the priority date, the more secure the water right, regardless of where the user is located on the stream.

When a water right is sold or changed, it ordinarily keeps its original priority date (so long as no other water user is injured). This is one of the most valuable aspects of its existence.

Note that when water rights are obtained by an irrigation delivery entity, such as a canal company or irrigation district, water rights are typically acquired for the project in a single block. Thus within the irrigation entity, all users who have obtained water rights out of that supply hold the same priority date, even if some settlers arrived earlier on the

[12] Idaho Code §§ 42-101, 42-226.

[13] *See also* Idaho Code § 42-106.

project than others.[14] Of course, if the project subsequently obtains an additional water right or rights, those subsequent acquisitions would have their own priority dates.

A senior water right holder may obtain the state's help in enforcing his or her priority. If a water user is not able to obtain water to achieve his or her beneficial use under the user's entitlement and believes that junior users are diverting water that he or she is entitled to divert, the senior may place a "delivery call" (aka "priority call" or simply "call") on the water source. In such a case, the state will require junior appropriators to reduce or cease their diversions to supply the senior. The curtailment of junior water rights by action of the state to enforce priorities is referred to as "administration" of the rights. On surface streams where the rights have been adjudicated, administration occurs in a routine and organized fashion through a state agent known as a watermaster: When the river flow drops to a pre-determined level, the watermaster closes a certain group of junior headgates; when it drops further, he or she closes the next group, and so forth. Where rights have not been adjudicated, or where both ground and surface water rights are to be administered together, administration often is more complicated, or requires additional processes. These and other issues pertaining to the administration of water rights are discussed in section 14.D(1) at page 215.

(4) Nature of use

The nature of use identifies the particular use that is made of the water under a water right. An appropriation must be for a useful or beneficial purpose.

Most descriptions of the nature of use are quite broad. For instance, an irrigation rights is simply described as "irrigation" without specifying, for instance, the particular crop.[15] Likewise, an industrial facility's water right is typically described generically as "industrial" or, perhaps, "commercial." In some instances, however, it might be described more specifically such as, for instance, a "food production facility." The Department does not have a fixed practice regarding how much specificity is required. From the holder's perspective, the more general the description, the better, to provide maximum flexibility in the future.

(5) Quantity: rate of diversion and annual volume

All water rights must be quantified in some way to determine the amount of the right. Very early irrigation water rights were quantified simply by reference to the lands

[14] *Faris v. Blaine Cnty. Inv. Co*., 3 F. Supp. 381 (D. Idaho 1983).

[15] *Muir v. Allison*, 33 Idaho 146, 191 P. 206 (1920); see note: "Changes in consumptive use do not require a transfer pursuant to section 42-222." Idaho Code § 42-202B(1) (as amended in 2004).

that were irrigated. (E.g., "water for 40 acres irrigation.") Just how much water this means is left for subsequent administrative or judicial determination.

Older irrigation water rights are often quantified simply in terms of a diversion rate, without any specified annual volume. This is typically expressed in cfs (cubic feet per second) or miner's inches (one fiftieth of a cfs in Idaho). The diversion rate is the rate of flow associated with the water diversion, measured at the point of diversion. If no annual volume is specified for the right, that does not mean there is no annual volume limitation (except in cases of municipal rights). Rather, the annual volume will be estimated based on historical use if the water right subsequently must be quantified, for instance in a transfer proceeding.

Today, new ground water rights and surface water rights typically are described with express terms for diversion rate, period of use, and annual volume. For instance, a water right used to irrigate 100 acres might be issued with a diversion rate of 2 cubic feet per second ("cfs") and an annual volume of 400 acre-feet. The annual volume serves as a critical cap on the water right. If a 2 cfs right were allowed to divert all day, year round, it would yield 1,448 acre-feet.

The question of how much water an irrigator is entitled to, is an evolving one. Prior to the advent of sprinkler systems, the Department issued most irrigation water rights based on the rather generous "inch per acre" rule specified in Idaho Code §§ 42-202(6) and 42-220. Under these statutes, which are still in effect, an irrigator may not exceed a miner's inch (0.02 cfs) for each acre irrigated unless the applicant can demonstrate special circumstances requiring a higher rate of diversion. Thus, based on the example above, 100 acres of irrigated land might have been awarded a water right with a diversion rate of 2 cfs (100 acres x 0.02).

With the advent of sprinklers and other more efficient delivery systems, however, an inch per acre is often more that is required to irrigate efficiently. Consequently, the Department is less likely to approve the full inch per acre at the permit stage. Instead, the Department will take into account the particular delivery system, and set the permitted quantity accordingly. Many ground water rights in Idaho have been licensed for less than one inch per for this reason.

Thus, an irrigator using less efficient gravity (i.e., flood) irrigation would be able to acquire a larger water right, up to an "inch per acre," than a farmer who has installed more efficient sprinkler irrigation equipment.

At the license stage, the Department will review quantity again based on beneficial use of the as-built irrigation system. Thus, the licensed quantity could be cut back further consistent with on-the-ground conditions. There is a limit, however, to how far the Department evaluates individual circumstances at the licensing stage. For instance, it is <u>not</u> the Department's practice to take into account the particular crop grown, soil

conditions, or other individual factors. Thus, to establish the diversion rate at the license stage, the Department ordinarily simply looks only at how much water the system delivers, measured at the point of diversion.

The discussion above relates to the quantification of irrigation rights. Industrial and commercial water rights are quantified based on the specific needs of the appropriator.

Small domestic rights are quantified based on a statutory formula.[16] However, in certain circumstances domestic rights may be aggregated in subdivisions and by non-municipal water providers serving domestic uses.[17]

Note that municipal water rights are quantified differently from others. It is the longstanding practice of the Department that municipal water rights are quantified solely in terms of flow (diversion rate); no separate annual volume is stated. In other words, its annual volume equates to what would be produced if operated at that rate of flow 24 hours per day for 365 days. Thus, a municipal right quantified at 2 cfs would carry (either implicitly or explicitly) an annual volume cap of 1,448 acre-feet (in contrast to 400 acre-feet for a typical 2 cfs irrigation right). As a practical matter, a municipal provider will not pump the full allowable volume for a number of years. Eventually, however, the municipal provider will "grow into" the full annual volume permitted. (See discussion of municipal rights and the "growing communities doctrine" in section 23.D(9) at page 412.)

What happens when an irrigator reduces the quantity of water required at some point after licensing of the right? For instance, suppose an irrigator historically using a gravity/flood irrigation technique switches to a more efficient sprinkler irrigation system. Does this reduce the size of the water right? The quick answer is "no," unless and until the water right is transferred to a new use (or some other change is made in the right's use).

So long as the right continues to be used for irrigation, the farmer retains the flexibility to convert back and forth among irrigation systems, or among more or less water demanding crops (so long as the diversion quantity specified in the license or decree are not exceeded). Thus, in theory, the farmer could go from gravity to sprinkler

[16] Idaho Code § 42-111; see also IDAPA 37.03.08.010.08 (definition of DCMI and discussion of domestic) and 37.03.08.010.15 (definition of "Single Family Domestic Purposes").

[17] There is no statutory provision specifically discussing these larger domestic rights. However, it has long been the Department's practice to award domestic rights for subdivision developments and the like. Since the enactment of the Municipal Water Rights Act of 1996, some of these uses may be eligible for a municipal water right, based on the broad definition of municipality. See discussion in section 23 beginning on page 379.

and back to gravity without risk of having his or her right cut back in the interim.[18] And, generally speaking, the consumptive use under the right should change little due to such a switch, depending on the comparative amounts of such things as evaporation from ditch losses and sprinkler spray. However, the timing and location of return flows could be quite different as between the two techniques.

The situation is different, however, when that farmer seeks to transfer the water right to a new type of use. If, for instance, the farmer were to sell her water right to an industrial user after having converted to sprinklers, the Department would evaluate the quantity of water available for transfer based on recent historical use, for example, over the last five years. In other words, she may be able to convey only the quantity of water historically required for use in her sprinkler system. (See discussion of transfers in section 15 at page 223.)

Prior to *Hagerman II,*[19] it had been the Department's practice to report water rights to the Snake River Basin Adjudication at the lower quantity reflecting current irrigation practices. The Department first justified this on the basis of partial forfeiture. When the SRBA Judge declared (incorrectly) that there was no such thing as partial forfeiture, the Department changed its theory and justified the practice on the basis of a constantly evolving "beneficial use." In *Hagerman I,*[20] the Idaho Supreme Court reversed the SRBA Court and declared that partial forfeiture does exist in Idaho water law. In the companion case, *Hagerman II*, the court also rejected the Department's "beneficial use" rationale, saying that the forfeiture statute, being more specific, controlled the issue.

At that point, the Department might have taken the position that any change in irrigation practice resulting in a smaller water diversion for five years constitutes a partial forfeiture. *Hagerman II* seemed to invite this. Instead, the Department has accomplished the same result under a different rubric. Rather than declaring that the reduced diversion into a more efficient delivery system results in a partial forfeiture, the Department simply observes that as a principle of the law of transfers, it can allow the transfer of only that diversion then being made of the water, based on recent historical use. This distinction is more than semantic; it allows the Department to be lenient to the irrigator (by not calling

[18] If the right were to be adjudicated (for example in the SRBA) at the stage when sprinklers were in place, the right holder would be entitled to a decree for the potentially larger diversion quantity specified in the license, allowing her to revert to that diversion amount to support flood irrigation if need be. A number of water rights, however, were decreed at the lower diversion quantity at a time when that was the Department's practice. The only avenue available for the user who wakes up to discover this uneven treatment is to seek relief from the court. He or she will have to contend with Idaho R. Civ. Pro. 60(b) which limits the reasons for which a final decree may be changed and sets a six month rule for most requests. As a practical matter, it is unlikely that an irrigator would regress from sprinkler to flood techniques.

[19] *State v. Hagerman Water Right Owners, Inc. ("Hagerman II")*, 130 Idaho 736, 947 P.2d 409 (1997) (Schroeder, J.).

[20] *State v. Hagerman Water Right Owners, Inc. ("Hagerman I"),* 130 Idaho 727, 947 P.2d 400 (1997) (Schroeder, J.).

the switch to sprinklers a partial forfeiture), while holding to the longstanding rule looking to historical beneficial use--or even in some cases historical consumptive use--when it comes to deciding what diversion to allow in a water right transfer.

The quantification of a water right can pose a challenge for a growing company. If an industrial user is still growing the business at the time a water right is licensed, the right will be quantified based on the best year of production during the proof period. There is no cushion for future growth. A growing enterprise must apply for (or acquire by purchase) a new water right to cover the expansion.

(6) Period of use (aka season of use)

The period of use (or season of use[21]) identifies the time of the year when water is authorized to be diverted and used. For example, a water right for irrigation may be used only during the irrigation season.[22]

Designation of the period of use is important because different water users often hold rights to the use of water from the same source but during different periods of the year. The period of use also reflects an implicit quantity limit on the water right. For instance, the holder of a year-round hydropower right on a stream may be concerned that irrigators not begin diverting upstream surface diversions too early in the Spring or too late in the Fall.

Older water rights often failed to expressly state the period of use, or simply describe it as, say, "the irrigation season." This creates difficulties in administration, and usually requires the Department or a court to determine the actual period of use based on actual dates, such as April 15-November 15 for irrigation. Current Idaho statutes require that in decreeing water rights the court shall designate the period of the year when water may be used for the authorized purpose.[23] Likewise, the Idaho Supreme Court has ruled that the irrigation season must be defined by specific beginning and ending dates. *A&B Irr. Dist. v. Idaho Conservation League* (aka *Basin-Wide Issue 5*) ("*ICL III*"), 131 Idaho 411, 424, 958 P.2d 568, 581 (1998) (McDevitt, J.).[24]

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[21] The terms period of use and season of use are interchangeable, although it is possible that a particular period of use might correspond to something other than a season.

[22] The irrigation season in Idaho ranges from six to nine months, depending upon the geographic area. A map designating the applicable irrigation season for each area of the state is set out in Appendix B to IDAPA 37.03.08.

[23] Idaho Code §§ 42-1411(2)(g), 42-1412(6).

[24] In *ICL III*, the Director of IDWR included various general provisions (addressing administrative issues broadly applicable to all water rights) in the Director's Reports for three test basins. A&B Irrigation District and others moved the SRBA Court to designate a basinwide

(7) Place of use

Place of use of course refers to where the water diverted under the right is being beneficially used. A statute provides that for irrigation purposes, a license shall give a description, by legal subdivisions, of the land irrigated.[25] Similarly, rights for industrial and commercial uses will carry a specific description of the place of use.

There are two broad examples where a more general description is acceptable. The first is for municipal purposes. (See discussion of the flexible "municipal service area" in section 23.D(6) at page 404.)

The second exception is for certain irrigation water delivery organizations, such as canal companies and irrigation districts. They may receive a generalized place of use description within which water diverted under the entity's water rights may be moved freely from one irrigated parcel to another, both when they are obtaining licensed rights and when their rights are being adjudicated. Idaho Code § 42-219 applies in the licensing context. Idaho Code § 42-1411(2)(h) requires IDWR during an adjudication to determine "a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except as provided in section 42-219." (emphasis added).

The referenced exceptions are as follows:

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issue to consider the appropriateness of the general provisions. The SRBA Court struck the general provisions as unnecessary to define or efficiently administer water rights. The Idaho Supreme Court (opinion by Justice McDevitt) reversed as to the provision on firefighting (holding that was an appropriate general provision), but upheld the District Court in striking the general provisions for stock watering and excess water. On reconsideration (opinion by Justice Walters), the Court remanded for further proceedings concerning general provisions on the season of use and conjunctive management.

In *A&B Irr. Dist. v Idaho Conservation League* ("*ICL II*"), 131 Idaho 329, 955 P.2d 1108 (1998) (Silak, J.), the Court addressed a general provision dealing with excess water included on water rights within the previously decreed Reynolds Creek Basin. In contrast to the "generic" excess water general provision in *ICL III*, this was a stipulated general provision setting out a specific administrative formula for administering the delivery of water during high flow periods. The SRBA District Court struck the provision, and various parties appealed. The Idaho Supreme Court upheld the general provision as necessary for the efficient administration of water rights, noting that it "describe[d] a long-standing system of allowing those who otherwise have water rights in the Reynolds Creek Basin to use excess water when it is available." *ICL II*, 131 Idaho at 334, 955 P.2d at 113. However, the Court also held that the provision did not establish a water right in the excess water because "General Provision 2 does not set forth a priority date, quantity, legal description of the place of use, nor any of the other elements of a water right." *ICL II*, 131 Idaho at 333, 955 P.2d at 112.

[25] Idaho Code § 42-219.

> (5) For irrigation projects where the canals constructed cover an area of twenty-five thousand (25,000) acres or more, or within irrigation districts organized and existing as such under the laws of the state of Idaho ….It shall not be necessary to give a description of the land by legal subdivisions but a general description of the entire area under the canal system shall be sufficient. ….
> (6) For an irrigation project developed under a permit held by an association, company, corporation or the United States to divert and deliver or distribute surface water under any annual charge or rental for the beneficial use by more than five (5) water users in an area of less than twenty-five thousand (25,000) acres, the license issued shall be issued to the permit holder. For the place of use description in the license issued for the irrigation project, it shall be sufficient to provide a general description of the area within which the total number of acres developed under the permit are located and within which the location of the licensed acreage can be moved provided there is no injury to other water rights. [26]

(8) Consumptive use quantity is not an element

Another important dimension of water quantification is consumptive use, that is, the volume of water consumed in the course of use or otherwise made unavailable to other users.[27] (Consumptive use is typically expressed as an annual volume: acre-feet per annum.) Early in the SRBA process, the Legislature mandated that consumptive use be quantified as part of the adjudication of each right. This requirement was repealed in 1997.[28]

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[26] Idaho Code § 42-219(5) and (6) (emphasis added).

[27] The water code defines "consumptive use" and "authorized consumptive use" as follows: "'Consumptive use' means that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use is not an element of a water right. Consumptive use does not include any water that falls as precipitation directly on the place of use. Precipitation shall not be considered to reduce the consumptive use of a water right. 'Authorized consumptive use' means the maximum consumptive use that may be made of a water right. If the use of a water right is for irrigation, for example, the authorized consumptive use reflects irrigation of the most consumptive vegetation that may be grown at the place of use. Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code." Idaho Code § 42-202B(1).

[28] 1997 Idaho Sess. Laws, ch. 374.

In 2004, the Legislature amended the water code to declare: "Consumptive use is not an element of a water right. . . . Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code."[29] This declaration reinforces the right of a water right holder to modify his or her use of the right (within the bounds of the water right) in a manner that increases the consumptive use. (See discussion in section 15.E(4) at page 232.) The declaration that consumptive use is not an element of a water right does not mean that consumptive use is never considered, however. It remains a vital part of measuring a water right in the transfer process—where water is transferred to a new use, consumptive use, typically, is the measure of the quantity of water that may be transferred without injury to others. Idaho Code § 42-222(1). (See discussion of consumptive use in section 15.E(5) at page 233 and discussion of enlargement in section 15.I on page 270.)

(9) Facility volume is not an element

Note: See also discussion in section 15.I(4) (Enlargement in a non-irrigation context) at page 282.

Earlier in the SRBA process, the Department took the position that water rights for fish farms should include a specification of facility volume in the "remarks" section, describing the number and size of the ponds, raceways, settlement basins and the like that could be served by the licensed or decreed diversion rate (rate being the amount of flow per second, potentially on a 24-hour basis). In other words, the facility volume was a statement of the maximum existing capacity of the operation, even though a larger capacity holding a larger volume of water could be served with the authorized diversion rate. The Department did not view facility volume as a separate element, but rather as part of the specification of the elements of quantity, nature of use and place of use.

SRBA District Court Judge Barry Wood rejected this approach in 1999, declaring that facility volume is not an element of a water right.[30] The court's opinion was based on statutory construction of section 42-1411(2), which lists each of the elements of a water right that the Director is to describe in his report to the SRBA Court. Because it does not list "facility volume," the court reasoned that it is not an element of a water right that will be decreed in the SRBA. Moreover, the court rejected the Department's contention that a description of facility volume is necessary to a complete description of the quantity, nature of use and place of use elements. The effect of this ruling was to

[29] H.B. 636, 2004 Idaho Sess. Laws, ch. 258 (codified at Idaho Code § 42-202B(1)).

[30] *In re SRBA Case No. 39576, Subcase Nos. 36-02708 et al, Order On Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, Idaho Dist. Ct., Fifth Judicial Dist. (Dec. 29, 1999) ("*Facility Volume Case*") (Barry Wood, J.).

allow expansion of a facility where the beneficial use takes place (for example, a fish propagation facility) while employing the same rate of diversion.

The more interesting aspect of the decision is the court's forthright discussion of why the Department (or other water users) might want facility volume to be included in the description of a water right. Such an element presumably would not benefit the water right holder, because its effect would be to limit the water right to the particular size of facility currently employed. The implication of having a facility volume described is twofold.

First, the water right holder arguably would be required to go through a change of water right proceeding every time additional raceways or other facilities were added (even though the diversion amount remains the same). In other words, expanding the size of the facility could be seen as an improper "enlargement" and would require the applicant to obtain a new junior priority right for the expansion. Second, if the holder implemented a water delivery call against junior users, any cash mitigation that might be ordered might be limited to the capacity and output of the original facility, not the enlarged (and potentially junior) portion.[31] The court rejected these principles.[32]

> It is also extremely curious to the Court that it is IDWR's position that if additional ponds were added to a facility for the purpose of pollution control, this would not be considered an increase in facility volume, but if the additional ponds or raceways were to actually grow fish in, it would be an increase in facility volume. To this Court, this is at least a tacit admission by IDWR that its proposed facility volume remark has nothing to do with the quantity element, but is intended to directly deal with regulating production so that in the event of a future delivery call, and mitigation is sought, junior water users may be required to pay less. This position is contrary to at least two fundamental principles of water law . . . .

The court went on to note that it is improper to attempt to limit a fish farmer to a particular size of production facilities when, by analogy, a domestic right holder is not

[31] By the way, there is no established precedent for awarding cash compensation in the context of a delivery call. Ordinarily, the focus is on the obligation of the junior to deliver an appropriate quantity of mitigation water to the senior, or else be shut off. Hence the term "delivery call." Whether the Department has the authority to order monetary compensation, rather than water, is an open question. Of course, parties may agree between themselves to resolve a dispute through such an arrangement. Thus a senior might agree to subordinate her water right to a junior in exchange for a payment by the junior to the senior.

[32] *Facility Volume Case* at 9.

required to obtain a new water right when she expands the size of her home, when a farmer switches crops or seed varieties to produce more or higher valued product that consumes more water, or when a hydropower user adds additional generating capacity to an existing water flow.[33]

The court did not mention other industrial or hydropower uses, but the implication of his decision is apparent there too. Thus, a description of the internal workings of an industrial facility is not part of a water right. Consequently, for instance, a microchip producer might upgrade its facilities, enabling it to produce twice the quantity of product with the same amount of water, without changing its water right.[34]

C. Diversion requirement

The rule as traditionally stated is that a water right requires a "*diversion* to a beneficial use."[35] That is, it is necessary to artificially remove (or impound) water to obtain a legally protected right to its use. However, Idaho's Supreme Court has ruled that the state Constitution does not require a diversion where none is necessary to accomplish the beneficial use. It is as yet unclear whether instream flow rights can be established in Idaho outside of Idaho's rather restrictive minimum stream flow statute.[36]

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[33] IDWR's *Transfer Memo* captures this as follows: "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." *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) at 7 (Dec. 21, 2009). Thus, for example, adding electric generating capacity is permissible so long as the right holder does not increase the amount of water diverted through the penstocks. However, an increase that requires a higher rate of flow presumably would not be allowed without obtaining a new water right.

[34] The court also did not address the situation where the expansion could entail an increase in annual diverted volume and potentially cause injury. This could happen, for example, where a 2 cfs diversion (a well, for example, or a pump in a stream) historically was used an average of 14 hours per day for a particular commercial enterprise, but after facility enlargement it was used at this rate for 20 hours per day.

[35] The diversion requirement is explored more fully in the Section on instream flows, see part 23.E beginning on page 439.

[36] Idaho's instream flow law is codified at Idaho Code §§ 42-1501 to 1505. (See discussion in section 24.C at page 495.)

D. Beneficial use - generally

Under Idaho's Constitution, an appropriation of water must be for a "beneficial use."[37] It is often recited that beneficial use is "the basis, the measure and the limit" of any water right. *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 111, 157 P.3d 600, 605 (2007) (Schroeder, C.J.). Indeed, Congress included this statement of the rule in the federal reclamation law.[38] The concept arises from the fact that a water right is not a right to the water itself, but rather is a right to *use* water owned by the people of the state.[39] In legal parlance, a water right is a "usufructuary" right. Thus, regardless of what the right holder may believe his right to be, and regardless of what the right's license, decree or other documentation proclaims, the extent of the right is limited to that amount which has actually been placed to beneficial use,[40] and the extent to which a prior right may be enforced as against a subsequent right is limited to the amount that actually is required by the senior.[41] Thus, "paper" water rights in Idaho are subject to challenge, and likely cannot be changed or transferred to a new place of diversion or use, because they are not

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[37] Idaho Const. art. XV, § 3 ("The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied…."). The Legislature has declared: "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases." Idaho Code § 42-104.

[38] This phrase appears in various places in western water law, and is perhaps the best succinct statement of the fundamentals of the prior appropriation doctrine. Congress included it as an express directive in section 8 of the Reclamation Act of 1902, 32 Stat. 388, 390. *See* Wells A. Hutchins, *Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 39 (1968) (an appropriator is held to the quantity of water he is able to apply to a beneficial use at a particular time, within the limit of his appropriation); 3 *Kinney on Irrigation*, § 1579 (2d ed. 1912) (no one is entitled to have a priority adjudged for more water than he has actually appropriated, nor for more than he actually needs); 2 *Waters and Water Rights* § 17.03(b) (1991); Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 Wyo. L. J. 1 (1956) (actual beneficial use is the measure of the right, and the right is not protected from loss by wasteful over-application); Golzé, *Reclamation in the United States* 95 (1961) (an essential part of the appropriation doctrine is the requirement that water be put to beneficial use, and if beneficial use lags, the right may be lost); Meyers, Tarlock, Corbridge & Getches, *Water Resource Management* 282 (3rd ed. 1988) (the concept that beneficial use is the basis, measure and limit of an appropriative right is recognized by state constitutions, statutes and judicial decisions throughout the Western states).

[39] *Coulsen v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320, 323-24, 227 P.29 (1924).

[40] *See e.g., Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1943); *Albrethsen v. Wood River Land Co*., 40 Idaho 49, 231 P. 418 (1924) (decree is evidence of beneficial use of the right only as of the date of the decree).

[41] *American Falls Reservoir District No. 2 v. IDWR* ("*AFRD*"), 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.).

being put to beneficial use.[42] , Quite simply, to the extent of non-use they are not water rights.

Idaho's Constitution, like those of most Western states, names only a few beneficial uses for which water may be appropriated: agriculture, domestic uses, manufacturing, mining and hydropower.[43] However, the Idaho Supreme Court has ruled that this is not an exclusive list.

> With the exception of those uses elevated to beneficial status by Article 15, § 3, of the Constitution, the concept of what is or is not a beneficial use must necessarily change with conditions. . . . The notion of beneficiality must include a requirement of reasonableness.

State of Idaho, Dep't of Parks v. IDWR, 96 Idaho 440, 447, 530 P.2d 924, 931 (1974) (Bakes, J. concurring).

> While it is well established in western water law that an appropriation of water must be made for a 'beneficial use,' nevertheless in Idaho at least the generic term 'beneficial use' has never been judicially or statutorily defined.

Dep't of Parks, 96 Idaho at 443, 530 P.2d at 927.

Recent Idaho statutes have defined a few specific uses as beneficial.[44] However, the generic term has never been statutorily defined.

The case law has filled in the constitutional and statutory gaps. For example, Idaho Supreme Court decisions and water right licenses issued by the Idaho Department of Water Resources have approved fish and wildlife habitat, aesthetics, recreation and similar purposes as beneficial uses in Idaho.[45] Today, the idea that only certain types of

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[42] *See e.g., Hillman v. Hardwick,* 3 Idaho 255, 28 P. 438 (1891).

[43] Idaho Const. art. XV, § 3.

[44] For instance, Idaho's Ground Water Recharge Act expressly states that "the appropriation and underground storage of water . . . for purposes of ground water recharge shall constitute a beneficial use." Idaho Code §§ 42-4201(2), 42-4201A(2) (repealed in 2009); s*ee also*, Idaho Code § 42-234(2). In a similar vein, in 1996, the Legislature addressed the issue in the context of municipal water rights. Municipal Water Rights Act of 1996, Idaho Code § 42-222 ("A water right held by municipal provider to meet reasonably anticipated future needs shall be deemed to constitute a beneficial use . . . ."). In a third example, the Legislature has declared certain instream uses to be beneficial. Idaho Code §§ 42-1501 to 42-1505.

[45] Judge Melanson, then of the SRBA Court, issued a ruling in a basin-wide issue confirming: "Under Idaho law, any person may establish a diversionary water right, including to

use are "beneficial" is little more than an historic relic.[46] The plain trend is toward recognition that, so long as the use serves some purpose and is not inherently wasteful, it probably qualifies as a beneficial use.

E. Storage rights

(1) Overview

This section addresses the law and practice of storage rights in Idaho, especially how their elements are described. In the case of natural flow surface water rights and ground water rights, water typically is applied to beneficial use as soon as it is diverted from its natural source.[47] In other instances, a user may desire to store water for later use. Water rights also may be obtained for stored water in either an on-stream or off-stream storage facility. A storage right is obtained just like any other. Even the same application form is used. (Of course, dam construction requires other permits as well as water rights.) See discussion in section 4.D at page 44 regarding storage of water as a beneficial use.

Compared to building a natural flow diversion facility, construction of a reservoir typically involves a considerably larger engineering effort. There are two basic advantages of owning a reservoir. First, a reservoir is capable of capturing flood flows during the pre-irrigation-season runoff period, even though a river's irrigation season flows may be fully allocated to senior natural flow rights. This is one reason why, historically, natural flow rights were developed first, and storage came later. Second,

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and from storage, for aesthetic, recreational or wildlife purposes." *In re SRBA, Case No. 39576,* Idaho Dist. Ct., Fifth Judicial Dist. (Basin-Wide Issue No. 00-91014, Amended Consent Decree, Feb. 25, 2009)

[46] An example of such a "relic" is *Empire Water and Power Co. v. Cascade Town Co.*, 205 F. 123 (8th Cir. 1913), in which a federal court applying Colorado law denied an instream flow water right to a resort community build around a natural waterfall. "[W]e think complainant [the town] is not entitled to a continuance of the falls solely for their scenic beauty. The state laws proceed upon more material lines. . . . It may be that if the attention of the lawmakers had been directed to such natural objects of great beauty they would have sought to preserve them, but we think the dominant idea was utility, liberally and not narrowly regarded, and we are constrained to follow it." *Id*. at 129. Certainly utility—beneficial use, to be precise— is the dominant idea. It would follow that a diversion to a useful aesthetic purpose, such as golf course ponds or artificial trout streams in a community, would meet this test. Likewise other recreational uses such as snow-making at ski resorts. None of these is expressly provided for in statute.

[47] Aquifer Storage and Recovery ("ASR") and Public Betterment Aquifer Recharge ("PBAR") projects would be exceptions to this. See Section 9.B at page 125.

large storage reservoirs almost always are designed to hold water over for future dry years, thus providing a more reliable supply than natural flow.

After water is captured under a storage right (often during peak flows or in the winter when irrigation natural flow rights are not allowed to divert), the holder of the right is entitled to release that quantity of flow pursuant to the terms of the storage right to serve beneficial uses. Stored water released from a reservoir may even be delivered past the headgates of unfilled senior natural flow rights. Thus, the rights to stored water can give the user considerable flexibility.

Many water users rely on a combination of storage and natural flow rights. They use their natural flow rights as their primary source of supply when available, and then increasingly turn to their storage as the natural flow supply diminishes through the course of the year. Absent speculation, hoarding or other potential abuses, storage water not needed during one season may be carried over to subsequent years.[48]

When an on-stream reservoir is involved, the entitlement to "divert" describes the circumstances under which the dam is allowed to pass less water than is flowing into the reservoir—in other words, store water. The dam must release enough water (but no more than is flowing in upstream) to meet all senior demands downstream. When there is more than enough natural flow entering the reservoir to meet downstream senior demand, and provided the storage right is not limited to a specifically designated storage season, then the reservoir's storage water right is "in priority" and it may store the excess.

No separate water right is required to release water from a reservoir. That may be done at the holder's option (so long as it is for the authorized beneficial use).

(2) Points of diversion

The point of diversion for an on-stream reservoir is the location of the dam or impoundment. The point of diversion for an off-stream reservoir is the location of the diversion facility on the stream or other natural body from which water is diverted and taken to the off-stream reservoir.

(3) Points of rediversion, release, or delivery

Many Idaho water rights authorize water to be diverted from one stream, "injected" into another stream, and then "rediverted" to a storage facility or other use.[49]

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[48] *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 201, 157 P.2d 76, 77 (1945) (Givens, J.); *American Falls Reservoir District No. 2 v. IDWR* ("*AFRD*"), 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.).

[49] Exchanges operate in a similar manner. Water may be injected into a stream to offset water diverted from the stream upstream of the point of injection.

An example of this is a storage and direct flow right (no. 63-19893) for the Mountain Home Reservoir operated by Mountain Home Irrigation District. Under the "points of diversion" heading, the right lists the original point of diversion from Little Camas Creek, a point of injection into East Fork Long Tom Creek (a tributary of Canyon Creek), and a point of rediversion from Canyon Creek. Thus, where water is injected back into a natural stream (and thus is outside the control of the appropriator) and subsequently rediverted from that natural stream, the injection and rediversion are considered additional points of diversion.

In contrast, when water is stored in a reservoir under the control of the appropriator, deliveries therefrom to beneficial uses are not deemed "points of diversion." In an on-stream reservoir, water is released by the dam, where it continues on down the stream to be rediverted later by water users. Typically, these water users also have natural flow rights out of the same stream, which are supplemented with released storage water when natural flow is inadequate. Their natural flow water rights specify a point of diversion, but the released storage water is not diverted under those natural flow rights. The water is simply diverted at the same point of diversion as the natural flow right pursuant to a spaceholder contract or other arrangement with the operator of the reservoir.

Less commonly, water is redirected to ditches directly out of an on-stream reservoir. An example is Payette Lake, a natural lake on the North Fork Payette River whose elevation was raised by a dam to create a manmade impoundment. Water is stored under water right no. 65-2278 held by Lake Reservoir Co. The stored water is then released from the lake into the river for diversion at various points of rediversion operated by several downstream irrigation entities. The water right notes the existence of these points of rediversion, but they are not listed under the description for "points of diversion." Instead, they are noted under the description of "place of use."[50]

Where water is stored in an off-stream reservoir, release or delivery of the water from the off-stream reservoir is not deemed a "point of diversion" for the storage right. An example is Lake Lowell.[51] That system, operated by the Boise Project Board of

[50] "Points of re-diversion and places of use are those of Emmett Irrigation, Farmers Co-op, Enterprise, Letma, Nobel & Lower Payette Ditches." Partial decree for no. 65-2278, under heading "Place of Use."

[51] Lake Lowell is located in Basin 63 (Boise River) in Canyon County, five miles southwest of Nampa, Idaho. It is a manmade, off-stream storage reservoir with approximately 9,800 surface acres and 28 miles of shoreline containing approximately 173,000 acre-feet of water. The impoundment is created by a set of three dikes and the Deer Flat Upper Embankment, which is an earthen dam completed in 1908 by the Bureau of Reclamation, with a height of 74 feet and 4165 feet long at its crest. Water is diverted from the Boise River into the New York Canal approximately 15 miles to the east of Lake Lowell in the NWSW of Section 3, T2N, R3E. Water right no. 63-301A held by the US Bureau of Reclamation ("BOR") is currently associated with Lake Lowell. This right, decreed by the SRBA Court in 2014, is the

Control for the benefit of several irrigation districts, diverts natural flow[52] from the Boise River into the New York Canal which delivers the water to Lake Lowell, a man-made lake 15 miles away. After storage in Lake Lowell, water is delivered to systems operated by various irrigation districts. Various facilities controlled by the irrigation districts divert water stored in Lake Lowell to their respective delivery systems. None of these are deemed points of diversion on the Bureau's water right. In essence, it is of no concern to IDWR (the entity that administers the right) what the plumbing is that delivers water out of the off-stream reservoir to the specified place of use.

The practice in Idaho of not treating the rediversion of water from a reservoir as another point of diversion comports with Idaho Code § 42-110, which provides: "Water diverted from its source pursuant to a water right is the property of the appropriator while it is lawfully diverted, captured, conveyed, used, or otherwise physically controlled by the appropriator."

(4) Purpose of use

In Idaho, storage rights typically are issued with multiple "purpose of use" components. As described in IDWR guidance,[53] storage rights will typically contain one or more "purpose of use" couplets: "[Purpose] Storage" and "[Purpose] from Storage."[54] For example:

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latest permutation of a right that originated with a license in 1913, and which was subsequently decreed in a private adjudication in 1929 known as the "Bryan Decree."

[52] In addition to its natural flow water rights, the Boise Project also diverts water stored in and released from federal reservoirs on the Boise River. These diversions of stored water are made pursuant to spaceholder contracts with the Bureau of Reclamation. The Bureau holds its upstream storage rights in trust for the irrigators and other users.

[53] Norm Young, IDWR Guidance, *Application Processing No. 14* (*Applications for Permit for Storage Rights*) (June 1, 1978).

[54] The in the Refill Litigation, the Court explained how purposes of use are identified:

> The purpose of use element of a storage water right generally contains at least two authorized purposes of use. The first authorizes the storage of water for a particular purpose (i.e., "irrigation storage," or "power storage"). The second authorizes the subsequent use of that stored water for an associated purpose, which is often referred to as the "end use" (i.e., "irrigation from storage," or "power from storage"). Each purpose of use is assigned its own quantity and period of use, which may or may not differ from one another.

A&B Irr. Dist. v. State ("*Basin-Wide 17*"), 157 Idaho 385, 389, 336 P.3d 792, 796 (2014) (Burdick, C.J.).

- "Irrigation Storage" and "Irrigation from Storage"
- "Power Storage" and "Power from Storage"
- "Streamflow Maintenance Storage" and "Streamflow Maintenance from Storage."
- "Stockwater Storage" and "Stockwater from Storage"
- "Wildlife Storage" and "Wildlife from Storage"

The first component (e.g., "Irrigation Storage") describes the right to capture and store the water in the reservoir. The second (e.g., "Irrigation from Storage") describes the right to release the stored water from the reservoir for that stated beneficial use.[55]

Note that off-stream reservoirs have a third component ("diversion to storage") which is quantified as a rate of flow. See discussion in section 4.E(4) on page 49.

A single water right may have more than one of these couplets. For example, Lake Cascade (an on-stream reservoir) stores water for irrigation and hydropower. Its storage right (No. 65-29027A) has these four components:

Purpose of Use	Quantity	Period of Use
Irrigation Storage	697,500 AFY	1/1 to 12/31
Irrigation from Storage	697,500 AFY	1/1 to 12/31[56]
Power Storage	697,500 AFY	1/1 to 12/31
Power from Storage	697,500 AFY	1/1 to 12/31

In some instances, a reservoir may also have a stand-alone purpose of use, such as "Recreation Storage," with no corresponding "Recreation from Storage" component. This is because the water is not released from storage. Its sole beneficial use is to sit in the reservoir to support a fishery or other purpose.

In addition to the components described above, off-stream reservoirs will have an additional component for "Diversion to Storage." This is the component that authorizes diversion from the river or other natural source to the off-stream reservoir. In contrast to those storage purposes described above, "Diversion to Storage" is quantified as a rate of flow, not a volume.

[55] In addition to listed purposes of use, holders of storage rights may release water for incidental purposes not listed on the water right that are inherent to reservoir operation, such as reservoir maintenance, flood control, or other emergencies.

[56] The year-round "Irrigation from Storage" period of use shown on this right is an anomaly.

Finally, some off-stream reservoirs may have yet another component authorizing "direct flow" use.[57] An example of this is Lake Lowell. That system, operated by the Boise Project Board of Control for the benefit of several irrigation districts, diverts natural flow[58] from the Boise River into the New York Canal which delivers the water to Lake Lowell, a man-made lake 15 miles away. After storage in Lake Lowell, water is delivered to systems operated by various irrigation districts. However, some irrigation ditches divert directly from the New York Canal before the water reaches Lake Lowell. Water delivered to beneficial use before it is stored is the so-called "direct flow." This direct flow component is listed on the water right simply as "Irrigation." Thus, the water right for Lake Lowell (No. 63-301A) has these four components:

Purpose of Use	Quantity	Period of Use
Irrigation	1,349.29 cfs	3/1 to 11/15
Irrigation Storage	173,100 AFY	1/1 to 12/31
Irrigation from Storage	173,100 AFY	3/1 to 11/5
Diversion to Storage	1,349.29 cfs	1/1 to 12/31

Note that the "irrigation" and "diversion to storage" components are quantified solely in terms of rate of flow, while the "Irrigation Storage" and "Irrigation from Storage" components are quantified solely in terms of volume.

All of this is consistent with guidance issued by IDWR decades ago (see footnote 53 at page 49). It should be said, however, that not all permits, licenses, and decrees conform to this format.[59]

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[57] In some instances, water rights for on-stream reservoirs also include a "direct flow" component. An example of this might be a farmer to constructs a reservoir on a stream on his or her property, and seeks a water right allowing diversion of inflow as it enters the reservoir "before it is stored" or when the reservoir is full.

[58] In addition to its natural flow water rights, the Boise Project also diverts water stored in and released from federal reservoirs on the Boise River. These diversions stored water are made pursuant to spaceholder contracts with the Bureau of Reclamation. The Bureau holds its upstream storage rights in trust for the irrigators and other users.

[59] An example of inconsistency is a water right for Mountain Home Reservoir (no. 61-10421). The reservoir sits on Rattlesnake Creek, but its water right authorizes diversions from two streams (Rattlesnake Creek and Canyon Creek). Thus, with respect to Canyon Creek, the reservoir is "off-stream." But contrary to *Application Processing Memo #14*'s instruction, the right does not contain a "diversion to storage" component for diversions from Canyon Creek. (By the way, the City of Mountain Home originally was known as "Rattlesnake Station.")

The storage components for so-called "Refill 1" and "Refill 2" water rights (nos. 63-33734A and 63-33734B) (which were decreed in 2019 in accordance with the *Refill Stipulation*) at first glance might appear to be a departure from the standard practice, but there is an explanation. These rights each have three storage components ("Irrigation Storage," "Municipal/Industrial storage," and "Streamflow Maintenance Storage"), but they lack any

(5) Period of use

Each purpose of use will have an associated period of use. For example, the period of use associated with "Irrigation Storage" is typically year round (reflecting the right to capture water any time it is legally and physically available and to retain it until it is needed). The period of use associated with "Irrigation from Storage" should be limited to the irrigation season. For hydropower, the period of use is year round.

(6) Quantity

As noted above in section 4.E(4) (Purpose of use), storage rights typically have multiple purposes of use. Each purpose of use will have an associated quantity. Some are measured in volume (acre-feet per year); others are measured by rate of flow (cfs).

As noted, storage rights for on-stream reservoirs are the quantified solely in terms of annual volume (for example the "Irrigation Storage" and "Irrigation from Storage" couplets). The quantity typically reflects the active storage capacity of the reservoir. The absence of a rate of flow for these volume-based components reflects the fact that the storage right may be used to store all physically and legally available water reaching the reservoir. Thus, an on-stream reservoir is required to bypass only water that downstream right-holders are entitled to divert. In other words, these on-stream rights authorize the owner to control every drop of water in the river—but only when they are in priority during a single fill. This maximizes the potential the reservoirs will fill completely and do so at a time least in conflict with other water users. This makes more water available for juniors and maximizes the use of the State's water resources.

As noted above, off-stream reservoirs (such as Lake Lowell) are licensed and decreed in a similar manner, with one critical distinction. In addition to the purposes of use components described above (which are quantified in annual volume), they will display an additional purpose of use called "diversion to storage" that is quantified in terms of a flow rate (cfs). This purpose of use component describes the right to divert the water from the stream or other natural source to the off-stream reservoir. Thus, a key difference between an on-stream reservoir and an off-stream reservoir is that on-stream reservoirs are authorized to divert all water that is physically available in the stream and not required to satisfy other water rights, while off-stream reservoirs (like other natural flow and ground water rights) are limited to the rate of flow stated on the face of the right.

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component to take water out of storage ("[Purpose] from Storage"). The reason is found in language on the face of the decree. It explains that water accruing to storage under Refill 1 and Refill 2 supplements water accrued to the storage under the so-called "base rights" associated with the reservoirs, and that all such water shall be allocated under the federal contracts as if it had accrued under the base rights.

See footnote 62 below for a discussion of whether the one-fill rule applies to off-stream reservoirs.

Hydropower storage rights licensed or decreed with the standard couplet ("Power Storage" and "Power from Storage") are likewise quantified in terms of volume (AFY). However, some hydropower rights are licensed or decrees with only a "power" component, which is measured in rate of flow (cfs). This presumably corresponds to the "direct flow" component of water right described in IDWR's guidance on storage rights (see footnote 53 at page 49). This might reflect run-of-river use of an on-stream reservoir.

At the time of licensing, each purpose of use must be proven separately. The "[Purpose] Storage" and "Diversion to Storage" components may be proven simply by showing the quantity of water that has been diverted to the reservoir.[60] In contrast, the "[Purpose] from Storage" component (e.g., "Irrigation from Storage") must be proven by showing actual application to the end beneficial use.

Thus, if an irrigation reservoir stored water, but, at the time of licensing, had never actually used any of that water for irrigation, the license would be denied because "Irrigation from Storage" purpose had not been shown. Mere storage of water without an ultimate beneficial use is an insufficient basis to establish a water right. *See*, *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981) (Albuquerque's storage of San Juan/Chama water for 40 years was not a beneficial use due to evaporation losses).

(7) Storage refill

(a) In a nutshell

The Refill Litigation involved the administration of water rights for federal on-stream reservoirs in Basin 63. In its accounting system, IDWR counts all "storable" water entering those reservoirs toward the satisfaction of the storage rights, even if that water is bypassed or later released to make space available for forecasted incoming flood waters. This is referred to as "paper fill," because the rights are deemed satisfied based on a computation, rather than the amount of water physically present in the reservoir. Once the storage rights are deemed satisfied, IDWR allows the reservoirs to store additional water only to the extent that excess water is available over and above the amount demanded by all other water rights.

[60] The same terms, "divert" or "diversion" are used to describe water entering both on-stream and off-stream reservoirs. Thus, for an on-stream reservoir, IDWR considers all water entering the upper end of the reservoir that the right holder is not obligated to release to satisfy downstream rights to be "diverted" to the reservoir and, hence, accrued toward the fill of that storage right. This issue, however, is being litigated as of this writing.

Junior surface diverters benefit from this practice because it allows their rights to come into priority once the reservoirs' water rights are satisfied, without risk that their water will be taken by upstream federal reservoirs for refill purposes. This practice incentivizes reservoir operators to be efficient and cautious in their flood control operations, because they cannot use water belonging to other water users to refill their reservoirs when more water is released than necessary.

The federal government and other irrigation entities challenged IDWR's accounting practice because, in their view, water bypassed or released for flood control should not count toward the satisfaction of the reservoirs' water rights. They contended that only water that is physically retained in storage should count toward the water rights.

After years of litigation, including three trips to the Idaho Supreme Court, the parties reached a settlement in the summer of 2018. As part of this settlement, the federal government and the irrigators dropped their so-called "late claims" for in-priority refill water rights. In exchange, the parties agreed to recognize two new refill water rights for the federal reservoirs (called Refill 1 and Refill 2) that are largely subordinated other water rights. Thus, the settlement leaves in place (with some exceptions) IDWR's longstanding practice of allowing refill of empty reservoir space only when there is sufficient water to also satisfy all other rights.

Notably, the Refill 1 water right may be exercised (with three "carve-out" exceptions) only when the Boise River is in "free river" status, meaning that there is ample water for all. Except for the carve-outs, this right is subordinated to all existing and future water rights. The quantity is essentially unlimited (based on the highest recorded river flow). But this does not matter to other water users (except for the carve-outs), due to the subordination.

The Refill 2 right is expressly subordinated to all Boise River surface rights existing at the time of the settlement. Its quantity, which is based on an obscure 1973 statute, is more modest than the huge Refill 1 right. But, again, the quantity is of no practical import to existing rights due to the subordination. In essence, it operates like a junior appropriation.

(b) One-fill rule (storable inflow and paper fill)

IDWR follows the rule common throughout the West[61] that an onstream[62] reservoir with a volume-based water right may be filled under right of priority only once a year

[61] See, e.g., *City of Westminster v. Church*, 445 P.2d 52 (Colo. 1968); *Orchard City Irr. Dist. v. Whitten*, 361 P.2d 130 (Colo. 1961).

[62] It appears that, because off-stream reservoirs are subject to a diversion rate limitation (the "diversion to storage" component), off-stream rights are not subject to the one-fill rule. However, the authors are not aware of a case or other authority expressly so holding. This

(unless the water right expressly or by clear implication authorizes multiple fills under priority). There is no Idaho statute on this point, but the Department has implemented the one-fill rule via a requirement in applications for water appropriations.[63]

The one-fill rule governs the operation of the main storage right for a reservoir (referred to as "base rights" in the Refill Litigation). It is possible that other storage rights for the reservoir may authorize additional fill (re-fill) beyond the first fill. For example, the *Refill Stipulation* provided for the decreeing of additional rights (known as Refill 1 and Refill 2) authorizing additional fill under specified conditions.

The one-fill principle has long been recognized as part and parcel of the prior appropriation doctrine. As far back as 1912, it was deemed black letter law in Kinney's treatise:

> As in the case with other rights acquired under the Arid Region Doctrine of appropriation, the rule of priority governs, and it is held that the reservoir having the prior right is entitled to fill the same first from the flow of the stream to the full extent of the capacity of the appropriation made therefor. <u>But having once during any one season filled such reservoir, a later appropriation or a subsequent reservoir may take the surplus of the water flowing in the stream, after the prior reservoir has been once filled.</u>

1 *Kinney on Irrigation*, 2nd ed. § 845, p. 1,484 (1912) (emphasis supplied).

The one-fill rule is based on the concept of "storable inflow." The storable inflow principle requires that if water is legally and physically available to be stored, it counts towards the annual fill of the volume stated on the face of the right. Thus, unless water in the stream must be bypassed to satisfy downstream seniors, it counts toward fill irrespective of whether it is stored or bypassed. Likewise, the release of water stored in the reservoir for flood control (or any other purpose) has no effect on the quantity accrued under the water right. Thus, the one-fill rule does not operate on the basis of "physical fill." Instead, the storage right holder is entitled to one "paper fill."[64] Once the

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conclusion was implicit, however, in the Refill Litigation (which addressed the one-fill rule only in the context of on-stream reservoirs and emphasized that the one-fill rule was needed to counter-balance the absence of any limitation on rate of flow).

[63] "Impoundment (storage) applications shall show the maximum acre-feet requirement per year which shall not exceed the storage capacity of the impoundment structure unless the application describes a plan of operation for filling the reservoir more than once per year." IDAPA 37.03.08.035.03.b.v.

[64] Counting all "storable inflow" toward fill of a storage water right is frequently described as "paper fill." Thus, the term "paper fill" is simply shorthand for the combination of

right has been filled on paper (even if water is bypassed or subsequently released for flood control), the reservoir operator may not fill or refill vacant space under right priority.

In sum, if water is physically present and legally available to store (i.e., "in priority"), the storage right holder is expected to store it. If a storage right holder decides to bypass storable inflow, or stores it and later releases some of it for whatever reason, that does not allow additional water to be stored under priority.[65]

Without calling it "storable inflow," IDWR's Director confirmed that the principle is embedded in IDWR's water rights accounting system:

> Under the accrual procedures of the Water District 63 water rights accounting program, any natural flow available under the priority of an on-stream reservoir water right at its point of diversion (the dam), or that would have been available at the dam if the water had not been stored in an upstream reservoir, is accrued (distributed) toward the satisfaction of the reservoir's water right until the cumulative total reaches the water right's annual volume limit.

Amended Refill Order, ¶ 106, p. 37.

Note that carry-over storage from the prior season counts toward the accrual of the single fill in the following year. *Amended Refill Order*, ¶ 118, p. 40. Thus, if a reservoir were half full at the beginning of the accounting year, the storage right holder would be entitled to store a quantity equal to the empty portion and no more.

"one-fill" and "storable inflow." The term "paper fill" has been described as a "term of convenience to describe the cumulative amount of natural flow accrued to a reservoir water right in the water rights accounting." IDWR Staff Memo of November 4, 2014 by Liz Cresto, Technical Hydrologist and then operator of the Department's accounting system.

[65] The history, basis, and operation of the one-fill rule is described in detail in a ruling by Director Gary Spackman in a contested case prompted by challenges to the Department's application of the one-fill rule. *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63* Idaho Department of Water Resources (Amended Final Order, Oct. 20, 2015) (Spackman, Director) ("*Amended Refill Order*"). This order was appealed in the final round of the Refill Litigation. Ultimately those appeals were dismissed and the district court's ruling on the order was vacated on October 22, 2019 as part of the settlement of the Refill Litigation (see *Refill Stipulation* of July 2, 2018, ¶ 13, pp. 6-7). The *Amended Refill Order* was left in place by the settlement and continues to reflect departmental policy.

The one-fill rule was litigated and ultimately settled in what is known as the Refill Litigation and the *Refill Stipulation*.

(c) The free river principle

An important exception or corollary to the one-fill rule is the free river principle.[66] It provides that, although an on-stream reservoir may be filled only once under right of priority, the reservoir owner is free to store any additional water available under so-called "free river" conditions—that is, when there is sufficient flow to satisfy all other water users. The key point is that this free river refill does not occur under right of priority.[67]

(d) The tension between maximizing storage and flood prevention

Few if any reservoirs are operated solely for the purpose of flood control. By and large, reservoirs are operated to capture and store as much water as is safely possible for beneficial uses such as irrigation, municipal, industrial, hydropower, or streamflow maintenance. There is inherent tension between the antithetical goals of maximizing storage (ideally, keeping the reservoir full) and flood prevention (ideally, keeping the reservoir empty).

Accordingly, water that could have been retained is often released[68] in winter and spring in order to maintain sufficient empty space to handle large runoff events that would cause flooding. Then, as the irrigation season approaches, the reservoir operator

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[66] The authors borrow the term "free river refill" from Colorado. *City of Westminster v. Church*, 445 P.2d 52, 59 (Colo. 1968).; Casey S. Funk, *Basic Storage 101*, 9 U. Denver L. Rev. 519, 539 n.137 (2006). Idaho employs the more abstruse terminology "excess water" and uses the term "unaccounted for storage" to describe such water once it is held in storage.

[67] In his 2016 order in the Refill Litigation, Director Spackman confirmed that IDWR's accounting system allows the historical practice of refilling vacated space in on-stream reservoirs with "excess flows" after the storage rights are satisfied: *Amended Refill Order*, ¶ 34, p. 67. The order was appealed as part of the Refill Litigation. District Court Judge Wildman affirmed virtually all of Director Spackman's order, but rejected the provision dealing with free river refill. Before the Idaho Supreme Court ruled on appeals of Judge Wildman's decision, the matter was settled and the Wildman order was vacated (see Stipulation of July 2, 2018, ¶ 13, pp. 6-7). (The settlement sidestepped broader free river principle by implementing it instead through recognition of a beneficial use right allowing additional refill subject to subordination.) However, the *Refill Stipulation* left Director Spackman's 2016 order intact. Accordingly, the free river principle described in the order continues to be employed in the Department's administration of all other on-stream reservoirs.

[68] The term "water releases" includes water that is "bypassed"—i.e., water that enters the reservoir and is passed through without being stored. All water that could have been lawfully stored under priority is referred to as "released" if it is not stored.

will often wish to "top off" the reservoir after making flood control releases that proved to be more generous than necessary. The question at the heart of the Refill Litigation was whether the operator may undertake such refill under the priority of its water rights, i.e., to the detriment of junior water users.

Idaho, like most western states, follows the rule allowing only one "fill" of a reservoir under priority pursuant to its storage right (except for rare instances where the right expressly or through clear implication authorizes refill). The one-fill rule incentivizes reservoir operators to be careful and efficient in reservoir operations. If the reservoir operator releases more water than necessary for flood control purposes, the reservoir may be topped off (refilled) only if there is sufficient water available to satisfy the rights of all other water users. This is referred to as "free river" conditions.

(e) The Refill Litigation

In the Refill Litigation, various irrigation entities challenged how IDWR "accounts" for the water rights for federal reservoirs.[69] The fight was over what water counts (or, technically speaking, "accrues") toward filling the right under the one-fill rule. Unless water is passed through a reservoir to serve downstream seniors, the Department counts all water entering the reservoir toward the satisfaction of the storage water right, even if that water is immediately bypassed or later released to make space for forecasted incoming flood waters. "Paper fill" is achieved when the rights are filled on paper even if the reservoir is not physically filled. After paper fill, the storage right is no longer "in priority," and the reservoir must allow sufficient incoming water to pass through to satisfy any downstream water rights then in priority (including rights junior to the reservoir rights).[70]

For years, IDWR quietly implemented the one-fill rule through its accounting procedures with little apparent concern by water users.[71] Beginning in 2007, however, a

[69] The Refill Litigation arose in the context of federal reservoirs, but the rules of law at issue (notably, the "one-fill rule") are equally applicable to non-federal reservoirs. Federal reservoirs in Idaho provide water to Idaho irrigation entities, but neither the irrigators nor IDWR actually control reservoir operations. The reservoir flood control operations within the Boise River Basin ("Basin 63") are managed by the U.S. Bureau of Reclamation ("Bureau") and U.S. Army Corps of Engineers ("Corps"). They make their storage and flood release decisions based on rule curves and other federal considerations. They are constrained only by the extent of their water rights (i.e., when they are in priority) and certain commitments to their contract holders.

[70] See footnote 62 on page 54 for a discussion of whether the one-fill rule applies to off-stream reservoirs.

[71] The September 21, 1979 Minutes of Committee of Nine Meeting states: "Lester Saunders asked the Director of the Department of Water Resources, Stephen Allred, to explain the watermaster's process for crediting water to the reservoirs. Steve explained that any water available at a reservoir for storage is credited to that reservoir storage right. Once a right has

decade-long battle occurred over the one-fill rule[72] known as the Refill Litigation.[73]

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been filled on paper, even if the water has been released and additional space is available, the priorities of the reservoirs are considered to no longer be in effect."

[72] The Refill Litigation was prompted by objections filed on April 19, 2007 in the SRBA by the Bureau to IDWR's recommendations on two Bureau storage right claims in the Snake River Basin (01-2064 and 01-2068). In its objections, the Bureau asked that a "remark" be added to its water right authorizing it to refill its Snake River projects under right of priority. IDWR declined to do so, instead offering an alternative remark authorizing refill during free river conditions only. See discussion in *In re SRBA Case No. 39576, Basin-Wide Issue 17, Subcase No. 00-91017*, Memorandum Decision at page 4 (4th Dist. Idaho Mar. 20, 2013) (Wildman, J.). Irrigators then filed a petition to designate a so-called "basin-wide issue." In 2015, Upper Snake parties resolved the refill dispute in the Upper Snake by the Bureau securing additional junior water rights authorizing refill. In 2019, a similar result was reached in the Boise River Basin.

[73] The "*Refill Stipulation*" of July 2, 2018 resolved the "Refill Litigation," which consisted of the following:

- Basin-wide 17: *In re SRBA Case No. 39576, Basin-Wide Issue 17, Subcase No. 00-91017*, Order Designating Basin-Wide Issue (4th Dist. Idaho Sept. 21, 2012) (Wildman, J.); *In re SRBA Case No. 39576, Basin-Wide Issue 17, Subcase No. 00-91017*, Memorandum Decision (4th Dist. Idaho Mar. 20, 2013) (Wildman, J.) (confirming that Idaho follows the one-fill rule, but declining to address the "more important question" of when a right is filled under IDWR's accounting system); *A&B Irr. Dist. v. State* ("*Basin-Wide 17*"), 157 Idaho 385, 336 P.3d 792 (2014) (Burdick, C.J.) (the question was improperly framed as basin-wide issue because it presents a mixed question of fact and law). Thus, the basin-wide issue failed to resolve the key question.
- Basin 63 Late Claims: *In re SRBA Case No. 39576, Subcase Nos. 63-33732 (consolidated subcase No. 63-33737), 63-33733 (consolidated subcase No. 63-33738), and 63-33734*, Memorandum Decision and Order on Challenge and Order of Recommitment to Special Master (4th Dist. Idaho Sept. 1, 2016) (Wildman, J.). No appeal was taken.
- Basin 65 Late Claims: *In re SRBA Case No. 39576, Subcase Nos. 63-23531 and 65-23532*, Memorandum Decision and Order on Challenges, Final Order Disallowing Water Right Claims (4th Dist. Idaho Oct. 7, 2016) (Wildman, J.); *United States v. Black Canyon Irr. Dist.,* 163 Idaho 54, 408 P.3d 52 (2017) (Burdick, C.J.); *Black Canyon Irr. Dist. v. State,* 163 Idaho 144, 408 P.3d 899 (2018) (Burdick, C.J.) (doctrine of claim preclusion barred irrigation district from seeking to litigate issues regarding water rights already decreed).
- Basin 63 Contested case: *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63*, Notice of Contested Case and Formal Proceedings, and Notice of Status Conference (IDWR Oct. 24, 2013)

The litigation centered mainly on IDWR's accounting methodology for water rights associated with federal on-stream reservoirs. The accounting methodology matters because Idaho, like most western states, allows only one "fill" of a storage water right under priority (unless the right expressly provides for additional fill).[74] The core question

(Spackman, Director); *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63*, Order Staying Proceeding (IDWR Dec. 27, 2013) (Spackman, Director); *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63*, Order Lifting Stay and Notice of Status Conference (IDWR Sept. 9, 2014) (Spackman, Director); *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63*, Amended Final Order (IDWR Oct. 15, 2015) (Spackman, Director) ("*Amended Refill Order*"); *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63*, Order Denying Petitions for Reconsideration (IDWR Nov. 19, 2015) (Spackman, Director); *Ballentyne Ditch Co. v. Boise Project Bd. of Control*, Case Nos. CV-WA-2015-21376 and CV-WA-2015-21391, Memorandum Decision and Order (4th Dist. Idaho Sept. 1, 2016) (Wildman, J.) (affirming in large part the Director's order); *Ballentyne Ditch Co. v. Boise Project Bd. of Control*, Case Nos. CV-WA-2015-21376 and CV-WA-2015-21391, Order Denying Rehearing (4th Dist. Idaho Nov. 14, 2016) (Wildman, J.). (Note that Judge Wildman's orders of Sept. 1, 2016 and Nov. 14, 2016 were vacated by the Idaho Supreme Court in accordance with the *Refill Stipulation*.) Three appeals were filed: Idaho Supreme Court Nos. 44677-2016, 44745-2017, and 44746-2017. These appeals were fully briefed and awaiting oral argument when the settlement was reached in the *Refill Stipulation* of July 2, 2018. Following the enactment of H.B. 1 and approval of Refill 1 and Refill 2 by the SRBA Court on 7/19/2019, the appeals were withdrawn and Judge Wildman's orders were vacated (see Stipulation of July 2, 2018, ¶ 13, pp. 6-7) in *Ballentyne Ditch Co. v. Boise Project Bd. of Control*, Case Nos. CV-WA-2015-21376 and CV-WA-2015-21391, Order Vacating Orders and Remanding to the Idaho Department of Water Resources (4th Dist. Idaho Oct. 22, 2019) (Wildman, J.).

[74] For convenience, we refer to the primary storage right(s) associated with a reservoir or system of reservoirs authorizing the initial fill as the "base right(s)." The base rights are distinguished from any additional water right(s) (*e.g.*, the "late claims" that resulted in Refill 1 and Refill 2) authorizing a second fill of the reservoir(s) under specified circumstances.

The Bureau's base rights for Basin 63 (Boise River Basin) are Nos. 63-303, 63-3613, 63-3614, and 63-3618. The Basin 63 late claims are Nos. 63-33732, 63-33733, 63-33734, 63-33737, and 63-33738. No. 63-33734 was split into 63-33734A and 63-33734B to become Refill 1 and Refill 2. Except for Refill 1 and Refill 2, all Basin 63 late claims were disallowed by the SRBA Court on 7/19/2019 pursuant to the *Refill Stipulation*. The Basin 65 (Payette River Basin) base rights are Nos. 65-2927A, 65-2927B, 65-2917, and 65-9483. The late claims for Basin 65 are Nos. 65-23531 and 65-23532. The Basin 65 late claims were disallowed on *res judicata* grounds (see footnote 73 on page 59).

was whether water vacated (i.e., released)[75] for flood control purposes counts (aka, accrues) toward fill (*i.e.*, satisfaction of the water right).

Oddly, the irrigators could have largely resolved their concerns by filing new storage right applications specifically for refill. Although these would have been junior in priority, they would be senior to all future water rights, thereby protecting the status quo. Under these rights, the reservoirs would be allowed to refill in priority vis-à-vis even more junior water rights while protecting existing right holders. As described below, this is essentially the outcome reached in the *Refill Stipulation*.

Instead of taking this relatively simple path, the irrigators adopted a two-pronged litigation approach in which they not only challenged IDWR's accounting system,[76] but also filed so-called "late claims"[77] for refill rights in the SRBA.[78] These late claims

[75] We employ the term "vacated" to describe space in a reservoir that becomes empty when stored water is released prior to the irrigation season for flood control purposes. In addition, the term "vacated" includes space that is kept empty when water that could have been lawfully stored is bypassed for flood control purposes (*i.e.*, water is passed through the reservoir without being physically stored). Strictly speaking, "vacate" refers to the creation or maintenance of space in the reservoir. Thus, one vacates space by releasing water. However, for convenience and brevity, we also speak of vacating water in order to create or maintain storage space. Thus, "vacated" water includes both releases of previously stored water and bypass of water than is never physically stored.

[76] Initially, the irrigators sought a ruling on a so-called "basin-wide issue" in the SRBA. This "Basin-Wide Issue No. 17" posed this confusing question: "Does Idaho law require a remark authorizing storage rights to 'refill,' under priority, space vacated for flood control?" In this way, the irrigators urged the district court and later the Idaho Supreme Court to add a "remark" to each storage right authorized in-priority refill. Ultimately, the basin-wide issue was resolved by the Idaho Supreme Court in *A&B Irrigation Dist. v. State* ("*BW-17*"), 157 Idaho 385, 336 P.3d 792 (2014) (Burdick, C.J.). The Idaho Supreme Court essentially ruled the question premature because it "was not a question anyone appears to have wanted answered." *BW-17*, 157 Idaho at 392, 336 P.3d at 799. In effect, the Court kicked the matter back to IDWR—where it belonged all along. The IDWR Director already had initiated (and then stayed) an administrative proceeding to address the very accounting question which this Court ruled was within the Director's discretion to decide. Attention then focused on that contested case in which the Director ultimately upheld his own accounting system, giving rise to judicial review to district court and appeals to the Idaho Supreme Court. It is these appeals that were resolved by the settlement that gave rise to H.B. 1 in 2019.

[77] A late claim is simply a claim for a water right in the SRBA (or other general adjudication) that was filed after the cutoff date for filing claims. Late claims are generally allowed upon a showing of cause.

[78] The Snake River Basin Adjudication ("SRBA") is the massive, decades-long general adjudication of all state and federal water rights in the Snake River Basin of Idaho. The SRBA

sought backdated priority rights for refill based on "beneficial use" (*i.e.*, without any prior permit, license, or decree). Then, to make matters even more confusing, they pursued various motions to establish that their own late claims were unnecessary, because they had the right of priority refill under the existing decreed "base rights."

In any case, priority refill under either the base rights or the late claims would have the same effect—establishing the right to refill under an early priority date, thereby allowing refill to occur at the expense of many other water users. Accordingly, both were opposed by the State and SUEZ.

The final round of the Refill Litigation involved challenges to the order issued by Director Gary Spackman in the contested case initiated by the Department in response to prior rounds of the Refill Litigation that failed to resolve the key question of what water counts toward the first fill. See footnote 73 on page 59.

Ultimately, as explained below, the settlement asked the SRBA Court to decree two late refill claims (known as Refill 1 and Refill 2), but not the ones the irrigators originally sought. More importantly, it puts to rest debate over the essential principles of IDWR's accounting system.

(f) The *Refill Stipulation*

(i) Overview

In late 2015, Director Spackman's contested case proceedings resulted in an order implementing the one-fill rule in accordance with storable inflow principle. In other words, storable water that is bypassed or released for flood control purposes counts toward fill. The decisions were appealed first to Judge Wildman, who largely upheld the Spackman order. That decision, in turn, was appealed to the Idaho Supreme Court. The appeals had been fully briefed and set for oral argument when the parties reached a settlement agreement. See footnote 73 on page 59.

The Refill Litigation was settled pursuant to a stipulation dated July 2, 2018 (the "*Refill Stipulation*"), in a manner that left in place IDWR's longstanding accounting system recognizing that under the one-fill rule all water available to a storage right holder accrues to the right.

A key part of the settlement provided that the irrigator's so-called "late claims" for priority refill would be disallowed and that instead decrees would issue for two new "beneficial use" storage rights known as Refill 1 (no. 63-33734A) and Refill 2 (no. 63-33734B). Beneficial use rights are rights that may be claimed in a general

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Court is the Idaho district court (the Fifth District sitting in Twin Falls, Idaho) that is responsible for the general adjudication and judicial review of water rights matters throughout the state.

adjudication based on actual beneficial use (prior to 1963 for ground water and prior to 1971 for surface water) rather than a permit, license, or decree (see section 11.B on page 180).

The settlement was conditional because it was premised on the enactment of certain implementing legislation[79] and the approval the Refill 1 and Refill 2 rights by the SRBA Court.[80] The settlement also called for the dismissal of the appeals pending before the Idaho Supreme Court as well as the vacation of Judge Wildman's 2015 orders in contested case appeal, thus eliminating any formal legal precedent regarding refill. Ultimately, all fell into place, and the settlement went into effect.

In sum, the settlement recognizes and implements IDWR's interpretation of the one-fill rule (based on the "paper fill" concept). But it also authorizes refill of federal reservoirs in Basin 63 with water under the Refill 1 and Refill 2 rights. The original water rights are referred to as the "base rights" (see footnote 74 on page 60).

(ii) Refill 1

Refill 1 confirmed the Bureau's unlimited right to "free river" refill—that is, the right to refill with virtually no limitation when there is sufficient water in the river to satisfy all other priorities. Refill 1 does not include any priority right to call out other users (with three exceptions known as "carve-outs"). Thus, Refill 1 formalizes the Department's longstanding administrative practice of allowing free river refill (*i.e.*, not under right of priority), except for carve-outs that allow some refill under priority.

Like Refill 2, Refill 1 has a relatively early priority date, September 30, 1965 (based on the year the Bureau asserted that the largest inflow into the reservoir system occurred prior to 1971, after which date new water rights could not be established without going through an application and permitting process with IDWR[81]). As with

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[79] As part of the settlement, the parties agreed to support legislation, which was promptly enacted as H.B. 1, 2019 Idaho Sess. Laws, ch. 16 (codified at Idaho Code § 42-115). The bill's sponsor was Scott Bedke, then Speaker of the House, who oversaw the settlement negotiations. The measure was passed unanimously in both houses.

The legislation provided that any new (post-2019) water rights for storage projects larger than 1,000 acre-feet would be subordinated to the refill of existing on-stream reservoirs. The settlement was not contingent on the enactment of this legislation. But its enactment resulted in the addition of a third "carve-out" for the Refill 1 right, allowing priority refill of the existing on-stream reservoir vis-à-vis large new reservoirs.

[80] The settlement was contingent upon the SRBA court decreeing the Refill 1 and Refill 2 rights. *Refill Stipulation*, § 14, p. 7.

[81] For decades, the permitting/licensing process was optional in Idaho, meaning that a water right could be perfected simply through diversion to beneficial use. In 1963, it was made mandatory for ground water rights (except for single family domestic or small stockwater uses).

Refill 2, the priority date is undercut through subordination. However, the subordination for Refill 1 is more extensive and more complicated.

As originally conceived, Refill 1 was meant to memorialize and expressly authorize the longstanding historical practice of allowing additional water to be stored for refill purposes under "free river" conditions. That is, reservoirs may be refilled after flood control with any excess water not needed to satisfy other water rights. This is why Refill 1's quantity reflects the largest recorded inflows into the reservoirs (*i.e.,* the entire river).

Thus, the starting point was simple. Refill 1 was to be a right to divert any river flows subject (subordinated) to all existing and future water rights. This would have allowed the storage of water whenever it is available and no one else needs it. Moreover, it allows additional appropriations of unappropriated water (which is what flood flows really are). If it had stopped here, this would be a true "free river" water right. Thus, as proposed by the State in the settlement discussions, Refill 1 simply formalized (in the form of an actual water right) IDWR's longstanding practice of allowing free river refill.

However, the settlement negotiations resulted in three exceptions or "carve outs" to Refill 1's subordination. The exceptions would give Refill 1 the ability to exercise its priority against a few classes of water rights: ground water recharge, hydropower, and surface water storage projects greater than 1,000 acre-feet. In essence, the carve-outs eliminate the full and total subordination that was originally intended, making Refill 1 a true priority water right vis-à-vis the carved-out classes of rights.

The irrigators demanded all three exceptions during the settlement negotiations. But the State contended that only the first two (ground water recharge and hydropower) were supported by existing legal authority. Accordingly, the settlement parties agreed to support new legislation to authorize the third exception. That legislation is H.B. 1.

(iii) Refill 2

In contrast, Refill 2 may be exercised under right of priority as to all post-settlement rights (roughly speaking, post-2014 rights). Thus, it allows the reservoirs to "top-off" by curtailing post-settlement rights up to 587,056 AF/year (which is more than half the volume of the federal Boise River reservoirs).[82]

1963 Idaho Sess. Laws, ch. 216 (codified at Idaho Code § 42-229). In 1970, it was made mandatory for surface water rights (except for watering stock directly from streams). 1971 Idaho Sess. Laws, ch. 177 (codified at Idaho Code §§ 42-103, 42-201). Refill 1 is based on pre-1971 diversion and beneficial use.

[82] By providing a substantial quantity of priority-based refill, Refill 2 renders Condition 908 unnecessary on new water rights. Condition 908 is a condition added to some Boise River

Although Refill 2 is the product of litigation over refill due to flood control, its priority and quantity elements have nothing to do with flood control. Instead, Refill 2's priority and quantity elements are based on a 1973 amendment to Idaho's water code to allow storage of up to five acre-feet per acre of land to be irrigated. *See* 1973 Idaho Sess. Laws, ch. 184, § 1 (amending what is now Idaho Code § 42-202(3)).[83] In settlement negotiations, the State contended that this amendment provided the only legal mechanism to support the irrigators' late claim for additional storage water to be used on the same lands as the base rights.

Thus, Refill 2 has a relatively early priority date, March 16, 1973, which is based on the date Idaho's water code was amended to add the five acre-foot provision.[84] Refill 2's quantity element (587,056 acre-feet) is the amount of additional water that could be stored under the amended statute's five acre-foot authorization that is beyond the quantities authorized to be stored under the base rights.

However, Refill 2's priority date is sharply undercut by two subordinations. (The subordinations for Refill 2 appear in "other provision 5" in the water right set out in

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rights allowing them to be exercised only "when the Boise River is on flood release below Lucky Peak dam/outlet."

[83] Idaho Code § 42-202(6) also references the 5 AF per acre limit, but it predated and was not amended by the 1973 legislation. The authors are unable to discern how either of these subsections of 42-202 (which set an upper limit on how large a permit application for a storage right may be) justify the issuance of Refill 2. In any event, the parties were motivated to find a settlement, and the subordination provision made the provision innocuous to existing water rights.

[84] All of the other "late claims" (including Refill 1) are so-called "beneficial use" rights, based on beneficial use of water in the absence of a permit, license, or decree. Refill 2 is <u>not</u> a beneficial use right, which explains why it has a different priority date from Refill 1. This also explains how Refill 2 could have a 1973 priority date, which is two years after the Legislature ended the ability to establish surface rights by beneficial use. Instead, Refill 2 is a so-called "enlargement" right authorized under Idaho Code § 42-1426. This is an "amnesty" statute that allows an enlarged use of a permitted, licensed, or decreed right (*e.g.*, irrigating more acres than authorized under the paper right) to be recognized as valid in an adjudication so long as the enlarged use occurred prior to the commencement of the adjudication. In 1996, the Idaho Supreme Court declared that this statute cannot operate so as to injure, such as by dilution of priority, any water right existing on the 1994 date the amnesty statute was enacted. *Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc*. ("Basin-Wide Issue 4"), 129 Idaho 454, 926 P.2d 1301 (1996). Thus, enlargement rights typically are decreed with a condition that subordinates them to water rights with a priority date earlier than April 12, 1994. The Refill 2 right, however, does not include this condition because the settling parties concluded that it was unnecessary given the right's other subordinations.

Exhibit 2 to Attachment D to the *Stipulation*.[85]) The parties agreed that Refill 2 will be subordinated to all existing surface water right permits and licenses (as identified in an agreed-upon list) and to all *de minimis* (smaller than 0.1 cfs) surface water rights with priority dates predating May 1, 2014. Thus, as a practical matter, the 1973 priority date is converted to a 1/3/2014 or 5/1/2014 priority date (depending on whether the right is on the settlement list or falls into the *de minimis* category).[86]

The idea is that Refill 2 provides a right that may be exercised in priority against future (post 2014) water rights. The effect is to protect the irrigators from future rights that they feared might take all of the unappropriated water historically available for refill. As noted above, the irrigators could have accomplished essentially the same thing (without any litigation or settlement thereof) simply by filing an application for a new refill right.

(iv) Summary Table of Refill 1 and Refill 2

The Refill 1 and Refill 2 rights are summarized in the table below. See also discussion of these rights in footnote 59 on page 51.

[85] Although the subordination list was prepared in 2018 at the time of settlement, the most junior (newest) water right on the list has a priority date of 1/3/2014.

[86] Unlike Refill 1 (which is subordinated to surface and ground water rights), Refill 2 is not subordinated to ground water rights. Thus, in the event of a conjunctive management call against ground water users, the federal projects could seek curtailment of ground water alleged to injure the "base rights" and/or the Refill 2 right. This is of little practical consequence, however. The vast majority of ground water rights are located far downstream from the federal reservoirs and therefore their pumping has no measurable impact on surface flows entering the reservoirs. To the extent a ground water right's pumping might impact a reservoir, the relatively close priority dates of the base rights and the refill rights means that if a ground water right interferes with one, it probably interferes with the other.

Summary of Refill Rights – *Refill Stipulation*		
	Refill 1 (63-33734A) ("Free River" Refill)	**Refill 2 (63-33734B) (Priority Refill)**
Purpose	This "beneficial use right" formally implements the concept of free river refill (*i.e.*, refill does not occur under priority, except for 3 carve-outs, where refill does occur under priority).	This is a senior right which, due to its subordination, functionally operates like a junior appropriation for second fill.
May be exercised under priority?	No. Except for the three carve-outs, Refill 1 is subordinated to all water rights (existing and future). Thus, diversion may occur only under "free river" conditions. However, Refill 1 operates under priority as to the three carve-outs.	Yes. Refill 2 may be exercised under priority against post-2014 water rights (as described in the subordination).
Subordination:	Subordinated to all existing and future water rights.	(1) All water rights included on a list attached to Refill 2. This list includes all known surface water rights through 1/30/2014. (2) All surface rights under 1.0 cfs with priority dates prior to 5/1/2014, even if omitted from the above list.
Carve-outs (which eliminate the subordination and allow the right to be exercised under priority):	(1) Surface water storage rights greater than 1,000 AF issued after 4/15/2019 (as described in Idaho Code § 42-115). (2) Managed ground water recharge rights issued after 4/15/2019. (3) All hydropower rights.	None.
Priority date	Due to the subordination, the 9/30/1965 priority date is irrelevant (except for the hydropower carve-out). For purposes of the other two carve-outs, the priority date is functionally converted to a 2019 priority.	Due to the broad subordination, the 3/16/1973 priority date is not meaningful. The right functionally operates with a 2014 priority. The 3/16/1973 priority date was based on the date of a 1973 statute allowing storage of up to five AF per acre.
Quantity	3,672,732 AF/year. This huge volume is based on the highest recorded inflow into the reservoirs. In other words, the right is for the entire river flow.	587,056 AF/year. This is the quantity that could be stored under the 1973 statute's five AF/acre provision beyond the quantity authorized under the base rights

(8) Place of use

It is well established in Idaho and elsewhere that storage of water in a reservoir is a beneficial use, so long as the storage water is appurtenant to an identifiable area and

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applied to a beneficial use (either within the reservoir or after release), such as irrigation, hydropower, municipal, or recreation purposes.[87]

However, in Idaho,[88] the fact that storage is a beneficial use does not mean that the place of use corresponds to the location of the storage reservoir. Instead, the place of use looks to the location of the ultimate place of beneficial use (e.g., irrigation or power generation).

Accordingly, the "[Purpose] Storage" component of the right ordinarily does not have an associated place of use (unless the storage itself is the end purpose, e.g., "recreation storage" or "aesthetic storage").[89] However, this practice is not consistent.

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[87] In the irrigation context, storage is seen as protection against recurring drought and as a source of supplemental supply for appropriators whose natural flow rights may not provide them enough to complete the irrigation season. "The supreme court held in 1941 that the maintenance of a dam, under permit from the Department of Reclamation [now the Idaho Department of Water Resources], for the storage of flood and winter-flow waters, could not constitute a wrongful interference with decreed rights on the stream, provided the owner of the dam released during the irrigation season the quantities of water necessary to supply the decreed rights." Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 45 (1968) (citing *Knutson v. Huggins*, 62 Idaho 662, 115 P.2d 421 (1941).)

"The storage of water for future uses has long been held to be a beneficial use." Robert E. Beck, 1 *Waters and Water Rights*, § 13.03 at 144 (1991) (citations omitted); "Initially, the system relented on this proposition [requiring immediate use] only with reference to the building of reservoirs to catch otherwise unusable seasonal flows and floodwaters. . . . Now, of course, municipalities are allowed to acquire supplies for projected future use; indeed, in many instances are required to, for long-term growth." Robert E. Beck, 1 *Waters and Water Rights*, § 12.03(c)(2) at 108 (1991) (citations omitted); Samuel C. Wiel, *Water Rights in the Western States* § 378 at p. 410 (1911); 45 Am. Jur. 2d *Irrigation* § 38 (1969). *But see*, *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981) (Albuquerque's storage of San Juan/Chama water for 40 years was not a beneficial use due to evaporation losses.).

[88] We understand that this is not the practice in Utah, which treats the storage reservoir as the place of use.

[89] For example, the three water rights held by Idaho Power Company for its Hells Canyon Complex (No. 3-10247 for Hells Canyon dam, No. 3-10246 for Oxbow dam, and No. 3-2018 for Brownlee dam) designate no place of use for the "Power Storage" component of those rights. Instead, a place of use at the power plant is designated for the "Power from Storage" component of these rights. The same is true for many rights held by the Bureau of Reclamation for on-stream reservoir storage; these rights designate the large area of irrigation and other uses as the place of use. E.g., No. 63-303.

On occasion, Idaho storage rights list the reservoir as the place of use for the "[Purpose] Storage."[90]

For example, the three water rights held by Idaho Power Company for its Hells Canyon Complex (No. 3-10247 for Hells Canyon dam, No. 3-10246 for Oxbow dam, and No. 3-2018 for Brownlee dam) designate no place of use for the "Power Storage" component of those rights. Instead, a place of use at the power plant is designated for the "Power from Storage" component of these rights.

Another example is Lake Lowell, which is not designated as a place of use on water right no. 63-301A. Instead, that right designates 194,498 acres of irrigated land as the place of use.

In contrast, the "[Purpose] from Storage" component does have a place of use; it is the location of that end use. Thus, for "Irrigation from Storage," the place of use might be a specified irrigated land or a more broadly described irrigation district boundary.

In the case of hydropower, the place of use for "Power from Storage" (or "power") is the location of the power generation facility. For an on-stream reservoir, the power plant is often located at the base of the dam—in which case, the point of diversion and place of use are the same. However, the power generation facility may be located elsewhere. For example, Idaho Power's Oxbow dam impounds water at a dam in Adams County, Idaho and delivers it to a power station downstream on the Snake River (after the oxbow turn) in Baker County, Oregon. (See water right no. 3-10246.)

(9) The 24-hour fill policy

As a matter of administrative ease, the Department does not require very small reservoirs to obtain storage rights. The Department's rule of thumb is that if the facility can be filled in twenty-four hours, based on the authorized direct diversion rate of a natural flow or ground water right, then no separate storage right is required.[91] This simplifies the application process for farms, ranches, dairy operations, subdivisions, and the like that often make use of small holding tanks, ponds and other storage facilities.

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[90] For example, the *Idaho Appropriation Application* lists Bear Lake as the place of use for each of the "[Purpose] Storage" components (Irrigation Storage, Municipal Storage, etc.). Additional Information, § 9, p. 2, attached to Application for Permit No. 11-7835 (Mar. 23, 2018).

[91] A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers,* 27 Idaho L. Rev. 249, 284 (1990). See also Norman C. Young, IDWR Guidance, *Application Processing No. 67*, at 3 (reproduced as Appendix O).

The twenty-four hour rule is discussed in two pieces of IDWR guidance (both are reproduced in Appendix O):

- Jeff Peppersack, IDWR Guidance, *Application Processing No. 73* (*Utilization of the 24-Hour Fill Allowance for Impoundments*) (Apr. 18, 2013).

- Norman C. Young, IDWR Guidance, *Application Processing No. 67* (*Permitting Requirements for Ponds*) (Feb. 28, 2003).

The 2003 memorandum states:

> 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.

Application Processes sing Memo No. 67, at 3.

In a 2007 decision, an IDWR hearing officer applied the rule with this explanation:

> Nonetheless, IDWR has recognized the need for short-term storage for irrigation sets of duration less than 24 hours. The shorter, more concentrated irrigations are necessary for golf courses, where irrigation during playing hours would frustrate the purpose of the irrigation. In addition, homeowners may also concentrate irrigation during shorter periods of the day. To accommodate the need for short-term storage, IDWR has allowed water to be delivered to storage by a direct flow water right, but has limited the storage to the volume of water that can be accrued by the direct flow authorized for a period of 24 hours.

IDWR Preliminary Order, Application for Amendment of Permit 95-9045 (Black Rock Utilities, Inc.), ¶ 13 at 6 (June 4, 2007).

(10) Storage and municipal water rights

On occasion, IDWR issues municipal water rights for storage purposes. These may follow the standard breakdown: "diversion to storage," "municipal storage," and "municipal from storage." See, for example, Water Right Permit No. 65-23750 issued to the Tamarack Resort in April 2020.

On other occasions, however, IDWR has recognized that storage incidental to delivery of water to municipal customers is included within the panoply of municipal uses and does not need to be called out on the face of a municipal water right. Two examples follow.

Black Rock Utilities, Inc.

The first involves the golf club and residential development known as Black Rock near Coeur d'Alene. A municipal provider known as Black Rock Utilities, Inc. serves that development. The irrigation system for the golf course employs aesthetic ponds used for storage.

In 2008, Black Rock filed an application to amend its permit No. 95-9045. (Although this was not a new appropriation, the principles with respect to storage rights for municipal water rights would be the same in the context of a new appropriation.)

Initially, the application for amendment of permit followed the standard practice of seeking storage for diversion to storage, municipal storage, and municipal from storage. However, Black Rock changed course and requested IDWR to issue the amended permit as a simple municipal water right without municipal components listed among the elements of the right.

The Department agreed. In 2010 it issuing a final order approving the permit amendment described only as municipal.[92]

Tamarack Resort

The second example is found in recent licenses for the Tamarack Resort between McCall and Cascade (Nos. 65-23811, 65-23812, 65-23813, and 65-23814) issued on March 13, 2019.

[92] Conditions were added to the permit, and later to the license, addressing storage quantities associated with the aesthetic ponds. That was a function of the fact that the right holder was constrained by an existing permit with a limited "reserve" that could be carved out for the new storage purpose. That complexity should not come into play in an ordinary application for a new municipal water right. Notably, these conditions were not displayed in the portion of the right showing the purposes and associated quantities as elements of the right.

The permits for these licenses had been issued, according to traditional practice, for the full panoply of diversion components (diversion to storage, municipal storage, and municipal from storage). When licensed, however, the rights were issued by the Department as a simple municipal use. In doing so, the Department found that the complexity of separately listing storage components in the permit is unnecessary in the case of municipal rights. This is because municipal use is broadly defined to include storage that is incidental to the delivery of water for other municipal purposes.

As noted above, a permit was recently issued to the Tamarack Resort that included storage components. We are advised, however, that this was done only because the application sought those components. We are further advised that those storage components are likely to be removed at the time of licensing, leaving only a simple municipal use.

F. Duty of water

Closely related to the rule of beneficial use is the concept of "duty of water," which is that amount of water reasonably necessary to achieve the purpose for which the water was appropriated, and no more. 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).

Each water right is limited by its "duty of water" even though the license, decree, or other basis for the right may not quantify that amount. For instance, a person might hold a license for a right to divert 10 cfs to irrigate a particular piece of land. Nevertheless, a competing user could argue that this rate of diversion is more than reasonably required. In making this argument, the other user would contend that the quantity stated in the first user's licensed right exceeded the duty of water and his diversion should be cut back to that duty. Such a challenge would arise ordinarily in a change or transfer proceeding, in a delivery call situation, or in a general adjudication.[93]

The duty of water concept ordinarily applies in the agricultural irrigation context and is often expressed in terms of cfs of diversions from the source per irrigated acre.[94]

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[93] Presumably, a challenge based on duty of water also could arise where the complaining party asserts that an appropriator is diverting more than a reasonable duty during a particular time period (such as in the early or late season, when less water might be needed). Such a challenge would essentially be an assertion that the appropriator is wasting water.

[94] "The duty of water in the Payette River Drainage is generally based on not more than 0.02 cfs per acre with consideration given for reasonable losses incurred. . . . [T]he duty of

Some have suggested it has no application outside that context.[95]

In Idaho, a statutory presumption regarding the duty of water has been codified:

> [N]o one shall be authorized to divert for irrigation purposes more than one cubic foot of water per second of the normal flow for each fifty (50) acres of land to be so irrigated, or more than five (5) acre feet of stored water per annum for each acre of land to be so irrigated, unless it can be shown to the satisfaction of the department of water resources that a greater amount is necessary.

Idaho Code § 42-202; *see also* Idaho Code § 42-220 (repeating the requirement in the context of issuance of water right licenses).

This flow rate (1 cfs per 50 acres) amounts to one "miner's inch" of water per acre.[96] Thus, for example, if a farmer irrigates 200 acres, the State will presume the duty of water not to exceed diversions of 200 x 0.02 = 4 cfs, absent a showing that more is needed.

Incidentally, if someone diverting at constant rate of one miner's inch throughout a 184-day irrigation season (4/15 through 10/15), that would yield over seven acre-feet. If the irrigation season was 3/1 through 11/15 (260 days), that would yield over over ten acre-feet. So, even a rather generous duty of water of 4.5 AF/acre is a limitation if the diversion rate in a miner's inch per acre.

Annual consumptive use by crops in Idaho typically is less than three acre-feet/acre (although IDWR uses as much as 4.5 AF/year for some irrigation land). For surface irrigation, considerable additional water (beyond consumptive use) must be diverted (to cover delivery losses, etc.). In contrast, Idaho irrigators using wells and sprinklers typically divert little more than the consumptive amount.

The duty of water will include a reasonable amount of seepage, evaporation and ditch carriage loss, and can vary from place to place depending on conditions. In addition, the one-inch-per-acre presumption can be overcome by evidence that more (or

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water under the decree is 0.0167 cfs per acre (1.6 cfs/96 acres = 0.0167)." *Dovel v. Dobson*, 122 Idaho 59, 65, 831 P.2d 527, 533 (1992) (Justice McDevitt dissenting).

[95] "Water duty is limited to agricultural uses." A. Dan Tarlock, *Law of Water Rights and Resources,* § 5:66.

[96] A miner's inch is a flow rate equal to 9 gallons per minute. Under the Idaho standard, there are fifty miner's inches in a cubic foot per second ("cfs"); thus, a miner's inch is also expressed as 0.02 cfs.

less) water is reasonably needed. For instance, a user could obtain a water right for diversions of 11 cfs if he could demonstrate that 10 cfs was required for application to his 500 acres and an additional 1 cfs was lost in transporting the water to the fields. Note that the water right is measured at the point of diversion. Only a portion of the water diverted under a user's water right, perhaps 50 percent, is actually consumed beneficially in many agricultural settings. As indicated above, canal diversions almost always are much higher per acre than ground water diversions.

The duty of water and beneficial use requirements both are central concepts in the corollary rule of Western water law that a water right does not include the right to waste water. In addition, the courts and legislatures of many Western states, Idaho among them, have announced that encouraging (or requiring) "maximum utilization" (or "optimum use") and efficiency also are legitimate subjects of state regulation.[97] This makes sense. The constitutional requirements of priority and beneficial use alone lay a broad foundation for these concepts.

G. Measurement

Water users are required to maintain headgates or other controlling works at the point of diversion suitable to the Department of Water Resources.[98] Water users must monitor and report their water usage only if there is a specific requirement to do so imposed by the Department. Such requirements, if they exist, are typically shown as a condition of the water right.[99]

In 1995, the Idaho Legislature authorized the Director to divide the state into water measurement districts to carry out the water measuring requirements of Chapter 7, Title 42, Idaho Code. The Director of IDWR issued an order on October 24, 1996, creating three water measurement districts covering the Eastern Snake Plain Aquifer in southern Idaho. Another has been added in the Big Wood River basin.

Increasingly, the Department is requiring the installation of more sophisticated measuring devices as a condition of new appropriations and transfers.

H. Preferences

See discussion in section 49.A at page 892.

[97] See discussion of maximum utilization and optimum use in section 7.E at page 101.

[98] Idaho Code § 42-701.

[99] Idaho Code § 42-701.

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I. Water quality as part of water right holder's interest

The prior appropriation doctrine deals primarily with the allocation of water quantity, not quality. Protection of water quality is left largely to other state and federal laws and regulatory bodies.[100] To a limited extent, however, some courts have recognized the right of an appropriator of water to bar other water right users from polluting a common water source. Professor Davis summed up these authorities as follows:[101]

> Prior appropriation waste discharge cases hold that a senior appropriator cannot expect to retain natural quality of flow, but must expect some deterioration in quality by the activities of upstream junior appropriators. However, he is entitled to be free from unreasonable interference with the fair enjoyment of his prior appropriative right by material deterioration of water quality.

In 1939, the Idaho Supreme Court offered the following summary of the law on the subject of water quality under the prior appropriation doctrine:[102]

> Numerous authorities announce the doctrine that while a proper use of the water of a stream for mining purposes necessarily contaminates it to some extent, such contamination or deterioration of the quality of the water cannot be carried to such a degree as to inflict substantial injury upon another user of the waters of said stream. [Citations omitted] We believe the rule stated in Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 P. 465, 470; *Id*., 230 U.S. 46, 33 S. Ct. 1004, 57 L. Ed. 1384, is controlling in this case, namely: "We do not mean to say that the agriculturist may captiously complain of a reasonable use of water by the miner higher up the stream, although it pollutes and makes the water slightly less desirable, nor that a court of equity should interfere with mining industries because they cause slight inconveniences or occasional annoyances, *or*

[100] "The Department of Health and Welfare continues to have the primary responsibility for policing water quality control in this state." *Shokal v. Dunn*, 109 Idaho 330, 341, 707 P.2d 441, 452 (1985) (Bistline, J.).

[101] Peter N. Davis, *Protecting Waste Assimilation Streamflows by the Law of Water Allocation, Nuisance, and Public Trust, and by Environmental Statutes*, 28 Nat. Resources J. 357, 368-69 (1988).

[102] *Ravndal v. Northfork Placers*, 60 Idaho 305, 311-12, 91 P.2d 368 (1939).

> *even some degree of interference, so long as such do no substantial damage*." [Emphasis by Court.]
> "What deterioration in quality would injuriously affect the water for irrigation, and whether or not the deterioration to which the defendant company subjected the waters in question injured the land of the plaintiff, were matters of fact;" Montana Company v. Gehring, supra.

The Department's rules for new water right appropriations establish this criteria:[103]

> The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense.

There has been little further litigation on the subject, and the above statements continue to provide the most complete expression of the law in Idaho.

Idaho's protection of water quality as a component of a water right has support from other states, as well.[104]

J. Priority of right: simple graphic examples

On the following pages, we set out some simple graphic examples demonstrating the operation of the priority system in a surface water context.

[103] IDAPA 37.03.08.045.01.a.iii.

[104] "Jurisdictions disagree whether a downstream junior appropriator must accept degraded water quality resulting from a senior appropriator's use. A California court held that the junior user takes the water as he finds it, both in quantity and quality; pollution resulting from a senior user's lawful use is considered part of his use. By contrast, a Colorado court held that by rendering the watercourse unfit for diversionary uses by a junior user, a polluting senior user had unlawfully appropriated the entire flow of the watercourse. The senior user had not only appropriated the water he diverted, but also the entire flow left in the stream by rendering it unfit for their use. Courts in most western states have not determined the water quality rights of junior appropriators." Peter N. Davis, *Protecting Waste Assimilation Streamflows by the Law of Water Allocation, Nuisance, and Public Trust, and by Environmental Statutes*, 28 Nat. Resources J. 357, 369 (1988) (footnote citations omitted). A Colorado case dealing with the quality-quantity issue is *Concerning the Application for Plan for Augmentation of the City & Cnty. of Denver (City of Thornton v. City & Cnty. of Denver)*, 44 P.3d 1019 (Colo. 2002).

APPROPRIATION EXAMPLE 1

This example illustrates the priority system.

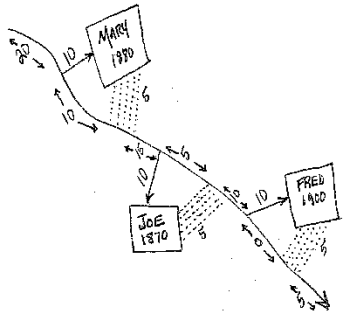
Generally, more senior water rights are better off in time of shortage. But not always.

In this example, Fred (the most junior) does better than Mary because he's lucky enough to be able to utilize the return flow of the most senior user.

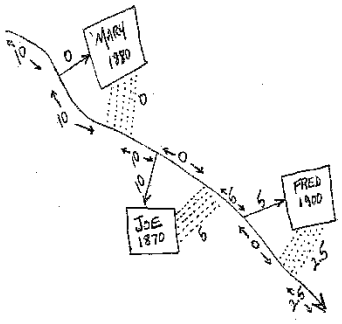
The example traces a natural flow of 20 units, with 10 units diverted to each of three users, and 5 units of return flow. The stream is now fully appropriated, with everyone receiving their full share.

However, if the natural flow were reduced to 10 units, Joe would call the entire amount past Mary's headgate. She would receive nothing. Meanwhile Fred, due to his fortuitous position, may take the 5 units of return flow in the river below Joe.

Normal Conditions – Flow 20 units



Drought Conditions – Flow 10 units



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STORAGE EXAMPLE 1

This example illustrates the integration of stored water into the priority system.

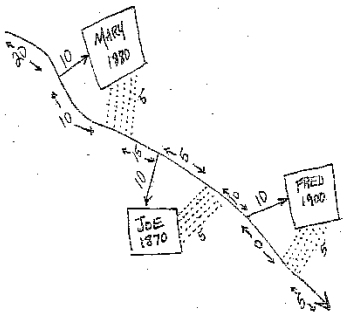
In the first scenario, three diverters each divert 10 units with 5 units of return flow. If under normal conditions 20 units are flowing in the stream, the stream is fully appropriated, with everyone receiving their full share.

If a new user needs water from this source, the only options are (1) to buy out an existing user, or (2) to construct storage.

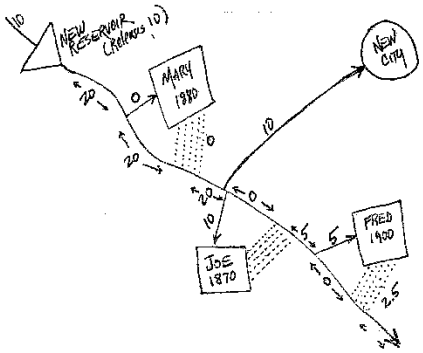
If a new reservoir is constructed on the stream, it will not be allowed to impound water so long as when flows are at 20 units, because it is all called for downstream. But it will be able to store high flows which occasionally occur.

Once stored, that water may be diverted at will by the new user, even calling it past senior natural flow water rights that have been curtailed during times of drought, as shown in the second diagram.

Normal Conditions – Flow 20 units
(Stream Fully Appropriated)



Drought Conditions – Flow 10 units
(Previously Stored Water Available)



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5. WATER USES THAT DO NOT REQUIRE A WATER RIGHT

A. Firefighting

The Department has long recognized that diversion of water from a natural water body to fight an existing fire does not require a water right. (As noted below, this is now codified.) However, routine sprinkling of water to maintain a vegetative barrier against fires is not considered fighting an existing fire and would require a water right.

Similarly, water stored for another purpose may be used to fight and existing fire. However, storage of water specifically for firefighting purposes would require a storage right just like any other storage of water.

In 1998, the Idaho Supreme Court approved the Department's inclusion of a general provision in all water rights decreed by the SRBA stating that the right may be used for firefighting. *A&B Irr. Dist. v. Idaho Conservation League* (aka *Basin-Wide Issue 5*) ("*ICL III*"), 131 Idaho 411, 415-16, 958 P.2d 568, 572-73 (1998) (McDevitt, J.). Indeed, the condition provides that any water, with our without a water right, may be used for firefighting.

The firefighting exemption was later codified, Idaho Code § 42-201(3)(a), along with an exemption for certain minor diversions for forest practices (such as dust abatement), Idaho Code § 42-201(3)(b).

IDWR's guidance documents on both RAFN[105] and non-RAFN[106] water rights provide that municipal ground water or natural flow water rights may not be obtained based on firefighting use. (See discussion in section 23.D(9)(e) at page 418 and section 23.D(9)(g) at page 426.) In other words, in quantifying a municipal water right, the quantity may not include a component for firefighting. The reason is that, as noted above, no water right is needed to fight an existing fire. Of course, a water right is required to store water to fight a future fire.[107]

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[105] Shelley W. Keen, IDWR Guidance, *Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (*RAFN Municipal Water Right Handbook*) (Oct. 1, 2021) ("*2021 RAFN Handbook*"). The 2021 guidance replaced prior guidance: Mat Weaver, IDWR Guidance, *Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (Mar. 16, 2015) (which, in turn, replaced Nov. 15, 2014 and Nov. 13, 2013 versions).

[106] Jeff Peppersack, *Administrator's Memorandum – Processing Applications and Amendments and Determining Beneficial Use for Non-RAFN Municipal Water Rights – Application Processing No. 18; Licensing No. 1* (Oct. 19, 2009) ("*2009 Peppersack Memo*").

[107] Presumably, the Department would make an exception and allow a municipal right for firefighting if it could be shown that the water would not be physically present but for the

On the other hand, any person, including a municipal provider, may obtain a non-municipal water right specifically for the purpose of firefighting. Such a right might be used not only to fight active fires, but to test diversion of water for fire flow testing. Such a right would constitute a property right with a priority right, and, presumably, under the right circumstances, such a right could later be transferred to another use. Since such a right is a non-municipal (and, hence, non-RAFN) right, it must be based and quantified upon present need, not future need.

B. Land application of effluent by municipal providers

In 2012, the Legislature enacted an additional exemption allowing municipalities, municipal providers as defined by Idaho Code § 42-202B, sewer districts, or a regional entities operating publicly owned wastewater treatment works to collect, treat, store, and dispose of effluent or stormwater where doing so "in response to state or federal regulatory requirements." Idaho Code § 42-201(8). See discussion in section 19.F at page 349.

existence and administration of the water right. That, however, would be an exceptional situation.

6. FORFEITURE AND ABANDONMENT

A. Overview

Because beneficial use is the basis for a water right, the failure to use a right, or a part of it, can result in its loss. Note how different this is from other forms of property. One does not forfeit ownership of a piece of land simply because he lets it sit vacant. But this is exactly what can happen to an unused water right; again, it is a right whose very existence is based on beneficial use. In other words, under the prior appropriation doctrine forfeiture is the other side of the beneficial use coin.

Water rights may be lost in several ways, the primary methods being forfeiture (an objective statutory rule) and abandonment (a common law doctrine based on subjective intent). Both rules operate throughout the West. Water rights lost through either abandonment or forfeiture revert to the state as unappropriated water and are either subject to further appropriation or serve to satisfy the rights of existing junior appropriators from the same water source. *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). This does not mean that, a forfeited senior-priority water right can be picked up and diverted under that priority by another water user. Rather, by eliminating this right from the priority line, more junior rights effectively "move up the ladder" or become that much more reliable because they have fewer senior rights in front of them.

There has been a trend in Idaho, as in some other Western states, to avoid strict enforcement of the forfeiture statute, and several exceptions have been enacted in recent years. This is an interesting development given the increasing demands for water. Nevertheless, statutes and case law have increasingly provided the means by which an appropriator who has no present need for water, and no present ability to place it to beneficial use, still may retain the water right. On the other hand, any transfer of a water right, or any attempt to curtail other rights to serve it, still must answer to its actual beneficial use. *See, e.g., American Falls Reservoir District No. 2 v. IDWR* ("*AFRD*"), 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.).

A detailed discussion of forfeiture in Idaho is found in Peter R. Anderson, *Why Does Idaho's Water Law Regime Provide for Forfeiture of Water Rights?*, 48 Idaho L. Rev. 419 (2012).

B. Common law abandonment

Abandonment is a common law principle long recognized by western courts. Abandonment of a water right requires (1) an intent to give up the right, and (2) an actual relinquishment or surrender of the right. *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982); *Sears v. Berryman*, 101 Idaho 843, 623 P.2d 455 (1981); and *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976).

The "actual relinquishment or surrender" does not require a declaration other affirmative act. Rather it refers to the relinquishment of possession, i.e., the physical act (or non-action) of not using the water.

As Samuel Wiel put it:

> To constitute abandonment, properly speaking, there must be a concurrence of act and intent, the relinquishment of possession, and the intent not to resume it for a beneficial use, so that abandonment is always voluntary, and a question of fact.
>
> It has been said: "To constitute an abandonment of a water-right, there must be a concurrence of the intention to abandon it and the actual failure in its use."

Samuel C. Wiel, 1 Water Rights in the Western State § 567 (1911) (cited as authority in *Gilbert v. Smith*, 97 Idaho 735, 738, 552 P.2d 1220, 1223 (1976)).

The standard of proof is high. "Intent to abandon must be proved by clear and convincing evidence of unequivocal acts, and mere non-use of a water right, standing alone, is not sufficient for a per se abandonment." *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 388-89, 647 P.2d 1256, 1260-61 (1982). "Such intent may be evidenced by non-use for a substantial period of time, but mere non-use is not a per se abandonment." *Gilbert v. Smith*, 97 Idaho 735, 738, 552 P.2d 1220, 1223 (1976).

The "abandonment" doctrine still applies in Idaho. However, it rarely is encountered because the requisite proof of a mental state (i.e., the intent to abandon) can be difficult to make.

C. The forfeiture statute

Idaho's water code has long contained a provision declaring that if a water right is not placed to beneficial use for a period of five years, it is "forfeited"—regardless of the owner's intent.[108] Section 42-222(2) provides, in part:

> All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to

[108] Predecessors to the current forfeiture provision have been on the books since 1903. 1903 Idaho Sess. Laws, at 223-24 (H.B. 146) (establishing a two year forfeiture period). In 1905, the period was extended to five years. 1905 Idaho Sess. Laws, at 27 (H.B. 19).

> water shall revert to the state and be again subject to appropriation under this chapter, except that any right to the use of water shall not be lost through forfeiture by failure to apply the water to beneficial use under certain circumstances as specified in section 42-223, Idaho Code.

Idaho Code § 42-222(2).[109] *See*, *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992). *See also* Idaho Code § 42-104 declaring that "when the appropriator or his successor in interest ceases to use it for such [beneficial] purposes, the right ceases."

This provision is followed by another authorizing the Department to extend the five-year period for an additional five years upon a showing of "good and sufficient reason for nonapplication." Idaho Code § 42-222(3) (This provision was added in 1933. 1933 Idaho Sess. Laws, ch. 193.) However, this appears to require an affirmative action by the user to obtain the extension prior to the expiration of the first five-year period. Moreover, the time may not be extended further than a total of ten years under this provision.

Courts have interpreted the statute as not to apply to water rights where the non-use results from circumstances beyond the right holder's control. *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). The issue of what qualifies as a circumstance beyond the right holder's control has been treated as a question of fact. Moreover, forfeiture does not apply if there is no need to divert water due to wet weather conditions. For instance, a storage right in a reservoir may be held for many years in anticipation of a drought.

Forfeiture must be proven by "clear and convincing evidence." This is a heightened evidentiary standard applicable in special cases such as abandonment,[110] forfeiture,[111] fraud,[112] and prescription[113] where the outcome is one disfavored in the law.

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[109] See also Idaho Code § 42-350 (added by 1986 Idaho Sess. Laws, ch. 313). This provision authorized IDWR to issue a show cause order and to initiate proceedings leading to the revocation of a license under which water has not been put to beneficial use for five years. As of this writing, there are no published decisions addressing this statute.

[110] *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 388-89, 647 P.2d 1256, 1260-61 (l982).

[111] *McCray v. Rosenkrance*, 135 Idaho 509, 515, 20 P.3d 693, 699 (2001).

[112] *Sowards v. Rathbun*, 134 Idaho 702, 706, 8 P.3d 1245, 1249 (2000).

[113] *Baxter v. Craney*, 135 Idaho 166, 173, 16 P.3d 263, 270 (2000).

D. Statutory exceptions to forfeiture

In addition, numerous specific statutory defenses to forfeiture have been enacted over time. Idaho Code § 42-223 (previously codified to section 42-222(2)).[114] The statutory exceptions to forfeiture include:

(1) Water rights appurtenant to lands placed in a federal cropland set aside program.
(2) Water right held by municipal provider for "planning horizon" needs.
(3) Water rights replaced by land application of waste water.
(4) Ground water rights not diverted in compliance with a ground water management plan aimed at bringing ground water withdrawals in balance with ground water recharge.
(5) Water rights placed in the water supply bank.[115]
(6) Nonuse resulting from circumstances over which the water right holder has no control.
(7) Nonuse of water supplied by an irrigation delivery entity (where nonuse is beyond the control of the delivery entity).
(8) Nonuse resulting from exclusion of land from an irrigation district (where nonuse is beyond control of the irrigation district).
(9) Nonuse resulting from a water conservation practice.[116]
(10) Nonuse resulting from the water right being used for mitigation purposes.
(11) Nonuse of a water right for "mining, mineral processing or milling," where the nonuse was "due in whole or in part to mineral prices," and where the water right owner "has maintained the property and mineral rights for potential future mineral production."
(12) Codification of resumption of use under *Sagewillow*.

E. The "no control" issue

Idaho Code § 42-223(6) sets out the defense to forfeiture that "the water right owner has no control."

"Typical circumstances in which this [no-control] exemption might apply include weather-related factors, family or civilian emergencies, financing problems, legal difficulties, or the destruction of diversion facilities." Peter R. Anderson, *Why Does Idaho's Water Law Regime Provide for Forfeiture of Water Rights?*, 48 Idaho L. Rev. 419, 435 (2012).

There is little Idaho case law on the subject. One issue addressed by the courts is that the defense applies when water under the right is not physically available:

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[114] *See*, *Jenkins v. State, Dep't of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982).

[115] The water supply bank protection from forfeiture is repeated in Idaho Code § 42-1764(2).

[116] See discussion in section 18.C beginning on page 326.

> The availability of water qualifies as a circumstance over which an appropriator has no control. That is, "for a water right to be forfeited water must be available to satisfy the water right during the alleged period of non-use." In *Re SRBA Case No. 39576, Subcase No. 65-05663B, Order of Partial Decree*, Idaho Dist. Ct. for the 5th Judicial District (May 9, 2002), p. 32–33 (Burdick, J.) ("*Wood v. Troutt*"). Similarly, this Court recently held that a senior water right holder was "entitled to the full measure of its rights, subject to availability of water." *Idaho Ground Water Ass'n v. IDWR*, 160 Idaho 119, 132, 369 P.3d 897, 910 (2016).").

Barnes v. Jackson , 163 Idaho 194, 198, 408 P.3d 1266, 1270 (2018) (J. Jones, J.).

F. Resumption of use

The courts also have carved out another special exception to forfeiture and abandonment, known as the resumption doctrine.[117] Under this doctrine, forfeiture may be avoided despite a period of nonuse, if the right is resumed before any third party obtains rights that would be impaired by the resumption. Until 2003, the scope of this doctrine and, in particular, the nature of third party rights that would defeat the resumption, was unclear.

In *Sagewillow, Inc. v. IDWR* ("*Sagewillow II*"), 138 Idaho 831, 70 P.3d 669 (2003) (Eismann, J.), the Supreme Court clarified the circumstances in which resumption will be allowed.[118] In that case, a landowner applied to the Department to change the place of use of numerous ground and surface water rights that originally had been authorized for irrigation of up to 2,390 acres in the Little Lost River Basin. The application was protested, and at the hearing it was established that two of the ground

[117] *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937); *Carrington v. Crandall*, 65 Idaho 525, 532-32, 147 P.2d 1009, 1011 (1944); *Application of Boyer*, 73 Idaho 152, 248 P.2d 540 (1952) (Givens, C.J.).

[118] A prior case, *Sagewillow, Inc. v IDWR* ("*Sagewillow I*"), 135 Idaho 24, 13 P.3d 855 (2000), involved the same parties and facts. On appeal, however, the Supreme Court vacated and remanded the decision of the District Court, Seventh Judicial District, which had affirmed the Department's findings of forfeiture, on the ground that the Snake River Basin Adjudication Court had exclusive jurisdiction. In response, the 2001 Legislature enacted Idaho Code § 42-1401D to provide that judicial review of Department actions subject to review under the Idaho Administrative Procedure Act (including *Sagewillow I*) were not to be heard in the SRBA district court, but rather in the district courts authorized by Idaho Code § 67-5272. The case was immediately transferred from the SRBA back to the Seventh Judicial District Court, which reissued its original order affirming the Department without further proceedings. The matter was back before the Supreme Court on a Sagewillow's Notice of Appeal by April of 2001.

water rights appurtenant to approximately 640 acres had been appropriated in the 1960s to facilitate obtaining federal desert land entry ("DLE") patents, and thereafter had been abandoned. Testimony also showed that between the late 1960s and 1989, no more than 1,412 acres had ever been irrigated under the remaining rights by Sagewillow's predecessor in interest. In 1989, Sagewillow purchased the property and immediately began redeveloping the irrigation system. By 1994, Sagewillow had brought approximately 2,390 acres back under irrigation, and then sought to change the place of use of the rights to reflect how they were then being used. The Department held that the two ground water rights appurtenant to 640 DLE acres had been forfeited in their entirety and that the portions of the remaining rights appurtenant to anything more than 1,412 acres also had been forfeited. The Department approved the transfer on condition that Sagewillow could irrigate no more than 1,412 acres. On appeal, the primary issue was whether Sagewillow had lawfully resumed the water rights and thereby avoided forfeiture.

The Supreme Court held that common law resumption remains a valid defense to forfeiture that can be defeated by a showing that a third party has made a "claim of right" to the water prior to the senior's resumption of use.[119] A third party has made a claim of right to the water if he has: 1) instituted proceedings to declare a forfeiture; 2) obtained a valid water right authorizing the use of such water with a priority date prior to the resumption; or 3) used the water pursuant to an existing right. *Sagewillow II,* 138 Idaho at 842, 70 P.3d at 680. The court also held that the resumption need not be made by the original appropriator, but must be upon the lands to which the water right originally was appurtenant. *Id*. Resuming the use of only a portion of the forfeited or abandoned right will not prevent a loss of the non-resumed portion. *Id*.

The Court remanded the case to the Department for further proceedings, in part because:

> [T]he Department did not make any finding that after the statutory period of nonuse and before resumption of use by Sagewillow and/or its predecessors, any junior appropriator used water that was available because of continued nonuse by Sagewillow and/or its predecessors. The Department

[119] The court did not address the argument made by the protestants, James Mays and Mays Land & Livestock, that the common law resumption doctrine was abrogated by enactment of Idaho Code § 42-222(4). That statute requires an application to be filed with the Department prior to the running of the forfeiture period requesting an extension of time to resume the use. The statute also establishes a procedure by which the Department determines whether other water rights will be "impaired by granting an extension of time within which to resume the use of the water," and whether good cause exists for the nonuse. Justice Kidwell, in a separate opinion concurring only in the result (joined by Justice Schroeder), found this argument persuasive. *Sagewillow II,* 138 Idaho at 846, 70 P.3d at 684.

> likewise did not make any finding that during such period any third party applied for and obtained a water right in the same or an interconnected watercourse. For example, the Department did not find that the two watercourses involved in this case were overappropriated and that because of continued nonuse by Sagewillow and/or its predecessor, junior water users received water that they would otherwise not have received.

Sagewillow II, 138 Idaho at 838, 70 P.3d at 676.[120]

Thus, although a water right may have gone unused for a significant period (in *Sagewillow II* nonuse continued for over twenty years), it may be resumed with the original priority date and to the original extent if it can be shown that junior water users did not obtain a determination of forfeiture or directly benefit from the forfeiture.

This is a big "if." As a practical matter, it is unlikely that a valid resumption of use can occur on many water systems in Idaho. This is because these systems already are fully (or over) appropriated.[121] By implication, there are juniors on the system who are benefiting from the senior's non-use and would be harmed by the resumption. Interestingly, although resumption essentially serves as an affirmative defense in the face of facts demonstrating forfeiture or abandonment, the court did not place the burden of proof on the party asserting the resumption defense. Rather, the court held:

> [A]lthough the owner of the water right has the burden of raising defenses to statutory forfeiture, the burden of persuasion remains on the party claiming that the water right was forfeited, and that party must disprove the defense.[122]

Sagewillow II, 138 Idaho at 842, 70 P.3d at 680.

[120] Compare *Sagewillow II*'s focus on whether the junior had made use of the water, with the Court's statement in *Jenkins* that a resumption that changes a junior's relative status on the ladder of priority clearly causes injury to the junior. ("Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to the right holder.")

[121] *Sagewillow II,* 138 Idaho at 846, 70 P.3d at 684 (Justices Kidwell and Schroeder concurring in result).

[122] *Id.,* 138 Idaho at 842, 70 P.3d at 680.

G. Partial forfeiture

Partial forfeiture refers to forfeiting a portion of a water right when that portion is not beneficially used. The concept of partial forfeiture was challenged by a group contending that a water right cannot be forfeited if any part of it is put to beneficial use. The Idaho Supreme Court rejected that argument and confirmed that the forfeiture statute applies where a portion of the beneficial use served by a water right goes unused, without adequate excuse, for the statutory five-year period. *State v. Hagerman Water Right Owners* ("*Hagerman I*") ("*Basin-Wide Issue 10*"), 130 Idaho 727, 947 P.2d 400 (1997) (Schroeder, J.).

The Hagerman Water Right Owners contended that Idaho Code § 42-222(2) contemplates only a total forfeiture, not partial forfeiture. The Idaho Supreme Court found that the statute is ambiguous, but construed it to allow partial forfeiture, based on consistency with longstanding prior administrative practice and sound public policy. In particular, the Court found that partial forfeiture advanced the "goal of securing maximum use and benefit of our natural water resources." *Hagerman I*, 130 Idaho at 735, 947 P.2d at 408.

In a companion case, *State v. Hagerman Water Right Owners, Inc.* ("*Hagerman II*"), 130 Idaho 736, 947 P.2d 409 (1997), the Court said that the Department could not report a water right for less than its prior decreed quantity simply because it was not being beneficially used to the same extent today. The only reason this "beneficial use" issue was raised is that the SRBA judge (Judge Hurlbutt) recently had rejected partial forfeiture (and abandonment is difficult to prove). Consequently, the Department was trying at the time (prior to *Hagerman I*) to find another legal theory on which to justify reporting and recommending water rights at their current level of use.

For example, consider the situation where a farmer has a 4 cfs water right to irrigate 200 acres, but then takes 50 acres out of irrigation for use as a processing facility, a housing development, or some other non-irrigated use. The "forfeiture clock" would begin running as to a portion of the water right. After five years, one-fourth of the water right, or 1 cfs, would be subject to a ruling that it had been forfeited. Such a result is hardly surprising, given that the foundational principles of the prior appropriation doctrine are beneficial use, the avoidance of waste, and maximum use of the resource. Of course, the farmer could avoid forfeiting this portion of the right by transferring it to some other use or placing it in a "water bank" or "rental pool" established pursuant to state law.[123]

Under the above example, one also might argue that the farmer could be deemed to have abandoned that portion of his water right, because his intent clearly was to stop using it. Nonetheless, abandonment is considered difficult to prove, and requires some

[123] Idaho Code §§ 42-1761—42-1766.

type of legal or administrative action to confirm it. As a practical matter, the courts are most likely to allow the five years, as a kind of "grace period," in which the right holder has the opportunity to seek to use the water right elsewhere or for a different use. Of course, in the transfer proceeding the agency will evaluate the amount of historical use under the right, including consumptive use, to determine what conditions must be imposed on the transfer to avoid causing injury to other water rights. Periods of nonuse may come into play in that analysis.

One frequently hears of water right holders who do not actually place some or all of their right to beneficial use but who claim that the right is not subject to forfeiture because they divert waters under the right once every season, or irrigate for a few days, or keep their ditch full. But diverting alone does not suffice to establish beneficial use. Water right holders who are using this technique may be in for a rude awakening if they ever attempt to transfer the right or if the right is subjected to the scrutiny of a water rights adjudication.

Partial forfeiture is triggered by a reduction in beneficial use (such as irrigating only a portion of the lands intended to be served by the right). IDWR takes the position that partial forfeiture does not apply to the diversion rate associated with a water right, so long as the full beneficial use is maintained. For instance, suppose that a farmer initially used the full diversion rate associated with the water right, but later changed the method of irrigation (e.g., from flood to sprinkler) so that the full diversion rate no longer was required to accomplish the beneficial use. The Department's position is that this would not result in a reduction of the diversion rate associated with the right. That farmer would be entitled to return to the previous method of irrigation employing the higher diversion rate (without notice to the Department or anyone else). Other western states have taken a more rigorous view of this issue; the Idaho Supreme Court has yet to address it.

H. The *Peiper* case and its codification

In Idaho, special considerations come into play in dealing with forfeiture of water rights held by irrigation water delivery entities. (For background on various types of water delivery entities *see* discussion in section 30 at page 600.) One reason the analysis is complicated is that the delivery entity typically holds title (at least legal title) to the water rights, while the landowner-irrigator actually applies the water to beneficial use (and may be seen as holding "beneficial title" to his or her share of the water right). The question, then, is what happens when the landowner-irrigator inexcusably fails to irrigate her land for the statutory period? Is the corresponding portion of the water right—which presumably is in the name of the irrigation entity—forfeited?

The obvious answer would seem to be "yes." After all, failure to place a water right to beneficial use (irrespective of who owns it) violates the most basic rule of the

appropriation doctrine. One would think that both forfeiture and abandonment would apply. The Idaho Supreme Court seemed to have so held in 1908:

> [T]he appropriation and diversion of water by a ditch company that is not prepared to use the water itself is practically valueless without water consumers. In other words, it takes the water user, applying the water to a beneficial purpose, to enable a ditch company that has appropriated waters for sale, rental or distribution, to continue the diversion of the water. If it should cease to have water users or consumers, and cease to apply the water to a beneficial use, its right to divert the water would cease.

Farmers' Co-Operative Ditch Co. v. Riverside Irrigation ., 14 Idaho 450, 458, 94 P. 761, 763 (1908) (Ailshie, C.J.).

And again in 1931:

> And where a ditch is used in common for the conveyance of water for two appropriations, each owner may sell or abandon his right to the ditch, separate from the other [citation], the same right belongs to a stockholder in a mutual ditch company [citation].

In re Dep't of Reclamation, 50 Idaho 573, 579, 300 P. 492, 494 (1931) (emphasis added).[124] There are many instances where suburban landowners, despite paying annual assessments to a ditch company or irrigation district, have elected to stop using the entity's water for a variety of reasons. The water typically still is diverted from the river, but just no longer serves such owners' parcels. Ordinarily, this would suggest forfeiture or abandonment of that portion of the water right.

Nevertheless, in 1999 the Idaho Supreme Court ruled that a Carey Act operating company (a type of mutual irrigation company) does not suffer forfeiture of a portion of the water right issued in its name when one of its shareholders fails to apply his share of the water to a beneficial use. *Aberdeen Springfield Canal Co. v. Peiper*, 133 Idaho 82, 982 P.2d 917 (1999) (Silak, J.).

The *Peiper* case arose in an unusual context. This was not a dispute among competing water right holders. Nor did it involve an action or determination by an

[124] *In re Dep't of Reclamation* involved a single ditch shared by (1) a mutual canal company and its shareholders and (2) a private water user who owned a separate water right using the same canal. As noted in the quotation above, however, the rule is the same when dealing with transactions among shareholders.

administrative agency dealing with forfeiture. Instead, the forfeiture issue was raised by the landowners, Mr. and Mrs. Peiper, when the canal company sought to recover assessments that had not been paid. The Peipers refused to pay because they and their predecessors had not used not used any irrigation water from the canal company in over 30 years and contended that the water right (or portion thereof) appurtenant to their property had been forfeited. Based on this, they argued they no longer were obligated to pay assessments.

The Court expressed no sympathy for the Peipers. "The Peipers wish to use forfeiture only to avoid paying maintenance assessments. A finding of forfeiture here would do nothing to advance the policy reasons that motivate the [forfeiture] statute's existence." *Peiper*, 133 Idaho at 87, 982 P.2d at 922. The Court continued:

> Such a ruling [for forfeiture] would give stockholders, who are not appropriators, the power to determine the fate of ASCC's water rights. If a number of stockholders chose not to use their share of ASCC's water for the statutory period, ASCC's water right would gradually revert to the state through partial forfeiture. If the Peipers' argument were valid, ASCC could only watch helplessly while its water right was lost.

Peiper, 133 Idaho at 87, 982 P.2d at 922 (citations omitted).

The Court's legal reasoning was based on a technical point—the observation that forfeiture applies to the "appropriator" of the water, not to the end user:

> In almost every case where forfeiture has been before this Court, the Court has held I.C. § 42–222(2) provides that an appropriator who fails to apply the water right beneficially for a period of five consecutive years loses all rights to use such water, regardless of intent. . . . The forfeiture statute was not intended to apply to settlers within a Carey Act project who were not themselves the appropriators of the water from the public stream of the state.

Peiper, 133 Idaho at 87, 982 P.2d at 922 (emphasis original) (citations and quotation marks omitted).

One might argue that the *Peiper* case is an anomalous application of the rule of forfeiture that should be limited to its particular facts.[125] But the Court's opinion does not

[125] In another part of the *Peiper* decision, the Court mentioned that the water not used by the Peipers may have been rented to other users. *Peiper*, 133 Idaho at 87, 982 P.2d at 922. If the *Peiper* decision were limited to situations in which the water company is making some substitute

call for such a narrow application. Indeed, it marked a sharp departure from the beneficial use requirement and the principle that the shareholder-irrigator holds beneficial title to that portion of the water right appurtenant to her property and may transfer, sell, forfeit, or abandon it.[126]

Irrigation entities applauded the decision, which was promptly codified by the Idaho Legislature in 2002 at their urging. H.B. 569, 2002 Idaho Sess. Laws, ch. 343. Indeed, the codification applies the non-forfeiture protection even more broadly than did the decision.[127]

The statutory exception to the forfeiture rule now reads:

> (7) No portion of a water right held by an irrigation district, a Carey Act operating company, or any other company, corporation, association or entity which holds water rights for distribution to its landowners, shareholders or members shall be lost or forfeited due to nonuse by such landowners, shareholders or members, unless the nonuse is subject to the control of such entity.

Idaho Code § 42-223(7).

The 2002 amendment provides that forfeiture protection applies not just to Carey Act companies, but to any irrigation distribution entity that holds a water right for use by its shareholders (e.g., a mutual canal company) or distributees (an irrigation district). Indeed, the statutory forfeiture protection is not limited to irrigation entities or irrigation water. Indeed, it applies to "any other company, corporation, association or entity which holds water rights for distribution to its landowners, shareholders or members." That would appear to cover, for example, a homeowners association that operated a water

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use of the water, that would be a far more limited ruling. If substitute use is not a requirement (and, frankly, it does not appear to be), then the *Peiper* case amounts to overturning *Farmers' Co-operative* discussed above.

[126] Mutual canal companies and irrigation districts hold no more than nominal title to the water right while their shareholders or patrons who use the delivered water hold beneficial title. *See United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) (Schroeder, C.J.); *Ickes v. Fox*, 300 U.S. 82, 57 S.Ct. 412 (1937). *See also* discussion ownership of water rights in water delivery entities in sections 30 and 31 of this Handbook.

[127] One could argue that the statue runs afoul of the Idaho Constitution's beneficial use requirement. Likewise, its retroactive effect could be seen as constituting an uncompensated taking of vested property rights. To the authors' knowledge, no one has raised these claims.

delivery system for its members within a subdivision or planned community development.

The statute does not require that water not used by one landowner be used elsewhere instead. Instead, the protection applies any time the non-use is not "subject to the control" of the company. Given that a water entity would rarely if ever be able to force its members or irrigators to use water, that is an easy test to meet. Indeed, it would also appear to protect from forfeiture a water right licensed to a homeowners association based on the "stub out" rule despite the fact that homes are not built for many years.

The effect of *Peiper* and its codification appears to be that non-use by subject entities is absolutely protected from forfeiture so long as the non-use is occurring for reasons beyond the control of the entity. But the lack of forfeiture still does not settle the question whether the water right was placed to beneficial use, and this will be relevant in any attempt to transfer the water right.

I. Tolling of "forfeiture clock" for SRBA claims

In two sub-cases, the SRBA Court has ruled that the forfeiture statute is tolled for water rights once a claim for them is filed in the SRBA, and that the tolling continues until a partial decree is issued for that right.[128] Moreover, once the partial decree issues, the statutory period for non-use begins to run anew and does not tack on pre-SRBA non-use.[129]

The Department adheres to this policy of restarting the forfeiture clock after the partial decree enters.[130]

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[128] *In re SRBA*, Case No. 39576, Subcase Nos. 36-02708 *et al.* (*Facility Volume* cases) (Idaho Fifth Judicial Dist., May 2002) (R. Barry Wood presiding); *In re SRBA*, Case No. 39576, Subcase No. 65-05663B (*Wood v. Troutt*) (Idaho Fifth Judicial Dist. - SRBA, May 2002) (Judge Roger S. Burdick).

[129] "Once the partial decree is issued for the water right, the non-user has five years within which to put the water to beneficial use before the decreed right is subject to forfeiture. In Idaho a decreed water right is not insulated from forfeiture, however, it has long been established that once the decree is issued the statutory time period for non-use begins to run anew." *Wood v. Troutt* at 21.

[130] "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." *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) at 22 (Dec. 21, 2009) (superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)).

Thus, by way of example, if a water right holder ceased irrigating without excuse or exception in 1986, filed a claim the SRBA four years later in 1990, and had that claim adjudicated in 2004, he or she would be entitled to a partial decree without forfeiture, and the five-year clock for forfeiture would begin again in 2004—despite 18 years of nonuse.

In *In re SRBA Case No. 39576, Subcase Nos. 36-02708 et al, Order On Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* ("*Facility Volume Case*"), Idaho Dist. Ct., Fifth Judicial Dist. (Dec. 29, 1999) (Barry Wood, J.), the SRBA court held expressly that filing a claim in the SRBA tolls the forfeiture clock. *Facility Volume Case* at 26-28.

In *McCray v. Rosenkrance*, 135 Idaho 509, 516, 20 P.3d 693, 700 (2001) (Kidwell, J.), the Court declined to take up the defense that filing a claim in the SRBA tolls the forfeiture clock because the issue had not been preserved on appeal.

J. Procedure

Unlike the practice in other states, the Idaho Department of Water Resources does not actively evaluate water rights to ferret out potential forfeitures. The forfeiture question arises most often in disputes between right holders, in an adjudication, or in those cases where one seeks to transfer a water right.

In a transfer proceeding, the Department typically will investigate whether there has been a forfeiture or abandonment of the right sought to be transferred; the state will not allow a forfeited water right to be brought "back to life" by transferring it to another user. To do so would result in injury to other users who benefited from, or obtained their rights in reliance on, the prolonged non-use of the water right.[131]

However, the Department is not required in all circumstances to evaluate forfeiture in a change case. It may choose not to do so, for instance, where it is apparent that the SRBA court will review the issue. A hearing officer summed up the law this way in a recent order:

> Determining whether a change does not enlarge a right or injure existing rights requires IDWR, in the first instance to determine whether the right exists at all. The Idaho Supreme Court recognized that this means that IDWR may investigate whether a water right has been forfeited or abandoned. *Jenkins v. IDWR*, 103 Idaho 384, 387 (1982). A logical extension of the *Jenkins* analysis is that IDWR must also determine whether an unadjudicated, beneficial use or

[131] *Jenkins v. Department of Water Resources*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982).

common law water right exists at all before it can be changed. The Idaho Supreme Court has also ruled, however, that forfeiture and abandonment do not necessarily need to be adjudicated in a change proceeding. [*Sagewillow v. IDWR* ("*Sagewillow II*"), 138 Idaho 831, 70 P.3d 669 (2003).] No similar pronouncement has been made whether IDWR must determine whether a beneficial use right even exists, before it can be changed.[132]

[132] Order re Motion for Stay and Scheduling Order, *In the Matter of Application for Transfer of Water Rights in the Name of United Water Idaho, Inc., Integrated Municipal Application Package (IMAP)*, Idaho Dep't of Water Resources (Nov. 12, 2003) (Peter R. Anderson, Hearing Officer).

7. GROUND WATER FUNDAMENTALS

A. Introduction

Idaho's Constitution specifically establishes the appropriation doctrine in Idaho only with respect to water diverted from natural streams. The operative language provides:

> The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. . . . Priority of appropriation shall give the better right as between those using the water. . . .

Idaho Const. art. XV, § 3.

The Constitution makes no mention of ground water. Nonetheless, nine years after statehood, Idaho's legislature asserted its authority over "subterranean waters," and declared that they were subject to appropriation.[133] And it was not until 1931 that Idaho's Supreme Court had the opportunity to reason, "by analogy," that ground water rights could be appropriated and administered, at least as among themselves, under the prior appropriation doctrine.[134]

As will be discussed in detail below, the ensuing years have seen the dramatic development of Idaho's ground water resources, to the point that significant conflicts between surface and ground water right holders have come to dominate Idaho water management and jurisprudence during the past twenty years. These conflicts are fostered by continuing uncertainties about ground water development's effects on surface water supplies, and by fundamental disagreements about the legal framework that should govern conjunctive administration of interconnected water sources.

B. Ground water is subject to appropriation

When compared to the surface water appropriation and administration system in the West, the history of ground water development and administration has been relatively brief. The complex hydrogeology of ground water sources, and the lack of adequate pumping technology, inhibited early exploitation of this abundant resource. Indeed, early understanding of ground water throughout the West often rested as much on superstition

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[133] *See* 1899 Idaho Sess. Laws (aka Gen. Laws), pp. 380-87, § 2 (now codified at Idaho Code 42-103); 1900 Idaho Sess. Laws (aka Gen. Laws), p. 191, § 9b (now codified at Idaho Code § 42-101).

[134] *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049, 1053 (1931).

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as on scientific observation. Despite these initial hindrances, Idaho now ranks among the top five states in terms of the volume of ground water used.[135]

Court decisions from the late 1800s and early 1900s reflect the limited understanding that people then had of the ground water resource. Like some other prior appropriation states, Idaho's Constitution authorizes appropriations from "natural streams," but does not mention ground water.[136] In 1899, the Idaho Legislature passed an act that provided that appropriations could be made from subterranean waters as well as from rivers, streams, lakes and springs.[137] Despite this statute, disputes continued into the 1930s regarding whether ground water was subject to the prior appropriation doctrine. Several of the early reported court decisions involved contests where each party labored to prove or disprove that a particular diversion was from water that flowed in an underground channel with a defined bed and banks so as to be an appropriation of water from a "natural stream."[138]

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[135] The Idaho Groundwater Quality Council estimates that ninety percent of Idaho's drinking water comes from ground water sources and Idahoans divert approximately 6,500 million gallons of ground water per day. Irrigated agriculture accounts for the majority of ground water usage in the state. Idaho Ground Water Quality Plan, Protecting Ground Water Quality in Idaho, Idaho Ground Water Quality Council (1991).

[136] Idaho Const. art. XV, § 3.

[137] 1899 Idaho Sess. Laws 380 (aka Gen. Laws), pp. 380-87, § 2 (now codified at Idaho Code § 42-103). Idaho's Territorial Statutes provided that "[t]he right to the use of the running water flowing in a river, or stream, or down a canyon or ravine, may be acquired by appropriation." Idaho Rev. Stat. § 3155 (1887).

[138] Occasionally, facts (or assumed facts) actually corresponded with the Stygian conception of ground water, in which subterranean watercourses were believed to flow in well-defined channels. An example is reported in *Medano Ditch Co. v. Adams*, 68 P. 431 (Colo. 1902). Medano Creek prehistorically had flowed west from the Sangre de Cristo Mountains in southern Colorado, and had served as the source of water for Big Springs Creek. Subsequent geologic events formed the Great Sand Dunes, which covered the Medano Creek channel to a depth of several hundred feet. Although a majority of the surface flow of Medano Creek thereafter was deflected by the dunes to the southwest, significant subsurface flows continued to follow the original channel under the dunes to emerge at the head of Big Springs Creek seven miles to the west. In resolving a dispute between appropriators, the Colorado court held that the ground water flows were within a natural stream within a defined bed and banks and the junior's appropriation from Medano Creek was enjoined to protect senior appropriations from Big Springs Creek. Colorado continues to observe legal distinctions between appropriations of surface and ground waters, although most ground waters in that state, deemed "tributary groundwater," are administered conjunctively with surface water courses.

Examples of water flowing in defined channels also exist in the Idaho's Snake Plain Aquifer where lava tubes carry large flows of water for considerable distances and where it has been hypothesized that the Big Lost River flows southwest in one or more ancient buried river

In 1931, Idaho's Supreme Court confirmed that ground waters were subject to appropriation under the priority doctrine either by the constitutional method of diversion and application to beneficial use, or by the statutory permit procedures.[139] The subsequent enactment of Idaho's Ground Water Act in 1951[140] established a comprehensive scheme of ground water appropriation, administration and protection, and validated pre-existing ground water appropriations. It also swept aside, through a simple definition, disputes over what is and what is not ground water: "'Ground water' is all water under the surface of the ground whatever may be the geological structure in which it is standing or moving."[141]

The Ground Water Act was amended in 1953 to provide, among other things, that the doctrine of first in time is recognized for ground water, but could not be exercised so as to block full economic development of the water resource. Prior ground water appropriations are to be protected through the maintenance of reasonable pumping levels. The 1953 amendments also granted the Department authority to protect ground water from depletion and to prohibit ground water withdrawal from existing wells when necessary to protect senior ground water appropriations.[142]

C. Ground water appropriation

After 1963, the application, permit, and license procedures became the exclusive means of acquiring ground water rights in Idaho.[143] However, the exceptions to the permit/licensing requirements still exist for domestic wells and drainage and recovery wells.[144] In addition to these exemptions, domestic wells drilled prior to March 29, 1978

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channels, then spreading into the basalt- and sediment- layered Eastern Snake Plain Aquifer to emerge from the canyon walls in the Snake River's Thousand Springs reach generally between Twin Falls and Bliss, Idaho. For purposes of appropriation and administration, however, surface and ground waters are treated similarly under Idaho law.

[139] *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1931).

[140] 1951 Idaho Sess. Laws, ch. 200 (codified as amended at Idaho Code §§ 42-226 to 42-239).

[141] Idaho Code § 42-230.

[142] 1953 Idaho Sess. Laws, ch. 182 (codified as amended at Idaho Code §§ 42-226 to 42-239).

[143] 1963 Idaho Sess. Laws, ch. 216 (codified at Idaho Code § 42-229).

[144] Idaho Code § 42-227. A domestic well is a well that provides water for domestic uses, which under Idaho Code § 42-111 is limited to:

> [t]he use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half acre of land, if the

may be absolutely protected from any significant drawdown by junior ground water diversions—that is, this class of domestic wells are not burdened by the "reasonable pumping level" obligation.[145] Indeed, this view of the law is reflected in a condition that has been included in at least some new ground water permits issued by the Department:

> The right holder is responsible to insure that pumpage under this water right does not directly cause the water level to significantly decline in any domestic well drilled and in use prior to March 29, 1978, or to cause the water level in any other well having a prior right to exceed a reasonable pumping level, unless the right holder provides reasonable compensation or mitigation to the prior water right holder for the reduced water levels as determined by the Director.[146]

The same appropriation procedures set out for surface waters apply to ground water, including the requirements of public notice and an opportunity to protest.[147] The protest must be filed within ten days of the last date of publication of notice of the application. If the would-be protestant misses the deadline, he or she may petition to intervene in the proceeding.

In addition to the permit requirements for appropriation of ground water, a well drilling permit must be issued before a well may be drilled. The Department has not required a well drilling permit for the excavation of gravel pits or ponds greater than eighteen feet that intercept and expose ground water.

All wells, including domestic, drainage and recovery wells, must be drilled by licensed well drillers.[148] An exception to the licensed well driller requirement exists for persons who dig wells by hand on their own property. Idaho Code § 42-238 *et seq*. contains the licensing requirements for well drillers and well drilling standards. The Department has adopted drilling rules establishing standard for well construction. Well drillers must demonstrate their knowledge of Idaho water law and well construction methods and standards before they may be licensed. They must prepare accurate well

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> total use is not in excess of thirteen thousand gallons per day . . . or any other uses if the total use does not exceed a diversion rate of four one-hundredths cubic feet per second and diversion volume of twenty-five hundred gallons per day.

[145] *See Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

[146] Condition No. 5 of the City of Eagle's Amended Permit No. 63-11413 (issued by IDWR Nov. 20, 1998).

[147] Idaho Code § 42-203A(1).

[148] Idaho Code § 42-227.

logs of all wells drilled. Well drillers also are required to obtain a surety bond, which, under certain circumstances, can be charged by the Department for the cost of reconstructing or abandoning wells that have been improperly constructed. Well drillers are subject to civil penalties of up to $10,000 for submitting fraudulent well logs.

D. Protection of ground water supplies from depletion (GWMAs and CGWAs)

The 1953 Amendments to Idaho's Ground Water Act provided the Department with the authority to regulate ground water withdrawals from aquifers that are subject to depletion. The primary mechanism for this regulation is the Department's designation of Ground Water Management Areas ("GWMA") and Critical Ground Water Areas ("CGWA").

A CGWA is any ground water basin without sufficient ground water to provide a reasonably safe supply for irrigation or other uses in the basin at the then current rates of withdrawal.[149] A GWMA is an area identified by the Department as approaching the conditions of a CGWA.[150]

Upon designating a special ground water area under the Ground Water Act, the Department may require measurement and reporting of existing withdrawals, limit or prohibit new appropriations, or curtail or reduce diversions in order of priority to bring withdrawals into balance with the reasonably anticipated average rate of future natural recharge within the basin.[151] Most of the designated GWMAs and CGWAs are in Southern Idaho.

In addition, an Idaho statute declares that "[w]ater in a well shall not be deemed available to fill a water right therein" if pumping from the well to satisfy the right would withdraw ground water supply " beyond the reasonably anticipated average rate of future natural recharge."[152] In *Baker v. Ore-Ida,* the court held that this language "forbids 'mining' of an aquifer."[153]

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[149] Idaho Code § 42-233a.

[150] Idaho Code § 42-233b.

[151] Idaho Code §§ 42-233a, 42-233b, 42-237a.

[152] Idaho Code § 42-237a(g).

[153] *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 583, 513 P.2d 627, 635 (1973). The concept of "mining" an aquifer is interesting and controversial. Where an aquifer receives significant annual recharge, this Idaho statute—together with other statutory provisions (such as reasonable pumping level requirements) and common law principles of reasonable means of diversion—allows the overall volume of water in an aquifer to be reduced to an equilibrium where annual natural recharge can be expected to produce a relatively steady state, with water

E. Protection of reasonable pumping levels and the Doctrine of Maximum Use

(1) Quick answer

The quick answer is that in Idaho, senior ground water users are entitled to protection against juniors only to the extent of maintaining a reasonable pumping level (as determined by IDWR). Thus, the senior is required to suffer the expense of deepening a well or taking other measures to continue the senior diversion if the junior has not lowered the water level below a reasonable pumping level. An exception, however, applies to pre-1978 domestic ground water rights, which are entitled to protection of their historic pumping levels.

(2) The mechanics of well interference

Modern ground water diversions often involve the use of powerful pumps that are capable of drawing water from great depths in the aquifer. When a ground water pump is turned on it draws water from the surrounding water-bearing material, causing the water level in the well to decline and creating a funnel-shaped area around the well where the water has been evacuated. See the figure below. The shape and extent of this "cone of depression," and its area of influence, depend on hydrogeologic factors such as porosity, permeability, transmissivity and the hydraulic gradient of the surrounding medium.[154] Cones of depression of neighboring wells may overlap, which may compound the drawdown effects of the neighboring pumps and further reduce the water level in the wells.

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levels in wells thereafter declining and rebounding during pumping and non-pumping sequences. The "beyond annual recharge" language appears to be aimed at preventing a sustained and irreversible downward trend in ground water to depths below reasonable pumping levels. On the other hand, there are aquifers (though perhaps not many in Idaho) having virtually zero annual recharge. Some in Arizona and Colorado come to mind. As a practical matter, the only use that can be made of such aquifers is to "mine" them—either that or forego the resource altogether. In these cases, the policy challenge would be to determine the rate of permissible mining and to put in place appropriate plans for alternative supplies when the resource no longer is economically or physically accessible.

[154] *See* Keith E. Anderson, *Ground Water Handbook* at 296 (1998).

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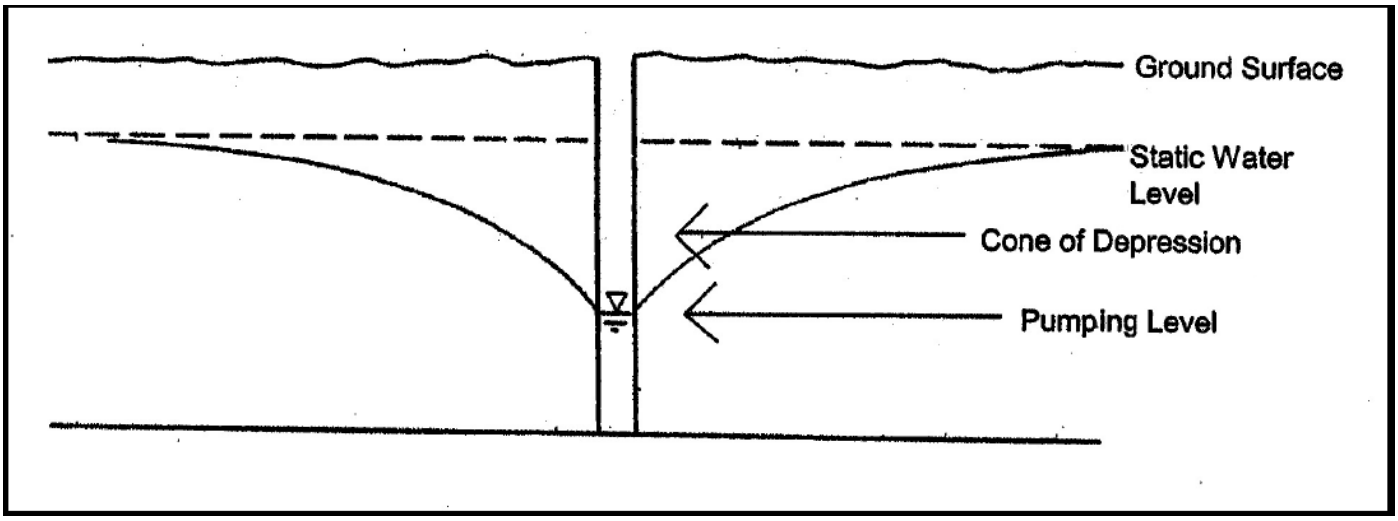

(3) Historic vs. reasonable pumping levels

Like all water rights in Idaho, ground water rights are protected by the priority system. Consequently, a junior appropriation of water will not be allowed to cause material injury to senior ground water rights. The question, then, is what is material injury? Under what circumstances does a reduction in pumping levels (or artesian pressure) constitute material injury?

The question boils down to whether the senior water right hold is entitled to protection of his or her historic pumping level, or whether the senior is only protected from interference with a reasonable pumping level (as determined by IDWR).

At a practical level, this boils down to who pays to deepen the senior's well—the senior or the junior? If the senior's historic pumping level is protected and the junior's well reduces the ground water level (or artesian pressure), then the junior must either curtail her right or pay to deepen the senior's well. If, on the other hand, a rule of reasonable pumping levels is in effect, the senior must pay to deepen his own well to some reasonable level.

(4) The 1953 amendment to the Ground Water Act retroactively established reasonable pumping levels as the standard

As the law has developed in the Western states, the rule generally has been that a senior appropriator is entitled to the maintenance of a reasonable pumping level (but not an unreasonable historic pumping level). Since 1953, Idaho has followed this principle—subject to an exception respecting pre-1978 domestic wells, as discussed below.

The Idaho law requiring reasonable pumping levels has constitutional and common dimensions as well as a statutory basis under the 1953 Amendments to the Ground Water Act. The concept of reasonable pumping levels is one expression of the

rule requiring water users to employ reasonable means of diversion, and not command all or a large portion of the resource to delivery their small part of it.[155]

This principle is codified in Idaho's Ground Water Act of 1951, which reaffirmed the "traditional policy of the state of Idaho" that ground water is subject to the prior appropriation doctrine "requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation." 1951 Idaho Sess. Laws, ch. 200 § 1 (codified at Idaho Code § 42-226). In 1953, the Legislature amended the Act, adding the provision respecting reasonable pumping levels. 1953 Idaho Sess. Laws, ch. 182 § 1 (codified at Idaho Code § 42-226).

The Act, as amended, provides:

> The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state . . . and while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of water resources as provided herein.

Idaho Code § 42-226.[156]

The 1953 Amendment applied retroactively to all ground water rights (except pre-1978 domestics, as discussed below), including those obtained prior to the 1953 Amendment. This is evident in another section of the 1951 Act, which stated: "But the administration of all rights to the use of ground water, whenever or however acquired, shall, unless specifically exempted herefrom, be governed by the provisions of this act."

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[155] The seminal case on reasonable means of diversion is *Schodde v. Twin Falls Canal Co.*, 224 U.S. 107, 121 (quoting *Basey v. Gallagher*, 20 Wall. 670, 683, 87 U.S. 670, 683 (1874)).

[156] In 1963, Colorado enacted the Ground Water Management Act, which adopted almost verbatim many of the provisions of Idaho's Ground Water Act including principles of full economic development of water resources, maintenance of reasonable pumping levels and authorities of the state to curtail diversions causing injury to prior rights. The Colorado version of this statute applies only to "designated ground water basins," which are basins containing ground water that is deemed not tributary to surface water sources.

1951 Idaho Sess. Laws, ch. 200 § 4 (codified at Idaho Code § 42-229). This proviso remained intact and applied to the 1953 Amendment as well.

This conclusion as to the retroactive effect of the reasonable pumping level provision was confirmed by IDWR in *In the Matter of Applications To Appropriate Water Nos. 63-32089 and 63-32090 in the Name of the City of Eagle*, Final Order at 33 n.2 (IDWR, Feb. 26, 2008)[157] (overruling a prior order containing dictum suggesting that the reasonable pumping level defense recognized in the 1953 Amendment applied only prospectively).[158] IDWR came to the same conclusion on different grounds in a separate case involving a delivery call by ground water users on the ESPA.[159]

The effect of the 1953 amendment was to legislatively overrule the common law rule enunciated in *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933) (Givens, J.) that protected a senior's historic pumping level with a new rule protecting the senior only to the extent of reasonable pumping level. This result was confirmed in *Baker v. Ore-Ida*

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[157] This is the citation to the subsequent case history: *In the Matter of Applications To Appropriate Water Nos. 63-32089 and 63-32090 in the Name of the City of Eagle* (IDWR's Final Order Feb. 26, 2008; Order on Reconsideration July 3, 2008), *appeal dismissed as untimely*, *City of Eagle v. Idaho Dep't of Water Resources*, 150 Idaho 449, 247 P.3d 1037 (2011).

[158] To reach this conclusion, IDWR had to overcome this statement in *Musser v. Higginson*: "[T]he original version of what is now I.C. § 42-226 was enacted in 1951. Both the original version and the current statute make it clear that this statute does not affect rights to the use of ground water acquired before the enactment of the statute." *Musser v. Higginson*, 125 Idaho 392, 396, 871 P.2d 809, 813 (1994) (citation to statute omitted). In its 2008 Order, IDWR explained that this statement in the opinion was "incorrect." Final Order at 31 § 14. Both sections 1 and 4 of the 1951 Ground Water Act made clear that the Ground Water Act applies to pre-1951 ground water rights. The Idaho Supreme Court's confusion arose in a 1987 amendment that imposed certain new restrictions on low-temperature geothermal wells, 1987 Idaho Sess. Laws, ch. 347 § 1, which stated, "This act shall not affect the rights to the use of ground water in this state acquired before its enactment." In context, it is clear that this provision applied only to the "Act" then being enacted, which was a set of amendments relating to geothermal ground water. In any event, the 1987 amendments did not change the provision in Idaho Code § 42-229 (quoted above) clearly stating that the Ground Water Act applies to pre-enactment ground water rights.

[159] *Order Regarding Motion for Declaratory Ruling, In the Matter of Petition for Delivery Call of A&B Irrigation District for the Delivery of Ground Water and for the Creation of a Ground Water Management District* (Hearing Officer Schroeder, May 26, 2008). In this case, the Hearing Officer found that the *Musser* language noted above did not address the *Baker v. Ore-Ida* ruling or Idaho Code § 42-229, and in any event was not aimed at determining the meaning of the Ground Water Act. Both the *City of Eagle* and *A&B Irr. Dist.* decisions are on appeal to district court as of early 2009.

Foods, Inc., 95 Idaho 575, 513 P.2d 627 (1973) (Shepard, J.).[160] On the other hand, the Court in *Baker* went on to explain that a junior's reasonable pumping level defense does not come into play if the junior is "mining" the ground water (in the sense of removing ground water at an unsustainable rate so as to ultimately deplete the resource) to the extent that there is not enough to serve both the junior and the senior. *Baker*, 95 Idaho at 583, 513 P.2d at 635.

(5) Constitutional and common law support for reasonable pumping levels

The statutory mandate for reasonable pumping levels has its basis in constitutional and common law principles. "We hold that the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Full economic development of Idaho's ground water resources can and will benefit all our citizens. . . . Our Ground Water Act contemplates that in some situations senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development." *Baker v. Ore-Ida Foods, Inc*., 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (Shepard, J.) (citations omitted). On the other hand, whether these principles mandate, or simply allow, reasonable pumping levels is another question.

The underlying basis for what may at first appear to be a departure from a strict application of the priority doctrine is the principle that no appropriator is entitled to maintain an unreasonable "means of diversion" that prevents the optimum use of the state's water resource. The seminal case of *Fellhauer v. People*, 447 P.2d 986 (Colo. 1968) was decided in 1968 by the Colorado Supreme Court.[161] It remains one of the most

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[160] *Baker v. Ore-Ida Foods, Inc*., 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) ("Appellants contend that our Act's use of the phrase 'reasonable pumping levels means that senior appropriators are not necessarily entitled to maintenance of historic pumping levels. We agree . . . ."

Decisions in other states such as Colorado have held that senior pumpers should not be required to improve their diversion facilities "beyond their economic reach." *City of Colorado Springs v. Bender*, 148 Colo. 458, 366 P.2d 552 (1961); *Alamosa-La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914 (Colo. 1983). These Colorado cases involved alleged injury to senior water rights caused by pumping tributary ground water. *Bender* is often cited for the proposition that, for a ground water user to insist on curtailment of juniors alleged to be causing him injury, he must show that he is producing ground water from a sufficient depth to ensure that the resource is not being hoarded or tied up by those whose wells barely penetrate the water table.

[161] Though extensively cited in Colorado and by commentators, *Fellhauer* has never been cited by an Idaho appellate court. However, the doctrine has also long been recognized in Idaho. In *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 867, 154 P.3d 433, 438 (2007) (Trout, J.), this Court upheld against a facial constitutional challenge the Department's Conjunctive Management Rules which were premised on an integration of the prior

oft-quoted decisions concerning the tension between a vested private right to the use of the public's water and the public's interest in optimizing the uses of the state's water resources. In *Fellhauer*, the Colorado court noted that the concept of maximum use of water always has been implicit in Western water law. Remarking on the water appropriation provisions in Colorado's Constitution, which were the model for Idaho's, the Court observed:

> It is implicit in these constitutional provisions that, along with *vested rights*, there shall be *maximum utilization* of the water of this state. As administration of water approaches its second century the curtain is opening on the new drama of *maximum utilization* and how constitutionally that doctrine can be integrated into the law of *vested rights*. We have known for a long time that the doctrine was lurking in the backstage shadows as a result of the accepted though oft violated, principle that the right to water does not give the right to waste it.

Fellhauer, 447 P.2d at 994 (emphasis original).

There has been some disagreement in Idaho regarding whether the reasonable means of diversion principle reflected in Idaho Code § 42-226 is applicable only to ground water uses. However, the better argument seems to be that all water rights are subject to the reasonable diversion and use requirement (and to the closely-related principle of maximum use) and that § 42-226 simply reiterates or affirms this requirement for wells in the context of the Ground Water Act.

Cases involving surface water consistently have held that an appropriator may not command the entire flow of a stream to effect an appropriation of only a portion. One way to read these cases is that the means of diversion itself is not a protected element of the water right.[162] This was the case in *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752

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appropriation doctrine and "the principle of optimum use of Idaho's water." In the same case, the Court recognized the Department's authority to determine, in the context of a conjunctive use delivery call, when use of a water right is "reasonable." *Id*., 143 Idaho 862, 876-77, 154 P.3d 433, 447-48 (citing *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107) (1912)). See also, *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960) ("The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources"); *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 904, 792 P.2d 926, 929 (1990) ("The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources."). The doctrine has now been codified in Idaho. Idaho Code § 42-226.

[162] *See e.g., Doherty v. Pratt*, 34 Nev. 343, 124 P. 574 (1912) (reasonable use requirement applies to methods of diversion); *Tudor v. Jaca*, 178 Or. 126, 164 P.2d 680 (1946) (wasteful methods of diversion common among early settlers do not establish a vested right to their

(1907) (Ailshie, C.J.), where the Court held that an appropriator was not entitled to dam an entire stream merely to raise the water level sufficiently to subirrigate his land.

The same approach was taken by the U.S. Supreme Court in *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1912) (*aff'g*. 161 F. 43 (9th Cir. 1908)), where a senior appropriator had used a waterwheel driven by the current of the Snake River to raise irrigation water to his lands. The Supreme Court affirmed the lower court ruling that there is "no right under the constitution and laws of the State of Idaho to appropriate the current of the river so as to render it impossible for others to apply the otherwise unappropriated waters of the river to beneficial uses." *Schodde*, 224 U.S. at 117 (1912). The Court cited one of its earlier cases in concluding that a water right "must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual." *Schodde*, 224 U.S. at 121 (quoting *Basey v. Gallagher*, 20 Wall. 670, 683, 87 U.S. 670, 683 (1874)).

Another reading of these cases would be that the appropriation of an unreasonable quantity of water to accomplish the diversion of the remainder does not constitute a beneficial use. The result is substantially the same in either case.

As courts have faced this issue in the context of ground water disputes, they have reached much the same result.

(6) Pre-1978 domestics excepted

An important exception to the reasonable pumping level rule was recognized in the 1982 case of *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982) (Bistline, J.).

In that case a senior domestic well pumper (Parker) sued to enjoin a junior pumper (appropriately named Junior Wallentine) whose deeper well was interfering with the senior's shallow well. The Idaho Supreme Court ruled that the reasonable pumping level mandate added to the Ground Water Act in 1953 did not apply to domestic wells because the Ground Water Act, when first enacted in 1951, declared that domestic wells "shall not

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continuance); *Hough v. Porter*, 51 Or. 318, 98 P. 1083 (1909) (old methods of diversion are not a right but a privilege permitted so long as they can be exercised without substantial injury to anyone); *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 Cal. 2d 489, 45 P.2d 972 (1935) (appropriator may not be compelled to use most scientific diversion method, but it must be reasonable according to the custom of the locality); *Wayman v. Murray City Corp*, 23 Utah 2d 97, 458 P.2d 861 (1969) (applying "rule of reasonableness" in refusing to protect ground water appropriator from diminution of pressure in existing well); *City of Colorado Springs v. Bender*, 148 Colo. 458, 366 P.2d 552 (1961) (at his own point of diversion, each diverter must establish some reasonable means of effectuating his diversion).

be in any way affected by this act."[163] Because the Act enunciated the reasonable pumping level standard, the Court reasoned that this principle does not apply to domestic well owners. Accordingly, the Court concluded that Parker was entitled to demand that Junior Wallentine either stop pumping or pay to have Parker's domestic well deepened.

However, the Court noted that the Act was changed in 1978 to remove this item of protection for domestic wells.[164] The Court noted that the Legislature could have made the 1978 amendment retroactive, but did not elect to do so. *Parker v. Wallentine*, 103 Idaho 506, 511, 650 P.2d 648, 653 (1982). Consequently, protection of historic pumping levels (i.e., immunity from the reasonable pumping level rule) is limited to pre-1978 domestic wells.

In sum, the reasonable pumping level defense is recognized only when the senior is a non-domestic well or a post-1978 domestic well. In the case of a pre-1978 domestic well, the junior will be curtailed or compelled to compensate for any decline in levels that adversely impairs the senior's beneficial use.

One could argue that the exception of pre-1978 domestics from reasonable pumping levels is contrary to the constitutional principles of maximum beneficial use of water. The authors are not aware of that contention being presented in a reported decision.

F. Domestic water rights

(1) Licensed domestic rights

The Legislature has allowed very few exceptions to the requirement that those seeking to establish new water rights go through the permitting and licensing process.[165]

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[163] "Section 2. DRILLING AND USE OF WELLS FOR DOMESTIC PURPOSES EXCEPTED. – The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be in any way affected by this act . . . ." 1951 Idaho Sess. Laws, ch. 200 § 2.

[164] 1978 Idaho Sess. Laws, ch. 324 ch. 324 § 1. This provision removed the provision saying that domestics would "not be in any way affected by this act" replacing it with a statement saying that domestics were exempt from permitting requirements.

[165] Stock watering directly from a surface stream also is exempt from licensing. Idaho Code § 42-113 and IDAPA 37.03.08.035.01.c. Other exemptions are found in Idaho Code § 42-201. For example, subsection 42-201(3)(a) (2000 Idaho Sess. Laws, ch. 291, § 1) makes it unnecessary to obtain a water right for diversions to fight existing fires. Subsection 42-201(3)(b) (2008 Idaho Sess. Laws, ch. 320, § 1) addresses forest practices and dust abatement. Subsection 42-201(3)(c) (2020 Idaho Sess. Laws, ch. 6, § 1) addresses environmental cleanups. Subsection 42-201(8) (2012 Idaho Sess. Laws, ch. 218, § 1) exempts use or disposal of treated municipal effluent. Subsection 42-201(9) (2016 Idaho Sess. Laws, ch. 139, § 1) exempts incidental hydropower generation in irrigation canals.

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The most notable exception is the one allowing water users to hold water rights for small domestic wells without any permit or license. Idaho Code §§ 42-111, 42-227 and IDAPA 37.03.08.035.01.b. In some cases, however, water users nonetheless elect to obtain a permit and license for their domestic ground water right.

If the domestic right relies on spring or surface water, rather than a well, the domestic exemption does not apply, and, since 1971, the user would be required to obtain a permit and license.

Obtaining a permit and license has the advantage of putting others on notice of the use and reducing the potential for factual disputes. It also can provide the basis for a delivery call by the domestic user. Moreover, domestic rights may be decreed in the SRBA or any other adjudication. (See discussion in section 37.C at page 702.) Indeed, domestic and stock water rights must be claimed in the SRBA, although the requirement for these claims has been postponed. See discussion in section 37.C at page 702.

The statutory definition of domestic use set out in Idaho Code § 42-111(1)(a) (which limits domestic uses to 13,000 gallons per day and irrigation of up to ½ acre of land) is applicable only to exempt domestic ground water rights, not to domestic water rights authorized by permits and licenses. Thus, a right for domestic purposes could be permitted and licensed for more than 0.02 cfs (which equates roughly to 13,000 gallons per day) and could authorize irrigation of more than ½ acre.

(2) Exemption for domestic ground water rights

Note: In 2025, the Legislature enacted S.B. 1083aa, 2025 Idaho Sess. Laws, ch. 129, which amended various water statutes including those dealing with exempt domestic water rights. The legislation also amended land use statutes dealing with the requirement to use surface water when available. This Handbook has not yet been re-written to reflect the changes addressing domestic rights.

In the 1951 Ground Water Act, the Legislature provided an exception from permitting requirements for domestic ground water rights:

> The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be subject to the permit requirement under section 42-229, Idaho Code; providing such wells and withdrawal devices are subject to inspection by the department of water resources and the department of environmental quality and providing further that the drilling of such wells shall be subject to the licensing provisions of section 42-238, Idaho Code. Rights to ground water for such domestic purposes may be acquired by withdrawal and use.

Idaho Code § 42-227 (originally enacted as 1951 Idaho Sess. Laws, ch. 200 § 2 and amended in 1970, 1978, and 2001). Regulations are found at IDAPA 37.03.08.035.01.b (exemption from application rules for ground water rights for single-family, domestic purposes).

Note that this domestic exemption applies to wells; it does not apply to surface diversions for domestic purposes.

Although persons whose domestic ground water use falls within the statutory definition are not required to obtain a permit or license, they nonetheless have a water right, meaning that their diversion is lawful and that they hold an enforceable real property interest. This is reflected in the last sentence of the statute: "Rights to ground water for such domestic purposes may be acquired by withdrawal and use." Idaho Code § 42-227.

Although domestic wells are exempt from permitting/licensing requirements for water rights, a well drilling permit still is required in all instances (see section 7.F(4) at page 115).

Domestic water rights obtained after 1978 (when the Ground Water Act was amended again) are subject to the same "reasonable pumping level" rules that govern non-domestic ground water rights. See discussion in section 7.E at page 101.

Special treatment also is provided for domestic uses (either exempt or licensed) under certain moratoriums (see discussion in section 20 at page 352). However, those moratoriums do not refer to the definition of domestic uses in section 42-111 (or any other definition). It is the authors' understanding that the use of the term "domestic" in these moratoriums is merely a generic reference to all domestic-type uses, including that portion of a municipal provider's delivery to households and similar purposes, and was not intended to be interpreted strictly within the statutory definition.

The Water Code sets out a detailed definition of domestic uses for purposes of the domestic well exemption:

> (1) For purposes of sections 42-221, 42-227, 42-230, 42-235, 42-237a, 42-242, 42-243 and 42-1401A, Idaho Code, the phrase "domestic purposes" or "domestic uses" means:
>
> (a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (½) acre of land, if the total use is

not in excess of thirteen thousand (13,000) gallons per day, or

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

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

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

Idaho Code § 42-111.[166]

The first category, described in section 42-111(1)(a), is applicable only to specific uses: "water for homes, organization camps, public campgrounds, livestock" and purposes incidental thereto. This section also allows for irrigation of up to one-half acre of land around the home or camp, provided that the sum of all the domestic uses do not

[166] Section 42-111 was first enacted in 1899. 1899 Idaho Sess. Laws (aka Gen. Laws), pp. 380-87, § 12. As enacted in 1899, it defined "domestic purposes" without any quantity precise quantity limitation to include "water for the household, and a sufficient amount for the use of domestic animals kept with and for the use of the household." It was amended in 1990 to add what appear now as sections 42-111(1) and (2). 1990 Idaho Sess. Laws, ch. 319. Thus, the limitation on use of the domestic exemption for multiple ownership subdivisions dates to 1990. It was amended again in 1995 to add what is now section 42-111(3). 1995 Idaho Sess. Laws, ch. 233.

exceed 13,000 gallons per day. (This equates roughly to 0.02 cfs on a 24-hour basis.) An IDWR regulation roughly tracks the language of this provision in its definition of "Single Family Domestic Purposes."[167]

The second category, provided in section 42-111(1)(b), is a catch-all, but for a smaller quantity. This section applies to any "other" uses, but caps the volume at 2,500 gallons per day and the flow rate at 0.004 cfs. This category allows a person to use a small quantity of ground water for any miscellaneous purpose (such as a water amenity or even an industrial use) without obtaining a water right. Thus, the definition of domestic uses includes uses that normally are not associated with the term "domestic" in the household sense. Indeed, to qualify they must be "other" uses (i.e., uses not for homes, camps, or livestock).

The statute contains two limitations. Section 42-111(2) makes "water for multiple ownership subdivisions, mobile home parks, or commercial or business establishments" ineligible for the domestic exemption, "unless the use meets the diversion rate and volume limitations set forth in subsection (1)(b)." Thus, for instance, a subdivision could use the domestic well exemption for irrigation of a small common area or for a water amenity that used a total of no more than 2,500 gallons per day.

The second limitation is found in section 42-111(3). It expressly prevents combining multiple domestic water rights into a "single combined water use or purpose that would not itself come within the definition of a domestic use or purpose." This limitation was added by the Legislature in reaction to efforts by some users to employ multiple domestic exemptions to serve large dairy operations. Thus, in the example above, the subdivision may use only one domestic well exemption for all of its water amenities—meaning that, collectively, they may not exceed 2,500 gallons/day.

The Department's position is that, irrespective of section 42-111(3), the domestic well exemption may be used by multiple individual homeowners within a subdivision, allowing each individual homeowner to drill a well without obtaining a permit or license.[168] In other words, the Department does not view multiple homeowners drilling their own wells as acting "in a manner to satisfy a single combined water use." This is not a settled question, however, and one might argue the contrary where, for example, the developer's plan calls for individual domestic wells in a multi-lot subdivision. The

[167] IDAPA 37.03.08.035.01.b (exemption from application rules for ground water rights for "single family domestic purposes"); IDAPA 37.03.08.010.15 (definition of "Single Family Domestic Purposes" as "Water for household use or livestock and water used for all other purposes including irrigation of up to one half (1/2) acre of land in connection with said household where total use is not in excess of thirteen thousand (13,000) gallons per day.").

[168] The Department has no rule or guidance on this subject, but generally follows this approach. Conversation with Phillip J. Rassier (Apr. 8, 2005).

argument would seem particularly strong where the developer of the subdivision drilled the wells on the lots prior to selling them (a situation the Department has not yet faced).

Water uses exceeding the statutory diversion volume or irrigation limits, or for purposes not listed in the applicable definition, do not give rise to a domestic ground water right. For example, a homeowner who uses a "domestic" well to provide indoor uses, to fill a pond, and to irrigate 0.6 acres of lawn (thus violating the ½ acre rule) is violating the statute and therefore has not established a domestic water right, even if the homeowner is within the 13,000 gpd limit. On the other hand, if she is irrigating a half-acre or less, she will be within the domestic exception if she can show that the combined uses, including the diversions to the pond, do not exceed the 13,000 gpd diversion limit.[169]

The domestic well exemptions described above are purely statutory. There is no constitutional entitlement to the domestic water right exemption.

The Department authorizes water users to tack on an exempt domestic ground water right to another permitted or licensed right. Thus, if a user had a license to irrigate 3.0 acres of residential lawn, but was actually irrigating 3.5 acres out of the domestic well, he or she could claim a domestic exception for the additional 0.5 acre of irrigation. This is so even if a moratorium on new water rights is in effect, because domestic water rights are exempt from the moratorium.[170]

(3) Protection from delivery calls.

In theory, domestic water rights are subject to curtailment by priority just like any other water right. This is equally true for undocumented exempt domestic rights and domestic rights for which the owner has obtained a permit, license, or decree. In practice, domestic rights have never been curtailed, and doing so on any significant scale undoubtedly would result in considerable political backlash.

Interestingly, the Department's *Conjunctive Management Rules* provide that domestic rights are <u>not</u> subject to curtailment pursuant to delivery calls by senior surface water right holders:

> A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date

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[169] *See* Norman C. Young, IDWR Guidance, *Application Processing No. 67* (Feb. 28, 2003) (reproduced in Appendix O) (permissible pond size depends on amount of daily flow necessary to fill it and keep it full).

[170] This was confirmed in a telephone call from Chris Meyer to Phil Rassier, then chief counsel to IDWR, on Nov. 21, 2006. Mr. Rassier consulted with Jeff Peppersack, Chief, Water Allocation Bureau, in confirming this.

> where such domestic use is within the limits of the definition set forth in Section 42-111, Idaho Code, nor against any ground water right used for stock watering where such stock watering use is within the limits of the definition set forth in Section 42-1401A(12), Idaho Code; provided, however, this exemption shall not prohibit the holder of a water right for domestic or stock watering uses from making a delivery call, including a delivery call against the holders of other domestic or stockwatering rights, where the holder of such right is suffering material injury.

IDAPA 37.03.11.020.11.

Thus, the Department has sought to give domestic and stock ground water rights special treatment in the delivery call context. Is this constitutional? These rights are not singled out in Idaho's Constitution for such treatment. The Idaho Supreme Court was asked to address this in the 2007 *AFRD* litigation, although neither side in the case placed much weight on the question. In its opinion, the Court indicated that the Rule provision exempting domestic ground water rights from delivery calls is not on its face unconstitutional because the Idaho Constitution allows domestic right holders to condemn, or pay for the taking of, senior irrigation or industrial water rights that might be instituting the delivery call. In other words, the Court found that there is a set of circumstances under which domestic water rights could immunize themselves from a delivery call without causing an uncompensated taking of the rights of non-domestic water right holders.[171] Still, if the issue were pressed in an actual delivery call, it is likely that even domestic and stock water right holders will be called to account, either by shutting off their wells, paying for mitigation, or taking some action to implement the constitutional "condemnation" provision (which might add up to the same thing as paying for mitigation).

The Department's practice is to recognize that portion of a municipal provider's ground water usage that falls within the 13,000 gallon-per-day and one-half acre limitations of section 42-111 as qualifying for "domestic purposes" within the above rule. Presumably, a municipal provider delivering surface water would not, to the extent of the surface water, enjoy the same protection. In any event, as indicated, it is quite possible that none of these delivery call exemptions can stand constitutional scrutiny in an as-applied context.

[171] *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 880-81, 154 P.3d 433, 451-52 (2007).

(4) A well drilling permit is required

Although obtaining a water right permit, license, or decree for a domestic right is optional, obtaining a well drilling permit is not. Before drilling a domestic well, the well driller or well owner must obtain a well drilling permit from the Department (which requires a $75.00 filing fee). Idaho Code § 42-235. This provision was first enacted in 1987. 1987 Idaho Sess. Laws, ch. 347, § 4.

Since 1970 (even before the well drilling permit requirement), Idaho Code § 42-227 has required that the project be carried out by a well driller who is licensed under Idaho's well driller statute, Idaho Code § 42-238. 1970 Idaho Sess. Laws, ch. 187, §§ 1, 4. This requirement is reiterated in the Department's rules. IDAPA 37.03.10.020.01.

As to the abandonment of a well—that is, closing and sealing off a well pursuant to specified procedures—section 42-235 explicitly states that this must be done by a licensed driller.

(5) A few facts about domestic wells in Idaho

(a) Individually, domestic wells use small amounts of water, but together their potential production is significant

An exempt domestic well is considered to involve a de minimis amount of water. However, in the aggregate these wells can pump a significant amount. For example, if the nearly 10,000 domestic wells drilled in the 1987-2004 period in Basin 63 produced half of their full annual entitlement, this group of wells alone would pump 70,000 acre-feet per year, or enough water each year to supply all the current yearly residential uses in Ada and Canyon Counties. In other words, domestic wells in the aggregate can account for much more than a de minimis contribution to aquifer withdrawals.

Two hydrologists reported in 1997 that in the eleven years between 1987 and 1997, almost 7,000 new domestic wells were drilled in Water Basin 63, which includes the Treasure Valley. These wells accounted for 76% of all the wells drilled in the basin during that period.[172] According to this report, as many as a thousand wells have been drilled in a single year in Basin 63. Between 1997 and June 2004, the basin averaged about 670 new domestic wells per year.[173]

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[172] Squires and Dittus, "Implications of Well-Construction to Aquifer Water-Quality: Some Observations," Proceedings of the Annual Meeting of the Pacific Northwest Region of the American Water Well Association (1997).

[173] John Carlson, Idaho Dep't of Water Resources, personal communication (July 1, 2004).

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(b) Exempt domestic wells often are necessary for single homes in remote locations or for homes in subdivisions where no community water system exists

A homeowner who wishes to build in an area that is not served by a municipal or other community water system either can seek a water right or simply forego the water right permitting process and construct a domestic well. Many take the latter course. In some areas, domestic wells are installed despite the existence of a municipal water supply system. Certainly, going through the application and permit process takes longer and costs more than the exempt domestic procedure, which involves simply obtaining the drilling permit and going ahead.

(c) Exempt domestic water rights may be developed despite aquifer-wide moratoriums that preclude new irrigation, industrial, and commercial water right applications

On the Eastern Snake Plain Aquifer and in Basin 63 (which includes Ada and Canyon Counties), the Department has imposed moratoriums on the processing or granting of new ground water right applications unless they provide one-for-one mitigation. Exempt domestic wells are also exempt from these moratoriums.

(6) Domestic wells can present water management challenges

Domestic wells are widespread and proliferating in Idaho, but the State knows relatively little about them. The authors believe that while domestic wells serve an important purpose, particularly where there is no alternative or community water supply available, they also present significant challenges to water management and protection of drinking water aquifers.

(a) Domestic wells are essentially unregulated

The Department's well construction standards, contained in IDAPA 37.03.09, enunciate the general requirement that all wells are to be "constructed in a manner that will guard against waste and contamination of the ground water resources of the state," and specify that domestic wells must meet "all of the siting and distance requirements set forth by the appropriate District Health Department and Idaho Department of Environmental Quality rules." IDAPA 37.03.09.025.01(a). However, the Department's rules are permissive with regard to specific provisions dealing with domestic wells (for example, allowing for verbal approvals), and currently have what some professionals in the well drilling field consider to be minimal casing and sealing requirements for all wells. No water quality sampling, hydraulic testing, or maximum depth is required for either type of well. Typically, domestic wells involve only a 6-inch-diameter, thin-wall

casing 18 feet into the ground with no effective seal or well-screen. With the large number of domestic wells drilled in Idaho each year, there is little opportunity for the State to inspect them.

There also is no standard for, or means of quality testing, the driller's report filed with the Department. Often, hydrogeologists find that drillers' logs are inaccurate and that well completion reports for domestic wells generally are not uniformly catalogued or indexed to allow consistent retrieval.

(b) Hydrological considerations—the layered nature of aquifers

As a general matter, most Idaho aquifers consist of layers of water-saturated sandy, gravelly, or fractured material between less permeable layers of clay, mudstone, or similar material. The less permeable layers act as barriers between aquifer zones. For example, in the Eastern Snake Plain Aquifer, the main water-bearing zones are layers of fractured basalt, which are interbedded with numerous sedimentary or unfractured layers that are not readily permeable and contain little or no water.

In most aquifer situations, the uppermost zones (the top 100 feet, for example) contain substantial alluvial gravels and are in hydraulic contact with surface waters such as streams, canals, drains, reservoirs, and lakes. Not surprisingly, most aquifer contamination originates in this uppermost zone, where contaminant spills on the land surface often readily enter the shallow aquifer. For the same reason, the shallow aquifer zone also is the most readily recharged from surface water. In some cases, a shallow aquifer can be created and maintained by leakage—sometimes called "incidental recharge"—from surface irrigation. Indeed, in parts of the Treasure Valley it is estimated that water levels in the shallow aquifer have risen more than 100 feet over natural conditions due to incidental recharge from canal systems and on-farm irrigation ditches and practices.[174] As the amount of this recharge declines due to commercial and residential development in the Valley, however, so will the water levels in the shallow aquifers.

(c) Well leakage issues

A basic problem presented by any well is how to prevent it from becoming a conduit for water or contaminant flow between layered aquifer zones. Most community drinking water is produced from wells penetrating into deeper aquifers that are separated from shallower aquifers by the largely impervious layers described above. By the same token, most individual domestic wells, particularly older wells, penetrate only the uppermost aquifers—only a small amount of water is needed, and it obviously is cheaper

[174] This is consistent with the adage that "sooner or later every irrigation district gives rise to a drainage district."

to drill only to a shallow depth. However, for a variety of reasons—including the decline in shallow aquifers due to reductions in incidental recharge and drought cycles (particularly since the late 1980s)—many domestic wells now have been drilled (or re-drilled) through the shallow aquifer and into deeper water-bearing zones.

Domestic wells often are drilled by air-rotary or cable tool methods, neither of which is particularly effective for sealing the well into impermeable layers or maintaining vertical separation between various geologic strata. Although a well may be lined throughout nearly its entire depth with steel or plastic casing (and presumably most new wells are cased), the concern really is the space outside the casing created by the drilling process. Air rotary and cable tool methods can create significant space, and often large and irregular voids, outside the well casing. This outside ring, or "annular" space, throughout the well's depth can act as a conduit for water and contaminants to move between aquifer zones. In most cases, the existence of this space also makes it impossible to actually "abandon" such a well; merely filling the casing with concrete or bentonite does nothing to fill the outside-the-casing space or stop it from continuing to conduct water between zones.

There are other drilling methods, principally mud rotary or similar fluid-assisted techniques, that use drilling fluids such as water or drilling mud to create a hole that can be sealed throughout its depth outside of the casing as the well is constructed. In other words, the well can be constructed to seal the outside of the casing tight against impervious native stratigraphy with grout, bentonite, or concrete, thus sealing off this space as a conduit. Most domestic wells (and presumably many non-domestic wells) are not sealed between the casing and the penetrated layers.

The Department's well construction rules[175] do not specify any particular drilling technique. The rules require only an 18-foot casing at the top of the well that is sealed on the outside. The short distance of this sealed section alone typically means that the casing terminates partway through surficial river floodplain gravel deposits. As the well continues below the upper layer, its annular space typically is not sealed and can provide a conduit for any water or contaminants it encounters.

(d) Unsealed wells present risks to ground water quality

Any well, unless adequately sealed, provides a conduit for surface contaminants and shallow contaminated ground water to move into the deeper aquifers. When municipal supply or other wells are activated in the deeper zone, their pumping can induce even more flow into these wells from any well in the vicinity, domestic or otherwise, that may not be properly sealed.

[175] IDAPA 37.03.09.

At least in the Treasure Valley, most of the municipal drinking water supply comes from deep aquifers that most municipal water providers tap with fully-cased wells constructed with high-quality techniques and proper seals at all levels. Unfortunately, conjunctive management administration of water rights ultimately may lead to drilling or re-drilling domestic wells into these deeper aquifers, since the deeper zones often are not connected to surface streams in areas where the connection may cause controversy. Without substantive changes to the drilling rules, the construction of deeper domestic wells could result in pollution of these all-important deep aquifers.

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8. LOW TEMPERATURE GEOTHERMAL WATER

Water rights for low temperature (85 º to 212º F) geothermal resources in Idaho are acquired by the same permitting process applicable to other ground and surface sources.[176] However, Idaho law includes a special provision applicable to geothermal resources: the appropriator is required to use the resource primarily for heat value and only secondarily for its value as water.[177] Consequently, the usage of low temperature geothermal water for uses other than heat value is not considered a beneficial use of the resource unless the Department exempts the proposed use. The Department may grant such an exemption provided 1) there is no feasible alternative use of the resource, 2) there is no economically viable source of non-geothermal water, and 3) the exemption is in the public interest.

Because the statute is drafted with reference to wells, it appears that it applies only to ground water, not to natural hot springs.

[176] Low temperature geothermal water is defined at Idaho Code § 42-230(a)(1).

[177] Idaho Code § 42-233(1).

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9. CONJUNCTIVE ADMINISTRATION OF GROUND AND SURFACE SUPPLIES

A. Introduction to conjunctive administration

Idaho, like most western states, has long recognized in principal that the prior appropriation doctrine applies to both ground and surface water.[178] Nevertheless, as a practical matter, ground water and surface waters long were managed separately. This is no longer the case. With improving scientific understanding of the physical connection between ground and surface waters, conjunctive administration has become a legal and practical reality.

First a comment on terminology. "Administration" refers to the Department's statutory responsibility to enforce priority, including the curtailment of junior water rights when required to meet senior needs. The term "conjunctive administration" refers to the administration of ground and surface water rights. The term "conjunctive management" is broader. It refers to the full panoply of mostly voluntary governmental and private efforts to reduce conflict between ground and surface water users and promote more effective utilization of all water resources. Thus, while conjunctive administration deals with the brute-force "policing" of priorities, conjunctive management includes such things as research, education, voluntary conservation measures and other demand reduction, recharge projects, provision of substitute water supplies, and other efforts to stabilize or improve water availability. This distinction in terminology, however, is fairly recent. At the time that the Conjunctive Management Rules were adopted in 1994, the term conjunctive administration was not yet in vogue. Using current terminology, those rules would more appropriately be named the Conjunctive Administration Rules.

Today, conjunctive administration and conjunctive management present perhaps the most complex policy issues in Idaho water administration today. Part of this complexity comes from the limited (but steadily increasing) knowledge about the hydraulic operation of the ground water resource itself and its connection to surface supplies. In the past, it was impossible to quantify how pumping a well here might affect a river there. Today sophisticated computer models are capable of predicting such impacts with remarkable precision—at least in parts of the state. Making such predictions is particularly complex because the impacts are not static. The extent and

[178] This recognition is not universal. For instance, the Supreme Court of Nebraska recently confirmed that Nebraska law ignores the interrelationship of ground water and surface water. In that state, the law of prior appropriation applies only to surface water, while ground water is governed by the common law rule of reasonableness and the statutory Ground Water Management and Protection Act. *Spear T. Ranch, Inc. v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005).

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timing of these effects often are delayed, masked, or compounded by other factors, both known and unknown.[179]

In most cases, ground water will be "tributary" (i.e., connected) to surface streams, meaning that it will contribute to, or receive water from, surface stream flows. Localized situations do exist where the ground water is confined in such a way that it will not reach a surface stream, where its movement toward a stream is best measured in geologic time, or where the connection is geographically remote from the stretch of river where most wells or headgates are located.

As a matter of law, conjunctive administration is applicable and appropriate anywhere in the state that ground and surface water supplies are hydraulically interconnected. To date, conjunctive administration has been actively undertaken by IDWR only with respect to water rights drawing from the Eastern Snake Plain Aquifer ("ESPA") and hydraulically connected rivers and streams. It is expected that conjunctive administration will reach other areas of the state, perhaps with the Big Wood River basin being next.

The ESPA is a highly productive ground water aquifer underlying a 10,800 square mile area stretching across southern and southeastern Idaho. (See map of the ESPA set out in Appendix G.) As the Idaho Supreme Court has observed, "[i]t is estimated that [the ESPA] contains up to a billion acre-feet of water, which would be roughly the amount of water contained in Lake Erie."[180] The aquifer is connected to the Snake River in various places and to varying degrees. The aquifer discharges to the Snake River approximately 7.5 million acre-feet annually through spring complexes located in the Thousand Springs area and near the American Falls Reservoir. It reportedly receives an average of 8 million acre-feet of recharge. In addition, the Snake River provides irrigation water to some two million acres through natural flow and some 4 million acre-feet of storage in the River's upper reaches. Another two million acre-feet of water is pumped each year from the ESPA to serve over one million acres of farm land.

In 1994, the IDWR promulgated rules governing conjunctive administration of ground and surface waters having a common source of supply.[181] The Department's

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[179] An excellent discussion of the complexities of conjunctive management is contained in Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water Under the Appropriation Doctrine*, 22 Land & Water L. Rev. 63 (1987).

[180] *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011) (this was the Idaho Supreme Court's decision in the "Spring Users' delivery call," discussed below).

[181] *Rules for Conjunctive Management of Surface and Ground Water Resources* ("*Conjunctive Management Rules*" or "*CMR*"), IDAPA 37.03.11, were promulgated by order of the Director on October 7, 1994. The Idaho Legislature took no action to disapprove the rules under Idaho Code § 67-5291.

rulemaking was spurred by the decision in the case of. *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). In *Musser*, the Idaho Supreme Court held that the Department's Director had a clear legal duty to "distribute" water to the holder of senior irrigation rights diverted from springs in the Thousand Springs area near Hagerman, Idaho.[182] Because the senior's source of water in *Musser* was a spring discharge from the ESPA at a point on the Snake River canyon wall, there were no junior spring or surface rights that could be curtailed to fill the calling spring right. The implication of this ruling, then, was that the Director could be required to curtail junior ground water rights withdrawing from the ESPA if the curtailment would result in more water being made available to the spring user.

The Department's Conjunctive Management Rules establish a procedure by which senior water right holders may make a "delivery call" by petitioning the Department to administer ground and surface water rights in priority within an area of common ground water supply. These rules set out extensive criteria for determining the nature and extent of the interconnection of various water rights, for evaluating whether withdrawals by a junior ground water right will materially injure a senior water right, and for evaluating mitigation plans that might be proposed by a junior right holder who ultimately is found to be subject to the senior delivery call. The rules also provide for phased-in curtailment of ground water rights subject to a delivery call.

Although the Conjunctive Management Rules are applicable statewide, so far the Department has designated only the ESPA as an area having a common ground water supply. This area is defined by the Department by reference to the report "Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho" U.S. Geological Survey Professional Paper 1408-F (1992).

In the SRBA, the court adopted a "general provision" dealing with conjunctive management that places all water users on notice that the designation of a source for their water right does not immunize them from a delivery call from a senior right holder in a separate, but connected, source.[183] The court's decision in what was designated as Basin Wide Issue 5, concluded protracted litigation among SRBA claimants concerning the manner in which the SRBA decree would address conjunctive management. In *A&B Irr. Dist. v. Idaho Conservation League* (aka *Basin-Wide Issue 5*) ("*ICL III*"), 131 Idaho 411, 958 P.2d 568 (1998) (McDevitt, J.), the Idaho Supreme Court observed that "[c]onjunctive management of ground water and surface water rights is one of the main reasons for the commencement of the Snake River Basin Adjudication." *ICL III*, 131 Idaho at 422, 958 P.2d at 579 (quoting 1994 Interim Legislative Committee Report on the

[182] *Musser v. Higginson,* 125 Idaho at 395, 871 P.2d at 812.

[183] *In re: SRBA Case No. 39576, Memorandum Decision and Order of Partial Decree, Connected Sources General Provision (Conjunctive Management), Basinwide Issue No. 5*, (Feb. 27, 2002).

Snake River Basin Adjudication, p. 36-37). The Court required the SRBA Court to determine the ultimate source of the ground and surface water rights being adjudicated and the relative priority between surface and ground water rights. *ICL III*, 131 Idaho at 423, 958 P.2d at 580.[184]

As water right claims have been recommended[185] or decreed in the SRBA, the Department has incorporated them into Water Districts organized pursuant to Chapter 6, Title 42 of the Idaho Code. Since 2002, the Department has formed five new Water Districts (Water Districts 100, 110, 120, 130 and 140) encompassing much of the ESPA.[186] Administration of ground water rights in these new Water Districts, including conjunctive administration, is to occur pursuant to standing instructions from the Department to the Watermasters.

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[184] In response to the SRBA Court's ruling that a conjunctive management general provision was not required because the Department had adopted the Conjunctive Management Rules, the Supreme Court also held that

> [the Rules] do not necessarily overlap the SRBA proceedings. They do not provide for administration of interconnected surface and ground water rights in the SRBA, nor do they deal with the interrelationship of water rights within the various Basins defined by the Director and the SRBA district court, and they do not deal with the interrelationships of those Basins to each other and to the Snake River in the SRBA proceeding. The Rules adopted by the IDWR are primarily directed toward an instance when a "call" is made by a senior water right holder, and do not appear to deal with the rights on the basis of "prior appropriation" in the event of a call as required.

ICL III, 131 Idaho at 422, 958 P.2d at 579. This language could be read to mean simply that the Rules themselves do not determine the relative priorities of rights or the hydrologic interrelationship between those rights or between the various sources and basins, which the Court ruled were issues the SRBA was specifically commenced to conclude. Others have argued that this statement holds that the Conjunctive Management Rules violate the prior appropriation doctrine. The Idaho Supreme Court's 2007 ruling that the Conjunctive Management Rules are constitutional on their face, however, is inconsistent with that argument. *See American Falls Reservoir Dist. No. 2 v. IDWR*, 2007 WL 677947 (Idaho).

[185] Some water right claims have been incorporated into Water Districts on the basis of the Department's recommendations of the claims to the SRBA before final determination and decree by the Court. The Department has sought such "interim administration" in areas where it believes it has sufficient information about the water rights and where immediate administration has been deemed necessary.

[186] *See* Appendix D.

B. Response to changes in aquifer levels and spring production

(1) Introduction

The early development of Idaho's water resources focused on direct diversions and storage of surface water to beneficial uses—primarily for mining and irrigation. By the time a second period of agricultural expansion began after World War II, much of the surface water supply in Idaho's arid southern region had been fully appropriated, or in some cases, over appropriated. This fact, and the availability of new high-lift pumping technology and relatively cheap electrical power, made ground water the preferred source, and in many cases the only source, for new water development.

At the time, a large supply of ground water (often augmented over pre-development volumes by recharge incident to irrigation) and lack of understanding or concern about the interrelationships between ground and surface water sources made the Department's approval of new ground water appropriations largely perfunctory. But between the 1960s and the late 1980s, the significant new ground water withdrawals for irrigation and growing municipal uses, combined with cycles of drought, increasing efficiencies in surface water irrigation and expanding urbanization significantly altered the water balance in some Idaho aquifers. Consequently, Idaho water managers and water users have begun to express growing concern about declining aquifer water levels in various parts of the state, and to consider alternatives to reverse these trends.

Declining water levels in some regional aquifers increased the pumping costs for local ground water users and affected shallow domestic wells.[187] The ESPA is not in a state of overdraft, but ground water pumping has been deemed to contribute to declining spring discharges to the Snake River.[188]

Although north Idaho generally receives more precipitation than southern Idaho, and (with the exception of Kootenai County) has experienced lower rates of population growth, concerns about declining aquifers and the effects of increasing aquifer

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[187] See discussion of *Parker v. Wallentine*, *Baker v. Ore-Idaho Foods* and related cases in sections 7.D and 7.D beginning at page 100.

[188] The fact that there is a correlation between increased ground water withdrawals and declines in spring discharges in the 1000 Springs reach of the Snake River near Hagerman, Idaho has been understood for many years. The actual contributing effect of these withdrawals, in comparison to the effects of drought and reduced incidental recharge, is less well understood. However, the IDWR has estimated that sixty percent of the observed declines in spring discharges is attributable to changes in irrigation practices on the Eastern Snake River Plain that have reduced the historical incidental recharge. This is not surprising given that nearly one hundred percent of the approximately 3,700 cfs increase in spring discharges that occurred between 1902 and 1953 is attributable to incidental recharge from surface water irrigation on the Eastern Snake River Plain that began in the early 1900s.

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withdrawals exist there as well. Like the ESPA, the hydrology of aquifers such as the Spokane-Rathdrum and the Moscow-Pullman is complex. This complexity can make identifying the sources of problems and possible solutions difficult. And in these aquifers, standard notions about aquifer management, including whether or how to conduct aquifer recharge, may need adjustment.[189] Existing research suggests that "more precipitation" does not necessarily translate into "more natural recharge" to some aquifers in the area, particularly the deeper aquifers. Nor is it necessarily correct to assume that increased withdrawals from these aquifers via pumping for irrigation and municipal purposes are primarily responsible for water level declines or that curtailing such diversions will increase water levels.

(2) The effects of drought and increasing irrigation efficiencies on aquifer levels

Coincident with the remarkable expansion of ground water-irrigated agriculture that occurred after World War II, southern Idaho has experienced repeated periods of drought. These droughts reduced the rates of natural recharge to regional aquifers from direct precipitation and snowmelt.[190] They also motivated many surface water irrigators to increase the efficiencies of their water delivery facilities, which in turn reduced the historical rate of incidental recharge to aquifers.[191]

In arid southern Idaho, incidental recharge from surface water diversions can be the primary source of water accruing to aquifer storage. For example, based on 1980 figures, it is estimated that natural recharge through precipitation accounts for only about

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[189] For example, in the Moscow-Pullman Basin, due in part to rolling topography, the nature of overlying soils and to the spatial relationship of the two primary basalt aquifers, diversions of surface water to recharge basins or injection wells, or through leaky canals, as is common in southern Idaho recharge projects, are unlikely to improve declining water levels in the Grande Ronde basalt aquifer—the primary source of municipal water in the area. Instead, managed recharge in this area conceivably could come in the form of "diversions" of ground water from the shallower Wanapum basalt aquifer to the deeper Grande Ronde aquifer via wells completed through both that essentially would allow ground water from the upper aquifer to leak into the lower.

[190] Natural recharge typically includes recharge to the aquifer from deep percolation of runoff, tributary underflow and to a lesser extent, precipitation.

[191] Incidental recharge is recharge resulting from the use of water diverted for beneficial uses, and includes recharge due to leakage from irrigation water distribution and delivery facilities, and deep percolation of applied irrigation water below the crop root zone. Improved irrigation facilities and practices implemented by surface water irrigators in the upper Snake River Basin following the severe drought of 1977 have reduced on farm deliveries of surface water by approximately one million acre-feet per year. *Snake River Technical Advisory Committee, Needed Water Resource Programs in the Snake River Basin 3* (Nov. 1983).

nine percent of the annual recharge to the Snake Plain Aquifer.[192] However, from sixty to eighty percent of the eight million acre-feet of annual recharge to the Snake Plain regional aquifer is incidental to—that is, it is a byproduct of—surface irrigation, including seepage from canals, ditches, laterals, and irrigated fields.[193]

For aquifers in southwest Idaho's Treasure Valley[194] the numbers are not yet fully developed, but their relative percentages may be similar to those for the ESPA. Preliminary recharge estimates for the Treasure Valley were that 60 percent of ground water recharge is attributable to canal leakage, some 30 percent is attributable to a combination of agricultural flood irrigation and precipitation, and that all of this recharge is primarily to the shallow alluvial aquifer system.[195] The thinking originally was that recharge to the deeper aquifers in the Treasure Valley—from which most of the area's drinking water is pumped— is very slight and/or that the water within them is confined by largely impervious layers.[196] However, more recent studies, and the stable water levels shown in both large-production municipal wells and long-term monitoring wells, have shown that these deeper municipal supply aquifers actually are primarily one large aquifer, now known as the Pierce Gulch Sand Aquifer, which is robustly recharged, likely has a connection to alluvial gravels where the aquifer slants upward across a wide swath of the Valley, and extends into the Payette River Drainage.[197]

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[192] S. P. Garabedian, *Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake Plain, Idaho*, U.S. Geological Survey Professional Paper 1408-F at (1992).

[193] G. F. Lindholm, *Summary of the Snake River Plain Aquifer-System Analysis in Idaho and Eastern Oregon*, U.S. Geological Survey Open-File Report 91-98 at 38-39 (1993).

[194] The Treasure Valley is the valley of the Boise River extending generally from Lucky Peak Dam to the Snake River. It includes some of the state's largest cities, including Boise, Nampa, Meridian, Caldwell, Eagle, and other communities, and is Idaho's fastest-growing region.

[195] Idaho Water Resources Research Institute, draft Treasure Valley Aquifer Study (2002).

[196] Idaho Water Resources Research Institute, draft Treasure Valley Aquifer Study (2002) and personal communication, Christian Petrich, University of Idaho, Idaho Water Resources Research Institute (October 29, 2003).

[197] *See, e.g.,* Hydro Logic, Inc., E. Squires, et al., *The Artesian Wells of the City of Meridian, Idaho,* pp. 9-11 (March 17, 2012); and *M3 Eagle Regional Hydrogeologic Characterization, North Ada, Canyon, and Gem Counties, Idaho, Year One Progress Report,* pp. 1-6 (May 4, 2007).

(3) Expanding urban landscapes

Conversion of significant areas of agricultural land to subdivisions, shopping malls and roadways can reduce both natural and incidental ground water recharge. In the Treasure Valley, where much of Idaho's population growth is occurring, these land use changes are beginning to have noticeable effects on aquifer recharge, particularly recharge to shallow aquifers. Lands that formerly were flood irrigated to grow row crops are giving way to development. Even though urban development's often retain significant areas of irrigated lawn and open space, typically more than half of the land in urbanized areas consists of impervious, non-irrigated surfaces.[198] These impervious surfaces increase surface runoff and preclude infiltration of precipitation.

Moreover, urban landscaped acres usually are served by pressurized irrigation systems that often are more efficient than gravity irrigation systems, and therefore may result in less incidental recharge.[199] Typically, these pressurized irrigation systems deliver the same non-potable surface irrigation water diverted through the same canal system that served the cropland on which the urban development now stands. The canal systems themselves continue to contribute to ground water recharge.[200] But the net effect

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[198] Personal communication, Zena Cook, Idaho Dep't of Water Resources, October 28, 2002.

[199] Recent studies have suggested that, for several reasons, suburban or commercial site lawn and landscape irrigation likely provides little direct ground water recharge. Many recharge-inducing lateral ditches are abandoned, lined or piped to accommodate urban development; lawn irrigation systems typically use sprinklers; and there is evidence that lawn irrigation itself often results in reduced soil perviousness due to compaction of soils and effects of grading during home construction. *See e.g.*, NRDC, *et al.*, *Paving Our Way to Water Shortages: How Sprawl Aggravates the Effects of Drought* at 5-6 (2002), *citing* EPA, *Clean Water Through Conservation*, EPA 841-B-95-002 (April 1995); Sakrison, R., *Water Use In Compact Communities: The Effect of New Urbanism, Growth Management and Conservation Measures on Residential Water Demands* (University of Washington, 1997); and Schueler, T., *The Peculiarities of Perviousness*, Watershed Protection Techniques, Vol. 2, Issue 1, 1995.

[200] Typically, where formerly flood irrigated farmland has been converted to urban pressurized irrigation in the Treasure Valley, the canal company or irrigation district delivering the water has continued to deliver the full historical amount of appurtenant water to the headgate, even though as much as half of the farmland may be converted to impervious or non-irrigated surfaces. This may provide the developed land up to twice as much water for urban landscaping as the irrigated farm ground received. Several reasons have been advanced for this approach. First, it provides a peaking capability for the irrigation system during periods of extreme temperature and irrigation demand, particularly systems that are not on a strict watering schedule. It also minimizes labor and management costs for the delivery entity and complaints from homeowners. But it also raises several legal and policy issues for future water management. First, this changes the "duty of water" for the water right on the developed land from, on average, one inch per acre to as much as two inches per acre. This presumably is

of urbanization on formerly agricultural areas still appears to be a decline in both the amount of beneficial use for irrigation and natural and incidental ground water recharge. Logically, where the subdivision results in reduced consumptive use of water, as compared to the former farm irrigation, the excess surface water will find its way to drains, other ditches, or the stream or river from which it was originally diverted.

(4) Declines in spring discharges to the Snake River and resulting water user conflicts

In addition to the growing awareness of the effects of changes in natural and incidental recharge throughout the state, in south-central Idaho declines in spring flows discharging to the Snake River from the ESPA have been the source of increasing conflict.[201] This conflict reached a peak in August of 2000, again in early 2004, and yet a third time in early 2005.

In August of 2000, anticipating continued severe drought conditions for southern Idaho and significant declines in spring discharges from the ESPA to the Snake River, the Department's Director gave notice to ground water users on the ESPA that he intended to curtail ground water diversions beginning in the spring of 2001 within a band extending from five to ten kilometers from the Snake River in the Thousand Springs and American Falls reaches to increase the water supply to spring and surface water users.[202] On the eve of the Department's intended issuance of curtailment orders,[203] water users presented the

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inconsistent with the goal of conservation, the decreed duty of water for the delivered right and Idaho statutes and case law that impose a standard duty of water of no more than one inch to the acre. Also, this can result in development of a delivery and use infrastructure that continues to demand the full historical "head" of water in the system to operate, and thereby can preclude alternative future uses of the water historically allotted to farmland, but now appurtenant to a parking lot or industrial complex.

[201] 1953 marked the end of a long-term trend of increased spring discharges to the Snake River that began in the early 1900s due to incidental recharge from widespread surface irrigation across eastern and southern Idaho. North side spring flow contributions to the Snake River below Milner Dam peaked at about 6,900 cfs in 1953 and had declined by approximately 600 cfs by 1980. *See* Jeffrey C. Fereday and Michael C. 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) for a historical review of Eastern Snake Plain Aquifer hydrology and development.

[202] IDWR, Order *In the Matter of Designating the American Falls Ground Water Management Area* (August 3, 2000) and IDWR, Order *In the Matter of Designating the Thousand Springs Ground Water Management Area* (August 3, 2000).

[203] The Director was proceeding under Idaho Code § 42-233b, which, among other things, requires that an order to ground water users within a Ground Water Management Area to cease

Director with an agreement in principle to avoid curtailments. Ground water users would provide up to 68,000 acre-feet of replacement water to surface and spring water users in the 2002 and 2003 irrigation seasons. The parties also would engage in mediation to attempt to reach long-term agreements aimed at managing the ESPA's ground and surface water supplies conjunctively.[204] This agreement in principle ultimately resulted in written agreements among water users above and below Milner Dam (the "2001 Interim Agreements"). These agreements are discussed further in section 9.C(2) below.

A second major period of conflict between ground and spring water users on the ESPA began in the fall of 2003 when ground and spring water users in Water District 130 were unable to reach either a long-term agreement or one that would extend the 2001 Interim Agreement. In October of 2003, the Magic Valley and North Snake Ground Water Districts filed a Preliminary Mitigation Plan with the Department proposing a five-year program to mitigate injury to senior spring rights. The Preliminary Mitigation Plan incorporated, in large part, the programs that were initiated under the 2001 Interim Agreements, but also included an adaptive management approach intended to allow changes to the Preliminary Mitigation Plan over its term based on new information, monitoring of results and collaboration with spring users and the Department. That Plan was protested by over sixty individuals and entities.[205] The potential for protracted litigation of the Preliminary Mitigation Plan ultimately was overshadowed by the Department's resolution in late 2003 of two sets of delivery calls made under the Conjunctive Management Rules—the Clear Lakes Call and the Rangen Call. The Musser Call, subsequent delivery calls, and the several resulting interim settlement agreements are discussed in more detail below.

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or reduce diversions must be issued before September 1, and is effective during the growing season of the next year.

[204] If the full amount of replacement water could not be obtained, ground water users agreed to curtail their diversions by a proportionate amount, up to a maximum of from ten to fifteen percent of historical diversions. In the Upper Snake River, replacement water was delivered into reservoir storage for surface water users' use. However, in the Thousand Springs reach the majority of the replacement water delivered was applied in the vicinity of springs to increase direct recharge through infiltration basins and increase incidental recharge through conversion of ground water irrigated acres to surface water irrigation. In addition to providing some incidental recharge to the aquifer, conversion of agricultural land to surface water irrigation also reduced ground water withdrawals in the vicinity of the springs.

[205] Proceedings for review of the Ground Water Districts' Preliminary Mitigation Plan were stayed as part of the March 15 Settlement reached among the Legislature, the Ground Water Districts, and spring and surface water users. (See discussion in section 9.C(4)).

C. Delivery calls and administration in the ESPA

(1) Round One: The Musser call

The current era of conjunctive administration of water rights began with the Musser call on June 16, 1993. Alvin and Tim Musser (together with tenant, Howard "Butch" Morris) (collectively, "Musser") placed a call for delivery of their 1892 priority water right, in the amount of 4.8 cfs. The right was delivered from a natural spring through the Martin-Curran Tunnel located in the 1000 Springs area near Hagerman, Idaho.[206] According to Musser, flows in the spring had declined due to up-gradient ground water pumping, and he was unable to meet their full water needs in 1993.

The Director denied the call on the basis that there had not yet been "a formal hydrologic determination that such conjunctive management is appropriate."[207] Musser sued, seeking a writ of mandate compelling the Director to administer the aquifer in priority to deliver their full senior right, pursuant to Idaho Code § 42-602 (which has since been modified).

Section 42-602 directs the Director to distribute water within designated water districts in accordance with the prior appropriation doctrine. The statute was substantially amended in response to the *Musser* decision (see discussion below). At the time, however, it authorized the Director to curtail unadjudicated water rights outside of a water district, so long as the call came from the holder of an adjudicated right within a water district. Although most water rights in the surrounding ESPA were then unadjudicated and therefore not within water districts, the Musser property was located within a small water district known as 36A in which surface and spring water rights had been adjudicated in the 1930s.

The Department initiated rulemaking for conjunctive management and a contested case proceeding for the Mussers, and urged the trial court to dismiss the lawsuit as moot, given that an administrative process was now underway. The trial court found the case was not moot, and issued a writ of mandate requiring the Director to "distribute water" in accordance with the Prior Appropriation Doctrine to serve Mr. Musser's decreed entitlement.

The writ of mandate affirmed by the court soon became moot when Musser received a supply of water from another source, so there was never any litigation over the appropriateness of how the Department responded to the writ. For example, the writ of mandate required that the Director "immediately comply with I.C. § 42-602." Because the dispute was mooted, there was never occasion to determine what immediate

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[206] *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

[207] *Musser*, 125 Idaho at 394, 871 P.2d at 811.

compliance means and what factors the Department should consider and what procedures it should employ in responding to such a call. Nevertheless, *Musser* plainly had the effect of jumpstarting the Department's development of conjunctive management rules, which have shaped the debate that continues to unfold.

The Legislature responded immediately to the *Musser* decision by amending section 42-602 and other sections addressed by the Supreme Court.[208] First, the amendments removed the Director's authority under Idaho Code §§ 42-602 to 42-619 to use the watermaster/water district system to curtail rights outside an established water district. The legislation also replaced the Director's specific "duty" to have "immediate direction and control" with a more deferential and discretionary directive that the Director "shall have direction and control of the distribution of water." The Legislature also struck the provision in section 42-602 requiring the Director to "execute the laws relative to the distribution of water in accordance with the rights of prior appropriation." This language was replaced with the provision that the Director is to "distribute water in water districts in accordance with the prior appropriation doctrine." Finally, it amended various other provisions of the water code to expressly recognize the Director's discretion in these matters and his authority to proceed administratively. These changes presumably were intended to recognize and underscore the Director's expertise and discretion in managing the complex interactions of water rights and to reaffirm that there is more to the prior appropriation doctrine than rote enforcement of priorities.

(2) Round Two: The 2001-2003 interim settlement and replacement water obligation

In 2001 the Department issued orders designating the Thousand Springs Ground Water Management Area and the American Falls Ground Water Management Area.[209] As part of these actions, the Director notified ground water users within these GWMAs of his intent to issue curtailment orders to ground water users within an area extending five kilometers from the Snake River in the Thousand Springs Reach ("TSR") of the Snake River (below Milner Dam) and the American Falls Reach (above Milner) due to the extended drought conditions and continuing declines in spring discharges. The Department's orders were based on a general finding of material injury to spring and surface water rights in the reaches. The orders set an August 31, 2001 deadline for ground water users to provide a plan for mitigation to the reaches or face curtailment. The North Snake, Magic Valley, Bingham, Bonneville-Jefferson and Aberdeen-American Falls Ground Water Districts were instrumental in negotiating two-year, interim agreements on behalf of their members. Agreements in principle were reached with

[208] 1994 Idaho Sess. Laws, ch. 450.

[209] IDWR, Order *In the Matter of Designating the American Falls Ground Water Management Area* (August 3, 2000) and IDWR, Order *In the Matter of Designating the Thousand Springs Ground Water Management Area* (August 3, 2000).

spring and surface water users on August 31st that later were reduced to formal written agreements. These agreements avoided IDWR's threatened curtailment of ground water withdrawals for irrigation, industrial and municipal uses. Among other things, the 2001 Interim Agreements required ground water users to acquire and provide up to 68,500 acre-feet of replacement water to surface and spring water users in the 2002 and 2003 irrigation seasons.[210]

The Department's action, although initiated without first holding a hearing, presumably was premised on the following assumptions: (1) that surface and spring water users in the Magic Valley were not receiving their full entitlements; (2) that such shortfalls constituted material injury to senior surface and spring rights; (3) to the extent shortfalls were being experienced, they could not be corrected by the seniors employing reasonable efforts to improve their existing means of diversion; (4) that those claiming shortfalls could beneficially use the higher quantities authorized under their decreed water rights; and (5) that persons holding water rights in springs fed in large part by incidental recharge and return flows from up-gradient surface water irrigation may require continuance of the same quantity of return flows by ground water users when up-gradient surface irrigation and related incidental recharge is reduced. Due to the 2001 Interim Agreements, these and other relevant assumptions have not been tested.

(3) Round Three: The Clear Lakes call

In May of 2003, Clear Lakes Trout Company, Rim View Trout Company and the Estate of Earl Hardy ("Clear Lakes") made demand on the Director of the Department to direct the Watermaster for Water District 130 to "administer water rights in the Water District that deplete the supply of water" to the Clear Lakes water rights that were not being satisfied by the available spring flows (the "Clear Lakes Call").

The Director deemed the Clear Lakes demand to be a "delivery call" under the Department's Conjunctive Management Rules. In October of 2003, the Director issued an Order denying the Clear Lakes Call. Among the reasons given for denying this call, the Director found that for certain of the Clear Lakes rights, there was sufficient water available, certain other rights were not receiving their full decreed rate due to natural seasonal variations that had existed since the time the rights were first appropriated, and that the mitigation then being provided by the Magic Valley and North Snake Ground Water Districts under the 2001 Interim Agreement was "an approved and effectively operating mitigation plan" under the Conjunctive Management Rules that provided full

[210] Under the separate Interim Agreements, the North Snake and Magic Valley Ground Water Districts agreed to provide 40,000 acre-feet of replacement water to the TSR in 2002 and 2003. The Aberdeen-American Falls, Bingham and Bonneville-Jefferson Ground Water Districts agreed to provide, in conjunction with several commercial/industrial ground water users, 28,500 acre-feet of replacement water per year to the American Falls reach above Milner.

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mitigation for the effects of ground water pumping under junior rights in Water District 130 through December 31, 2003.[211]

The Order also provided the opportunity for any person aggrieved to petition the Department for a hearing. Clear Lakes did petition for a hearing, and numerous parties intervened. This contested case was stayed as part of the settlement of a subsequent delivery call filed by Rangen, Inc., that the Director determined to honor.

(4) Round Four: The Rangen call

In September and October of 2003, a fish food producer and research facility known as Rangen, Inc. filed a delivery call demanding that the Director shut off junior water rights alleged to be interfering with Rangen's 1962 priority spring water right diverted from the Curren Tunnel—the same source as the Musser water right.[212] On February 25, 2004, after expiration of the 2001 Interim Agreement for Water District 130, the Director recognized the Rangen delivery call and stated his intent to order curtailment of all up-gradient consumptive water rights within the Water District junior to July 13, 1962 unless ground water users submitted, and received approval of, a suitable mitigation plan by April 1, 2004 ("Rangen Order").[213]

Specifically, the Rangen Order provided that members of the North Snake Ground Water District or the Magic Valley Ground Water District would not be curtailed (on a temporary basis) if they provided sufficient replacement water. The replacement water could be either (1) a substitute supply of 16,000 acre-feet directly usable by Rangen, or (2) 53,000 acre-feet of replacement water to the TSR. In either case, the plan for providing the substitute supply would have to be approved by the Director by April 1st. At a status conference held on March 5, 2004, the Department announced that due to the discovery and correction of a computer modeling error after the Rangen Order had been

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[211] Order, *In the Matter of Distribution of Water to Water Right Nos. 36-02659, 36-02680, 36-04032A, 36-04032B, 36-04032C, 36-04032D, 36-07004, 36-07080, 36-07167, 36-07176, 36-07725, 36-07731 and 36-08089* (October 10, 2003).

[212] The delivery call referenced three water rights. The most senior (1957 priority) right has been fully met, however. The most junior (1977 priority) was deemed to have been "incorrectly" issued by the Department and therefore arguably not the proper basis for a call. Consequently, the water right that drove the call was the intermediate priority right with a July 13, 1962 priority date.

[213] Order, *In the Matter of Distribution of Water to Water Right Nos. 36-15501, 36-02551 and 36-07694* (February 25, 2004).

issued, the Department had determined that the required quantity of replacement water to the TSR would be reduced to 26,500 acre-feet.[214]

The Rangen Order implicated the potential curtailment of ground water diversions serving approximately 120,000 irrigated acres in the Magic Valley, as well as many municipal and commercial rights held by cities and dairies. To avoid the threat of significant economic dislocation caused by both the declining spring flows and potential curtailment, the Ground Water Districts, Rangen and Clear Lakes sought to reach a further interim agreement that would include significant involvement and commitments by the State of Idaho. On March 15, 2004, following a full day of negotiations, a settlement was reached among water users, the Legislature and the Governor that resulted in the stay of the Clear Lakes and Rangen Calls and the pending curtailment of post-1962 ground water diversions in Water District 130 ("2004 Settlement").[215]

During the 2004 Settlement's one-year term, the parties each agreed to undertake specific actions, the most significant of which were the commitment by the Ground Water Districts to continue to provide 40,000 acre-feet of replacement water to the Thousand Springs Reach and the authorization of the Legislature's Expanded Natural Resources Interim Committee for Water Supply and Management Issues ("Interim Committee"). The Interim Committee was assigned a broad scope of tasks aimed at developing short-term and long-term management goals for the ESPA, investigating and recommending water management and supply programs, and investigating funding and legislative needs to implement identified goals and objectives. The Interim Committee established monthly meetings of the full committee and smaller working groups that were assigned specific tasks for the ESPA and other regions of the State experiencing water supply problems.

[214] Subsequent review of the computer modeling simulations revealed that the 26,500 acre-foot number also was incorrect. However, because of a settlement reached among the State of Idaho, the Magic Valley and North Snake Ground Water Districts and other water users on March 15, 2004, a final quantification of this number never was developed pursuant to the Rangen Call.

[215] Eastern Snake Plain Aquifer Mitigation, Recovery and Restoration Agreement (March 15, 2004). The March 15 Settlement also provided for the stay of a pending district court case challenging the validity of the Conjunctive Management Rules brought by Clear Lakes in Ada County and pending contested cases before the Department concerning the dissolution of the Thousand Springs GWMA and amendment of the boundaries of the American Falls GWMA. The March 15 Settlement also provided for a stay of the pending contested case concerning the Ground Water Districts' Preliminary Mitigation Plan.

(5) Round Five: The Surface Water Coalition's 2005 delivery call and the challenge to the Department's rules in *AFRD*

In January 2005, a group of seven canal companies and irrigation districts diverting at or above Milner Dam on the Snake River and calling themselves the "Surface Water Coalition" (or "SWC")[216] filed a delivery call with the Department seeking curtailment of hundreds of junior ground water rights in the ESPA that they alleged decreased river flows to the injury of their senior water rights. This action resulted in near-immediate emergency orders from the Director, followed by preparations for hearings on the merits (discussed below).

However, even before discovery could be completed, five SWC members and others brought a court challenge in 2005 to the Department's Conjunctive Management Rules under which their call would be heard.[217] This challenge, which sidetracked the delivery calls pending its outcome, led to the Idaho Supreme Court's ruling in *American Falls Reservoir District No. 2 v. IDWR* ("*AFRD*"), 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.). The opinion upheld the facial validity of Idaho's Conjunctive Management Rules ("Rules"), IDAPA 37.03.11.000, *et seq*. The Rules, adopted by the Department in 1994, set forth the process by which ground and surface water rights in Idaho are to be administered together. *AFRD* is given particular attention here because it is seen as a highly significant ruling in the area of conjunctive administration and the confirmation of central principles of water law in Idaho.

In addition to validating the Rules, the decision confirmed, in the context of water rights administration, several foundational principles of Idaho's prior appropriation doctrine—each of which is referenced in the Rules—such as the continuing requirements of beneficial use and reasonable means of diversion, the state policy of full economic development of water resources, the prohibition of waste, and others. The court held that the Rules are consistent with state constitutional principles in allowing the agency to consider the amount of storage water available to a senior surface water right holder before ordering the curtailment of a junior water right. The decision underscores the

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[216] These are the Twin Falls Canal Company, North Side Canal Company, Milner Irrigation District, American Falls Reservoir District No. 2, Minidoka Irrigation District, A&B Irrigation District, and Burley Irrigation District.

[217] Joining the five Surface Water Coalition members as plaintiffs challenging the Rules were Idaho Power Company (which maintains hydroelectric facilities on the river at Milner and elsewhere) and holders of water rights in springs flowing from canyon walls in the river reach below Twin Falls. Each of these plaintiffs asserts its water rights are dependent, at least in part, on Idaho's vast Eastern Snake Plain Aquifer ("ESPA" or the "aquifer"). As noted elsewhere in this paper, the aquifer is understood to be connected to the Snake River in various places and to varying degrees across southern Idaho.

importance of administrative fact-finding before the state will shut off diversions under junior water rights alleged to be causing material injury to seniors.[218]

The plaintiffs in *AFRD* had criticized the Rules in various ways since their adoption, and in this litigation finally brought their theories to court. Plaintiffs' central premise over the years had been that when a senior water right holder alleges a water shortage and demands curtailment of junior-priority water rights, the Department's job is immediate and ministerial, and watermasters should be directed to shut off ground water pumps without the Director first considering any facts other than the quantity of the senior's water right and the existence of shortage. Plaintiffs' position became even more emphatic once the bulk of ground water rights on the ESPA had been decreed in the ongoing Snake River Basin Adjudication and brought into water districts for which watermasters were appointed.

The Rules do not describe a summary curtailment model for conjunctive administration, and instead require fact-finding on various issues. Because of this, Plaintiffs claimed that the Rules violate a number of water law principles, including the "first in time" admonition of Idaho's Constitution; Idaho' water delivery statutes, Idaho Code § 42-601 *et seq.* (setting forth, among other things, watermaster duties in water districts); and the common law. Plaintiffs further asserted that it was illegal for the Rules to allow the Director, when responding to a delivery call, to consider such issues as the seniors' actual beneficial use (such as the number of acres actually being irrigated), whether their means of diversion are reasonable, and how the agency's action would serve the concept of "full economic development of underground water resources." Idaho Code § 42-226. Plaintiffs took the position that any such matters had been resolved in the process wherein their water rights were licensed or decreed and could not be revisited in a delivery call, and that engaging in these inquiries under the Rules would cause a "readjudication" of their water rights. In *AFRD*, the Idaho Supreme Court rejected all of these theories.

(a) Background: the Surface Water Coalition's 2005 delivery call

As noted above, the dispute giving rise to *AFRD* began in early 2005 when the Surface Water Coalition, acting under the Rules' delivery call procedures, formally asked the Department to curtail diversions under unspecified thousands of ESPA ground water rights. The Surface Water Coalition believes ESPA ground water pumping is reducing spring inflows to the river upstream from their headgates and injuring their surface water rights.

[218] The procedure or body of law by which the state uses its power to shut off a junior water right so that a more senior right might obtain its water supply is commonly referred to as water right administration. The senior's request is referred to as a "delivery call."

The Department responded immediately. Applying various provisions of the Rules, the Director issued emergency orders in February through May 2005 that, on a preliminary basis, determined it reasonably likely that pumping would cause material injury to the water rights of two of the seven[219] SWC members in the upcoming irrigation season. The emergency orders sought additional information from the SWC, but in the meantime required ground water users to provide the SWC with certain amounts of replacement water.

Both sides filed objections to the preliminary orders. The Department established a discovery schedule and scheduled a hearing. Meanwhile, the ground water users provided mitigation water as required by the orders, primarily by renting storage water from upper Snake River reservoirs to provide to the SWC and by fashioning means to idle ground water wells. A final determination in the matter, including any mitigation requirement, would come after the facts could be sorted out at the hearing, where both sides could put on evidence on various factors enunciated in the Rules.[220]

The Surface Water Coalition took the position that there should be no further fact-finding, that their water right decrees were proof enough of their entitlements, and that their delivery call sufficiently explained to the Director that they were not receiving water to which they are entitled. They maintained that, under the Constitution's "first in time" mandate, the Department was obligated to shut off ground water pumps in the ESPA, and to do so immediately. The Surface Water Coalition also contended that the various Rule provisions on which the Director relied, and under which he intended to receive evidence at hearing, were unconstitutional or otherwise in violation of Idaho water law.

However, rather than wait to raise these claims in the administrative hearing on the delivery call, in August 2005 five of the seven Surface Water Coalition members, joining with Idaho Power Company and a group of aquaculture interests in the Thousand Springs area[221] (collectively, "Plaintiffs"), filed a separate action in Idaho's Fifth Judicial District

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[219] The five Canal Companies who were plaintiffs in the *American Falls* case were Twin Falls Canal Company, American Falls Reservoir District No. 2, Minidoka Irrigation District, Burley Irrigation District, and A&B Irrigation District.

[220] As of this writing, the hearing still has not been held, although the Department has resumed its analysis of the delivery calls and has issued notified certain ground water right holders that they will be subject to curtailment unless they provide replacement water for 2007. Absent a settlement, these issues presumably will go to hearing.

[221] The Eastern Snake Plain aquifer's western edge is truncated by the deep Snake River canyon along an approximately 40-mile long section downstream from Twin Falls. The aquifer's water, flowing westward, encounters the canyon and literally spills out of the basalt canyon walls through innumerable fissures and springs in the Buhl/Hagerman area. The aquifer discharges in this reach collectively are several thousand cubic feet per second. Large amounts of this cold, clean water are collected to serve, primarily, the water rights of fish farms and irrigated tracts on benchlands situated between the cliffs and the river below, including the

Court in Gooding County Judge Barry Wood) asking for a declaration that the Rules violate the prior appropriation doctrine as established by the Idaho Constitution. Plaintiffs' arguments were as follows:

- The Rules allow inquiry into several principles other than "first in time" that Plaintiffs believed should not come into play in water right administration, including such concepts as "reasonable means of diversion," whether a senior right can be satisfied using alternate points and/or means of diversion; whether the senior actually is suffering "material injury;" and whether the administration is consistent with "full economic development" of the ground water resource.

- The Rules allow the Department to evaluate a senior's storage water account, including projected "carryover storage," in determining whether senior rights are suffering material injury.

- The Rules invite factual inquiry that impermissibly "looks behind," "readjudicates," or otherwise gives insufficient legal effect to the senior's water right decrees.

- The Rules impermissibly shift the burden to the senior to prove injury in a delivery call.

- The Rules are illegal in allowing junior right holders to provide mitigation in lieu of curtailment.

Plaintiffs' complaint asked Judge Wood for a declaratory judgment that the Rules are unconstitutional both on their face and as the Director sought to apply them in the delivery calls. Normally, a district court would dismiss such an action for failure to exhaust administrative remedies; the parties had not yet produced evidence in the administrative case, the agency had not applied law to facts, and there was no final agency action or factual record for court review. However, Plaintiffs convinced Judge Wood that their action should be heard because of language in Idaho's declaratory judgment statute, Idaho Code § 67-5278, referring to the statute's applicability where rules are "threatened" to be applied. Plaintiffs argued, in essence, that the Director's current process under the Rules was the "best evidence" of how the Department aimed to apply the Rules. The Department and the ground water users argued against this interpretation, but Judge Wood sided with Plaintiffs and heard their challenge.

Rangen facility referenced above (the "Spring Users"). By the time the Spring Users had joined the Canal Companies in filing the Rules litigation, they too had filed their own delivery calls against ESPA ground water pumpers. These delivery calls also are still pending.

(b) The lower court decision in *AFRD*

After motion practice over many months, lengthy briefing, and oral argument, the District Court issued a 127-page opinion granting Plaintiffs' summary judgment motions, relying on "the underlying facts in this case," that is, the actions that had occurred under the delivery calls lodged with the agency.[222] The Judge construed the declaratory judgment statute as vesting the court with jurisdiction over the action based on the "threatened application" of the Rules that Plaintiffs alleged in their briefing. The District Court thus adopted a hybrid approach that considered the Rules constitutionally both facially and as the Department threatened to apply them.[223]

In its Order, the District Court found that the Rules are unconstitutional because they: 1) fail to include express directives as to five "tenets and procedures" that the court believed are constitutionally required; 2) exempt domestic and stock water rights from conjunctive administration; and 3) allow the Director, in determining material injury, to consider a senior's right to store water in reservoirs for potential future use (so-called "carryover storage").

The press reports of Judge Wood's decision were simply that he had declared the Rules unconstitutional. However, the District Court's ruling actually upheld the bulk of the Rules, finding them unconstitutional only on narrow, mostly procedural, grounds. For example, the District Court rejected Plaintiffs' central premise that the numerous factors the Rules allow the Director to consider "are on their face contrary to the prior appropriation doctrine."[224] Judge Wood held that a "decree is not conclusive as to any post-adjudication circumstances,"[225] and in a delivery call "the Director has the duty and authority to consider" whether the senior is "irrigating the full number of acres decreed under the right."[226] The District Court rejected Plaintiffs' argument that junior users cannot use mitigation or replacement water to avoid curtailment.[227] The court agreed with defendants that the "concept of 'reasonableness of diversion' is also a tenet of the prior

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[222] Order at 25. References to the "Order" refer to Judge Barry Wood's *Order on Plaintiffs' Motion for Summary Judgment* in *American Falls Res. Dist. #2 v. IDWR*, Case No. CV-2005-600, Idaho District Court for the Fifth Judicial Dist., County of Gooding (June 2, 2006).

[223] Order at 25.

[224] Order at 83.

[225] Order at 92.

[226] Order at 92.

[227] Order at 90 and 102.

appropriation doctrine."[228] Judge Wood specifically noted that the prior appropriation doctrine allows the state "to compel a senior to modify or change his point of diversion under appropriate circumstances."[229]

In a portion of the order that could have particular relevance to the injury claims of the Spring Users in the Hagerman Valley area, the District Court states that, in a delivery call, the Director is entitled to "tak[e] into account whether the senior is protected to historical diversion levels or reasonable aquifer levels."[230] The Judge ruled that "a water user may not command the entirety of a volume of water of a ground or surface source to support his appropriation for a beneficial use involving less than the entire volume," and that "a senior spring user cannot tie up the entire volume of water of an aquifer in order to maintain the natural flow of a spring."[231] The District Court referred to this as the "bath tub" example, wherein "the only time the 'over-flow' produces water is when the bath tub is full."[232]

The District Court acknowledged that juniors subject to a delivery call are entitled to a hearing, and may offer evidence to show, among other things, that the senior is "wasting water," or "to establish a futile call."[233] The lower court agreed that "the policy of the state is to secure the maximum use and benefit and least wasteful use of its resources," and the Rules' "integration of this policy" "is not necessarily inconsistent with Idaho's version of the prior appropriation doctrine."[234] The District Court ruled that a "senior user cannot call for water if the water is not, or will not, be put to a beneficial

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[228] Order at 88.

[229] Order at 89.

[230] Order at 102.

[231] Order at 88-90.

[232] Order at 90; n. 21. The ESPA actually exhibits greater spring discharges in this area today than it did before any significant water development began on the Snake River Plain. This is due to incidental recharge to the aquifer, and increases in aquifer storage, that resulted from surface water irrigation on the Plain beginning in the late 1800s. Between 1902 and 1953, the spring discharges in this fabled "Thousand Springs" reach increased by approximately 3,700 cubic feet per second, nearly doubling the 1902 discharges. Most of the rights appropriated by the Spring Users were established when the aquifer was in this enhanced state. Since 1953, spring discharges have gradually decreased (although they still are above 1902 levels), due in part to the use of increasingly efficient surface irrigation practices on the Eastern Snake River Plain that have reduced the historical incidental recharge. Ground water pumping and cyclical drought also are seen as causes of spring flow declines.

[233] Order at 101.

[234] Order at 86.

use, irrespective of whether the right is decree,"[235] and acknowledged "that most of the issues pertaining to the principles comprising the prior appropriation doctrine have developed in the context of surface water only. Applying these same principles to the integration of surface and ground water presents an entirely new set of complexities."[236]

Plaintiffs' arguments to the District Court essentially took the position that in water right administration there is no place for any of the several tenets of Idaho's prior appropriation doctrine except the "first in time" rule. They ended up with a decision from the District Court that disagreed with this theory and with most of their substantive claims. As the Supreme Court was to note in its decision, the "district court rejected [Plaintiffs'] position . . . that water rights in Idaho should be administered strictly on a priority in time basis."[237] The upshot is the unremarkable proposition that all of the doctrine's tenets remain in play not just at the appropriation stage, or at the time a water right is scrutinized in an adjudication, but throughout all periods when the right is being exercised. And especially when its owner asks the state to curtail others to supply it. Plaintiffs did not appeal the District Court's rulings on these issues, although they continued to argue about several of these points in their briefs to the Supreme Court.

The District Court rejected Plaintiffs' core contentions about Idaho water law, but did conclude that the Rules are unconstitutional primarily with regard to certain procedural points. As the Supreme Court put it, "[w]hile the district court largely rejected [Plaintiffs'] arguments, it did grant summary judgment based on its finding that the Rules are facially unconstitutional on a different basis: a lack of 'procedural components' of the prior appropriation doctrine that the court viewed as constitutionally mandated."[238] The District Court perceived constitutional infirmities in the Rules' failure: 1) to describe burdens of proof and evidentiary standards applicable in a delivery call; 2) to give proper legal effect to senior water right decrees; 3) to describe objective criteria necessary to evaluate these factors; and 4) to establish a time frame in which the delivery call process must be completed.

The District Court had believed that "[s]uch components are necessary to protect and prevent diminishment to vested senior property rights," and that without these elements in place, "seniors are put in the position of re-defending their adjudicated water right every time a call is made for water."[239] Judge Wood had concluded that while "some minimal due process is required" in carrying out a delivery call, "setting up a

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[235] Order at 86.

[236] Order at 91.

[237] *American Falls*, 154 P.3d at 441.

[238] *American Falls*, 154 P.3d at 439.

[239] Order at 90 and 97.

procedural labyrinth of requiring a senior water right holder to initiate a contested case proceeding . . . which cannot be completed during the irrigation season prevents timely administration to a growing crop and was not what either the framers of the constitution had in mind or what the legislature had in mind in adopting" Idaho's water administration statutes.[240]

As to the substantive issues, the District Court concluded that the Rules' exclusion of domestic and stock water rights from administration amounts to a taking of the senior's water right without compensation. It also struck down the Rules' treatment of a senior's carryover storage in a delivery call.

The carryover storage ruling could be seen as the central substantive water law question in the case on appeal. The question was whether it is constitutional for the Director to ascertain whether "the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies" before curtailing junior well owners, as specified by the Rules. IDAPA 37.03.11.42.01.g (the "Carryover Rule").

The Carryover Rule defines reasonable carryover as the water an appropriator would have left in his reservoir account at year's end "under comparable water conditions" without restricting his ability to divert water to storage and fill his reservoirs when water is available: "In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system." IDAPA 37.03.11.42.01.g. Plaintiffs claimed, and the District Court agreed, that it was unconstitutional for the agency ever to require an appropriator to use some of its storage before curtailing junior rights.

The State and the ground water users appealed to the Idaho Supreme Court. The Plaintiffs did not appeal.[241] The Idaho Supreme Court took up the matter on an expedited schedule. As to their delivery calls, Plaintiffs technically could have gone forward with the administrative hearing during the court challenge and appeal; indeed, the Plaintiffs successfully resisted the State's motion that the Supreme Court stay the administrative action until after it ruled. Nonetheless, Plaintiffs did not press for action before the Department, and the calls effectively were placed on hold while the Rules challenge went through the appeal.

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[240] Order at 97-98.

[241] One of the plaintiffs, Clear Lakes Trout Co., had raised an equal protection argument below—arguing that the Rules impermissibly allow different standards to apply to ground water and surface water rights—and did appeal the District Court's rejection of their theory to the Supreme Court. However, the Supreme Court did not address the question.

Presumably, now that the Idaho Supreme Court has made its decision, the Surface water users' allegations of injury will resume as contested cases before the Department. *AFRD* makes clear that the Rules set forth correct legal standards under which the Department will hear these cases.[242]

(c) The Supreme Court's decision in *AFRD*

(i) The *AFRD* ruling on facial vs. "as applied" constitutionality

To begin with, the Idaho Supreme Court held that the District Court erred in considering a lawsuit that evaluated aspects of the Rules "as applied." The high court held, as defendants had argued below, that the reference to a rule's "threatened application" in Idaho's declaratory judgment statute is intended "to permit standing to challenge a rule, but does not eliminate the need for completion of administrative proceedings for an as applied challenge."[243] The Court noted that "a district court cannot properly engage in an 'as applied' constitutional analysis until a complete factual record has been developed."[244] However, rather than simply reverse on this single point and dismiss the case as premature, the high court took up, and ultimately reversed, the balance of the District Court's opinion.[245]

(ii) The *AFRD* holding on the Rules' lack of certain procedural components

The Supreme Court analyzed each of the "tenets and procedures" the District Court had concluded the constitution requires be set out in the Rules. As a starting point, the court noted that the Rules expressly incorporate all applicable Idaho law, and found that "it is unnecessary to incorporate every extant law unless specifically necessary to a clear understanding of the particular Rule."[246] This is particularly the case, found the

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[242] Plaintiffs sought rehearing before the Idaho Supreme Court on the carryover storage issue. As of this writing, the Court has not acted on the rehearing petition. Plaintiffs also refiled their delivery calls for 2007.

[243] *American Falls*, 154 P.3d at 442-43.

[244] *American Falls*, 154 P.3d at 442-43.

[245] Actually, the Court affirmed the District Court on one ruling not germane to the water law issues: whether the lower court erred by revoking the City of Pocatello's intervention as a party in the case. The Supreme Court agreed that the District Court had properly exercised its discretion in that regard.

[246] *American Falls*, 154 P.3d at 444.

court, in a constitutional challenge where a court is required to seek an interpretation of a rule that upholds its constitutionality.

As to the specific rulings, the court first reversed the District Court's conclusion that the Rules must specify burdens of proof and evidentiary standards. These procedures "have been developed over the years and are to be read into the Rules," and the Rules "do not permit or direct the shifting of the burden of proof."[247] The court expressed no opinion as to what those burdens are in connection with particular claims, defenses, or factual allegations in a water delivery call.

Second, the Supreme Court rejected the District Court's conclusions about "timely administration" of water rights. "Even if this Court embarked on an analysis of an as applied challenge to the Rules, the facts developed thus far do not support American Falls' contention that it was deprived of timely administration in response to the Delivery Call."[248]

> Clearly it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water. While there must be a timely response to a delivery call, neither the Constitution nor the statutes place any specific timeframes on this process, despite ample opportunity to do so. Given the complexity of the factual determinations that must be made in determining material injury, whether water sources are interconnected and whether curtailment of a junior's water right will indeed provide water to the senior, it is difficult to imagine how such a timeframe might be imposed across the board. It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.

AFRD, 154 P.3d at 446.

Third, the court took up the question of whether the Rules violated a constitutional principle for failing to enunciate "objective standards." The high court noted that the Rules catalogue numerous factors the Director may consider "in determining material injury and whether the holders of water rights are using water efficiently and without waste." The court held that these "are decisions properly vested in the Director."[249]

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[247] *American Falls*, 164 P.3d at 445.

[248] *American Falls*, 154 P.3d at 445.

[249] *American Falls*, 154 P.3d at 446.

> Those factors, of necessity, require some determination of "reasonableness" and it is the lack of an objective standard—something other than "reasonableness"—which caused the district court to conclude the Rules were facially defective. Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director. . . . [T]he Rules are not facially deficient in not being more specific in defining what is "reasonable" in any given case.

AFRD, 154 P.3d at 446.

Fourth, the Supreme Court addressed the District Court's conclusion that the Rules "allow the Director to, in essence, re-adjudicate water rights by conducting a complete re-evaluation of the scope and efficiencies of a decreed water right in conjunction with a delivery call."[250] The Supreme Court noted, with evident approval, that the District Court had ruled that "even with decreed water rights, the Director does have some authority to make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use and full economic development."[251] The court found that the Rules allow the Director to consider factors such as "the system, diversion, and conveyance efficiency, the method of irrigation water application and alternate reasonable means of diversion."[252]

Plaintiffs had argued that "the Director is not authorized to consider such factors before administering water rights" and "is 'required to deliver the full quantity of decreed senior water rights according to their priority' rather than partake in this re-evaluation. (Emphasis in original brief.)."[253] In rejecting the plaintiffs' position, the court focused on the admonition in the Constitution itself that priority is to be extended only to those actually using water. Consequently, the court found that actual use always is a factor to be considered in water rights administration.

> Clearly, even as acknowledged by the district court, the Director may consider factors such as those listed above in water rights administration. Specifically, the Director "has the duty and authority" to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right. If this court were to rule the Director

[250] *American Falls*, 154 P.3d at 447.

[251] *American Falls*, 154 P.3d at 447.

[252] *American Falls*, 154 P.3d at 447.

[253] *American Falls*, 154 P.3d at 447.

> lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water. Additionally, the water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a readjudication.

AFRD, 154 P.3d at 447-48.

(iii) The *AFRD* ruling on carryover storage

Carryover storage refers to "the unused water in a reservoir at the end of the irrigation year which is retained or stored for future use in years of drought or low-water." *AFRD*, 143 Idaho at 878, 154 P.3d at 449. There is no doubt as to the right of the holder of a storage right to retain such stored water for future years. The issue in *AFRD* was whether a person who held both storage rights and natural flow rights could curtail junior users in order to provide a full supply of his natural flow rights despite the availability of water in storage. In other words, is the holder of these rights obligated first to draw on his own storage before curtailing juniors? Or, to put it yet another way, may the Director "refrain from curtailing junior water rights if a senior has sufficient storage rights to meet his needs"? *AFRD*, 143 Idaho at 879, 154 P.3d at 450. The Conjunctive Management Rules said the answer is, essentially, maybe. Specifically, the Rules allow the senior to demand both all natural flow rights necessary to satisfy his beneficial use plus a reasonable quantity of carryover storage. That is, he must use his storage rights before curtailing others to the extent that the storage rights are in excess of what is reasonably needed to protect against future drought.

Judge Wood had concluded that the Rules are unconstitutional in allowing the Department to consider a senior's carryover storage in determining whether to curtail juniors. The Supreme Court also reversed Judge Wood on this issue.

> Concurrent with the right to use water in Idaho "first in time," is the obligation to put that water to beneficial use. To permit excessive carryover of stored water without regard to the need for it would be in itself unconstitutional. The CM Rules are not facially unconstitutional in permitting some discretion in the Director to determine whether the carryover water is reasonably necessary for future needs.

AFRD, 154 P.3d at 451. The court further held:

> Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use. At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or
> future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law in Idaho.

AFRD, 154 P.3d at 451.

(iv) The *AFRD* ruling on domestic and stock water rights

The District Court had held that the Rules' exemption of domestic and stock water rights from administration in a delivery call amounted to a taking of the seniors' water rights—in other words, that conjunctive administration should not give this category of water rights a free pass.[254] Neither side attacked this ruling in its appeal briefs, but the Supreme Court took it up anyway, reversing the District Court. The Supreme Court's position was that the Constitution allows those diverting water for domestic purposes to have "preference" over those using for any other purpose, provided that the domestic right owner provide compensation to the rights taken.[255] Even though the Rule exempting domestic and stock water rights does not reference the "take, but compensate" authority,

[254] The Rules provide an exemption from administration for domestic and stock water rights. IDAPA 37.03.11.20.11.

[255] "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 appropriations shall give the better right as between those using the water; but when the water 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 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, shall have preference over those using the same for manufacturing or agricultural 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." Idaho Const. art. XV, § 3.

the court reasoned that because the Rules incorporate all applicable Idaho law and do not prohibit use of this authority, this provision is constitutional.

The court did not explain how a stock water right—presumably an "agricultural" entitlement within the constitutional provision—might be able to have preference over another agricultural water right, such as the irrigation rights the Canal Companies assert in the pending delivery calls. The constitutional provision does not mention stock water rights as such, but expressly provides agricultural rights as a preference only over those using water for "manufacturing purposes."

The Idaho Supreme Court's decision in *AFRD* likely will be seen as a milestone in Idaho water law. It cleared away a number of questions about the Rules and reaffirmed several fundamental principles of the prior appropriation doctrine.

(6) Round Six: The ESPA delivery calls go to hearing before the Department, result in rulings

In the four months between January and April 2008, and following close on the heels of *AFRD*, the Idaho Department of Water Resources ("Department") conducted hearings and issued decisions in three delivery calls in these near-epic contests between holders of ground and surface water rights in or dependent upon the huge ESPA.

The amount of water in ESPA storage increased dramatically after surface water irrigation began in eastern Idaho in the late 1800s—seepage from ditches and fields, and even year-round diversion practices in some areas, put huge amounts of water into the aquifer. With the advent of ground water pumping in about 1950, and later the conversion of flood irrigation techniques to more efficient methods, both the amount in storage and the amount of incidental recharge declined. While aquifer levels still are above those believed to have existed before settlement, aquifer contributions to the Snake River have declined since about 1950, primarily in two reaches. One is upstream from Twin Falls where river flows serve the senior rights of the seven irrigation districts and canal companies calling themselves the Surface Water Coalition ("SWC"). The other is at the western edge of the ESPA where the aquifer spills spectacularly out of the walls of the deep Snake River canyon in huge springs whose cold, pure waters supply trout farms (the "Spring Users"), hydropower, and other uses on bench lands situated between the aquifer and the river.

As discussed above, in 2005, believing ground water pumping had injured their water rights, both the Spring Users and the SWC filed delivery calls with the Department's Director by which they sought orders shutting off literally hundreds of junior ground water irrigation wells in the ESPA. This section discusses the outcome (so far) of these delivery calls.

AFRD answered fundamental questions about how delivery calls—particularly those involving disputes between ground and surface water rights—are to be carried out in Idaho, and affirmed the Department's administrative rules governing such calls. While it is appropriate to identify *AFRD*, and now these decisions, as milestones in Idaho water law, to a great extent these rulings all reaffirm—albeit in the new setting of conjunctive administration—principles of water law that have been around for decades. The senior surface water users in these cases contended that such principles do not apply or should be narrowed. These contentions failed. However, the decisions of course still require juniors to answer for actual material injury they cause to senior water rights, subject to several "public interest" limitations.

The first of these post *AFRD* decisions, a hearing officer's post-hearing recommended order to the Director, was issued January 11, 2008 in the Spring Users' delivery call. The second was the January 29, 2008 ruling from the Director in the A&B Irrigation District delivery call. The third, issued April 29, 2008, was the hearing officer's recommended order in the Surface Water Coalition's delivery call. (Below, we discuss the SWC case first, because it provides useful context for considering the others.)

(a) Surface Water Coalition delivery call—the Hearing Officer's Recommended Order

Editor's note: The discussion below was written before the appeal of the Director's ruling. That ruling was largely affirmed by the district court, which, in turn, was affirmed by the Idaho Supreme Court in A&B Irr. Dist. v. IDWR, 153 Idaho 500, 284 P.3d 225 (2012) (Burdick, C.J.).

On April 29, 2008 the Department's Hearing Officer issued his Recommended Order[256] in the case before the Department entitled *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of [the Surface Water Coalition]* (2008).

In this case, seven irrigation districts and canal companies holding senior rights to divert from the Snake River, and pursuing their claims jointly under the name "Surface Water Coalition" ("SWC"),[257] filed a delivery call with the Department in early 2005

[256] The Department's Rules specify the process by which the Director assigns a matter to a hearing officer, who then makes a recommended order for the Director's consideration. IDAPA 37.01.01.720 (Rule 720).

[257] The SWC participants are Twin Falls Canal Company, North Side Canal Company, Minidoka Irrigation District, Burley Irrigation District, Milner Irrigation District, American Falls Reservoir District No. 2, and A&B Irrigation District. Each diverts from the Snake River at or just above Milner Dam, which is up-river from the City of Twin Falls.

seeking curtailment of hundreds of ground water wells in Water Districts 120 and 130, which cover a large part of southern Idaho's agricultural land.[258] In response, the Director issued an emergency, pre-hearing order in May 2005 and supplemented it several times thereafter (collectively, the "Emergency Order").[259] The Emergency Order found it likely that ground water pumping in these areas was causing, or had caused, material injury to two of the SWC members' surface water rights, and directed junior ground water right holders (at least pending a full evidentiary hearing) to provide replacement water to these two SWC members. The Emergency Order determined that the other five had not suffered material injury and were not likely to in the coming irrigation season. Both sides filed exceptions to the Emergency Order and asked for a hearing.

The evidentiary hearing in the controversy was delayed for nearly two years while the parties took a side trip to district court and then to the Idaho Supreme Court to test SWC's theory that the Department's Conjunctive Management Rules ("Rules") are unconstitutional. This, of course, resulted in the *AFRD* decision rejecting SWC's theory that the Rules impermissibly allow the Director to evaluate various factors, such as the senior's means of diversion, its actual use of water, and factors pertaining to material injury. In early 2008, the SWC matter finally went to evidentiary hearing on both sides' challenges to the Director's Emergency Order. The Department's Hearing Officer, retired Idaho Supreme Court Justice Gerald F. Schroeder,[260] issued a recommended decision (i.e., a recommendation to the Director) on April 29, 2008 ("SWC Rec. Order").

In most respects, the SWC Rec. Order affirms the Director's Emergency Order, which had projected some material injury to, and required replacement water for, Twin Falls Canal Company ("TFCC") and American Falls Reservoir District No. 2. However, the trial produced several important adjustments to the Director's approach.

These are the most significant portions of the Hearing Officer's Recommended Order:

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[258] The SWC call actually did not seek to shut off ground water rights in Water District ("WD") 130; it named only the more easterly (upstream) WD 120. However, the Director determined that, based on evidence available to the Department (including results from running various scenarios under the Eastern Snake Plain Ground Water Model), pumping in the adjacent WD 130 also had an effect on river reach gains above Milner, and that therefore WD 130 must be included. Ground water pumping in WD 140 is projected by the ground water model to have significant effects in both WDs 120 and 130, so we can expect 140 to be a target of future delivery calls.

[259] Idaho's Administrative Procedure Act authorizes an agency, in certain circumstances, to issue an emergency order before conducting a hearing on the matter, provided the hearing is conducted "as quickly as feasible." Idaho Code § 67-5247(4).

[260] The parties stipulated to former Justice Schroeder's appointment to the case.

(i) Neither side should be seen as the bad guy

The Hearing Officer began with language plainly intended to defuse the rhetoric and emotion that has arisen around this multi-year controversy. He noted that both the surface water users and ground water pumpers have valid water rights and both have contributed to the development of the state. The surface water users "have opened vast expanses of land to productivity" and "have done so under a state of law that appeared to provide them with protection ('first in time, first in right') from interference with the rights they developed." SWC Rec. Order at 1-2. The ground water pumpers, he wrote, "are not poachers who sneaked through an unlocked door to take water away from surface water users." SWC Rec. Order at 2. He also concluded that the interconnected Snake River and ESPA system "has not run out of water." SWC Rec. Order at 6.

(ii) The Director is obligated to investigate the senior's injury claims rather than taking them at face value

Hearing Officer reiterated this fundamental ruling from *AFRD,* noting that "to do otherwise would be irresponsible to the public interest and often unduly expensive to the parties." SWC Rec. Order at 28.

(iii) Some SWC members suffered material injury in 2004 as a result of ground water pumping, and, in his Emergency Orders, the Director reasonably predicted the same would occur in 2005

There was not much evidence of crop loss due to lack of water in this case. The SWC failed to identify lands that were not irrigated, or insufficiently irrigated, due to lack of water. However, the Hearing Officer found, based on certain Farm Services Administration information upon which the Department had relied, that there were some instances of water shortages that "adversely impacted crops and influenced crop decisions, e.g. foregoing a cutting of hay to supply water to corn crops." SWC Rec. Order at 30.[261]

[261] Since the SWC delivery call, which is deemed renewed each year, has been in place since 2005, the Department has responded to it in the context of three separate years. After the hearing in the case, Department staff issued a memorandum containing injury calculations for 2007 and the projected injury for 2008. "Surface Water Coalition Call 2007 Final Injury and 2008 Predicted Injury," *Memorandum from Steve Burrell, Hydrology Section, to Director Dave Tuthill* (April 14, 2008). The memorandum calculates a total of 17,345 acre-feet of injury in 2007, all to one SWC member: Twin Falls Canal Company. It projects no injury for any SWC member in 2008.

(iv) Burdens of proof in a water call

Citing *AFRD*, the Hearing Officer found that the senior users in a delivery call "have the initial burden of establishing their water rights and material injury to those water rights," after which the burden shifts to the junior to present defenses. SWC Rec. Order at 25. The Hearing Officer noted that the Emergency Order does not make clear how the Director applied these burdens, but since the Emergency Order was issued without the benefit of hearing, that could be expected. In any event, the Hearing Officer made it clear that he applied the burdens as the Supreme Court had directed.

(v) The Department appropriately used a regional ground water model to determine several facts about the interaction of the aquifer and the river

The ESPA controversy has proceeded concurrently with the development and refinement of the Eastern Snake Plan Aquifer Model ("ESPAM"), a multi-agency project that has been produced over several years of data gathering, scientific collaboration and number crunching (and continues today). The Hearing Officer noted that ESPAM has limitations. It cannot predict, for example, the effect of a well on a particular spring outflow into the Snake River. However, the Hearing Officer found that the model has scientific basis and is the best tool currently available to make certain predictions. SWC Rec. Order at 33. In summary, the model predicts the effects of ground water pumping on several Snake River reaches across southern Idaho. Among these is the conclusion that "ground water pumping has contributed to a decline in ground water levels ranging between five and 60 feet throughout the ESPA." SWC Rec. Order at 6. This has contributed to a declining trend in reach gains to the river above Milner during the irrigation season. SWC Rec. Order at 10. The Hearing Officer found the evidence to show that about "90% of the total steady-state depletions to ground water pumping have manifested themselves in the Snake River." SWC Rec. Order at 12.

(vi) The Department appropriately applied a ten percent error factor to the model and established a "trim line" to limit the extent of ground water curtailment

In his Emergency Order, the Director had found the model to embody a ten percent margin of error and therefore determined that ground water rights falling within an area having ten percent or less effect on a particular reach would not be curtailed or required to provide mitigation as a result of the SWC delivery call. (He made a similar ruling in the Spring Users case, discussed below.) According to the Hearing Officer, "Application of the trim line was proper to avoid a significant probability that curtailment would extend to ground water users who would suffer significantly without contributing water where necessary to remediate the material injury to the surface water users." SWC

Rec. Order at 33. The Hearing Officer observed that as the model is refined, "these improvements should be applied as they occur." *Id.* at 34.

(vii) Not all pumping from the ESPA adversely affects the SWC's water rights; in wetter years, there is no injury and conjunctive management is "unnecessary or minimal"

SWC Rec. Order at 29. The Hearing Officer found that during recent drought years, "ground water pumping has affected the quantity and timing of water available to SWC members." *Id.* This and other portions of the Recommended Order contradict one of SWC's core contentions—namely, that the ESPA is over-appropriated and that there is ongoing injury that can be solved only by permanently shutting off many wells. *See, e.g.*, SWC Rec. Order at 18. The Hearing Officer found that:

> not all water withdrawn from pumping has an adverse effect on surface water users dependent upon the Snake River. Sometimes there is enough water entering the system to fill all needs. In such circumstances conjunctive management is unnecessary or minimal.

SWC Rec. Order at 29.

(viii) The doctrine of "first-in-time, first-in-right" is to be applied in light of the public interest

The Director has discretion to consider factors that may outweigh a water user's priority, including the senior's actual need and beneficial use, actual acres irrigated and whether the irrigator is using reasonable means of diverting or applying the water. The Hearing Officer cited the case of *Schodde v. Twin Falls Land and Water Co.*, 224 U.S. 107 (1912), for the proposition that "the public interest is a factor to be considered in water rights litigation that impacts the public." SWC Rec. Order at 37. The Hearing Officer concluded:

> The Director is not limited to counting the number of acre-feet in a storage account and the number of cubic feet per second in the license or decree and comparing the priority date to other priority dates and then ordering curtailment to achieve whatever result that action will obtain regardless of actual need for the water and the consequences to the State, its communities and citizens.

SWC Rec. Order at 39. The Hearing Officer found that the senior must be placing "the water to a beneficial use," and must not simply have "a desire to use the maximum right

in the license or decree." *Id.* The Hearing Officer noted that these conclusions relative to the public interest are embodied in the Rules, and that they

> have significance in considering several issues in this case. They affect the Director's use of the so-called "trim line," a point of departure beyond which curtailment will not be considered. It affects the Director's consideration of alternatives to curtailment. The public interest affects determination of whether there will be curtailment of other mitigation to provide for carryover storage water, drawing a line between what is reasonable and what is hording [*sic*]. It affects consideration of issues of farm efficiency as opposed to achievable farm efficiency. Consideration of the public interest gives relevance to evidence of the economic impact of curtailment upon the State and local communities.

SWC Rec. Order at 39. These are examples of rulings in this case that restate longstanding principles of water law, but ones that the SWC has maintained do not apply in their actions against ground water users.

(ix) In a delivery call, the Department must remove non-irrigated lands from its injury or curtailment calculation

It seems elementary that when an irrigation entity, such as those in the SWC, makes a delivery call to supply its irrigation water rights, it should expect the State to curtail juniors only to the extent necessary to supply actually irrigated acres. However, in their 2005 delivery calls the SWC members did not describe the number of acres that actually are irrigated within their boundaries, relying instead on their more generally described boundaries and the number of shareholders or members they have. This approach was rejected by the Hearing Officer, who found, in his SWC Rec. Order, that some 14,500 acres in three of the seven irrigation entities "are not irrigated" and cannot be considered in calculating their necessary water supply.[262] SWC Rec. Order at 53. Much of this non-irrigated area is comprised of land that, though farmed in the past, now has been developed into residential subdivisions and commercial areas. The Hearing

[262] The group of irrigation entities that brought the ESPA delivery call (which calls itself the Surface Water Coalition) is comprised of seven members. It is possible that the other four entities not mentioned by the Hearing Officer in this context also have acres that are not irrigated but for which curtailments are sought. At the hearing, the ground water users offered evidence only on the three noted by the Hearing Officer in the Recommended Order (Twin Falls Canal Co., Minidoka Irrigation District, and Burley Irrigation District).

Officer concluded that the "calculation of a water budget in determining if there will be curtailment should be based on acres, not shares." *Id.*

(x) The Director appropriately adopted a "minimum full supply" concept to project material injury, but did not employ it correctly and now must modify it

In the Emergency Order, the Director had calculated the minimum water supply, both natural flow and storage, the seniors needed to meet their crop requirements in the upcoming irrigation season. Then he compared this to the predicted 2005 supply to determine injury. The SWC members objected, again asserting simply that they were entitled to their licensed and decreed amounts. The Hearing Officer approved of the minimum full supply concept, noting that "if it accurately defines need, use of water above that amount would not be applied to a beneficial use and would constitute waste." SWC Rec. Order at 44. However, the Hearing Officer found that the Director's use of 1995 as a baseline year, without adjustment to take into changing conditions, was inappropriate.

(xi) The Director's use of 1995 as a fixed base year for determining minimum full supply was not appropriate.

The Hearing Officer observed that the Director's use, in the Emergency Order, of 1995 conditions as involving the SWC's minimum full supply "was never intended as a final word," that the baseline should not be fixed onto one year, and that it should be "adjustable" to reflect wet and dry years and changing irrigation practices. Specifically, the Hearing Officer concluded that the 1995 baseline should be analyzed and adjusted as necessary to embody the following elements:

- To what degree the need for irrigation water in 1995 was "depressed by the well-above average precipitation" that year compared to a normal year.
- Any significant cropping changes since 1995.
- Changes in facilities, diversion, conveyance, and irrigation practices, such as conversions to sprinklers.
- Soil conditions, such as soil water retention ability.
- The number of non-irrigated acres in the SWC entity's service area (this is discussed further below).
- Calculation of the senior's water needs should be based on acres, not shares in a mutual canal company (such as Twin Falls Canal Co.).

- Twin Falls Canal Company's per-acre full headgate rate of water delivery must be limited to $^{5}/_{8}$ miner's inch (0.0125 cfs), instead of the ¾ inch 0.015 cfs) they claimed (this is discussed further below).

SWC Rec. Order at 49-53.

(xii) Reasonable conservation practices and on-farm efficiencies

The City of Pocatello, which has at least one ESPA ground water right, had argued that the SWC members should be held to the standard of "achievable farm efficiency" in their irrigation practices. The Hearing Officer disagreed, noting that the Rules require the calling senior to employ "reasonable diversion and conveyance efficiency and conservation practices." SWC Rec. Order at 56. He concluded that the SWC members have been reasonably efficient and have employed reasonable conservation practices. However, he noted that if the Director identifies such measures that are not being used, he "may consider that fact in future determination of need." SWC Rec. Order at 57.

(xiii) The SWC members have a right to a reasonable amount of carryover storage, and juniors may be curtailed to provide it

Again, the Hearing Officer turned to the Rules, as supported by the holding in *AFRD*, to conclude that the SWC members are entitled to a reasonable amount of carryover storage. The Hearing Officer concluded that curtailment or a replacement water obligation to supply carryover storage could be imposed only for "the forthcoming year," and that attempting to ensure carryover "for periods of years" is problematic and presents "too great a likelihood for the waste of water." SWC Rec. Order at 62. "There is no precise amount of reasonable carryover storage, but the amount should be sufficient to assure that if the following year is a year of water shortage there will be sufficient water in storage in addition to whatever natural flow rights exist to fully meet crop needs." *Id*.

(xiv) Juniors are not responsible for storage the seniors lease to others, and if the reservoir system fills, it cancels any need for mitigation

Curtailment cannot be imposed to make up for storage water whose holder sold or leased to others "for purposes unrelated to the original right." SWC Rec. Order at 61 and 64 (again citing *AFRD*). This includes stored water that is leased to other irrigators or for instream flow maintenance or salmon flow enhancements. On the other hand, if storage releases are mandated without compensation to the surface water users, then "ground water users would be subject to a condition for their depletion of the river." SWC Rec. Order at 61. If the senior's storage accounts fill, this "would erase the debits and credits"

relative to determining injury and the juniors' responsibility for mitigation. SWC Rec. Order at 62.

(xv) Mitigation or curtailment must be provided in the season when it is needed by the seniors

The ground water users responded to the Emergency Order by offering, in the 2005-2007 period, storage water and other measures to provide replacement water to offset the projected injury to the two SWC members. The Hearing Officer observed that despite these efforts, "the procedural steps for approving a mitigation plan," as outlined in the Rules, were not followed and there never was a hearing or other "protocol for the presentation of objections" on such a plan. SWC Rec. Order at 65. One of the criticisms SWC leveled at the replacement water plans was that they allegedly did not provide "in-season" relief. The Hearing Officer found that the injured seniors "are entitled to curtailment or replacement water in the season of material injury," and suggested that a protocol should be developed to handle these questions. *Id.* He ruled that in-season replacement may occur either by the ground water users "obtaining lease water before the beginning of [the] irrigation season" to provide to the seniors or "underwriting the affected SWC members in their acquisition of the water as needed with a year end accounting." SWC Rec. Order at 66.

(xvi) Desirability of ground water users obtaining their own storage for mitigation

The Hearing Officer observed that it "would be very desirable to have a mechanism for [ground water users] to have an independent right to storage which it could apply as replacement water as an alternative to curtailment . . . ." SWC Rec. Order at 11. To date, the ground water users do not have a permanent storage contract, and instead must obtain storage (typically on a one-year basis) from the Upper Snake Rental Pool.

(xvii) Likely no curtailment in 2008

The Department expects a full Snake River reservoir system in spring 2008. Accordingly, we anticipate that there will be an adequate water supply for SWC members in 2008 and that ground water users will not be required to curtail pumping or provide mitigation to surface water users in the upcoming irrigation season. However, it seems inevitable that drier years in the future will require ground water users to provide some level of mitigation or replacement water, at least to the two SWC participants who were deemed to have suffered injury in 2005. Assuming the Hearing Officer's recommendations are accepted (and upheld on any appeal), in those years the Director will implement the recommendations and, presumably, make additional findings concerning the issues the Hearing Officer identified but did not answer (these are discussed below).

(xviii) Remaining issues for the Director to address in future years

The Hearing Officer noted that the Director still will have facts to determine in coming seasons. These issues would include, perhaps among others:

- *Conduct further analysis of the base year in calculating minimum full supply*. As noted above, the Director would need to consider additional factors to determine the basis for calculating the seniors' minimum full supply.
- *Determine the acreage served by supplemental ground water rights held by SWC members*. The Hearing Officer found that an "undetermined number" of SWC irrigators may hold supplemental ground water rights. SWC Rec. Order at 10. During the first weeks of the delivery call in 2005, the Director had requested information from SWC about the number and locations of these wells, but this information was not made available then. Evidently it still remains unclear. In any event, the Hearing Officer noted that "[i]t would seem that any such ground water rights would be junior to the surface irrigation rights and subject to curtailment." SWC Rec. Order at 10. This appears to be another area where ground water users could insist on a display of facts in future years.
- *Account for additional non-irrigated acres within SWC*. The proof at hearing pertaining to non-irrigated acres focused on only three of the seven SWC members. Furthermore, even these three can be expected to have additional lands converted from irrigated agriculture to non-irrigated areas in the future. Consequently, it would appear that the Director would need to investigate such conversions in all seven entities before either determining material injury or setting a curtailment or mitigation number in the future.
- *Develop a protocol for considering mitigation or replacement water plans*. The Hearing Officer's decision carries the expectation that the Department will adopt a protocol for either providing storage water before the fact or paying for the seniors' purchase of it. Presumably, the Director will take one of these paths or adopt some other acceptable protocol. SWC Rec. Order at 65-66.

(b) The Spring Users' delivery call

The second part of what we refer to "Round Six" concerns the Spring Users' delivery call. On January 11, 2008, Hearing Officer Gerald Schroeder issued his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* ("Springs Rec.

Order") after a November 2007 evidentiary hearing in two consolidated delivery calls brought by Blue Lakes Trout Farm, Inc., and Clear Springs Foods, Inc. (together, the "Spring Users"). These entities are trout producers in Idaho's famed "Thousand Springs" region. Each holds water rights authorizing large diversions from springs that flow from the basalt canyon walls where the Snake River has incised into, and truncated, the Eastern Snake Plain Aquifer. The Spring Users' commercial trout facilities are situated between the aquifer and the river, and they depend on the gravity flow of large quantities of cold, high-quality water from the aquifer into their raceways. Their delivery calls were premised on the claim that junior-priority ground water pumping from the aquifer had depleted flows to their facilities and caused them material injury.

As was the case in the SWC delivery call, the Director had issued a pre-hearing emergency order. The Hearing Officer was in effect reviewing that order based on the evidence at a trial. His order is a recommendation to the Director after hearing.

Following the hearing, Hearing Officer Schroeder issued a recommended order that in nearly all material respects affirmed former Director Karl Dreher's orders that junior ground water users are to provide a certain level of mitigation to increase spring flows for the benefit of the Spring Users, based on injured spring water rights having priorities of 1964 and 1973. Many of the Hearing Officer's conclusions mirror those in the SWC delivery call decision, and these will not be repeated. In addition to those, the following are the key rulings in the Springs case:

(i) Ground water pumpers are not solely responsible for spring declines, but must stop diverting or provide mitigation to the extent their pumping interferes with senior rights

The ground water pumpers, acting through the North Snake and Magic Valley Ground Water Districts (the "Ground Water Districts") and represented by a larger consortium of such districts known as Idaho Ground Water Appropriators, Inc. ("IGWA"), pointed out that the Spring Users made their appropriations at times—primarily the 1960s and 1970s—when aquifer outflows at the springs were higher, due to incidental recharge from inefficient surface irrigation practices, than they were in 1902. "IGWA maintains that there should not be curtailment when the Spring Users' rights are dependent upon an inflated water level that was dependent upon incidental recharge that resulted from inefficient farming practices that cannot now be required." Springs Rec. Order at 7. The Hearing Officer acknowledged the anomalous situation in the ESPA, in which the aquifer holds more water now than it did under pre-development conditions, but applied the basic priority rule nonetheless. He noted that the Spring Users "cannot require the continuance of inefficient flood [irrigation] practices." At the same time, he found that ground water rights still must answer to the priority system. Accordingly, he ruled that the "Spring Users are entitled to curtailment to the extent that the junior ground

water users interfere with the water the Spring Users would otherwise have under their water rights." Springs Rec. Order at 8.

(ii) It was proper for the Director to consider historical information about water available to the Spring Users' rights at the time they were appropriated, and not base his analysis solely on the maximum amounts stated in the Spring Users' decrees

The Spring Users maintained that they should be entitled to curtail juniors to supply the full amount of their licensed water rights year-round, and that the Director was without power to "go behind" or "readjudicate" their recent SRBA decrees ratifying these amounts. The Ground Water Districts maintained that, at the time the spring rights were established, the supplies from the aquifer fluctuated down seasonally, and did not supply the maximum diversion amounts year-round. The Hearing Officer agreed with the ground water users, as had the Director in his emergency order. The amount of curtailment or mitigation would take into account such fluctuations. Springs Rec. Order at 10-11. The "Spring Users cannot be guaranteed the full amount of the water rights adjudicated every day of the year or every year when that condition has not existed during any relevant time." *Id.* at 18-19.

(iii) The ground water users failed to prove that the Spring Users employed unreasonable means of diversion

AFRD had confirmed that, in a delivery call, juniors can raise the defense that the seniors are not using reasonably efficient means of diversion. In his emergency order, the Director already had found a couple instances where the Spring Users were not using reasonable means, and he had restricted the amount of curtailment accordingly. At hearing, the ground water users argued for additional restrictions, but failed to provide adequate proof. The Hearing Officer found that arguments such as the possibility of horizontal drilling into the aquifer or pump-back arrangements lacked sufficient evidence to support expanding the Director's findings on this issue. Springs Rec. Order at 10-12.

(iv) The ground water pumpers were required to curtail, or provide replacement water equivalent to, some 57,000 acres of irrigated land in a program phased in over five years

As part of their mitigation or replacement water effort, the Ground Water Districts have obtained storage water with which to provide aquifer recharge for the benefit of spring flows, and have shut off several wells in favor of using available surface water to

irrigate these same lands. The Hearing Officer found that the Rules appropriately allowed phased curtailment or mitigation over a five year period.

(v) The 10% "trim line," based on model uncertainty, applies to the Spring Users' delivery call

As in the SWC delivery call, the Hearing Officer agreed it was appropriate for the Director to limit the reach of the delivery call to those wells for which the model predicts, with greater than 10% certainty, that their pumping depletes a particular spring reach. The use of the trim line was of huge import in this case. "One of the most startling facts in these cases is the amount of [ground water supplied] acreage that must be curtailed in order to deliver water to the Spring Users facilities." Springs Rec. Order at 22. The Hearing Officer noted that, without applying the 10% trim line, the number of ground water irrigated acres required to be dried up "for Blue Lakes would go from 57,220 acres to 300,000 acres. The acres curtailed to be applied to [Clear Springs] would rise from 52,740 acres to 600,000 acres." Springs Rec. Order at 22. The Hearing Officer recited the importance of ground water development to several cities and the agricultural industry in southern Idaho, then wrote:

> In this context to say that land will not be dried up when there is a substantial possibility that there will be no significant contribution to the Spring Users water rights is consistent with the policies set forth in the Conjunctive Management Rules, which are consistent with the Idaho Constitution and the legislative policy towards ground water development.

Spring Rec. Order at 23.

(vi) The public interest is to be considered when curtailment is proposed

Again citing *Schodde*, the Hearing Officer found that "the public good" can be considered in delivery calls such as this, and in some cases might "outweigh the private right." Springs Rec. Order at 15.

> "First in time is first in right" is fundamental to water administration but is subject to consideration of the public interest. The Director is not limited to counting the number of cubic feet per second in the decree and comparing the priority date to other priority dates and then ordering curtailment to achieve whatever result that action will obtain regardless of the consequences to the State, its communities and citizens. These conclusions have significance in several

> issues in this case. They affect the Director's use of the so-called "trim line," a point of departure beyond which curtailment was not ordered. The public interest affects the timing of curtailment. Consideration of the public interest gives relevance to the economic evidence that was presented.

Springs Rec. Order at 17.

(vii) Water quality of the Spring Users' supply is an element that may be considered

The Spring Users argued that the quality of the water they receive from the springs, including its temperature, is essential to fish propagation and should be maintained in any replacement water plan. Although water quality is not an element of a water right, the Hearing Officer concluded nonetheless that "in considering alternate proposals to provide water in a manner different from the practices in place when the rights were licensed and ultimately decreed, the quality of the water may be considered." Springs Rec. Order at 22.

(viii) Where the senior privately agrees to subordinate its water right, it cannot seek to fill it through a call against other juniors

In his Emergency Order, the Director had reduced the amount of water to which Blue Lakes was entitled by 0.7 cfs, which was the amount of a license that Blue Lakes in an earlier and unrelated dispute had agreed to subordinate to the more junior right held by a neighboring fish facility. The Hearing Officer concurred with the Director's view. "Rather than curtail [junior ground water pumpers] to provide this water, it should be counted as water already available to Blue Lakes Trout Farm." Springs Rec. Order at 25.

(ix) The Ground Water District's replacement water plan for 2008

The Magic Valley and North Snake Ground Water Districts, the only districts among the eight covering portions of the ESPA, submitted a Replacement Water Plan ("Plan") to the Department for 2008 that includes continuation of certain mitigation actions they have implemented in prior years, such as supplying surface water to formerly ground water-irrigated acres. The Plan also incorporates mitigation measures that have been facilitated by the joint purchase of a separate fish farm by the State, the City of Twin Falls and the Ground Water Districts. The purchase makes it possible for this farm's spring water to be redirected to supply the Blue Lakes hatchery, thus alleviating the shortage on which it based its delivery call.

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- The Ground Water Districts also propose to use spring water rights currently diverted by the Idaho Department of Fish and Game to supply up to 2 cfs of spring water to Clear Springs.
- Based on this representation by the Districts, the Director found them to be proceeding in good faith and did not curtail junior ground water users. The Idaho Supreme Court ultimately found the Ground Water Districts' Replacement Water Plan for 2008, though it provided sufficient replacement water that year for the seniors, violated the Rules' requirement that only formally approved mitigation plans can be used for this purpose. *In the Matter of Distribution of Water to Various Water Rights, A&B Irr. Dist. et al. v. Spackman*, Slip Op. at 19-20 (Dec. 17, 2013) (discussed below).
- Based on the Emergency Order, which the Hearing Officer largely ratified, the Ground Water Districts are obligated to provide increasing amounts of mitigation over a five-year period (beginning in 2005).

In his July 11, 2008 *Final Order Regarding Clear Springs and Blue Lakes Delivery Calls*, Department Director David Tuthill affirmed the Hearing Officer's Recommended Order in all material respects.

(c) IDWR Director's decision denying A&B Irrigation District's delivery call

This analysis discusses the third part of "Round 6," the Director's January 29, 2008 Order in the case before the Department titled *In the Matter of the Petition for Delivery Call of A&B Irrigation District for the Delivery of Ground Water and for the Creation of a Ground Water Management Area* ("*A&B Order*").

In the *A&B Order*, IDWR Director David Tuthill denied a water delivery call in which A&B Irrigation District ("A&B") sought to curtail potentially hundreds of junior ground water rights in the ESPA. The Director concluded that A&B had suffered no material injury and that the water supply problems they allege likely stem from poor well construction or location, overly-shallow pumping depths, and similar problems—not from reduced supply due to pumping by junior ground water right holders. In any event, he noted that A&B has sufficient water to fully irrigate its patrons' lands. The Director also denied A&B's request to create a Ground Water Management Area.

A&B is comprised of two divisions. The A Division relies on Snake River surface water to irrigate about 15,000 acres. With respect to these surface water rights, A&B is part of the Surface Water Coalition ("SWC"), and has participated in SWC's delivery call against essentially the same junior ground water rights as are involved in the A&B call (discussed below). The B Division, which serves some 63,000 acres and is the subject of the delivery call, relies on about 177 wells diverting ESPA ground water under 1948-

priority rights. This priority is among the most senior ground water priorities in the ESPA, and likely is a chief reason A&B has seen itself aligned with SWC, despite SWC's broad-based attack on ESPA pumping.[263]

A&B's position is that aquifer levels at its wells have dropped an average of 20 to 40 feet since 1959, and that it has had trouble pumping enough water to fully satisfy its rights. A&B alleged that it now can produce only about 974 cfs, about an 11 percent decrease in flow rate from the 1,100 cfs it says was available originally. *A&B Order* at 43. It blames junior ground water users.

A&B's delivery call against junior ESPA ground water users actually was filed in 1994, then put on hold due to a stipulation. In March 2007 A&B petitioned the Department to proceed with the matter, the Department did so, and the *A&B Order* resulted. A&B then challenged the *A&B Order*'s denial of its delivery call, and has petitioned for a hearing. The hearing was scheduled for mid-May 2008 before Hearing Officer Gerald Schroeder. In the meantime, A&B has filed a motion for declaratory order asserting that it is not subject to the Idaho law (or the Conjunctive Management Rule mandate) requiring ground water appropriators, at their own expense, to produce from a reasonable pumping level—that is, a level that is sufficiently deep so as not to command the entire ground water resource to the exclusion of other appropriators.

As he has done in the other two delivery call disputes (Spring Users and SWC), Director Tuthill reviewed the delivery call petition, evaluated information requested from A&B, considered the Department's own information about A&B's water rights, and then issued a decision. The Director's *A&B Order* reflects a significant amount of hydrological and geological analysis.

The *A&B Order*'s fundamental conclusion is that A&B failed to demonstrate material injury. The additional information the Director reviewed solidified this finding.

These are the main points from the A&B decision:

(i) A&B has a full water supply

The Director concluded that, in part due to efficiency improvements, such as sprinklers replacing flood techniques, A&B was receiving sufficient water from its wells to fully irrigate all the lands of its patrons (approximately 63,000 acres). Based on

[263] It is likely that any ground water curtailment to serve the SWC's surface water rights would not require shut-offs of ground water priorities as senior as 1948. Indeed, the Director's May 2, 2005 emergency order in the SWC delivery call (and subsequent orders supplementing it) affected only ground water rights that, though numerous, were many years more junior. As to a future Spring Users' call, it also is unlikely that ground water rights senior to the early 1960's would be subject to curtailment; most spring rights for fish propagation were granted between the late 1960s and mid-1980s.

studies by the Department, the University of Idaho, and the U.S. Bureau of Reclamation regarding irrigation water requirements within A&B—as well as information from A&B's own hydrogeologist—A&B has pumped a full water supply to its lands every year since 1994. *A&B Order* at 12-14.

(ii) Available date show that none of A&B's lands are short of water

A&B claimed it had 18,525 acres that were "water short," and not receiving the ¾ inch of deliveries per acre that A&B believes its lands require. The Department used an evapotranspiration model, Landsat photos, and other analyses to test this claim, and found that these lands in fact had been receiving adequate irrigation water. *A&B Order* at 15-23.

(iii) A&B has supplemental wells for which it has not accounted

Some 27,000 acres within A&B (including some of the claimed water short areas) receive ground water from private supplemental wells, although the "annual volumes pumped from these private wells were not provided by A&B and are not included in any A&B annual or monthly water use summaries." *A&B Order* at 16. In other words, the Director found A&B's wells annually pumped sufficient water for the entire project, but that over 40 percent of the project lands received at least some water from separate ground water pumps operated by A&B patrons. The Director did not discuss the priorities of these supplemental wells or their potential effects on the A&B wells.

(iv) A&B is subject to the reasonable pumping level mandate

The Director noted that ground water levels in the ESPA have declined some since the 1950s, but "generally remain above" the levels existing before surface irrigation and its attendant incidental recharge began in the late 1800s. *A&B Order* at 5. The Director concluded that A&B is required to produce its water from a reasonably deep level, and that there is no indication that A&B is being asked to pump water from below such a level. *Id.* Furthermore, the Director found that the costs A&B has incurred in deepening its wells "are not unreasonable." *Id.* at 45. In its recent motion for declaratory order, A&B argues that its 1948 priorities immunize it from the reasonable pumping level requirements of the 1951 Ground Water Act. The motion was argued in late April 2008, and the Director has not yet ruled on it.[264]

[264] There is little doubt that the Director will rule that A&B, despite having water rights that predate the 1951 Ground Water Act, is subject to the reasonable pumping level mandate spelled out in that statute. This is because the Director recently ruled, in another case, that pre-1951 rights are subject to the Act. *In the Matter of Applications To Appropriate Water Nos. 63-*

(v) Hydrogeology

The Department referenced several hydrological and geological studies of the ESPA in A&B's area to conclude that some of A&B's wells were located in areas having little ground water productivity. The Director noted that other A&B wells were constructed into areas that had not been evaluated for productivity. A&B Order at 24. The Director refused to curtail other ground water rights when A&B's own actions had left it with insufficient water due not to overall supply in the aquifer, but to their having chosen well locations poorly.

(vi) Well design and construction

A&B had asserted, in support of its delivery call, that it abandoned seven wells "because they no longer provide adequate water." *A&B Order* at 26. However, the Director found that only five had been abandoned and that the reasons for abandonment could not be laid at the feet of the junior pumpers (four were in the non-productive sediments in the south of the project and one was abandoned due to a crooked borehole). *Id.* at 27. A&B also maintained that since 1980 it "drilled 8 replacement wells to replace wells that would no longer provide an adequate water supply as a result of the lower ground water tables." *Id*. at 28. Again, A&B's assertions did not square with the facts, since there were only five such replacement wells, one was the well to replace the crooked bore described above, and four were in the difficult hydrogeological zone. In any event, the Director concluded that "[t]he need for well deepening, well replacement, pump lowering, and pump bowl replacement, however, is not a recent development and is attributable, in part, to substandard original well construction, routine operation and maintenance, extraordinary operation and maintenance caused by sand pumping, and a variety of other causes." *A&B Order* at 28.

The Director also found that that A&B did not have geophysical logs of its wells or information about the saturated thickness of the aquifer. *A&B Order* at 32. In the absence of this information, the Director concluded that "it is difficult to assess how serious a problem is posed by potential future water level declines." *Id.* at 32.

The Director ruled that "A&B has not adopted formal standards for the design and installation of wells," and instead designs wells informally with a drilling contractor. *A&B Order* at 44. A&B uses the cable tool drilling technique, "which is not well suited for use in the geological environment in the southwestern portion of the District…." *Id.* A&B's "[f]ailure to use appropriate technology artificially limits access to available

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32089 and 63-32090 in the Name of the City of Eagle (IDWR's Final Order Feb. 26, 2008; Order on Reconsideration July 3, 2008), *appeal dismissed as untimely*, *City of Eagle v. IDWR*, 150 Idaho 449, 247 P.3d 1037 (2011).

water supplies and is not consistent with the requirement for the appropriator to use reasonable access." *A&B Order* at 45.

(vii) Use of the ground water model

A&B sought to extrapolate effects on its wells from ground water pumping that might be deduced from use of the ground water model that has been used to evaluate pumping effects on reach gains to various reaches of the Snake River. The Director noted that the ground water model "does not properly account for local hydrogeologic features within the aquifer or local pumping effects and thus, should not be used to evaluate impacts of one well on another." A&B Order at 33.

(viii) Irrigation of enlargement areas

A&B asserted that it had some 22,700 acres of water-short areas under 39 wells. However, the Director observed that the senior water rights associated with these wells allow irrigation of about 4,100 fewer acres than this. *A&B Order* at 15. These acres may correspond to a similar number of acres that were recognized as enlargements in *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005) (Schroeder, C.J.). Enlargement acres received a statutory amnesty but are required to take a priority of 1994, the date of the statute.

(ix) Denial of ground water management area designation

Idaho Code § 42-233b authorizes the Director to designate a ground water management area ("GWMA") covering a ground water basin that he determines "may be approaching the conditions of a critical ground water area." The GWMA statute authorizes the Director to impose certain conditions or restrictions, including curtailment of junior rights, to protect ground water levels and senior water rights. A&B asked that the ESPA be designated as a GWMA, essentially as an alternative means to achieve curtailment of junior ground water rights. The Director denied the petition, concluding that because water districts pursuant to Idaho Code Title 42, Chapter 6, already are in place across the entire ESPA, and because administration of junior water rights can be carried out in these districts, "no additional relief would be provided to A&B by such a designation." *A&B Order* at 47.

(7) Round Seven: The SRBA Court's decision rejecting Idaho Power's attack on the *Swan Falls Agreement*

In its *Memorandum Decision and Order on Cross-Motions for Summary Judgment*, ("*IPCo Decision*"), Consolidated Subcase 00-92023 (92-93), *In re SRBA, Case No. 39576*, Idaho Dist. Ct., Fifth Judicial Dist. (April 18, 2008), the Snake River Basin Adjudication ("SRBA") Court ruled that the *Swan Falls Agreement*, the 1984 contract between the State of Idaho and Idaho Power Company, will be enforced as Idaho Power's

water rights are decreed in the SRBA. The court ruled that, under the *Swan Falls Agreement*, a portion of Idaho Power's hydropower water rights on the Snake River at Swan Falls Dam were placed in trust, with the State as trustee, and that these rights are subject to being subordinated by the State to new water rights licensed upstream or up-gradient that might deplete flows at Swan Falls. Such new rights, for irrigation and other uses, were granted in the ensuing years pursuant to statutory provisions implementing the Agreement.

The dispute arose when the SRBA court, "due to an oversight in uncontested cases," issued partial decrees naming Idaho Power as the sole owner of these water rights. *IPCo Decision* at 42. The State and others filed late objections seeking to name the State as owner, subject to the trust described in the *Swan Falls Agreement*. In this decision, the court ruled for the State, and will issue the decrees in the name of the State, as legal title holder, noting that Idaho Power and the citizens of Idaho share equitable title to those Idaho Power water rights held in trust pursuant to the *Swan Falls Agreement*. *IPCo Decision* at 20-21.

This decision thwarted Idaho Power's attempt to evade the *Swan Falls Agreement*'s subordination of the company's rights to junior ground water rights in the ESPA.

(8) Round Eight: The Idaho Supreme Court ultimately upholds most of the lower court (and Department) rulings on the Surface Water Coalition's original ESPA delivery call.

In December 2013, the Idaho Supreme Court issued its decision in the appeal from the protracted litigation that originated with the 2005 delivery call filed by the Surface Water Coalition—the same 2005 delivery call discussed above.[265] The high court had before it only a few issues on appeal, two of which are material here.

First was the question as to how material injury is to be determined. The SWC argued that the Director had abused his discretion with his approach, which:

> considered a "baseline quantity" independent of the decreed or licensed quantity. The baseline quantity represented the amount of water predicted from natural flow and storage needed to meet in-season irrigation requirements and reasonable carry-over [of storage]. The Director then

[265] *A&B Irrig. Dist. et al. v. Spackman,* 315 P.3d 828 (Idaho 2013).

> determined material injury based on shortfalls to the predicted baseline as opposed to the decreed or licensed quantities.[266]

The Court ruled that the factors for determining material injury in Rule 042 of the CM Rules require that "a finding of material injury requires more than shortfalls to the decreed or licensed quantity of the senior right."[267] of water to which the senior is entitled for deciding whether material injury has occurred to senior water rights that calculates "minimum full supply" and "reasonable in-season demand."[268] The Court upheld the Director's approach.

Second was the question whether the Director abused his discretion by not requiring the ground water users to implement a mitigation plan containing "contingency plans by which junior water right holders would ensure that material injury would not occur to the seniors' carry-over storage rights."[269] The Court agreed with the district court that the Director had, by allowing insufficient "water replacement plans," essentially followed a "wait and see" approach that put the risk of shortfall on the seniors. This approach, found the Court, was not allowed by the CM Rules.[270]

[266] *A&B Irrig. Dist. et al. v. Spackman,* 315 P.3d at 836.

[267] *Id.*

[268] *Id.*

[269] *Id.* at 842.

[270] *Id.*

10. STOCK WATER RIGHTS

Stock water rights may be obtained based on ground or surface water diversions. Such rights are referred to as "in-stream watering of livestock" rights where the livestock drink directly from a natural stream without use of a constructed physical diversion works.[271]

Holders of stock water rights are exempt from permitting requirements. (This is similar to the exemption for domestic ground water rights, as discussed in section 7.F(1) at page 108.) Of course, stock water users are free to, and often do obtain permits, licenses, and decrees for their stock water rights. Indeed, they must file a claim in the SRBA, although the claim deadline has been postponed. See discussion in section 37.C at page 702.

The Legislature has adopted a statute specifically designed to facilitate stream protection improvements that move cattle out of streams through the construction of off-stream troughs or tanks.[272] This statute requires the water user to file a notice, pay a small fee, and meet certain measurement and technical requirements, but it exempts the user from obtaining an approval of a change in the water right under section 42-222.[273] Water rights under this special provision are limited to 13,000 gallons per day per diversion.[274]

Where grazing occurs on federal lands, the federal government has taken the position that it holds stock water rights. President Coolidge's 1926 Executive Order withdrew and reserved thousands of tracts of public land containing water holes and other water sources used by the public for watering purposes. The SRBA Court concluded that the Executive Order did not create a federal reserved water right. The Idaho Supreme Court reversed, ruling that the Executive Order was an express statement showing an intent to reserve federal water rights in the waters on these lands. *United States v. State* ("*Basin-Wide Issue 9*"), 131 Idaho 468, 959 P.2d 449 (1998) (Walters, J.).

The Court noted that the purpose of the federal reservation was to ensure that the water would be available for use "by whichever member of the public happens at any time to have the grazing permit for the lands" thereby preventing private appropriations whereby "individuals could monopolize the water." *Basin-Wide Issue 9*, 131 Idaho at 471, 959 P.2d at 452. "To hold otherwise would be in contravention of the policy of this state 'to secure the maximum use and benefit, and least wasteful use, of its water

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[271] Idaho Code § 42-113(1).

[272] Idaho Code § 42-113(3).

[273] Idaho Code § 42-113(3)(d).

[274] Idaho Code § 42-113(3)(b).

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resources.'" *Basin-Wide Issue 9*, 131 Idaho at 472, 959 P.2d at 453 (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 502 P.2d 61, 65 (1960) (Smith, J.)).

An Idaho statute provides that any changes sought in such rights require the approval of the grazing permittee.[275]

Meanwhile, the United States pursued and obtained partial decrees for thousands of stockwater rights on non-reserved BLM land based on beneficial use (as opposed to federal reserved rights). These de minimis stock water claims were subject to deferral, but the United States elected to pursue them. Then, in 2007, the Idaho Supreme Court ruled water rights for stockwatering on unreserved federal land (BLM land) are held by the grazing permittee, not by the federal government. *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007) (Eismann, J.). That shut down any new federal stock water claims on BLM land, but left the thousands of rights already obtained intact. In 2020, however, the Idaho Legislature enacted Idaho Code § 42-224, which provides a mechanism for forfeiture of federal stockwater rights in accordance with the holding in *Joyce Livestock*.

[275] Idaho Code § 42-113(4).

11. METHODS FOR APPROPRIATING WATER RIGHTS

A. The permit/license method

(1) The "mandatory permit" requirement: Idaho Code § 42-229 (ground water-1963), §§ 42-103 and 42-201 (surface water-1971)

In the early days of settlement, water could be appropriated simply by taking it (see the "constitutional method" discussed below in section 11.B at page 180.) This "do-it-yourself" approach may have worked well enough for the early-arriving miners, all of whom essentially were temporary trespassers on the public domain. Their title, as against all but the federal government, could be perfected solely by the will to take possession of the water and the determination to keep it. It also helped that the relative number of these trespassers was small. But as more people arrived in Idaho and took water from the streams for the new and larger projects necessary to support permanent settlement, this early approach ultimately had two primary shortcomings. First, the appropriation was not confirmed or quantified in any way, and thus always was subject to challenge and uncertainty. Second, there was no way to secure a water right prior to completion of the proposed project.

In response to these problems, the Idaho Legislature soon created a more formal process for obtaining water rights through a state agency. In 1903 the Legislature established a permit-based procedure for the appropriation of water. Thus, since the early days of statehood, a person seeking a water right could file an application seeking a water right with the state reclamation engineer (now the Director of the Department of Water Resources).

In 1951, the Legislature enacted the Ground Water Act, 1951 Idaho Sess. Laws, ch. 200.[276] Section 7 through 12 of the Act established procedures for permitting and licensing of ground water rights. (These procedures were for ground water only, but loosely tracked modern sections 42-202 *et al.*, which today govern permitting and licensing of both ground and surface water rights). However, the 1951 Act expressly provided that the ground water permitting procedures were optional, and that ground water rights could also be created by diversion to beneficial use. 1951 Idaho Sess. Laws, ch. 200, § 4 (codified as amended at 42-229).

In 1963, the Ground Water Act was amended to make the permit process mandatory (with limited exceptions) for ground water rights. 1963 Idaho Sess. Laws, ch.

[276] The 1951 Session Law did not codify the legislation. Parts of it were later codified (section 1 through 6 of the Act became Idaho Code §§ 42-226 through 42-231).

216 (codified at Idaho Code § 42-229). The Act contained an emergency clause making it effective on March 25, 1963.

In 1971, the Legislature enacted legislation mandating permitting for all water rights (with exceptions). 1971 Idaho Sess. Laws, ch. 177 (codified at Idaho Code §§ 42-103, 42-201) (discussed in *Joyce Livestock Co. v. United States*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007)). The 1971 amendments did not single out surface water (as the 1963 amendments had singled out ground water). The 1971 amendments made permitting mandatory for all water rights, subject to exceptions carved out elsewhere. The 1971 Act did not contain an emergency clause, so it went into effect on May 20, 1971.

In 1986 the Legislature amended the mandatory permitting statute by re-numbering Idaho Code § 42-201 as subsection 42-201(1) and adding a new subsection 42-201(2). H.B. 369, 1986 Idaho Sess. Laws, ch. 313, § 2. Since its amendment in 1971, subsection 42-201 provided that the only way to obtain a water right is through the permitting process. But it did not expressly prohibit persons from diverting water to beneficial use without a permit. In other words, a person might lawfully choose to divert water to beneficial without the protection of a water right. The addition of subsection 42-201(2) in 1986 established that, henceforth, the only way to lawfully divert and apply water to a beneficial use is through the permitting process.

Today, the only water uses that are authorized to commence without an approved permit are domestic uses from ground water wells,[277] stock water use where the stock drink directly from a surface source,[278] firefighting,[279] and land application or other disposal of municipal effluent.[280]

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[277] Idaho Code § 42-227 (exempting domestic wells from licensing requirements); Idaho Code § 42-111 (defining "domestic purposes"); Idaho Code § 1401A(4) (definition of "Domestic use" for purposes of water right adjudications. See also IDAPA 37.03.08.035.01.b (exemption from application rules for ground water rights for "single family domestic purposes"); IDAPA 37.03.08.010.15 (definition of "Single Family Domestic Purposes" as "Water for household use or livestock and water used for all other purposes including irrigation of up to one half (1/2) acre of land in connection with said household where total use is not in excess of thirteen thousand (13,000) gallons per day."); IDAPA 37.03.11.020.11 (delivery calls not effective against exempt domestic water rights). See discussion of domestic ground water rights in section 7.F starting on page 108.

[278] Idaho Code § 42-113; IDAPA 37.03.08.035.01.c.

[279] Idaho Code § 42-201(3).

[280] Idaho Code § 42-201(8).

The permitting process is a two-step approach, involving a permit and then a license. The first step is to apply for a "permit."[281] The criteria for approval of a permit are discussed in section 16 at page 302. This is typically done before the applicant begins construction of the project. Once the permit is issued, it secures the holder's priority date. The holder then may construct the project with the knowledge that a water right, of known priority, will be available.

After the permit Application is filed, it is advertised according to statute. Other appropriators or members of the public are entitled then to protest the permit application within a fixed period of time. If that happens, the Department will conduct a "prehearing conference" in an effort to resolve the protest. If that does not end the protest, a full-blown administrative hearing takes place in which all parties present argument, testimony and other evidence.[282]

In deciding whether to grant a water right permit, the Department must determine whether the application satisfies statutory criteria. Today, there are seven set out in section 42-203A(5):

> 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 director 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 as defined in section 42-202B, Idaho Code, or
>
> (f) that it is contrary to the conservation of water resources within the state of Idaho, or
>
> (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates;

[281] Idaho Code § 42-202.

[282] Idaho Code § 42-203A(4).

> 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 quantity of water than applied for, or may grant a permit upon conditions.

Idaho Code § 42-203A(5) (formatted added to improve readability).

See also the summary of statutory tests in section 16 at page 302.

Note that Director may grant the permit in full or in part or with conditions.[283]

The Department has promulgated regulations addressing water appropriation. IDAPA 37.03.03. These include regulations governing trust water, IDAPA 37.03.08.000 to 37.03.08.039. It also includes regulations specifying information that must be included in an application for appropriation, IDAPA 37.03.08.040 ("Rule 40").[284] And it includes regulations setting out "evaluation criteria" for new permits. IDAPA 37.03.08.045 ("Rule 45").

There are no comparable rules for transfers.[285]

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[283] The Water Code provides: "[T]he director of the department of water resources may reject such application and refuse issuance of a permit therefore, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions." Idaho Code § 42-203A(5). The Department's rules provide: "The director will use the following criteria in evaluating whether an application . . . should be approved, denied, approved for a smaller amount of water or approved with conditions." IDAPA 37.03.08.045.01.

[284] More detailed "Additional Information Requirements" are set out in IDAPA 37.03.08.040.05. These requirements are waived for applications of 5.0 cfs or less. However, the Department reserves the right to require submission of this additional information even for small applications when it determines necessary. IDAPA 37.03.08.040.05.c. It has determined that certain additional information is required for municipal water right applications. See discussion in section 23.D(9) at page 412 of this Handbook.

[285] There are no comparable rules for evaluating the local public interest or other requirements in the context of water transfers. Indeed, the Department has not promulgated <u>any</u> rules governing water transfers. One might argue that these rules (applicable to new appropriations) should apply, at least by analogy, to public interest review in the context of water transfers. On the other hand, one might contend that the criteria should not be the same. Arguably a new appropriation (which, in effect, takes water out of the public domain) should be subject to more vigorous public review than the transfer of a water right from one private use to another. Because new appropriations are "free" (meaning that the appropriator pays nothing for the right except a filing fee), the marketplace provides no reality check on the economic value of

A permit is not a water right (though it does authorize the holder to divert and use the water under the terms of the permit). A water permit is often described as an inchoate right.[286] The permit is not itself real property, but represents the user's right to perfect an interest in real property. Consequently, it is described as personal property, rather than real property.[287] Consequently, the Legislature may change the rules governing licensing and make the changes applicable to existing permit holders.[288] Other than this, the real versus personal property distinction is largely semantic (but see the discussion of differences in how the two are conveyed).

(2) Proof of beneficial use at the end of the "development period."

Once the permit is issued, the holder is authorized to proceed with the project and begin placing the water to beneficial use. Except for very large water rights (over 25 cfs), the holder must begin excavation or construction of the diverting works within one year and proceed "diligently and uninterruptedly to completion."[289]

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the use. Water transfers, in contrast, typically are subject to significant marketplace constraints that, to some extent at least, ought to guard against unwarranted uses.

[286] *Hardy v. Higginson*, 123 Idaho 485, 490, 849 P.2d 946, 951 (1993).

[287] In contrast to a water right (evidenced by a license or decree or by beneficial use), an application for a permit and a permit itself are deemed personal property. By application for permit under such statutes the permittee secures an inchoate right which will ripen into a legal and complete appropriation by compliance with the statutory steps. Such right is merely a contingent right, which may ripen into a complete appropriation, or may be defeated by a failure of the holder to meet the statutory requirements. The permit, therefore, is not an appropriation of the public waters of the state. It is not real property." *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 402, 263 P. 45, 52 (1927). "An applicant's interest in an application for permit to appropriate water is personal property." IDAPA 37.03.08.035.02.d (Water Appropriation Rules).

[288] *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927); *Hidden Springs Trout Ranch, Inc. v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981).

[289] "Every holder of a permit which shall be issued under the terms and conditions of an application filed hereafter appropriating twenty-five (25) cubic feet or less per second must, within one (1) year from the date upon which said permit issues from the office of the department of water resources, commence the excavation or construction of the works by which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted through no fault of the holder of such permit by circumstances, over which he has no control." Idaho Code § 42-204.

The permit will specify a period of time of up to five years from the date of permit approval in which to place the water to beneficial use.[290] This is known as the "development period." On or before the last day of the development period, the permit holder must submit proof of beneficial use.

The statute provides various extensions of the deadline for submission of proof of beneficial use. Every permit is eligible for one five-year extension upon showing of good cause.[291] One or more extensions totaling up to ten years are available for certain larger water right permits.[292] Most practitioners find that the Department applies a lenient standard in determining good cause under these extension provisions. There are a handful of other special extensions.[293]

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[290] "The department shall require that actual construction work and application of the water to full beneficial use shall be completed within a period of five (5) years from the date of such approval, but may limit the permit to a less period than is named in the application, and the permit shall set forth the date when beneficial application of the water to be diverted by such works shall be made." Idaho Code § 42-204. Where a shorter time is set, it may be extended back to the full amount provided upon a proper showing. Idaho Code § 42-218.

[291] "In all other situations not governed by these provisions the department may grant one (1) extension of time, not exceeding five (5) years beyond the date originally set for completion of works and application of the water to full beneficial use, or beyond any grant of extension pursuant to the provisions of subsection (1) of this section, upon request for extension received on or before the date set for completion, provided good cause appears therefor." Idaho Code § 42-204(6).

[292] "The time for completion of works and application of the water to full beneficial use under any permit involving the diversion of two (2) or more cubic feet per second or the development or cultivation of one hundred (100) or more acres of land may be extended by the director of the department of water resources upon application by the permittee for an additional period up to ten (10) years beyond the initial development deadline contained in the permit, or beyond a grant of extension pursuant to the provisions of subsection (1) of this section [dealing with regulatory delays], provided the permittee establishes that the permittee has exercised reasonable diligence and that good cause exists for the requested extension." Idaho Code § 42-204(4). The statute previously provide for only a five-year extension. This ten-year provision was added in 2013. 2013 Idaho Sess. Laws, ch. 82. An informal guidance memorandum from Shelley W. Keen dated May 21, 2013 states: "Furthermore, if the department grants an extension of fewer than ten years under this provision, the permit holder is not limited to filing only one extension request. If the size requirement applies, the Department may grant multiple extensions totaling up to ten years." This guidance is reproduced in Appendix O.

[293] *E.g.*, Idaho Code § 42-204(2) (for projects irrigating at least 5,000 acres diverting over 25,000 acre-feet per year); Idaho Code § 42-204(3) (for storage projects of more than 10,000

However, an applicant for a water right permit is not allowed to assume that an extension will be granted for purposes of showing need for water at the time of application.[294]

An uncodified portion of the 2013 legislation (adding the 10-year extension) provided that the legislation is retroactive: "Permits pending before the department are entitled to the maximum qualifying extension available pursuant to the provisions of section 42-204, Idaho Code, regardless of whether the permittee received a prior extension under section 42-204(6), Idaho Code." 2013 Idaho Sess. Laws, ch. 82 § 2.

In addition, other provisions of the water code provide extensions of time in connection with the submission of proof. Idaho Code §§ 42-218, 42-218(a).

Once the project is completed and the water is put to beneficial use, the permittee must "prove up" his or her water right, that is, demonstrate to the Department's satisfaction, that the water has been put to beneficial use according to the terms of the permit. Idaho Code § 42-217.

The Water Code provides limited statutory exceptions for failure to prove up within the allotted time.[295] If proof is not provided (or excused) within this time, the water right will be deemed abandoned.[296]

The proof is accomplished by submitting a *Proof of Beneficial Use* form to the Department accompanied by either (1) a license examination fee and request for the Department to perform the field exam, or (2) a completed field report prepared by a certified water right examiner retained by the water right holder.

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acre-feet); Idaho Code § 42-204(5) (for water projects undertaken by the United States or the Idaho Water Resource Board).

[294] The Department expects the applicant for a non-RAFN municipal appropriation to demonstrate at the time of application that system-wide need for the permit will materialize (and the ability to divert will be in place) within the five-year "development period" after permit issuance. Although extensions of the proof deadline are often obtained for up to a total of 15 years, the Department will not allow the permit quantity to be premised on needs beyond the first five years. Water rights premised on needs more than five years out require a RAFN application. Telephone conference between Jeff Peppersack, [Former] Chief, Water Allocation Bureau, IDWR and Christopher H. Meyer (March 3, 2015); confirmed by email from Mr. Peppersack to Mr. Meyer (Mar. 19, 2015).

[295] Idaho Code § 42-204(1) (extension of time available in the case of litigation retaining to water title and for failure to obtain certain consents and approvals). As noted in footnote 293 on page 178, certain large water projects are accorded additional leniency in the proof date.

[296] Idaho Code § 42-204.

If the proof is not timely submitted, the permit will "lapse" and a *Lapse Notice* will be mailed to the holder. If proper administrative steps are not promptly undertaken, the permit will be forfeited entirely. However, the Department may reinstate the permit if the holder makes a showing of reasonable cause within 60 days of the lapse notice. In such case, the priority date of the permit will be advanced by the number of days that the showing followed the date set for proof. Idaho Code § 42-218a(1). If a showing of reasonable cause is made more than 60 days after the lapse notice, the permit may be reinstated but the priority date will be advanced to the date that beneficial use proof is made. Idaho Code § 42-218a(2).

(3) Issuance of license

Once the proof is satisfactorily completed, the permit holder is entitled to receive a license for that amount of water beneficially used with a priority date relating back to the date of the application for the permit.[297] In many cases, the quantity of water on the license will be adjusted downward from the permitted quantity to reflect actual beneficial use.

The primary advantage of the permit/license process is that a potential water user may determine and secure his priority (or place in line) *before* undertaking a considerable investment in the construction of the water project. Today, every Western state, except Colorado, has adopted a permit system. Colorado achieves much the same result via what it calls a "conditional right" issued by a special water court.

A license, like a decree, is sometimes described as a "paper" water right. It is legal evidence of the right, but that right may be lost through subsequent abandonment or forfeiture. And of course, there is no guarantee that water will be available to fill the water right.[298]

B. Beneficial use (aka "constitutional method") water rights

From the earliest days of the territory, an appropriation of water could be made simply by diverting water to beneficial use with the intent to create a water right. "As early as 1881 a statutory procedure for appropriating water was adopted, providing that a person intending to appropriate water should post a notice at the point of diversion and record the same." *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators*, 129 Idaho 454, 456, 926 P.2d 1301, 1303 (1996) (Schroeder, J.) (referencing Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1 (1968).

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[297] Idaho Code § 42-219.

[298] *State v. Hagerman Water Right Owners, Inc.* ("*Hagerman II*"), 130 Idaho 736, 947 P.2d 409 (1997) (Schroeder, J.).

Idaho courts have long recognized that these three acts (intent, diversion and beneficial use) establish a valid water right with a priority date as of the date of application to beneficial use.[299]

This do-it-yourself approach is sometimes referred to as the "constitutional method" and claims thereunder are often called "beneficial use" rights. The reference to the constitution reflects the courts' recognition that even without specific statutory authorization, appropriations are lawful under the Idaho Constitution.[300] The "constitutional method" terminology is potentially misleading, however.

The constitutional method is not constitutionally mandated, but merely constitutionally permissible. It is better understood as a creation of the common law, and, as such, is most certainly subject to legislative override (unlike a constitutional right). Consequently, it would be more accurately described as the "common law method." Alas, the "constitutional method" terminology has come to stick.

Prior to the adoption of statutes governing the process of appropriation, the constitutional method was the only means of obtaining a water right. Even after legislation was adopted (which occurred as early as 1881[301]), the constitutional method was deemed by the courts for many years to be an alternative to statutory requirements.[302] Finally, in 1963 (for ground water)[303] and 1971 (for surface water),[304] the Idaho Legislature enacted legislation making clear that statutory methods were henceforth the only methods available for appropriating water.

Because there is no administrative or judicial process involved in obtaining a constitutional method water right—and thus nothing recorded—these rights remain a significant unknown in the administrative system. One of the major objectives of modern general adjudications in Idaho, such as the Snake River Basin Adjudication and the

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[299] *Sand Point Water and Light Co. v. Panhandle Development Co.*. 11 Idaho 405, 413, 83 P. 347, 349 (1905); *Olson v. Bedke*, 97 Idaho 825, 829-30, 555 P.2d 156, 160-61 (1976); *State v. United States,* 134 Idaho 106, 996 P.2d 806 (2000) ("Smith Springs" case).

[300] "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." Idaho Const. art. XV, § 3 (emphasis added).

[301] See the "posted notice" method discussed below.

[302] *R.T. Hahas Co. v. Hulet ("Nahas II")*, 114 Idaho 23, 752 P.2d 625 (Idaho Ct. App. 1988).

[303] 1963 Idaho Sess. Laws, ch. 216 (codified at Idaho Code § 42-229).

[304] 1971 Idaho Sess. Laws, ch. 177 (codified at Idaho Code §§ 42-103, 42-201).

Northern Idaho Adjudication, is to review, define and quantify these beneficial use rights, and place them within the administrative system.

It is important to note that, within water districts, beneficial use water rights are administered as junior to decreed, permitted, or licensed rights.[305]

See discussion in section 11.C below regarding requirements to report or claim beneficial use water rights.

C. Water rights for certain domestic and livestock uses that are exempt from permitting

The Idaho Legislature has allowed limited water rights to ground water to be established outside the permit system by diverting and beneficially using ground water for statutorily-defined "domestic" uses, which include residential culinary uses and stock watering, provided the overall diversion volume does not exceed 13,000 gallons per day and any irrigation involved is for less than one-half acre.[306] A ground water right within these limits is exempt from the statutory permit/license requirement, but the water user must obtain a drilling permit before the well can be drilled.[307] While water rights for domestic purposes can be obtained by license, and can receive decrees in water right adjudications, often they are evidenced in IDWR's records only by means of a drilling permit and, once the well is completed, the driller's report.

The Idaho Code also authorizes exempt water rights to surface water for certain stock water uses. Idaho Code § 42-113(1) states that "[a] permit may be issued, but shall not be required for appropriation of water for the in-stream watering of livestock." The statute explains that "the phrase 'in-stream watering of livestock' means the drinking of water by livestock directly from a natural stream, without the use of any constructed physical diversion works." *Id.* Despite this "drinking from stream" language, section 42-113(3) provides that a person who has established such a stock water right "may, in addition to the in-stream use, divert the water for livestock use away from the stream" so long as the diversion is to "a trough or tank through an enclosed delivery system," it involves diversions of no more than 13,000 gallons per day per diversion, and it meets several other conditions. *Id.*

[305] Idaho Code § 42-607.

[306] Idaho Code § 42-111.

[307] Idaho Code §§ 42-227 and 42-238(2).

D. Statutory claims

Since 1967, Idaho's water code has authorized persons holding beneficial use water rights to file their claims with the Department.[308] In 1978, this option was converted to a mandatory requirement that such claims be filed by June 30, 1983.[309] However, the Legislature later declared that a claim filed in the Snake River Basin Adjudication (or other general adjudication commenced) prior to June 30, 1988 satisfies this requirement.[310]

In a somewhat confusing choice of terminology, the Department refers to beneficial use claims filed under this statute as "statutory claims" (referring to the statute authorizing and later requiring that such beneficial use claims be filed). The choice of language is confusing because the basis of these beneficial use claims is not statutory law, but common law.

The idea behind this filing requirement was to require water users to declare the existence of their beneficial use claims. Failure to do so would result in non-recognition of a beneficial use right. However, no statute indicates that the IDWR is expected, or even authorized, to subject these claims to any scrutiny once they are submitted. The Department simply publishes notice of the claims and keeps them on file. Presumably, one who asserts a beneficial use claim—such as in opposition to someone else's appropriation or transfer, or in aid of one's own proposed transfer—will be required to answer to the filing requirement.

This statute remains in effect statewide. Within the Snake River Basin, however, the statutory claim requirement has been overtaken by the SRBA, which is reviewing all water rights, including all beneficial use claims. Outside the Snake River basin (e.g., Kootenai River basin, Bear River basin), this statute continues to have practical effect. Those who have not filed statutory claims by the deadline can no longer assert beneficial use claims.

E. Posted notice

There is a special category of beneficial use rights known as "posted notice" rights. Under a statute enacted in 1881[311] and repealed in 1903, an appropriator could physically post notice of his or her intent to appropriate water. The notice would be

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[308] Idaho Code §§ 42-243, 42-244. (Section 42-243 was designated section 42-225a prior to 1978.)

[309] 1978 Idaho Sess. Laws, ch. 345 (codified at Idaho Code §§ 42-243 to 42-245).

[310] Idaho Code §§ 42-245.

[311] 1881 Idaho Sess. Laws, at 267.

posted near the proposed diversion (and recorded like a mining claim). In addition, the user was required to record the notice at the county recorder's office. If he or she completed the project within a reasonable time, and applied the water to beneficial use, a water right, based on actual measured use, would be issued with a priority date going back to the original posting.

These rights share with rights under the permit system the advantage of "relation back" to the date of the notice. Nevertheless, they are considered "beneficial use" rights because they are not confirmed by a permit, license, or decree.

This method is no longer available. However, rights created under this method are still valid (assuming they have not been forfeited or abandoned).

F. The curious case of "private waters"

Idaho Code 42-212, enacted in 1911 and carrying the caption "Diversion of private waters," addresses springs or small lakes that are "situated wholly or entirely upon the lands" of a single landowner. This statute prohibits IDWR from granting permits to divert this water "except to the person or corporation owning said land, or with his or its written permission…." Most of the few cases construing the statute have found that the statute does not apply because the water is found to flow off the property in some way. No reported case has considered whether a spring's (or lake's) contribution to a regional ground water aquifer—which presumably occurs in nearly every case through percolation—is such a disqualifying circumstance. However, as a matter of hydrology, it probably would be difficult to argue that spring seepage does not eventually reach an aquifer and leave the property in that way, and therefore is not "wholly or entirely" upon the owner's land.

Moreover, and despite the statute's caption, the text of the statute does not address the concept of "private waters." Rather, it simply bars a non-owner from obtaining a permit for waters "situated wholly or entirely" on another's property without that property owner's permission. Moreover, it clearly indicates that the landowner himself still would need a permit or an exemption, such as those provided by sections 42-111 or 42-113, to use this water (section 42-212 simply prohibits IDWR from granting permits for this water "except to the person or corporation owning said land or with his or its permission").

Interestingly, a few Idaho Supreme Court cases, in dictum, and despite the statute's actual language, have stated that section 42-212 establishes the rule that such springs "are appurtenant to and a part of the lands and belong exclusively to the owners of the land." *See, e.g., Maher v. Gentry*, 67 Idaho 559, 566, 186 P.2d 870, 874 (1947). The authors believe that the "private waters" statute would be narrowly construed today, and that it is unlikely a court would follow the *Maher* dictum and conclude that such waters "belong exclusively" to the landowner. Still, based on the

Maher dictum, a property owner who can make the case that a source is "wholly or entirely" on his or her land would have a plausible argument that there is such a thing as private waters.

G. Private and general adjudications of water rights

Water users also may bring lawsuits to establish their rights and settle disputes. A private water adjudication is analogous to a quiet title action for land. The result is a decree recognizing each party's water rights in a particular reach of stream or other water body. However, an adjudication does not create water rights, it simply recognizes already-established water rights created by some lawful means, either as a valid use exempt from permitting (domestic or stock water), as a right created through the statutory permit method, or as one established before the statutory deadlines by the constitutional method.

In addition to such private adjudications, general adjudications are held from time to time for particular basins. A private adjudication is limited to named parties. In a general adjudication, in contrast, notice is published and every person claiming to hold a water right in the named basin must come forward and prove up his or her water right.

A general adjudication usually is necessary only when the general state of affairs is confused with respect to who holds what water rights, what their amounts and uses are, and so forth. The purpose of the general adjudication is to bring all players into court, resolve all the controversies at once, settle the books, and allow future developments to proceed with greater certainty. Sometimes a general adjudication is deemed necessary so that federal and Indian Tribe water rights can be determined and quantified in state court under the immunity waiver provided by the McCarran Amendment, as discussed in footnote 1125 at page 701.

The most notable general adjudication is the Snake River Basin Adjudication, discussed in section 37 at page 700.

Water rights obtained through such private or general adjudications are referred to as "decreed" rights.

H. The burden of proof in water appropriations

Idaho's water code does not expressly allocate the burden of proof[312] in water right appropriation.[313] However, the Idaho Supreme Court has squarely placed the burden on the applicant for a new water appropriation to demonstrate that the basic statutory requirements are met.[314]

The court has twice addressed the burden of proof issue in the context of a public interest challenge to a new water right appropriation.[315] In the case of the local public

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[312] The burden of proof is really composed of two elements: the burden of production—that is, who has to go first—and the burden of persuasion—that is, who wins in an evidentiary "tie." IDAPA 37.03.08.040.04.a.

[313] In the special case of "trust water" appropriations under the *Swan Falls Agreement*, the statute does allocate the burden of proof. Idaho Code § 42-203C; IDAPA 37.03.08.040.04.

[314] *Cantlin v. Carter*, 88 Idaho 179, 186, 397 P.2d 761, 765 (1964).

[315] In *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985), the Court quoted District Judge Schroeder in this extended, but lucid, discussion of the burdens of production and persuasion:

> As Judge Schroeder correctly noted below, this burden of production lies with the party that has knowledge peculiar to himself. For example, the designer of a fish facility has particularized knowledge of the safeguards or their lack concerning the numbers of fish that may escape and the amount of fecal material that will be discharged into the river. As to such information the applicant should have the burden of going forward and ultimately the burden of proof on the impact on the local public interest. On the other hand, a protestant who claims a harm peculiar to himself should have the burden of going forward to establish that harm.
>
> However, the burden of proof [that is, the ultimate burden of persuasion] in all cases as to where the public interest lies, as Judge Schroeder also correctly noted, rests with the applicant:
>
> > [I]t is not [the] protestant's burden of proof to establish that the project is not in the local public interest. The burden of proof is upon the applicant to show that the project is either in the local public interest or that there are factors that overweigh the local public interest in favor of the project.

Shokal, 109 Idaho at 339, 707 P.2d at 450 (referring to District Judge Schroeder, now on the Supreme Court) (quoted again in *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 607, 759 P.2d 891, 898 (1988).

The only other Idaho case to address burden of proof in the context of the local public interest was *Collins Bros.* That case merely recited that "the applicants had not met their burden

interest, a special rule applies: The applicant bears the initial burden of coming forward with evidence for the evaluation of the local public interest criterion as to any factor of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant bears the initial burden of coming forward with evidence relevant to any factor for which the protestant can reasonably be expected to be more cognizant than the applicant. The applicant then bears the ultimate burden of persuasion.[316]

The Department subsequently adopted regulations allocating the burden of proof in all new appropriation applications:

> b. The burden of coming forward with evidence is divided between the applicant and the protestant as follows:
>
> i. The applicant shall bear the initial burden of coming forward with evidence for the evaluation of criteria (a) through (d) of Section 42-203A(5), Idaho Code [injury, supply, speculation, and finance];
>
> ii. The applicant shall bear the initial burden of coming forward with evidence for the evaluation of criterion (e) of Section 42-203A(5), Idaho Code [local public interest, now section 42-202B], as to any factor affecting the local public interest of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant shall bear the initial burden of coming forward with evidence relevant to criterion (e) of Section 42-203A(5), Idaho Code [local public interest, now section 42-202B], of which the protestant can reasonably be expected to be more cognizant than the applicant.
>
> iii. [Deals with "trust water" appropriations.]
>
> c. The applicant has the ultimate burden of persuasion for the criteria of Section 203A, Idaho Code [all standard criteria, including local public interest, which is now defined in section 42-202B], and the protestant has the ultimate burden of persuasion for the criteria of Section 42-203C ["for trust water"].[317]

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of proof" and quoted from the Shokal case regarding burden of proof." *Collins Bros.*, 114 Idaho at 606, 759 P.2d at 897.

Note that different burden of proof rules apply to the special public interest tests applicable to appropriations of "trust water" pursuant to the *Swan Falls Agreement*. Idaho Code § 42-203C; IDAPA 37.03.08.040.04.

[316] *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985).

[317] IDAPA 37.03.08.040.04.

See part 15.L(2) at page 290 for a discussion of the burden of proof in transfer proceedings.

I. One may not appropriate water that has been diverted and stored by another.

Once water is diverted and stored under a water right by one person, another person may not thereafter appropriate that water.

> After the water was diverted from the natural stream and stored in the reservoir, it was no longer "public water" subject to diversion and appropriation under the provisions of the Constitution (article 15, § 3). It then became water "appropriated for sale, rental or distribution" in accordance with the provisions of sections 1, 2, and 3, art. 15, of the Constitution. The waters so impounded then became the property of the appropriators and owners of the reservoir, impressed with the public trust to apply it to a beneficial use. A subsequent appropriator claiming a part or all of such waters would be the only person who could question the lack, extent, or nature of its application to a beneficial use.
>
> We are treating the water appropriation here from which this reservoir is supplied as being taken from a natural stream or flow of "public waters." It is not entirely clear from the record, and we accordingly do not pass upon the question, as to whether or not the waters collected in this reservoir are in fact taken from a natural stream or on the contrary are a mere collection of flood waters from rains and melting snow that runs off in the winter and spring and does not actually comprise or enter any natural stream or body of water. If the water impounded belongs to the latter class, then it is the unqualified private property of the owners of the reservoir, and they may do with it as they see fit. *King v. Chamberlin*, 20 Idaho, 504, 118 P. 1099; *Public Utilities Commission v. Natatorium Co.*, 36 Idaho, 287, at page 302, 211 P. 533; *Union Central Life Ins. Co. v. Albrethsen*, 50 Idaho, 196, 202, 294 P. 842; *Hinton v. Little*, 50 Idaho, 371, 374, 296 P. 582; *Vaughan v. Kolb*, 130 Or. 506, 280 P. 518; *Hagerman Irr. Co. v. McMurry*, 16 N. M. 172, 113 P. 823; 1 *Wiel on Water Rights*, (3d Ed.) § 37. Otherwise, it is impressed with the public trust as above indicated.
>
> No one can make an appropriation from a reservoir or canal for the obvious reason that the waters so stored or conveyed are already diverted and appropriated and are no

> longer "public waters." *Rabido v. Furey*, 33 Idaho, 56, 190 P. 73. This does not mean, however, that the reservoir or canal owner may waste the water or withhold it from persons who make application to rent the same. *Van Camp v. Emery*, 13 Idaho, 202, 89 P. 752; *Gerber v. Nampa & Meridian Irr. District* (on rehearing), 16 Idaho, 22, 26, 100 P. 88; *Niday v. Barker*, 16 Idaho, 73, 79, 101 P. 254; *Farmers' Co-op. Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho, 525, 535, 102 P. 481; *Schodde v. Twin Falls Land & Water Co.*, 161 F. 43, 88 C. C. A. 207, affirmed 224 U. S. 107, 32 S. Ct. 470, 56 L. Ed. 686. If, on the other hand, the owner of the reservoir owns land subject to irrigation from such reservoir, he may apply it to his own land or sell it to others, or both, according to the priorities of their applications.

Washington Cnty. Irr. Dist. v. Talboy, 55 Idaho 382, 43 P.2d 943, 945-46 (1935) (Ailshie, J.),

12. ADVERSE POSSESSION OF A WATER RIGHT

It is possible, at least in theory, for one person to adversely possess, and thus come to own, the water right of another. In *Mountain Home Irr. Dist. v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957) (Taylor, J.), the senior irrigation district sought to enjoin an upstream diversion. The defendant contended that he was entitled to divert the water because he had done so for more than five years. (Note that the statutory period to establish adverse possession is now 20 years) The Idaho Supreme Court rejected the defense on the facts, holding that the ditch rider for the irrigation district allowed the upstream diversion only in years when the downstream reservoir did not need the water in order to fill. "The rule that the adverse use must in fact conflict with the owner's right has long been the law in this jurisdiction." *Mountain Home*, 79 Idaho at 443, 319 P.2d at 969.

The Court premised its ruling on the policy of maximum use. "It must be remembered that the policy of the law of this state is to secure the maximum use and benefit of its water resources." *Mountain Home*, 79 Idaho at 442, 319 P.2d at 968. It described this as a "constitutional policy" that is also grounded in statute. *Id*.

13. THE MAXIMUM USE DOCTRINE

In a seminal 1907 decision, the Idaho Supreme Court noted that a senior may not take his water inefficiently so as to deprive others:

> In this arid country, where the largest duty and the greatest use must be had from every inch of water in the interest of agriculture and home building, it will not do to say that a stream may be dammed so as to cause subirrigation of a few acres at a loss of enough water to surface irrigate 10 times as much by proper application.

Van Camp v. Emery, 13 Idaho 202, 208, 89 P. 752, 754 (1907) (Ailshie, C.J.) (senior upstream user not entitled to dam stream to subirrigate a meadow resulting in reduced stream flows to junior downstream headgates).

In 1909, the Court allowed a prior decree to be re-opened to examine whether senior appropriators really needed as much water as they had been awarded. *Farmers' Co-operative Ditch Co. v. Riverside Irrigation District, Ltd.,* 16 Idaho 525, 102 P. 481 (1909) (Ailshie, J.). "One farmer, although he has a superior water right, should not be allowed to waste enough water in the irrigation of his land to supply both him and his neighbor simply because his land is not adequately prepared for the economical application of the water." *Farmers' Co-operative*, 16 Idaho at 536, 102 P. at 484.

In 1912, the U.S. Supreme Court, applying Idaho law, handed down the most celebrated maximum use case of all. In *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1912), a German immigrant installed a waterwheel driven by the current of the Snake River to raise irrigation water to his farm. Sometime thereafter, Milner Dam was built. When the placid water behind the dam stilled Schodde's waterwheels, he sued the junior appropriator. The U.S. Supreme Court affirmed the Ninth Circuit's ruling that, while the senior's priority is entitled to protection, he may not use an inefficient diversion to impair all other development of the Snake River. No doubt Schodde's waterwheel was a brilliant engineering feat. And it was efficient, so far as Schodde was concerned. But it was inefficient, so far as the resource as a whole was concerned.

As the *Schodde* Court said, "If the plaintiff were permitted to own the current of the stream appurtenant to his right of appropriation and diversion, he would be able to add indefinitely to the water right he could control and own. . . . It is clear that in such a case the policy of the state to reserve the waters of the flowing streams for the benefit of the public would be defeated." *Schodde*, 224 U.S. at 120. The U.S. Supreme Court cited one of its earlier cases in concluding that a water right "must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in

a single individual." *Schodde*, 224 U.S. at 121 (quoting *Basey v. Gallagher*, 20 Wall. 670, 683, 87 U.S. 670, 683 (1874)).

The Idaho Supreme Court held in a 1915 water right transfer case that the quantity transferred is limited to the amount previously put to beneficial use. This principle—which seems obvious enough today—was grounded in the Court's recognition that the policy of maximum beneficial use is embedded in the prior appropriation doctrine. "A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes." *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915) (Budge, J.).

In 1931, a federal district court ruled that the Twin Falls Canal Company may not compel upstream users to pay for construction of Milner dam, even if they benefit from the increase in water elevation. Doing so would "result in such a monopoly as to work disastrous consequences to the public." *Twin Falls Canal Co. v. American Falls Reservoir Dist. No. 2*, 49 F.2d 632, 635 (D. Idaho 1931). The court said this result was compelled by *Schodde*. *Id.* at 636.

In 1954, the Ninth Circuit, applying Idaho law, rejected a nuisance claim by a farmer who complained that an upstream reservoir increased the flow below the dam thus interfering with his ability to ford the stream. "In our opinion, the *Schodde* case supplies a complete answer to appellant's contentions." *Johnson v. Utah Power & Light Co.*, 215 F.2d 814, 816 (9th Cir. 1954).

In 1957, the Idaho Supreme Court addressed the maximum use doctrine in the context of adverse possession of a water right. In *Mountain Home Irr. Dist. v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957) (Taylor, J.), the Court rejected the defendant's claim of adverse possession of a water right. The Court premised its ruling on the policy of maximum use. "It must be remembered that the policy of the law of this state is to secure the maximum use and benefit of its water resources." *Mountain Home*, 79 Idaho at 442, 319 P.2d at 968 (citing *Van Camp*, *Farmers' Cooperative*, *Duffy*, *et al*.). It described this as a "constitutional policy" that is also grounded in statute. *Id*.

In a 1960 case, the Court held: "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960) (Smith, J.) (holding that one party may discharge its irrigation waste into the drainage ditch of another party where that artificial channel substituted for the original channel by which the wastewater would have been returned to natural flows).

In 1964, the Court reiterated that "it is the policy of the law to prevent waste and to secure the maximum beneficial use of the waters of the state." *Ward v. Kidd*, 87 Idaho 216, 226-27, 392 P.2d 183, 190 (1964) (Taylor, J.).

In 1973, the Court upheld a constitutional challenge to the reasonable pumping level restrictions in Idaho's Ground Water Act. "We hold that the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Idaho Const. art. 15, § 7." *Baker v. Ore-Ida Foods, Inc*., 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (Shepard, J.). Accordingly, "senior appropriators are not necessarily entitled to maintenance of historic pumping levels." *Id*.

In 1977, the Court invoked the principle of maximum use in holding that the statute authorizing state water masters to allocate water during times of shortage with preferences for decreed, permitted, and licensed water rights did not work a deprivation of property as to holders of non-adjudicated constitutional use water rights. "The governmental function in enacting not only I.C. § 42-607, but the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources." *Nettleton v. Higginson*, 558 P.2d 1048, 1052 (Idaho 1977) (Donaldson, J.).

In 1982, the Court upheld—on the basis of "optimum development" and "maximum use"—a statutory distinction (eliminated in 1978) between treatment of domestic and other wells. "The decision as to how the optimum development of water resources in the State of Idaho can best be achieved is a policy decision exclusively within the province of the legislature. The legislature was therefore free to give special consideration to the position of domestic water users in enacting legislation to implement the policy of 'optimum development.'" *Parker v. Wallentine*, 103 Idaho 506, 512, 650 P.2d 648, 654 (1982) (Bistline, J.). The Court continued:

> Furthermore, it is clearly state policy that water be put to its maximum use and benefit. That policy has long been recognized in this state and was reinforced in 1964 by the adoption of article XV, section 7 of the Idaho Constitution.

Parker, 103 Idaho at 513, 650 P.2d at 655 (citing *Poole* and Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 2 (1968)).

In 1985, the Court invoked the policy of maximum use in holding that a prescriptive easement for drainage does not entitle the owner to engage in unnecessarily wasteful irrigation practices. "Regardless of how long such practices had continued, or whether easements had been acquired to discharge certain volumes of water across a lower property, those wasteful practices would contravene the public policy of this state. That policy 'is to secure the maximum use and benefit, and least wasteful use, of its water

resources.'" *Merrill v. Penrod*, 704 P.2d 950, 959 (Idaho Ct. App. 1985) (Swantrom, J.) (quoting *Poole*).

In 1990, the Court reiterated that our arid conditions compel maximum use of our water resources. "Because Idaho receives little annual precipitation, Idahoans must make the most efficient use of this limited resource. 'The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.'" *Kunz v. Utah Power & Light Co.*, 792 P.2d 926, 929 (Idaho 1990) (Bakes, C.J.) (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 502 P.2d 61, 65 (1960) (Smith, J.) (the policy of seeking maximum use of the State's water resources justifies not holding reservoir and canal operators strictly liable for flood damage).

In a 1997 basin-wide decision, the Court recognized partial forfeiture of water rights, which it found was compelled by the longstanding goal of maximum use. "The governmental function in enacting . . . the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing maximum use and benefit of our natural water resources." *State v. Hagerman Water Right Owners* ("*Basin-Wide Issue 10*") ("*Hagerman I*"), 947 P.2d 400, 408 (Idaho 1997) (Schroeder, J.) (quoting *Nettleton* and citing *Kunz*).

In the same year, the Court extended the maximum use ruling in *Kunz* (which limited the liability of irrigation dam owners) to dams constructed for wildlife and other purposes. As in *Kunz*, the Court based its ruling on the policy of maximum use. "It has been the policy of this State to secure the maximum use and benefit of its water resources." *Stott v. Finney*, 950 P.2d 709, 711 (Idaho 1997) (Walters, J.).

In another 1998 case, the Court recognized a federal reserved water right for stock watering to benefit permittees on federal lands. *United States v. State*, 131 Idaho 468, 959 P.2d 449 (1998) (Walters, J.). The Court noted that the purpose of the federal reservation was to ensure that the water would be available for use "by whichever member of the public happens at any time to have the grazing permit for the lands" thereby preventing private appropriations whereby "individuals could monopolize the water." *United States v. State*, 131 Idaho at 471, 959 P.2d at 452. "To hold otherwise would be in contravention of the policy of this state 'to secure the maximum use and benefit, and least wasteful use, of its water resources.'" *United States v. State*, 131 Idaho at 472, 959 P.2d at 453 (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 502 P.2d 61, 65 (1960) (Smith, J.)).

In 1999, the Court carved out an exception to the forfeiture principle for Carey Act irrigators. In noting that forfeiture is not favored, the Court relied on the "state policy of securing the maximum use and benefit of its water resources." *Aberdeen-Springfield Canal Co. v. Peiper*, 982 P.2d 917, 926 (Idaho 1999) (Silak, J.) (quoting *Hagerman I*, which, in turn, quoted *Nettleton*).

In 2007, the Court upheld the constitutionality of the Department's Conjunctive Management Rules which were expressly premised on an integration of the prior appropriation doctrine and "the principle of optimum use of Idaho's water." *American Falls Reservoir District No. 2 v. IDWR* ("*AFRD2*"), 143 Idaho 862, 867, 154 P.3d 433, 438 (2007) (Trout, J.).

In 2011, the Court employed the maximum use doctrine in upholding the Director's conjunctive management curtailment order.

> There is no difference between securing the maximum use and benefit, and least wasteful use, of this State's water resources and the optimum development of water resources in the public interest. . . . The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.

Clear Springs Foods, Inc. v. Spackman, 252 P.3d 71, 89 (Idaho 2011) (Eismann, C.J.) (citing *Niday v. Barker,* 101 P. 254 (Idaho 1909), *Farmers' Cooperative*, *Poole*, and *Parker*).

In 2013, the Court invoked the policy of maximum use in upholding the right of an irrigator to condemn a pipeline easement in order to reduce conveyance losses. The Court reiterated that it is "this State's policy to secure the maximum use and benefit, and least wasteful use, of its water resources." *Telford Lands LLC v. Cain*, 154 Idaho 981, 987, 303 P.3d 1237, 1243 (2013) (Eismann, J.) (quoting *Poole*).

In 2016, the Court upheld the Director's conjunctive management curtailment order in which the Director relied on the maximum use doctrine in avoiding curtailments beyond a "trim line." "Additionally, the Director relied on the policy of promoting the optimum development of the State's water resources enunciated in Article XV, section 7 of the Idaho Constitution and this Court's decision in *Clear Springs,* where we stated that '[t]he policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.'" *Rangen, Inc. v. IDWR* ("*Rangen II*"), 369 P.3d 897, 907 (Idaho 2016) (J. Jones, C.J.) (brackets original)[318]. "As we recently stated in *Clear Springs,* the policy of securing the maximum use and benefit, and least wasteful use of Idaho's water resources, has long been the policy in Idaho." *Rangen II*, 160 Idaho

[318] *Rangen II* is sometimes referred to as *IGWA v. IDWR*. IGWA is included in the "In the Matter of" portion the caption, but Rangen is the plaintiff-appellant. Another Rangen case, *Rangen, Inc. v. IDWR* ("*Rangen I*"), 159 Idaho 798, 367 P.3d 193 (2016) (J. Jones, J.), deals with the finality of decrees and does not implicate the maximum use doctrine. A third case deals with a mitigation plan addressing the same delivery call. *Rangen, Inc. v. IDWR* ("*Rangen III*"), 160 Idaho 251, 371 P.3d 305 (2016) (J. Jones, J.).

at 131, 369 P.3d at 909 (citing *Clear Springs*, *Niday*, *Farmers' Co-operative*, and *Poole*). "[A]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water." *Rangen II*, 160 Idaho at 140, 369 P.3d at 918 (quoting IDAPA 37.03.11.020.03).[319] The Court also expounded on the importance of *Schodde* and *Van Camp*. *Rangen II*, 160 Idaho at 132-34, 369 P.3d at 910-12.[320]

[319] In this passage, the Court quoted from IDWR's conjunctive management rule. The Court made clear, however, that the principle of maximum use has its roots not just in the rule but in the Idaho Constitution. "The Director did not treat either [the rule or the Idaho Constitution] as directly granting him discretion to apply a trim line. Instead, the Director recognized, correctly, that each source merely restated a broader understanding of Idaho law . . . ." *Rangen II*, 160 Idaho at 132, 369 P.3d at 910.

[320] The maximum use doctrine is not unique to Idaho. See, *American Fork Irr. Co. v. Linke,* 121 Utah 90, 97, 239 P.2d 188, 192 (1951) (upholding use of water right that "contemplates the more beneficial use of water, a most desired result fully consistent with progress and change, and reflecting the established policy of this state."); *Arave v. Pineview West Water Co.,* 2020 UT 67, ¶33 (holding that the "primary objective" in water disputes is ensuring that "the greatest amount of available water is put to beneficial use").

14. THE ADMINISTRATIVE SYSTEM

A. Overview of the IDWR

The Idaho Department of Water Resources ("IDWR") has authority over water quantity related issues, including water rights, in Idaho.[321] IDWR's authority primarily resided in title 42 of the Idaho Code. IDWR's administrative rules are located at IDAPA 37. IDWR has other authorities, including jurisdiction over stream channel alterations[322] and injection wells.[323]

The water resource activities of IDWR are divided into two divisions: the water management division and the planning and policy division. (A third division deals with energy issues.) The water management division contains the water right permitting, transferring and enforcement functions. The planning and policy division supports the statewide water resource planning conducted by the Idaho Water Resource Board. It also provides the technical services for the entire Department. An IDWR organizational chart is set out under Appendix E.

The Department administers water rights on the basis of over fifty "administrative basins." They are shown on the map set out under Appendix D. Each permit or water right issued by the Department is assigned a number whose first two digits correspond to the administrative basin in which it is located.

The primary contact with IDWR for most practitioners will be at IDWR's regional offices. Applications for water right permits, transfers, well permits and other administrative approvals can be obtained at these offices and are submitted there as well.

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[321] The IDWR traces its roots to the Office of the State Engineer, established by the Idaho Legislature in 1895. In 1919 the agency's name was changed to the Idaho Department of Reclamation. Initially its it head was known as the Commissioner of Reclamation, but in 1943 the agency's head was renamed the State Reclamation Engineer. In 1965 the Legislature created the Idaho Water Resource Board (discussed in section 14.D(6) at page 219). In 1970, the agency's name was changed to the Department of Water Administration and its head was renamed the "Director." 1970 Idaho Sess. Laws, ch. 12. Four years later, in 1974, the Legislature merged the Idaho Water Resource Board into the Department of Water Administration and changed its name to the Department of Water Resources, as it is known today. 1974 Idaho Sess. Laws, ch. 20 (codified as amended at Idaho Code §§ 42-1701 to 42-1806). In 1981 the Office of Energy was merged into the Department of Water Resources, as an operational division known as the Division of Energy.

[322] Idaho Stream Channel Protection Act, Idaho Code §§ 42-3801 to 42-3813. Implementing regulations are found at IDAPA 37.03.07.

[323] *Waste Disposal and Injection Wells*, Idaho Code §§ 42-3901 to 42-3919.

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A list of addresses and phone numbers for IDWR's offices is provided under Appendix E.

B. IDWR hearing procedures

(1) Application and filing fee

All requests for new or transferred water rights begin with an application. Requirements for applications for appropriation of new water rights are discussed in section 11.A at page 173. See section 15.L at page 290 for a discussion of procedures for water right transfers.

Every application must be accompanied by a filing fee, which vary depending upon the type of application and the quantity of water involved. The various filing fees are set out in Idaho Code § 42-221.

When a water right application is filed, the Applicant is entitled to have the Department process the application.[324] The form and timing of IDWR's investigation and hearing are within its discretion, so long as the fundamental rights of the participants are not violated.

(2) Publication

Upon receipt of the application and the filing fee, the Department will prepare a notice for publication.[325] The notice will be published for two consecutive weeks in a newspaper printed or circulated within the county containing the point of diversion.[326] If the application involves more than ten cfs or 1,000 acre-feet of water, the notice must be published in newspapers achieving statewide circulation.[327]

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[324] Idaho Code § 42-222(1) ("Upon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon."); Idaho Code § 42-211 ("Whenever a permit holder desires to change the place, period, or nature of the intended use, or make other substantial changes in the method of the diversion or proposed use or uses of the water, he shall file an application for amendment . . . and upon receipt thereof [of an application for amendment of a permit] it shall be the duty of the department of water resources to examine same . . . .").

[325] Idaho Code §§ 42-203A, 42-211 and 42-222(1).

[326] Idaho Code § 42-203A(2).

[327] Idaho Code § 42-203A(2).

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(3) Amendment of application for permit

Idaho Code § 42-211 addresses amendments of applications for permit. It requires, anachronistically, that the amendments "be made by indorsement by the applicant or his agent on the original application" and that the application then be re-published.

(4) Protests

Anyone wishing to object to an application may do so by filing a notice of protest with the Department within ten days of the last date of publication of the notice. Idaho Code §§ 42-203A(1) and 42-222(1). The protest must be accompanied by a $25.00 filing fee. Idaho Code §§ 42-203A(4), 42-221(L), and 42-222(1).

The statutes do not require a protestant to be a water right holder. However, a protestant initially should be prepared to demonstrate that he or she would somehow be affected by the outcome of the application.[328] An impact on the protestant arising under the local public interest test is a sufficient basis for a protest. (See discussion the local public interest in section 27 at page 550.)

(5) Pre-hearing conference

If a protest is filed, the Department will arrange an informal meeting called a "prehearing conference" with the transfer applicant and the protestants. This will be scheduled at the parties' convenience, typically within a few weeks of the protest. The prehearing conference will be moderated by a departmental employee (frequently the head of the regional office).

Although it is generally a good idea for the parties to have arranged to see each other before hand, the prehearing conference is often the first time the parties meet. The conference provides a good opportunity for the applicant to explain the purpose of the application and for the protestants to identify their concerns. The prehearing conference serves as an informal settlement conference. It also provides an informal opportunity for the parties to narrow the issues, to exchange documents and information, to agree on undisputed facts, to schedule any discovery and set other deadlines. It is worthwhile for both parties to give considerable thought to each of these matters before appearing at a conference, and to make the most of the opportunity to resolve the dispute informally.

[328] The Department has held that a protestant must "demonstrate some nexus to the issue in controversy." *Hardy v. Higginson*, Case No. 92599 (4th Dist., July 25, 1990) (unpublished Memorandum Decision).

To encourage frank discussions, the prehearing conference may be conducted off the record.[329]

(6) Hearing

If the protest cannot be settled by the parties at the prehearing conference stage, the Department will appoint a hearing officer, who will set the matter for hearing in the county where the water right is located.

Note that if no protest is filed (or the protest is withdrawn), the Department will proceed to evaluate the application issue an order without holding a hearing. In the case of an amended permit application,[330] a transfer application,[331] or an exchange application,[332] a disappointed applicant may request a hearing after the Director issues an order to build a record for judicial review.

The hearing is governed by the APA, the Department's Rules of Practice and Procedure, and the Idaho Rules Civil Procedure (to the extent they are adopted by the Department's rules). Litigants should carefully review these rules, which set out important procedures for appearance, pleading and conduct at the hearing.

The hearing will be scheduled far enough out to allow the parties to prepare. Formal discovery (under the Idaho Rules of Civil Procedure) is not automatically available, but may be sought by motion to the Hearing Officer.[333] Subpoenas may be issued by the Director commanding the appearance of witnesses from any place within Idaho.

The hearing is basically an administrative trial. If a party has several applications pending which raise common issues, the Department may agree to consolidate them into a single hearing. The hearing may last anywhere from a few hours to a few weeks. Most are completed within a couple of days. Counsel are often present, although parties are allowed to appear *pro se*.[334] Although strict rules of evidence do not apply, most hearing

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[329] IDAPA 37.01.01.512.

[330] Idaho Code § 42-211.

[331] Idaho Code § 42-222(5).

[332] Idaho Code § 42-240(7).

[333] IDAPA 37.01.01.521.

[334] Natural persons may appear *pro se*. However, corporations must be represented by counsel.

officers will follow a "common sense" version of the rules of evidence in which irrelevant, immaterial, incompetent or redundant material is excluded.

Testimony is typically presented by live witnesses in a manner similar to a courtroom procedure (with direct examination, followed by cross-examination and re-direct). However, the Department's rules do allow for the use of pre-filed prepared testimony of expert witnesses, at the Hearing Officer's discretion.[335] Prepared testimony is not commonly employed at the Department, but is the standard practice before the Idaho Public Utilities Commission. Prepared testimony can shorten hearing times and enable a more effective and efficient fact-finding exercise.

(7) Building the record

Judicial review of contested cases is conducted "on the record" (as opposed to *de novo*). IAPA, Idaho Code §§ 67-5277, 67-5249; see also Idaho R. Civ. P. 84(b)(2), 84(j), 84(k) and 84(l). Therefore, creating the best possible record in the proceedings below is critical to upholding or overturning an action in court.

The hearing is tape-recorded by the Department. The hearing officer should ensure that speakers identify themselves and speak clearly and audibly. The recording equipment is cumbersome to use, and attempting to transcribe these recordings is not easy. Anyone wanting a transcript of the hearing should request a court reporter several days before the hearing and arrange to pay for the reporter's presence.[336] An accurate transcript can be a valuable asset on appeal.

The administrative record also includes written materials, including the application, staff reports, maps and any other information submitted into the record. These materials should become part of the record simply by submitting them to the decision-making body. However, it is a good practice to formally request inclusion in the administrative record of any material important to a matter. Parties should also take care to ensure that materials offered by other parties are properly placed in the record.

Winning before the Department is not enough. A decision can be overturned if it is not supported by substantial evidence in the administrative record. Therefore, it is very important to address each of the statutory and regulatory criteria with evidence and argument needed to support party's position.

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[335] IDAPA 37.01.01.413.01.b and 37.01.01.605 (Rule 605). This is expressly authorized by the APA. Idaho Code § 67-5241(b).

[336] See IDAPA 37.01.01.651.

(8) The decision

Under its rules, the Department may issue four types of orders:

- "Interlocutory orders." These do not decide all previously undecided issues presented in a proceeding. They are issued during the course of a proceeding by either the hearing officer or the Director. Because they are not final, they are not appealable (until a final order is issued).[337] A party[338] may seek review by the director of an interlocutory order at any time during the course of the administrative proceeding.[339] The rule specifies no time limit for such a petition.

- "Recommended orders." This is a type of order typically issued at the end of a proceeding by the hearing officer. Recommended orders do not become effective without action of the Director.[340]

- "Preliminary orders." This is another type of order typically issued at the end of a proceeding by the hearing officer. Preliminary orders will become effective automatically within a fixed period of time, unless the Director affirmatively undertakes to review them.[341] The Department also employs preliminary orders to handle administrative matters, such as error corrections, that do not go before a hearing officer.

- "Final orders." This is either (1) a preliminary order that becomes final automatically, (2) an order issued by the Director in review of a recommended order, or (3) any other appealable order issued by the Director.[342] Typically, a final order concludes the entire proceeding or, in some instances, concludes discrete portions of a proceeding. However,

[337] IDAPA 37.01.01.710 (Rule 710) and 37.01.01.711 (Rule 711).

[338] Rule 711 says that any "party or person affected by an interlocutory rule" may seek review. Thus, even non-parties may seek review.

[339] IDAPA 37.01.01.711 (Rule 711). The review is in the nature of a petition for reconsideration, but, under the terminology of the rule, is referred to as a petition to review the interlocutory order. It is directed to the officer who issued the interlocutory order (which may be either a hearing officer or the Director).

[340] IDAPA 37.01.01.720 (Rule 720).

[341] IDAPA 37.01.01.730 (Rule 730).

[342] IDAPA 37.01.01.740 (Rule 740)

final orders are also employed by the Director in special, emergency circumstances such as cease and desist orders and show cause orders.[343]

In the ordinary course, the Director does not review interlocutory orders issued by a hearing officer until the hearing is concluded and the hearing officer issues either a recommended or preliminary order. However, the hearing officer has the authority to refer interlocutory matters to the Director at any time.[344] Moreover, the Director has the authority to review, *sua sponte*, any interlocutory order of the hearing officer at any time.[345]

The rules do not expressly provide a mechanism for a party to refer or appeal an interlocutory matter to the Director. Presumably, the same could be accomplished by either a motion to the hearing officer or a petition to the Director seeking that he or she exercise his or her discretion under Rule 562. This, however, is not a standard practice.

A party, at its option, may seek review of a recommended order, preliminary order, or final order by way of petition for reconsideration. Petitions for reconsideration are governed by statute and administrative rules. The statute, part of the IAPA (Idaho Code § 67-5246), sets a 21-day deadline for the agency to "dispose of" the petition. The Idaho Supreme Court ruled that this means the agency must issue a ruling on the merits within 21 days, and is not allowed to simply grant the petition and then take the matter under consideration (as is typically done in the judicial context). *A&B Irr. Dist. v. IDWR*, 154 Idaho 652, 301 P.3d 1270 (2012) (Eismann, J.).

The rules for such petitions are contained in the separate rules for each type of order.[346] In each case, the petition must be filed within fourteen days. Note that the three-day mailbox rule does not apply here.[347] A petition for reconsideration is not mandatory (to exhaust administrative remedies).

An alternative (or supplement) to the petition for reconsideration is the petition for clarification.[348] A petition for clarification may be filed in response to any type of order (interlocutory, recommended, preliminary or final). However, unlike a petition for reconsideration, a petition for clarification does not toll the time to seek further review.

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[343] IDAPA 37.01.01.740.01 (and statutory authority cited therein).

[344] IDAPA 37.01.01.562 (Rule 562).

[345] IDAPA 37.01.01.562 (Rule 562).

[346] IDAPA 37.01.01.720 (Rule 720 - recommended orders), 37.01.01.730 (Rule 730 – preliminary orders), and 37.01.01.740 (Rule 740 – final orders).

[347] IDAPA 37.01.01.057 (Rule 57).

[348] IDAPA 37.01.01.770 (Rule 770).

Thus, the petition for clarification should be employed only where the party does not object to the merits of the order, but merely seeks clarification of some detail.

A rarely-employed special review procedure is available to persons who are aggrieved by a final decision, but who have not been afforded an opportunity to be heard.[349]

Note that post hearing procedures and deadlines are governed both by the APA[350] and by the Department's own rules.[351] The two dovetail. In a few cases, the Departmental rules provide specific deadlines left up to the discretion of the agency by the statute.

(9) Res judicata

"The doctrine of res judicata applies to administrative proceedings. *Hansen v. Estate of Harvey*, 119 Idaho 333, 806 P.2d 426 (1991); *J & J Contractors/O.T. Davis Constr. v. State by Idaho Transp. Bd.*, 118 Idaho 535, 797 P.2d 1383 (1990)." *Sagewillow, Inc. v. IDWR* ("*Sagewillow II*"), 138 Idaho 831, 844, 70 P.3d 669, 682 (2003) (Eismann, J.). However, issue preclusion attaches only to issues actually raised. Thus, a transfer approval in which the issue of forfeiture did not actually arise is not res judicata as to that issue.

By statute, decrees from a general adjudication (such as the SRBA) are given binding effect. "The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system [with certain stated exceptions, e.g., domestic rights excluded by court order]." Idaho Code § 42-1420.

See also, *State v. Hagerman Water Right Owners, Inc.* ("*Hagerman I*"), 130 Idaho 736, 947 P.2d 409 (1997) (dealing with the non-binding effect in the SRBA of certain prior decrees), discussed in section 37.I(2) at page 707.

(10) Retroactive legislation

There is a good discussion of retroactive water rights legislation in *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179 (Ariz. 1999).

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[349] Idaho Code § 42-1701(3); IDAPA 37.01.01.740.02.b.

[350] Idaho Administrative Procedure Act ("APA"), Idaho Code §§ 67-5243 to 67-5249.

[351] IDAPA 37.01.01.720 to 37.01.01.740 (Rule 740).

In 1978 the Idaho Legislature amended the law governing water rights for domestic wells.[352] The Idaho Supreme Court noted that the Legislature could have made the 1978 amendment retroactive—presumably retroactive so as to affect rights with pre-1951 priorities—but did not elect to do so.[353]

In *Fremont-Madison Irr. Dist.& Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J), the Idaho Supreme Court was asked to consider the constitutionality of the amnesty for illegal enlargements. The question was whether the Legislature retroactively can validate illegal enlargements of water rights by such a waiver. The Idaho Supreme Court's answer is yes, but with a substantial caveat that sharply limits the result. The Court cautioned that a waiver cannot operate so as to injure, such as by dilution of priority, any water right existing on the 1994 date the amnesty statute was enacted. The effect of this ruling is to require mitigation or a condition, such as a subordination, before an enlargement can be given a date-of-enlargement priority.

The Washington Legislature codified the rule in *Theodoratus* and extending it to all water right holders, including municipal providers. Thus, all new certificates for "perfected rights" will be limited to actual beneficial use, not system capacity. The Legislature softened the blow, however, by creating an expansive new definition of "municipal water supply purposes" (Wash. Rev. Code § 90.03.015) and grandfathering water right certificates issued for such purposes (Wash. Rev. Code § 90.03.330). This legislation was challenged as being unconstitutional retroactive legislation, but it survived. *Lummi Indian Nation v. State*, 241 P.3d 1220 (Wash. 2010).

(11) Judicial review

As noted above, interlocutory orders are not appealable to district court (until a final order is issued).

When a final decision is rendered by the Department, any party to the proceeding may appeal to district court within 28 days of the final decision.[354] The district court's decision may be appealed directly to the Idaho Supreme Court (bypassing the court of appeals).

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[352] 1978 Idaho Sess. Laws, ch. 324 ch. 324 § 1. This provision removed the provision saying that domestics would "not be in any way affected by this act" replacing it with a statement saying that domestics were exempt from permitting requirements.

[353] *Parker v. Wallentine*, 103 Idaho 506, 511, 650 P.2d 648, 653 (1982).

[354] Idaho Code §§ 42-203A(6), 42-211, 42-222(5), 42-240(7), 42-1701A(4), 67-5270, and 67-5273(2).

The standard of review is set out in Idaho's APA.[355] Essentially, the party challenging the agency's decision must show that the Department (1) applied the law incorrectly, (2) made a factual determination which is clearly erroneous, or (3) abused its discretion.

An Idaho statute (which effectively overruled a prior case) states that the SRBA court does not have jurisdiction to review Idaho Department of Water Resources administrative decisions affecting water rights claimed in an adjudication, including a water right transfer decision involving a determination that all or a portion of a water right has been forfeited. Rather, judicial review of Department decisions is to be brought pursuant to the Idaho Administrative Procedures Act.[356] This statute notwithstanding, the Idaho Supreme Court issued an administrative order on December 9, 2009 stating that "all petitions for judicial review of any decision regarding the administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication . . . ."

(12) Exhaustion

The issue of exhaustion of administrative remedies (notably, whether it is necessary to file exceptions or a petition for reconsideration) is addressed in the *Idaho Land Use Handbook*.

(13) Attorney fees and sanctions

EDITOR'S NOTE: A more extensive discussion of Idaho Code § 12-117 and other attorney fee provisions is contained in the *Idaho Land Use Handbook.*

The Department's rules contain no provision addressing the award of attorney fees or other sanctions against a non-prevailing party who engages in unreasonable or frivolous administrative litigation. "Generally, an administrative agency has no power to award attorney's fees unless specifically authorized by statute or agreement between the parties." *In the Matter of Application for Transfer No. 5691 in the Name of Jerome Cheese Company,* Idaho Department of Water Resources (Order Denying Motion for Attorney's Fees, Nov. 11, 2000) at 2 (citing *Idaho Power Co. v. Idaho Public Utilities Comm'n*, 102 Idaho 744, 750, 639 P.2d 442, 448 (1981).

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[355] Idaho Code § 67-5279. *See*, *Dovel v. Dobson*, 122 Idaho 59, 61-62, 831 P.2d 527, 529-30 (1992), and cases cited therein.

[356] Idaho Code § 42-1401D (negating decision of the Idaho Supreme Court in *Sagewillow, Inc. v. IDWR* ("*Sagewillow I*"), 135 Idaho 24, 13 P.3d 855 (2000), which held that venue and jurisdiction provisions of adjudication statutes override those of the Idaho Administrative Procedures Act). The legislation amending Idaho Code § 42-1401 included an express statement of intent. *See* 2001 Idaho Sess. Laws, ch. 31.

However, the Department has recognized that Idaho Code § 12-117 authorizes it to award attorney fees in administrative matters involving litigation between a governmental entity and a private party. *In the Matter of Application for Transfer No. 5691 in the Name of Jerome Cheese Company,* Idaho Department of Water Resources (Order Denying Motion for Attorney's Fees, Nov. 11, 2000) (case involved a protest by a city against a private party applicant). Although the Department declined to award attorney fees in that case, it determined that it could and must do so where the standards of section 12-117 are met. (See the *Idaho Land Use Handbook* for a detailed discussion of attorney fee recovery provisions.) This case, however, is unusual in that the protestant was a governmental entity, thus making section 12-117 applicable. This provision authorizes awards of attorney fees to the prevailing party in litigation involving "a state agency, a city, a county or other taxing district." Idaho Code § 12-117(1). Moreover, it authorizes awards "in any administrative or civil judicial proceeding." *Id*. Idaho courts have interpreted this to allow awards not only in the context of judicial appeals of administrative decisions, but by the administrative body in the administrative hearing itself. *Stewart v. Dep't of Health and Welfare*, 115 Idaho 820, 822-23, 771 P.2d 41, 43-44 (1989), *see*, *Ockerman v. Ada Cnty. Bd. of Comm'rs*, 130 Idaho 265, 267, 939 P.2d 584, 586 (Idaho Ct. App. 1997).

Where none of the parties to a contested case are governmental entities, there does not appear to be any direct statutory authority for the Department to award attorney fees at the administrative level. For instance, Idaho Code §§ 12-121 and 12-123 authorize attorney fee awards and sanctions, but are limited to civil proceedings.

Note, however, that the Department's Rules do authorize the award of sanctions in the context of discovery abuses. IDAPA § 01.01.01.531. Under Rule 37 of the Idaho Rules of Civil Procedure, discovery sanctions can include the award of attorney fees.

(14) Error correction

The Department does not have express general statutory authority to correct errors discovered in permits, licenses, and other documents. The Department's practice, however, it to correct such errors without instituting special proceedings therefore, where the error is manifest and other parties are not affected thereby. Typically, the Department simply will issue a preliminary order to the water right holder explaining how the error occurred, accompanied by a corrected permit, license, or other document.

(15) Authority of the Department to impose conditions on water rights

The authority to condition water rights is expressly stated in the Water Code. The first applies to transfers:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

Idaho Code § 42-222(1) (emphasis added).

The second applies to permit amendments:

> The director of the department of water resources shall give such notice to other affected water users as he deems appropriate and may grant the amendment, in whole or in part or upon conditions, or may deny same.

Idaho Code § 42-211 (emphasis added).

The third applies to licensing:

> … The director shall condition the license to prohibit any transfer of the place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use of amounts held for reasonably anticipated future needs together with such other conditions as the director may deem appropriate.

Idaho Code § 42-219(1) (as amended in 2020) (emphasis added).

C. Time lines for IDWR hearings

(1) "Fast" versus "slow" scenario

Predicting how long a hearing before the Department necessarily involves some guesswork. The best we can provide are some illustrative examples. Here we employ two: a "fast" and a "slow" scenario.

The "fast" scenario assumes that a protest is filed, followed by minimal discovery, a short hearing, no briefing, no reconsideration, and no appeal. That scenario would play out in just over five months (from the date of application).

In contrast, the "slow" scenario assumes that protests are filed and that the protestants will take advantage of every opportunity for discovery, briefing, reconsideration and review. The estimated time frame for the slow scenario runs one year and three months (from the date of application). The two scenarios are compared below:

STAGE	FAST SCENARIO	SLOW SCENARIO
From Application to Hearing	88 days	156 days
From Hearing to Initial Decision	30 days	88 days
From Preliminary or Recommended Order to Final Order	14 days	149 days
From Final Order to Deadline to Initiate Judicial Review	28 days	63 days
TOTAL	160 days	456 days

The estimated times for each step are based on a combination of fixed regulatory timeframes coupled with estimates where no fixed deadline applies. Obviously, actual time frames can vary widely.

The slow scenario is not a worst case scenario. Complex discovery, motion practice, remands and other delays could extend this process even further. These time frames take the applicant only to the point of judicial review. As noted above, district court litigation might take eight months or more and a state supreme court appeal could entail another year.

(2) Detailed slow scenario

A detailed breakdown of the "slow scenario" follows.

(a) From application to hearing

EVENT	COMMENT	ESTIMATED TIME	CUMULATIVE TIME
Application Filed			Day 1

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EVENT	COMMENT	ESTIMATED TIME	CUMULATIVE TIME
Prepare Publication Notice	The Department will prepare the notice of publication and submit it to local newspaper(s). Idaho Code § 42-203A(2).	2 weeks (Depending on the Department's workload, this could be much longer)	Day 15
Notice of Application Published	Notice of the Application must be published once in each of two weeks. Idaho Code § 42-203A(2).	8 days, plus 5 days advance time required by paper	Day 28
Deadline for Protests	Protests must be filed within 10 days of the last day of publication. Idaho Code § 42-203A(1). However, a would-be protestant who misses the deadline may file a petition for intervention.	10 days	Day 38
Prehearing Conference	This is arranged through the Department by mutual agreement of the parties. IDAPA 37.01.01.510 to .513.	2 weeks (this could be much longer)	Day 52
Discovery and Motion Practice	Discovery is not automatic, and must be initiated through petition. The Department will then set a discovery schedule (which will generally conform to the agreement of the parties). IDAPA 37.01.01.521.	3 months (this could be longer or shorter, in some cases much longer)	Day 142
Witness and Exhibit Disclosure	The Department will set a deadline for disclosure and identification of witnesses and exhibits.	Assume 10 days before trial, following discovery cutoff	Day 152
Hearing	This is arranged through the Department by mutual agreement of the parties. Idaho Code § 42-1701A; Idaho Code § 7-5242; IDAPA 37.01.01.550. Note: In addition to the above, the water code contains a separate "catch all" provision that provides a right to a hearing before the Director when no other opportunity for hearing was provided. Idaho Code § 42-1701A(3); IDAPA 37.01.01.730.02.e; IDAPA 37.01.01.740.02.b.	Assume 4 day hearing	Day 156

(b) From hearing to initial decision by hearing officer

EVENT	COMMENT	ESTIMATED TIME	CUMULATIVE TIME
Last day of hearing			Day 0
Post-hearing briefs	There is no provision in the rules for the filing of briefs. Parties should discuss this with the hearing officer.	Assume opening brief 14 days after hearing, response 7 days later, followed by reply in 7 days	Day 28
Recommended or preliminary order	Idaho Code § 67-5243(1)(a); IDAPA 37.01.01.720.01; IDAPA 37.01.01.730.01 Note: Once the recommended or preliminary order is issued, the clock begins to run simultaneously on petitions for reconsideration and administrative appeals.	No deadline. However, IDWR orders usually come out within 60 days.	Day 88

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(c) From preliminary or recommended order to final order

EVENT	COMMENT	ESTIMATED TIME	CUMULATIVE TIME
Preliminary Order or Recommended Order	The Hearing Officer may issue either a preliminary order or a final order. If she issues a preliminary order, it will become final automatically if not challenged. If challenged, the agency head will review and issue a final order. If she issues a recommended order, it will be reviewed by the agency head (whether or not it is appealed). The agency head will then issue a final order. Either type of order may be appealed to the agency head. If an appeal is filed, the time frames are identical. Preliminary Order: Idaho Code § 67-5243(3)(b); IDAPA 37.01.01.730. Recommended Order: Idaho Code § 67-5243(3)(a); IDAPA 37.01.01.720.		Day 0
Optional: Petition for reconsideration of preliminary order.	Preliminary Order: Idaho Code § 67-5243(3); IDAPA 37.01.01.730.02.a. Recommended Order: Idaho Code § 67-5243(3); IDAPA 37.01.01.720.02.a. Note: A party may skip the "petition for reconsideration" and immediately file an administrative appeal. If a petition for reconsideration is filed, the parties will have another opportunity to file an administrative appeal after the petition is resolved. Filing a petition for reconsideration at this stage affords the hearing officer an opportunity to correct the alleged error before the matter is elevated to the agency head. Note that there is a separate provision for a "petition for clarification," IDAPA 37.01.01.770. This serves a similar, but less formal function. Most importantly, a petition for clarification does not suspend the time for appeal.	14 days after preliminary or recommended order. Preliminary Order: If neither petition for reconsideration or administrative appeal is filed within 14 days, the preliminary order automatically becomes final (and appealable). Recommended Order: If neither petition for reconsideration or administrative appeal is filed within 14 days, the recommended order goes to Director for further action.	Day 14
Optional: Response to petition for reconsideration.	The rules do not contemplate the filing of a response to a petition for reconsideration. This follows the appellate model, in which no response is filed unless and until the petition for reconsideration is granted, at which point additional briefing may be ordered. Nevertheless, some people do file responses, and the Department generally accepts them for filing.	None	Day 14

EVENT	COMMENT	ESTIMATED TIME	CUMULATIVE TIME
Order "disposing of" petition for reconsideration.	Preliminary Order: Idaho Code § 67-5243(3); IDAPA 37.01.01.730.02.a. Recommended Order: Idaho Code § 67-5243(3); IDAPA 37.01.01.720.02.a. Note: The hearing officer is required to "dispose of" the petition within 21 days. Neither the statute nor the rule say what this means. It could mean that the hearing officer is required to address the merits of the petition within that time. But the Department does not read the rule that way. According to the Department, granting the petition simply means that the hearing officer has agreed to reconsider his or her decision. It does not indicate one way or the other whether the order will be changed in accordance with the request of the petitioner. Moreover, according to the Department, granting the petition essentially "stops the clock." Because the IDAPA and the Department's implementing rule do not say what happens next, the Department takes the view that the hearing officer can take as long as he or she needs to reconsider the matter. Presumably, the end result is a new recommended order or preliminary order, which sends the parties back to step one. But this is not spelled out in the statute or rule. Thus, there is risk of substantial delay in filing a petition for reconsideration.	21 days after petition for re-consideration (or else deemed denied).	Day 35
Appeal to agency head from preliminary or recommended order	Preliminary Order: Idaho Code § 67-5245(3); IDAPA 37.01.01.730.02.b. The terminology is inconsistent. The statute speaks in terms of "administrative review," "motion for review" and "petition for review." The regulation says a party may "appeal or take exceptions." Note: Even if no one seeks review of the preliminary order, the agency head may, on his own motion, within 14 days, decide to review the order. Idaho Code § 67-5245(3). However, this statutory provision for "sua sponte review" does not appear to be reflected in IDWR's rules. Recommended Order: Idaho Code § 67-5244(1); IDAPA 37.01.01.720.02.b. The statute says a party may "file exceptions." The regulation says a party may "support or take exceptions."	14 days from order, or from denial of petition for reconsideration.	Day 49
Opening brief on petition.	Preliminary Order: Idaho Code § 67-5245(5); IDAPA 37.01.01.730.02.b. Recommended Order: Idaho Code § 67-5244(1); IDAPA 37.01.01.720.02.b and .c.	The opening brief is filed simultaneously with the administrative appeal.	Day 49
Opposing brief on petition.	Preliminary Order: Idaho Code § 67-5245(5); IDAPA 37.01.01.730.02.c. Recommended Order: Idaho Code § 67-5244(1); IDAPA 37.01.01.720.02.c.	14 days from opening brief.	Day 63

EVENT	COMMENT	ESTIMATED TIME	CUMULATIVE TIME
Further briefing and oral argument (optional).	Preliminary Order: Idaho Code § 67-5245(5); IDAPA 37.01.01.730.02.d. Recommended Order: Idaho Code § 67-5244(1); IDAPA 37.01.01.720.02.c.	If the agency head grants the petition, further briefing and oral argument will follow. No deadline set. This schedule assumes (most optimistically) that argument is scheduled within 30 days.	Day 93
Final order (or remand for further evidentiary hearings).	Preliminary Order: Idaho Code § 67-5245(6)(a); IDAPA 37.01.01.730.02.d. Recommended Order: Idaho Code § 67-5245(2)(a); IDAPA 37.01.01.720.02.c. Note: The 56 day clock does not begin to run until the other parties have had an opportunity to file briefs. So, as a practical matter, this is really 70 days from the filing of the appeal (aka exceptions). Note: The rules provide that the Department may extend the 56 day deadline "for good cause shown" but they do not provide any consequence for failure of the Department to take any action. The Department's position is that its failure to respond by the deadline does not have any legal effect. Specifically, its lack of a response does not have the effect of automatically denying (or granting) the exceptions. Nor does it convert the preliminary order into a final order. Consequently, judicial review continues to be premature, and the clock for filing a judicial appeal has not started to run. A party finding itself in this circumstance may bring the matter to the attention of the Department, or may request a court to force the agency to act. Note: In addition to issuing a final order, the agency head also has the option to conduct further hearings or remand the issue for further factual development of the record. Preliminary Order: Idaho Code § 67-5245(6)(b) and (c); IDAPA 37.01.01.723.d. Recommended Order: Idaho Code § 67-5244(2)(b) and (c); IDAPA 37.01.01.720.02.c. Note: A party may choose to file a motion seeking an administrative stay on further processing of the application to supplement the record or for other stated purposes. However, the party should simultaneously file an appeal.	56 days after briefs and oral argument, if there is one. The agency may take longer, for good cause.	Day 149

(d) From final order to judicial review

EVENT	COMMENT	ESTIMATED TIME	CUMULATIVE TIME
Final Order by agency head (or a Preliminary Order that was not challenged)			Day 0

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EVENT	COMMENT	ESTIMATED TIME	CUMULATIVE TIME
Optional: Petition for reconsideration of final order by agency head. (Not applicable to preliminary order which becomes final automatically).	Idaho Code § 67-5246(4); IDAPA 37.01.01.740.02.a. Note: This is called a "motion for reconsideration" in the statute. Idaho Code § 67-5246(4). However, the regulations refer to it as a "petition for reconsideration." IDAPA 37.01.01.740.02.a. Note: A petition for reconsideration may be filed at this stage only if the final order was issued by the agency head. If a preliminary order has become final automatically (because there was no appeal or petition), then no further administrative review is available.	14 days from final order issued by agency head.	Day 14
Order disposing of petition for reconsideration.	Idaho Code § 67-5246(4); IDAPA 37.01.01.740.02.a.	21 days from petition (or else deemed denied).	Day 35
Final order becomes "effective." Applies only to orders issued by agency head (not to preliminary order which becomes final automatically).	Idaho Code § 67-5246(5). Note: The statute refers to "the order" which apparently relates back to "any final order issued by the agency head" in the previous subsection. This 14 day period runs simultaneously with the 28 day appeal period. Thus, the rule becomes effective halfway through the appeal period, if no petition is filed. Thus, this statutory provision is simply a mechanism to ensure that the parties have an opportunity to file a petition for reconsideration of orders issued by an agency head before the order goes into effect. Note: This rule has no applicability to preliminary orders which become final automatically because no administrative appeal is filed; they become "effective" as soon as they become final—because there is no further mechanism for administrative review. Note also that the Department's rules provide that the effectiveness of any order shall not be stayed automatically on the filing of an appeal.	14 days after issuance of the order, if no petition for reconsideration. If a petition for reconsideration is filed with respect to a final order by an agency head, the final order becomes effective once the petition is disposed of.	(runs concurrently)
Petition for judicial review to district court.	Idaho Code §§ 67-5270 to 67-5279, in particular 67-5273(2); IDAPA 37.01.01.740.02.c.	28 days from final order (that is, 28 days from order issued by the agency head or from date when preliminary order became automatically final). Note, if no petition for reconsideration is filed, the 28 days begins to run immediately from issuance of order. Note: Venue is specified in IDAPA 37.01.01.740.02.c.	Day 63
Cross-petition for judicial review.	Idaho Code § 67-5273(2).	14 days from petition for judicial review.	Day 77

D. Administration of water rights

The curtailment of junior water rights by state action to enforce priorities is referred to as the "administration of water rights." In its simplest terms, administration usually refers to shutting down juniors in accordance with their priorities to meet the needs of seniors. In contrast, the term "water management" or "management of water rights" implies a broader regulatory perspective and the use of a broader range of management tools. For instance, management might involve aquifer recharge and cooperative conservation efforts. Both administration and management of water rights occurs within the framework of the prior appropriation doctrine.

The Department does not have general or blanket authority to administer water rights. Rather, the Director (or a water right holder seeking enforcement) must proceed under one of a handful of specific authorities:

- IDWR (typically acting through a watermaster) may administer decreed rights within a "water district" pursuant to Idaho Code §§ 42-602 to 42-619.
- IDWR may administer ground water rights under the Ground Water Act, Idaho Code § 42-237a(g).[357]
- In the case of conjunctive management of water rights, the Conjunctive Management Rules provide mechanisms for calls under each of these authorities. Rule 40 deals with calls within a water district. Rule 30 deals with calls outside of a district.[358]
- In addition, the Department has authority to shut down diversions by persons without a water right, but this is not technically "administration" in the sense of enforcing priorities.
- Finally, an injured water right holder may seek direct judicial enforcement of his or her priority. Each of these is discussed below.

(1) Administration of water rights within water districts

As discussed in section 30.F on page 614, water districts are created solely in areas where water rights have been adjudicated—that is, where the rights have been through a general or local court action (a "water rights adjudication") brought to determine amounts, priorities, places of use, and other elements of all water rights claimed in a particular source. Around the West, and certainly in Idaho, essentially all major surface streams have had some type of adjudication.

[357] IDAPA 37.03.11.040.

[358] IDAPA 37.03.11.030.

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The Department's authority and responsibility to administer water rights within water districts is governed by Idaho Code §§ 42-602 to 42-619. This authority ordinarily is limited to the administration of decreed rights within the water district.[359] A delivery call placed pursuant to Idaho Code § 42-607 cannot reach junior water rights outside the water district, even if they are the cause of the shortage.[360]

The Department also may seek authority from the SRBA Court for "interim administration" of partially decreed water rights,[361] which the Director has done in created Water Districts 120 and 130. On February 19, 2002 the Director issued an order creating Water District 120 (American Falls area) and another order creating Water District 130 (Thousand Springs area) pursuant to Idaho Code § 42-604.[362] On January 8, 2003, the Director issued an order expanding the boundaries of Water District 130 (Thousand Springs area) to include parts of Administrative Basin 37.[363] On January 22, 2003, the Director expanded the boundaries of Water District 120 to include parts of Administrative Basin 29.[364] The Department is now seeking to further expand the boundaries of Water Districts 120 and 130 to include virtually all ground water within the Eastern Snake Plain Aquifer.[365]

Under the statutory framework set out under Chapter 6 of the Water Code, the distribution of water within water districts is carried out by a locally-elected state official

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[359] Idaho Code §§ 42-602, 42-604, 42-607.

[360] Such extra-district calls upon unadjudicated water rights have always been prohibited, except for a two-year period ending in 1994. 1992 Idaho Sess. Laws, ch. 34; 1994 Idaho Sess. Laws, ch. 450. During this window, the *Musser* case was decided (see discussion in section 9.C(1) at page 131).

[361] Idaho Code § 42-1417.

[362] On November 19, 2001, the Department sought authority from the SRBA Court for interim administration of partially decreed rights in Administrative Basins 35 and 41 (American Falls area) and Basins 36 and 43 (Thousand Springs area). On January 8, 2002, the SRBA Court issued an order authorizing the requested interim administration.

[363] On August 30, 2002, the Department filed a second motion with the SRBA Court seeking authorization for interim administration of water rights within Administrative Basin 37. The SRBA Court granted the request on November 19, 2002.

[364] On July 10, 2003, the Department filed a third motion with the SRBA Court seeking authorization for interim administration of water rights within a portion of Administrative Basin 29. The SRBA Court granted the request on October 29, 2003.

[365] On April 15, 2005, the Department filed three motions with the SRBA Court seeking authorization for interim administration of rights within Administrative Basins 25, 31, 32, 33, and 45.

known as a watermaster. Each water district has its own watermaster. The watermaster operates under the authority of the IDWR Director, but typically is not seen as a department employee so much as an agent for a local committee of irrigators and other water users who are empowered by statute to elect the watermaster and (subject to the Department's final approval) set the watermaster's annual budget, which in turn is funded by annual fees levied on the district's water users. The distribution of water is not typically seen as being the result of a "delivery call" (although that is, in effect, what the watermaster is administering on a daily basis). Rather, it is seen as a rote exercise established after the amounts and priorities have been sorted out in an adjudication.

Historically, virtually all water districts were based upon an adjudication of surface water rights, and therefore were organized to administer surface diversions. For example, Water District 1, Idaho's largest such district, administers natural flow surface diversions and surface storage deliveries on the Snake River upstream from Milner Dam. Likewise, in Water District 63, the watermaster opens and shuts headgates, measures surface diversions, and accounts for storage deliveries along the Boise River, all pursuant to a decree of water rights entered in the early part of the twentieth century.

Idaho's water districts typically are labeled with the number corresponding to the Department's administrative water basin in which the district exists. An exception has been in the recent creation of water districts that include decreed ground water rights on the Eastern Snake River Plain. The first two such water districts were numbered Water District 120 and Water District 130. Water Districts 110 and 140 are contemplated as ground water rights in the upper Snake River Basin and in the Oakley Fan area that are recommended to be decreed in the next one to two years (as of this writing). The water district covering surface waters in the Boise River drainage, which is administrative Basin 63, is Water District 63. In a few cases, sub-areas have been established to encompass decreed rights in smaller tributaries or sources within a water district. In one unusual situation, the holders of ground water rights within a specific, well-defined ground water source that earlier had undergone the proof and sorting out process of an adjudication, successfully petitioned the Department to establish a water district. The result was Water District 63A, which encompasses a portion of the low-temperature geothermal aquifer in the Boise area. Now that conjunctive management of ground and surface water sources will begin to occur in many areas, there will be additional water districts comprised of ground water rights. Water Districts 120 and 130 on the Eastern Snake Plain Aquifer are two examples.

The essential reality underlying the traditional watermaster's duties is that, on a surface stream, there are a limited number of established diversions—typically, headgates—that can be manipulated and readily measured; shutting or opening each of them has immediate effects on the flow available for other water rights. Such a system usually can be operated on a basis of more-or-less instantaneous cause-and-effect relationships, as headgates are closed or opened. Consequently, the judges who issued the old court decrees—virtually all of which dealt solely with the surface water rights on

a stream—faced the relatively straightforward task of determining acres irrigated and sorting out the parties' relative priorities. Once this had been accomplished, the "administration" was a largely ministerial task of closing and opening headgates according to the program set out in the decree. Water users did not have to go back into court to have their water delivered. While there sometimes were controversies (typically involving alleged illegal diversions and the like), rarely was there a "delivery call" as such. It was much more a question of living in the priority system according to the level of stream flows. It was usually obvious whose headgate was to be turned off, when, and for how long. This system incorporated such concepts as futile call, and usually gave rise to a set of local customs and practices for assuring the delivery of water in line with the decree while avoiding controversy or waste of water.

Now that Idaho has begun to administer ground water rights conjunctively with surface water rights, the water district concept is likely to undergo change; as this happens, the concept should be understood in the context of its origins. Because of the complexity of ground water-surface water interactions, simply shutting off ground water rights in priority will not produce the same result, in the same timeframe, as occurs on the surface stream when surface headgates are opened or closed according to the decreed priorities. Rather than having a watermaster carry out a well-defined program of opening and shutting headgates according to river gauge readings and decreed priorities, the watermaster operating in the era of conjunctive management may be called upon to administer mitigation plans or other arrangements involving a widespread group of ground and surface water users, and do so with reference to complex hydrological models, special rulings from the Department, or long-term agreements among the affected water users.

(2) Administration of ground water rights under the Ground Water Act

The Department is given authority to administer ground water rights pursuant to the Ground Water Act,[366] notably Idaho Code § 42-237a(g). The Department's Conjunctive Management Rules are premised in part on this Act. Even in the absence of the Conjunctive Management Rules, however, the Department presumably would have direct authority to administer ground water rights under this Act.

(3) Administration through the Conjunctive Management Rules

The Conjunctive Management Rules implement the Department's authority under the Ground Water Act and under Chapter 6 (dealing with Water Districts) with respect to

[366] Idaho Code §§ 42-226-239.

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the conjunctive management of ground and surface rights. These rules are discussed in section 9 beginning on page 121.

(4) Temporary water rights

The Water Code authorized the Department to issue temporary water rights on an expedited basis for a "minor use of short duration" that is "not intended to become an established water right." Idaho Code § 42-202A. Such rights may not exceed five acre-feet in total diversion and can last no more than one year.

If an entity needs more than five acre-feet, it may rent water from the Idaho Water Supply Bank on a temporary basis.

IDWR also has the authority to issue temporary approval of transfers in a drought emergency. Idaho Code § 42-222A.

Another approach is to rely on an exempt domestic water right. This would provide a permanent right but for a small quantity. Despite the name, "domestic" is defined broadly to include "any other use"—even industrial or commercial. However, the domestic exemption allows only 0.04 cfs capped at a volume of 2,500 gallons per day. Also there are limits on the ability to use multiple such domestic exemptions. Idaho Code §§ 42-111(2) and (3).

(5) Curtailment of illegal water diversions

Under Idaho Code § 42-351 the Director has authority to issue a notice of violation and/or seek judicial enforcement against any person diverting water without a water right. This section, however, does not authorize action against water right holders to enforce priority.

Violations of section 42-351 may give rise to an enforcement action under Idaho Code § 42-1701B. Subsection 42-1701B(6)(a)(i) provides for penalties for illegal water diversion of $50 per 0.1 cfs per day or $50 per 0.2 acre-feet diverted to storage—up to a maximum of $50,000 per year. In addition, Idaho Code § 42-351(4) authorizes IDWR to seek injunctive relief (in addition to pursuing a notice of violation).

(6) Judicial enforcement of priority

Priorities also may be enforced by recourse to the courts, although, understandably, this typically arises where the water rights have not been decreed and there is no water district.[367] In such cases, the litigants are required to demonstrate the

[367] *See Geertson v. Barrack*, 3 Idaho 344, 29 P. 42 (1892); *Dunniway v. Lawson*, 6 Idaho 28, 51 P. 1032 (1898).

various elements of their water rights vis-à-vis the others, and the plaintiffs must prove material injury from the junior diversions.

It is likely that the plaintiffs seeking judicial enforcement will have to show that they have exhausted available administrative remedies. In the case of undecreed surface water rights outside of a water district, there would be none to exhaust. However, for rights within a water district or covered by either Rule 30 or 40 of the Conjunctive Management Rules, it is possible that the court might require the injured party to exhaust available remedies first.

E. The Idaho Water Resource Board

The Idaho Water Resource Board was created by the Idaho Legislature in 1965 following the passage of a constitutional amendment that established the Board.[368] There are eight Board members, appointed by the governor, who serve four-year terms. The current members of the board are listed under Appendix E.

The Board initially was created as a separate agency with its own staff. In 1974, the Board and the existing Department of Water Administration were combined to form the present Idaho Department of Water Resources. Today, the Department provides administration and staff support to the Board. The Board and IDWR have interrelated functions in areas such as appeals, administrative rules adoption, water bank administration, and water right negotiations with the federal government and Indian Tribes.

Board programs are divided into three general categories: comprehensive state water planning, water management activities, and financial programs.

F. The State Water Plan

In the 1964, partly in response to concerns about proposals to divert Idaho rivers for use in the Southwest, Idahoans approved a constitutional amendment which established the Idaho Water Resource Board and empowered it to "formulate and implement a state water plan for optimum development of water resources in the public interest."[369] In adopting the Plan, the Board must follow criteria including, among other things, means to achieve conservation and optimum use; minimum stream flow for aquatic life, recreation and aesthetics; and maximizing supplies for beneficial uses.

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[368] Idaho Const. art. XV, § 7 (adopted in 1964).

[369] Idaho Const. art. XV, § 7 (adopted Nov. 3, 1964, amended Nov. 6, 1984). Implementing legislation is codified primarily at Idaho Code §§ 42-1730 to 42-1736B and 1805(7).

The Board is the agency described in Idaho's constitution to formulate and implement the State Water Plan (reproduced under Appendix F). The Idaho Supreme Court ruled in 1983 that the Board, being a constitutional entity, has authority to adopt a state water plan (including designation of instream flow targets on the Snake River) without legislative approval.[370] This did not sit well with the Legislature. The Idaho Constitution was subsequently amended to expressly provide that legislative approval or acquiescence is required.[371]

The first State Water Plan was adopted in 1976 and approved by the Legislature (with amendments) 1978.[372] The current State Water Plan was adopted in 1996 and is reproduced under Appendix F. The current plan is arranged into numerous short policy statements, each followed by a brief explanation. These policies carry considerable weight with the Department in water allocation decisions and may well be influential with a court. Policies adopted by the Board include recognition of the importance of non-consumptive uses and the need for protection of instream flows, particularly in connection with the state's anadromous fishery resource, endorsement of the Water Supply Bank, closer review of federal water projects, establishment target flow levels for the Snake River (ranging from zero flow below the Milner gauge to 13,000 cfs at Lime Point) (see discusion in section 24.H on page 503).

Although the State Water Plan has limited direct legal effect, applications for new appropriations must be consistent with the minimum flow provisions of the State Water Plan.[373] Under the Department's rules, appropriations of "trust water" that have a

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[370] *Idaho Power Co. v. State ("Swan Falls I")*, 104 Idaho 570, 661 P.2d 736 (1983).

[371] Idaho's Constitution now provides: "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." Idaho Const. art. XV, § 7. The Legislature implemented this constitutional authority as follows: "The state water plan adopted by the Idaho water resource board pursuant to authority of section 42-1734, Idaho Code, shall not become effective until it has been submitted to the legislature of the state of Idaho and has been affirmatively acted upon in the form of a concurrent resolution which may adopt, reject, amend or modify the same. Thereafter, any change in the state water plan shall be submitted in the same manner to the legislature prior to becoming effective." Idaho Code § 42-1736. (This statute was actually enacted prior to the 1984 constitutional amendment providing for legislative approval.) There appears to be conflict between the Constitution (which contemplates legislative acquiescence) and the statute (which requires affirmative approval).

[372] House Concurrent Resolution No. 48 (1978).

[373] "In addition to the other duties prescribed by law, the director of the department of water resources shall have the following duties: . . . After notice, to suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights or to

significant impact on Snake River flows must be shown to be consistent with the State Water Plan.[374] Although not directly binding, the Department will consider the State Water Plan in applying the "local public interest" evaluation applicable to new appropriations and transfers and the special "public interest" evaluation applicable to trust water appropriations.

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." Idaho Code § 42-1805(7).

[374] IDAPA 37.03.08.045.03.f.i.

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15. TRANSFERS OF WATER RIGHTS

A. Background

A change or transfer of a water right simply refers to a change in its use, that is, a change in one of its "elements."[375] That might entail, for instance, moving irrigation water from one farm to another. It might involve moving an irrigation right to a new industrial use. Or it might involve adding a new use, such as a new program of land application of waste water at the tail end of an existing industrial process.

Water transfers are quite common today, but this was not always so. In the early stages of water development, a person seeking to start a new activity using water was often able to appropriate a new water right for the project. There was no point in going through the expense and complexity of a transfer proceeding if a new water right could easily be obtained. As demand on the State's water resources increases, however, new users are increasingly finding it necessary to secure a water supply by acquisition and transfer of existing water rights.

The trend toward transfers has been slower to develop in Idaho than in some other Western states, simply because Idaho is a relatively water-rich state. The Snake River Basin contributes nearly thirty-seven million acre-feet of water to Columbia River flows each year,[376] Idaho has over 12 million acre-feet of surface reservoir storage space, and the Snake Plain Aquifer, which underlies much of the approximately 15,600 square mile Snake River Plain, holds an additional 300 to 500 million acre-feet.[377]

Despite this relative abundance of water in Idaho, shortages do occur on both a regional and seasonal basis. Even during normal precipitation years in areas such as the Upper Snake River Basin, the Big Lost River Basin, and the Boise River Basin, the natural surface flows during the peak of the irrigation season typically are fully appropriated. In addition, most of the feasible water storage projects already have been constructed in Idaho, and the availability of federal or state funding for large new storage projects appears to be limited for the foreseeable future.

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[375] For a detailed treatment of the subject of changes and transfers, see A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249 (1990). In 1990, the author was a senior deputy attorney general assigned to the IDWR. She is now a Magistrate Judge in the Third Judicial District.

[376] Idaho Dept. of Water Resources, *Stream Flows in the Snake River Basin: 1989 Conditions of Use and Management*, Open File Report 27 (June 1989).

[377] U.S. Dept. of Energy, *Geohydrologic Story of the Eastern Snake River Plain and the Idaho National Engineering Laboratory* 2 (Wash. D.C. 1982).

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Also, modern, large-scale development of ground water resources within the Snake Plain Aquifer and elsewhere have combined with periodic drought and changing surface water irrigation practices to affect recharge to the aquifers and return flows to surface sources. As a result, opportunities to make new ground water appropriations have become severely limited in recent years as controversies have erupted and the Department has imposed administrative moratoriums on the acceptance or processing of applications for permits. (See part 20 at page 352 for a discussion of moratoriums.)

Where opportunities for new appropriations now are much more limited, changes of existing water rights to new uses and transfers to new owners, new places of use and new points of diversion represent a practical means of obtaining water for new beneficial uses. Under the prior appropriation doctrine, in areas where existing supplies are fully appropriated, transfers of existing rights may represent the only means of acquiring water to meet the new and growing demands for water for industry, municipalities and environmental protection. Consequently, water transfers are becoming increasingly common in Idaho, as they are throughout the West.

In addition to traditional agriculture-to-agriculture transfers involving changes in points of diversion and places of use, significant amounts of water are being transferred to new beneficial uses—typically from irrigation to municipal and industrial uses. Temporary transfers are facilitated through Idaho's Water Supply Bank programs. The U.S. Bureau of Reclamation,[378] which operates most of Idaho's largest irrigation reservoirs, also is involved in transfers among irrigators of Bureau-stored water. It is likely that the Bureau will play a greater role in future water reallocations as demand increases for new uses of water.

B. Terminology: change vs. transfer vs. conveyance

The terms "change" and "transfer" tend to be used interchangeably. Sometimes we hear the word "transfer" used to describe what is more accurately described as a conveyance—that is, a change in ownership of a water right.

Technically speaking, the term "transfer" is used in Idaho to describe the process for a change in how a water right can be used (that is, a change in one of its elements).

[378] The Bureau of Reclamation has developed a transfer policy and an administrative guidance document that govern the Bureau's role in water right transfers in the West. The underlying principle of the Bureau's transfer policy is that the Bureau will involve itself only as a facilitator of voluntary transfers affecting federal water projects and water rights with the goal of mitigating third party effects and preserving existing financial, operational and contractual commitments of the Bureau and its water users. *See* Department of Interior, *Principles Governing Voluntary Water Transactions that Involve or Affect Facilities Owned or Operated by the Department of Interior* (Dec. 16, 1988); U.S. Bureau of Reclamation, *Voluntary Water Transactions: Criteria and Guidance* (1989).

These are initiated by filing an *Application for Transfer of a Water Right* under Idaho Code § 42-222(1). Likewise, they are governed by the Department's guidance, James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024). Thus, if someone wishes to change the point of diversion or place of use under a water right, the person would file a water transfer application. As noted, this might also be called, at least informally, a "change" application.

In contrast, a change in the ownership of a water right is accomplished by a conveyance—that is, a deed—and involves no approval process. Once the deed or other proof of title is obtained, the new owner should file a *Notice of Change in Water Right Ownership* form with the Department.[379] Thus, for instance, if the owner of a farm sells the farm to another (along with the water right), and no change in use of the water right is contemplated, the new owner may simply inform the Department that he or she now owns the water right. No regulatory review or approval is required.

In many instances, a change in ownership does contemplate a water right transfer. This would be the case, for instance, where a farmer, without reserving his irrigation water right in the deed, sells a portion of his farm to a land developer, who in turn seeks to use the appurtenant water right for a commercial purpose. Here, Department approval is not required for the water right's conveyance to the developer, but is required for to change its nature of use (that is, from an irrigation to a commercial purpose).

C. The basic entitlement to change the elements of a water right

In Idaho, as in other prior appropriation states, a water right is valuable real property that may be conveyed together with, or apart from, the land to which it is

[379] Note that only the buyer (the new owner) signs the notice form. The form must be filed with the Department within 120 days of closing. Idaho Code § 42-248. (As a practical matter, however, this deadline is not generally enforced.)

In some cases, the sale is consummated before the Department has approved the transfer. When this occurs, the new ownership form should be filed (together with a copy of the deed) following closing. When this occurs, the Department will issue the new water right in the buyer's name. If the Department has only been provided a copy of a purchase and sale agreement, the new water right will be issued in the name of the seller, with the expectation that the buyer will notify the Department upon completion of the sale.

A change of ownership notice also is required if a portion of a water right is conveyed to a different owner. This is referred to as a "split." Note, however, that this is applicable only if the water continues to be used on the same ground. If a water right is to be split, and any change is made to any element of the right (such as place of use), then a transfer of the right is required as well.

Where a change in ownership occurs for a right for which an SRBA claim has been filed, notice shall be provided to the IDWR. If no claim has been filed, the new owner is obligated to do so. Idaho Code § 42-1409(6).

appurtenant.[380] Idaho's courts held early on that a water right holder also has the right to change its type or nature of use provided that the rights of others are not injured as a result.[381] One commentator observed:

> It has been held that, absent injury, the right to make a change in use of a water right is inherent in the constitutional right of property ownership and that the statute setting forth the procedure and standards for changes in use neither adds to nor detracts from existing rights. It therefore appears that the right to change is a constitutional right much like the constitutional "right to appropriate," although the right to change is not expressly stated in the Idaho constitution.[382]

Despite this general entitlement, strict standards and procedures apply. The basic point of these is to ensure that injury to existing water rights does not result from the transfer.

Under Idaho law, a transfer of a water right can involve a change in virtually any of the right's essential elements. (See part 4.B at page 32 for a discussion of the elements of a water right.) The most typical elements changed in a transfer proceeding are:

1. point of diversion
2. nature (or type) of use[383]
3. place of use
4. period of use

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[380] Idaho Code § 55-101(1) (definition of real property); *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918); *In re: Robinson*, 61 Idaho 462, 103 P.2d 693 (1940); *Anderson v. Cummings*, 81 Idaho 327, 334, 340 P.2d 1111, 1115 (1959); *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984).

[381] *First Security Bank of Blackfoot v. State*, 49 Idaho 740, 291 P. 1064 (1930); *In re Dep't of Reclamation*, 50 Idaho 573, 300 P. 492 (1931); *In re Robinson*, 61 Idaho 462, 103 P.2d 693 (1940); *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933) (overturned as to reasonable pumping levels by *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973).

[382] A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 251-52 (1990).

[383] Until 1981 changes in nature of use and period of use were not authorized by statute. *Beker Indus. Inc. v. Georgetown Irr. Dist.*, 101 Idaho 187, 610 P.2d 546 (1980) (McFadden, J.) (denying transfer from agricultural use to manufacturing). In 1981, the Legislature amended the water code to expressly allow such changes, but added a proviso requiring the Department to evaluate the impact of transfers of agricultural rights on "the agricultural base of the local area." 1981 Idaho Sess. Laws, ch. 147 (codified at Idaho Code § 42-222).

These four elements are specifically mentioned in the water transfer provisions of Idaho's water code. Under limited circumstances, the Department may permit changes in other aspects of a water right. For instance, although a water user generally may not transfer a water right's diversion point to a completely new source (although it is theoretically possible if no injury results), she may be allowed to switch to a different tributary of the same source, assuming no injury to other users. To some extent, a new method of diversion may be adopted (although this may not entail a formal transfer, so long as it makes no change in return flows or causes no injury to others). Within bounds, the rate or volume of diversion may be reallocated when a water right is split into two or more parts.

D. Basic transfer principles

Idaho's water code lists the basic requirements for a water right transfer:[384] As amended in 2003, the Department's criteria for approving a transfer are as follows (paragraphs added to facilitate reading):[385]

> 42-222. …
> (1) …
> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in the use of the original right, the change is consistent with the conservation of water resources within the state of Idaho[386] and is in the local public interest as defined in section 42-202B, Idaho Code,[387] the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of

[384] Idaho Code § 42-222(1), *see also* Idaho Code § 42-108.

[385] Idaho Code § 42-222(1) (emphasis added).

[386] The "conservation of water" test was added in 1990. 1990 Idaho Sess. Laws, ch. 141. The measure was adopted in response to *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.). See discussion in footnotes 906 at page 583.

[387] The "local public interest" test was added in 1981, along with the protection of the local agricultural base. This act also added a provision limiting water rights to one change; this was repealed in 1986. 1981 Idaho Sess. Laws, ch. 147.

> water originates,[388] and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.[389] The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area.

Idaho Code § 42-222 (footnotes added).

See also summary of criteria in section 16 at page 302.

The Department has not promulgated rules governing water transfers. However, it recently issued guidance for water transfers in the Eastern Snake Plain Aquifer.[390] As a practical matter, that guidance is setting departmental policy statewide.

E. The "no injury" rule

(1) The fundamental premise

The first principle listed in section 42-222(1) that "no other water rights are injured thereby."[391] This is the foremost requirement in any water right transfer. The basic idea is that no other water user, junior or senior, may be made worse off as a result of the transfer.[392] Thus:

> Injury will result where a change makes a junior appropriator subject to a priority to which the junior was not previously

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[388] This basin-of-origin protection requirements was added in 2003, as one of the amendments to the local public interest test. H.B. 284.

[389] In 1996, the Legislature added "beneficial use" as the fifth criterion, and declared that beneficial use was satisfied in the case of "future need" water rights for municipal providers. Municipal Water Rights Act of 1996, 1996 Idaho Sess. Laws, ch. 297.

[390] IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) (Dec., 21, 2009) (superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)).

[391] "The director is statutorily required to examine all evidence of whether the proposed transfer will injure other water rights." *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982) (quoted in *Barron v. IDWR*, 135 Idaho 414, 418, 18 P.3d 219, 223 (2001)).

[392] The Department's rule outlining what constitutes injury is codified at IDAPA 37.03.08.045.1.a.

> subject or where a change increases the burden on the stream or reduces the volume of water flowing in the stream. The injury, however, must be to a water right and must be real and substantial.[393]

(2) The rule is aimed at protecting all existing water rights

The rule quoted above speaks only about protecting juniors. Seniors, however, are protected too. Idaho Code section 42-222(1) draws no distinction between juniors and seniors. It speaks of protecting all water rights. As a practical matter, however, the injury analysis typically focuses on protection of junior right holders because they are the only ones ordinarily at risk, and if juniors are protected then seniors automatically would be as well. In any event, "[t]he injury or enlargement analysis is generally not concerned with injury to senior appropriators because seniors are protected by their priorities."[394]

An example may illustrate this. Suppose that a junior water right holder were to move her point of diversion upstream of a senior. Ordinarily, the senior would not be injured by this move because she may "call out" (i.e., seek curtailment of) the junior priority in times of shortage. Thus, as a practical matter, the upstream junior headgate is no threat, because the senior below may shut it off as needed to fill her senior right.

Often, however, the senior will oppose the transfer to ensure that the transferred use will not place a greater draw on the system than the pre-transfer condition. A senior also might oppose if the effect will be to compel the senior to repeatedly take actions to protect his right in the future. While such may not be grounds for denying the transfer, it may result in the Department's imposing conditions that guarantee, to everyone's satisfaction, that the status quo on the stream will not change.

There are instances, however, where a senior right holder's priority might not adequately protect her against a junior's transfer. These are based on practical considerations. This might occur, for example, where a transfer would change a point of diversion so as to overlap and interfere with a senior right holder's point of diversion, or where a change in the location of a storage reservoir would inundate a senior's water right or increase the rate of evaporation from the stream system.[395] Likewise, it could occur in a conjunctive management context where movement of a ground water right would reduce the supply of water to a down-gradient spring user, but due to hydrological

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[393] A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers,* 27 Idaho L. Rev. 249, 260 (1990).

[394] Krogh-Hampe, 27 Idaho L. Rev. at 254 (1990).

[395] *See e.g., Lionelle v. Southeastern Colorado Water Conservancy Dist.*, 676 P.2d 1162 (Colo. 1984) (increased evaporation from enlargement of existing reservoir site).

lag times there is no practical way of curtailing the ground water use in time to benefit the senior.

Thus, the general rule is that juniors are entitled to have conditions in the source maintained as they found them when they first made their appropriation.[396] "The fundamental premise underlying the no-injury rule is that a junior appropriator has a vested right to maintenance of stream conditions existing at or after the time of the junior's appropriation."[397] One might think of the fundamental transfer rule as requiring that a water right must not increase its overall net impact on the water source or on the rights of others—that is, its full impact after taking into account all consumption, evaporation, seepage and return flows attributable to the exercise of the right pre-transfer. Evaluating these cases can become complicated when one considers issues of timing and location of return flows and actual historical consumption.

However, not every *effect* is legal *injury*. The injury occurring due to a transfer or, for that matter, an alleged out-of-priority use, must be real, identifiable and material, not merely theoretical or speculative. As the Idaho Supreme Court has said: "The question . . . is whether other users . . . are injured or will be injured by the change, or, as frequently said, substantially injured, not merely a fanciful injury but a real and actual injury."[398] This does not mean that small effects cannot be injury, or that they cannot be considered in light of their effect when accumulated with other small effects. In fact, just the opposite generally is the rule. For example, in the 1998 contested case of *Huf-N-Puf*,[399] the proposed transfer's added effect on a river would amount to 0.02 cfs. The applicant argued that this was so small compared the river's average flow that it could not be measured and, consequently was not "substantial and material" under *Cassia*. The Department ruled that, small or not, it was "real and actual injury" and would not be allowed absent mitigation.

(3) Change in point of diversion in a surface supply

Reciting the no-injury rule is easy enough. Applying it is trickier. A few examples will demonstrate that the analysis is highly dependent on the unique hydrological factors of each circumstance. (These examples deal with injury in the context of surface diversions. See the discussion in section 15.E(4) at page 232 for

[396] *Crockett v. Jones*, 47 Idaho 497, 277 P. 550 (1929); *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912). The "no injury" rule has been codified at Idaho Code §§ 42-222 and 42-108.

[397] Krogh-Hampe, 27 Idaho L. Rev. at 259.

[398] *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 7, 154 P.2d 507, 509 (1944).

[399] *In the Matter of Applications for Transfer No. 5174 in the Name of Dennis M. Baker and No. 5175 in the Name of Huf-N-Puf Trust* (IDWR, Final Order, Nov. 25, 1998).

examples dealing with injury between ground water users. See part 8 at page 120 for a discussion of ground versus surface water conflicts.)

In a simple example, suppose that two farmers have natural flow water rights, in which the junior is located upstream and the senior is located downstream. Suppose that the senior sought to change her point of diversion to a location upstream of the junior. Would the junior be injured? That cannot be answered without knowing the hydrologic conditions in the stream. (Although, as a practical matter, the junior probably would file a protest to make sure no injury occurred.)

If the stream is neither gaining nor losing and there are no changes in the quantity of water entering the stream, the upstream movement of the senior would have no effect on the junior user. If conditions on the stream do not allow both rights to be fully met, the senior will either call water past the junior (if located downstream) or physically take it out first (if located upstream). The result is the same either way; the junior is no worse off. (In fact, the junior could be made better off by having the senior move upstream, thus allowing the junior to benefit by the senior's return flow.)

Another example would be a situation where a senior several miles upstream from a junior appropriator seeks to move her point of diversion (and place of use) to a point downstream of the junior's headgate. On the face of it, one might conclude that there is no difference: In the original configuration, the senior diverted all her entitlement before it reached the junior's headgate; and, after the change, the senior would be entitled to call all her water past the junior's headgate. But it often is not so simple, primarily because of the changes to the return flow regime that the change may cause. If the junior were relying on return flows from the upstream senior's use, then the senior generally will not be allowed to make the change without providing mitigation for the junior. She would be depriving junior of the pattern of return flows that junior relied upon when he established his right.

A variation on this would be the instance where a stream gains stream flow the farther it flows (that is, water is being added to the stream at various points along its length from the aquifer, from tributaries, or from return flows through drains or otherwise). The movement of the senior to a point upstream of the junior may injure the junior. This is because the senior has moved into the "water-poor" section of the stream. Because she no longer benefits from the stream gain downstream of the junior, her water right must now be served by water that previously flowed to the junior. Thus, the junior would be injured, and this transfer would not be allowed or would require mitigation.

In contrast, if the stream is a losing one (that is, water is being lost naturally to the aquifer as water moves downstream), movement of the senior to a point upstream will probably not injure the junior, and may even enhance her position. This is because, in a losing stream, it takes a large quantity of water upstream to deliver a relatively small quantity of water to the downstream senior. If the senior voluntarily moves her point of

diversion upstream, into the more "water rich" portion of the stream, that right may be more easily satisfied, with as much or more water left over for the junior.

Now, let us consider movement by an upstream senior to a new diversion point below a junior user. Here, even if the stream is neither gaining nor losing, such a move would injure the junior user. This is because prior to the change the junior probably benefited to some extent from the senior's return flow. Movement downstream means that the return flow from the senior will no longer be available to the junior water user. Instead, if the transfer were allowed, the senior could call the entire diversion quantity past the now upstream junior. Accordingly, to avoid injury, it would be necessary to condition the senior's water right to reduce the quantity transferred (at least in times of shortage).

These examples form the tip of the iceberg. Many more are explored in Judge Krogh's article.[400]

(4) Changes in water consumption in same beneficial use do not require a transfer

It is not uncommon for farmers to switch from one crop to another. Because crops vary in consumptive use, changing crops will affect the amount of return flow available to other users. In 2004 the Legislature adopted legislation to confirm what had generally been understood to be the law before: Such changes may be made freely, despite their impacts on other users, without any oversight by the Department.[401] The Legislature expressly declared: "Consumptive use is not an element of a water right."[402] The legislation further provides:[403]

> "Authorized consumptive use" means the maximum consumptive use that may be made of a water right. If the use of a water right is for irrigation, for example, the authorized consumptive use reflects irrigation of the most consumptive vegetation that may be grown at the place of use. Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code.

Note that the last sentence of the section, stating that changes in consumptive use do not require a transfer, is not limited to agricultural contexts. Thus, an industrial user

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[400] A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers,* 27 Idaho L. Rev. 249, 266-74 (1990).

[401] 2004 Idaho Sess. Laws, ch. 258 (codified at Idaho Code § 42-202B(1)).

[402] *Id*.

[403] *Id*.

presumably could modify its processes, and substantially decrease return flow, without seeking the Department's approval.

On the other hand, if any element of the water right is changed, a transfer application and approval of the Department continues to be required under section 42-222.[404] Moreover, when such a transfer occurs, consumptive use may not be increased. This is discussed in the following section.

(5) Limitation to historical consumptive use in water right transfer

As discussed above, Idaho law, like the law in other appropriation doctrine states, prohibits enlarging the use under a water right through a transfer. When a water right transfer involves no change in nature of use, quantification and enlargement are usually not issues. For example, if a farmer dries up one forty-acre field and seeks to transfer the water right to an adjacent forty-acre field, the Department ordinarily will simply transfer the right in whatever quantity appears on the face of the license or decree (assuming there is one). Barring exceptional circumstances (such as forfeiture, etc.[405]), the full diversion quantity (both the rate and the volume) can be moved from the old use to the new use. Of course, as indicated above, the location of return flows still may be an issue in an injury analysis, depending upon the hydrology of the situation.

However, when a new use or changes in the points of diversion are involved, more scrutiny is required because the change may alter or eliminate return flows, thus affecting other users.[406] To protect other water users, the rule of thumb is that only the consumptive use component of the water right may be transferred when the transfer involves movement to a new use in a way that disrupts prior return flows. This longstanding principle was codified in 1997,[407] and was recognized by the Idaho Supreme

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[404] The 2004 legislation expressly declared that consumptive use is not an element of a water right. 2004 Idaho Sess. Laws, ch. 258 (codified at Idaho Code § 42-202B(1)).

[405] The Department's memorandum (James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)) mentions another possibility: An agriculture-to-agriculture transfer might be limited to historic beneficial use where sub-irrigation at the original place of use limited actual historic use of the right.

[406] "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." IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) p. 14 (Dec. 21, 2009) (superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)).

[407] "The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in

Court in 2001.[408] Of course, consumptive use has always fundamental to the injury/enlargement analysis.

Consumptive use (or "CU") refers to the quantity of water consumed in the course of a particular beneficial use, and therefore is not available to other water users. In an agricultural setting, consumptive use is the water consumed in growing the crops. This includes evaporation in the course of water delivery and evapotranspiration from the plants themselves. By limiting the amount of a water right that may be changed to a new use to its consumptive use component, injury to other users is prevented.

Bear in mind that crops typically derive their water from a combination of diverted irrigation water and natural precipitation. The amount of precipitation that the crop is able to use is called the "effective precipitation." Sometimes people use the term "consumptive use" to describe the entire quantity of water used by a crop, regardless of the source. Other people use the term "consumptive use" to describe only that portion of the water consumed by the crops that is attributable to the irrigation water. In an effort to avoid confusion, some people employ the term "consumptive irrigation requirement" or "CIR" to more clearly describe the latter, distinguishing it from total consumptive use. Thus, the CIR is equal to total amount of water consumed by the crop less the portion of consumptive use supplied by precipitation. In a dry climate, most of the water consumed by a crop will come from irrigation, so the CIR will be a large component of the total consumptive use for the crop.

This distinction is important in quantifying changes in water rights. When a person changes a water right to a new use, he or she is only allowed to move the water right itself. The user may not claim credit at the new place of use for the precipitation that was consumed by the crops at the old place of use. Consequently, the Idaho Department of Water Resources will allow the user to transfer only the consumptive use associated with the water right (the CIR), not the effective precipitation.

In Idaho, the CIR typically is determined by reference to tables set out in an analysis by Allen & Robison.[409] These tables take into account the particular crop and the climate in which they crops are grown.

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use of the original water right." 1997 Idaho Sess. Laws, ch. 373 (codified at Idaho Code § 42-222(1)).

[408] *Barron v. IDWR*, 135 Idaho 414, 419, 18 P.3d 219, 224 (2001).

[409] R.G. Allen and C.W. Robison, *Evapotranspiration and Consumptive Irrigation Water Requirements for Idaho*, University of Idaho Research and Extension Center at Kimberly (Sept. 2006, rev'd April 2007) www.kimberly.uidaho.edu/ETIdaho/. Previously, the accepted analysis on this subject was R.G. Allen and C.E. Brockway, *Estimating Consumptive Irrigation Requirements for Crops in Idaho*, Idaho Water and Energy Resources Research Institute,

The volume of consumptive use or CIR is likely to be substantially less that the diversion volume shown on the license or decree (and much less than the annual quantity based on the diversion rate). In the case of flood irrigation, less than half the water diverted may be consumptively used. In the case of ground water delivered directly through sprinklers (usually a far more efficient means of irrigation), the consumptive use is likely to be substantially more than half the volume diverted.

The flip side of CIR is return flow. Return flow is the quantity of diverted water that returns to the public source of supply (the stream or aquifer). To avoid injury to others, a user changing a water right typically must avoid any material alteration of the return flow, including its quantity, timing, and location.

You will hear people use the term "return flow" in different ways, but we use the term broadly to be everything diverted under a water right that is not consumed.[410] This includes various components. It includes water that seeps from irrigation ditches and laterals and water applied to the crops that is not taken up and passes below the plant root zone. It also includes water that runs off the end of the field as waste water. All this water eventually reaches other water users and is again diverted and applied to other beneficial uses. Indeed, water is often used and reused many times as it works its way down a stream system and even through an aquifer system. All other water users, even juniors, are entitled to have these return flows maintained in the event of a transfer.

The Department limits the transferred quantity to the historical consumptive use.[411] This practice is consistent with that of other prior appropriation states, such as Colorado,[412] and was approved by the Idaho Supreme Court.[413] Thus, for instance, the

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University of Idaho (August 1983). The two analyses do not differ a great deal, and we still see Allen and Brockway cited occasionally.

[410] As described by the Colorado courts, return flows consist of "irrigation water seeping back to a stream after it has gone underground to perform its nutritional function." *City of Boulder v. Boulder & Left Hand Ditch Co.* 192 Colo. 219, 223, 557 P.2d 1182, 1185 (1976).

[411] IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) p. 30 (Dec. 21, 2009) (superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)).

[412] "[O]nce an appropriator exercises his or her privilege to change a water right . . . the appropriator runs the real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right . . . which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historical use of the right." *Pueblo West Metropolitan Dist. v. Southeastern Colorado Water Conservancy Dist.*, 717 P.2d 955, 959 (1986).

[413] "Under I.C. § 42-222(1), the director may consider historic consumptive use, as defined in I.C. § 42—202B, as a factor in determining whether a proposed transfer would result

Department will look to the actual crops irrigated by the water user, and base the consumptive use on the consumptive use rates associated with those crops. Where the farmer has grown different crops over the years, the Department will approve the transfer based on the most consumptive crop, that is, the highest consumptive use in any given year.[414] This policy may give rise to a temptation to switch to a more consumptive crop prior to requesting the transfer. The Department has not yet been confronted with this fact setting.

In 2004, the Legislature adopted an amendment to the water code providing, for the first time, a definition of "authorized consumptive use."[415] However, the legislation's effect was limited to circumstances in which the only thing changed is the consumptive use.[416]

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in an enlargement in use or injure other water rights." *Barron v. IDWR*, 135 Idaho 414, 419, 18 P.3d 219, 224 (2001) (footnote omitted).

[414] The Department's revised Transfer Processing Memorandum No. 24 dated December 21, 2009 ("*Transfer Memo*") (superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)) contemplates that the transfer applicant will submit the most recent five years of cropping pattern and rotation data. However, the Department will consider information from prior years where "information provided by the applicant supports using a longer historic period." *Transfer Memo* at 30. The Department then will select the year with the highest consumptive use out of the data available.

[415] 2004 Idaho Sess. Laws, ch. 258 (codified at Idaho Code § 42-202B(1)). As amended, the water code provides: "'Consumptive use' means that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use is not an element of a water right. Consumptive use does not include any water that falls as precipitation directly on the place of use. Precipitation shall not be considered to reduce the consumptive use of a water right. 'Authorized consumptive use' means the maximum consumptive use that may be made of a water right. If the use of a water right is for irrigation, for example, the authorized consumptive use reflects irrigation of the most consumptive vegetation that may be grown at the place of use. Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code." Idaho Code § 42-202B(1).

[416] As originally introduced, the legislation would have required the Department to quantify a right in a transfer proceeding based on the authorized consumptive use defined as "the maximum consumptive use that may be made of a water right." Thus, the Department would have been required, apparently, to look at the most water consumptive crop that could possibly have been grown on the property, and base the quantity of water transferred on that hypothetical use, irrespective of what was actually grown. This provision of the legislation was dropped prior to passage. Consequently, the limitation to historic (or "historical") consumptive use remains in effect.

(6) The practical side to determining consumptive use in irrigation: FSA Acreage Reports.

As noted in the proceeding section, when an irrigation water right is changed to another use, the Department will evaluate the quantity of consumptive use and allow transfer of only that quantity reflecting the most water consumptive crop that has been irrigated. Where multiple crops are grown on a particular property in any given year, the Department will look to the highest overall average consumptive use in any year for the land that will be dried up. Thus, it is necessary to know which crops were grown and the acreages for each.

Often the most effective ways to document cropping history is through acreage reports provided by the farmer to the local office of the Farm Service Agency ("FSA"), an agency of the U.S. Department of Agriculture. These records are provided voluntarily by farmers who elect to participate in federal crop subsidy programs. Participation rates in Idaho, however, are very high.

Copies of these reports may be obtained from the FSA only with the permission of the particular farmer who submitted the reports.[417] Thus, the current owner may not be able to obtain older cropping records on his or her own farm, unless he has secured a release from the prior owner. This is an important thing to think about at the time of acquiring a property, when the buyer has some leverage. Farm or water sale agreements should include an obligation on the seller to produce these records to facilitate future transfers.

(7) Place of use transfers within irrigation districts and canal companies do not require approval

The Legislature has provided an exemption to the transfer procedure for those situations where water users within a canal company or irrigation district simply are changing the irrigated place of use under the entity's water rights, so long as the new

[417] The FSA's position is based on a provision of the federal Freedom of Information Act that exempts from disclosure "personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). There are agency rules and guidance on the subject, but they do little more than restate statutory language. The FSA nonetheless deems the acreage information in the acreage reports to fall within the "similar files" category. The FSA's take is that any information that tends to reveal the personal wealth of an individual falls into this catch-all exemption. The FSA's view is that the type of crop grown is not personal and may be released without the farmer's authorization, but that the acreage numbers tend to reveal wealth and are not disclosable without authorization. The agency has not developed written guidance to this effect, but the position appears to be well entrenched.

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place is within the "generally described place of use" authorized for the entity. The statute still prohibits any increase in the amount of water diverted or the acres irrigated.[418]

Implicit in this authorization is the concept that a canal shareholder or irrigation district patron may change his or her point of delivery as necessary to serve the new location within the entity's service area (again, subject to the non-injury rule). This is not to say that the water user could, without a formal transfer approval, establish a new "point of diversion"—i.e., change or add to the entity's licensed or decreed point of diversion from the source. Rather, the change contemplated in this provision would be to a different headgate, pump or other diversion on the ditch or lateral system, or to different lands, within the entity's boundaries.

A separate statute, Idaho Code § 50-805A, authorizes cities to pool water supplies obtained by contract with multiple irrigation districts and that "such pooling shall not be deemed a change in place of use and shall not require compliance with sections 42-08 or 42-222, Idaho Code." This statute, which is discussed in more detail below in connection with municipal water rights, was enacted in 1981 at the behest of the City of Nampa, with contracts with Nampa & Meridian Irrigation District, Pioneer Irrigation District, and Boise-Kuna Irrigation District for delivery of surface water used in the City's pressurized irrigation water delivery system.

F. Ground water transfers

Ground water transfers are subject to generally the same procedural requirements as transfers of surface waters, except that if an applicant proposes an out-of-basin transfer of ground water that will irrigate more than five-thousand acres, or that will involve a volume of more than 10,000 acre-feet per year, the transfer must be approved by both the Director and the Legislature.[419]

An interim policy memorandum issued by the Department in 2002 governs the processing of applications proposing transfers of ground water rights in the Eastern Snake Plain Aquifer ("ESPA"). This policy sets out the information that must be included with an application for it to be accepted and processed, and describes when a transfer

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[418] Idaho Code § 42-219(7). This provision provides, in part: "Subject to other governing law, the location of the acreage irrigated within a generally described place of use, as defined in accordance with subsections (5) and (6) of this section and as filed with the department pursuant to sections 42-323, Idaho Code, may be changed without approval under the provisions of section 42-222, Idaho Code. However, the change shall not result in an increase in either the rate of flow diverted or in the total number of acres irrigated under the water right and shall cause no injury to other water rights." The process for establishing an irrigation entity's "generally described place of use" is set forth in the referenced subsections.

[419] Idaho Code § 42-226.

application is and is not required. With respect to ESPA transfers, the policy provides that:

> 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 can be obtained by contacting the department or visiting the department's web site.

IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) (Dec. 21, 2009) (footnote omitted) (superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)).

The stated purpose for this requirement is to provide a basis for evaluating whether the proposed transfer will increase depletions to hydraulically connected reaches of the Snake River. The policy presumes that any increases in depletions will cause injury to existing water rights. This presumption may be rebutted with an appropriate analysis. Absent such an analysis, however, increased depletions are required to be mitigated.[420]

Although the October 30, 2002 transfer policy is directed toward ground water transfers within the ESPA, much of the document is applicable to transfers generally, and it has been implemented in each of the several IDWR administrative regions for processing surface and ground water transfers.

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[420] IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) at 12 (Dec. 21, 2009) (superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)).

G. Water rights mitigation in transfers, appropriations, and delivery calls

(1) Different meanings of mitigation

Before launching into a discussion of mitigation, it is worth pondering that mitigation means different things in different contexts. In the dictionary sense, it means to reduce the extent or intensity of a harm, not to avoid or eliminate it altogether. It is used in that sense in the law of contracts, which calls on the non-breaching party to mitigate (i.e., minimize) the damages caused by the breaching party. In this context, the injured party is called upon to mitigate the damages.

In contrast, in environmental and water law it is the party causing the harm who undertakes the mitigation. For example, federal environmental laws might require a party to mitigate adverse impacts to wetlands or endangered species by taking offsetting actions to restore habitat. Though not usually termed mitigation, the same concept applies in the context of air and water pollution credit trading programs.

In water law, mitigation describes an action by one water user to offset injury that his or her diversion causes to another water user. The duty to mitigate applies differently in the context of delivery calls versus transfers and appropriations. In the context of priority administration (a delivery call), a water right holder owes a duty to avoid material injury only to seniors. That duty to avoid injury expands to include juniors as well as seniors when a water right is changed (aka transferred) in some way. In other words, the change cannot be approved if there will be injury to any other water right (junior or senior). And, in a new appropriation, the appropriator has a duty to everyone, since the new right is the most junior.

In order to avoid injury, the right holder may seek to "mitigate" that injury. This is typically, but not necessarily, accomplished by providing a substitute supply to the injured right holder. This allows an existing use to continue or a new or changed use to be made. Where water rights are concerned, the idea is not just to reduce the harm, but to avoid or eliminate material injury altogether, thus making the other water user whole.

In the water rights context, mitigation may come in various forms. On occasion, notably in the context of settlement of tribal reserved rights claims, mitigation may consist of an array of government funded or facilitated measures addressing environmental and instream flow concerns that may or may not be directly related to the alleged injury to the reserved rights. In other contexts, state or other governmental entities may undertake aquifer recharge or other water replacement programs on a regional scale in response to or in anticipation of delivery calls that could cause economic dislocation.

Elsewhere in the West, water right mitigation is often undertaken in response to extraordinary strains on water supplies that are complicated by federal environmental laws (e.g., the Endangered Species Act), tribal reserved water rights, and/or federal decrees or compacts apportioning water supplies between states. Idaho, in contrast, enjoys a comparatively abundant water supply. Moreover, most water right mitigation in Idaho is undertaken without the complication of a federal law overlay.[421] Accordingly, Idahoans enjoy ample opportunities for win-win solutions that allow the State's water to be put to optimum use while protecting environmental values.

(2) California's "physical solutions doctrine"

It is not necessary that the injured water right holder agree to the mitigation proposed by the party causing the injury. If the Idaho Department of Water Resources ("IDWR" or "Department") or a court finds that a mitigation plan proposed by the party causing the injury is sufficient to avoid material injury, that plan may be approved over the objection of the injured parties.

California has taken this a step further, allowing mitigation to be designed an imposed by the court. Thus, under what is known in California as the "physical solutions doctrine," California has gone much further than Idaho in imposing mitigation solutions. Although this doctrine has no applicability in Idaho, we discuss it here because, by way of contrast, it sheds light on how mitigation is viewed in Idaho.

Under California's doctrine, a court may craft its own mitigation solution and impose it on both parties. The seminal case dates to 1936: "[I]t is not only within the power, but it is also the duty, of the trial court to admit evidence relating to possible physical solutions, and, if none is satisfactory to it, to suggest on its own motion such physical solution. The court possesses the power to enforce such solution regardless of whether the parties agree." *City of Lodi v. East Bay Municipal Utility Dist.*, 60 P.2d 439, 341 (Cal. 1936) (citation omitted).

More recently, the California Court of Appeals summarized the physical solution doctrine this way: "As noted, a physical solution is an equitable decree designed to implement the constitutional mandate and to maximize the beneficial use of water. The court has power to enforce a physical solution regardless of whether the parties agree to

[421] Even when no federal environmental laws are applicable, the environmental effects of a mitigation plan are appropriately considered under Idaho law. This is called out in the Conjunctive Management Rules themselves (IDAPA 37.03.11.043.03.j). It is also reflected in the Idaho Water Code's local public interest provisions (Idaho Code §§ 42-202B(3), 42-203A(5)(e), 42-222(1), 42-1763). Finally, the mitigation plan must work within the constraint of any existing instream flow water rights (Idaho Code §§ 42-1501 to 42-1507). On the other hand, it is not the obligation of the mitigating party to enhance environmental conditions. See discussion of instream flows in section 15.G(8)(h) at page 256.

it." *Central Basin Municipal Water Dist. v. Water Replenishment Dist. of S. California*, 150 Cal. Rptr. 3d 354, 360, Cal. App. 4th 943, 950 (2012).

The breadth of the doctrine is captured in this commentary:

> In working out a physical solution to water shortages where more efficient means of diversion and conveyance may be desirable, a court of equity is not limited by physical properties as they stand at the time of trial, or by suggestions and offers made by the parties. If it feels that substantial savings can be effected at reasonable cost by changing some of the works, it has the power, by injunctive order, to cause the change to be accomplished and to apportion the cost as justice may require. The court must, however, keep in mind that prior appropriators have prior rights and cannot be required lawfully to incur any material expense in order to accommodate a later appropriator. In working out a physical solution and determining whether an injunction should be granted, the fact that there is no immediate danger to a water right is an element to be considered. If the trial court needs or desires expert assistance or evidence to determine a physical solution in the problem of putting water resources to beneficial use to the fullest extent possible, it possesses the statutory power either to refer the matter to the division of water rights, or to appoint it as an expert.

Romualdo P. Eclavea, *et al.*, *Physical Solutions as Equitable Remedy in Allocating Water Interests*, 62 Cal. Jur. 3d Water § 456 (2015) (footnotes omitted).

Indeed, commentators have gone so far as to describe as mitigation what amounts to condemnation of the senior water right that is suffering the injury:

> A physical solution is not incompatible with a finding that it will not provide full compensation, and if the facts justify it, an award of damages may be made in addition to the physical solution. Further, a physical solution need not be applied when the remedy in damages is adequate.

Eclavea, § 456 (footnotes omitted).

If this commentary is correct, it means that California's physical solutions doctrine embraces not only the imposition of physical solutions, but financial ones, on the parties to a water conflict. It would allow a court to say, in essence: "I am not impressed with the mitigation strategy urged by the juniors. It is costly and likely to be ineffective in the

long run. But it is not in the public interest simply to curtail the juniors. Given the enormous economic benefits of allowing the juniors to continue to divert (in comparison to the economic benefits generated by the senior), the sensible thing is for the senior to stop diverting and the junior to fully compensate the senior for its resulting losses."

(3) Three types of aquifer recharge in Idaho—ASR, PBAR & ARM

Water right mitigation strategies run the gamut—drying up farms, piping water to new places, building dams, you name it. An increasingly common and important mitigation strategy involves aquifer recharge. Indeed, aquifer recharge may be used either as a basis to mitigate other water rights or for storage of water to create new water rights (which is not mitigation at all).

Because aquifer recharge is so important (and complicated), I include here a background discussion that draws distinctions among three very different approaches to aquifer recharge:

- Aquifer Storage and Recovery ("ASR")
- Public Betterment Aquifer Recharge ("PBAR")
- Aquifer Recharge for Mitigation ("ARM")

They have different goals and operate in different ways. Each has value, but sets out a distinct approach that should not be confused with the others.

ASR, PBAR, and ARM are all commonly accepted approaches to mitigation in Idaho (though these labels are not routinely employed).

(a) Aquifer Storage and Recovery ("ASR")

The first category of aquifer recharge is known in Idaho as aquifer storage and recovery ("ASR"). In an ASR project, water is stored underground so that it may later be recovered (i.e., diverted) for the project owner's own use.

ASR is not a mitigation strategy. It is typically a water supply strategy in support of new water rights, though ASR is may also be undertaken for water quality reasons. ASR is conceptually no different than storing water in an above-ground reservoir. Obviously, water put in the ground does not stay put quite as well as water held behind a dam. Accordingly, a major part of any ASR project is the technical challenge of quantifying how much will remain for subsequent diversion over time.

ASR is typically undertaken by private parties to create a stored underground supply for later diversion to beneficial use by the entity undertaking the recharge. For

example, Micron Technologies diverts water from the Boise River, stores in it an aquifer, and later pumps and uses a calculated volume based on the amount recharged. In this sense, ASR works conceptually like a surface reservoir (while also providing water purification benefits).[422]

In theory, an ASR project could be undertaken by a governmental agency, just as the Bureau of Reclamation built irrigation dams across the West for the ultimate benefit of individual irrigators. But there is no precedent for this in Idaho.

(b) Public Betterment Aquifer Recharge ("PBAR")

Aquifer recharge may be undertaken by the State or other entities for the general benefit of all water users. I call this "Public Betterment Aquifer Recharge" (or "PBAR").[423] This typically involves large scale, regional efforts to recharge aquifers through infiltration ponds and/or by running water in leaky irrigation canals during the non-irrigation season.

The practice often is undertaken with minimal hydrologic analysis. Unlike ASR, no hydrologic analysis is required for PBAR projects, because the water put in the ground does not result in any specific new or enhanced water right to divert that water. Nor does it serve as a basis for releasing particular water uses from a delivery call.

Thus, a PBAR plan may be quite seat of the pants: "Let's put some water in the aquifer. It will probably do some good. Hard to say how much, but it can't hurt." There is no need to monitor or quantify how much good a PBAR project does, because it is not undertaken as a basis for subsequent diversion under right or as mitigation for particular water right users. Rather, PBAR is simply an effort to create a better supply for all. This "firms up" the rights of all water users connected to the aquifer and reduces the likelihood of conflict among users. It is as if Mother Nature added the water for everyone's benefit.

PBAR may be undertaken as a precautionary measure before delivery calls are made, or it may be undertaken in direct response to a call by holders of senior water rights. The thing that distinguishes "public betterment" aquifer recharge from other

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[422] Obviously, aquifers are not tightly confined storage vessels like surface reservoirs. Accordingly, it is typically necessary for the proponent of an ASR project to develop a computer model that predicts how much of the water placed in the aquifer will still be there, over time, for subsequent diversion.

[423] There is one statutory reference to "public betterment" in the context of aquifer recharge. "In view of the public betterment to be achieved by the completion of aquifer recharge projects, the legislature hereby declares that the appropriation and underground storage of water by an aquifer recharge district hereinafter created for purposes of groundwater recharge shall constitute a beneficial use . . . ." Idaho Code § 42-4201(2).

aquifer recharge is that PBAR is not undertaken for the specific benefit of particular water users. Thus, in a call situation, a PBAR project might be of sufficient size to completely eliminate the call, or it might only partially satisfy the call thereby reducing the number of juniors called out. In either case, water continues to be allocated in order of priority just as before. No one has a special claim to the water recharged through PBAR.

(c) Aquifer Recharge for Mitigation ("ARM")

A third form of aquifer recharge involves recharging an aquifer for the purpose of providing a replacement supply to senior users who, but for the recharge, would call out juniors. The authors call this "Aquifer Recharge for Mitigation" or "ARM." This may occur, for instance, where steps are taken to add water to an aquifer which then discharges the additional water to a stream serving senior surface users.

By providing this mitigation, other users may secure new appropriations or avoid having existing rights called out. This sort of mitigation may be undertaken by individual water users for their own benefit, by quasi-governmental ground water districts for the benefit of their members, or by a mitigation project developer who, in turn, sells mitigation plans or credits to junior water users.

Unlike PBAR, ARM is undertaken for the specific benefit of specific junior water users (or a class of them, such as members of a ground water district). An ARM recharge plan is calculated to provide a replacement supply sufficient only to compensate for the impact of the specific diversions providing the mitigation. Thus, other diverters who have not provided mitigation may continue to be called out.

In contrast to PBAR, an ARM plan invariably requires strict attention to hydrogeology, pumping effects, ground water movement, and similar variables; often, a ground water model is involved.

Implementing an ARM allows its sponsor to take credit for providing the replacement supply, thereby allowing it or its members to continue diverting. Meanwhile, other juniors who fail to offer mitigation may face curtailment. In PBAR, by contrast, curtailments continue to occur in strict order of priority, but, one hopes, there will be fewer of them because of the increased water supply.

Summary Comparison	
ASR	Typically undertaken privately for the purpose of storing and diverting the water for the benefit of the person who stored it. If some "leaks" out of the aquifer and is used by others, that is incidental and unavoidable.
PBAR	Typically undertaken at public expense by governmental entities for the purpose of allowing more water to reach surface users. Indeed, if some

	"leaks" out of the aquifer, that is the whole purpose. If a ground water user diverts some from the aquifer before it "leaks" out, that is incidental and unavoidable.
ARM	Typically undertaken by private parties for profit or by groups of water users (or governmental districts) for mitigation purposes. Unlike PBAR, the entity undertaking the project owns the water, may prevent others from taking it, and may claim the quantifiable mitigation benefits from the quantity that "leaks" out.

(4) Should ARM be undertaken for profit?

No one seems to struggle with the idea of ARM undertaken by the junior water users to avoid a call or by governmental entities to help resolve a call. Indeed, one of the stated legislative purposes of ground water districts is to develop and implement ARM.[424] In contrast, ARM undertaken for profit by third-party mitigation project developers is a new concept in Idaho, and it has encountered some resistance.

This discomfort with the idea of for-profit aquifer recharge is reflected, for instance, in unsuccessful legislative efforts over the last few years. Specifically, there have been efforts to modify Idaho Code § 42-234 (authorizing water rights for aquifer recharge). Some of the legislative proposals appear to reflect a measure of uncertainty or mixed feelings with respect to efforts by private parties to undertake for-profit aquifer recharge programs (particularly those involving new appropriations) in support of mitigation plans that will be sold to other water users. Also involved may be concerns that successful ARM projects, using stream flood flows, will reduce amounts flowing through hydropower projects on the Snake River that cannot demand, but benefit from, these flows.

Some people sense something wrong in someone profiting by selling an interest in a mitigation plan that utilizes a public resource like water. This concern may derive from the prior appropriation doctrine's hostility to speculation and the insistence that only

[424] In response to growing attention and concern among water users about conjunctive management issues, particularly within the Eastern Snake River Plain, the Idaho legislature enacted legislation authorizing the creation of ground water districts. 1995 Idaho Sess. Laws, ch. 290; Idaho Code § 42-5200 *et seq*. The primary purposes of these special districts were to provide a mechanism for ground water users within a given area to organize and assess themselves for the costs of measuring and reporting annual ground water withdrawals from wells, and as necessary, responding collectively to delivery calls, curtailment orders, or other forms of administration. Thus, ground water districts, unlike water districts, are not water delivery entities.

those putting water to beneficial use may obtain rights therein. Others dismiss this concern, pointing out that there is no incompatibility between individual profit and maximum use of the resource. After all, the biggest canal in the Treasure Valley—the New York Canal—is so named because it was conceived and funded by entrepreneurs two thousand miles away in New York City. Likewise, no one doubts the right of a farmer to sell his or her water rights at great profit. Similarly, no one doubts that for-profit water brokers may lawfully make a living matching buyers and sellers of water rights, thereby ensuring that this public resource finds its way to its highest and best use. The fact is, water rights mitigation is increasingly complicated and challenging. Not every water user has the wherewithal to design and undertake a successful mitigation project.

The author of this section sees nothing in the prior appropriation doctrine that should prevent people from putting together such projects and selling credits in them to others. I don't know how to build a car, either. Nor do I care to rely on the government to build all the cars. I am glad that someone does build them, and is willing to sell one to me. For this analogy to work, however, it is essential that the developer of the mitigation project add something of value, rather than just appropriate water and sell it to others. That value may come in the form of engineering, infrastructure (diversion, storage, or delivery), computer modeling, administrative services, and the like.

The concern centering on the for-profit aspect of these efforts is particularly acute in the Big Wood River Valley where plans are being explored by private mitigation project developers to use otherwise unclaimed spring flood flows to recharge the aquifer in the Sun Valley area to support mitigation plans that may be sold to holders of junior surface and ground water rights (or those diverting without any water right) who face all but certain curtailment in the coming years. It conceivably could support some new appropriations as well, a fact that seems hard to swallow for people who have been confronted with the typical seasonal water scarcity in the area.

(5) Statutes addressing mitigation

At its core, mitigation is a common law principle growing out of a water right owner's entitlement to provide a substitute supply to a senior, thereby allowing both parties to enjoy their constitutional right to divert. Idaho statutes provide scant guidance on water rights mitigation.

One of the few statutes speaking to the subject is the aquifer recharge statute mentioned above, Idaho Code § 42-234, which dates to 1978.[425] It is a sweeping statement of public policy extolling the virtues and value of aquifer recharge coupled

[425] 1978 Idaho Sess. Laws, ch. 366 (codified as amended at Idaho Code §§ 42-232, 42-233a, 42-234; *see also* 1978 Idaho Sess. Laws, ch. 293 (codified as amended at Idaho Code §§ 42-4201 to 42-4231).

with maddeningly ambiguous regulatory authority over recharge projects. The statute may have been written with PBAR in mind, but its language is not so limited. For instance, it includes the broad and unambiguous declaration that "the appropriation of water for purposes of ground water recharge shall constitute a beneficial use of water." Idaho Code § 42-234(2). Thus, the statute appears to provide a foundation for private ARM projects, as well.

Another statute touching on the subject is an amendment to Idaho Code § 42-223(10) which expressly protects from forfeiture a water right that is not being diverted because of its use as part of a mitigation plan.

See also Idaho Code § 42-1416B dealing with expanded (i.e., enlarged) ground water rights within a critical ground water area. It provides: "Water shall be deemed unavailable to fill the rights for expanded use, even if decreed in the adjudication, unless the director finds that a management program exists which will, within a time period acceptable to the director, limit the average annual water withdrawals from the aquifer designated in the critical ground water area to no more than the average annual recharge to the aquifer."

Idaho Code § 42-1779 provides for a statewide "a statewide comprehensive aquifer planning and management effort over a ten (10) year period of time beginning in fiscal year 2009."

Since 1978, the Idaho Legislature has provided for the establishment of aquifer recharge districts, which have taxing authority to raise money for and undertake ground water recharge project. Idaho Code §§42-4202 to 42-4231.

(6) Three types of mitigation

In Idaho, private water rights mitigation comes in various forms. One may place them into three broad categories, as follows:

- "Capital-M mitigation" (undertaken pursuant to Idaho's Conjunctive Management Rules in response to an active delivery call)
- "small-m mitigation" (developed outside of the Conjunctive Management Rules (a) in support of an appropriation, transfer, or exchange, (b) in anticipation of a delivery call, or (c) in response to an active delivery call against a surface right (which is not covered by the Conjunctive Management Rules))
- "ESPA mitigation" (a sub-species of "small-m mitigation") involving changes in points of diversion of ground water rights hydrologically connected to surface rights

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Each of these is discussed below.

(7) Mitigation pursuant to the Conjunctive Management Rules: "Capital-M mitigation"

The only formal administrative rules dealing with mitigation are contained within the Conjunctive Management Rules, IDAPA 37.03.11.000 to 37.03.11.050.[426] The Conjunctive Management Rules were promulgated in 1994 (and approved by the Legislature in 1995) in response to calls for the administration (i.e., curtailment) of ground water rights by a trout farm. *See, Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). They set out a carefully crafted set of legal principles governing the difficult subject of delivery calls directed to junior ground water rights. However, the applicability of these rules is limited.

The conjunctive management rules come into play only in response to "a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply." IDAPA 37.03.11.001.[427] Notably, they do not come into play until a delivery

[426] The formal title of the rules is "Rules for Conjunctive Management of Surface and Ground Water Resources," IDAPA 37.03.11.001, but they are commonly referred to as the Conjunctive Management Rules. A note on terminology: "Administration" refers to the Department's statutory responsibility to enforce priority, including the curtailment of junior water rights when required to meet senior needs. The term "conjunctive administration" refers to the administration of ground and surface water rights. The term "conjunctive management" is broader. It refers to the full panoply of mostly voluntary governmental and private efforts to reduce conflict between ground and surface water users and promote more effective utilization of all water resources. Thus, while conjunctive administration deals with the brute-force "policing" of priorities, conjunctive management includes such things as research, education, voluntary conservation measures and other demand reduction, recharge projects, provision of replacement water supplies, and other efforts to stabilize or improve water availability. This distinction in terminology, however, is fairly recent. At the time that the Conjunctive Management Rules were adopted in 1994, the term conjunctive administration was not yet in vogue. Using current terminology, those rules would more appropriately be named the Conjunctive Administration Rules.

[427] The rules also require that the Department to establish an "area having common ground water supply." *See* IDAPA 37.03.11.010.01 (definition of area having a common ground water supply); IDAPA 37.01.11.031 (determination of areas of common ground water supply); IDAPA 37.01.11.050 ("Rule 50") (areas determined to have a common ground water supply). The Department has included only one area of common ground water supply in Rule 50—the Eastern Snake Plain Aquifer. In a 2014 rulemaking, Docket No. 37-0377-1101, the Department sought to repeal Rule 50 altogether, explaining that the formality of declaring these areas by rulemaking is unnecessary and that "the administrative hearings and deliberations associated with individual delivery calls is the proper venue to address which ground water right should be subject to administration under a delivery call." The Idaho Legislature (which has the power to

call is made. Even then, they do not apply to calls against surface water users,[428] and they apply only if an area of common ground water supply has been established.

The Conjunctive Management Rules address a host of issues. One of them is mitigation plans developed in response to a delivery call against ground water users. This is known as "Rule 43" of the Conjunctive Management Rules. IDAPA 37.03.11.043 ("Rule 43") (copy attached.)[429]

Rule 43 borrows heavily from the Colorado concept of "plans for augmentation." This was the first time the concept of private mitigation for the benefit of specific water rights was codified in Idaho.

Here are some of the key points about Rule 43:

As noted, the Conjunctive Management Rules operate in the context of an active (as opposed to anticipated) delivery call. Accordingly, a water user may not obtain

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veto rules, Idaho Code § 67-5291) rejected the rule in 2015. 2015 House Concurrent Resolution No. 10. The effect of this is somewhat unclear, but there is an argument that areas of common ground water supply must be added by formal rulemaking to Rule 50 before the Department has authority to administer rights in such area under a conjunctive management delivery call.

Arguably, another prerequisite of conjunctive administration is the development of a reliable computer model to evaluate the effect of ground water diversions and recharge on surface rights and other ground water rights. This is not stated in so many words in the Conjunctive Management Rules, but it is difficult to imagine how the Department would fulfill its obligation to evaluate material injury and the futile call defense in the absence of such a model. The whole premise of the Conjunctive Management Rules is that rights should not be curtailed by rote application of the priority system (as is done, more or less, for surface water calls); instead curtailment should be limited to the extent necessary to effectively prevent material injury. *See*, IDAPA 37.03.11.020.04 (application of futile call principle), IDAPA 37.03.11.010.08 (definition of futile call); IDAPA 37.03.11.042 (determining material injury).

[428] The Conjunctive Management Rules do not apply to delivery calls against junior surface rights. The thought was that surface water is easy enough to administer. (When surface rights are involved, a diversion upstream has a clearly quantifiable impact on downstream rights. There is no need to develop a computer model to figure out who is causing the injury, and how and when it radiates from the point of diversion.) This means, however, that junior surface users—who do not fall within the Conjunctive Management Rules—may not develop Capital-M mitigation plans in response to a delivery call. However, they may still craft small-m mitigation plans outside the rules, which may be just as effective.

[429] In addition, "Rule 42" expressly provides: "The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan." IDAPA 37.03.11.042.02 (copy attached).

advance approval of a Capital-M mitigation plan under Rule 43 in anticipation of a call. A water user may develop a mitigation plan and keep it on the shelf, but the Department will not determine the plan's adequacy until the delivery call is made and everyone's hair is on fire. This may seem odd, but the Department takes the position it does not know what the delivery call will look like until it sees it and cannot approve a plan in the abstract. Likewise, the Department says that senior users should not be required to review and object to every mitigation plan (or forever hold their peace) in advance of an actual delivery call. Furthermore, until the delivery call is made, it is not clear which seniors have an interest in, and must be entitled to respond to, the Capital-M mitigation plan.

Rule 43 recognizes that no two mitigation plans are alike. The rule encourages creative solutions tailor-made to the specific circumstances of the call. Specifically, it notes that mitigation may come in the form of "other appropriate compensation." IDAPA 37.03.11.043.c. For instance, a water user might pay for efficiency improvements in the senior's use of water, thereby enabling the junior to provide less wet water as a replacement supply. Likewise, it is conceivable that a junior user depleting an instream flow might provide offsetting habitat improvements to compensate for the flow reduction. This is known as out-of-kind mitigation (as opposed to in-kind mitigation, which is replacement water). Tradeoffs like these are common in negotiated settlements, but compelling the senior water user to accept out-of-kind mitigation is new territory in Idaho.[430]

Rule 43 established a detailed list of "factors" the IDWR Director must consider in determining whether to approve a plan. The factors control the Director's otherwise broad discretion.

One of the factors is agreement between the junior and senior users. But this is only a factor. In other words, even a stipulation of the parties that the mitigation is adequate may be rejected by the Director. In the absence of a stipulation, a mitigation plan proposed by the junior user may be imposed on the senior making the call. On the other hand, the rules do not appear to go so far as California has under its physical solutions doctrine, which would allow the Department to devise its own mitigation solution and impose it on both parties (see discussion in Section 15.G(2) at page 241).

[430] California—which faces much more severe water challenges than does Idaho—has embraced out-of-kind mitigation under its "physical solutions" doctrine. See discussion in Section 15.G(2) at page 241. Although out-of-kind mitigation is embraced to some extent in Rule 43 of the Conjunctive Management Rules, it does not appear that Idaho has not gone quite so far in that direction as has California, particularly with respect to allowing the Department or a court to fashion and impose a mitigation plan not embraced at least by the junior water right holders. Likewise, there is no suggestion, to date, in Idaho that damages would be a sufficient remedy for injury to a water right.

The plan must address only "material injury," not insignificant or fanciful injury. Rule 42 of the Conjunctive Management Rules sets out various factors (including the efficiency of the senior's use and the reasonableness of the senior's means of diversion) to consider in determining whether an allegation of injury constitutes "material injury." IDAPA 37.03.11.042.

(8) Mitigation when there is no conjunctive management delivery call: "small-m mitigation"

(a) Mitigation plans in support of applications for appropriation, transfer, or exchange

As noted above, Capital-M mitigation plans are available only in the context of responding to an active conjunctive management delivery call against a ground water right. However, the Department will evaluate and recognize on a case-by-case basis what I call "small-m mitigation" plans that fall outside the Conjunctive Management Rules. For instance, the Department will consider a plan to mitigate the impact of new appropriations, transfers, or exchanges.

Suppose a homeowner or real estate development requires a new water right, but water in the area is either fully appropriated or new appropriations are subject to frequent curtailment due to their junior priority. (Alternatively, suppose that a domestic well has been illegally diverting water for irrigation or aesthetic purposes in excess of the authorized amount, and the owner wishes to obtain a lawful appropriation.) In such a case, the applicant will need a plan to mitigate the effects of new appropriation by providing a replacement supply for senior water users. The result is to allow water under the new appropriation to be diverted "out-of-priority" so long as the mitigation plan is in effect.[431] For all practical purposes, the junior priority of the new right becomes irrelevant, and the new right takes on the priority date of whatever water right is offered as mitigation. Or, if the mitigation plan is premised on storage (including aquifer recharge), then its ability to divert out-of-priority is effective so long as stored water is physically available to offset any material injury that would otherwise be caused by the diversion.

(b) Mitigation of existing water rights

The owner of a junior water right may be concerned that his or her right will be called out in the future. This is a real threat in the Big Wood River Valley today, where trophy homes and hobby ranches in the Sun Valley area face imminent curtailment of

[431] Diversion "out-of-priority" is a commonly employed shorthand reflecting that the right is not subject to curtailment despite its junior priority. Meanwhile, other junior rights that have not provided mitigation are subject to curtailment in order of priority.

ground water rights in conjunctive administration.[432] Even today, surface water rights as senior as the early 1880s are subject to late-season curtailment in the Big Wood because they are junior to even more senior downstream surface rights.

The difficulty is that a Capital-M mitigation plan under the Conjunctive Management Rules cannot be approved in advance of the delivery call. And, under current policy, the Department will not evaluate a small-m mitigation plan outside the context of an application for appropriation, transfer, or exchange.

A water user wishing to secure approval of a mitigation plan for an existing right prior to a delivery call may get the plan before the Department by subjecting the existing right to some sort of water right application, such as a transfer application to add an alternate point of diversion. Kluges like this are not always available, however.

Even if they cannot obtain advance review and approval of the plan, junior water users are nonetheless well advised to put together a mitigation plan and have it available in the event of a delivery call. At that point, it may be offered as a Capital-M plan, and the user will find out if the Department deems it good enough. However, if it is developed by competent engineers, hydrogeologists, and water attorneys, the likelihood of it being effective is maximized.

(c) Small-m mitigation must be "like kind."

As noted above, Rule 43 of the Conjunctive Management Rules contemplates the possibility of out-of-kind mitigation (i.e., something other than a replacement supply of water). In contrast, small-m mitigation plans, which operate outside of Rule 43, ordinarily provide like-kind mitigation. In other words, a water user relying on a small-m mitigation plan will probably be required to provide a water supply to the senior of sufficient quantity, quality, and timing to meet the senior's needs to the same extent as those needs would have been met by curtailing the junior.

(d) Small-m mitigation is subject to re-evaluation at time of delivery call

As noted above, Capital-M mitigation plans, once approved, cannot be re-opened during the course of the call. Small-m mitigation plans that are approved in the context

[432] On February 23, 2015, two delivery calls were placed by groups of senior surface water users on the Big and Little Wood Rivers south of Sun Valley. Arguably, these calls are premature, given that the Department has not yet designated the valley's aquifer as a "common source of supply," as is required under the Conjunctive Management Rules. IDAPA 37.03.11.050 ("Rule 50"). In 2014, the Department repealed Rule 50, which would have allowed it to informally declare or adjust the boundaries of common sources of supply (including the Big Wood River Valley aquifer) without formal rulemaking. In 2015, however, the Idaho Legislature overruled the repeal. House Concurrent Resolution 10 (signed Mar. 16, 2015).

of an application for appropriation, transfer, or exchange do not enjoy that certainty. The Department may approve the mitigation plan for purposes of the pending application, thus allowing the permit, transfer, or exchange to be approved.

However, if and when a delivery call is made in the future, the effectiveness of the previously approved mitigation plan may be reevaluated in light of new circumstances and information, including impacts on parties not anticipated at the time the original plan was approved. In other words, approval of a small-m mitigation plan in anticipation of future conjunctive management provides no guarantee that the mitigation plan will be found adequate when the delivery call comes.

Obviously, this uncertainly is a drag on marketplace and financial transactions involving property that requires reliable water rights.

(e) Type I and Type II mitigation

IDWR guidance updated in 2015 breaks down mitigation into two forms:

- Type I – Diversion and delivery of replacement water to offset injury or depletion
- Type II – Non-use of water to offset injury or depletion

Jeff Peppersack, IDWR Guidance, *Application Processing No. 71, Transfer Processing #27* (*Describing Mitigation in Water Right Records*) (updated Nov. 4, 2015).

(f) It is no longer required to change the nature of use to mitigation

In the past, the Department required that if the acquired right is left idle for mitigation purposes (Type II mitigation), its nature of use element must be changed through the transfer process to "mitigation," "aquifer recharge," or the like in order to protect the undiverted right from forfeiture.

This requirement to change the nature of use was of no great consequence, so long as the right was fully under the control of the person creating the mitigation plan. In other words, it was just another "t" that needed to be crossed. However, it presented a problem if, for instance, the plan relied on deliveries by a separate irrigation entity whose right cannot easily be changed to some other nature of use. In other words, even if the irrigation district wanted to cooperate, it could not if it perceived that its water rights could not lawfully be changed to a use other than irrigation.

In response, the Legislature amended the forfeiture statute, Idaho Code § 42-223(10), to exempt from forfeiture a water right that is not diverted because of its use in a mitigation plan. Consequently, a mitigation plan may now safely rely on an

undiverted water right, without putting that right through its own transfer proceeding to change its nature of use to mitigation.

(g) Example involving mitigation of ponds

In Idaho, a water right is required for every artificial pond (to cover the evaporative loss), even if the pond fills naturally with ground water. Thus, if a developer contemplates construction of an artificial pond fed by ground water, a water right must be obtained. The Department has determined that the consumptive use associated with irrigation is virtually identical to the annualized evaporative loss of ponds on an acre-for-acre basis. In other words, if you dry up an acre of irrigated land to create a one-acre pond, there is no gain or loss of water to the system. Thus, it would seem to be a trivial exercise to convert previously irrigated land to aesthetic ponds. Alas, it can be tricky, and a mitigation plan may be required.

In one example, a developer sought to convert farm land irrigated with surface water to a commercial development with ponds that would fill naturally from ground water with a high water table.

If the farm land had been irrigated with ground water, a portion of those rights readily could have been changed from irrigation use to aesthetic pond use. This would be a straight transfer with no mitigation required. Of course, the aesthetic right would have the same priority date as the ground water right and would thus be vulnerable to being called out in a future conjunctive administration call. The problem is that this is not a risk the pond-owner is allowed to take. If a ground-water-fed pond is found to be not in priority, the water cannot simply be shut off. Water will continue to fill that pond no matter what (unless the pond is filled in). Thus, the owner would be obligated to scramble to develop a new mitigation plan under crisis conditions.

Here, the problem was different. The farm was irrigated with surface water, while the pond is fed by ground water. Surface and ground water are considered to be different "sources" of water, and transfers from one source to another are not allowed. Nor could the developer obtain a new appropriation of shallow ground water to feed the pond, because the shallow ground water is hydrologically related to the fully appropriated Boise River.

Consequently, it was necessary to develop a mitigation plan. The surface water right previously used for irrigation of the land where the ponds were located was left undiverted and dedicated to mitigation of the evaporative loss of the ponds. The additional water left in the Boise River thus would offset any claim of injury by downstream seniors. (No one raised an issue about impacts to other ground water users; the "pressure point" was the over-appropriated Boise River. In other words, there was unappropriated ground water available.)

(h) Mitigation and instream flows

Where a junior water right is subject to curtailment (or where there is no unappropriated water available to cover an illegal or new use), one approach is for the user to acquire a senior right and transfer it his or her use. This, of course, is not mitigation; it is a simple transfer. This can be tricky, however, where a point of diversion of a surface right must be moved upstream—which must be done in a manner that protects all other water rights on the river, even juniors. It is all the more challenging where the other water right is an instream flow right.

Such is the case in the Big Wood River Valley where two instream flow waters rights have been imposed on the Big Wood River from Ketchum to Bellevue.[433] As a practical matter, this makes it impossible to move a senior water right upstream within or above the protected reach. Water diverted at a farm below the protected reach has no impact on the protected reach. But if the point of diversion is moved upstream, the depletion will diminish flows in the protected instream flow reach.

This is a big problem on the Big Wood because most of the properties in need of water are within or above the protected reach and nearly all of the senior rights available for purchase are downstream.

The Department has adopted the practice of imposing a condition on such upstream transfers subordinating them to the minimum stream flow rights. The effect is that the transferred right cannot be exercised any time the minimum stream flow right is not being met. Because the minimum stream flow rights on the Big Wood River are quite junior (1981 and 1987), they are often out of priority. As a practical matter, such a condition defeats the entire purpose of the transfer, because the right may only be used in the wettest years despite its early priority.

The good news is that there is a work-around for the minimum stream flow problem—at least for some users. You guessed it, it involves a mitigation plan. The idea is to acquire a senior surface right capable of providing a replacement supply to the seniors downstream. (To be effective, the replacement water right must be upstream of every downstream senior who could place a call on the junior. It would be pointless to eliminate one call and still be subject to another.)

Instead of transferring the acquired right up the river, it is used to provide mitigation to downstream seniors (thereby allowing the out-of-priority upstream diversion to continue). Conceptually, it works like this. One does not change any of the elements of the acquired right. Instead, it is simply not diverted (drying up whatever land it was used to irrigate). In the event of a call (or as part of another water application), the

[433] Nos. 37-7919 and 37-8307 have priority dates of 1981 and 1987, respectively. They cover the same stretch of river, but the second right adds additional cfs.

user seeks approval of a mitigation plan under which the un-diverted replacement water compensates for any injury caused to the senior user(s).

One might ask why calling it "mitigation" works when simply transferring the same right up river is not viewed as injury to the instream flow. The impact on the minimum stream flow is identical under either scenario. In either case, the continued diversion by the junior will diminish flows that would otherwise be available to the instream right.

The answer is this works if and only if the upstream junior holds a water right that is senior to the instream flow right. Like all water rights, the instream flow right "took the river as it found it," which included the upstream user's right to divert. Thus, the upstream user is entitled to continue to divert to the detriment of the even more junior instream flow right. Moreover, the upstream user is entitled to respond to a call by a downstream senior in any way that satisfies the senior.[434] The instream flow right may "hope" that the upstream right is called out. But, if that happens, it would be only an incidental result of the call. The purpose of the call was to satisfy the downstream senior, not to incidentally benefit the instream flow. The holder of the instream flow right may not complain if the upstream diverter manages somehow to satisfy the call and continue its diversion. Thus, the upstream user may continue to divert, under the mitigation plan, even when the minimum stream flow is not being met.

In contrast, if he or she had sought simply to transfer the replacement right upstream to serve his or her use, the transfer would have been denied. This is because transfers must avoid injury to all other water rights, even the junior minimum stream flow right. In contrast, the mitigation plan essentially amounts to a transfer of the acquired right downstream to the senior, which has no injury effect on the instream flow.

Again, however, this mitigation approach will not be effective if the upstream user does not hold a water right that is at least senior to the instream flow. In other words, it is a shallow accomplishment for the mitigation plan to resolve the call by the downstream diverter if the junior upstream right is still subject to curtailment by a more senior instream flow right.[435] The upshot is that a seemingly worthless upstream junior water

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[434] For example, the junior could go to the senior and offer enough money to simply buy the senior out. Doing so would allow the junior to divert more (in priority with other rights), and the instream flow right would have no basis to complain. A mitigation plan based on a substitute supply closer to the senior is no different. Yes, every user (including the instream flow) "takes the river as he or she finds it." But one of the things they "take" is the potential that a downstream senior will no longer need or desire to call for as much water.

[435] If the mitigation plan involved idling a senior right upstream of both the instream flow right and the senior downstream diverter, then it could effectively respond to both calls. The problem in the Big Wood River Valley is that nearly all of the senior rights available for

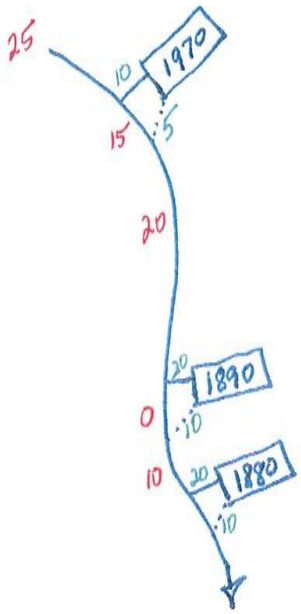
right is quite valuable indeed so long as it is senior to the instream flow rights and is coupled with a mitigation plan that addresses injury to senior diverters further downstream.

There is one possible glitch. Because the mitigation cannot be approved as a Capital-M mitigation plan until there is a delivery call (nor as a small-m mitigation plan outside of water right application), the non-diverted replacement water is subject to forfeiture. (Idaho Code § 42-223(1) protects from forfeiture Capital-M and small-m mitigation plans, but only if they have been approved by the Department.) Accordingly, steps should be taken to either keep the replacement water in use until needed for mitigation or to get it into the water supply bank.

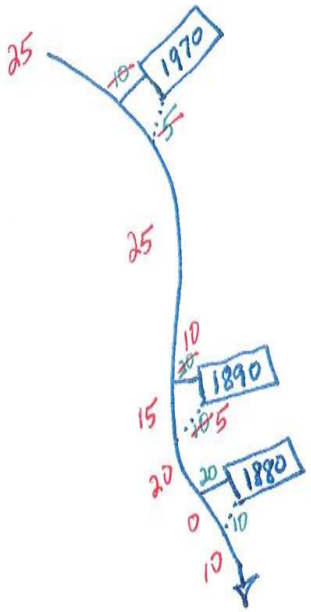
This concept of mitigating a downstream senior to benefit a diversion upstream of (or within) a reach protected by an instream flow right is conceptually tricky. The simplified schematics on the pages that follow may assist the reader in seeing how this works. Scenarios A1, A2, and A3 show how much easier it is to move water rights around in the absence of an instream flow right. These scenarios illustrate how an upstream junior may respond to a delivery call by a downstream senior by buying another right and moving it upstream. Scenarios B1, B2, and B3 show how this does not work if there is an intervening instream flow. Scenario B4 illustrates how a mitigation plan may work where moving the right upstream does not.

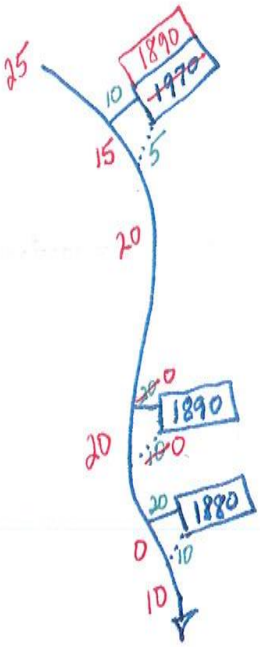
purchase are located within or downstream of the instream flow reach. To be effective in a call by the instream flow right, the mitigation would need to benefit the entire reach.

***Scenario A1*: Shortage before call.**
In this scenario, 25 units of water is insufficient water to satisfy all three users. The downstream 1880 right is short 10 units and is entitled to call for water.



***Scenario A2*: Result after call.**
The 1880 right will initiate a delivery call resulting in the complete curtailment of the 1970 right and a partial curtailment of the 1890 right. The 1880 right is made whole.





***Scenario A3*: Result after transfer of 1890 right.**
Faced with being called out, the owner of the junior 1970 right may acquire the 10-unit portion of the 1890 right that survives the call and move its point of diversion up to her property.

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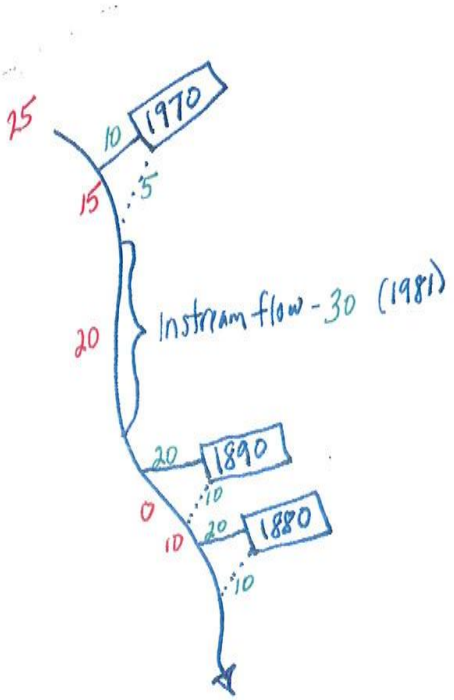
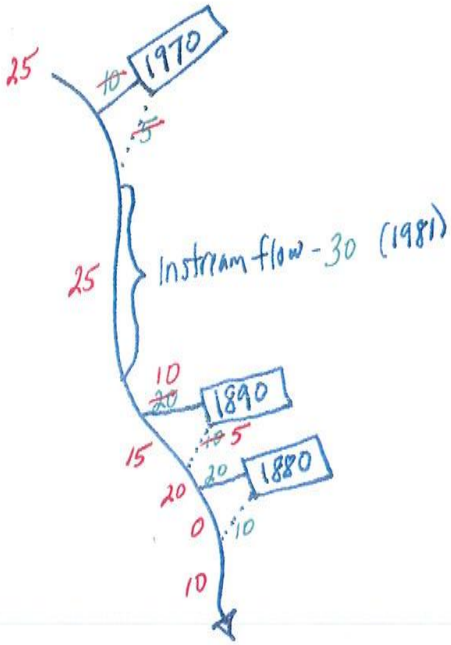
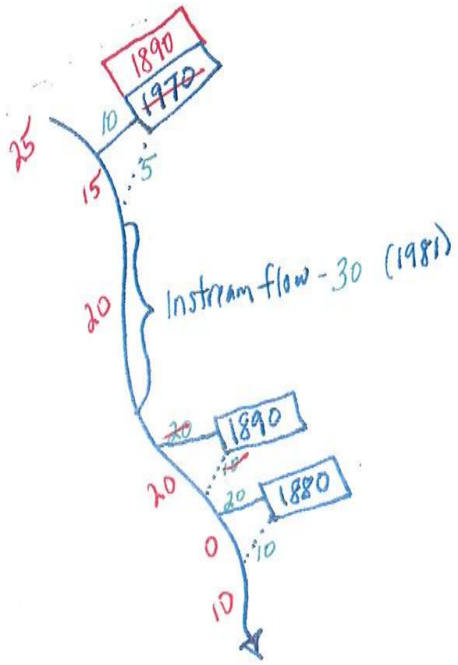


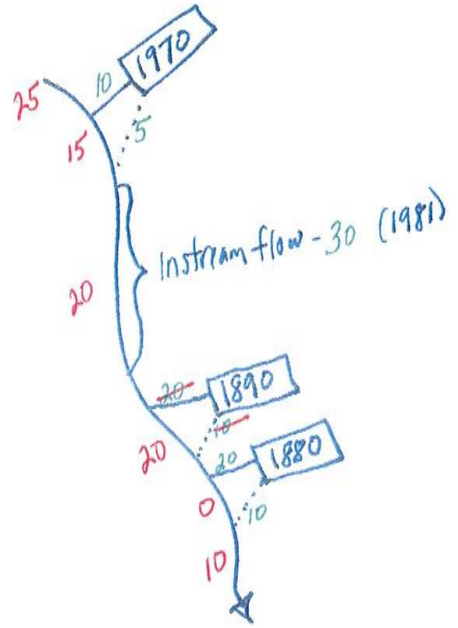
***Scenario B1*: Shortage before call.** This is same as Scenario A1, except for the addition of an instream flow right of 30 units with an 1981 priority date. Again, 25 units of water are insufficient to satisfy all water rights. The downstream 1880 right and the instream right are each short 10 units. The 1880 right is entitled to call for water. In contrast, the 1981 instream flow right may not, because it is junior to the upstream user. It must suffer the 10 unit shortage.



***Scenario B2*: Result after call.** The 1880 right will initiate a delivery call resulting in the complete curtailment of the 1970 right and a partial curtailment of the 1890 right. The 1880 right is made whole. The 1880 right will not call out the junior instream flow, because doing so would not add any new water. This result is identical to Scenario A2 (without the instream flow).



***Scenario B3*: Result after attempted transfer of 1890 right.** As in *Scenario A3*, the owner of the junior 1970 right may acquire the 10-unit portion of the 1890 right that survives the call and attempt to move its point of diversion up to her property. Doing so would not be allowed, however, because a change in the point of diversion will only be allowed if no injury occurs. Moving the 1890 right upstream would reduce the instream flow to 20 units (compared to 25 units before the transfer as shown in *Scenario B2*). Accordingly, this transfer would be denied.



***Scenario B4*: Result after mitigation plan using 1890 right.** Alternatively, the owner of the junior 1970 right may acquire the 10-unit portion of the 1890 right that survives the call and use it in a mitigation plan that dries up the farm. The additional 10 units now flows to the 1880 right, making it whole and allowing the 1970 right to continue to divert. The other 10 units under the 1890 right would continue to be called out by the 1880 right, but that is of no concern to the holder of the 1970 right, whose only duty is to mitigate for the injury her diversion causes. Meanwhile the instream flow continues to suffer a 10-unit shortage, but, it can do nothing about it. The instream flow cannot call out the 1970 right, because it is junior to that right. Nor can it complain of the mitigation plan, which involves no change in point of diversion and, in any event, does not affect water rights above it on the stream.

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(i) If a senior water right is acquired as a replacement supply, why not simply transfer it to the acquiring junior user?

The basic premise of many mitigation plans is to acquire a senior right and make it available to the senior to offset the adverse effects of the junior's diversion. One might ask, having gone to the trouble of acquiring the senior right, why not simply transfer it to serve the junior's use? The effect is identical. Either way, the junior user gets to operate under the priority of the newly acquired water right.

That is a good question—one that sometimes people skip over. The answer is that, if the acquired right can be transferred to the acquiring party's place of use and point of diversion, that is probably the way to go. In short, one should keep the solution as simple as possible. There are times, however, when a direct transfer of the replacement supply to the junior will not work.

For example, there may be times (particularly where the replacement supply results from aquifer recharge or other storage) when it is not physically possible to get the new water to the place where the junior needs it. In other words, the only option may be to deliver the water to the senior under a mitigation plan. This might entail, for example, dry up of land irrigated by ground water where the land is located down-gradient from the junior but above-gradient from the senior, thus allowing the undiverted water to flow downward to the satisfy the call.

The mitigation water right may be owned by a water district or other entity that is unwilling or unable to allow a portion of its water right to be split off and transferred to a new use. But the district may be willing to let a portion of its water right go "idle" to serve as mitigation.

In some cases, the senior surface right acquired as a replacement supply cannot be moved upstream without injury to other rights—notably where the stream is subject to an instream flow right. (See discussion below in section 15.G(8)(h) at page 256.)

(9) Mitigation of ground water transfers within the ESPA

Ordinarily, it is fairly simple to move points of diversion for ground water from one place to another within the same aquifer. There may be individual well interference issues (cone of depression issues). But, other than that, one may "move a straw from one end of the bathtub to the other" without any impact on the water resource or other users. Thus, mitigation is usually not required as between ground water users.

The situation is different, however, where ground water is hydrologically connected to surface water. Moving the point of diversion of a ground water right from one well to another well may affect hydraulically connected surface rights and entail mitigation. This is a special sub-category of small-m mitigation.

It arises most notably in the Eastern Snake Plain Aquifer ("ESPA") in the Magic Valley of Idaho. The Snake River runs for hundreds of miles along or near the southern boundary of the ESPA, a massive aquifer covering 10,800 square miles and holding as much water as Lake Erie.[436]

Water within the ESPA flows underground toward to the Snake River. Thus, every consumptive diversion of ground water from the ESPA results in a corresponding reduction in flows somewhere in the Snake River. Each well affects the river in a different way, however. To put it simply, wells in the upper (eastern) part of the aquifer reduce flows most significantly in the upper part of the Snake and have gradually less impact on each succeeding lower reach of the river. And vice versa.

As a result, moving a point of ground water diversion from "point A" to "point B" will increase flows in one part of the Snake while reducing flows in another. The net depletion effect (once steady state is achieved) will be zero, but the effect on specific reaches of the river may be substantial as the impact is redistributed up and down the river. This change benefits some users and injures others.

Because the ESPA is administered as being fully appropriated, new users (notably dairies, industries, and cities) must buy water rights from farms, dry them up, and transfer the water right to the new location.

For a while during the 1990s, the Department refused to approve any ground water transfers due to the then-unquantifiable injury to surface users. Ultimately a computer program (known as the Eastern Snake Plain Aquifer Model or "ESPAM") was developed to model the effect of every possible change in location on every reach of the river.

This methodology, and the Department's implementation of it to date, is focused solely on mitigating the adverse effects of a transfer on the affected reaches of the Snake (and tributaries thereto). The same methodology also quantifies the corresponding and offsetting positive impacts on other reaches of the river. A major piece of unfinished business is the establishment of a "credit" system to reflect these positive benefits. So

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[436] "The Eastern Snake Plain Aquifer ('ESPA') is defined as the aquifer underlying an area of the Eastern Snake River Plain that is about 170 miles long and 60 miles wide as delineated in the report 'Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho.' U.S. Geological Survey ('USGS') Professional Paper 1408-F, 1992, excluding areas lying both south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. The ESPA is also defined as an area having a common ground water supply. See IDAPA 37.03.11.050." *Order*, Finding No. 1 at 2, *In the Matter of Distribution of Water to Various Water Rights Held By or For the Benefit of A&B Irr. Dist., American Falls Reservoir Dist. #2, Burley Irr. Dist., Milner Irr. Dist., Minidoka Irr. Dist., North Side Canal Co., and Twin Falls Canal Co.* (IDWR, Feb. 14, 2005).

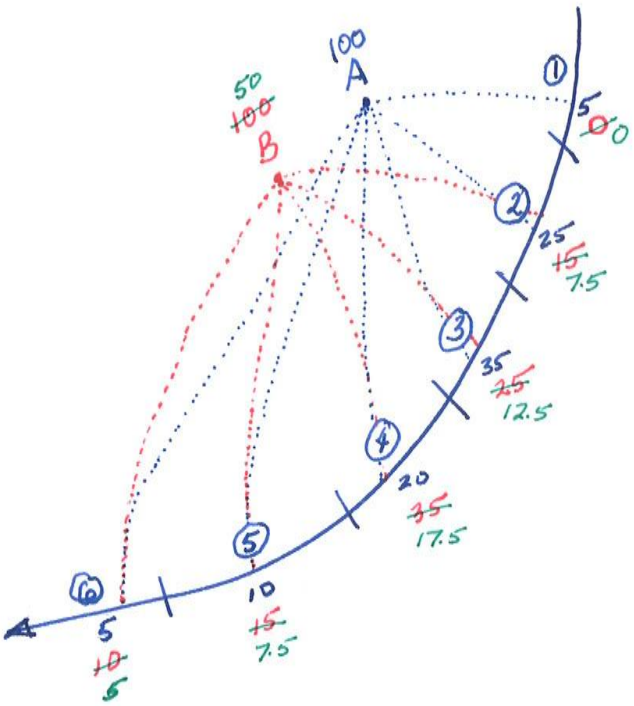
far, the Department has approved water right transfers recognizing those benefits and securing the right of water right holders to claim them in the future once a system is put in place to quantify and trade those credits.

The result is that a person seeking to transfer a point of diversion to a new location in the ESPA may be required to leave some of the water behind. For instance, if the right authorized diversion of 5 cfs at the original location, the Department might approve a transfer of only 4 cfs, if the computer model showed that pumping that amount in the new location would leave no surface user of the Snake River worse off. The greater the distance the water is moved up and down the aquifer, the more water must be left behind to prevent injury.

Of course, in such a transfer, some water users will be made better off. There are two ways in which the transferring party may capture this benefit. First, the Department has recognized a "credit" for the improvement to other reaches of the Snake River. That credit (in theory at least) may be used to offset some future transfer in the other direction. Alternatively, the water user (or water broker) may arrange various simultaneous transfers in opposing directions whose impacts on various reaches of the river cancel each other out, thus allowing the rights to be transferred at full face value (or close to it).

The reduction in transferred quantity based on the ESPAM is different from other mitigation plans in several ways. First, it is not undertaken in response to or anticipation of a conjunctive administration delivery call. Second, no new, alternate supply of water provided to the other potentially injured rights. Instead, injury is avoided by cutting back the quantity of an existing right (the transferred right) or by using credits or offsets from other transfers. (That quantity may be defined to change over time, reflecting the gradual impact of the transfer until steady state is achieved.) Third, once the transfer is approved, there is no ongoing mitigation plan to implement. Fourth, the effect of the mitigation is only to allow approval of the transfer. It has no effect in protecting the ground water user from a future delivery call. However, when that delivery call comes, it will be evaluated on the basis of the post-transfer impacts of new (lower) quantity being diverted from the new place of diversion.

An illustrative example of a ground water transfer within the Eastern Snake Plain is set out on the following page. This is, of course, grossly simplified. It communicates, however, the idea that a change in the point of diversion may be accomplished without injury to any of the river reaches if the diversion quantity is reduced at the new point of diversion. This amounts to "leaving money on the table," because other reaches are benefited and the overall impact of the diversion is reduced. To some extent, this "money on the table" effect may be avoided by combining two or more transfers that to some extent cancel out each other's impact. This may be done simultaneously, or at different times through retention of credits after the first transfer.



Eastern Snake Plain Aquifer Ground Water Transfer Scenario. In this scenario, 100 units of water are initially pumped from location A and consumptively used. The computer model calculates that this will diminish flows in each of six reaches of the Snake River as shown in blue.

If the point of diversion is moved to location B, the computer model predicts that the steady-state impact on each river reach will be as shown in red. The effect of the move from A to B is to improve flows in reaches #1, #2 and #3, but to reduce flows in reaches #4, #5, and #6. This equates to injury, and the transfer will not be approved for the full 100 units.

By restricting the diversion at point B to 50 units, the steady-state impact on each reach is reduced by half (as shown in green). The result is that reaches #1, #2, #3, #4, and #5 all experience a decline in impact compared to pumping 100 units at point A (meaning more flow and no injury), while reach #6 is neutral.

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H. Change in source of water

(1) Underlying theory

Idaho's transfer statute authorizes changes in "point of diversion," but says nothing about changes in the "source" of the water. Nevertheless, it is well understood that a change in point of diversion is permissible (assuming no injury, etc.), while a change to an entirely new source of supply is prohibited. Instead, it will be treated as a new appropriation.[437] The trick is telling the difference.

If the user simply moves the point of diversion from one location to another within the same source, that is an ordinary transfer, and will be evaluated on the basis of injury, enlargement, and so on. If approved, the old priority will be retained.

If, on the other hand, the user is really moving the point of diversion to an entirely new source of supply, that is not a change. It is really a new appropriation (and abandonment of the old one). This matters in several ways. First, it may affect the injury analysis, because there is no *status quo* diversion against which to measure the new appropriation. Also, the new appropriation will have a new priority date, rather than keeping the old one. Moreover, it may not be allowed at all if, for instance, a moratorium on new appropriations is in place.

How does one determine whether a change in point of diversion is a change in water right or a new appropriation? It boils down to whether the new location is tributary (that is, hydraulically connected) to the old location. "Since the original right did not include any right to non-tributary sources of water, the use of water from a non-tributary source is a new appropriation. Therefore, a purported change to a source that is not tributary to the original source must be considered a new appropriation."[438]

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[437] In *In re SRBA,* Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (reproduced in Appendix S), *aff'd, City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.), SRBA Judge Melanson (who retained the case after his appointment to the Idaho Court of Appeals) rejected the City of Pocatello's argument that the accomplished transfer statute does not apply to pre-1969 water rights. The same court also held that the accomplished transfer statute does not allow changes in the source of water, but only changes in place of use, point of diversion, nature or purpose of use, or period of use. The court observed: "A change in source is essentially the appropriation of a new water right." *Id*. at 11. The Idaho Supreme Court affirmed in 2012.

[438] A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 260-61 (1990).

(2) Surface-to-surface changes

Thus, for instance, a surface user may switch from one fork of a stream to another, and a downstream user below the fork would have no right to complain if the overall impact is unchanged.[439] Such a move might be barred if it impaired uses on the other tributary, but that would be a function of injury analysis, not an absolute prohibition based on being a different source.[440] In contrast, obviously, a move from one river to an entirely different river system would be considered a different source and would be treated as a new appropriation, not a transfer.

(3) Ground-to-surface and surface-to-ground changes

The same principles would appear to apply to a change from surface to ground water. One commentator has stated: "Applying the general rules applicable to changes in source, a purported change from a surface source to a non-tributary aquifer would be a new appropriation while a change from a surface source to a tributary aquifer would be evaluated as a change in use."[441] Another commentator (who is also a departmental official) has a more circumspect viewpoint.[442] In any event, even if the source is determined to be tributary and therefore the "same source," the user seeking the change still must demonstrate no injury to both surface and ground water users which might be affected. This would entail a potentially complex hydrological analysis. A special master in the SRBA has concluded, in a recommended order, that "IDWR will recognize

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[439] *Saunders v. Robinson*, 14 Idaho 770, 95 P. 1057 (1908). Of course, such a move might change the overall impact. For example, suppose the new fork had more consistent flows than the old fork, thereby enabling the water user to fill her right more often. In such a case, a downstream junior could complain of injury, even though the transfer was deemed to be from the same "source."

[440] S*ee*, *Clear Springs Foods, Inc. v. Clear Lakes Trout Co*., 136 Idaho 761, 40 P.3d 119 (2002) (holding that two streams fed by different springs flowing from the Snake Plain Aquifer are the same sources, however holding depended in part on the fact that diversion structures commingled the water).

[441] Krogh-Hampe at 261.

[442] "It is not a given that the Department will allow a change in point of diversion of a surface water right to a tributary ground water source. Despite the interconnection, this normally is viewed as a change in source and not allowed except in extraordinary circumstances that I am not presently able to describe." Email from Phillip J. Rassier, Chief Counsel, IDWR (April 30, 2003).

a well as an alternate point of diversion for a surface water source if the two are very closely connected."[443]

A change from ground water to surface water may be accomplished, assuming that the ground water is tributary to the surface stream. However, the injury questions are hydraulically complicated. A recently developed model for the ESPA, for instance, would allow a user to buy up and shut down ground water rights, and predict, subject to the model's limitations, the resulting increases in flows in the Snake River. Of course, the impact will not be immediate, but the model would predict how much could be diverted without injury in any given year. Another complicating factor, however, would be time of use. A shutdown of irrigation wells would result in a year-round increase in flows in the river.

A change from surface water to ground water is also permissible, if and only if a close hydraulic connection can be demonstrated.

The Department's 2002 transfer guidance addresses the topic of ground-to-surface and surface-to-ground water changes. It provides that an appropriation for transfer proposing such a change is approvable if the ground water and surface water sources 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).[444]

A 2007 decision from Special Master Bilyeu of the SRBA Court rejected a claim by the City of Pocatello, which sought recognition of its wells as alternate points of diversion for its surface rights.[445] The Special Master concurred with the conclusion in the Director's Report that the wells (which were between ¼ and 1 mile from the creeks) were not sufficiently hydraulically connected. Special Master Bilyeu offered this useful summary: "IDWR does not usually recognize wells as alternate points of diversion for surface water sources. However, IDWR will recognize a well as an alternate point of diversion for a surface water source if the two are very closely connected. For example, IDWR recognized that a well as an alternate point of diversion near the Salmon River. In that case, a point of diversion on an abandoned ditch was changed in favor of a nearby

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[443] *Master's Report and Recommendation and Order on Motion to Reconsider*, Subcase Nos. 29-00271 *et al.*, *In re: SRBA,* Case no. 39576 Dist. Ct. for 5th Jud. Dist. of Idaho (October 2, 2007) at 6.

[444] IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) (Dec. 21, 2009) (superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)).

[445] Her decision was affirmed by the SRBA Court in *In re SRBA,* Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (reproduced in Appendix S), and was affirmed by the Idaho Supreme Court in *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.).

well. IDWR determined that the two points of diversion were close to each other and the well was so shallow that the ditch and the well essentially withdrew the same water." *In re SRBA*, Case No. 39576, Subcases: See Attached Exhibit A, Master's Report and Recommendation, Idaho Fifth Dist. Ct, at 6 (Oct. 2, 2007). The Special Master explained that it is insufficient to show that a stream contributes substantially to an aquifer. The person seeking to divert a former surface right from the aquifer must demonstrate that the hydraulic connection is so tight that "the two are essentially diverting the same water." *Id*. at 12.

I. The rule against enlargement

(1) The basic concept

Enlargement is a concept closely related to injury, but it is not the same. Injury is a consideration for both new water appropriations and changes of existing rights; enlargement is only applicable only to changes in rights. Both injury and enlargement are aimed at avoiding actions that increase the burden on the water system or otherwise make less water available to other water users protected by the priority system. Changes in water use that result in injury typically result in enlargement, and vice versa. But this is not always the case.

Injury analysis is typically fact-specific and is evaluated with respect to a specific injured party. In contrast, enlargement may be thought of as *per se* injury—injury that is presumed and need not be shown as to particular water users. Here are some examples:

- If a user sought to increase the rate of diversion beyond that specified on the original right or to increase consumptive use in the context of expanded irrigation acres or a new nature of use, this would result in injury. Indeed, it constitutes is *per se* injury (meaning it is presumed to hurt someone) and is therefore deemed an enlargement.

- If a user sought an earlier priority date than he or she was entitled to, that too would constitute *per se* injury. This might or might not also be described an enlargement, but it hardly matters because it is impermissible.

- If a user sought to move a point of diversion from point A to point B (without changing the quantity or any other element), that may or may not result in injury depending on the circumstances. If, for instance, it reduced return flows relied on by another user, that would constitute injury. But even if there were injury, it would not be described as an enlargement because there is no overall increase in burden on the water system and no *per se* injury.

It is generally understood that any change in use that increases the rate or volume of diversion, the number of irrigated acres, or the duration of the period of use[446] constitutes an enlargement. Such changes can be predicted to cause injury to some other water right, if not immediately then in the future at a time of administration. This is the reason that enlargement is described as a *per se* injury rule. In such a case, it is deemed an enlargement and there is need to go through the exercise of identifying and proving injury to a specific water user.

In some cases, enlargement is discussed in terms of increases in beneficial use (see footnote 460 on page 282). Most of the time, references to increased "beneficial use" is really just shorthand for increases irrigated acreage—which increases consumptive use. The one reported decision addressing enlargement in a non-irrigation context found that an increase in beneficial use where nothing else changed and the burden on other water users was not increased did not constitute enlargement.[447] Nevertheless, for reasons that are unclear, IDWR's transfer guidance continues to suggest that an increase in beneficial use alone may, in some contexts, constitute enlargement. See discussion in section 15.I(4) (Enlargement in a non-irrigation context) at page 282.

One way to think about enlargement is that it is, in effect, a new appropriation. It cannot be carried out unless it is separately approved. Even though a new ground water right, for example, might be shown to cause no injury to existing water rights, it still must take its place as the newest right in the system and be assigned a junior priority. Its owner cannot be assigned a senior priority simply because there is no evident injury to another user. For example, if a farmer appropriated 3.2 cfs to irrigate 160 acres, and then later sought to irrigate an additional 40 acres with the water she "conserved" through the use of more efficient irrigation methods, she would be obliged to obtain a new water right for the 40 acres and accept a junior priority for it. The reason is simple. Despite the fact that farm is diverting no more water than before, 200 acres of crops will consume more water than the original 160 acres, resulting in less water available for others.

Thus, the rule against enlargements really is another way of stating a more fundamental rule: each new water right must take its place in line behind all existing water rights. Put simply, an enlargement is a new or additional use that must have a new

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[446] As for changes in the period of use, see discussion in section 15.J on page 287.

[447] *In re SRBA Case No. 39576, Subcase Nos. 36-02708 et al, Order On Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* ("*Facility Volume Case*"), Idaho Dist. Ct., Fifth Judicial Dist. (Dec. 29, 1999) (Barry Wood, J.). This SRBA decision was not appealed. The *Facility Volume Case* has been cited by the Idaho Supreme Court, but not with respect to the enlargement issue. *North Snake Ground Water Dist. v. Gisler*, 40 P.3d 105, 108-08 (Idaho 2002) (Kidwell, J.).

water right, with a junior priority. If it cannot obtain a new-priority right (due, for instance, to a moratorium), then, legally, it cannot exist.

The most common fact setting for enlargement is "water spreading." This is the practice of expanding the number of irrigated without increasing the quantity of water diverted, which can be accomplished through the adoption of more efficient irrigation techniques.[448] Addressing water spreading in general adjudications is the purpose of the

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[448] A farmer might switch from flood irrigation to pressurized sprinklers, or from an earthen ditch to a pipeline. The improvements appear to result in more water, and there is no question that water has been conserved. Irrigating the same field now requires diversion of less water: less water per unit diverted escapes through percolation, ditch leaks, and the like, and a higher percentage is delivered to the crop. But the amount of consumptive use per acre remains the same. The irrigator then would find herself with "extra" water without increasing the rate of diversion. One having additional water might conclude she is allowed to bring additional acreage under irrigation.

Many have done this, believing it acceptable because they did not increase their original diversion rate and achieved the enlargement through a conservation practice. However, as more acreage is brought under irrigation, the total consumptive use necessarily increases (as does the place of use, which typically is another limiting element in a water right). In short, water is illegally taken from the system, return flows reduced—and other water right holders injured or at least placed more at risk of a shortage—even though the appropriator's diversion rate stays the same. Such water spreading is illegal in Idaho.

Thus, the only way to bring new acres under irrigation with the same water right, is to dry up an equal number of previously irrigated acres. There are several reasons for the dry-up requirement. First, the prior appropriation doctrine limits a water right to the amount that reasonably can be placed to beneficial use. If the original lands could continue to be irrigated after some portion of the appurtenant water right had been transferred to other lands, then the amount being transferred away presumably was never needed for the beneficial use in the first place. Second, any increase in the total acres irrigated under the right after the transfer would increase the right's consumptive use and reduce return flows, including ground water recharge, supplying other rights.

Note that in some instances, a conservation measure actually can decrease consumptive use somewhat. For example, if an open ditch is replaced with a pipeline, this will eliminate the evaporation from the ditch surface and the evapo-transpiration through phreatophytes along the ditch—actual consumption of water is reduced. (Phreatophytes are plants growing along streams and canals.) The authors sometimes refer to this as the "sliver" of consumptive use that can be freed-up by implementing a conservation measure. However, this amount usually is so small that it is impractical to quantify or use it—although it could be practical if, say a large ditch were piped, reducing evaporation from acres of water surface. In any event, a proposal to put such saved water to use on new land or in some other new use still would require a new water right. Finally, the courts (at least in other states) have discouraged or disallowed the use of this type of saved consumptive use in part for policy reasons. For example, in *Southeastern Colorado Water Conservancy Dist. v. Shelton Farms, Inc.*, 529 P.2d 1321 (Colo. 1971), appropriators cut down portions of a cottonwood forest growing along the Arkansas River and then attempted to claim the "saved" water resulting from the elimination of these phreatophytes. The Colorado Supreme

accomplished transfer statute (Idaho Code §§ 42-1425 and 42-1426). The accomplished transfer statute uses the term "enlargement" to describe this practice. As the Court said in reference to this statute:

> The term "enlargement" has been used to refer to any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means. See I.C. § 42–1426(1)(a). An enlargement may include such events as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion.

Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996) (Schroeder, J).

Injury must be addressed in both in new appropriations and in transfers. Enlargement, in contrast, arises only in the context of a change to an existing water right. Enlargement is addressed in the transfer statute (Idaho Code § 42-222[449]) and in the

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Court rejected the attempt, and refused to recognize a new water right free from call on the river. In its opinion, the Court reviewed the extremely narrow circumstances in which one might acquire such a water right based on a "salvaged water" or similar theory. The *Shelton Farms* ruling could be seen as stemming in part from the Colorado court's concern about the environmental degradation that could result if the decision when the other way. To a similar effect is *RJA, Inc. v. Water Users Association of District 6*, 690 P.2d 823 (Colo. 1984) (appropriator was denied the attempt to enlarge his water supply by draining a peat bog).

[449] The transfer statute provides in pertinent part:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right.

> The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area. The transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement in use of the original right even though more acres may be irrigated, if no other water rights are injured thereby. A copy of the approved application for change shall be returned to the applicant and he shall be authorized upon receipt thereof to make the change and the original water right shall be presumed to have been amended by reason of such authorized change. In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter set forth. Provided however, minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code.

Idaho Code § 42-222(1) (emphasis added).

accomplished transfer statute (Idaho Code §§ 42-1425[450] and 42-1426[451]).[452] There are no

[450] Section 42-1425 of the accomplished transfer statute provides in full:

> (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, the northern Idaho adjudications, and the Bear 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, prior to January 1, 2006, for the northern Idaho adjudications authorized by section 42-1406B, Idaho Code, and prior to the date of commencement of the Bear River basin adjudication authorized by section 42-1406C, Idaho Code, may be claimed in the applicable general 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 recommendation 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.

Idaho Code § 42-1425 (emphasis added).

[451] Section 42-1426 of the accomplished transfer statute provides in pertinent part:

(1) Legislative findings regarding enlargements:

(a) The legislature finds that several adjudications of water rights were commenced or will be commenced in the state of Idaho subsequent to the mandatory permit system provided in sections 42-201 and 42-229, Idaho Code. These adjudications include the following, with associated commencement dates:

[list of adjudications]

Persons entitled to the use of water or owning any land to which water has been made appurtenant by decree, license or constitutional appropriation have, through water conservation and other means, enlarged the use of said water without increasing the rate of diversion and without complying with the mandatory permit system adopted by the legislature. Enlargements have been done with the knowledge of other water users, and water has been distributed based upon the right as enlarged. Junior water users made appropriations based upon a water system that reflected these enlarged uses. Thus, the legislature further finds and declares that it is in the public interest to waive the mandatory permit requirements for these enlargements in use prior to the

IDWR rules addressing enlargement, but there is a guidance document.[453]

Although the Water Code sets out the obligation to avoid enlargement in a transfer or accomplished transfer, it does not define the term. The only guidance on the meaning of enlargement found in section 42-222 is this sentence: "The director may consider consumptive use . . . as a factor in determining whether a proposed change would

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> commencement of a general adjudication, as long as such enlargements in use did not increase the rate of diversion of the original water right or exceed the rate of diversion for irrigation provided in section 42-202, Idaho Code, after the enlargement of use, and the enlargement of use did not reduce the quantity of water available to other water rights existing on the date of the enlargement in use.
>
> . . .
>
> (2) The mandatory permit requirements of sections 42-201 and 42-229, Idaho Code, are waived, and a new water right may be decreed for the enlarged use of the original water right based upon the diversion and application to beneficial use, with a priority date as of the date of completion of the enlargement of use for any enlargement occurring on or before the commencement date of an adjudication; provided however, that the rate of diversion of the original water right and the separate water right for the enlarged use, combined, shall not exceed the rate of diversion authorized for the original water right; and further provided, that the enlargement in use did not injure water rights existing on the date of the enlargement of use. An enlargement may be decreed if conditions directly related to the injury can be imposed on the original water right and the new water right that mitigate any injury to a water right existing on the date of enactment of this act. If injury to a water right later in time cannot be mitigated, then the new right for the enlarged use shall be advanced to a date one (1) day later than the priority date for the junior water right injured by the enlargement. It is further provided that any such enlargement of use allowed in a general adjudication shall not constitute an abandonment or forfeiture of the original water right to the extent of current use.

Idaho Code § 42-1426 (emphasis added).

[452] A special provision of the transfer statute allows an expanded number of acres in transfers involving stored water, so long as injury is avoided. Idaho Code § 42-222.

[453] See, *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) § 2 (Changes in Consumptive Use), p. 4, § 2 (Intensified Use of Water), p. 7, § 5d (Enlargement of Use), pp. 28-33 (revised Dec. 21, 2009) (superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)).

constitute an enlargement in use of the original water right." Idaho Code § 42-222(1). This suggests that enlargement, like injury, is aimed at avoiding changes to a water right that would increase its burden on the water supply.

Section 42-1426 of the accomplished transfer statute (which applies only in the context of general adjudications) sets out legislative findings and limitations with respect to enlargement (see footnote 451). However, these provisions boil down to a traditional injury analysis. In a nutshell, an enlargement made in violation of the mandatory permit statute may be decreed with its own priority date which must be advanced as necessary to assure that no other water user is injured thereby. Indeed, as the Idaho Supreme Court found, the priority date will always be advanced.[454]

(2) Increase in carriage losses

Enlargement of a water right also can occur where an appropriator seeks to transfer a point of diversion to a location farther from the original place of use, or vice versa. Often the increased distance between the point of diversion and place of use will increase conveyance or carriage losses of the water because of increased exposure to canal seepage and evaporation. If the diversion rate were to be increased to compensate for the increased loss, an enlargement of the water right would occur. In Idaho, the burden of increased conveyance loss must be borne by the one seeking the transfer and not by other appropriators.[455] This is consistent with the principle that a water right is measured for its sufficiency at the point of diversion and not at the place of use.[456]

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[454] The accomplished transfer statute was held constitutional in *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J), owing to the act's built-in protections against injury and enlargement. See discussion of this statute and the related enlargement statute in section 37.I(9) beginning on page 713. Nine years later, the Court confirmed that *Fremont-Madison* did indeed create a *per se* injury rule requiring that expansions of acres irrigated seeking protection under the amnesty statute are subject to a mitigation condition subordinating the expanded portion of the right to all rights existing on April 12, 1994 (the enactment date of the amnesty statute, Idaho Code § 42-1426). *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005) (Schroeder, C.J.). This was confirmed again in *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) and *3G AG LLC v. IDWR*, 170 Idaho 251, 509 P.3d 1180 (2022) (Stegner, J.).

[455] *Glen Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 494 P.2d 1029 (1972).

[456] *Stickney v. Hanrahan*, 7 Idaho 424, 63 P. 189 (1900); *State v. Twin Falls Canal Co.*, 21 Idaho 410, 121 P. 1039 (1911); *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912). *See also, State v. Dickcon*, In Re: SRBA Case No. 39756, Memorandum Decision re: Petition for Preliminary Injunction, Docket No 91-07-009 (5th Dist. 1991) (recognizing that conveyance losses incurred by changing place of use are to be borne by transferor and do not justify increase in rate of diversion of the original right). *See generally Fremont-Madison Irr. Dist. & Mitigation*

(3) Stacked water rights (primary and supplemental rights) (the *3G* case)

A primary water right is the principal (or only) water right supporting a particular use. In some instances, water users may obtain an additional "supplemental" water right to serve as a back-up supply, in the event that the primary right is unavailable. A combination of primary and secondary rights serving the same purpose and place of use are referred to as "stacked rights." If those rights are separated and transferred or conveyed to separate uses, that is referred to as "unstacking" of rights.

In a typical situation, a water user may hold a surface right as the principal means of irrigation, but will also obtain a supplemental ground water right that she uses only when the surface right is not available. The supplemental ground water right is granted subject to the condition that it may be used only when the primary water right is not available.

The distinction between a primary and supplement right often receives the most attention when the holder seeks to transfer one of the rights. The rule of thumb is that a supplemental right cannot be converted to a primary right (because doing so would constitute a *per se* enlargement). This issue is addressed in James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024).

In *Barron v. IDWR*, 135 Idaho 414, 418, 18 P.3d 219, 223 (2001) (Walters, J.), the Idaho Supreme Court upheld the Department's denial of a transfer application that sought to transfer a portion of a primary surface right to a new location, leaving the supplemental ground water right in place at the original location. The applicant argued that doing so would not cause injury or enlargement, because the Department could and should curtail the ground water right. But the Court said that it was the applicant's responsibility, not the Department's, to avoid injury and enlargement. In addition to unstacking, *Barron* involved the applicant's failure to provide evidence of his historical use.

At least in theory, a supplemental water right may be separated from its primary water right and transferred to a new primary use. However, to prevent an enlargement—an increase in its diversion, volume, or consumptive use under the right as it was used as originally appropriated—the post-transfer elements must be no greater than the pre-transfer elements.

The Department's guidance on supplemental rights provides:

Grp. v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J) and Idaho Code § 42-1426 (making clear that such enlargements, even if they result from "conservation practices," are not authorized under a water right and must be approved, if at all, under the amnesty provided by this statute).

> 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 that may be greater than five years, will be the basis for the volume available for transfer. . . .

IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24), § 5d(5), p. 30 (Dec. 21, 2009) (superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)).

For example, if a supplemental well had been used an average of fifteen days per year at a flow rate of one cfs, then its transferable amount should be about 30 acre-feet per year (1 cfs x 1.98 AF/day x 15 = 29.7 AF), not the 723 acre-feet that such a well would produce if pumped year-round (1 cfs x 1.98 AF/day x 365 = 722.7 AF). As a result of the transfer, of course, the original primary right loses the supplemental back-up. Often, attempting to transfer supplemental uses is not practical because of these complications. Typically, the supplemental water right will continue to be tied to the primary water right in a transfer.

In *3G AG LLC v. IDWR*, 170 Idaho 251, 509 P.3d 1180 (2022) (Stegner, J.), the Court affirmed IDWR's rejection of a transfer that sought to unstack irrigation water rights. In *3G*, an irrigator used both a licensed ground water right and a surface water entitlement (shares in Aberdeen-Springfield Canal Company) to irrigate a 53.9 acres of land. The irrigator stopped using the ground water right and sought to transfer it to other land, thus doubling the number of irrigated acres. The district court and then the Idaho Supreme Court affirmed IDWR's rejection of the transfer. Both courts agreed with IDWR that the unstacking was an unlawful enlargement under Idaho Code § 42-222(1) because it would have allowed twice as much land to be irrigated as before, thereby increasing consumptive use and constituting *per se* injury.

The significance of the *3G* case is that it confirmed or clarified that ground and surface rights that serve the same land for the same purpose are deemed stacked even if the water rights themselves contain no express language linking them together. In other words, the stacked rights concept is inherent to the enlargement/injury analysis and is compelled by the statutory directive in Idaho Code § 42-222(1) that IDWR "shall examine all the evidence and available information." The stacked water analysis is not dependent on the presence of condition language on the face of the water rights (e.g., a combined use condition or a condition requiring that the supplemental right be used on when the primary right is unavailable.) In the *3G* case, there was no such language in the ground water right, notwithstanding the fact the IDWR became aware of the canal company shares at the time of licensing. Indeed, the record apparently did not reveal which came first—the permit or the shares. The Court said, in essence, "who cares?" It found it unnecessary to decide which right was primary and which was supplemental. Either way, the transfer would have allowed more acres to be irrigate than before, which

constituted both enlargement and *per se* injury. *3G*, 170 Idaho at 264-65, 509 P.3d at 1193-94.

The *3G* case plowed no new ground. It is a "no brainer" analysis of enlargement in a traditional irrigation context. It affirmed longstanding IDWR guidance (the *Transfer Memo*) based on settled law (*Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J) and *Barron v. IDWR*, 135 Idaho 414, 18 P.3d 219 (2001) (Walters, J.)). It addresses enlargement in the context of a change in use bringing more land under irrigation. The proposed increase in beneficial use would have increased consumptive use and constituted *per se* injury thereby burdening the public water supply and making less water available to other users.

The *3G* Court summed up enlargement as follows:

> Thus, there are two types of enlargement: (1) "an increase in the number of acres irrigated"; and (2) "an increase in the rate of diversion or duration of diversion."

3G, 170 Idaho at 264-65, 509 P.3d at 1193-94 (quoting *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996) (Schroeder, J)).

The Court also confirmed that when it speaks about increases in beneficial use, it means increases in irrigated acreage.

> The two "enlargement" issues in *Barron* were whether: (1) the transfer would cause an increase in the rate or duration of diversion at the two proposed points of diversion; and (2) whether unstacking the overlapping surface and ground water rights would cause an increase in the total number of acres irrigated, i.e., an increase in overall beneficial use. Id. at 419-420, 18 P.3d at 224-25.

3G, 170 Idaho at 517, 509 P.3d at 1188.

In other words, an increase in beneficial use standing alone is not a problem. It is the increase in consumptive use resulting from increasing the number of acres irrigated or the quantity of diversion that gives rise to enlargement. Thus, nothing in the *3G* case is at odds with the teaching of the *Facility Volume Case*: An increase in beneficial use that does not burden the public water supply by increasing diversion quantity or consumptive use is not enlargement. That kind of increase in beneficial use is a good thing.

(4) Enlargement in a non-irrigation context

Except for the *Facility Volume Case* discussed below, all reported decisions on the subject of enlargement have arisen in the irrigation context (water spreading,[457] stacked water rights,[458] or changes in consumptive use[459]). In the irrigation context, enlargements are all about *per se* injury—that is, injury arising from increases in the amount of water diverted or consumed, thereby reducing the water available to other water right holders. As noted above, the accomplished transfer statute was specifically aimed at water spreading. Accordingly, the language in that statute and in the *Fremont-Madison* case refer to increases in irrigated acreage as "enlargements" and "increases in beneficial use."[460] Likewise, the transfer statute (which says IDWR may consider consumptive use in evaluating enlargements) and the accomplished transfer statute (which is aimed at preventing *per se* injury via water spreading) reinforce the idea that the prohibition of enlargement is directed to increases in beneficial use that have the potential to harm others.

In a non-irrigation context (as in any other context), enlargement should also be thought of as *per se* injury resulting from actions that increase the burden on other water users. However, language arising in the irrigation context equating "enlargement" and

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[457] E.g., *Fremont-Madison Irr. Dist.& Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J). This case is also known as "Basin-Wide Issue 4" in the SRBA.

[458] E.g., *Barron v. IDWR*, 135 Idaho 414, 18 P.3d 219 (2001) (Walters, J.); *3G AG LLC v. IDWR*, 170 Idaho 251, 509 P.3d 1180 (2022) (Stegner, J.).

[459] Typically, consumptive use comes into play when the user seeks to change the nature of use or period of use or to unstack water rights. For example, in addition to unstacking, *Barron* involved the applicant's failure to provide evidence of historical use. The statutory definition of consumptive use was amended in 2004 to provide: "Consumptive use is not an element of a water right. . . . Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code." H.B. 636, 2004 Idaho Sess. Laws, ch. 258 (codified at Idaho Code § 42-202B(1)). Thus, a change in consumptive use alone (that does not violate the terms of the water right) is permissible and no transfer is required. But increases in consumptive use may come into play if a transfer is required for other reasons. "The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right." Idaho Code § 42-222(1) (added in 1997). IDWR's *Transfer Memo* addresses changes in historic consumptive use in a variety of contexts, see, e.g., *Transfer Memo* § 2, p. 4, § 5d(5), pp. 29-30.

[460] *Fremont-Madison*, 129 Idaho at 458, 926 P.2d at 1305 ("The term 'enlargement' has been used to refer to any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means. *See* I.C. § 42-1426(1). An enlargement may include such events as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion.").

"increase in beneficial use" led IDWR to re-conceive enlargement as arising any time there is an increase in beneficial use—even if no other water user is impacted.

IDWR's strict view of enlargement was rejected in the *Facility Volume Case* discussed below. Yet IDWR's transfer guidance continues to state that any transfer involving a change in the nature or place that also results in a net increase in beneficial use constitutes an enlargement. It is difficult to reconcile IDWR's guidance on this point with the *Facility Volume Case* and the Maximum Use Doctrine. This is explored further below.

(a) The *Facility Volume Case*

The only reported case to address enlargement in a non-irrigation context is the SRBA court's decision in *In re SRBA Case No. 39576, Subcase Nos. 36-02708 et al, Order On Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* ("*Facility Volume Case*"), Idaho Dist. Ct., Fifth Judicial Dist. (Dec. 29, 1999) (Barry Wood, J.).[461] This case is discussed further in section 4.B(9) at page 41.

The *Facility Volume Case* did not arise in the context of a transfer. It arose as part of the SRBA's adjudication of existing water rights held by various fish farmers.[462] IDWR sought to include a "facility volume remark"[463] on each water right describing the extent of the existing hatchery facilities. The effect of the facility volume remark was to prevent the fish farmer from adding additional raceways in the future.

In this unappealed ruling affirming all three special masters, the SRBA court rejected IDWR's inclusion of a facility volume remark. The court held that a trout farm may increase the beneficial use made of its water right by adding more raceways to a fish hatchery, so long as it does not increase the diversion rate, annual volume, or consumptive use. The court held that IDWR view of enlargement was overly strict and would needlessly punish the water right holder for increasing beneficial use in a way that

[461] The *Facility Volume Case* has been cited by the Idaho Supreme Court, but not with respect to the enlargement issue. *North Snake Ground Water Dist. v. Gisler*, 40 P.3d 105, 108-08 (Idaho 2002) (Kidwell, J.).

[462] The *Facility Volume Case* involved challenges to IDWR's recommendations brought by Clear Lakes Trout Company, Clear Springs Foods Inc., Blue Lakes Trout Farm Inc, and John W. Jones, Jr. When each of three special masters ruled in favor of the trout farmers, irrigation water right holders brought this consolidated appeal to the SRBA judge.

[463] Idaho Code § 42-1411(2)(j) authorizes the Director to include in the Director's Report setting out recommended water rights in a general adjudication "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." If approved by the adjudication court, these remarks will be included in the partial decree and become part of the water right.

harmed no one. This, said the court, was contrary to Idaho's constitutional doctrine of maximum utilization. The court noted that the only reason any other water user might care about such an increase in beneficial use was if the other water user was injuring the fish farmer and wished to provide financial compensation (rather than wet water) to mitigate that injury. The court said the goal of the prior appropriation doctrine is to encourage maximum utilization, not to minimize the cost of mitigation in response to a delivery call.

> It is also extremely curious to the Court that it is IDWR's position that if additional ponds were added to a facility for the purpose of pollution control, this would not be considered an increase in facility volume, but if the additional ponds or raceways were to actually grow fish in, it would be an increase in facility volume. To this Court, this is at least a tacit admission by IDWR that its proposed facility volume remark has nothing to do with the quantity element, but is intended to directly deal with regulating production so that in the event of a future delivery call, and mitigation is sought, junior water users may be required to pay less. This position is contrary to at least two fundamental principles of water law: the prior appropriation doctrine and the goal of obtaining the maximum beneficial use of water. Additionally, this illustrates that trying to regulate fish propagators with facility volume is analogous to IDWR trying to regulate an irrigator to the type or quantity of a crop that can be grown, i.e., regulation of production, not quantity of water.

Facility Volume Case at 9.

The court concluded that an increase in beneficial use that does not burden other water users is not an enlargement.

> The court cannot limit "the extent of beneficial use of the water right" in the sense of limiting how much (of a crop) can be produced from the use of that right, so long as there is not an enlargement of use of the water right. . . . In other words, because the use is a non-consumptive, continuous flow use, the highest and greatest duty of the water would seem to encourage the grower to use his or her best efforts to maximize the crop obtained from using the water. And if this means the grower under these circumstances can economically produce 200 pounds of fish versus 100, there is

> no legitimate policy in water law for not allowing this to occur.

Facility Volume Case at 17.

Accordingly, the SRBA court determined that it was not proper to describe and thereby limit the size of the trout-rearing facility. *Facility Volume Case* at 18. Water users are allowed and encouraged to increase the extent of beneficial use, so long as the water available to others is not reduced.

(b) IDWR's *Transfer Memo*

Ten years after the *Facility Volume Case*, IDWR adopted its revised version of *Administrator's Memorandum, Transfer Processing No. 24* (Dec. 21, 2009) ("*Transfer Memo*") (superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)). This guidance addresses a range of subjects including enlargements.

The *Transfer Memo* first addresses the subject in the context of when a transfer is not required.

> 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.

Transfer Memo, § 2, p. 7 (emphasis original).

This is a direct and straightforward implementation of the court's ruling in the *Facility Volume Case*. In other words, if the only thing that changes is the amount of beneficial use (aka intensity of use), the increase is permissible and no transfer is required.

The harder question is when a transfer is required for some other reason. First, the *Transfer Memo* states that, in a transfer application, the extent of beneficial use is not an enlargement consideration for nonconsumptive water rights.

> 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.

Transfer Memo, § 5d, p. 28. This conclusion flows directly from the *Facility Volume Case*. If the use is nonconsumptive, any increase in beneficial use will not harm other water users. Thus, there can be no *per se* injury, and enlargement should not come into play.

In the next breath, however, the *Transfer Memo* reaches the opposite conclusion if a non-consumptive use is added to an existing consumptive 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.

Transfer Memo, § 5d(2), p. 28 (emphasis added).

IDWR does not explain why adding a new hydropower use to an irrigation right is an enlargement, while adding additional hydropower capacity to a facility served by an existing hydropower right is not enlargement.[464]

In addition, the quoted provision from section 5d(2) could be read to say that an existing nonconsumptive use (e.g., hydropower) cannot increase its beneficial use (e.g., add new generating capacity) if the transfer also entails a change in place of use. That conclusion, however, cannot be reconciled with earlier quoted portion of section 5d saying that increased beneficial use is not a consideration for nonconsumptive water rights. Accordingly, it may be appropriate to understand the section 5d(2) guidance as limited to the situation where a user seeks to add an entirely new beneficial use to an

[464] Elsewhere, the *Transfer Memo* states that increasing the generating capacity of hydroelectric generators is not an enlargement and does not even require a transfer. *Transfer Memo*, § 2, p. 7 ("Intensified Use of Water").

existing water right (as in the example of adding a hydropower right to an irrigation right).

Even that conclusion (that adding hydropower to an irrigation right is enlargement) is at odds with the teaching of the *Facility Volume Case*, which held that the purpose of the prior appropriation doctrine and the maximum utilization doctrine is to encourage the full use of water where doing so does not injure others.

J. Change in period of use

Change in period of use (aka season of use[465]) is permissible, but it can raise injury and enlargement issues. For instance, if a surface water user wished to expand her period of use from six months to seven, that would plainly constitute an impermissible enlargement (absent an annual volume limit or other restrictive condition). Suppose, on the other hand, she simply sought to shift her entire period of use (both the beginning and ending dates) forward by a few weeks, the result of which was no increase in the quantity diverted or consumed. Thus, there arguably would be no enlargement. Such a shift might nevertheless constitute injury if other surface users on the stream had rights to divert during those last weeks of the season, and were now subjected to a new senior priority during this critical period.

Take another example. Suppose an entity acquired a surface irrigation right and sought to change it to a year round municipal or industrial use on the same stream—thus spreading out the impact of the use over twelve months. Out the outset, it is clear that this could only be done subject to an annual volume limitation, to avoid enlargement of the right. Assuming such a volume limit, the result would be less stress on the river during peak irrigation season, but more stress on the river during the winter. If there were other junior right holders with entitlements during the winter, they could object to any new senior demand during those months that would impair their ability to divert. In such a case, the transfer could be approved only if they were protected, for instance by subordinating the changed right to the junior winter users.[466]

Suppose, however, there were no junior winter users on the stream. Under this unusual fact setting, it is conceivable that an irrigation right might be converted to a year-round right. Then again, this is really no different than requiring the person to obtain a new appropriation. If there are no other users on the stream, priority is irrelevant.

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[465] We use the terms period of use and season of use interchangeably, although it is possible that a particular period of use might correspond to something other than a season.

[466] A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 284 (1990).

One way of accomplishing a change in period of use while avoiding injury to other users is through the use of storage. If water can be lawfully stored when it is "in priority" then it may be diverted out of storage at any time without injury to others. Thus, in theory, one could divert a surface irrigation right during the historical irrigation season, place it in storage, and divert it out of storage irrespective of period of use—without injury to any other user. Storage might come in the form of an on-stream reservoir, an off-stream reservoir, or, notably, an aquifer (a natural storage reservoir). In such cases, a ground water right might be converted to a year round use without any impact on other users within the same aquifer.

The SRBA Court held that expansion of the season of use of a ground water right by an industrial user does not constitute an enlargement, and is permissible so long as no injury occurs to other users.[467] In this case, Magic West, Inc. held two water rights for a potato processing plant in Glenns Ferry. Although the rights were licensed for 7 and 10.5 months per year, respectively, Magic West actually used the rights year round. The company claimed in the SRBA that it was entitled to an "accomplished transfer" for the year-round use under Idaho Code § 42-1425. The accomplished transfer statute allows recognition of such transfers, so long as there was no enlargement of the right or injury to others.

The *Magic West* court concluded that the change did not constitute an improper enlargement, so long as there was no increase in the volume of water diverted annually.[468] The court was careful to note, however, that this case involved a ground water use, and, consequently, that it made no difference to other users during what part of year the water was diverted. Indeed, the court noted that in other hydrological situations, a change in season of use might well injure other users. The thrust of the decision seems to be that, so long as the volume is not increased and no injury results, an expansion in season of use does not constitute enlargement.

The decision leaves open whether a surface water right may be changed to a different season of use. However, as noted above, it would seem that if there is any other junior user on the stream during the time period into which a new user sought to expand her season of use, that user would be in a position to assert injury.

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[467] *In re SRBA Case No. 39576, Subcases 61-02248B and 61-07189* (Order Modifying Memorandum Decision and Order on Challenge; I.R.C.P. 11(a)(2)(B); & Order of Partial Decree) (Idaho Dist. Court for Fifth Judicial Dist. – SRBA, Jan. 4, 2002) (the *Magic West* case). The opinion (which reversed a prior decision by the same judge) was authored by Roger S. Burdick, who now sits on the Idaho Supreme Court.

[468] The SRBA court initially held that the expansion of season of use constituted a *per se* enlargement. The court then reconsidered its decision and reached the opposite conclusion.

K. Changes in rate of diversion

In Idaho, water rights typically are quantified in terms of rate of diversion (the maximum instantaneous flow rate) and often also an annual volume. (There are exceptions. See discussion in section 4.B(5)34.) When a water right is split in two, the associated quantities ordinarily are allocated to each of the new rights, maintaining the same proportion as in the original right.

For instance, suppose a farmer held a water right to irrigate 100 acres. If the diversion rate was originally calculated based on an "inch per acre," the total diversion rate would be listed as 2 cfs. Let us further suppose that the right was based on a duty of water equal to three and a half acre-feet per acre. Its volume cap would then be 350 acre-feet per annum. Suppose the farmer decided to sell to a dairy the water right appurtenant to half of his acreage. Assuming that the new dairy use was 100 percent consumptive use, the farmer would be entitled to transfer only the former "consumptive use" associated with the fifty acres he has agreed to dry up. That consumptive use will be calculated by the Department based on historic cropping patterns. Assuming that his consumptive use is calculated to be 2.75 acre-feet per acre the dried-up 50 acres will produce an annual volume of water available to the dairy equal to 50 x 2.75 = 137.5 acre-feet per annum.

Ordinarily, the diversion rate would be split as well. Because fifty percent of the land was taken out of production, the new dairy right would be allocated 1 cfs, and the water right retained for the other fifty acres would be allocated the other 1 cfs.

Suppose, however, that the two parties agree to allocate the rate of diversion more heavily in favor of the dairy. Is there any reason they could not, for instance, allocate 1.2 cfs to the dairy and 0.8 cfs to the retained 50 acres of irrigation? The answer presumably would be no, so long as the original beneficial use on the retained 50 acres can still be achieved at that lower maximum pumping rate.

On the other hand, the parties would not be free to allocate 1.2 cfs to the remaining fifty acres of irrigation, unless they were able to justify exceeding the statutory "inch-per-acre" rule of thumb.[469]

A word of caution: Transfers of this nature are new to the Department, so there is little or no precedent for this sort of reallocation. However, the principles of water law seem to clearly dictate the result. There can be no injury or enlargement. Consequently, the "before" and "after" diversion rates must be equal. However, so long as the total remains unchanged, and each beneficial use remains viable, the parties should be free to reallocate the diversion rate so as to maximize the beneficial use.

[469] Idaho Code §42-202(6).

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L. Administrative procedures for water transfers

(1) The application process

The procedures for obtaining a transfer are contained in Idaho's water code, the APA, and the Department's rules. Note in particular the Department's guidance document, James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024).[470]

The transfer process is initiated by filing an application form with the Department describing the existing right and the way it will be exercised after the transfer.[471]

If the transfer involves water that is represented by shares in a corporation or irrigation district, then consent to the transfer is required from the corporation or district.[472] Applications for change in period of use or nature of use for a quantity exceeding 5,000 acre-feet of stored water or fifty cfs of any water requires the approval of the Legislature.[473]

The procedures for publication, protests, pre-hearing conference, hearing, decision and review thereof are the same as for applications for appropriation. These are discussed in section 14.B at page 198.

(2) The burden of proof in water right transfers

Idaho's water code does not address the burden of proof in either transfers or new appropriations. The Department has adopted regulations allocating the burden of proof in new appropriations,[474] but there are no regulations governing water transfers. Nor does IDWR's guidance (James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)) address the subject.

In *Barron v. IDWR*, the Idaho Supreme Court placed the burden of proof on the applicant for a water transfer to prove non-injury and non-enlargement.[475] The court

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[470] The guidance memorandum applies on its face only to transfers of ground water in the Eastern Snake River Plain. However, the Department's practice appears to be to follow this guidance for all water right transfers.

[471] Idaho Code § 42-222(1).

[472] Idaho Code § 42-108. This restriction is discussed further in section 31.D beginning on page 630.

[473] Idaho Code § 42-108.

[474] IDAPA 37.03.08.040.04.

[475] *Barron v. IDWR*, 135 Idaho 414, 418, 18 P.3d 219, 223 (2001).

noted that this is the case even where there are no protestants to the application.[476] This is consistent with informal guidance issued by the Department on protested transfer applications.[477] This is also consistent with the general law of burden of proof in civil litigation.[478]

Even where the burden of proof rests with the applicant, however, it does not follow that protestants should be allowed to "put the applicant to its proof" for purposes of strategic delay or expense.[479]

The court has twice addressed the burden of proof issue in the context of a public interest challenge to a new water right appropriation.[480] In the case of the local public

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[476] *Barron v. IDWR*, 135 Idaho 414, 421, 18 P.3d 219, 226 (2001).

[477] IDWR's "Conference and Hearing Procedures."

[478] A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 253 (1990) (the author is now a Magistrate Judge in the Third Judicial District).

[479] In the authors' opinion, the Department should use the prehearing conference, and discovery if necessary, to determine whether the applicant is prepared to present a *prima facie* case and, if so, whether the protestant has any meaningful and relevant rebuttal. If the applicant is prepared to go forward, but the protestant has not shown that it will be capable of presenting a relevant rebuttal case, then, on the applicant's motion, the protest should be dismissed prior to hearing. In such a case, the applicant should not be subjected to the costs of "fishing-expedition-type" discovery nor the costs of retaining experts and presenting a formal case on the public interest.

If the protestant is allowed to proceed, the Department should specify with reasonable clarity the bounds of allowable issues and evidence, so that both protestant and applicant may effectively and efficiently prepare for hearing.

If the Department summarily denies a protest or excludes an issue area, the protestant should be allowed to make a brief record of the nature of the evidence which would have been sought or produced. But neither the protestant nor the applicant should be put to the expense of fully developing evidence on that issue unless and until a reviewing court overrules the Department and remands for further proceedings.

[480] In *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985), the Court quoted District Judge Schroeder, who now sits on the Idaho Supreme Court in this extended, but lucid, discussion of the burdens of production and persuasion:

> As Judge Schroeder correctly noted below, this burden of production lies with the party that has knowledge peculiar to himself. For example, the designer of a fish facility has particularized knowledge of the safeguards or their lack concerning the numbers of fish that may escape and the amount of fecal material that will be discharged into the river. As to such information the applicant should have the burden of going forward

interest, a special rule applies: The applicant bears the initial burden of coming forward with evidence for the evaluation of the local public interest criterion as to any factor of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant bears the initial burden of coming forward with evidence relevant to any factor for which the protestant can reasonably be expected to be more cognizant than the applicant. The applicant then bears the ultimate burden of persuasion.

(3) Conditions on transfers

Numerous conditions can be placed on an approved transfer to prevent injury or to protect the public interest. Some common transfer conditions include:

1. Limit the amount transferred to the consumptive use;
2. Require measuring devices to document diversions and/or return flows;
3. Require water releases at specified times to guarantee water availability at a junior's point of diversion;
4. Require basin-of-origin protection such as construction of additional storage for out-of-basin transfers;
5. Retain administrative jurisdiction for a reasonable period to evaluate and fine-tune the transfer; and

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> and ultimately the burden of proof on the impact on the local public interest. On the other hand, a protestant who claims a harm peculiar to himself should have the burden of going forward to establish that harm.
>
> However, the burden of proof [that is, the ultimate burden of persuasion] in all cases as to where the public interest lies, as Judge Schroeder also correctly noted, rests with the applicant:
>
> > [I]t is not [the] protestant's burden of proof to establish that the project is not in the local public interest. The burden of proof is upon the applicant to show that the project is either in the local public interest or that there are factors that overweigh the local public interest in favor of the project.

Shokal, 109 Idaho at 339, 707 P.2d at 450 (referring to District Judge Schroeder, now on the Supreme Court) (quoted again in *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 607, 759 P.2d 891, 898 (1988).

The only other Idaho case to address burden of proof in the context of the local public interest was *Collins Bros.* That case merely recited that "the applicants had not met their burden of proof" and quoted from the Shokal case regarding burden of proof." *Collins Bros.*, 114 Idaho at 606, 759 P.2d at 897.

Note that different burden of proof rules apply to the special public interest tests applicable to appropriations of "trust water" pursuant to the *Swan Falls Agreement*. Idaho Code § 42-203C; IDAPA 37.03.08.040.04.

6. Restrict the rate of diversion or period use to avoid expansion of the right and/or to guarantee the timing of return flows.

M. Amendments to permits and pending applications

(1) Amendment of issued permits prior to or at time of licensing

The discussion in this section deals primarily with changes in final water rights (that is, licensed rights, decreed rights or beneficial use claims). Similar principles govern the amendment of a permit (where the permit has been issued, but the right has not yet been licensed).

Permit amendments are governed by a separate statute that sets out a more limited set of criteria. It authorizes amendment of an issued permit, subject to two criteria:

> [I]t shall be the duty of the department of water resources to examine the same [an application for amendment of a permit] and if approval thereof would not result in the diversion and use of more water than originally permitted and if the rights of others will not be adversely affected thereby, the director of the department of water resources shall approve said application and return an approved copy to the permit holder.

Idaho Code § 42-211 (emphasis added). (Idaho Code § 42-211 also provides for changes to applications for permits, where no permit has yet been issued).

These two criteria are the familiar "enlargement" and "injury" criteria applicable to a transfer of a licensed right. One might ask why the other criteria do not apply as well. The Idaho Supreme Court pondered this question in *Hardy v. Higginson*,[481] concluding that the local public interest test should also apply. Accordingly, the Department now applies the local public interest test to permit amendment applications in addition to the injury and enlargement tests set out above.

On the other hand, the Department does not apply the other tests for water right transfers set out in Idaho Code § 42-222 (e.g., no adverse effect on the local economy of the watershed for trans-basin transfers). Nor does the Department apply the criteria set out in Idaho Code § 42-203A(5) applicable to an application for permit (e.g., financial qualifications).

[481] *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993).

Publication of notice of the application for amendment of a permit is discretionary. "The director of the department of water resources shall give such notice to other affected water users as he deems appropriate . . . ."[482]

(2) Amendment of pending permit applications

Suppose an applicant files an application for a permit, but then seeks to change the terms of the application before the permit is issued. Idaho Code § 42-211 (paragraph 2) provides that changes to applications for permits (where no permit has yet been issued) may be handled informally simply by modifying the application form.[483]

Rules governing amendments of pending permit applications are set out at IDAPA 37.03.08.035.04. The Department has also issued informal guidance on this subject.[484]

Although amendments are freely allowed, republication may be required if there is any enlargement. Likewise, if more water is sought, the priority date is advanced to the date of the amendment.

Filing fees associated with such amendments are set out in Idaho Code § 42-221(A) (if the quantity is increased) and Idaho Code § 42-221(F) (for all amendments).[485]

(3) Amendment of pending transfer applications

Suppose an applicant for a transfer seeks to modify the terms of the transfer application after it has been filed, but before it has been approved. No statute or rule addresses this circumstance. However, the Department recently issued the following guidance:

> 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

[482] Idaho Code § 42-211 (paragraph 1).

[483] Idaho Code § 42-211 (paragraph 2). The first paragraph of section 42-211 deals with changes made after a permit has been issued (but before licensing). The second paragraph of section 42-211 deals with changes to an application for permit before the permit is issued.

[484] Norman C. Young, IDWR Guidance, *Amended Application Processing No. 9* (Jan. 12, 2000).

[485] IDAPA 37.03.08.035.e.

> 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 notarized letter describing the amendments in sufficient detail. 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" 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.)[486]

(4) Assignment of pending applications to new owner

Department guidance expressly provides that transfer applications are freely assignable.[487] The only requirement is notice to the Department.

Applications for permit are also assignable. However, the Department's rules provide: "An assignment of interest in an application must include evidence satisfactory to the director that the application was not filed for speculative purposes." IDAPA 37.03.08.035.02.d

There is a reason for this difference in the treatment of permit and transfer applications. In the case of an application for a permit, the priority date of the water right is tied to the application date. In contrast, the priority date of a water right involved in a transfer is not affected by the date of the transfer application. Consequently, whether a modification is treated as an amendment or a new application matters more in the case of a permit. Moreover, the Department is obligated by statute to consider the speculative

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[486] IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) (Dec. 21, 2009) (superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)).

[487] IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) (Dec. 21, 2009) (superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)).

purpose and financial feasibility of the proposed use in the case of a new permit, while this is not a factor in transfer applications. Thus, if the Department determined that the initial applicant for a permit was a speculator, the Department would not allow the purchaser of the permit application to step into the shoes of the speculator and retain the original priority date.

N. Exchanges of surface water

An exchange is essentially a swap of one water right (or portion thereof) for another (or portion thereof). For example, one water right holder might agree to allow a second water user to divert water under the first user's water right in exchange for a substitute supply provided by the second user. Exchanges have been used informally for decades.

A good introduction to exchanges is found in Michael White's article:

> When exchanges first came on the scene, well before the turn of the [last] century, they were relatively simple. To divert or store water "by exchange," an upstream junior water right owner simply kept downstream seniors whole by insuring that they received a specifically designated substitute supply of water sufficient to satisfy their senior water rights. Typically, . . . the upstream junior controlled downstream reservoir releases which it could not use itself but which could be used as a substitute supply for the seniors' benefit. For the better part of this century, such exchanges were routine in several states — usually carried on under the administrative supervision of state water officials.
>
> More recently, however, the practice of exchange has taken on new dimensions. Instead of simply using storage releases to satisfy senior direct flow rights, exchanges now appear in every conceivable combination of direct flow and storage. Instead of operating primarily upstream-to-downstream, exchanges now also operate downstream-to-upstream and "around the horn" (from one tributary of a river to another of its tributaries). In addition, exchanges are now made not only between groundwater and surface water users but also between groundwater users themselves. With the proliferation of exchanges, water right administration is becoming increasingly demanding if not overwhelming.

Michael D. White, *Water Quality Exchanges*, 39 Rocky Mtn. Min. L. Inst. § 18.03 (1993).

Although changing water rights to accommodate new needs is recognized in all the western states, alternate devices exist in some states. Instead of being changed, the old water right is used to generate a substitute supply for downstream seniors, thereby satisfying the senior calls and, as a result, allowing junior or out-of-priority diversions for the new need. Most frequently these devices are called "exchanges," although they and their variations are also known as substitute supply plans, replacement plans, augmentation plans, rotation plans, in lieu plans, make up plans, commingling, secondary use, physical solutions, mitigation plans, and repositioning plans. With the caveat that there are significant differences, all these devices will be referred to in this paper as "exchanges."

Of the western states, exchanges (or close relatives) appear to be accepted in some form by Arizona, California, Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. They do not appear to be available in Alaska, Hawaii, Kansas, North Dakota, Oklahoma, South Dakota, and Texas.

When they first came on the scene more than 100 years ago, exchanges were relatively simple. In order to divert or store water "by exchange," an upstream junior water right owner simply needed to make sure that downstream seniors were kept whole through the receipt of a specifically designated substitute supply of water sufficient to satisfy their senior water rights. Typically, reservoir releases which the junior could not use himself were designated as a substitute supply for the downstream seniors' benefit. Such exchanges have become routine in several states and are administered by state water officials. With increased competition for water, however, exchanges now appear in every conceivable combination of direct flow and storage. With the proliferation of exchanges, their administration is becoming increasingly demanding if not overwhelming.

Exchanges make sense under only certain conditions:

> A water exchange is usually appropriate when at least four or, perhaps, five conditions exist. Obviously, water must be physically available at the exchanger's headgate, reservoir, or well. The exchanger must control a substitute supply of water which can satisfy senior

> water rights by replacing the water to be diverted by exchange. Upon operation of the exchange, there may be no resulting injury from reduced flows to intervening senior water rights diverting within the exchange reach, i.e., the stream segment between the exchange's diversion and the point of introduction of the exchange's substitute supply. In some instances, where surface streams are involved, another requirement is imposed, necessitating a "live stream" between the exchanger's headgate and the introduction point of substitute supply. Based on the futile call doctrine, this requirement is designed to insure that the water diverted in the exchange would have actually reached the senior right. In addition, without a live stream, upstream diversions may establish a "hole" in the alluvial aquifer which will continue long after termination of exchange operations.

Michael D. White, *Water Transfers* (presented at CLE International's Western Water Law Conference in Denver, Colorado on March 5, 1998).

Amendments to the Idaho water code in 1998 codified and regularized the practice of informally exchanging surface water rights between users.[488] The 1998 amendments ensure that informal exchanges end, and that all further exchanges be subject to a level of departmental review functionally the same as for the ordinary transfers.[489] This includes opportunity for protests and requires local public interest review.

The exchange concept is statutorily limited to surface rights. However, natural flow rights may be exchanged for storage rights.

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[488] Idaho Code §§ 42-105, 42-240. The 1998 enactment replaced an older exchange statute (adopted in 1969) that was repealed in 1986, inadvertently leaving a gap until the 1998 enactment.

[489] Idaho Code § 42-105(3).

Two examples of exchanges of storage releases for natural flow water rights were approved by the Idaho Department of Water Resources in 1999 and 2004.[490] In these two nearly identical cases, diversions under Snake River water rights are foregone in exchange for a like amount of diversions on the Boise River. These exchanges involved an interesting twist, essentially amounting to a program of making temporary use of instream flow releases. It works like this. The federal government makes annual summertime storage releases from reservoirs above Boise to provide additional stream flow far downstream in the lower Snake River—all as part of a NOAA Fisheries program believed to aid endangered salmon and steelhead migration. Veolia Water Idaho Inc. (then United Water), the municipal water provider for households and businesses in the City of Boise and surrounding areas, maintains two water treatment plants and diversion facilities on the Boise River. It also owns irrigation water rights with licensed diversion points on the Snake River above the mouth of the Boise River. Under these approved exchanges, United Water diverts a portion of the federal government's flow augmentation releases from the Boise River while simultaneously replacing these withdrawals by foregoing an equivalent amount of diversions under its Snake River rights.

Exchanges such as these achieve the same result as a new appropriation made subject to a mitigation condition requiring an offsetting release of water from another water right. Whether one chooses to approach this as a new appropriation or as an exchange may depend on other considerations. Calling it an exchange has the benefit of emphasizing that there will be no increase in total diversions thereby avoiding injury—and thus minimizing protests. Calling it a new appropriation has the benefit of producing an asset (a new water right) that may be easier for lenders and others to understand. An appropriation may also allow more flexibility as to the source of the mitigation water.

O. Accomplished transfers

The discussion above relates to formal transfers pursuant to Idaho Code § 42-222. In launching the SRBA, the Legislature quickly came to recognize that many water right holders had moved points of diversion or otherwise changed elements of their water rights over the years without bothering to apply for a transfer under the Water Code. The Legislature granted a broad amnesty to such "accomplished transfers" in Idaho Code § 42-1425. In 2006, the accomplished transfer statute was amended to include the Northern Idaho Adjudication ("NIA").

This statute was held constitutional in *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 457-58, 926 P.2d 1301, 1304-05 (1996) (Schroeder, J), owing to the act's built-in protections against injury and

[490] *In the Matter of Application for Exchange of Water in the Name of United Water Idaho*, Preliminary Order, July 22, 1999 (this order since has become final); and *In the Matter of Exchange of Water by United Water Idaho Inc.*, Water Right No. 63-31871 (Preliminary Order issued May 11, 2004). Both of these orders now are final.

enlargement. See discussion of this statute and the related enlargement statute in section 37.I(9) beginning on page 713.

The statute allows a claimant in a general adjudication to base the claim on changes to the place of use, point of diversion, nature of use, or period of use that have occurred on the ground (notwithstanding the absence of a formal transfer) if the changes occurred before the commencement of the adjudication. Idaho Code § 42-1425(2). For the SRBA, that is November 19, 1987. For the NIA, the cutoff date is January 1, 2006. Idaho Code § 42-1425(2).

The critical caveat is that the change must not result in injury to other water rights or enlargement of the right. Idaho Code § 42-1425(2).

Per longstanding IDWR policy interpretation, the accomplished transfer provision does not apply to a claim based on a permit. In other words, the Department will base its recommendation on the elements as described in the permit. If a change has occurred since the permit was issued, the permit holder should file an application to amend the permit.

P. Modifications of existing conditions on water rights

In some instances, the holder of a water right may desire a modification of a condition imposed by the Department on the water right. Some conditions directly affect an "element" of a water right.[491] For instance, conditions might be imposed on a group of water rights limiting the total quantity which they may collectively divert. Any modification of a condition affecting an "element" of a water right must be accomplished through the formal procedures for a "change" in a water right discussed above in this section.

On the other hand, some conditions do not relate to the elements of a water right. For instance, the water right might be conditioned to require a particular procedure for monitoring and reporting of diversions. If the water right holder wished to substitute a new technology or less cumbersome procedure, what procedure should he or she follow?

Neither the water code nor the Department's regulations specifically address how the holder and the Department should process such a request.

In some instances, the conditions themselves may set out a procedure for their own modification. For instance, a condition on the water right might expressly provide that the Director is retaining jurisdiction to re-evaluate a particular requirement. Where that is the case, obviously, any procedures set out in the conditions will control.

[491] The "elements" of a water right are identified and discussed in section 4.B beginning on page 32.

In most circumstances, however, the water right will not spell out any mechanism for the modification of conditions. In these situations, the Department has relied on its general authority under the Idaho Administrative Procedure Act ("APA") to entertain and act on such a request.[492] The water right holder should initiate consideration of the matter by filing a request setting out the proposed modification and justification therefore.

As a practical matter, the Department will act informally (without initiating a contested case) where it is apparent that no other person would be adversely affected by the requested modification. Where there is any potential for such adverse effect on others, the Department will initiate a formal contested case proceeding, with notification to known interested parties and the public.

[492] For example: "An agency shall not revoke, suspend, modify, annul, withdraw or amend a license, or refuse to renew a license of a continuing nature when the licensee has made timely and sufficient application for renewal, unless the agency first gives notice and an opportunity for an appropriate contested case in accordance with the provisions of this chapter or other statute." Idaho Code § 67-5254.

16. STATUTORY CRITERIA FOR WATER RIGHT APPROPRIATIONS AND TRANSFERS

A. Summary of all statutory criteria

Three sets of statutory criteria are potentially applicable to water right permit and transfer applications:

- Criteria applicable to water permit applications (for new appropriations) are set out in Idaho Code § 42-203A(5).
- Criteria applicable to water transfer applications are set out in Idaho Code § 42-222(1).
- Both of these, as well as six other criteria (or called "factors") are applicable to out-of-state water transfers.

One would think that only the transfer criteria would be applicable, but that is not the case. The Idaho Water Export Act arguably applies. If it does (and we are assuming that it will if Idaho asserts jurisdiction), the export act makes the permit criteria applicable as well. Accordingly, we analyze all three sets of criteria.

They are summarized in the tables below. The permit and transfer criteria overlap to some extent, so they are presented in the first table. The six additional water export criteria are presented in the second table.

Permit criteria (Idaho Code § 42-203A(5)) *Paraphrasing:* The Director may reject, condition, or partially approve an application where the proposed use is such:	**Transfer criteria (Idaho Code § 42-222(1))** *Paraphrasing:* The Director shall approve in whole or in part or upon conditions, provided that:
(a) that it will reduce the quantity of water under existing water rights, or	[1] no other water rights are injured thereby, [2] the change does not constitute an enlargement in use of the original right,
(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 director 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 as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or	[3] the change is consistent with the conservation of water resources within the state of Idaho and [4] is in the local public interest as defined in section 42-202B, Idaho Code,
(g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates;	[5] the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and

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	[6] the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

In addition to satisfying the criteria above, all applications for out-of-state uses are subject to the Director's consideration of the following six factors:

Export criteria (Idaho Code § 42-401(3))
Paraphrasing: To approve an out-of-state application, the Director must find the use is consistent with section 42-203A(5) criteria for new appropriations. [Implicitly, the section 42-222(1) criteria for transfers would also be applicable to an out-of-state transfer.] In addition, the Director shall consider the following factors:
(a) The supply of water available to the state of Idaho;
(b) The current and reasonably anticipated water demands of the state of Idaho;
(c) Whether there are current or reasonably anticipated water shortages within the state of Idaho;
(d) Whether the water that is the subject of the application could feasibly be used to alleviate current or reasonably anticipated water shortages within the state of Idaho;
(e) The supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
(f) The demands placed on the applicant's supply in the state where the applicant intends to use the water.

These are discussed in more detail in the sections below.

B. Tests applicable to both new appropriations and transfers

Beneficial use. An appropriation of water must be for a beneficial use.[493] In the case of a municipal provider who has an approved planning horizon and quantification of future needs, water rights sought to satisfy those needs automatically satisfy the beneficial use test.[494]

No injury. A water permit application may be rejected where "it will reduce the quantity of water under existing water rights."[495] Likewise, a transfer application

[493] Idaho Code §§ 42-104 (appropriations); 42-222(1) (transfers).

[494] Idaho Code §§ 42-222(1), 42-223(2).

[495] Idaho Code § 42-203A(5)(a); *see* IDAPA 37.03.08.040.05.a and IDAPA 37.03.08.045.01.a (appropriations).

may be rejected where "other water rights are injured thereby."[496] Although worded differently, the two tests mean the same thing. The "no injury" test is closely related to the "no enlargement" test discussed below.

Conservation. Appropriation and transfer applications may be rejected if the new use is "contrary to conservation of water resources within the state of Idaho."[497] (Adopted in 1990.[498])

Local public interest. Both new appropriations and transfers may be rejected where found to "conflict with the local public interest."[499] (Adopted in 1978.[500])

Basin-of-origin protection. As part of the 2003 amendment to the local public interest legislation, the Legislature grafted onto the water code new protections against out-of-basin water uses. When water is moved from one basin to another (in an appropriation, transfer, or other context), the Director must determine that

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[496] Idaho Code § 42-222(1).

[497] Idaho Code §§ 42-203A(5)(f) (appropriations), 42-222(1) (transfers). Note that the Department's water appropriation rule does not address this requirement. This provision was used in 2002 to deny two water right applications filed in connection with two proposed gas-fired power projects near Rathdrum, Idaho. *In the Matter of Application for Permit No. 95-09069 in the Name of North Idaho Power LLC*, Before the Idaho Dep't of Water Resources (Preliminary Order, July 18, 2002); *In the Matter of Application for Permit No. 95-09086 in the Name of Kootenai Generation LLC*, Before the Idaho Dep't of Water Resources (Preliminary Order, July 18, 2002). Both applications were denied because the proposed natural gas-fired power projects proposed to employ water-based cooling technologies where other technologies were available. The Department concluded that the inefficient use of water threatened the Rathdrum Prairie Aquifer. Note that this decision was based on the "conservation of water" test (Idaho Code §§ 42-203A(5)(f), 42-222(1)), not the local public interest test.

[498] 1990 Idaho Sess. Laws, ch. 141, §§ 4, 5. Note that the Department's water appropriation rule does not address this requirement.

[499] Idaho Code §§ 42-203A(5)(e) (appropriations); 42-222(1) (transfers); 42-202B (definition); *see* IDAPA 37.03.08.040.05.g (appropriations). The scope of the public interest evaluation in Idaho was narrowed by the Legislature in 2003 and is now limited to an evaluation of impacts on the water resource itself (as opposed to broader social impacts). 2003 Idaho Sess. Laws, ch. 298 (H.B. 284) (amending Idaho Code §§ 42-203A(5)(g), 42-222(1), 42-240(5), 42-1763) (limiting the scope of the local public interest to "interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.").

[500] 1978 Idaho Sess. Laws, ch. 306, § 1 (codified as amended at Idaho Code §§ 42-202B(3), 42-203A(5)(e)); 1979 Idaho Sess. Laws, ch.193, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-1763); 1981 Idaho Sess. Laws, ch. 147, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-222(1)); H.B. 284 (2003).

the move "will not adversely affect the local economy of the watershed or local area in which the source of water originates" (i.e., the basin of origin).[501] Note: This is one of two "basin-of-origin" provisions, the other being Idaho Code § 42-226, which is limited to large new ground water appropriations. See discussion in section 44.C(3) (Basin-of-origin protection (avoiding harm to local economy)) at page 824.

Out-of-state. Out-of-state water uses are required to follow special procedures to satisfy five additional tests aimed generally at evaluating the relative ability of water in the sending and receiving states.[502] (Adopted in 1990.[503]) Likewise, out-of-state water bank rentals are subject to the same five special tests.[504] (Adopted in 1992.[505]) See further discussion of export restrictions in section 44.C(2) at page 820.

C. Tests applicable to new appropriations only

Available water. A water permit application may be rejected where "the water supply itself is insufficient for the purpose for which it is sought to be appropriated."[506] (Adopted in 1935.[507])

Note that additional information requirements relative to the impact of the proposed use on other water rights are required of applicants seeking to appropriate more than 5 cfs, 500 acre-feet of storage, or 200 acres of irrigation.[508] Unlike the other tests described in this chapter, these requirements are imposed by administrative rule, not be statute. The rule provides, however, that the Director, in his discretion, may impose these information requirements on any applicant.

Speculation. A permit application also may be rejected "where it appears to the satisfaction of the director that such application is not made in good faith [or] is

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[501] 2003 Idaho Sess. Laws, ch. 298 (H.B. 284). It is codified in multiple places: Idaho Code §§ 42 203A(5)(g) (appropriations), 42-222(1) (transfers), 42-240(5) (exchanges), 42-1763 (water bank).

[502] Idaho Code §§ 42-401(3).

[503] 1990 Idaho Sess. Laws, ch. 141, § 3.

[504] Idaho Code §§ 42-1763.

[505] 1992 Idaho Sess. Laws, ch. 101 § 1.

[506] Idaho Code § 42-203A(5)(b); *see* IDAPA 37.03.08.040.05.d.

[507] 1935 Idaho Sess. Laws, ch. 145, § 2.

[508] IDAPA 03.08.040.05.c.

made for delay or speculative purposes."[509] (Adopted in 1935.[510]) Although the statute does not expressly so provide, presumably water rights acquired by a municipal provider to meet an approved future needs plan would be deemed not to be speculative.

Financial resources. An appropriation application may be denied where "the applicant has not sufficient financial resources with which to complete the work involved therein."[511] (Adopted in 1935.[512]) In *Shokal v. Dunn*, 109 Idaho 330, 335-36, 707 P.2d 441, 446-47 (1985) (Bistline, J.), the Idaho Supreme Court ruled that it is not necessary for the applicant to demonstrate that he or she can "then and there" obtain the necessary financing to complete the project. Rather, the applicant must show that it is "reasonably probable" that financing can be secured to complete the project within the time constraints of the permit.[513]

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[509] Idaho Code § 42-203A(5)(c); *see* IDAPA 37.03.08.040.05.e. This was the basis for rejecting a water right application for expansion of a CAFO in October, 2002. The Department determined that the application was speculative in light of the fact that the Applicant had been denied a "request for variance" from the county and would not be able to obtain one without a change in the county ordinance. *In the Matter of Application for Permit of Water Right No. 61-11954 in the Name of Rocky Mountain Land & Cattle Co.* (IDWR Preliminary Order, Oct. 21, 2002). The decision also cited "local public interest" concerns.

[510] 1935 Idaho Sess. Laws, ch. 145, § 2.

[511] Idaho Code § 42-203A(5)(d); *see* IDAPA 37.03.08.040.05.f.

[512] 1935 Idaho Sess. Laws, ch. 145, § 2.

[513] The court explained:

> The ultimate question under the financial resources requirement of I.C. § 42-203A is this: who should bear the risk of failure. . . . The 'then and there" standard, while admirably encouraging pecuniary caution, goes beyond a reasonable reading of the statutory requirement of "sufficient financial resources." I.C. § 42-203A(5)(d).
>
> The "reasonably probable" standard used by Water Resources shifts the risk of failure and shows that the state is more willing to take a risk by providing individuals with the opportunity to put water to beneficial use. It indicates a willingness on the part of the state to take a chance that a proposed water use with sound prospects of financing will become a successful venture, thereby benefiting both the water user and the state. We believe this to be a more reasonable standard for the financial resources requirement of I.C. § 42-203A. The water resources of this state are not so limited that they must be safeguarded with permits issued *only* when the applicant has secured all necessary financing prior to the

Over 25 cfs, 500 horsepower, or 10,000 acre-feet. An applicant seeking more than 25 cfs, the development of more than 500 theoretical horsepower, or the storage of over 10,000 acre-feet in active storage may be required by the Director to provide detailed financial information.[514] (Adopted in 1967.[515])

Instream flow. All new appropriations must respect all prior instream flow appropriations.[516] (Adopted in 1978.[517]) Note also that all instream flow

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> water permit application. At the same time, the applicant must make a showing that it is reasonably probable he or she will obtain necessary financing within five years [the date when proof is due under the permit]. The extent of the applicant's own investment is a strong factor to be considered.
>
> The financial resources requirement, added in 1935, was clearly intended to prevent the tying up of our water resources by persons unable to complete a project because of financial limitations. The financial requirement provision was added at a time when unscrupulous promoters were obtaining permits and lulling unsuspecting investors into purchasing worthless securities on worthless projects. *See* Eighth Biennial Report of the Department of Reclamation, State of Idaho, 1933-1934, R.W. Faris, Commissioner of Reclamation, pp. 28-29. The legislature has provided Water Resources with the authority to weed out the financially insufficient applications. I.C. § 42-203A. We believe a showing by the applicant that it is "reasonably probable" that financing can be secured to complete the project within five years serves the purpose of screening out undeserving projects without being destructive of growth and development in the state. Any concern which may exist about tying up the water to the prejudice of a potential junior applicant is adequately satisfied by other statutory provisions requiring timely commencement, progress and completion of works. I.C. §§ 42-204 and 42- 301. Thus we hold proper the "reasonably probable" standard originally applied by Water Resources.

Shokal, 109 Idaho at 335-36, 707 P.2d at 446-47 (emphasis original). In this case, the Court found it sufficient that the applicant for a water right for a fish farm had a $4,500 "base" (presumably referring to money in hand) for a project that would cost over $265,000.

[514] Idaho Code § 42-202(5).

[515] 1967 Idaho Sess. Laws, ch. 374, § 1.

[516] Idaho Code § 42-1736B(1).

[517] 1978 Idaho Sess. Laws, ch. 345, § 2.

appropriations must meet a set of statutory criteria, including a finding that it is in the "public, as opposed to the private, interest."[518] (Adopted in 1978.[519])

Out-of-basin ground water - over 5,000 acres or 10,000 acre-feet. An appropriation for use of ground water for use "outside the immediate ground water basin" for irrigation of over 5,000 acres or for a total volume of over 10,000 acre-feet (apparently for any purpose) per year must meet special tests related to "the local economic and ecological impact" and must be specifically approved by the Legislature.[520] (Adopted in 1980.[521]) Note: This is one of two "basin-of-origin" provisions, the other being Idaho Code §§ 42 203A(5)(g) (appropriations), 42-222(1) (transfers), 42-240(5) (exchanges), 42-1763 (water bank).

D. Tests applicable to water right transfers only

No enlargement. The Department may reject a transfer application if it would "constitute an enlargement in the use of the original right."[522]

Agricultural base. The Department may reject a transfer application involving "a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area."[523] (Adopted in 1981.[524])

Over 50 cfs/5,000 acre-feet. Specific legislative approval (presumably in the form of a concurrent resolution) is required of any change in the nature or period of use of any water right involving over 50 cfs or 5,000 acre-feet of storage water.[525] (Adopted in 1981.[526]) Note that this provision is triggered only if the period or nature of use is changed. Thus, it does not apply to changes in point of diversion or place of use, even on a very large scale. Also, the Department is allowed to approve temporary transfers of large water rights for less than three years without

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[518] Idaho Code § 42-1503.

[519] 1978 Idaho Sess. Laws, ch. 345, § 11.

[520] Idaho Code § 42-226.

[521] 1980 Idaho Sess. Laws, ch. 186, § 1.

[522] Idaho Code § 42-222(1).

[523] Idaho Code § 42-222(1).

[524] 1981 Idaho Sess. Laws, ch. 147, § 3.

[525] Idaho Code § 42-108.

[526] 1981 Idaho Sess. Laws, ch. 1.

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legislative approval.[527] Although the statute does not specify a sequence, IDWR has expressed the view (informally) that legislative approval would not be sought until after the Department has acted to approve the transfer.

E. Tests applicable to water exports

The Idaho Water Export Act, Idaho Code § 42-401(3), sets the following out six criteria (called "factors") to be applied by the Director in evaluating an out-of-state transfer. See discussion in section 44.C(2)(a) (Idaho Water Export Act) at page 820.

The supply of water available to the state of Idaho.

The current and reasonably anticipated water demands of the state of Idaho.

Whether there are current or reasonably anticipated water shortages within the state of Idaho.

Whether the water that is the subject of the application could feasibly be used to alleviate current or reasonably anticipated water shortages within the state of Idaho.

The supply and sources of water available to the applicant in the state where the applicant intends to use the water.

The demands placed on the applicant's supply in the state where the applicant intends to use the water.

F. Tests applicable to inter-basin transfers (aka out-of-basin transfers)

See discussion in section 44.C(3) (Basin-of-origin protection (avoiding harm to local economy)) at page 824.

G. Statutory history of tests

The following chart traces the legislative enactments leading to several of the key current statutory tests applicable to new appropriations and transfers.

Date	Current Citation	Session Law	Applies to	Operative Language (as codified today)	Comment
1935	Idaho Code § 42-203A(5)(b).	1935 Idaho Sess. Laws, ch. 145, § 2, p. 358	Appropriation	The director must find "that the water supply itself is insufficient for the purpose for which it is sought to be appropriated".	Requires a showing of sufficient hydrological availability to support the use.

[527] Idaho Code § 42-108.

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Date	Current Citation	Session Law	Applies to	Operative Language (as codified today)	Comment
1935	Idaho Code § 42-203A(5)(c).	1935 Idaho Sess. Laws, ch. 145, § 2, p. 358.	Appropriation	The director must deny an application upon finding "that such application is not made in good faith, is made for delay or speculative purposes".	Speculative applications may be rejected. Was used to deny an application for an expanded CAFO.
1935	Idaho Code § 42-203A(5)(d).	1935 Idaho Sess. Laws, ch. 145, § 2, pp. 358-59.	Appropriation	The director must deny an application upon finding "that the applicant has not sufficient financial resources with which to complete the work involved therein".	Authorizes evaluation of the applicant's ability to carry out the project.
1935	Idaho Code § 42-202.	1935 Idaho Sess. Laws, ch. 145, § 1, p. 355.	Appropriation	If the application involved more than twenty-five (25) cubic feet per second of water or the development of more than five hundred (500) theoretical horsepower . . .."	Establishes a set of special criteria for large appropriations. The applicant must provide detailed financial and corporate disclosure data, etc.
1978	Idaho Code §§ 42-202B(3), 42-203A(5)(e).	1978 Idaho Sess. Laws, ch. 306, § 1, pp. 767-69.	Appropriation	The director may reject an application where he finds "that it will conflict with the local public interest" where the local public interest is defined as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the pubic water resource." (Note, the above language reflects 2003 amendment.)	The "local public interest test" was first adopted in 1978, when it applied to water appropriations only. See below amendments of 1981 (extending to water right transfers) and 2003 (limiting scope of the test). Note that the Department's implementing criteria (IDAPA 37.03.08.045.01.e) have not been updated to reflect the 2003 legislation.
1978	Idaho Code § 42-1503.	1978 Idaho Sess. Laws, ch. 345, § 11, p. 893.	Appropriation	To be approved, the director must find that a proposed instream flow "is in the public, as opposed to private, interest".	Section 11 of chapter 345 (1978) created the minimum flow law. It contained its own public interest determination provision (quoted here).
1978	Idaho Code § 42-1736B.	1978 Idaho Sess. Laws, ch. 345, § 2, p. 886.	Appropriation	"All future filings, permits and decrees on the unappropriated waters of this state shall be determined with respect to the effect such filings, permits and decrees will have on the minimum daily flow of the affected stream or river, or on the daily maintenance level of the affected lake or reservoir."	Section 2 of chapter 345 (1978) (quoted here) requires future appropriations to protect prior established instream flows.
1979	Idaho Code § 42-1763.	1979 Idaho Sess. Laws, ch. 193, § 3, p. 561.	Water Bank	Rental of water from water supply bank must not "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."	This is the same language as section 42-203A(5)(e), but there is no cross-reference to this section. It was made part of the original water supply bank legislation in 1979, and has not been changed since then.

Date	Current Citation	Session Law	Applies to	Operative Language (as codified today)	Comment
1980	Idaho Code § 42-226.	1980 Idaho Sess. Laws, ch. 186, § 1, p. 414.	Appropriation	"Any application for a water permit that seeks to transfer ground water outside the immediate ground water basin as defined by the director of the department of water resources for the purpose of irrigating five thousand (5,000) or more acres on a continuing basis or a total volume in excess of ten thousand (10,000) acre feet per year, the application must first be approved by the director of the department of water resources and then by the Idaho Legislature. Each shall give due consideration to the local economic and ecological impact of the project or development so proposed."	Sets up a special public interest review for large agricultural transfers outside the basin of origin. Also requires legislative approval.
1981	Idaho Code § 42-222(1).	1981 Idaho Sess. Laws, ch. 147, § 3, p. 256.	Change	The director must find that an application for change of water right "is in the local public interest" as defined in section 42-202B(3).	This 1981 act extended 1978 local public interest test to changes in water rights. See 2003 amendment (restricting scope of test).
1981	Idaho Code § 42-222(1).	1981 Idaho Sess. Laws, ch. 147, § 3, p. 256.	Change	"[T]he director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area."	The same 1981 act contained a provision to protect the local agricultural base from changes in the nature of use of water rights.
1981	Idaho Code § 42-108.	1981 Idaho Sess. Laws, ch. 147, § 1, p. 254.	Change	"[A]ny permanent or temporary change in period or nature of use in or out-of-state for a quantity greater than fifty (50) cfs or for a storage volume greater than five thousand (5,000) acre-feet shall require the approval of the Legislature, except that any temporary change within the state of Idaho for a period of less than three (3) years may be approved by the director without legislative approval."	Note that this provision applies only to changes involving a change in period or change in nature of use. Thus, it appears that the Act is aimed at transfers from agricultural use to new industrial, municipal or other uses. The provision applies equally to in-state and out-of-state transfers.
1990	Idaho Code § 42-401.	1990 Idaho Sess. Laws, ch. 141, § 3, pp. 316-17.	Appropriation and Change	"Applications for use of public waters outside the State. . . . The director shall consider the following factors: (a) The supply of water available to the state of Idaho; (b) . . ."	Repealed former statute specifically providing for use of Idaho water rights in Oregon. Added new section 42-401 requiring all out-of-state users to meet five additional criteria relating to the relative availability of water in Idaho and the receiving state.
1990	Idaho Code §§ 42-203A(5)(f), 42-222.	1990 Idaho Sess. Laws, ch. 141, § § 4, 5.	Appropriation and Change	Requires that applications be consistent with (or not contrary to) "conservation of water resources within the state of Idaho."	The same act (ch. 141) also amended the appropriation and change provisions affecting all water rights, to include this new criterion. This was used to deny water right applications for energy projects.
1992	Idaho Code § 42-1763.	1992 Idaho Sess. Laws, ch. 101, § 1, pp. 319-20.	Water Bank	"The director shall consider in determining whether to approve a rental of water for use outside of the state of Idaho those factors enumerated in subsection (3) of section 42-401, Idaho Code."	Out-of-state rentals from the water bank were previously prohibited. This act allows out-of-state uses, but subjects them to the test set out in section 42-401 for permanent out-of-state uses.

Date	Current Citation	Session Law	Applies to	Operative Language (as codified today)	Comment
2003	2003 Idaho Sess. Laws, ch. 298 (H.B. 284).	2003 Idaho Sess. Laws, ch. 298 (H.B. 284).	Appropriation, Transfer, Exchanges and Water Bank	Limited the scope of the local public interest to "interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource."	Clarified that local public interest test authorizes review only of issues related to protection of the water resources, not other social or environmental concerns.
2003	Idaho Code §§ 42-203A(5)(g), 42-222(1), 42-240(5), 42-1763.	2003 Idaho Sess. Laws, ch. 298 (H.B. 284).	Appropriation, Transfers, Exchanges and Water Bank	Prohibits inter-basin transfers which "will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates."	The same bill which limited the scope of the local public interest review added an entirely new basin-of-origin protection feature to the water code.

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17. WATER RIGHTS CONVEYANCING

A. Introduction

At the outset, it bears emphasis that transferring (aka changing) a water right is different from conveying a water right. (See discussion in section 15.B.) A conveyance changes ownership of something from one person to another. For instance, a seller may convey land and appurtenant water rights to a buyer without making any change in the water rights themselves. However, where the parties wish to separate the water (or part of it) from the land to which it previously was appurtenant, they will need both to convey the water right (a purely private matter between the parties) and to transfer the water right (a regulatory procedure over which the Department of Water Resources has control).

Previous chapters have explored water right transfers. This chapter deals with conveyancing.

Water rights are real property.[528] As such, they are conveyed by deed, just like any other real property.[529] As with other real property, water rights may be conveyed by warranty deed, special warranty deed, grant deed, or quitclaim deed. These terms are not defined by Idaho statute, except for Idaho Code § 55-612 discussed below and another statute which has very narrow application.[530]

In real estate transactions involving land, title insurance may be obtained to protect the buyer in the event title is not properly conveyed. As a practical matter, title insurance companies do not issue title policies for water rights. Consequently, the onus falls on the parties to ensure that title is properly conveyed, and the selection of the proper form of conveyance is all the more important.

In the world of conveyancing, form sometimes matters, but substance always does. The practitioner should never rely upon the title of a deed or other document. If you want

[528] Idaho Code § 55-101.

[529] Water rights of all types may be conveyed, including water rights represented by licenses or decrees, beneficial use claims, domestic rights, and water rights provided by canal companies and irrigation districts.

[530] Idaho Code § 42-2604 provides, on its face, that all "contracts and deeds for the sale of water rights shall be of the form approved by the department . . . ." Despite the over-broad language of this section, it applies only to particular circumstances involving the initial creation of canal companies and their conveyance of water rights to settlers within the project; this was the case with Carey Act Companies. There is no standard departmental form of contract or deed.

to know what the deed does, you should read the deed to see what, if any, covenants and warranties are included.[531]

B. The purchase and sale vs. option agreement

Water rights, of course, may be conveyed as appurtenances to land. However, they are often conveyed separately from the land, particularly when the purchaser intends to change them to a new use. Because of the uncertainties of the transfer process, transactions in water often rely on an option agreement, rather than a direct purchase and sale. This enables the purchaser to undertake due diligence and pursue the transfer before exercising the option and moving to closing.

In some cases, simple form purchase and sale or option agreements have been employed to accomplish this. With the increasing value of water, and the increasing complexity of the transfer process, the stakes have been raised. Accordingly, option agreements are increasingly sophisticated and individually tailored to the circumstances of the transaction, allocating risks and contingencies, establishing duties and entitlements, defining representations and warranties, and setting deadlines and penalties. In a high value transaction, the option agreement may run dozens of pages.

Among many other issues to be considered in tailoring a purchase and sale or option agreement are the following (in no particular order):

- Unit definition & pricing. There are many ways to define the price terms, and many pitfalls resulting from misunderstandings about how quantity terms work. Typically annual volume is of more relevance to the buyer than the diversion rate. However, depending on the needs of the buyer, other measures of quantity that may be critical.
- Quantification before or after transfer. Likewise, the timing of quantification is significant. Do the parties intend for the price term to be applied to the quantity prior to transfer, or after? Will it be diminished to the extent of mitigation requirements, consumptive use restrictions, etc.?

[531] As a practical matter, the verbs "covenant" and "warrant" are used interchangeably by most drafters. Technically, a covenant is a promise to do something (or to refrain from doing something) in the future, such as a covenant to defend title. A warranty is an assertion of a condition in the present, such as a warranty of ownership. Thus, a covenant may be breached in the future, while a warranty may be breached at the time of execution of the conveyance document. This is a semantic nicety which is of no particular consequence.

- Shortfall in quantity. Does the seller have a responsibility to provide additional water in the event that transferable quantities are less than anticipated? How will the source of that water be identified?
- Identification of individual acres. Each of the above consideration has potential ramifications under *Lexington Heights v. Crandlemire.*[532] Failure to provide mechanisms for resolving uncertainty at any stage of the contract, under any possible scenario, may result in giving one of the parties an unintended way out of the agreement. See discussion in section 17.D at page 319.
- Partial forfeiture. If partial forfeiture is identified during the course of the transaction, how will that affect the price term?
- Duration / option periods. The duration of the option may be fixed, keyed to other contingencies, or extendable at the option of the buyer. These provisions may have their own price terms.
- Sequencing of payments. The timing of option and purchase payments may be simple or quite complex. It is important to think through the all contingencies and to clarify any offsets.
- Incremental transfers. The parties should consider whether the buyer is entitled to exercise the option incrementally—with respect to parts of the water right. If that is permissible, the agreement should include a mechanism to determine what is being acquired. Lack of specificity may void the contract.
- Due diligence period. One or more diligence periods may be required. The parties should define the authority of the buyer to continue investigations after the due diligence period(s). The scope of access granted should be clarified. The parties should clarify the seller's obligation to be forthcoming, particularly with FSA records and other documentation (including records of prior owners).
- Initiation of transfer prior to exercise. The parties should consider under what circumstances the buyer is authorized to initiate the transfer proceeding prior to exercise of the option. The agreement should clarify the duties of the parties in the event that the transfer is denied, approved with conditions unacceptable to buyer, and other potential circumstances. The agreement should allocate the obligations and costs

[532] *Lexington Heights v. Crandlemire*, 140 Idaho 276, 92 P.3d 526 (2004). See discussion in section 17.D at page 319.

associated with transferring the water back in the event the sale does not go through.

- Recording. Depending on the parties' needs, the agreement may provide for recording of a memorandum of option agreement, pending closing. In any event, it should define what either party is entitled to record and under what circumstances.

- Dry up obligation. The agreement should carefully address the scope of the dry-up obligation. Does the seller have a right and/or duty to continue farming (or other water use) pending transfer approval, after transfer approval (to end of irrigation season), etc.? What rights do the buyer and seller have to change the use during the middle of the irrigation season?

- Representations and warranties. The agreement must carefully consider and define disclosure obligations, representations and warranties regarding the use and validity of the water right. As with other issues, there is no cookbook answer for what these obligations should be. Key issues to address (in addition to the usual real estate representations and warranties) would include:

  - quantities and forfeiture,
  - the accuracy of information and good faith disclosures,
  - the presence of supplemental water rights,
  - existing mitigation obligations, and
  - subordinations.

- Encumbrances. The parties should develop and define financial disclosure obligations and mechanisms for dealing with encumbrances and refinancing during the option period and at closing.

- Confidentiality. The parties should consider their interest in confidentiality and carefully define confidentiality obligations and penalties.

- Form of deed. The parties should come to terms at the time of the option agreement as to the form of the deed. This, in turn, raises key questions regarding warranties.

- Easements. The parties should think through whether any easements need to be conveyed in conjunction with the water rights.

- Wells and equipment. The parties should consider whether any wells or equipment is to be conveyed along with the water rights.

- Closing(s). Closing provisions vary greatly from agreement to agreement. The agreement should resolve confusion over whether closing refers to closing on the option agreement or closing on the exercise of the option (or closing on an incremental exercise).
- Survivability. The agreement should define which provisions survive closing and for how long.
- Walk-away provisions. The agreement should carefully define under what circumstances either party may walk away from the transaction (without triggering a default), and who keeps what.
- Remedies. The parties should carefully identify the cures and remedies available for each potential default. Boilerplate should be avoided where it does not fit the needs of the parties.

C. Conveyance of perfected water rights by deed

(1) Quitclaim deed

The most minimal form of conveyance is the quitclaim deed. A quitclaim deed provides simply that the grantor conveys whatever interest the grantor may then have in the property. It includes no warranties of any kind.

In essence, the grantor says: "I'm not saying I own this water right. I may have even sold it to someone else. But whatever interest I retain in it today is now yours, and I will be unable to claim that I own it." To put it colloquially, a quitclaim deed would be the proper vehicle (from the seller's perspective) to repeatedly sell the Brooklyn Bridge.

A quitclaim deed is appropriate where the purpose of the conveyance is to remove a cloud (as to any claim by the grantor) and thus help to clarify title in a particular party.

The operative words in a quitclaim deed are "I hereby quitclaim."[533] The drafter should not use the verb "grant" in a quitclaim deed. Doing so will likely convert it to a grant deed, as discussed below.[534]

[533] To express it as a lawyerly redundancy: "I hereby convey, release, remise and forever quitclaim . . . ."

[534] Oddly, most quitclaim deeds employ the noun "Grantor" while avoiding the verb "grant." Presumably, and according to the statute, it is only use of the verb that triggers the "grant deed" warranties.

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(2) Grant deed

An Idaho statute states that the use of the term "grant" in any conveyance carries by implication two and only two covenants, unless otherwise expressly set out in the deed. Idaho Code § 55-612. Thus, if the grantor simply declares that he "grants" (or grants, conveys, etc.) his or her water rights to a named person, and says nothing else, the court will imply the following two covenants: first, that he or she has not previously conveyed the property to another and, second, that he or she has not encumbered or suffered an encumbrance on the property as of the time of execution.

In plain English, the seller is saying: "I don't know if I own this water right, but I promise you that I have not previously sold or encumbered it, and whatever I own is now yours." This is basically a glorified quitclaim deed, enhanced only by the promise that the seller has not previously sold or encumbered the property. To put it even more colloquially, one might say: "Here is a deed to the Brooklyn Bridge. This is the first time I have ever sold the Brooklyn Bridge."

In other words, you may convey the Brooklyn Bridge by quitclaim as often as you like without violating any warranty, but you may convey it by grant deed only once.

Such an unadorned grant deed may be employed in water transactions where there is some reason for uncertainty about whether the seller actually owns the rights. In such cases, it is reasonably preferred and expected over a simple quitclaim deed, because the seller, even if he cannot promise that he or she owns the right, should be able to promise at least that he or she has not sold it twice.

(3) General warranty deed

A general warranty deed goes a substantial step further and includes warranties of fee simple ownership coupled with promises to defend title to the property if it is challenged. From the buyer's perspective, a warranty deed is always preferred. From the seller's perspective, a warranty deed may be problematical if there is any question about the validity of the underlying water rights. On the other hand, the warranty arguably only extends to the defense of title, not to the validity of the water right.

(4) Special warranty deed

The parties to a transaction are not limited to the three models set out above, but are free to devise other covenants or warranties. Such hybrid deeds go by various labels including "special warranty deed," "limited warranty deed," "bargain and sale deed," and even "grant deed" (despite the fact that it contains more than the statutory covenants). Others prefer the name "special warranty deed." For all practical purposes, the name makes no difference, so long as the covenants and warranties are themselves clear.

Thus, special covenants and warranties may be devised to handle particular purposes. These are not very common in ordinary real estate transactions (where a cookie cutter deed is generally appropriate), but are common for water right deeds (where the issues of validity and ownership can be murkier).

For example, the parties to a transaction might agree to assurances that more clearly define what warranties are included, for example including a defense of title but not of the validity of the water right. The deed might also include a warranty to the effect that the seller has acted in good faith in acquiring and using the water rights and knows of no defect in them.

D. Specificity/particularity and the statute of frauds (*Lexington Heights* and its progeny)

In the case of *Lexington Heights v. Crandlemire*, 140 Idaho 276, 92 P.3d 526 (2004) (Eismann, J.), the Idaho Supreme Court imposed a rigorous standard for specificity of the lands to be conveyed. Although the case dealt with the sale of land, presumably it would apply equally to water right deeds.

A more detailed discussion of this topic is found in the *Idaho Land Use Handbook*.

E. Conveyance of permit by assignment

In contrast to a perfected water right, a water right permit is an inchoate right authorizing the holder to proceed with diverting water to beneficial so as to perfect an interest in real property in the future.[535] As such, the permit is deemed personal property, not real property.[536] Consequently, water right permits traditionally are formally conveyed by assignment (and/or bill of sale[537]), rather than by deed.

The Idaho Department of Water Resources provides a form entitled *Assignment of Permit* for this purpose. It is intended to be executed and acknowledged by the assignor

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[535] *Hardy v. Higginson*, 123 Idaho 485, 490, 849 P.2d 946, 951 (1993).

[536] "An applicant's interest in an application for permit to appropriate water also is personal property." IDAPA 37.03.08.035.02.d (Water Appropriation Rules).

[537] Technically, a bill of sale is used to convey tangible personal property to which title attaches. Intangible personal property interests to which title does not attach (such permits, shares of stock, and contract rights) are conveyed by assignment. Nevertheless, this subtle distinction is not always followed. Indeed, parties often employ a separately drafted bill of sale in addition to the Department's *Assignment of Permit* form. Perhaps this is an unnecessary belt and suspenders exercise, but it is a common practice and, until our courts tell us otherwise, probably a good idea.

and filed with the Department, along with a required filing fee. Unlike the Department's *Change of Ownership,* form, which is used to provide the Department with notice that a perfected water right has been conveyed by deed to a new owner, either as an appurtenance or separate from land, the *Assignment of Permit* form can serve the dual purpose of effecting the legal conveyance of the permit and providing notice to the Department of the conveyance of the permit.

What happens if an assignment is not used where a permit authorizing development of a water right on a particular tract of land exists? Suppose first that a seller conveyed her land, which was being irrigated pursuant to an inchoate water right represented by a permit. Suppose also that she used a "silent" deed (which simply conveyed the land and all appurtenances, without expressly naming them), and suppose there was no separate assignment or bill of sale concerning the permit. Would the deed effectively convey the right to irrigate the land represented by the permit even though it is deemed personal property? The authors are not aware of a judicial decision on point. Arguably the right to develop a water right on a particular piece of real property (i.e., the permit) could be considered an appurtenance, and a "silent" conveyance of the land would convey all appurtenant interests in water, both real and personal. On the other hand, Idaho law requires that water rights be treated with the same formalities as other property. But, again, we are not aware of precedent on this point.

F. Assignments in conjunction with water right deeds

It is sometimes appropriate to include other assignments along with the conveyance of a water right. This is appropriate where there are physical documents that reflect title or other interests in the water right, such as claims to water rights filed in a water right adjudication, stock certificates, or contracts. Assignments may be included as part of a deed. Note, however, that water delivery organizations typically have their own procedures and forms of documents for the transfer of water rights on their books or assessment rolls. These organizations should be consulted prior to closing a transaction that involves water rights that they deliver.

For instance, if the water right is represented by shares in a mutual canal company (aka mutual ditch company, including Carey Act companies), it is important not only to convey to the buyer the water rights themselves but also to assign and deliver the shares in the canal company to the purchaser.

Another example of an appropriate use of an assignment is for SRBA claims. Where a water right has been claimed in the SRBA, but not yet decreed, the conveyance document should include a deed for the water right (or assignment for the permit) coupled with an assignment of the SRBA claim. When conveying land with appurtenant water rights that are the subject of a claim in a water rights adjudication, the authors prefer to use a single document styled as a "deed and assignment" that describes not only the underlying real property with specificity, but also all water rights intended to be

conveyed as appurtenances to the land, together with an express assignment of all notices of claim to water rights pending in an adjudication.

In transactions involving a water right evidenced by a license, the parties sometimes assign and deliver the original license certificate in addition to conveying the water right by deed.

G. Conveying a portion of an existing facility

Most commercial and industrial facilities are served by municipal water providers and do not own their own water rights. However, some of the larger ones do have their own wells, as do dairies and other large or remotely located industrial operations.

If the entire facility is being conveyed as a unit, it is a simple matter to convey the appurtenant water rights. Indeed, it is no different from conveying irrigated land. Since no change in use is entailed, this is not a "transfer" event requiring approval from the IDWR. It is simply a matter of providing the appropriate new ownership notice to the Department.[538]

Likewise, if a commercial, industrial, or agricultural property is being divided and a portion of it sold to a user who will maintain the same nature of use, this will entail what the Department calls a "split" of the right. Again, this is not a "transfer" event (within the meaning of section 42-222), so no Department approval is required. But the Department must be made aware of the change in ownership, whereupon the Department will change its records to show that the water right has been divided into two separate rights, each with a new number.[539] Naturally, in the conveyance documents the parties should be explicit about the quantity of water, preferably expressed in both cfs and acre-foot amounts, each resulting right holds.

[538] The proper form is known as a "Notice of Change in Water Right Ownership." This is described in footnote 379 at page 225.

[539] Formerly, the Department assigned "A," "B," "C" suffixes to split water rights. Its current practice, however, is to assign entirely new numbers to the two resulting rights, retiring the old number.

18. CONSERVED WATER

A. Public policy

In recent years, attention has focused on efforts to squeeze more water out of a given diversion stream through conservation measures.[540] These measures can include lining ditches, increased use or maintenance of pipelines, tighter scheduling of irrigation applications to meet actual crop consumptive irrigation requirements, and the use of sprinkler application rather than flood irrigation. In the domestic or municipal water context, conservation measures may include water conservation education programs or restricting lawn watering to specific days or times of the day. Experience has demonstrated that these kinds of conservation methods can significantly reduce instantaneous and annual water demand, although per unit pricing of water surely remains the primary means to induce conservation.

Some conservation measures involve substantial capital investments to minimize seepage, evaporation or flow-through of waste water. Idaho law and policy already mandate that the right to use the waters of the state does not include the right to waste it. However, for water users who already employ reasonable diversion and application methods, such laws and policies likely are less important in their decision to employ water conserving methods than the simple need to reduce labor and maintenance costs, or to improve product quality and profit margins.

In recent years, water conservation has become a significant theme in the debate on water policy. Seeing enormous "waste" in water use, many policy makers have seized upon the idea that the gains achieved recently in energy conservation—such as improvements in electrical appliances, gas mileage, and insulation—should set the pattern for water conservation.

"Shouldn't we encourage water users to become more efficient?" the thinking goes. More specifically, the suggestion is made that water right holders who adopt conservation measures should be entitled to retain the benefits of that conservation. That is, they should be allowed to use the "conserved" water for a new use, or sell it to someone else.

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[540] We use the term "conserved water" to describe water saved as a result of efficiency improvements or other changes made in the delivery or application of a water right. The term can also be used to describe efforts to reduce consumer demand in the context of municipal water rights.

"New" water can also be created through modifications of natural conditions aimed at reducing system losses to evaporation and the like. These rights are often referred to as "developed" water, or sometimes, "salvaged" water. Although there are some parallels between conserved water and developed water, judicial treatment of the two often differs.

Other Western states, such as California and Oregon, have adopted precisely this approach, with statutes that expressly allow conserved water to be sold, leased, transferred or exchanged.[541] Unfortunately, these state statutes fail to distinguish carefully between true conservation and recapture of return flows. Thus they overlook the most difficult issue: increases in consumptive use causing injury to others. As a result, they have proven largely ineffective in their policy goal. The discussion in the prior section outlines the law governing the use of conserved water. In addition to those theoretical problems, practical problems are encountered by those seeking to apply or market such water.

A few states–Oregon comes to mind–have been quite direct about the issue. The Oregon Legislature has created a system aimed at encouraging water conservation through more efficient water uses.[542] Under this Oregon statute, if changes are made which "save" surface water through greater efficiency, the bulk of the "conserved" water is retained by the owner of the water right, while a fraction (25 percent) is automatically committed to instream flows.

Even in places like Oregon, which actively encourage conserved water projects, there have been relatively few successful examples of conserved water to date. One reason is it is hard to find cases where the expanded use made possible by the improved efficiency will not injure some other water users. In other words, water conservation often involves robbing Peter to pay Paul.[543] In this way, water conservation is much more complicated than, say, energy conservation.

B. The practical problem of finding conserved water

Water is used over and over by a series of people. A change in use by one user is likely to affect everyone else downstream. An example may help to illustrate the point.

Consider the hypothetical situation above involving two rather inefficient irrigators. Suppose that Farmer Hanson and Farmer Rodriguez each own water rights to divert 10 cfs of water, and that each farm consumed only 3 cfs while returning 7 cfs to the stream through leaky ditches and so on. (The relative priorities of the farms are not relevant here.) Regardless of priority, neither farmer may make any change which injures the other.

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[541] Cal. Water Code § 1011(b); Or. Rev. Stat. §§ 537.455 to 537.500 and 540.510 (allowing a water right holder to retain up to 75 percent of conserved water, with the balance going to the State to maintain return flows).

[542] Or. Rev. Stat. § 540.510.

[543] An efficiency improvement saves a watt of energy, a watt of energy has been saved, and one less needs to be created. Water, in contrast, is used and reused by many people.

As a result of these diversions, what would have been a natural flow of 13 cfs, is reduced to 3 cfs between points A and B, 10 cfs between points B and C, zero between points C and D, and 7 cfs downstream of D. Thus, the stream is "fully appropriated" in the sense that no new consumptive user can divert upstream of either farmer.

Now suppose that for one reason or another (for instance, a federal subsidy, a regulatory requirement, or a mitigation banking effort), Farmer Hanson decides to undertake an extensive irrigation efficiency improvement project. Let us suppose that by lining his ditches, converting to drip irrigation, or what have you, Farmer Hanson is able to significantly improve his efficiency and cut his diversions in half. Thus, after the efficiency improvements, Farmer Hanson only needs to divert 5 cfs to grow the same crop while consumptive use stays at 3 cfs. This would leave 8 cfs in the stretch between points A and B (compared to 3 cfs before the improvements).

Moving downstream, however, the water savings vanish. As Farmer Hanson reduced his diversion by 5 cfs, his return flow also was reduced by 5 cfs (from 7 to 2 cfs). Downstream of his return flow (between points B and C), the flow remains at 10 cfs, the same as it was before the costly efficiency measures were installed. And Farmer Rodriguez continues to divert all of it onto his crops.

Presumably, most efficiency improvements are worthwhile to the water right holder, who will be able to reduce labor or maintenance expenses or increase yields. However, whether the efficiency improvements are worthwhile in changing conditions instream depends upon whether the object was to improve flows within the depleted stretch upstream of the return flow (between points A and B) or downstream of the return flow. For instance, if an endangered snail lived between points A and B, the efficiency improvements could be of significant value in improving that habitat. If, on the other hand, the object of the improvements was to provide more water to flush endangered salmon through reservoirs somewhere far downstream of point B, the efficiency improvements may not have increased the total volume of downstream flow.

This example, of course, is highly simplified. It assumes (1) instantaneous return flows, (2) discrete, non-overlapping return flow points, (3) no conjunctive use of ground water, (4) no change in consumptive use, (5) no storage of water, (6) no inter-basin transfers, (7) no water quality effects, and (8) no cumulative effects. Changing any of these assumptions might change entirely the outcome of the analysis.

First, in the real world, return flow is not instantaneous. The component of return flow that returns water to a river at the end of the irrigation system is close to instantaneous, but the component which returns via ground water may involve considerable delays. To the extent that return flows are delayed, water conservation measures may result in temporary net inputs to the river until a new equilibrium is reached. This would occur as diversions are reduced, but recharge (from old diversions)

continues for a period at the same rate. While the bonus is temporary, it might nevertheless be a critical component of a species recovery program.

Second, water which returns to the stream via the ground water return usually does not come in at a particular point and may not return for long distances. Consequently, the area of improved flow resulting from efficiency improvements may be both less discrete and much larger than in the example above. Thus, flows may be improved not just down to the next farm, but for hundreds of miles.

Third, the example above does not include a ground water component. A more realistic example may be that Farmer Hanson's excessive diversion is not only returning to the stream to be used by downstream diverters, but is recharging a large aquifer which also is supplying down-gradient ground water pumpers. If Farmer Hanson then implements irrigation improvements which reduce his diversions, there will be more water in the river and less water for the ground water pumpers. Assuming the ground water pumpers cannot prevent Farmer Hanson from reducing his diversion,[544] they are the loser, and the river is the winner.

Fourth, the example in the figure above assumes no change in consumptive use. That is probably a fair assumption in most cases. Lining a ditch, for example, has little impact on evaporative loss and does not change the quantity of water lost to evapotranspiration. On the other hand, some conservation measures may change consumptive use. Where that happens, "real" savings are realized. For instance, if water is lost from a leaky ditch to a contaminated aquifer whose waters cannot be used, lining the ditch puts "new" water back into the system. Switching from sprinkler to drip irrigation will reduce evaporation. And, of course, switching crops may produce huge changes in consumptive use.

Fifth, while the example above produced no change in the total *volume* of water below point B, the timing of flows may have changed due to a variety of real-world factors. In a particular situation, it may be that flows could be "shaped" to improve habitat or advance other goals. This ability to shape flows may be enhanced if the water not diverted may be put into storage (or may be left in storage).

Sixth, if the water savings occur on a trans-basin diversion (or involve crossing other hydrologic or legal barriers, such as state lines), the results may be substantially different from the example above. For instance, if Denver diverts water on the Western

[544] This is probably the correct result. While ground water users are entitled in Idaho (and most Western states) to complain of injury just as is a downstream diverter, it is unlikely that a court would consider Farmer Hanson's efficiency improvements to constitute a "change" in use, because he has not changed his point of diversion, place of use, or time of use. It must be said, however, that this is merely a prediction of a legal outcome. The authors are not aware of this situation having been tested in the courts.

slope of the Rockies but provides return flows to the Platte River system on the other side of the Continental Divide, municipal water conservation (if it actually leads to reduced diversions) would increase flows on the Western Slope while reducing flows in the Platte.

Seventh, even if water quantity is not increased below Farmer Hanson's return point, water quality may be improved. For instance, the addition of flow may improve the stream's capacity to assimilate discharges within the reach.

Eighth, the example above focuses on conservation measures adopted only by a single farmer. Perhaps a more meaningful scenario would involve water conservation adopted throughout a basin. If that were the case, the incremental savings between points A and B could be replicated over a larger area.

In short, while water conservation is an important goal, it is not as simple as screwing in a lower wattage bulb. A gallon saved is not necessarily a gallon earned. Whether habitat is improved as a result of efficiency improvements is highly situation specific, a fact sometimes not fully appreciated by advocates for efficiency improvements. By better understanding the dynamics of water conservation and water reuse, we can better target investments in conservation to ensure the biggest return for increasingly scarce dollars.

C. Idaho's 2003 Water Conservation Statute

The costs of employing conservation measures, and the potential that they will allow more water to be available for actual beneficial use, raises the question of who is entitled to make use of the conserved water, and for what purposes. In Idaho, the law appears to be that the original appropriator may use the "additional" water for the original beneficial use, provided the water has not yet left his control, and provided the use does not result in an expansion of the original use. These, however, are significant conditions.

One of the early Idaho cases to consider the question is *Reno v. Richards.*[545] In *Reno*, the appropriator had removed brush and logs from the stream, and excavated channels through gravel bars in the streambed. In doing so, the appropriator increased the amount of water flowing through the channel and available for diversion. The Idaho Supreme Court held that:

> A person who, by removing obstructions from a stream and constructing artificial works, prevents the loss of water flowing therein through seepage and evaporation, and materially augments the amount of water available from the stream for a beneficial use, has the right to make use of the

[545] *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918).

> amount of water so conserved by his efforts in excess of the natural flow of the stream.[546]

Actually, the *Reno* case is more accurately treated as an "augmented supply" case rather than as one involving the right to conserved water. In *Reno*, the facts show that the actual supply of water at the source was increased by the appropriator's efforts.[547] In contrast, "conserved water" might best be defined as that water which results from making better use of the water once it has been diverted.

In 2003, the Legislature enacted a measure expressly exempting conserved water from forfeiture.[548] Thus, a water right user, having managed to "conserve" a fraction of her water right through the institution of conservation measures, is assured that the conserved portion will not be forfeited. Thus, the user retains the option of reverting to the pre-conservation practice. This merely confirms what is already departmental policy. (See discussion of partial forfeiture in section 6.G at page 88.)

The Act provides a new definition of conservation practice:

> For purposes of this section, "water conservation practice" means any practice, improvement, project or management program, that results in the diversion of less than the authorized quantity of water while maintaining the full beneficial use(s) authorized by the water right. Water conservation practices include, but are not limited to, practices that result in reductions in consumptive use as defined in section 42-202B, Idaho Code, reductions in conveyance losses, and reductions in surface and seepage losses occurring at the place of use.[549]

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[546] 32 Idaho at 1, 178 P. at 82-83.

[547] *See also Basinger v. Taylor*, 36 Idaho 591, 211 P. 1085 (1922) (party who augments streamflow by 10 percent by constructing pipeline should be decreed prior right to the quantity saved). Compare the cases of *Southeastern Colorado Water Conservation Dist. v. Shelton Farms, Inc.,* 529 P.2d 1321 (1975), and *R.J.A., Inc. v. Water Users Ass'n of Dist. No. 6*, 690 P.2d 823 (Colo. 1984), in which the Colorado Supreme Court held that there is no right to appropriate water made available by removing water consuming vegetation along a stream. The rationale in the Colorado cases is that such water already is a part of the stream, and when it becomes available, belongs to appropriators from the stream in the order of their priority. These Colorado cases also focus on the potential for severe environmental effects that would result from a policy that encouraged destruction of riparian vegetation to salvage additional water from the stream.

[548] H.B. 1100 (2003) (codified at Idaho Code §§ 42-223(9), 42-250).

[549] Idaho Code § 42-250(2).

Consumptive use, in turn, is defined as follows:

> "Consumptive use" means that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use does not include any water that falls as precipitation directly on the place of use unless the precipitation is captured, controlled and used under an appurtenant water right.

Idaho Code § 42-202B(1).

Thus, under the 2003 Act, conserved water may be created and protected from forfeiture through practices such as ditch lining. As noted above, however, ditch lining and similar practices often result in a material reduction in return flows to other users—or, more likely, they alter the location and timing of return flows. Thus, presumably, no such conserved water may be transferred to a new use, because doing so would result in injury.[550] Thus, the practical applicability of the legislation appears to be quite limited.

Although there are no Idaho cases directly addressing the right to conserved water, Idaho cases dealing with the right to recapture and use waste water or seepage (discussed below) are instructive.

[550] The act only addresses forfeiture. It does not change the rules governing transfer of the "conserved" portion for transfer to a new use. Such transfers would remain subject to basic no-injury principles. Thus, for instance, a user who lined a leaking canal could not sell the "conserved" portion of the right, if other users had formerly relied on return flows from the leaking canal.

19. RECAPTURE AND REUSE, AND THE APPROPRIATION OF WASTE WATER

A. Overview

Few water uses consume one hundred percent of the water they divert. For example, a surface water irrigator typically diverts considerably more water than is applied to the crops. What is left over goes by various names such as waste water, return flow, tail water, seepage water, and drain water—whose definitions are sometimes vague and overlapping.

We use the terms "waste water"[551] and "return flow" interchangeably to describe, collectively, tail water accruing at the end of an irrigated field, the seepage water that leaks out of canals or reservoirs, the excess water applied to crops that percolates into the soil, and effluent or sewage generated or collected by an industrial user, a municipality, or a sewer district.[552]

This section explores the rights of the original appropriator to recapture his or her own waste water and the rights of third parties to obtain an appropriation of waste water released by another. This section also addresses the rights of municipal entities and industrial users to retain and use effluent (aka "wastewater") from their municipal treatment facilities or industrial operations. It also addresses the rights of a municipal provider to contract with another entity for reuse of wastewater. Finally, it addresses broader questions of land application of wastewater, with and without a water right.

B. Right of the original diverter to recapture waste water for use on the original place of use

It is a basic premise of the Prior Appropriation Doctrine that water diverted and not used be returned to its source.[553]

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[551] Note that wastewater—typically written without a space—refers to effluent from industrial uses or municipal treatment plants. In the irrigation context, waste water—typically written with a space—has a somewhat different meaning; it refers to any water left over after the initial irrigation. This also is sometimes referred to as "tailwater."

[552] In *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P.3d 78 (2005) (Schroeder, C.J.) (emphasis omitted), the Idaho Supreme Court (quoting the SRBA Court) defined waste water as: "(1) water purposely discharged from the project works because of operation of necessities, (2) water leading from ditches and other works, and (3) excess water flowing from irrigated lands, either on the surface or seeping under it."

[553] A good overview of the entire subject of water rights in waste water and reuse is James W. Johnson, et al., *Reuse of Water: Policy Conflicts and New Directions*, 38 Rocky Mtn. Min. L. Inst. § 23 (1992).

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Printed 10/5/2026 10:07 AM

> It is elementary that the waters of the public streams of this state belong to the people, and that appropriators acquire only a right of use. It is also settled law that an appropriator is limited in his use of water to his actual needs. He must not waste it, and if there is a surplus remaining after use, it must be returned to the stream whence it came.

Water Supply and Storage Co. v. Curtis, 733 P.2d 680 (Colo. 1987) (quoting *Pulaski Irr. Dist. v. City of Trinidad*, 203 P. 681 (Colo. 1922).

This principle is counterbalanced with the equally important principle that an appropriator may recapture and reuse water previously diverted so long as the reuse occurs within the geographic and other limitations of the original water right. This is not so much an exception to the obligation to return water to the common source as it is a clarification of what is "unused." Simply put, the water that is lawfully recaptured and used within scope of the original water right is not "unused" water that must be returned to the common supply.

The right to recapture has long been recognized Idaho law. "It is settled law that seepage and waste water belong to the original appropriator and, in the absence of abandonment or forfeiture, may be reclaimed by such appropriator as long as he is willing to put it to beneficial use." *Reynolds Irr. Dist. v. Sproat* ("*Reynolds II*"), 70 Idaho 217, 222, 214 P.2d 880, 883 (1950) (Taylor, J).[554] This is true even if the recapture and reuse comes years after the initial water right was established. And, most importantly, it is true even if the change reduces the water available to other water users downstream.[555] It is generally recognized that the recapture must occur before the appropriator relinquishes control (i.e., before the water reaches natural water bodies where it becomes available for appropriation by others).

For example, a farmer may capture tail water running off the low end of a field and pump it back to a portion of that field which, due to topography or other factors, was

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[554] *See also Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980); *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927) (third parties may appropriate waste water, subject to the original appropriator's right, in good faith, to cease wasting it and put it to a beneficial use); and *Application of Boyer*, 73 Idaho 152, 248 P.2d 540 (1952) (Givens, C.J.). None of these cases addresses the question whether one may reduce waste, then transfer the surplus to some new use. Later opinions make clear that an appropriator may not do this. *See, e.g., Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J).

[555] One principle governing waste water is that an irrigator "is not bound to maintain conditions giving rise to the waste of water from any particular part of its system for the benefit of individuals who may have been making use of the waste." Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 100 (1968).

chronically under-irrigated. Since the right of recapture is considered part of the original water right, it would be allowed under the priority date of the original diversion—provided the recaptured waste water is put to beneficial use on the original parcel (for example to water an area that previously was under-irrigated). Others who may have come to rely on the waste water may not insist that the original appropriator maintain the artificial conditions from which they have benefited.

This is not to say that all seepage and waste water literally "belongs" to the original appropriator in the sense that they may do with it as they like. In fact this right to recapture and reuse is quite limited, particularly in the irrigation context. As discussed below, however, the situation is considerably more flexible tor municipal providers.

Notably, the right to recapture and reuse waste water does not override other principles of water law, such as the rule against enlargement. In *United States v. Haga*, 276 F. 41 (Dist. Idaho 1921), the federal court suggested that the beneficial use of the conserved waste or seepage must occur within the same lands for which the water originally was appropriated.[556] This limitation—that recaptured waste or seepage water may be used only on the original lands—reinforces Idaho's anti-enlargement policy. Allowing a water user to make more complete use of water under his or her water right within the licensed or decreed place of use, and for the licensed or decreed purpose, promotes efficiency and the full beneficial use of water under the right; doing so logically has been seen by Idaho courts as fully within the original right. Obviously, however, the limitation to the original land and purpose of use sharply constrains the right to recapture and reuse. Notably, the farmer is not free to use that recaptured water to bring new lands under cultivation.

This rule against enlargement was articulated again by the Idaho Supreme Court in *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J). It was reinforced a few years later in *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P.3d 78 (2005) (Schroeder, C.J.). In the 2005 opinion, the Court ruled that "A&B may use the [reclaimed waste] water on its original appropriated lots." *A&B*, 141 Idaho at 752, 118 P.3d at 84.[557] But it may not rely "on an unappropriated source, that of

[556] The court referred only to the beneficial uses on the "project" lands, which in that case included a federal irrigation project in the Boise River Basin.

[557] The central dispute in the *A&B* case concerned 2,363 acres the irrigation district was irrigating but which were in excess of the water right's licensed acreage. The district explained that the acres were irrigated with waste water originating from both the district's ground water delivery system and natural runoff, and argued that it should be allowed to do this because it "owned" the waste water. The plaintiffs, who were junior ground water users, asserted that these additional acres were illegal enlargements and that a water right to irrigate them could be recognized, if at all, only under Idaho's amnesty statute, Idaho Code § 42-1426, in which case the right would have to take a subordinated priority tied to the 1994 date the statute was passed.

recaptured drain and/or waste water to irrigate its additional acres." *Id*. The *A&B* Court not only emphasized this point, but went beyond it to state that an excess of waste water obligates the appropriator to diminish its diversion to reduce the waste:

> As the Ground Water Users and the State appropriately note, should A&B find itself in the unique situation of having more excess drain and/or waste water than it can reuse on its appropriated properties, Idaho water law requires the district to diminish its diversion. Reclamation Act of June 17, 1902, ch. 1093, § 8, 32 Stat. 388, 390.

A&B, 141 Idaho at 752, 118 P.3d at 84. [558]

Thus, if recapture and onsite reuse proves so effective that less water is required to accomplish the licensed or decreed beneficial use, the user may be required to reduce his or her diversion accordingly. However, as discussed below, the user typically retains the right to cease the recapture and revert to the prior regime.

The *A&B* Court took an exacting approach in its discussion of recaptured drain or seepage water which again emphasizes that this water cannot serve new lands without a new water right. The irrigation district had contended that the "source" of water to irrigate the extra acres is waste water, and not ground water under the district's original water right (even though the waste water originated primarily from the ground water supply). Although the Idaho Supreme Court ultimately rejected this and agreed with the district court that the source was the district's original ground water source, it did entertain the question of what would happen had it viewed the source as simply "waste water" not originating from the district's licensed diversion. It found that, if that were the case, the water user would be required to obtain a new water right by appropriation of the waste water:

> A&B's additional 2,363.1 acres neither qualifies as an enlargement or for amnesty under I.C. § 42-1426 based upon a finding that the water source is recaptured drain and/or waste water. A&B is not seeking to expand the number of acres it irrigates with original ground water under right no.

This had been the essential ruling in *Fremont-Madison*. Indeed, the amnesty statute itself explains the Legislature's recognition that enlargements arose "through water conservation and other means" that allow more acres to be irrigated with the same diversion. Reducing or recapturing waste water is a classic example of water conservation.

[558] The reference to the Reclamation Act, presumably, is intended to embrace Congress' recognition that beneficial use of water is "the basis, the measure and the limit" of a water right. See discussion in section 4.D at page 44.

> 36-02080. Rather, it relies on an unappropriated source, that of recaptured drain and/or waste water to irrigate its additional acres. This is in violation of the mandatory water permit requirements. Idaho Code § 42-229 (2003). Treating the water as something other than ground water, A&B must seek a new water right for this water source prior to any further use on the 2,363.1 acres.

A&B, 141 Idaho at 751-52, 118 P.3d at 83-84.

In a footnote, the Court held that the waste water did not qualify as "private water" and therefore "appropriation under the mandatory permit scheme is the only method by which this water can now be put to beneficial use." *A&B*, 141 Idaho at 752 n.1, 118 P.3d at 84 n.1. Ultimately, the Court found that the district's source was water diverted under its original ground water right (although recaptured on the surface as seepage or waste), and that the irrigation district therefore did qualify for the amnesty. Accordingly, the district was able to continue irrigating the enlarged acres, but was required to accept the subordination condition on the new water right for them.

Provisions of Idaho's water code other than the amnesty provision discussed above also are consistent with the non-enlargement principle when it comes to an appropriator's collection and use of waste water arising from his irrigation practices. An Idaho statute authorizes the construction of wells by a person owning irrigation works "for the sole purpose of recovering ground water resulting from irrigation under such irrigation works for further use . . . on lands to which the established water rights of the parties constructing the wells are appurtenant." Idaho Code § 42-228.[559] In other words, this statutory pronouncement on the recapture of waste or seepage water expressly restricts the use of the recaptured water to the original place of use—that is, enlargements are not allowed. Likewise, Idaho's transfer statute expressly prohibits enlargements as a result of any transfer. Idaho Code § 42-222(1).

In summary, although the earlier cases authorizing an appropriator's recapture and reuse of waste water[560] did not expressly address the enlargement issue, it now has been addressed, and in clear terms. If additional lands or other uses are to be added to a water right through the recapture of waste water, a new water right will be necessary.

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[559]This statute allows shallow ground water wells to recapture seepage originating from the surface irrigation of a parcel, roughly equivalent to a seepage ditch at the end of a field from which the farmer pumps water back to fully irrigate the parcel.

[560] E.g., *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927); *Application of Boyer,* 73 Idaho 152, 248 P.2d 540 (1952) (Givens, C.J.); *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980).

The author of this section offers this additional commentary. It would seem that the *A&B* decision was unnecessarily preoccupied with an obscure semantical question about the "source" of the water—distinguishing ground water from waste water. The decision got to the right place in the end, essentially saying that it does not matter what you call it. The author suggests that the Court's holding may be articulated as follows:

The original appropriator may recapture and reuse its own waste water (derived from its own water right, recaptured before it reaches the public water supply) if and only if he or she applies the recaptured waste water to lands or uses within the scope of the original right. If someone else (a third party) wishes to capture and use that same waste water after it reaches the public water supply (e.g., in a drain that the third party may legally access), he or she must appropriate that waste water. If the original appropriator wishes to recapture and reuse the same waste water for use outside the ambit of the original right (i.e., on expanded acreage), he or she has two choices: (1) obtain a new, junior appropriation for the new acres or (2) fit under the amnesty statute, if one can, and accept subordination to April 12, 1994 under the amnesty statute (Idaho Code § 42-1426). In A&B's case, the district ended up with the second option.

C. There is no right to compel another appropriator to continue discharging waste water.

There are instances in which a third person may make a new appropriation of waste water generated by another or even by the same user.[561] However, waste water loses its characterization as such when released back to the public water supply. Thereafter, it is subject to appropriation (and available to satisfy prior appropriations) just like any other public water.

In either case, an important caveat is that the appropriator (whether of waste water or of water whose supply is enhanced by waste water) has no guarantee that the waste water will continue to be available. An irrigator "is not bound to maintain conditions giving rise to the waste of water from any particular part of its system for the benefit of individuals who may have been making use of the waste." Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 100 (1968).

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[561] In *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927) (Varian, J.), the Court confirmed the basic right to appropriate waste and seepage water made available as a by-product of the diversions of other appropriators. "We conclude that surface waste and seepage water may be appropriated under the provisions of C. S. § 5562, subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use." *Sebern*, 44 Idaho at 418, 258 P. at 178. (Prior to this decision, there was some thought that appropriations might be limited to water naturally occurring.) See also, *A&B*, 141 Idaho at 752, 118 P.3d at 84 (an appropriation of "recaptured drain and/or waste water" requires compliance with the mandatory permitting requirements).

For instance, the original appropriator who generates the waste water could cease diverting altogether so as to leave the new appropriator without a water source. Likewise, the original appropriator might alter his or her operation to reduce the amount of waste water generated (e.g., by ditch lining). Finally, as noted, the original appropriator may recapture the waste water for use within the scope of his or her water right.

Indeed, in *Sebern*, the waste water appropriator was allowed to re-establish his diversion of waste water after a waste ditch was relocated by another appropriator. The Court added the now-familiar caveat, however, that the waste water appropriation is "subject to the right of the owner [that is, the person generating the waste water] to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use." *Sebern*, 44 Idaho at 418, 258 P. at 178. This is significant given that in a change or transfer application, the prior appropriator is <u>not</u> allowed to make any change (even in good faith) that would injure a junior.

In 1956, the Idaho Supreme Court held that a neighbor could not obtain a waste water appropriation that essentially compelled the original appropriator to continue to discharge waste water:

> It is a rule long recognized that a landowner cannot acquire a prescriptive right to the continued flow of waste or seepage water from the land of another, that is, seepage water or waste water running from one's land to that of another need not be continued and it may be intercepted and taken by such owner at any time and used on the land to which it is appurtenant.

Thompson v. Bingham, 78 Idaho 305, 308, 302 P.2d 948, 949 (1956) (Keeton, J.) (citing cases in Utah and Colorado) ().

In *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980), the Idaho Supreme Court unanimously reaffirmed the principle that an appropriator of waste water may not compel the original diverter to continue the practices leading to the generation of the waste water.

> No appropriator of waste water should be able to compel any other appropriator to continue the waste of water which benefits the former. *Crawford v. Inglin*, 44 Idaho 663, 258 P. 541 (1927). While the waste of the original appropriator is not to be encouraged, the recognition of a right in a third person to enforce the continuation of waste will not result in more efficient uses of water.

Hidden Springs, 101 Idaho at 681, 619 P.2d at 1134.

The *Hidden Springs* Court emphasized that it makes no difference whether the waste water arises before the use (from a leaky canal) or after the use (from post-irrigation tail water, for example). The original appropriator may at any time cease the practice giving rise to the waste water, even to the detriment of those who hold valid water rights in that waste water (subject, of course, to the limitations as to non-enlargement and beneficial use as described in *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 752, 118 P.3d 78, 84 (2005) (Schroeder, C.J.)).

Thus, the original appropriator is free to abandon or modify the activity producing the waste water. For example, an irrigator is free to replace a leaky ditch with a pipeline or otherwise improve the efficiency of his or her application. After the improvement is made, less water is applied to the field and/or less water escapes along the conveyance. As a result, the neighboring hydrology may be affected and water available to serve other water rights could be reduced. Holders of those rights, however, have no legal basis to object to such efficiency improvements by their neighbors.

These legal principles pertaining to waste water have been followed in the Snake River Basin Adjudication ("SRBA"). Special Master Terry Dolan reiterated these principles in *Special Master's Report*, *In re SRBA,* Case No. 39576, Subcases 75-4471 and 75-10475 (Silver Creek Ranch Trust) at 4 and 6-7 (September 28, 2009). Similarly, in *In re: Janicek Properties, LLC, Memorandum Decision and Order on Motion for Summary Judgment, In re SRBA*, District Court of the Fifth Jud. Dist. of the State of Idaho, Subcase No. 63-27475 (May 2, 2008), the Bureau of Reclamation and its contracting irrigation district argued that they constructed a drain and could trace most or even all of the water in it to seepage and return flows from the district's irrigated lands. They contended that the drain was not a natural watercourse and that they should be deemed the owner of the drain and the water in it. Based on this reasoning, they asked the adjudication court to invalidate a farmer's 1951-priority licensed water right pursuant to which he pumped water from the drain to irrigate his crops. The Special Master rejected this challenge to the farmer's drain water right, ruling that, regardless of who constructs a drain, the water in it is "public water of the state of Idaho and subject to appropriation and beneficial use." *Janicek Properties*, slip op. at 6. The SRBA Court found that whether the drain is a natural watercourse "is immaterial—what matters is that the water is water of the state" and is subject to appropriation. *Id.* at 8.

Once water is released by the original appropriator and is beyond his or her control (whether that be to an artificial conveyance such as a drain or to a natural stream or aquifer), it becomes public water once again and subject to appropriation. Referring to such a source as "waste water" undoubtedly has led to some confusion over the years. Other than the caveat discussed above (that the new appropriator cannot complain if the waste water is no longer supplied), there is little to be gained in attempting to distinguish it from water occurring naturally. Even a constructed drain at times will carry natural runoff. Similarly, natural stream flows in agricultural areas nearly always contain some

measure of return flow and seepage, either those flowing to the stream as surface returns or those arriving through ground water discharge. The essential rule is simply that public waters are subject to appropriation regardless of their origin or whether they are found in drains or similar structures.

D. Reuse of municipal effluent.

The principles of recapture and reuse that were developed in the context of irrigation apply as well in the context of municipal wastewater. In short, a city may recapture and reuse effluent from its sewage treatment plant before it is released to a public water body. Likewise, irrigators or others who had come to rely on the prior discharge of that wastewater cannot complain when the city recaptures and reuses it.

Although the same general principles apply, there are important practical differences when it comes to municipal wastewater. Under Idaho law, municipal water rights are different from others in two important respects.

First, they do not have a fixed place of use. Instead, a municipal service area grows over time as does demand. Idaho Code § 42-202B(9). (See discussion in section 23.D(6) at page 404.) This moots the constraint applicable to irrigators and industrial users limiting the reuse to the original place of use (at least, without a transfer or a new appropriation). "This rule [limiting reuse to the original irrigated land] was changed for municipalities, without an adjustment period for those who had relied on the return flow, when the courts allowed municipalities to start consuming their sewage effluent through disposal methods that no longer sent it back to the stream as return flow." Robert E. Beck, *Municipal Water Priorities/Preferences in Times of Scarcity: The Impact of Urban Demand on Natural Resource Industries*, 56 Rocky Mtn. Min. L. Inst. § 7.02[4] (2010).

Second, municipal use encompasses a broad range of uses from low consumptive domestic uses to high consumptive uses by industries served by the municipal provider. This mix may change over time. Accordingly, the Department deems municipal water rights to be potentially 100 percent consumptive.[562] As a result, cities may recapture wastewater and reuse it for other municipal uses (such as watering parks, golf courses, or lawns) and such use is not deemed to be an enlargement.

While Idaho courts have not yet had occasion to address the issue, other state courts have consistently upheld the right of municipal providers to recapture and reuse

[562] *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) p. 31 (revised Dec. 21, 2009) (superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)). This section of IDWR's guidance addresses the disposal of dairy, industrial, and municipal wastewater. It notes that "the use of water [for such purposes] is considered fully consumptive."

municipal effluent and even, in some cases, to sell it to others.[563] The only limitation seems to be that the recapture occur before the water reaches a public water body.[564] These principles have been confirmed in informal guidance from the Idaho Department of Water Resources.[565]

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[563] In addition, at least five states have adopted statutes regulating, facilitating, and encouraging the reuse of municipal effluent. Or. Rev. Stat. §§ 537.131, 537.132, 540.510; Cal. Water Code §§ 13551-13556; Nev. Rev. Stat. Ann. § 533.024; Wash. Rev. Code §§ 90.44.062 to 140; Utah Code Ann. §§ 73-3c-1 to 73-3c-8.

[564] Perhaps a city could engage in an aquifer storage and recovery project employing treated effluent. Doing so would require affirmative steps to measure and control the stored water, as well as the acquisition of corresponding water rights and/or approval of a mitigation plan. See discussion in section 22.C at page 372.

[565] "You confirmed my understanding that a city may recapture and reuse its municipal effluent and apply it to other municipal uses within its growing service area, and that doing so does not cause legal injury to other water uses. You also confirmed that, if required to meet environmental regulations, treatment utilizing an infiltration basin would be viewed as being within the existing municipal use. You also confirmed that the uses could be modified over time. For example, as conditions change and demand grows, the City could put less water into treatment of effluent by infiltration and use some or all of the effluent to serve new customers (e.g., for lawn or open space irrigation). Finally, you confirmed that these uses would not require a transfer—assuming that the reuse of the effluent was required in order to satisfy environmental requirements." Letter from Christopher H. Meyer to Garrick L. Baxter and Jeff Peppersack (May 24, 2011) and response from Garrick L. Baxter (May 26, 2011) (edits from reply are reflected in quotation).

"This responds to your letter of August 18, 2011 requesting confirmation that the City of McCall ("City") has authority to land apply its municipal effluent to lands located beyond the city limits but within the City's service area. I have reviewed your letter with the staff of the Idaho Department of Water Resources ("IDWR") and am able to confirm that on the issue of whether municipal reuse of waste water comes within the original use of the municipal right, your analysis is consistent with current IDWR policy. Waste water treatment necessary to meet adopted state water quality requirements is considered by IDWR as part of the use authorized under a municipal right so long as the treatment process complies with the 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. For new uses of municipal wastewater that are not necessary to meet water quality requirements, an application for permit to appropriate water should be files as required by Idaho Code § 42-202." Letter from Garrick L. Baxter to Christopher H. Meyer (Sept. 7, 2011). The September 7, 2011 letter went on to say that, under the 1996 Municipal Water Rights Act, the land application could occur outside the boundaries of the city so long as "the constructed water delivery system for the area outside the city limits shares a common water distribution system with lands located within the corporate limits." The city limits issue, however, is mooted by S.B. 608 (Idaho Code § 42-201(8)) enacted in 2012.

A city's right to recapture and reuse municipal effluent was recognized in *Reynolds v. City of Roswell*, 654 P.2d 537 (N.M. 1982). This case dealt with a water system on the former Walker Air Force Base, all of which had been acquired by the city. The city filed an application to add additional points of diversion and change the place of use, the effect of which would be to integrate the original air force water right into the city's municipal system. Prior to the application, the city (and the Air Force before that) sold some of the sewage effluent associated with the air base to farmers and to a golf course and discharged the rest into the Hondo River. The State Engineer approved the change application but added a condition requiring the city to continue to discharge into the river at the same ratio as under prior practice. "The State Engineer's conditions required that the city either continue selling treated effluent to the farmers east of the City and to the Roswell Country Club or to continue discharging treated effluent directly into the Hondo River." *City of Roswell*, 654 P.2d at 538. The city challenged the condition, contending that it should be allowed to recapture and reuse the effluent in its municipal system if and when it saw fit. The Wyoming Supreme Court sided with the city. It affirmed the district court's ruling that "[t]he City of Roswell's sewage effluent is private water which the City may use or dispose of as it wishes." *City of Roswell*, 654 P.2d at 538.

The court limited its ruling, however, noting that the recapture must occur before the city loses control of the effluent:

> The City readily acknowledges, and we agree, that once the effluent actually reaches a water course or underground reservoir [i.e., an aquifer], the City has lost control over the water and cannot recapture it. That is what the courts state in the cases relied upon by the State Engineer. *See Brantley v. Carlsbad Irr. Dist.*, 92 N.M. 280, 587 P.2d 427 (1978); *Kelley v. Carlsbad Irrigation District*, 76 N.M. 466, 415 P.2d 849 (1966); *State v. King*, 63 N.M. 425, 321 P.2d 200 (1958); *Rio Grande Reservoir and Ditch Co. v. Wagon Wheel Gap Improvement Co.*, 68 Colo. 437, 191 P. 129 (1920).
> We stress that the specific legal issues on appeal in this case do not concern the recapture of water which has escaped into and have become commingled with the natural public waters, whether surface or underground. The issue here is whether Roswell may take the sewage effluent before it is discharged as waste or drainage water and reuse it for municipal purposes.

Reynolds, 654 P.2d at 540-41.

In reaching its decision, the *Reynolds* Court quoted at length from a 1925 decision by the Wyoming Supreme Court directly addressing the right of a city to reuse its wastewater to extinction:

> It is not strange that we are unable to find any cases considering the right of a city to dispose of its unpurified sewage for irrigation purposes. Most of the controversies with respect to sewage that have gotten into the courts concern the rights of those who claim that in disposing of its sewage the city is guilty of maintaining a nuisance. In this case both the plaintiff and defendant are satisfied, for the present at least, and in fact insist, that the city discharge its sewage in such a way and at such place as will permit them to use it. It is well known that the disposition of sewage is one of the important problems that embarrass municipalities. In order to dispose of it without injury to others, a city may often be confronted with the necessity of choosing between several different plans, and in the selection of the plan to be followed we think it should be permitted to exercise a wide discretion. In determining how it will make a proper disposition of that which may be termed a potential nuisance, we think the city should not be hampered by a rule that would always require the sewage to be treated as waste or surplus waters. Sewage is something which the city has on its hands, and which must be disposed of in such a way that it will not cause damage to others. It would often be considered the height of efficiency if it could be disposed of in some other manner than by discharging it into a stream. Even in this state, where the conservation of water for irrigation is so important, we would not care to hold that in disposing of sewage the city could not adopt some means that would completely consume it.

Wyoming Hereford Ranch v. Hammond Packing Co., 236 P. 764, 772 (Wyo. 1925) (emphasis added). This 1925 decision continues to be cited and quoted for its bedrock principles.

In *Wyoming Hereford*, the City of Cheyenne contracted with a packing company for the disposal of the city's sewage effluent, which had previously been discharged into a creek. Under the contract it was delivered to the packing company "in such a way and at such place as will permit [the packing company] to use it." *Wyoming Hereford*, 236 P. at 772. The court ruled that whether this was permissible depended on whether the sewage effluent was delivered directly to the new use or via a public stream. There were two sewage lines in this case. Under the contract, one of them (the sanitary sewer east of Lake Minnehaha) delivered water straight to a ditch on land owned by the packing

company. The other (the sanitary truck line) discharged into Crow Creek where it flows across the lands of the packing company. The court upheld the city's right to recapture and convey to the packing company with respect to the first but not with respect to the second. Once the water "becomes commingled with the waters of the stream" it is no longer the city's to recapture. *Wyoming Hereford*, 236 P. at 773. This limitation on the right to recapture is consistent with that in *Reynolds*, discussed above, and *City of San Marcos v. Texas Comm'n on Envtl. Quality*, 128 S.W.3d (Texas Ct. App. 2004), discussed below. Where water is delivered straight to the new use, the court perceived no problem:

> It might, we think, be diverted to waste places, or to any chosen place where it would not become a nuisance, without any consideration of the demands of water users who might be benefited by its disposition in some other manner. In providing such a place, the city might acquire the right to discharge the sewage on the lands of any person willing to suffer such a use of his lands, and we see no reason why this right might not be gained by the city in consideration of the landowner's right to use or dispose of the sewage in any lawful way. From these views with reference to the city's rights, it follows that the sewage deposited from the so-called "sewer east of Lake Minnehaha" should not be considered as a part of the public waters of the state subject to the rights of the appropriators from Crow creek. It is our opinion, therefore, that the plaintiff, as an appropriator of waters of Crow creek, has no right to question the contract between the city and the defendant in so far as it provided for the discharge and use of sewage from the sewer line last mentioned.

Wyoming Hereford, 236 P. at 772-73.

This Wyoming case, in turn, was relied on by the Arizona Supreme Court in reaching a similar conclusion confirming the right to recapture municipal effluent in that state. *Arizona Public Service Co. v. Long*, 773 P.2d 988 (Ariz. 1989).[566] In the Arizona case, holders of junior downstream irrigation rights had come to rely on effluent discharged by Phoenix and other cities. They sued to stop the cities from selling that effluent to a utility that would use it for cooling water at a nuclear power plant. The Arizona Supreme Court upheld the cities' right to do so, holding that they could put their

[566] This important case is discussed in Ginette Chapman, Note, *From Toilet to Tap: The Growing Use of Reclaimed Water and the Legal System's Response*, 47 Ariz. L. Rev. 773 (2005), and 2 Robert E. Beck, *Waters and Water Rights* § 13.04 (2000).

sewage effluent to any reasonable use that would allow them to maximize its use and its economic value. The Arizona Court of Appeals confirmed these principles in *Arizona Water Co. v. City of Bisbee*, 836 P.2d 389 (Ariz. Ct. App. 1991), a case involving a city's sale of effluent to Phelps Dodge for use in copper leaching operations.[567]

In *Barrack v. City of Lafayette*, 829 P.2d 424 (Colo. Ct. App. 1992), the Colorado Court of Appeals released the City of Lafayette from liability for no longer providing effluent water under a contract with plaintiffs when environmental regulations made that delivery illegal. In so ruling, the court ruled that plaintiffs' procedural due process was not violated because they had no property interest in the effluent.

In *City of San Marcos v. Texas Comm'n on Envtl. Quality*, 128 S.W.3d (Texas Ct. App. 2004), the Texas Court of Appeals found that the City of San Marcos did not have the right to recapture its wastewater effluent in a river three miles downstream of the sewage treatment plant. The city sought to recapture the water, treat it, pipe it back to the city, and add it to its municipal supply. The purpose of leaving it in the river for so long was to allow the effluent to be diluted with cleaner river water, thus reducing the cost of treatment after recapture. In rejecting the plan, the court concluded that the character of the water changed once the city released it to the river, whereupon it became public water. "By intentionally discharging its effluent into the river, where it eventually commingles with the State's water, the City effectively abandons its control over the identifying characteristics of its property. This physical reality suggests that the City is voluntarily and intentionally abandoning its ownership rights over the effluent." *San Marcos*, 128 S.W.3d at 277. By clear implication, however, the city would have been allowed to recapture and reuse its wastewater if it had done so before returning it to the river. Indeed, as the court noted, that was exactly what the city's opponents said: "If the City wants to reuse its wastewater, it should use it directly rather than unnecessarily mixing it with the pure river water." *San Marcos*, 128 S.W.3d at 267.[568]

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[567] The *Arizona Public Service* Court rejected the reasoning found in an early Colorado "en decision in which two justices dissented and one did not participate." *Arizona Public Service*, 773 P.2d at 993. The case was *Pulaski Irrigation Co. v. City of Trinidad*, 203 P. 681 (Colo. 1922). *Pulaski* held that the City of Trinidad was required to return its purified waste water to the stream, unless the cost of purification was too high. "Thus, *Pulaski* appears to state that water may be reused or otherwise disposed of but only if it is uneconomical to return it to the common supply." James W. Johnson, et al., *Reuse of Water: Policy Conflicts and New Directions*, 38 Rocky Mtn. Min. L. Inst. § 23 (1992).

[568] Texas, by the way, is the only western state that applies a rule of capture (rather than the prior appropriation doctrine) to ground water. (The City's water supply, and hence its effluent, was based entirely on ground water.) The court discussed the rule of capture at some length, but it does not seem that the outcome would be any different had the prior appropriation doctrine applied instead.

In *City of Aurora v. N. Colorado Water Conservancy Dist.*, 236 P.3d 1222 (Colo. 2010), the Court examined a contract for reuse of wastewater between the Conservancy District and the City of Aurora. The Court focused on the contract details without questioning the right of a municipal water provider to enter into a contract authorizing the city to reuse water collected in the city's sewer system.

E. Land application of municipal or industrial wastewater

(1) IDEQ permit

Certain land applications of effluent require a permit from the Idaho Department of Environmental Quality, pursuant to the Department's Recycled Water Rules (formerly Wastewater—Land Application Rules) at IDAPA 58.01.17. A discussion of these permitting requirements is beyond the scope of this Handbook.

(2) Background

In recent years "land application" of waste water has become increasingly common. This refers to the disposal of wastewater from industrial processes or municipal sewage effluent by applying it to land to irrigate crops or grasses. Typically, the untreated waste water is applied directly to crops (with little or no pre-treatment), though it is often mixed with clean (or at least irrigation-quality) water to dilute it.[569] The basic goal is to use natural processes to eliminate pollutants in the waste water and, at least to a large degree, consume the water. At the risk of oversimplification, the pollutants in the industrial or municipal wastewater (such as phosphorus or other nutrients) are broken down and/or taken up by the plants and thereby kept out of soils and water. In some cases, valuable crops are produced. In other cases, the application irrigates grasses or other plants of little or no economic value, which are mowed and discarded.[570]

The law on this subject is premised in large part on the general principles of recapture and reuse discussed above. In addition, IDWR has issued specific guidance on the subject of land application. Nearly all of it, however, is in the context of land application of industrial wastewater. Two guidance documents were issued by the Department in 1996. Phil Rassier, Chief Counsel, *IDWR Memorandum: Land Application of Industrial Effluent* (Sept. 5, 1996); Norm Young, IDWR Guidance, *Application Processing No. 61* (Sept. 27, 1996). (These are reproduced in Appendix N.)

[569] In one project (now proposed in Gooding County) waste water would be treated, before irrigation, to remove all pollutants. Biosolids removed from the treated waste water would be metered back in to the clean water before being applied to crops. This technologically sophisticated approach is very different from the typical land application project.

[570] In some cases, crops or cut grasses may be removed from the immediate watershed to prevent their up-taken nutrients from entering the water system.

This guidance has be updated and modified to some extent by a broader guidance document, IDWR Guidance, *Transfer Processing No. 24 – "Transfer Processing Policies & Procedures"* (revised Dec. 21, 2009) (superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)). Note footnote 1 on page 3 of of the 2009 version of *Transfer Proceeding No. 24*, which expressly overrides certain guidance in *Application Processing No. 61*.

This raises the question whether the discharger must obtain a new water right or a change in water right to apply the waste water to the land. In other words, should the land application be viewed simply as part of the original industrial or municipal water right (requiring no transfer)? Or should the land application be viewed as a new beneficial use that requires a new water right or a change in the original industrial water right? Likewise, will a change in place of use be required? Will a new water right be required for the water used to dilute the waste water?

The answers to the last two questions are not difficult. First, if the land application falls outside the originally described place of use, then a change in place of use will be required. Second, a water right for the make-up water (i.e., water used to dilute the effluent before land application) will be required, just like any other use of water. The original industrial water right could serve this purpose, if the land application is close enough to be physically supplied by it, and the additional quantity is available under the right. Or it might be obtained from another source (e.g., a new appropriation or a transfer of an irrigation water right).

The trickier question is whether the land application use falls within the original place of use authorized for the water right. According to the Department's 1996 guidance, the answer depends on whether the land application is "mandated" by environmental requirements, or is being undertaken for the independent purpose of producing crops. This is discussed in more detail below.

(3) Required land treatment

Let us suppose that an existing industrial facility with an existing industrial water right decides to switch its disposal strategy to land application. IDWR has announced that land application of wastewater by the industrial facility will be considered part of the industrial use (hence a beneficial use) if it is mandated by environmental requirements and is consistent with best management practices established by the State.

This discussion assumes that the owner of the industrial water right is authorized to consume 100 percent of the water. If that is not the case (that is, if the owner is obligated to return a certain portion of the water diverted to a natural source as return flow), then none of the discussion below applies.

This discussion also assumes that the water user does not relinquish physical control over the water resource in accomplishing the land application. In other words, the wastewater from the industrial use should be delivered directly (e.g., through a pipe) to the industrial use. If the wastewater is allowed to reenter the public domain, there is a strong argument that it is no longer part of the original water use. In this case, it could be recaptured, via a separate water right with a junior priority.

If the land use application involves the cultivation of crops or any other new beneficial use, a change in nature of use (and presumably place of use) must be sought by the water right holder and approved by IDWR. (If the original use was municipal use, no change would be needed, because such uses fall within the included "related purposes" in the definition of municipal uses.) If the land application does not entail the cultivation of crops or otherwise produce value, the land application will be deemed part of the original industrial purpose.[571] Even so, the land application may require approval by the Department of a change in place of use, if the land application does not occur on the industrial site. Thus, the requirement of a change application may be avoided only where the new treatment method is within the original place of use and entails no new beneficial use.

The Department's guidance states that consumptive use can increase up to the amount determined to be consistent with the original water right, but diversion rate, annual volume diverted, and period of use cannot change. Thus, if the industrial user initially had the right to use and reuse the water to exhaustion, but was not actually doing so, the user may switch to land application. If, on the other hand, the original water right was expressly or implicitly restricted to its prior consumptive use, then it cannot be changed to expand the consumptive use; in this case a new water right must be obtained for the land application.

(4) Optional land treatment

The discussion above was premised on the assumption that land application (or some other form of treatment) is required to meet environmental regulations (and, therefore, is "part of" the industrial process). Suppose, on the other hand, that land application is not required to meet water quality requirements, but is merely convenient or economical. In this case, the Department has said it will view the cultivation as a separate use, requiring a separate appropriation of water.

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[571] In many instances, even though there is income from the sale of crops, the overall farming operation may be unprofitable or negligibly profitable. In other words, the economic purpose of the operation is not to make money farming, but to dispose of the contaminants. The Department's guidance does not address whether such minimal, incidental economic benefit would be treated as creating a "new beneficial use." Until the situation is clarified, however, it is safer to assume that the Department will treat this as a change in use.

Although the Administrator's Memorandum does not address this, the new water right presumably could be obtained by filing for a junior "waste water" right at the point of discharge from the industrial facility.

(5) Mixing water

If additional fresh water is required to dilute the waste water, the fresh water must be obtained pursuant to a water right. If the existing industrial right allows additional pumping (without exceeding the right's established rate and volume), it may be used for this purpose. Otherwise, the operator will have to obtain another water right by appropriation or transfer for this purpose.

(6) Land application where land has existing water right

The 2009 version of Transfer Processing Memorandum No. 24 includes new provisions reflecting a more liberal approach to land application by the Department. Specifically, it provides (in several places) that no transfer application 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 a full existing water right for irrigation of the place of use receiving wastewater." *Transfer Processing Memo No. 24* § 2 at page 7 (superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)).

(7) Where industrial user relies on municipal water

The Administrator's 1996 Memorandum is based on the assumption that the industrial user holds its own industrial water right. The Memorandum then addressed the issue of when the land application could be viewed as "part of" the original industrial right.

The memorandum does not address the situation where the industrial user purchases water from a municipal provider. (In this case, the municipal provider is the water right holder.) In this circumstance, can the land application be viewed as "part of" the municipal right?

Municipal purposes are broadly defined in Idaho.[572] On the other hand, municipal uses do not ordinarily include crop irrigation. Does that mean they cannot be part of a municipal right, where the economics allow municipal water to be used for crop irrigation?

[572] Idaho Code § 42-202B(6) (definition of "municipal purposes"). This broad statutory definition is consistent with case law across the West.

A strong argument can be made that any beneficial use made by a customer of a legitimate municipal provider, with the approval of the provider, is a municipal use. Under this theory, it should not matter whether the land application were "required" or "optional." Moreover, under this theory, there would be no need to obtain a change in place of use (assuming the new land application use physically occurred within the municipal provider's broadly described service area).

On the other hand, the industrial user may choose to file for a new appropriation in its own name.[573] This would eliminate any uncertainty regarding use of the right for irrigation purposes, and create a valuable property right and asset.

(8) Land application of municipal effluent by cities pursuant to water rights

In 2012, the Idaho Legislature amended the water code to allow land application and other disposal undertaken pursuant to environmental requirements to occur without a water right. That is discussed in section 19.F at page 349. This section addresses the law prior to that amendment. This section is also applicable to the extent that the municipality or similar entity elects to undertake land application pursuant to a water right (in order to protect the right) or where Idaho Code § 42-201(8) is for some reason not applicable.

Very few cases, and none in Idaho, deal with land application of municipal effluent. (One that does, from Wyoming, is the *Wyoming Hereford* case discussed above.) Likewise, the guidance discussed above is focused on land application by industrial users. The 1996 guidance is expressly limited to land application of industrial wastewater. The 2009 *Transfer Memo* mentions municipal effluent only in one place:

> Disposal of Waste Water. An application for transfer filed to provide for the disposal of wastewater, by land application, 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

[573] A waste water appropriation will not be allowed, if there is no release of control of the water back into the natural environment. However, the industrial user may obtain a new water right that piggy-backs the original municipal right and adds an additional use (but with a junior priority).

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> the 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.

Transfer Processing Policies & Procedures (Transfer Processing No. 24) § 5d(9) at page 31 (revised Dec. 21, 2009) (superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)). This confirms that, because municipal uses are 100 percent consumptive, land application does not constitute an illegal enlargement of the water right. However, the statement is in the context of a discussion of transfer applications. This raises the question of whether a transfer is required at all.

Arguably, no transfer should be required for land application of municipal effluent, so long as the land application is within the municipal service area and so long as the land application is deemed part of the municipal use. Moreover, the requirement in paragraph 3 on page 3 of the 1996 Rassier memorandum (saying that a transfer is required for land application on cultivated fields) has been overridden by the 2009 version of Transfer Processing Memorandum No. 24 (superseded by James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024)), which provides that no transfer is required if the land application occurs on lands that were previously cultivated under another water right. In other words, so long as no new land is brought under cultivation, it us unnecessary to determine whether the land application falls within the previously authorized municipal uses.

Another complication for land application of municipal effluent is that, unlike industrial effluent, it cannot be assumed that all of the water physically derives from the original diversion. Municipal effluent may contain other sources of water, such as storm water or water from domestic wells with their own water rights. The situation is further complicated if the municipality or sewer district operating the sewage collection system was not itself the supplier of municipal water. In such a case, it may be appropriate to think about this as entailing an appropriation of water or, in the case of recapture of water from domestic wells, an appropriation of waste water.

Such has occurred in the past. Phil Rassier's 1996 legal memorandum notes the precedent of issuing "waste water permits" (Nos. 29-7431 and 29-7437) to the City of Pocatello and the J.R. Simplot Company, respectively, in connection with land application of the city's effluent. Phil Rassier, Chief Counsel, *IDWR Memorandum: Land Application of Industrial Effluent* at page 3 (Sept. 5, 1996). This would appear, however, to predate the Department's current thinking that the land application use may be viewed as a part of the original right.

F. 2012 statute (H.B. 608): A separate water right or transfer not required where wastewater is reused or disposed of in order to comply with environmental requirements.

In 2012, the Idaho Legislature enacted H.B. 608, 2012 Idaho Sess. Laws, ch. 218 (codified at Idaho Code §§ 42-201(8), 42-221(P)). The legislation was prompted by concerns of the City of McCall (which sought the legislation) that its land application of effluent might require a new water right. In communications with the Department, the City determined that no new water right (or change in its municipal water rights) was required to land apply effluent derived from its own municipal water rights outside of the city limits. The problem was that the City's sewage treatment plant was treating both the City's own wastewater and sewage from collected by a nearby sewage district serving unincorporated areas.

In order to resolve uncertainty with respect to the need for a water right to land apply the sewage from the sewage district, the City worked with IDWR and the Idaho Water Users Association to develop legislation clarifying that no water right is required when a governmental entity engages in land application or other measures to dispose of effluent pursuant to environmental regulatory requirements.

The legislation provides:

> Notwithstanding the provisions of subsection (2) of this section [which requires a water right for all diversions], a municipality or municipal provider as defined in section 42-202B, Idaho Code, a sewer district as defined in section 42-3202, Idaho Code, or a regional public entity operating a publicly owned treatment works shall not be required to obtain a water right for the collection, treatment, storage or disposal of effluent from a publicly owned treatment works or other system for the collection of sewage or stormwater where such collection, treatment, storage or disposal, including land application, is employed in response to state or federal regulatory requirements. If land application is to take place on lands not identified as a place of use for an existing irrigation water right, the municipal provider or sewer district shall provide the department of water resources with notice describing the location of the land application, or any change therein, prior to land application taking place. The notice shall be upon forms furnished by the department of water resources and shall provide all required information.

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Idaho Code § 42-202(8).[574] Idaho Code § 42-221(P) sets the fee for filing a notice of land application.[575]

This section is contained in the same part of the water code that exempts certain other uses from the requirement to obtain a water right. (For example, a water right is not required to fight an existing fire. Idaho Code § 42-201(3)(a).) The basic premise is that if a municipality, sewer district, or similar entity is engaged in land application or some other treatment or disposal strategy in order to comply with environmental regulations, the entity is not required to obtain a water right. This is analogous to fighting a fire. (It is something they must do, not something they wish to do.) This legislation makes clear that no water right is required, even if some beneficial use (such as growing crops) is entailed. The legislation also makes clear that if a municipality stops directing its effluent to a stream and instead directs it to a land application or other treatment or disposal use, water users downstream who had come to rely on that effluent have no legal complaint.

This legislation does not preclude a municipality from obtaining a water right for its land application or other use. It simply says that it is not required to obtain a right. As a practical matter, there is not likely to be any consequence to not having a water right. Without a water right, the municipality may not "call" for the water to be delivered to its land application. But that is probably the least of the city's concerns. The practical fact is that the sewage effluent will be there.

For reasons discussed above, this legislation is not necessary for a city that is land applying water traceable to its own municipal water rights and connected via a common water distribution system. Cities have the right to use and reuse their water rights to extinction. However, the legislation would make a difference in the following situations:

(1) Sometimes the entity undertaking the land application does not have a municipal water right. For example, a sewer district typically does not provide municipal water. Likewise, some cities (such as McCall) land apply treated sewage that is collected from outside the city's municipal water service area and thus cannot be traced to a municipal water right. In other situations (such as the City of Boise), a city may provide wastewater treatment, but is not in the business of providing municipal water.

[574] This legislation was recommended for passage unanimously by both germane committees, and adopted by unanimous vote in both the House and Senate.

[575] The Idaho Department of Water Resources sought and obtained language requiring the municipality to notify it of land application. This way, the Department is able to reconcile satellite imagery showing irrigation with information about municipal land application not undertaken pursuant to a water right.

(2) Sometimes the land application occurs at a location outside the city limits that is not physically plumbed to the city's municipal water treatment system. For example, it may rely on delivery via an irrigation district's canal system. There is uncertainty as to whether this is covered by the "service area" description in the 1996 Municipal Water Rights Act.

Although the legislation was drafted to address a question involving land application of effluent, the statute's language was broadly crafted to encompass the "collection, treatment, storage or disposal [of effluent], including land application." In 2021, the Department ruled on a petition for a declaratory ruling addressing whether H.B. 608's language means that neither the City of Nampa nor Pioneer Irrigation District is required to obtain a new water right in connection with a reuse project approved by IDEQ that entails the delivery of the city's treated wastewater to a canal operated by the irrigation district.

20. MORATORIUMS

The Department is authorized to suspend processing of permits and applications for new water rights upon a determination that such action is necessary to protect existing water rights, including the state's minimum stream flow rights.[576] From time to time since 1989 the Department has acted under this authority to impose moratoriums on the appropriation of new water rights.[577] Some of these orders remain in effect, substantially restricting new appropriations in significant portions of the state.

The discussion in this chapter traces the history of the 1992 Moratorium Order originally covering the entire Snake Plain Basin. (Appendix K contains a detailed summary of these moratoriums as well as copies of the orders and other documents.) 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. Key moratoriums, and a summary chart, are set out under Appendix K. Some, but not all of the Department's moratorium orders are listed on the Department's web site (www.idwr.idaho.gov).

Although the statute authorizes the Department to halt processing of both new applications and permits, the Department has never suspended the processing of issued permits. Instead, the moratoriums have been limited to the processing of applications for permit. Holders of existing permits, licenses, and beneficial use rights are unaffected. Likewise, transfers of existing rights are unaffected.

These moratoriums apply within defined geographic areas based on hydrological boundaries. They are based on a determination by the Director that the area is fully appropriated and that any new water rights are likely to impair other uses and interfere with the administration of water rights generally.

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[576] Idaho Code § 42-1805(7); IDAPA 37.03.08.055. The Department's practice is to issue moratoriums by way of order, without public hearing or comment.

[577] In 1980, the Department issued a memorandum expressing its view that there is no surface water available for appropriation during the irrigation on the Boise River upstream of Lucky Peak Reservoir. See Appendix K. That memorandum remains in effect as an expression of the Department's viewpoint. However, it does not have operative effect as a moratorium order. In other words, an application for a new appropriation could still be filed and processed, but the applicant should be aware of the Department's predisposition regarding the unavailability of additional water for appropriation.

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Due to an extended drought beginning in 1986, the Director issued the first large-scale moratorium in 1992.[578] It prohibited the issuance of new permits for consumptive use of both ground and surface water in the Snake River basin upstream from Weiser, Idaho, covering a large portion of southern Idaho.

The moratorium was amended on January 6, 1993 to eliminate the "non-trust water area" (an area in the southeast of Idaho, mostly outside of the ESPA in the vicinity of American Falls Reservoir, where ground water is tributary above the Milner Dam).[579] The non-trust water area was then made subject to a separate five-year moratorium, [580] which has since expired.[581]

The 1992 moratorium was amended again on April 30, 1993, limiting its applicability to the Boise River Drainage Area and the Eastern Snake Plain Area (still, very substantial areas).[582] The Eastern Snake Plain Area is defined as the trust water area on the Snake River upstream of the King Hill gage.

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[578] *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* (IDWR Moratorium Order, May 15, 1992). (See Appendix K.) Two previous orders, affecting the Big Lost River drainage and the Mud Lake area, issued in 1989 and 1990 respectively, were subsumed within this order.

[579] *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* (IDWR Moratorium Order, Jan. 6, 1993) (the first of two moratorium orders issued on this day). (See Appendix K.)

[580] *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* (IDWR Moratorium Order, Jan. 6, 1993) (the second of two moratorium orders issued on this day). (See Appendix K.)

[581] "This moratorium shall be in effect on and after its entry and shall remain in effect until December 31, 1997." Order at ¶ 1. However, paragraph 9 of the Order contemplated that the Director would issue an order affirmatively ending the moratorium, which action never occurred. For some time after 1997, an internal debate occurred within the Department as to whether the moratorium remained in effect and at least one order recognized its continuing effect. More recently, the Department has concluded that the moratorium has indeed expired. Despite the expiration, however, the Department views the non-trust water area as fully appropriated (with the exception of occasional spills over Milner dam) and is unlikely to approve new appropriation applications in the non-trust water area. *Conversation between Shelley Keen (Manager, Water Right Permits Section) and Christopher H. Meyer* (May 18, 2009).

[582] *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* (IDWR Moratorium Order, Apr. 30, 1993). (See Appendix K.)

In 1994, the Legislature adopted a statute preventing the Director from removing that portion of the April 1993 amended moratorium applicable to the Eastern Snake Plain Aquifer prior to December 31, 1997.[583] That prohibition has now expired, but the moratorium remains in effect.

The moratorium was modified again in 1995 to largely exempt the Boise River drainage area.[584] Shortly thereafter, however, the Department issued an "Administrator's Memorandum" which effectively re-imposed the moratorium on an informal basis, but only with respect to the Lower Boise River Basin below Lucky Peak Dam.[585]

In recognition of the fact that small domestic water users are exempt from statutory permit requirements, these moratoriums exempt such uses from their coverage.[586] The current moratoriums also authorize the Director to make special exceptions based on the public interest or a determination that the particular appropriation will have no effect on other users.

Moratoriums are issued on a summary basis.[587] That is, the Director does not engage in a public hearing or contested case process before issuing the moratorium. However, a moratorium may be challenged after issuance.[588] To date, no one has challenged either the Director's authority to issue moratoriums or the propriety of any specific moratorium.

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[583] 1994 Idaho Sess. Laws. ch. 449, § 1 (formerly codified at Idaho Code § 42-1806). (See Appendix K.)

[584] *In the Matter of Applications for Permits for the Diversion and Use of Surface and Ground Water Within the Boise River Drainage Area* (IDWR Moratorium Order, May 3, 1995). (See Appendix K.) Despite lifting the moratorium, the order imposed restrictions on the processing of new surface water applications for diversions from the Boise River upstream of the Star Bridge, unless mitigated to avoid injury. However, the effect was simply to limit new appropriations to flood water, which would be the case anyway. Thus, the practical effect was to eliminate the moratorium as to the Boise River Drainage Area.

[585] Norman C. Young, IDWR Guidance, *Application Processing No. 59* (June 20, 1996). (Reproduced in Appendix K.)

[586] The moratorium does not reference the definition of domestic uses in section 42-111 (or any other definition). Thus, it is not clear whether or not the use of the term "domestic" in those moratoriums is intended to pick up the nuances under the statute discussed in section 7.F at page 108.

[587] IDAPA 37.03.08.055.01.b.

[588] IDAPA 37.03.08.055.01.c.

21. THE "TWO RIVERS" CONCEPT ON IDAHO'S SNAKE RIVER

A. Separate administration generally

Ordinarily, water sources that are hydraulically interconnected are administered as a single source. For example, a river and its upstream tributaries are ordinarily treated as a single source, even though diversions from that river may be separated by tens or hundreds miles. Likewise, surface water and tributary ground water are administered conjunctively as a single source. However, in rare instances two tributaries (or even different parts of the same river) may be administered separately, as if they were two unrelated bodies of water.

This may come about through the institutionalization of historical practices and understandings that may not reflect hydrologic reality—or may reflect only some of it (such as the facts concerning surface water flows, but not ground water). In some instances, separate administration simply institutionalizes a "futile call" practical reality. An example would be where it has been shown that closing headgates on an upstream tributary will not deliver surface water to diversion points on the downstream river because the tributary sinks before reaching the river. Portions of the Little Lost River system near Howe, Idaho are administered in this way. In a 2004 delivery call situation, the IDWR Director issued an order finding that, due to "extremely high losses" in both the river channel and the senior users' ditch, certain upstream junior diversions from the Big Lost River would not be curtailed because doing so would not deliver water to the downstream seniors.[589]

In the case of an actual futile call, water administration effectively separates hydraulically connected sources; this is a well-established rule that is supported by both hydrologic reality and the legal mandate against waste of the water resource. In other situations, separate administration of hydraulically connected sources might be more a legal fiction, an accepted custom, or a political compromise. In these cases, one might argue that separate administration is inconsistent with property rights and entitlements under the prior appropriation doctrine and the state constitution. After all, it inherently (and perhaps unconstitutionally) results in changing the set of "winners" and "losers" from what would be the case under normal administration. No one has ever tested this in Idaho.[590]

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[589] *In the Matter of Determining a Futile Call for the Delivery of Surface Water in Water District No. 34, Big Lost River* (July 30, 2004) (citing Rules Governing Water Distribution in Water District No. 34, IDAPA 37.03.12.20.04)

[590] A challenge in Colorado failed, however. *Alamosa-La Jara Water Users Protection Assn. v. Gould,* 674 P.2d 914 (Colo. 1983). And a case can be made that separate administration is consistent with the no-injury rule, where separate administration simply reflects long-standing

B. The administration of the Snake River above and below Milner Dam

Idaho has its own notable example of separate administration that plainly falls into the second of the two categories discussed above: The "Two Rivers Concept" in the administration of water rights on the Snake River.

The idea is that the Snake River should be viewed as two rivers. The first begins in the headwaters and continues to Milner Dam; the second begins immediately below Milner Dam and continues until it leaves Idaho. The basis for this fiction is the fact that virtually all of the Snake's water is diverted into a series of huge irrigation canals at or above Milner Dam. Thus, the river is seen as "starting over" below Milner, where it is fed by return flows, tributaries and springs.

Milner Dam, located several miles upstream of Twin Falls, Idaho, was constructed in 1905 to serve the Twin Falls South Side Project (operated by the Twin Falls Canal Company).[591] Today it also serves the North Side Canal, the Milner Low-Lift Canal, and the Milner-Gooding Canal. On occasion, virtually the entire flow of the Snake River is diverted into canals fed by the dam.

Return flows and springs—resulting from diversions at Milner and many more at other diversion facilities farther upstream on the Snake—quickly feed the river below the dam, allowing a whole new set of appropriations to be made downstream of Milner. The Two Rivers Concept reflects this unusual (and artificial) hydrological circumstance, and the practical reality that for a century people have viewed the source of below-Milner appropriations to be springs and ground water, rather than the river above Milner. Thus the concept emerged that water users below Milner should be allowed to call out only water users tributary to them, that is, water users on or tributary to the river below Milner.

The Two Rivers concept has its origins in actions of and positions taken by Idaho Power Company and the U.S. Bureau of Reclamation in the development of American Falls and other storage projects in the upper Snake.[592] The concept, though probably

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expectations. A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers,* 27 Idaho L. Rev. 249, 263 (1990).

[591] Milner Dam was built at the western most point in the upper Snake at which significant amounts of water could be diverted from the river by gravity systems. The large canals on the north and south sides of the river at Milner divert under water rights carrying priorities ranging from 1900 to 1939.

[592] A detailed analysis of this concept is beyond the scope of this Handbook. For a more detailed discussion of the Two Rivers Concept, see Jeffrey C. Fereday & Michael C. Creamer,

based on faulty legal premises,[593] was sufficiently solidified in practice that by the time Idaho Power filed its general protest in 1978 of all water rights interfering with its Swan Falls rights, it only called for curtailment of below-Milner rights.[594]

The Two Rivers concept also has been institutionalized in Idaho's State Water Plan, which first recognized a zero instream flow at that point in 1976.[595] (This zero flow is a fiction. Flows have never been zero.[596] Moreover, the State's zero minimum flow right (No. 2-200) was disallowed by the SRBA court.) Moreover, a "zero flow" minimum flow right is a nonsensical concept, analogous to a right to divert zero cfs. What was described in earlier State Water Plans as an actual zero minimum instream

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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, 589-94 (1992).

[593] Jeffrey C. Fereday & Michael C. 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, 591-92, n.82 (1992).

[594] Protest of Idaho Power Company to Applications for Permit to Divert and Consumptively Use Water, *In the Matter of Applications Filed for Water Diversions for Consumptive Use on the Surface and Subterranean Tributaries of the Snake River Between Milner Dam and Hells Canyon* (Dec. 30, 1977, filed with the Idaho Dept. of Water Resources Jan. 5, 1978). The relief sought by Idaho Power in the subsequent Swan Falls litigation was also limited to below Milner diverters. See discussion in of the Swan Falls controversy in section 35 at page 681.

[595] State Water Plan (Dec. 1976). The zero instream flow was not discussed in the text of the plan, but was simply reflected in a table showing river flows that will be "protected." The same table showed instream flows of 3,300 cfs at the Murphy gage and 4,750 cfs at the Weiser gage. The zero flow provision for Milner has been carried forward, with some modification in how it is described, through each subsequent State Water Plan.

[596] "Over the period from 1914 to about 1923, these diversions [at Milner Dam] had drastically reduced the average August flows past Milner from over 2,000 cfs to less than 100 cfs. Still, some water almost always passed American Falls, where Idaho Power had an early power plant, and Milner during the irrigation season. But the long list of senior natural flow appropriations on the Upper Snake River guaranteed that these amounts would be small in most years. From 1924 through the late 1970s the average August flows were as low as approximately fifty cfs in the irrigation season, and overall averages during that period were about 150 cfs." Jeffrey C. Fereday & Michael C. Creamer, *Swan Falls in 3-D: A New Look at the Historical, Legal and Practical Dimensions of Idaho's Biggest Ever Water Rights Controversy*, 28 Idaho L. Rev. 573, 590 (1991-92). Today, water flows at Milner are not really zero, despite the statutory zero instream flow. Some water is bypassed for hydropower generation at Milner. Additional water is bypassed in connection with the federal government's program of providing salmon "flushing" flows (See discussion in section 43 at page 802).

flow is now more accurately described this way: "The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero."[597]

The above/below Milner distinction also is recognized by the Water Supply Bank. (See discussion of the price difference for below-Milner rentals in section 29 beginning at page 595.) Likewise, storage rights from the above-Milner Palisades Reservoir placed in the tribal water bank operated by the Shoshone-Bannock Tribe pursuant to a 1990 settlement agreement may not be rented or delivered for use anywhere below Milner Dam.[598]

The most notable legal basis for the Two River concept is a statute adopted in 1985 implementing the *Swan Falls Agreement*. Note, however, that the statute in not limited in its application to Idaho Power's water rights. It applies to all affected water users. It provides in pertinent part:

> For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream of Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

Idaho Code § 42-203B(2). In other words, surface water users downstream of Milner may not call out either surface or ground water rights above Milner to satisfy their rights, regardless of relative priority.

This bifurcation of the Snake River adds some complexity and uncertainty to the task of moving water rights from above to below Milner. For instance, does Idaho Code section 42-203B(2) simply limit the scope of a call for Snake River water, or does it impair the ability to move water across the Milner threshold? One commentator has suggested it is the latter.[599] However, the authors suggest that this reads too much into the statute, particularly considering its Swan Falls context.

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[597] It has been carried forward through the current State Water Plan, Policy 5B at 17 (Dec. 1996, ratified Mar. 1997) (reproduced under Appendix F). As noted above, the zero flow right was disallowed by the SRBA court on 1/23/2013.

[598] 1990 Fort Hall Indian Water Rights Agreement, By and Between the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, The State of Idaho, The United States, and Certain Idaho Water Users § 7.3.4(i) (1990).

[599] "Based on this statute, a change in point of diversion from the Snake River upstream from Milner Dam to a point of diversion downstream from Milner Dam should be treated as a

The better reading, and the one to which the Department subscribes,[600] is that the statute applies only in the context of the implementation of Idaho Power's subordination of its hydropower rights and the development of so-called "Trust Water." (See discussion in section 35.C at page 689.) This view is consistent with the Department's Trust Water Regulations.[601] It does not mean that water rights can never be moved past Milner.[602]

Thus, putting aside other legal obstacles (injury, etc.) and practical considerations (the ability to administer such a changed right), one should be able to purchase a ground or surface water right whose diversion point is located above Milner and whose return flows are tributary above Milner, and change the diversion point and return flow to a location below Milner. This, of course, would entail moving the water past Milner Dam. Such a transfer has never been sought before, so the issue has not been tested. Administration of such a right would require some adjustment's in the computerized water rights accounting programs used to administer rights above Milner Dam. However, there does not appear to be any sound practical or legal basis for objection to such a change, again, assuming other legal requirements are met.[603]

Implementing the Two River concept is further complicated by determining where to draw the line. The river is divided not on the basis of a water right's point of diversion (which is easy to pinpoint), but on whether its return flow is tributary above or below Milner. The Department's delineation of above-Milner and below-Milner ground water rights set out in its regulations.[604] This map places most of the Eastern Snake Plain in the "below-Milner" category.

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new appropriation." A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 263 (1990).

[600] Telephone conference between Phillip J. Rassier, Chief Deputy Attorney General for the Department, and Christopher H. Meyer (June 10, 2004).

[601] IDAPA 37.03.08.030.03(e). The rule recognizes section 42-203B(2) as serving to define the scope of Trust Water

[602] Indeed, such a reading would raise serious constitutional questions.

[603] This is a critical, and perhaps difficult, assumption. Under current conditions, many water rights above Milner are threatened by potential calls from surface users at the Milner diversion, not to mention Thousand Springs. Attempting to move one of these rights past Milner raises another set of problems not addressed in this discussion.

[604] "Geographic Area From Which Groundwater Is Determined To Be Tributary To the Snake River In The Milner Dam To Swan Falls Reach," IDAPA 37.03.08 (Appendix A). (Reproduced under Appendix H).

This map may accurately reflect those areas where at least a part of the return flow is tributary below Milner. It ignores, however, the hydrological reality that ground water rights in the area are tributary partially above and partially below Milner. Thus, no ground water right in the Eastern Snake Plain Aquifer can be moved any significant distance without affecting flows both above and below Milner. Modern realities suggest that the time has come to dispense with the Two Rivers fiction, or at least limit it to the statutorily mandated call limitation in section 42-203B(2) and the moribund provisions on Trust Water.

22. AQUIFER ENHANCEMENT

A. The need for additional water storage options

Idaho's population is growing rapidly, and with it the demand for reliable public water supplies. At least in portions of the Treasure Valley, municipal providers are beginning to look to surface water to augment their historically reliable ground water supplies. At the same time, the acreage devoted to irrigated crops is static or declining in the Treasure Valley and other areas, suggesting that irrigation storage water should be more available for conversion to municipal and industrial uses. Idaho has some 12 million acre-feet of surface water storage reservoirs, virtually all of it devoted to agricultural irrigation. However, obtaining irrigation storage supplies for these new uses is not a straightforward process, and involves several political and institutional constraints. One example is the demand for storage water releases from these typically federally-owned reservoir facilities to address Endangered Species Act concerns.

As to the supply side—that is, building and finding water rights for more storage facilities—the reality is that most of the feasible above-ground storage projects in Idaho already have been constructed. In addition, large surface water storage projects face significant obstacles in obtaining necessary approvals, as exemplified by the Denver Water Board's inability to obtain federal Clean Water Act permitting to construct its proposed Two Forks Dam in the late 1980s. Present economic, social and environmental factors suggest that most new large-scale storage projects will remain infeasible for some time to come. Indeed, the Bureau of Reclamation, which built and operates many of the water storage projects in Idaho, has long since moved away from a primary focus on new water development projects in favor of a redirected focus on existing facilities management, demand-side management and water transfers.[605]

But that still does not relieve the need for municipal, commercial, and industrial users to obtain access to stored water. Even though these users increasingly will rely on former irrigation storage in existing reservoirs, a viable alternative is to use aquifers as storage reservoirs. This is not new, of course; aquifer storage is being used extensively in other more populous parts of the West. In comparison to surface storage facilities, aquifers can provide vast amounts of water storage with comparatively less planning, physical and environmental engineering, capital construction, and operation and maintenance costs than above-ground storage projects. As part of a comprehensive conjunctive management scheme, aquifer storage can be operated much the same as surface reservoirs—inject surface water into the aquifer when surpluses are available, store it in the aquifer, and then either pump it up as needed or, in the case of recharge to augment spring flows, simply allow it to discharge naturally to surface sources. As explained below, the Idaho Legislature has taken steps over the years to allow and

[605] *See*, U.S. Dept. of Interior, Bureau of Reclamation. Strategic Plan FY2000-2005.

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encourage aquifer storage, and the common law of appropriation also is at home with the concept.

The remainder of this section of the Handbook surveys the major statutory provisions pertaining to aquifer recharge in Idaho, and discusses some of the issues about recharge that have arisen in recent years.

B. Public betterment aquifer recharge ("PBAR")

(1) The evolution of Idaho's ground water recharge statutes: Idaho Code § 42-232; Idaho Code § 42-234; and Idaho Code §§ 42-4201 to 42-4231

Idaho's ground water appropriation statutes were first enacted in 1951. 1951 Idaho Sess. Laws, ch. 200. But statutes expressly addressing aquifer recharge[606] were not passed until 1978. (See discussion below.) Aquifer recharge originally was a narrow concept—only "recharge districts" or specified "pilot projects" could make diversions to recharge, and then only pursuant to the application, permit and license process. The Legislature later modified the relevant statutes to allow anyone to engage in aquifer recharge.

The 1978 Idaho ground water recharge statute, 1978 Idaho Sess. Laws, ch. 366 (codified as amended at Idaho Code § 42-234), ratified and encouraged a "pilot project to recharge ground water basins in the vicinity of St. Anthony and Rexburg," and recognized appropriation of water for recharge in this vicinity "as a beneficial use."[607] That same year, the Legislature authorized formation of a "ground water recharge district" in the Jerome-Gooding area and sanctioned the district's appropriation and subsequent underground storage of unappropriated waters of the Snake River and its tributaries. 1978 Idaho Sess. Laws, ch. 293 (codified at Idaho Code §§ 42-4201 to 42-4231). Water appropriated for recharge by the recharge district also was declared to be a beneficial use. That act also provided for the establishment of aquifer recharge districts. Idaho Code § 42-4202.

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[606] In its most general sense, "aquifer recharge" refers to any planned project that intentionally places more water into an aquifer than otherwise would accrue either through natural processes or incidental to beneficial uses of the water. Department rules define "artificial ground water recharge" as "a deliberate and purposeful activity or project that is performed in accordance with Section 42-234(2), Idaho Code and that diverts, distributes, injects, stores or spreads water to areas from which such water will enter into and recharge a ground water source in an area having a common ground water supply." IDAPA 37.03.11.010.01.

[607] The reference in the 1978 statute to the pilot projects is no longer included in the statute.

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(2) Idaho's "public betterment aquifer recharge" statute

The intended beneficiaries of the projects authorized by the 1978 statutes and their subsequent amendments were to be ground water users and others[608] in the general area, perhaps simply the water resource itself. For this reason, the author of this section refers to activities undertaken pursuant to these statutes as "public betterment aquifer recharge" ("PBAR"), the key mark of which is that no one obtains a new water right specifically to remove and use the water stored in the aquifer.[609] Rather, the new water introduced to an aquifer reinforces the natural resource that supports the community of existing ground water rights in the area. It is as if Mother Nature added the water for everyone's benefit. At that point, anyone with a valid water right may pump that water—in priority, of course—or may benefit from any resulting increases in stream flows that supply a surface diverter's water right.

These public betterment aquifer recharge projects are unlike other reservoir projects. A typical reservoir holds water for the benefit of specific water right holders. Thus, only the entity diverting and storing the water (or the entity's shareholders or beneficiaries) is entitled to take the stored water out for its own benefit. In contrast, a PBAR project has no particular identified beneficiaries other than the public resource itself or perhaps water right holders in the area generally. In other words, once the water has been added to the ground water supply, the recharging entity relinquishes control and the water becomes part of the public supply. Even though a PBAR diversion is for the general benefit, there is nothing in Idaho law requiring the operator to continue the practice.

For these reasons, PBAR projects are atypical in the West where ordinarily capital is invested by, and water is appropriated and diverted for the benefit of, the appropriator. Consequently, it was necessary for the Legislature to declare that ground water recharge is a beneficial use to confirm that unappropriated surface water can be appropriated and

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[608] Projects located above Thousand Springs may benefit not only ground water users, but springs in the Hagerman area and surface flows in the Snake River below the springs. Furthermore, section 42-4201 states that, "[i]n view of the public betterment to be achieved by the completion of aquifer recharge projects, the legislature hereby declares that the appropriation and underground storage of water by the aquifer recharge district" authorized by the statute "shall constitute a beneficial use and hereby authorizes the department of water resources to issue a permit" for it. This language is part of the reason the authors refer to the Public Betterment Aquifer Recharge concept.

[609] There are several statutory references to "public betterment" in the context of aquifer recharge. For example: "In view of the public betterment to be achieved by the completion of aquifer recharge projects, the legislature hereby declares that the appropriation and underground storage of water by an aquifer recharge district hereinafter created for purposes of groundwater recharge shall constitute a beneficial use . . . ." 1982 Idaho Sess. Laws, ch. 204 (previously codified at Idaho Code § 42-4202(2)) (repealed in 2009).

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placed "in storage" for no purpose other than to make more water available in the public ground water supply for existing or future appropriators to take out according to their separate rights.

(3) Appropriations versus water right transfers for aquifer recharge

From their inception, the Idaho recharge statutes have expressly authorized the "appropriation and underground storage of water" and tied this authority to the Department's authority to issue permits and licenses in connection with recharge projects. It remains unclear whether the statutes actually contemplate using existing water rights for recharge purposes through a transfer or change proceeding. Certainly the original statutes could be read as allowing recharge only through appropriation of new water rights for this purpose. However, in 1995 and 1996 the Jerome-Gooding ground water recharge district in fact used rented storage water—i.e., an existing water right—in a recharge project carried out through the Snake River Water Bank with full legislative support and funding.[610] In the 2002 irrigation season, rented storage again was used in fulfillment of an interim agreement between certain ground and surface water users, with the water being placed in the North Side Canal Company's ditches for recharge purposes aimed at increasing the Eastern Snake Plain Aquifer and, by extension, the Thousand Springs outflow. So, presumably, a new water right or an existing water right, through transfer, could be used for recharge under the statute. However, no court has yet been asked to confirm this.

(4) Aquifer recharge as a designated beneficial use; allowing any entity to appropriate water for recharge

Importantly, the 1978 "recharge district" law declared that "the appropriation and underground storage of water by the aquifer recharge district hereinafter created . . . shall constitute a beneficial use" of water.[611] It also contained a separate provision declaring that recharge is a beneficial use and authorizing IDWR, without reference to who might apply, "to issue a permit for the appropriation and underground storage of unappropriated waters in an area of recharge."[612] Thus, any person or entity, not just recharge districts, could appropriate water for recharge. In 2009, the Legislature revised this to clarify that

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[610] In 1994, the Legislature appropriated $75,000 to allow the Jerome-Gooding recharge district to acquire and deliver storage water for recharge through the North Side Canal Company conveyance system.

[611] Idaho Code § 42-4201(2). The statutes now allow any person to appropriate water for aquifer recharge. *See also* Idaho Code § 42-234(2).

[612] Idaho Code § 42-234(2).

IDWR could issue both permits "and licenses" for recharge, "in compliance with other applicable Idaho law and the state water plan."[613]

One might ask why the Legislature thought it important to expressly recognize ground water recharge a beneficial use. The answer, as indicated above, may be that traditionally diversion of water into storage for its own sake may not be considered a beneficial use. It is only when water has been diverted to storage for some other specific beneficial use such as stock watering, recreation or aesthetic purposes, or for later diversion from storage for irrigation, commercial or municipal purposes, that the placement of water in storage has been deemed "beneficial" in the water law sense. Of course, the definition of beneficial use has never been seen as restricted to a precise list of purposes, and has evolved to meet changing needs; aquifer recharge understandably was not a concern or goal in the State's earlier decades. Nonetheless, aquifer recharge—at least in the PBAR context—arguably could have qualified for a water right only after the 1978 enactment, and then only in the hands of those entities specified in the statute.

In any event, the 1978 recharge district statute listed several reasons why aquifer recharge in the Jerome-Gooding area will "serve the interests of the public and advance the multiple use water policy of this state," including "sustaining and increasing the flow of springs in the general vicinity of the Hagerman Valley" (i.e., the Thousand Springs area); increasing the water available for withdrawal from wells; "providing additional aquatic habitats" for wildlife; and "increasing and sustaining the flow of the Snake River during the summer months and in times of drought when additional flow is needed for the generation of hydroelectric power and the maintenance of water recreation facilities."[614] In 1982 the Legislature added a new section to the recharge district statute that made it possible for recharge districts to be formed in areas other than just the Jerome-Gooding area.[615] The 1982 amendment did not recite this list of benefits.

The 1994 amendments also removed all references to the St. Anthony-Rexburg pilot project and thereby transformed Idaho Code § 42-234 into a generalized approval of the acquisition of recharge water rights.

Finally, the 1994 amendments addressed the issue of "incidental recharge." In pertinent part, Idaho Code § 42-234, as amended in 1994 now provides that:

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[613] 2009 Idaho Sess. Laws, ch. 242 (codified at Idaho Code § 42-234(2)). The 2009 amendment also repealed a highly controversial provision, inserted into section 42-234 in 1994, that made all recharge water rights subordinate to the water rights of "any privately-owned electrical generating company to appropriate waters in the reaches of the Snake River downstream from the Milner diversion for purposes of hydroelectric power generation."

[614] 1978 Idaho Sess. Laws, ch. 293 (codified at Idaho Code § 42-4201(1)).

[615] 1982 Idaho Sess. Laws, ch. 204 (codified at Idaho Code §§ 42-4201A, *et seq*.).

> (5) The legislature further recognizes that incidental ground water recharge benefits are often obtained from the diversion and use of water for various beneficial purposes. However, such incidental recharge may not be used as the basis for claim of a separate or expanded water right. Incidental recharge of aquifers which occurs as a result of water diversion and use that does not exceed the vested water right of water right holders is in the public interest. The values of such incidental recharge shall be considered in the management of the state's water resources.[616]

Subsection (5) disallows a claim for a separate water right or an expanded water right for incidental recharge, while acknowledging that recharge incident to the lawful diversion and use of a water right is "in the public interest." This at least implies that such incidental recharge, while not being recognized as an element of a water right, will not be prohibited.[617] The practical effects of the incidental recharge provision are two-fold: it precludes claims in water right adjudications that a water right originally developed for irrigation use also includes ground water recharge as a beneficial use element;[618] and it precludes assertions by surface water users of ownership of the incidental recharge resulting from their irrigation. At the same time, where an irrigation entity continues to divert the same amount into its canal system despite serving decreasing irrigated acres (which is the case in many urbanizing areas), this language

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[616] In 1994, the Legislature also passed Senate Concurrent Resolution 140 which recites, inter alia, that "artificial recharge of Idaho's ground water aquifers has been and continues to be a useful and productive utilization of Idaho's water and shall be encouraged wherever possible; . . . ." 1994 Idaho Sess. Laws, Sen. Con. Res. 140, at 1524.

[617] One question that arises under this statute is whether a third party benefiting from the recharge could use this provision to block an efficiency measure by, say, a canal owner that would reduce the incidental recharge.

[618] At the time, certain water users or water user organizations were concerned that either the Department or the SRBA Court would determine the annual volumes of water diverted under their water right claims for irrigation (in some instances up to sixteen acre-feet per acre per year to accommodate local customs of "sub-irrigation") were unreasonable, and that their claims might therefore be decreed for a lesser amount. One potential means of avoiding that result, given the 1978 recharge statute's declaration that recharge is a beneficial use, would have been to assert that the significant incidental recharge resulting from this irrigation method is an element of the water right with the same priority as the underlying irrigation right. Arguably this could have been done through the use of Idaho Code § 42-234 (recharge is a beneficial use) and Idaho Code § 42-1426 (allowing claims for enlargements of water rights occurring prior to November 19, 1987).

provides at least a "public interest" argument that the diversions should be allowed to continue.

Arguably, because section 42-234(5) declares incidental recharge to be in the public interest, an appropriator seeking to increase the efficiency of his or her water use—and thus reduce recharge—might find this declaration an obstacle to doing so, at least if the beneficiaries of the incidental recharge complained. Such a ruling, however, presumably would collide with the Idaho Supreme Court's ruling in the *Hidden Springs* case, discussed above.

(5) Voidance, then partial reinstatement, of Idaho Power's Swan Falls subordination with respect to certain water rights acquired for aquifer recharge

Interestingly, the 1978 recharge district law included a provision stating that "the rights acquired by the aquifer recharge district pursuant to any permit and license were to be secondary to all prior perfected water rights, including those held by any privately-owned electrical generating company to appropriate waters in the reaches of the Snake River downstream from the Milner diversion for purposes of hydroelectric power generation."[619]

The first clause of this provision presumably was unnecessary since by definition any new appropriation, for aquifer recharge or otherwise, would be junior to all prior water rights. The second clause is more interesting, however. Because Idaho Power Company's Hell's Canyon dam complex held water rights that the Company had agreed to subordinate to upstream development as a condition of licensing by the Federal Energy Regulatory Commission ("FERC"), the second clause of the 1978 legislation may have been inserted in an attempt to override that subordination—that is, to give Idaho Power priority over water rights the recharge district might seek to divert to aquifer storage, and thus to nullify Idaho Power's existing FERC license subordination as to such rights.

Regardless of the intent and applicability of this original 1978 provision, in 1994 the Legislature substituted express language making it clear that at least the subordination of Idaho Power's water rights that occurred pursuant to the 1984 *Swan Falls Agreement*[620]

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[619] 1978 Idaho Sess. Laws, ch. 293 (codified at Idaho Code § 42-4201(2)).

[620] In 1984, Idaho Power Company and the State of Idaho entered into the *Swan Falls Agreement*. In that Agreement, Idaho Power agreed that its hydropower water rights, including the portion of its hydropower rights in excess of specified seasonal minimum flows at its Swan Falls plant were "subordinate to subsequent beneficial upstream uses upon approval of such uses by the State. . . ." This subordination was ratified by the Legislature in 1985 with amendments to the water appropriation statutes. *See, e.g.*, Idaho Code §§ 42-203B, 42-203C, and 42-203D. Neither the Agreement nor the legislation implementing it limited the types of future water rights that would be entitled to enjoy this subordination, so new water rights for recharge would be

would not apply with respect to water rights acquired for aquifer recharge. The 1994 statute amended section 42-234 to read:

> The rights acquired ~~by an aquifer recharge district or irrigation district~~ pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights, including those ~~held by any privately-owned electrical generating company to appropriate waters in the reaches of the Snake River downstream from the Milner diversion for purposes of hydroelectric power generation~~ water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho power company on October 25, 1984, and ratified by the legislature pursuant to section 42-203B, Idaho Code.

1978 Idaho Sess. Laws, ch. 293 (codified at Idaho Code § 42-4201(2)).

By expressly addressing Idaho Power's Swan Falls subordination, the 1994 amendment could be read to imply that the Company's Hells Canyon FERC-subordinated rights remain subordinated to all subsequent upstream appropriations, regardless of the intended new beneficial use. But it specifically removed the subordination benefit provided by the *Swan Falls Agreement* when it comes to new permits or licenses for aquifer recharge. It is not clear what purpose the Legislature sought to achieve with this amendment, or whether, in doing so, it secured any consideration from Idaho Power.

It could be argued that the Legislature believed the amendment necessary to protect all past-Milner flows for hydroelectric power production. But this would be contrary to the *Swan Falls Agreement*. Likewise, it would be contrary to a 1986 amendment to Idaho Code § 42-203B, which remains a part of the statute and provides that "[f]or the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner Dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner Dam shall be considered."[621] Read together, the non-subordination and separate administration provisions would appear to mean that the Legislature's voiding of the Swan Falls subordination with respect to recharge appropriations still does

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entitled to the Swan Falls subordination. For a discussion of the Swan Falls issue, see Jeffrey C. Fereday and Michael C. 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).

[621] 1986 Idaho Sess. Laws, ch. 117.

not permit Idaho Power to call out a junior above-Milner recharge water right to fill Idaho Power's below-Milner hydropower rights.

When the Idaho Water Resource Board established a minimum flow of zero at Milner Dam, it was based on the premise that the Snake River is "fully appropriated upstream from Swan Falls except for trust water and occasional flood waters."[622] On this premise one also might assume that the 1994 amendment partially voiding the Swan Falls subordination gave little to Idaho Power since there would be limited opportunities for junior recharge appropriations anyway. However, in 1998, the Department of Water Resources issued an interim report that concluded that in most years, up to three hundred thousand acre-feet of surface water could be available in the upper Snake River (above Milner) to be used for managed aquifer recharge *provided the recharge was not subordinated to existing water rights held for power purposes by Idaho Power.*[623] The Department later concluded that if Idaho Power enforced the 1994 amendment partially removing its water right subordination, then recharge diversions could occur only once in about every fifty years.[624]

Thus, the Legislature's partial reversal of the Swan Falls subordination effected by the 1994 amendment to Idaho's aquifer recharge statutes—both the "recharge district" statute in section 42-1401 and the general authority to permit recharge projects in section 42-234—cast a cloud on PBAR projects, or at least on those that would rely on any permit or license acquired for recharge purposes. In addition to this cloud on above-Milner water rights appropriated for recharge, another provision in the recharge statute authorizes the IDWR Director to regulate (that is, to reduce) the amount of water diverted for a PBAR project, even when the water right is in priority.[625] This regulatory authority to override a recharge water right reflects a sharp departure from the fundamentals of the prior appropriation doctrine, and potentially undermines the value and integrity of PBAR projects.

In 2009, the Legislature removed the Swan Falls subordination reversal language from section 42-234, but left it in section 42-1401. The 2009 amendment also added to

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[622] State Water Plan (Jan. 3, 1992).

[623] IDWR, Eastern Snake River Plain Aquifer Managed Recharge Project Interim Report (October 1998).

[624] IDWR, Feasibility of Large-Scale Managed Recharge of the Eastern Snake Plain Aquifer System 43 (December 1999).

[625] Idaho Code § 42-4201(4). See also Idaho Code § 42-4201(4) authorizing the Director to curtail water rights for PBARs under certain circumstances. Finally, see Idaho Code § 42-234(2) which provides that water rights obtained for PBARs are subject to "depletion for surface storage or direct uses after a period of years sufficient to amortize the investment of the appropriator."

section 42-234 language that already exists in section 42-1401 (pertaining to recharge districts), including the provision that IDWR "may reduce" the amount allowed for diversion to recharge under a permit or license "even though there is sufficient water to supply the entire amount originally authorized by permit or license."[626]

(6) Summary of the public betterment aquifer recharge experience

The 1978 Legislature adopted a measure supporting the concept of recharge projects and their implementation by recharge districts on a limited basis.[627] In subsequent enactments it has expanded the authorization to allow any person, not just special districts, to appropriate water for recharge, and it has even appropriated funds to acquire and deliver water for recharge in the Jerome-Gooding area of south-central Idaho. Numerous studies and investigations into the ground water hydrology and recharge capabilities of various aquifers have been conducted. In addition to this authority and information, there appear to be increasing incentives to initiate aquifer recharge projects. So the question must be asked: Why have there not been more large-scale recharge projects undertaken in Idaho? Several reasons seem likely.

Aquifer recharge for its own sake (i.e., PBAR), has some inherent disincentives. The first is the relationship of cost and benefit. It presumably is difficult to justify the costs inherent in developing an aquifer recharge project—costs that will be borne by a specific, limited group of sponsors—where the benefits that might be realized are generalized, spread across poorly-defined areas, and are difficult to quantify. Absent significant declines in water levels that jeopardize the ability of ground water users to fill their rights,[628] or the immediate threat of curtailment to fill senior ground or surface water rights, investments in aquifer recharge to stabilize or increase water levels are not likely. In fact, the Idaho aquifer recharge projects that have been implemented on a consistent basis to date tend to be projects like those of the South West Irrigation District near Oakley, Idaho to stabilize water levels in the critical ground water areas within its own boundaries for the direct benefit of the District's ground water pumpers.

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[626] 2009 Idaho Sess. Laws, ch. 242 (codified at Idaho Code § 42-234(3).

[627] Idaho Code § 42-234(1) ("It is the policy of the state of Idaho to promote and encourage the optimum development and augmentation of the water resources of this state. The legislature deems it essential, therefore, that water projects designed to advance this policy be given maximum support.")

[628] A mass measurement of ground water levels in wells throughout the ESPA was conducted by the U.S. Geological Survey in 1980. When ESPA ground water levels were again measured in 2000, the Department of Water Resources found that over the ensuing twenty-years changes in water levels in most areas of the aquifer were insignificant, including many areas with substantial ground water development.

Before these potentially large investments will be made, those making the investments presumably will want some level of certainty that water will be available to divert to recharge. Uncertainty in this area of water law is heightened by the questions surrounding the 1994 legislative waiver of Idaho Power's Swan Falls subordination with respect to water rights the recharge district in Lincoln, Jerome, and Gooding Counties might acquire for recharge under Idaho Code 42-4201(2). However, all other recharge appropriations and transfers presumably will not have to contend with this impediment because it was removed from section 42-234(2) in 2009.

The physical and economic feasibility of aquifer recharge depends in large part on a delivery system that can put water where it will do the most good when it is most available. In many situations, this means using existing irrigation diversions, canals and laterals to divert and distribute recharge water through leakage. But even though surface water may be available in the stream, and in priority, to divert to aquifer recharge, there may not be sufficient capacity in these irrigation facilities to carry both irrigation water and recharge water.

As noted in the Department's 1999 Managed Recharge Feasibility Report for the ESPA, there are other institutional, environmental and land use issues that affect the feasibility of large-scale aquifer recharge. These include addressing the requirements of the federal Endangered Species Act, Clean Water Act and National Environmental Policy Act ("NEPA"), as well as requirements of various statutes, regulations and contracts controlling the use of U.S. Bureau of Reclamation facilities and storage water.[629] They also include federal, state and local land use regulations such as those governing use of lands controlled by the U.S. Forest Service or Bureau of Land Management. The Department's feasibility report concluded that for the ESPA, large-scale managed recharge appeared to be hydraulically and economically feasible, but also that institutional controls and environmental priorities create many uncertainties about overall feasibility. Some or all of these factors will come into play in any aquifer recharge project in Idaho.

[629] At first blush, agreements, or amendments to agreements, to allow use of federal facilities to divert or carry water for aquifer recharge or to obtain needed rights-of-way on federal lands would appear to be straightforward tasks. However, as "federal actions" they would be subject to the environmental impact review required by NEPA. And, given the potential impacts on federally listed endangered species in the Columbia River Basin, and the existence of pending federal and tribal water right claims in the Snake River Basin, extensive consultation with the National Marine Fisheries Service and U.S. Fish and Wildlife Service under Section 7 of the Endangered Species Act and consultation and/or negotiation with the Tribes almost certainly would be required.

C. Private Aquifer storage and recovery or "ASR" projects

(1) The difference between PBAR and ASR

The Legislature's various pronouncements about aquifer recharge do not address private aquifer storage and recovery ("ASR") projects, except to the extent that they do confirm that aquifer recharge is a beneficial use of water. Unlike the PBARs discussed above, which require some special treatment under the prior appropriation doctrine, ASR projects conceptually are very familiar—they simply are ordinary storage projects that have been moved underground.

Consequently, no special legislative authorization is required, and, indeed, the Legislature has as yet said nothing on the subject. More importantly, the unique legislative restrictions applicable to PBAR projects are inapplicable to ASR projects. What this means is that an entity seeking to undertake an ASR project should be able to obtain a water right (through appropriation or transfer) allowing the entity to divert water from some source (surface water, ground water or storage) and place the water into the aquifer without regard to the non-subordination provisions applicable to PBAR projects.

(2) Water diversions and ASR

What about the other end? Is a separate water right required to take the water out again?

In the limited ASR matters that have come before the Department it has required the project proponent to obtain a water right permit to recover water intentionally stored in an aquifer.[630]

Arguably, there is no legal requirement for obtaining a new water right to recover ground water once it has been lawfully placed into storage.[631] Once water has been diverted in priority and placed into aquifer storage, it should be available for withdrawal

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[630] See discussion of Micron Technologies ASR project below.

[631] Typically, once water has been diverted into storage, it is for all practical purposes the appropriator's property, and may be diverted from storage as the appropriator deems necessary, provided the amounts diverted are reasonable and can be beneficially used. *See Washington Cnty. Irr. Dist. v. Talboy, supra* (although water diverted to storage no longer is public water, reservoir owner may not waste it); *City & Cnty. of Denver v. N. Colo. Water Conservancy Dist.*, 276 P.2d 992 (1954) (the "Blue River" case) (all water impounded must be put there only temporarily; otherwise its capture from the stream defeats beneficial use). For example, in Idaho, a storage right for a surface reservoir will note the priority of the right to divert water into storage (i.e., to capture water behind the dam), and also will identify the ultimate use(s) for which water may be released from the reservoir. However, reservoir releases of captured water are not subject to any priority constraint.

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from the aquifer by the project sponsor without regard to priority. This seems consistent with the analogy to diversion from a surface reservoir. So long as the water remains under the appropriator's "control," the water is no longer public water, but rather has become private property. Provided that the water has been properly diverted, in priority, into storage in the first instance, and the water can thereafter be accounted for using an approved ground water model or other means, one could argue that the ASR proponent remains in constructive "control" of the water, in the same manner as the owner of an on-stream reservoir. Wells into which water can be injected can be constructed and used pursuant to rules implementing the statutes pertaining to Waste Disposal and Injection Wells, Idaho Code §§ 42-3901 through 42-3919; IDAPA 37.03.03.

The Department also attaches a priority date to aquifer storage recovery permits. This too seems antithetical to the entire purpose of an ASR project—to divert water to storage when it is available and draw upon it later without regard to priority when it is needed. The Department has obtained the same effect–in a roundabout way–through the inclusion of a condition in the water right approval that allows "out of priority" diversions of ground water to the extent that they are mitigated by ground water recharge activities. To the author of this section, this is a needless complication.

There is no magic in ASR projects. Like any reservoir, an ASR project typically does not create new water in the hydrologic system.[632] The issue is primarily one of timing—making water available when needed. In some cases, ASR projects may be employed because they improve the quality of water. In others, the project goal may simply be to make the water physically available in a different place. Except in the limited example of diversion of water from a foreign source into a closed ground water basin, no ASR project, increases the overall quantity of water in the system.

As with any reservoir, there must be a mechanism for determining what water within the reservoir belongs to the storage right older. In the case of a surface reservoir, that calculation is relatively simple. In the case of an underground reservoir, the technical computations may be more complex. The question of control over the water, and where it goes after it is injected into the subsurface, are matters of hydraulics and hydrogeology that need to be answered by an expert, preferably one who is using reliable monitoring wells and other data. In addition, proper well construction is essential. How much of the injected water will be available for recovery will depend on such analyses. Because water in aquifers moves according to geology and hydraulic head, there also will be questions of timing: will the water placed in storage still be present when the appropriator seeks to withdraw it? Thus, ASR projects raise questions not faced by surface storage owners, whose reservoirs are understood to fully capture and hold the

[632] The "hydrologic system" here being the interconnected surface and ground water source.

water placed there, less seepage and evaporation (both of which generally can be calculated more accurately than movement of water underground).[633]

(3) Examples of ASR projects

As of this writing, the author of this section is aware of three ongoing projects that can be considered ASR projects: South West Irrigation District's program on the Oakley Fan aquifer; a small pilot program being carried out by United Water Idaho in Boise, and a program—also still in the pilot stage—being implemented by Micron Technology in the Southeast Boise Ground Water Management Area.

Southwest Irrigation District ("SWID"), which is served primarily by ground water in Cassia and eastern Twin Falls Counties south of Burley, Idaho, has applications pending for the use of several injection wells in an aquifer storage and recovery (or mitigation) project. The applications have been filed in connection with SWID's proposed mitigation plan it filed with IDWR in late 2009 in response to delivery calls affecting the Eastern Snake Plain Aquifer.

For a number of years, SWID has used surface water to recharge the aquifer underlying its members' lands, using a variety of infiltration and injection methods. These methods have included injection of surface water into the aquifer through some 13 wells installed beginning in 1991.[634] SWID annually has recharged approximately 3,900 acre-feet of surface water through these injection wells, using diversions from Cottonwood Creek, Dry Creek, and Murtaugh Lake. It also maintains a constructed infiltration ditch about 8 miles in length.[635]

SWID's program is probably better described as a mitigation project, not an ASR program. As indicated above, SWID recently proposed a mitigation plan that further explains the program.[636]

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[633] The practitioner may wish to consult published papers or other literature in this field before implementing an ASR project. Two sources are: R. Pyne, *Groundwater Recharge and Wells, A Guide to Aquifer Storage Recovery*, Lewis Publishers (1995); and J.H. Peters, *et al.*, eds., *Artificial Recharge of Groundwater*, A.A. Balkema Publishers (1998).

[634] B. Higgs, *Groundwater Management Plan of Southwest Irrigation District* (Draft) at 5 and 19 (September 2001). The plan using these 13 wells is now being replaced by a larger plan involving 25 injection wells, all of which are awaiting permitting by IDWR. Permitting requires water quality monitoring of the injected water.

[635] Personal communication with Brian Higgs (October 22, 2009).

[636] Other entities on the ESPA in the past have injected water through wells. An example is A&B Irrigation District, which for many years injected wastewater from its project back into the aquifer through wells.

In the Micron ASR project, the Department has required a permit to remove the water from the aquifer once it has been stored. The permit issued includes a 2001 priority date, and states that the permit is "subject to all prior water rights." Nevertheless, conditions of approval allow out-of-priority diversions to the extent that 1) the diversions are mitigated by ground water recharge activities and 2) the diversions do not injure senior rights through direct well interference. The Micron permit allows one hundred percent of the water injected into the aquifer to be diverted under the permit provided the diversion is in the same calendar year. To the extent water injected in any given year is not diverted in the same calendar year, recharge credits may be carried forward to subsequent years, subject to a ten percent reduction per year.[637] This system of accounting for recharge credits is based upon computer modeling of aquifer hydrology prepared by Micron's consultant and approved by the Department. It is logical that such accounting would be accomplished on a case-by-case basis.

Micron annually injects approximately 1,200 acre-feet of Boise River water into the Boise Fan Aquifer, where the Company's production wells are located. Before being injected, the river water is put through a sophisticated membrane water treatment facility capable of treating some 2 million gallons per day. The injected water exceeds (i.e., is cleaner than required by) drinking water standards. In addition to water quantity, water quality and temperature are important considerations. For example, Micron's ASR project employs river water to cool the warmer aquifer water to the temperature needed for the Company's manufacturing processes.

Veolia (formerly SUEZ and United Water Idaho) is the municipal water provider for the City of Boise and surrounding areas. During the winter low-demand season, United Water is injecting drinking water pumped from elsewhere in its system into nine of its production wells and recovering it in the same year over several weeks during the period of peak municipal water demand in the summer. The purpose is not to enlarge production per se, but to improve the water quality available to each of these wells. So far it has proven successful.[638]

Moreover, improving an aquifer's quality also usually increases its usefulness. Thus, an ASR project focused on the quality question can effectively augment supplies because it makes productive those wells that otherwise might be off-limits.

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[637] Idaho Dep't of Water Resources, Permit to Appropriate Water No. 63-31183 (February 14, 2002).

[638] Personal Communication with Roger Dittus, United Water Idaho (October 12, 2009). The constituents subject to maximum contaminant levels (mcls) in the Boise area typically are arsenic, manganese, uranium, and ammonia. In addition, some wells are affected by dissolved solids, such as calcium carbonate, which cause problems with equipment.

The Department issued United Water an injection well permit for each of the injection points, but did not require new diversion permits, presumably because there is no out-of-source water being brought to the system. The water being injected has been diverted originally pursuant to one or more of United Water's existing municipal water rights in the area and it is recovered pursuant to the water right associated with the injection well. The injection well was drilled originally in connection with the development of a municipal water right held by United Water. Hence, no new permit was required. Because the injected water is of drinking water quality, the project carries no additional treatment requirement.[639]

(4) Aquifer mitigation

"Aquifer mitigation" is used here to refer to a situation that arguably is the opposite side of the ASR coin. In this scenario a project sponsor adds a particular amount of water to an aquifer (or retires a particular amount of pumping) not for the public betterment, but rather to allow the sponsor to appropriate specified amounts of ground water right that otherwise would not be in priority. The project mitigates the junior right holder's depletion and maintains the status quo for senior pumpers using the aquifer or for tributary surface water rights. An example from Colorado is the project managed by Groundwater Appropriators of the South Platte ("GASP"), where pumpers divert flood flows and non-irrigation season from the river into leaky ditches and infiltration basins, carefully account for the amounts recharged, account for the timing of return flows of the recharged water to the South Platte River and then are entitled to pump their junior tributary wells according to a schedule that recognizes the mitigation to senior surface water rights provided by the recharge.

IDWR's Conjunctive Management Rules specifically list recharge as an appropriate mitigation device available to any appropriator facing water right administration. IDAPA 37.03.11.43.3.d.

In Idaho, the author of this section is aware of several mitigation proposals involving aquifer recharge that have allowed the Department to process applications to appropriate ground water despite the Department's current moratorium on processing new applications in the Boise Basin.

In one instance, the Department has approved a relatively small appropriation of ground water from the shallow aquifer for irrigation use where the applicant proposed to divert an existing surface water right into infiltration basins near the well. The applicant

[639] The requirement that water injected be of drinking water quality and subject to a permit can be essential in these cases. Recently, the Idaho Federal District Court found criminal liability where a feedlot operator injected surface water into the Eastern Snake Plain Aquifer without permits. *United States v. King*, Case No. CR-08-002-E-BLW (D. Idaho 2009).

provided measurements of the rate of infiltration to the aquifer from the basins and was authorized to divert the same volume from a well.[640]

The Department also has processed applications involving the appropriation of ground water exposed by the construction of ponds that intercept shallow ground water. The ponds are to be constructed for aesthetic purposes in residential and commercial subdivisions and no ground water was proposed to be diverted from the ponds. To account for the evaporative losses from the ponds, however, the applicants proposed to change the nature of use of natural flow water rights represented by their shares of stock in mutual irrigation ditch companies from irrigation to ground water recharge. Each share represented the right to receive up to 0.02 cfs of water per appurtenant acre within the development. One "share" was offered as mitigation for each acre of pond and an equivalent area of "dry up" (i.e., no future irrigation) was proposed to insure no net increase in consumptive use of water following the pond construction and transfer.[641] The transferred water rights were proposed to be diverted directly into one or more of the ponds as recharge to offset evaporative losses.

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[640] The conditions imposed on the new right concerning recharge were as follows:

> The right holder shall mitigate the groundwater diversion authorized under this right by directing water diverted from the Boise River under existing water rights into unlined ponds and causing it to seep into the ground. The volume of water directed into the ponds for mitigation purposes shall equal or exceed the volume of groundwater diverted under this right each year. The ponds shall be modified and/or constructed and the seepage shall be quantified in accordance with the plan proposed [by the applicant's consultant]. If the proposed mitigation proves to be inadequate or cannot be maintained, the Director retains jurisdiction to require modifications to maintain sufficient recharge in order to offset diversion from the aquifer under this right. The Director retains jurisdiction to require measurement and reporting of the amount of surface water supplied to the ponds for mitigation purposes.

State of Idaho Dep't of Water Resources, Water Right No. 63-12092 (issued November 18, 1999).

[641] The assumption here is that the annual evaporative loss (consumptive use) of ground water per exposed surface acre is equivalent to the annual consumptive use attributable to the same acre due to irrigation. Hence the dry up of an acre of historical irrigation offsets the depletive effect of exposing one surface acre of ground water. Depending on the consumptive use values appropriate for evaporation and irrigation in the location where the mitigation is being proposed, the applicant could be required to provide more or less mitigation water.

Typically, "mitigation" has meant the avoidance or offset of injury to senior water rights.[642] But in the above cases, there was no indication that pumping the small well or evaporation from the ponds would interfere with water levels in neighboring wells. Nor was there any indication that they actually would cause injury to senior surface water rights, although that assumption is the basis for the Department's processing moratorium. Nor was the recharge proposed to benefit a specified senior water right or to avoid a delivery call. Rather, it was to have no net effect on the water system and water users in that system as a whole—much like the PBAR projects discussed previously. In its most simple terms, the mitigation was offered because it was a prerequisite to being able to have the permit application processed.

(5) Injection of spent geothermal water

Both to conserve the volume of a geothermal aquifer and maintain its heat energy, several holders of geothermal water rights inject the water from which varying amounts of heat has been extracted. The City of Boise's geothermal system is an example. The U.S. Department of Administration in Boise is another. The injection is carried out pursuant to a permit under the injection well statute (discussed below), but it provides no right to the injected water as such, and it is not considered aquifer storage.

[642] The Department's draft Water Management Rules define "mitigation" as "[t]he result of an action taken by or for the benefit of the holder of a junior priority water right to prevent injury to a senior priority water right, or to provide compensation acceptable to the holder of a senior priority water right for injury caused by the diversion and use of water under the junior priority water right." This is consistent with the use of the word in the context of a mitigation plan which is defined in the Department's Conjunctive Management Rules, IDAPA 37.03.11.010.15, as "a plan submitted by the holder(s) of a junior-priority ground water right and approved by the Director . . . that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply."

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23. MUNICIPAL WATER RIGHTS AND RAFN

A. The growing communities doctrine—an exception to the anti-speculation rule

The prior appropriation doctrine, born during the frenzied settlement of the western states in the nineteenth century, embodies the entrepreneurial energy that characterized that era. It entrusts private initiative with the duty to efficiently allocate a public resource. Caution as to environmental and other public interest considerations was not grafted onto the doctrine for many decades.

From the start, however, there was a tension within the prior appropriation doctrine. While it embraces laissez faire capitalism, it eschews one of the driving forces of the capitalist market place—speculation. In other contexts, speculation (and the investment resources it brings to the table) is considered the engine of private development and one of the hallmarks of the American success story. In water law, however, speculation is seen as the enemy of beneficial use, which is elevated to the prior appropriation doctrine's most prominent position. Beneficial use is more important even than being first in time: The law condemns the water speculator while rewarding the farmer who actually applies water to the land, regardless of who got there first.

Why the hostility toward the speculator? Simple. Water is a public resource. A speculator is someone who seeks to appropriate water without having an immediate need for it in the hope of selling it later to someone who can put the water to work. Water law views the speculator harshly as someone who has contributed nothing and should not be allowed to profit by tying up a public resource. While our economic system embraces speculation in virtually every other aspect of the economy—from land to futures markets—we have always treated public resources differently. Thus, while speculation in privately owned real estate is allowed and even encouraged, the public domain, by and large, was not sold to the highest bidder but was doled out for free to homesteaders, miners, and others who actually put the land to work. The same is true for water. Once reduced to private ownership, however, both land and water may be bought and sold, and speculation is allowed to play its appropriate economic role of allocating the resource.

This tension—in which speculation is excluded from the marketplace, at least at the time of initial allocation—is important to understand in the context of municipal water rights and the special treatment accorded to municipal water providers.

In the early days, before permit systems were established in Idaho and most other Western states, a water right came into existence only by actual diversion to beneficial use.[643] The statutory permit system provided critical assurance to the developer of a new

[643] "The procedure for appropriating water contained in the act of 1881, providing that an intending appropriator should post a notice at the point of diversion and record the same, was replaced in 1903 by the present procedure which places the regulation of appropriation of waters

water right. Rather than engage in a risky race to develop a water supply, the user could obtain a water right permit in advance, which secured the quantity and priority of the water right sought. With permit in hand, the user then could obtain financing and proceed to construction of the diversion and delivery system with reasonable confidence that water would be available. Once the project was completed and in use, a license would be awarded with a priority date relating back to the date of the application for the permit. Idaho Code §§ 42-202, 42-219.

In Idaho, the user may spend up to five years getting from permit to license, with another five to ten-year extension upon a showing of need. Idaho Code §§ 42-204.[644] In specified (and very limited) circumstances, further extensions may be obtained.[645] In

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under the jurisdiction of [what is now Idaho Department of Water Resources]." Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 21 (1968). Except for certain small domestic wells, the permit/license process is now mandatory in Idaho. Idaho Code §§ 42-103, 42-201 (for surface water diversions, effective May 19, 1971) and Idaho Code § 42-229 (for ground water diversions, effective March 25, 1963). Implementing regulations are found at IDAPA 37.03.08.035.01.a. (may not "commence the construction of any project works" until permit application has been approved).

[644] Idaho Code § 42-204 provides that "actual construction work and application of the water to full beneficial use shall be complete within a period of five (5) years from the date of [permit] approval. . . ." An extension of up to ten years is available for larger water right permits: "The time for completion of works and application of the water to full beneficial use under any permit involving the diversion of two (2) or more cubic feet per second or the development or cultivation of one hundred (100) or more acres of land may be extended by the director of the department of water resources upon application by the permittee for an additional period up to ten (10) years beyond the initial development deadline contained in the permit, or beyond a grant of extension pursuant to the provisions of subsection (1) of this section, provided the permittee establishes that the permittee has exercised reasonable diligence and that good cause exists for the requested extension." Idaho Code § 42-204(4). (This 10-year provision was added in 2013, 2013 Idaho Sess. Laws, ch. 82. It used to be just five years.)

An extension of unlimited duration is available for permits held by the United States or the Idaho Water Resource Board. Idaho Code § 42-204(5).

All others are eligible for one five-year extension: "In all other situations not governed by these provisions the department may grant one (1) extension of time, not exceeding five (5) years beyond the date originally set for completion of works and application of the water to full beneficial use, or beyond any grant of extension pursuant to the provisions of subsection (1) of this section, upon request for extension received on or before the date set for completion, provided good cause appears therefor." Idaho Code § 42-204(6).

Most practitioners find that the Department applies a lenient standard in determining good cause under this provision. Other provisions deal with extensions of time in connection with the submission of proof. Idaho Code §§ 42-218, 42-218(a).

[645] For example, further extensions may be provided for certain, specified permitting delays. Idaho Code § 42-204(1). An extension for up to 12 years is allowed for certain large irrigation projects. Idaho Code § 42-204(2). Extensions are allowed for large reservoir projects.

most cases, that has proven sufficient time to design, fund, and construct a water project, at least for the typical Idaho irrigation project.

The system has not been entirely satisfactory, however, for cities and other municipal water providers.[646] Municipal providers shoulder an obligation unlike that of other water users. Cities and municipal water utilities are bound to serve all those customers who find it desirable to locate within their service area.[647] Municipal providers never know how many customers they will be obligated to serve in the future, but must serve them when they come. Thus, cities cannot wait for the future to unfold and simply hope that water may be obtained as needed. Although some uncertainty is inherent in growth projections, practical necessity demands that cities and utilities lay the foundation today to meet the water needs of the coming decades.

In short, water rights to serve these municipal systems generally must be acquired long before the systems are in operation at full capacity. The planning horizon for these endeavors typically is longer than the five to fifteen years allowed under Idaho's water licensing statute. Cities have argued that they should not be subject to such a limitation. By and large, courts and legislatures have agreed.

B. Development of the doctrine in Colorado

Special treatment for municipal providers was first recognized by the courts, with legislative enactments coming along more recently. The courts of Idaho and other Western states long ago recognized the unique obligations of municipalities and have treated them differently than other water users.

> Of course, as the West began to urbanize, the prohibition against speculation served as a barrier to planning and development of adequate municipal supplies to accommodate future needs. Most states eliminated this barrier by providing

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Idaho Code § 42-204(3). Extensions are allowed for federal or Idaho Water Resource Board projects. Idaho Code § 42-204(5).

[646] The term "municipal provider" is a defined term in Idaho. Idaho Code § 42-202B(5). The term is also commonly used in Colorado. Most other western states refer to cities and public utilities that provide water to customers as "municipal water suppliers."

[647] "Public utilities have a duty to serve all customers within a service area, provided that the system as a whole can absorb the cost and still yield a reasonable rate of return. A leading California case extended the duty to serve to include a duty on water providers to acquire the necessary supplies to meet projected demands." A. Dan Tarlock & Sarah B. Van de Wetering, *Western Growth and Sustainable Water Use: If There Are No "Natural Limits," Should We Worry About Water Supplies?*, 27 Pub. Land and Res. L. Rev. 33, 59 (2006) (citing *Lurawka v. Spring Valley Water Co.*, 146 P. 640, 645-46 (Cal. 1915)).

> special protections for municipalities, allowing them to hold, or at least acquire rights to, water supplies for future use. But for everyone else, the requirement of actual beneficial use remained.

Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 Envtl. L. 919, 965 (1998) (footnote omitted).

As discussed in the next section, Idaho was the first state to recognize the principle of special treatment for municipal providers. Colorado was quick to follow, and the doctrine has been most thoroughly discussed by the courts of that state. The seminal exposition comes from the Colorado Supreme Court, writing in 1939:

> The concern of the city is to assure an adequate supply to the public which it serves. In establishing a beneficial use of water under such circumstances the factors are not as simple and are more numerous than the application of water to 160 acres of land for agricultural purposes. A specified tract of land does not increase in size, but populations do, and in short periods of time. With that flexibility in mind, it is not speculation but the highest prudence on the part of the city to obtain appropriations of water that will satisfy the needs resulting from a normal increase in population within a reasonable period of time.

City & Cnty. of Denver v. Sheriff, 96 P.2d 836, 841 (Colo. 1939) (emphasis added).

The "growing communities doctrine,"[648] as the teaching of *Sheriff* and its progeny has come to be known, recognizes that long-term planning by municipalities is prudent

[648] We use the phrase "growing communities doctrine" in reference to this body of the case law. The label has been employed by the Washington Supreme Court, *State of Washington, Dept. of Ecology v. Theodoratus*, 957 P.2d 1241 (Wash. 1998) (dissent) and by a number of commentators, e.g., Janis A. Carpenter, *Water for Growing Communities: Refining Tradition in the Pacific Northwest*, 27 Envtl. L. 127 (1997); Sandra Zellmer, *The Anti-Speculation Doctrine and its Implications for Collaborative Water Management*, 8 Nevada L. J. 994 (2008); A. Dan Tarlock, *The Progressive Growth Doctrine Meets Old and New Stresses on the West's Variable and Perhaps Shrinking Water Supplies*, 11 No. 2 ABA Water Resources Committee Newsletter 12 (2009); Lora Lucero and A. Dan Tarlock, *Water Supply and Urban Growth in New Mexico: Same Old, Same Old or a New Era*?, 42 Nat. Resources J. 803 (2003); A. Dan Tarlock & Sarah B. Van de Wetering, *Western Growth and Sustainable Water Use: If There Are No "Natural Limits," Should We Worry About Water Supplies?*, 27 Pub. Land and Res. L. Rev. 33 (2006). Although this shorthand description has not yet been employed by the Idaho Supreme Court, and differs somewhat from the "great and growing cities doctrine" which has taken hold in Colorado, we think it captures the idea. The doctrine plainly applies to all growing communities, large and

and necessary, and that the prior appropriation doctrine can accommodate the need for cities to hold water rights for long periods before they are put to use.

Subsequent decisions of the Colorado Supreme Court have reinforced the holding in *Sheriff*. "We cannot hold that a city more than others is entitled to [a] decree for water beyond its own needs. However, an appropriator has a reasonable time in which to effect his originally intended use as well as to complete his originally intended means of diversion, and when appropriations are sought by a growing city, regard should be given to its reasonably anticipated requirements." *City & Cnty. of Denver v. N. Colorado Water Conservancy Dist.* (the "*Blue River*" case), 276 P.2d 992, 997 (1954). "Courts should not intrude their own opinions to override the studied good-faith opinions of governmental agencies as to future needs of the public for facilities or commodities." *Metro. Suburban Water Users Ass'n v. Colorado River Water Conservation Dist.*, 365 P.2d 273, 289 (Colo. 1961). "The *Sheriff* decision clearly counsels against a strict application of the anti-speculation doctrine to municipalities seeking to provide for the future needs of their constituents. . . . Thus under *Blue River*, a city may appropriate water for its future needs without violating the prohibition on speculation so long as the amount of the appropriation is in line with the city's 'reasonably anticipated requirements.'" *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 37-38 (Colo. 1996).

C. Recognition of the doctrine in Idaho

This common law principle has long been recognized in Idaho.[649] Two Idaho cases and one federal case applying Idaho law have ruled squarely that cities may obtain water rights of sufficient quantity to meet future population growth. The first of these predated *Sheriff*.

In *City of Pocatello v. Murray*, 206 F. 72 (D. Idaho 1913), *aff'd, Murray v. City of Pocatello*, 214 F. 214 (9th Cir. 1914), the City of Pocatello granted a franchise to Murray and his associates to provide water to the city.[650] The city complained that while Murray had delivered some water from Mink Creek, he had not obtained the entire supply physically available in the creek. Applying Idaho law, the federal court found Murray indeed had failed to fulfill his contractual obligation. The court rejected Murray's

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small, not just to great cities. For instance, in *Village of Peck v. Denison*, 92 Idaho 747, 751, 450 P.2d 310, 314 (1969), the doctrine was applied to a community of 200 inhabitants.

[649] Special treatment accorded to municipal providers in other western states is summarized in the discussion in section 23.I at page 445 and the table in section 23.I(14)(b) at page 463.

[650] The appeals court affirmed on the narrow basis of the construction of the municipal ordinance. However, the appeals court noted that one of the purposes of the water supply agreement between the city and defendants was to provide "as well for their future use." *Murray*, 214 F. at 220.

argument that it was against public policy for the city to appropriate more water than was then needed. The court declared that the leeway accorded agricultural users "should and doubtless would, be applied with even greater liberality to the superior and more elastic needs of a growing municipality." *Murray*, 206 F. at 80.

In *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940) (Holden, J.), the Idaho Supreme Court upheld the city's right to purchase irrigation water rights and hold them for future municipal needs. The court went on to hold that such water need not be applied to irrigation in the meantime to avoid forfeiture.[651]

> A municipality may purchase lands, if that be necessary, to acquire water for its municipal needs, but is not required, after purchase, to irrigate the lands or cause the same to be irrigated, to avoid a loss of the water on a charge of abandonment. To require that would amount to nullifying the power granted to a municipality to acquire and hold water for future needs—<u>an absolute necessity to the life and existence of a municipality</u>.

Beus, 62 Idaho at 7, 107 P.2d at 154 (emphasis added).

[651] In support of its decision, the Idaho court quoted from a Wyoming case, *Holt v. Cheyenne*, 137 P. 876 (Wyo. 1914):

> [T]he Supreme Court of Wyoming had before it . . . the identical question presented in this case. The court held: "A city's right to appropriate the waters of a stream is not limited to the needs of its citizens at the time of the adjudication of its rights, but is entitled to appropriate for the probable future demands of its population."
>
> The court then reviewed numerous authorities holding that property may be held by a municipality for its future growth and development without being subject to adverse claims of others, and then continues: "Such, we think, is the better reasoning, and is supported by the great weight of authority and to which many courts have in later cases acceded, although a contrary doctrine has been announced in earlier decisions."

Beus, 62 Idaho at 6, 107 P.2d at 154 (this quotation, which *Beus* attributed to *Holt*, is actually from the headnote to *Holt*). The *Holt* court did state: "The city was not limited in the amount of its appropriation to the needs of its citizens at the time of the adjudication." *Holt*, 137 P. at 880. The court further stated that "the securing of water sufficient not alone for its present but such as may be necessary for its future inhabitants was and is within its governmental powers." *Holt*, 137 P. at 881.

In addition to the common law, the Court found support for special treatment of municipalities in Idaho statute.

> Finally, the view that a municipality may acquire and hold water for future needs seems to be placed beyond serious controversy by Section 49-1132, supra, which, among other things, provides that a municipal corporation has power to supply excess water to persons or corporations outside its corporate limits. If a municipality may only acquire water for the existing needs of its inhabitants-those residing within its corporate limits-there could be no excess water to sell outside the limits of a city.

Beus, 62 Idaho at 7, 107 P.2d at 154.[652]

In the case of *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969) (McQuade, J.), the court upheld the right of the village to obtain an unquantified water right for "all the flow" from a particular source. Whether the water was needed for current or future needs is somewhat unclear from the decision. Thus, the discussion of future needs is arguably dictum. In any event, the Court noted in a footnote:

> [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); see Hutchins, op. cit. at p. 44 (municipal use of water).

Village of Peck, 92 Idaho at 751, n.4, 450 P.2d at 314, n.4.

The court's reference in the quotation above is to an article published a year earlier by Wells Hutchins, the distinguished water law scholar, Wells A. Hutchins, *The Idaho*

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[652] The referenced statute, Idaho Code § 49-1132, has been repealed. It may have been replaced by Idaho Code § 50-323, which was created in a comprehensive re-codification of municipal statutes in 1967. H.B. 41, 1967 Idaho Sess. L. ch. 429, § 20. However, this is difficult to trace, because the bill language is in an un-codified format. Nor does the legislative history of the 1967 act provide any information specific to this provision. In any event, an extraterritorial provision similar to that in the prior Idaho Code § 49-1132 is now found in the Idaho Revenue Bond Act, Idaho Code § 50-1030(a).

Idaho Code § 49-1132 may be traced back to 1901. 1901 Idaho Sess. L. ch. 41. However, the 1901 version does not contain the extra-territorial language.

Law of Water Rights, 5 Idaho L. Rev. 1 (1968). Mr. Hutchins concluded that Idaho law does recognize water rights for future municipal growth:

> [A] city is not limited in the amount of its appropriation to the needs of its citizens at the time of adjudication of its water right, but may dispose of and apply the surplus water to beneficial use up to the amount of its application.

Hutchins, 5 Idaho L. Rev. at 44 n.211. The *Village of Peck* Court thus adopted Mr. Hutchins' observation. This shows that the Court viewed the doctrine has having a continuing vitality and a basis independent of the since repealed statute referenced in *Beus* (former Idaho Code § 49-1132, whose successor statute is discussed section 23.K(5) at page 482).

Thus, Idaho case law consistently has recognized and accommodated the special burdens on municipal water providers—providing them a measure of protection from the statutory forfeiture laws and common law abandonment principles.[653] As one commentator put it: "Therefore, when a municipal corporation acquires a water right, the city generally will not lose the water right due to nonuse." Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 294 (1990). In the same vein, the Department's chief legal counsel noted: "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." Phil Rassier, Chief Counsel, *IDWR Memorandum: Municipal Water Rights – Statutory Background* at 1 (May 7, 1979) (reproduced in Appendix M).

D. The Municipal Water Rights Act of 1996

(1) Text of the statute (as amended)

In 1996, the Idaho Legislature codified the growing communities doctrine and established specific procedures and limitations governing a municipality's ability to acquire water rights (by appropriation or transfer) for long-term growth. Municipal Water Rights Act of 1996 ("1996 RAFN statute" or the "Act").[654] Because the text of the

[653] These three Idaho cases on the Growing Communities Doctrine are analyzed by former Deputy Attorney General Philip Rassier in his Memorandum of May 7, 1979 (reproduced in Appendix M).

[654] 1996 Idaho Sess. Laws, ch. 297 (codified as amended at Idaho Code §§ 42-202(2), 42-202(11), 42-202B, 42-217, 42-219(1), 42-219(2), 42-222(1), 42-223(2)). This list of codified sections excludes some minor "clean up" to other sections of the Water Code that were included in the 1996 RAFN statute. References to municipal providers are also found in Idaho Code §§ 43-335 and 43-338, dealing with the right of irrigation districts to lease water to municipal providers. These references were not part of the 1996 RAFN statute but came a year later. The text in the table has been updated to reflect amendments to the 1996 RAFN statute, most recently

Act is important, we set it out here in full (with subsequent amendments) for reference. The following reflects amendments through 2026:

Idaho Code § 42-202(2)	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. The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made. An application for reasonably anticipated future needs for or including geothermal heating and cooling shall include sufficient information and documentation to demonstrate where and how injection of the diverted low temperature geothermal water is or will be accomplished.
Idaho Code § 42-202(11)	Provided further, that water rights held by municipal providers prior to July 1, 1996, shall not be limited thereby.
Idaho Code § 42-202B(4)	"Municipality" means a city incorporated under section 50-102, Idaho Code, a county, or the state of Idaho acting through a department or institution.
Idaho Code § 42-202B(5)	"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.

S.B. 1316 (2020 Idaho Sess. Laws, ch. 164) (providing for incremental licensing of RAFN rights).

Idaho Code § 42-202B(6)	(a) "Municipal purposes" refers to water that a municipal provider is entitled or obligated to supply to users within a service area, including those located outside the boundaries of a municipality served by a municipal provider, for residential use, commercial use, industrial use, irrigation of parks and open spaces, geothermal heating and cooling, and related purposes, or a combination thereof. (b)(i) Geothermal heating and cooling are considered "municipal purposes" if: 1. It is provided by a municipality from a low temperature geothermal water source, as that term is defined in section 42-230(a)(1), Idaho Code; 2. The water use is non-consumptive under normal operating conditions; and 3. The use otherwise complies with section 42-233, Idaho Code. (ii) A municipality is obligated to supply geothermal heating and cooling only to those users approved for service in accordance with its local codes and policies.
Idaho Code § 42-202B(7)	"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.
Idaho Code § 42-202B(8)	"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. Reasonably anticipated future needs for geothermal heating and cooling require injection of diverted low temperature geothermal water back into the same aquifer from which it was diverted and shall be considered when determining what needs will be expected within the planning horizon.

Idaho Code § 42-202B(9)	"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 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 § 42-204	. . . (3) The provisions of this subsection [setting a five-year development period] shall not apply to permits held by municipal providers for reasonably anticipated future needs. . . . (4) For permits held by municipal providers for reasonably anticipated future needs, the permit development period shall correspond to the planning horizon authorized by the permit, which may not be extended. During the permit development period, the municipal provider shall periodically submit to the department incremental statements of completion showing proof of beneficial use consistent with the provisions of section 42-217, Idaho Code. Each such incremental statement shall document the extent of application of water to beneficial use during the most recent reporting interval. Each incremental statement shall be prepared by a certified water rights examiner, unless the permit holder is not asserting any additional increment of beneficial use during that reporting interval. The department shall set and may later adjust the duration of any reporting interval for any permit, which shall be made a condition of the permit, to any duration not shorter than five (5) years. Sixty (60) days before the end of each reporting interval, the department shall forward a notice to the municipal provider by certified mail to its address of record specifying the date the incremental statement is due. Unless an extension of the deadline for the incremental statement is requested by the municipal provider prior to the deadline, and the extension is approved by the director upon a showing of good cause, failure to timely submit an incremental statement shall result in a lapse of that portion of the permit that has not previously been licensed or for which an incremental statement of completion showing proof of beneficial use has not been submitted. Such lapsed permit portion may be reinstated only in accordance with the provisions of section 42-218a, Idaho Code. For reasonably anticipated future needs permits existing on July 1, 2020, the department shall have one (1) year from July 1, 2020, either to issue a license, where proof already has been submitted, or to modify the permit to conform to the provisions of this section by establishing future reporting intervals for periodic proof statements, by establishing the date for the final proof statement corresponding with the end of the planning horizon authorized by the existing permit, and by updating approval conditions to clarify whether information that must be submitted with proof of beneficial use is due at each reporting interval or only with the final proof statement. . . .

	(6) Subject to the provisions for reinstatement as provided in section 42-218a, Idaho Code, a permit holder who fails to comply with the provisions of this section within the time or times specified shall be deemed to have relinquished all rights under its permit or, in the case of a permit held by a municipal provider for reasonably anticipated future needs, the permit holder shall be deemed to have relinquished all rights under any portion of the permit that has not previously been licensed or for which an incremental statement of completion showing proof of beneficial use has not been submitted.

Idaho Code § 42-217	(1) On or before the date set for the beneficial use of waters appropriated under the provisions of this chapter, or the date set for submission of an incremental statement of completion showing proof of beneficial use, the permit holder shall submit a statement on a form furnished by the department of water resources that the permit holder has used such water for the beneficial purpose allowed by the permit. The statement shall include: (a) The name and post office address of the permit holder; (b) The permit number; (c) A description of the extent of the use; (d) In the case of a municipal provider, a description of the current service area; (e) The source of the water used; and (f) Such other information as shall be required by the department's form. (2) Such written statement shall include fees as provided in subsection K. of section 42-221, Idaho Code, or a field examination report prepared by a certified water right examiner. For permits held by a municipal provider for reasonably anticipated future needs, such statements shall be provided in accordance with section 42-204(4), Idaho Code. (3) Upon receipt of such written statement and the fee as required in section 42-221, Idaho Code, the department shall examine, or cause to be examined: (a) The place where such water is diverted and used and, if the use is for irrigation, the area and location of the land irrigated and the nature of all the improvements which have been made as a direct result of such use. (b) The capacities of the ditches or canals or other means by which such water is conducted to such place of use and the quantity of water that has been beneficially applied for irrigation or other purposes. (4) The department or the person making such examination under the direction of the department shall prepare and file a report of the investigation: provided, that whenever an irrigation project is developed in the name of an association, company, corporation, irrigation district or the United States as provided in section 42-219, Idaho Code, proof of beneficial use shall be made by the permit holder. The lands upon which the water has been used need not be described by legal subdivisions, but may be described as provided in section 42-219, Idaho Code, and it shall only be necessary to show in such cases that the quantity of water beneficially applied for irrigation has been applied within the limits of the project.

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Idaho Code § 42-218a	(1) A permit upon which the proof of beneficial use, or an incremental statement of completion showing proof of beneficial use, has not been submitted, or a request for extension of time has not been received on or before the date set for such proof or incremental statement, shall lapse and be of no further force nor effect. For a permit held by a municipal provider for reasonably anticipated future needs, such lapse 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. Notice of said lapsing shall be sent by the department to the permit holder at the address of record by regular mail. . . .

Idaho Code § 42-219	(1) Upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license corresponding to the beneficial use. Such license shall state the name and post office address of such user, the purpose for which such water is used and the quantity of water that may be used, which in no case shall be an amount in excess of the amount that has been beneficially applied. For permits held by a municipal provider for reasonably anticipated future needs, a license may be issued incrementally for an amount corresponding to the beneficial use demonstrated to the satisfaction of the department in each incremental statement of completion showing proof of beneficial use submitted pursuant to section 42-204(4), Idaho Code, which amount, together with any previously licensed portion of said permit, shall not exceed the initial quantity authorized under the permit. The final incremental license at the end of the planning horizon shall be issued for an amount corresponding to the beneficial use. The director shall condition the license to prohibit any transfer of the place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use of amounts held for reasonably anticipated future needs together with such other conditions as the director may deem appropriate. (2) If such use is for irrigation, such license shall give a description, by legal subdivisions, of the land irrigated by such water, except that the general description of a place of use described in accordance with subsection (5) or (6) of this section may be described using a digital boundary, as defined in section 42-202B, Idaho Code. If the use is for municipal purposes, the license shall describe the service area as provided in section 42-202B(9), Idaho Code. . . .
Idaho Code § 42-222(1)	Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change. Such application shall be upon forms furnished by the department and shall describe the right

	licensed, claimed or decreed which is to be changed and the changes which are proposed, and shall be accompanied by the statutory filing fee as in this chapter provided. Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required in section 42-108, Idaho Code, and if otherwise proper to provide notice of the proposed change in a similar manner as applications under section 42-203A, Idaho Code. Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon. He shall also advise the watermaster of the district in which such water is used of the proposed change and the watermaster shall notify the director of the department of water resources of his recommendation on the application, and the director of the department of water resources shall not finally determine the action on the application for change until he has received from such watermaster his recommendation thereof, which action of the watermaster shall be received and considered as other evidence. For applications proposing to change only the point of diversion or place of use of a water right in a manner that will not change the effect on the source for the right and any other hydraulically-connected sources from the effect resulting under the right as previously approved, and that will not affect the rights of other water users, the director of the department of water resources shall give only such notice to other users as he deems appropriate. When the nature of use of the water right is to be changed to municipal purposes and some or all of the right will be held by a municipal provider to serve reasonably anticipated future needs, the municipal provider shall provide to the department 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. The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made. An application for reasonably anticipated future needs for or including

	geothermal heating and cooling shall include sufficient information and documentation to demonstrate where and how injection of the diverted low temperature geothermal water is or will be accomplished. When a water right or a portion thereof to be changed is held by a municipal provider for municipal purposes, as defined in section 42-202B, Idaho Code, that portion of the right held for reasonably anticipated future needs at the time of the change shall not be changed to a place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use. The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area. The transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement in use of the original right even though more acres may be irrigated, if no other water rights are injured thereby. A copy of the approved application for change shall be returned to the applicant and he shall be authorized upon receipt thereof to make the change and the original water right shall be presumed to have been amended by reason of such authorized change. In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter set forth. Provided however, minimum stream flow water rights may not be

	established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code.
Idaho Code § 42-223(2)	A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs.

(2) The 1996 RAFN statute recognized the common law as its foundation

In enacting the Municipal Water Rights Act of 1996, the Legislature affirmed the growing community doctrine's role in Idaho water law, while placing clear sideboards on how it is to be applied. By requiring careful planning and full disclosure by those who seek future needs water rights, the statute establishes a cautious approach to the municipal water rights consistent with the objectives of maximum use and conservation of water resources.

In the law's statement of purpose, the Legislature recognized that it was not writing on a blank slate and specifically recognized and embraced the common law doctrine of special treatment for municipalities:

> The appropriation doctrine as applied throughout the western states provides flexibility for municipal providers to obtain and hold water rights needed to assure an adequate water supply for reasonably anticipated future needs. While this concept is recognized in Idaho case law, it should be further described in statutes in order to guide the actions of the Department of Water Resources, water users and the courts, and to assure that the use of this concept is appropriately controlled. The legislation seeks to define and limit the authority of municipal water providers to develop and hold water rights for reasonably anticipated future needs and to allow water to be supplied to expanding service areas. This statute addresses future licensing of water rights for municipal purposes (including those currently permitted) as well as future changes in water rights to municipal purposes. The statute does not address those licensed and decreed water rights now held by municipal providers, and the legislation intends no change in the common law with respect to such rights. Municipalities would be required to provide information to describe their service area, to establish a

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> reasonable planning horizon, and to show that the water rights are necessary for reasonably anticipated future needs.

Statement of Purpose, R.S. 06104, which became S.B. 1535, enacted as the Municipal Water Rights Act of 1996, 1996 Idaho Sess. Laws, ch. 297.

The 1996 RAFN statute is more than a codification of the common law, however. It contains several new concepts and reflects a much more precise regulatory interpretation of the doctrine. The structure of the new approach is reflected in several newly defined terms of art, all contained in the following one-sentence summary of the statute: "Municipal providers" may secure water rights for "municipal purposes" of sufficient quantity to serve all "reasonably anticipated future needs" (aka "RAFN") within an expanding "service area" during a specified "planning horizon."

The following sections address each of these terms of art.

(3) Who is a municipal provider?

The term "municipal provider" is defined to include more than cities who provide water to their customers. The Act defines four types of municipal provider: (1) cities, counties and the state, (2) water utilities, like Veolia, (3) water and sewer districts, and (4) subdivision developers and homeowner associations. Idaho Code § 42-202B(5). Each is discussed below.

(a) Cities, counties, and state

The first category of municipal provider is simply: "A municipality that provides water for municipal purposes to its residents and other users within its service area." Idaho Code § 42-202B(5)(a). The reference to "municipality" is somewhat broader than it sounds because that term is defined elsewhere to include cities, counties, and state entities. "'Municipality' means a city incorporated under section 50-102, Idaho Code, a county, or the state of Idaho acting through a department or institution." Idaho Code § 42-202B(4). Thus, for instance, a state university or state prison providing drinking water to students or prisoners would fall within the definition of "municipality" and, hence, "municipal provider." In another example, the Idaho Transportation Department has obtained a municipal water right under the Act to irrigate landscaping at the Bliss rest stop.[655] To the authors' knowledge, no county in Idaho provides municipal water. But a county would fall within this definition if it chose to do so.[656]

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[655] This and other RAFN rights are identified in the table found in section 23.G at page 442.

[656] The term "municipality" is defined differently in other parts of the Idaho Code. For example: Idaho Code § 50-1702 defines municipality very broadly (to include such things as highway districts and sewer districts) in the context of local improvement districts. The term is

(b) Municipal water utilities

The second category is regulated utilities: "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." Idaho Code § 42-202B(5)(b). This would include large utilities such as United Water Idaho (which happens to be the largest municipal provider in the state) and small ones like Eagle Water Company serving portions of Eagle.

(c) Other political subdivisions (such as water and sewer districts)

The third category also includes "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." Idaho Code § 42-202B(5)(b) (the same subsection of the act includes both the second and third categories described here). This would include, for instance, water and sewer districts that provide municipal water to their customers.[657]

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also broadly defined in Idaho Code § 67-8702 (to include such things as school districts and special purpose districts) in the context of the Idaho Bond Bank. Idaho Code § 50-2018 defines municipality more narrowly (to include only cities, towns, and counties) in the context of urban renewal law. Another narrow definition is found in Idaho Code § 50-2702 (including only cities, towns, and counties) in the context of the municipal industrial development program.

[657] There is no doubt that water and sewer districts are political subdivisions of the state. "The judges of election shall certify the returns of the election to the district court having jurisdiction. If a majority of the votes cast at said election are in favor of the organization, the district court shall declare the [water or sewer] district organized and give it a corporate name by which, in all proceedings, it shall thereafter be known, and designated the first board of directors elected, and thereupon the district shall be a governmental subdivision of the state of Idaho and a body corporate with all the powers of a public or quasi-municipal corporation." Idaho Code § 42-3207 (providing for the creation of water and sewer districts) (emphasis provided). See also, Idaho Code § 42-3218C (providing that subdistricts of water and sewer districts are political subdivisions). This is consistent with other broad definitions of political subdivision found throughout the Idaho Code. E.g., Idaho Code §§ 6-902(2), 7-1303(6), 12-117(6)(b), 44-2013(2)(a), 46-1002(4), 56-1402(5), 58-1102(c), 59-802(5); 63-3622*O*(2)(j), and 67-2809(2)(b)(i). Only a few definitions, which are not applicable here, provide a more restrictive scope. E.g., The Idaho Video Services Act, Idaho Code § 50-3002(12).

(d) Private developers and homeowners' associations (and the "not your first rodeo" rule)

The fourth category includes private land developers and homeowner groups: "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." Idaho Code § 42-202B(5)(c). The definition of "public water supply" is quite broad. It includes small private residential water systems serving at least 15 connections or 25 individuals.[658]

The Department takes the position that in order to qualify as a municipal provider seeking a RAFN right, the applicant must already be providing municipal water to others. In other words, the applicant for a RAFN right must already be in the business of providing municipal water—this cannot be "their first rodeo." This is a non-issue for cities and others that have long provided municipal water rights. But it is for developers of new projects.

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[658] This definition was amended in 2010, increasing the minimum number of service connections from 10 to 15. It now provides: "'Public water supply' or 'public drinking water system' means a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen (15) service connections, regardless of the number of water sources or configuration of the distribution system, or regularly serves an average of at least twenty-five (25) individuals daily at least sixty (60) days out of the year. Such term includes any collection, treatment, storage and distribution facilities that are under the control of the operator of such system and used primarily in connection with such system, and any collection or pretreatment storage facilities not under such control that are used primarily in connection with such system. Such term does not include any special irrigation district." Idaho Code § 39-103(12).

This is implemented by regulation:

> **Public Drinking Water System (PWS).** A system for the provision to the public of water <u>for human consumption</u> through pipes or, after August 5, 1998, other constructed conveyances, if such system has at least fifteen (15) service connections, regardless of the number of water sources or configuration of the distribution system, or regularly serves an average of at least twenty-five (25) individuals daily at least sixty (60) days out of the year. Such term <u>includes: any collection, treatment, storage</u>, and distribution facilities under the control of the operator of such system and used primarily in connection with such system; and any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system. Such term does not include any "special irrigation district." A public water system is either a "community water system" or a "non-community water system … .

IDAPA 58.01.08.56 (2024) (emphasis added).

This limitation is based not on the definition of municipal provider, but on another provision of the 1996 RAFN statute which states:

> 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. . . .

Idaho Code § 42-202(2) (emphasis added).[659]

Focusing on the present tense of the verb "qualifies," former Director Gary Spakman ruled that to obtain an appropriation for RAFN, the applicant must already qualify as a municipal provider at the time of the application.[660] This ruling is now codified in the Department's guidance. *2021 RAFN Handbook* at 6.[661]

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[659] Similar "qualification" language is found in Idaho Code § 42-222(1) applicable to transfers of existing water rights to municipal RAFN purposes.

[660] "The interim director [former Director Gary Spackman] interprets the verb [qualifies] to mean that the applicant must be a municipal provider as defined by Idaho Code 42-202B(5) at the time the application is considered by the Department." *In the Matter of Application to Appropriate Water No. 63-32573 in the Name of M3 Eagle LLC ("M3 Decision")*, at 9-10 (IDWR Amended Final Order, Jan. 25, 2010). This order was appealed, *M3 Eagle LLC v. Idaho Dep't of Water Resources*, Case No. CVOC1003180, Petition for Judicial Review (4th Dist. Idaho Feb. 19, 2010), but the case was settled and the appeal dismissed. The Department ruled that M3 Eagle LLC ("M3") did not qualify as a municipal provider entitled to obtain a RAFN right because it was not then providing municipal water to others in Idaho. M3's parent company is an established developer and municipal provider in Arizona; this was its first project in Idaho. This was the first time the Department applied this qualification rule in this way. Indeed, the M3 decision departed from prior precedent. A RAFN water right was awarded by the Department to the developer of the Tamarack ski resort (then known as West Rock). *In the Matter of Application for Permit No. 65-22357 in the Name of West Rock Associates, LLC* (IDWR, Final Order, Dec. 20, 2002) (Conclusion of Law No. 5) (on appeal as of June 2011). Tamarack was a first-time developer, not an existing municipal provider. The Department said it was not bound by the Tamarack precedent because the qualification issue was not discussed in the Tamarack decision. *M3 Decision* at 12.

[661] The full citation is: Shelley W. Keen, IDWR Guidance, A*pplication Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (*RAFN Municipal Water Right Handbook*) (Oct. 1, 2021) ("*2021 RAFN Handbook*"). The 2021 guidance replaced prior guidance: Mat Weaver, IDWR Guidance, *Application Processing No.*

What this means is that the applicant's expressed intent and demonstrated ability to provide municipal water is insufficient to presently "qualify" as a municipal provider. In order to obtain a RAFN right, the applicant already must be a municipal provider providing municipal water to someone else. This obviously presents a chicken and egg problem. The only way for a developer (or a newly formed water utility) to become a municipal provider is to serve its homeowners or customers solely with non-RAFN municipal rights.[662] Then, when seeking to expand its development or operation, the municipal provider may presently "qualify" as a municipal provider and therefore be able to apply for RAFN rights. It is unclear what public policy is advanced by this two-step process. The legislative history sheds no light on the matter, but the authors doubt that the drafters intended the statute to be read so narrowly. It would appear that the Department's adoption of this narrow reading of the Act (and reversal of prior precedent) reflects its anti-sprawl philosophy.

To the authors' knowledge, this qualification issue has arisen only once, in the context of a private residential developer (M3 Eagle LLC, discussed in footnote 660 above). It is now addressed in IDWR's guidance on this topic:

> 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 is issued.

2021 RAFN Handbook at 6. See also *2021 RAFN Handbook* at 24, n.15.

As a practical matter, it is this third category of municipal provider that is most likely to face this issue; existing cities and water utilities already are in the business of providing municipal water. Hence, qualification is not an issue for them. It is unclear why IDWR's guidance says that it is legally limited to subsection (c) municipal

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74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29 (Mar. 16, 2015) (which, in turn, replaced Nov. 15, 2014 and Nov. 13, 2013 versions).

[662] This is doable because, under the Department's parsing of the Act, first-time developers may be deemed municipal providers for purposes of obtaining a non-RAFN water right even though they do not "qualify" as municipal providers eligible for future needs water rights. As noted above, the present-tense "qualifies" requirement is found in the RAFN provisions of the water code.

providers. It would seem that the principle would apply equally to all categories of municipal provider. Thus, if a new water utility were formed or if a county or city decided to get into the water supply business for the first time, one would think that it too would face the chicken and egg conundrum discussed above. That is, they cannot "qualify" as a municipal provider for RAFN purposes unless they already are a municipal provider. But that is not what the Department's guidance says.

(4) What are municipal purposes?

The term "municipal purposes" is broadly defined to include "residential, commercial, industrial, irrigation of parks and open space, and related purposes." Idaho Code § 42-202B(6) (definition of "municipal purposes"). This list was broadly drawn and is intended to serve as a catch-all for virtually any use that may arise within the provider's service area.[663]

The only use expressly excluded from municipal purposes is "water from geothermal sources for heating." Idaho Code § 42-202B(6) (definition of "municipal purposes"). However, geothermal water used for non-heat purposes (such as irrigation) does fall within the exclusion.

Departmental policy recognizes that treatment of municipal effluent that is mandated by environmental regulations falls within the definition of municipal purposes. This would include both land application and infiltration projects.[664]

(5) Geothermal water

The 1996 RAFN Act was amended in 2026 by H.B. 676, 2026 Idaho Sess. Laws, ch. 65. The 2026 legislation changed the provisions dealing with RAFN and geothermal water. When enacted in 1996, the definition of "municipal purposes" excluded the "use of water from geothermal sources for heating." 1996 Idaho Sess. Laws, ch. 296, § 1 (most recently codified at Idaho Code § 42-202B(6)). Geothermal water was excluded because it was perceived that this important resource should be protected from large appropriations based on future needs. In 2026, the City of Boise worked with the Idaho Water Users Association to modify this provision to allow municipalities (not any municipal provider) to secure RAFN appropriations of geothermal water, but only when the water is used in a non-consumptive manner and is reinjected into the original aquifer

[663] A 1979 IDWR policy statement defined municipal use as including "domestic, irrigation, stockwater, fire protection, recreation, commercial, industrial, and any other water use incidental to the functioning of a city." Norman Young, *Administrator's Memorandum – Definition of Municipal* (Nov. 5, 1979). This list, like the one in the 1996 RAFN statute, was intended to embrace any use a municipal provider might be called upon to provide.

[664] Personal communication between Jeff Peppersack and Garrick Baxter of IDWR and Christopher H. Meyer of Givens Pursley, May 16, 2011.

after use. It also requires compliance with the strict provisions protecting geothermal resources set out in Idaho Code § 42-233.

Note that not all geothermal water satisfies these conditions. The earliest geothermal resources in Boise were appropriated by private corporations. Moreover, geothermal water is often used consumptively (discharged to the sewer system after its heat is extracted). Boise is undertaking a more technologically sophisticated program in which the cooled water is reinjected into the original aquifer (where it will be heated again naturally).

Note that the 2026 legislation speaks of geothermal water being used for heating or cooling. Today, geothermal water is used only for heating. But the technology exists to use if for cooling as well through mechanisms similar to heat pumps.

Note also that the definition of "municipal purposes" applies to all water rights, not just those held for RAFN purposes. Thus, entities using geothermal water that do not fit the 2026 criteria must obtain and hold those rights for other named purposes (typically "heating"), not under the broad category of "municipal purposes."

The 2026 legislation made one other "clean-up" change. The statute previously defined "municipal purposes" by listing various water uses that that "a municipal provider is entitled or obligated to supply to all those users within a service area." Idaho Code § 42-202B(6) In 1996, the words "all those" were stricken to make clear that a municipality is not obligated to provide geothermal water to everyone who wants it. This change was reiterated in new section 42-202B(6)(b)(ii), which expressly states that municipalities are not obligated to supply geothermal water to everyone. This change reflects the fact that there is not enough geothermal water to heat every building in Boise (or elsewhere that geothermal resources exist). This allows a city to make commitments to serve new developments hot water only to the extent the city believes it has the resources to do so.

The 2026 legislation did not have any other effect on the administration of RAFN water rights or municipal water rights.

(6) The flexible service area

The Act provides for substantial flexibility in the establishment of a "service area." Idaho Code § 42-202B(9). One of the basic elements of every water right is its place of use. For most water rights, the exact boundaries of the place of use (or larger "permissible place of use") must be identified, and any change in these boundaries requires that the water right holder seek departmental approval of a change in place of

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use.[665] This presents a problem in the case of traditional municipal water rights because the place of use changes as the city grows.

The Department has long recognized this special feature of a municipal water right, and allowed it to be described simply by reference to the "city limits" of the community or the licensed service area of a water utility. Norman Young, *Administrator's Memorandum – Definition of Municipal* (Nov. 5, 1979) (reproduced in Appendix M).

But what if a municipal provider serves customers outside the city limits? Prior departmental guidance limited the service area to a municipality's city limits. E.g., Norman Young, *Administrator's Memorandum – Definition of Municipal* (Nov. 5, 1979) (reproduced in Appendix M). This was never tested in court. In any event, this issue was resolved in the 1996 RAFN statute, which expressly expanded the scope of the service area.[666] Under the 1996 RAFN statute, a municipal provider's place of use is not limited to a city's corporate limits. A city may provide service outside of its city limits, if it is within the municipality's planning area[667] and the delivery system outside the city is physically connected to the city's delivery system inside the city.[668] Note that these limitations do not apply to municipal providers other than cities. In the case of water utilities, the service area is the certificated area approved by the Idaho Public Utilities Commission, which may include one or more cities and/or unincorporated areas. The

[665] In the case of irrigation rights, the water right must identify the place of use by "legal subdivisions"–that is, down to the forty acre "quarter-quarter" of a one-square-mile section. Idaho Code § 42-202(6).

[666] "'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 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(9) (definition of "service area").

[667] See discussion of the meaning of "planning area" in this context in footnote 742 on page 478.

[668] See broader discussion the authority of cities to serve outside their city limits in section 23.K at page 477.

Act also clarifies that a general description of the service area is sufficient. There is no need to identify a precise boundary.[669]

More significantly, the service area is not fixed in time, but automatically includes any future "changes therein after the permit or license is issued." Idaho Code § 42-202B(9) (definition of "service area"). This confirms longstanding practice that cities and water utilities are not required to seek a formal change in place of use each time the area it serves is expanded. As codified, this now applies to all those meeting the statutory definition of municipal provider.

The 1996 RAFN statute does not specify whether or how often a municipal provider must update its description (other than a requirement to update all estimates and descriptions at the time of licensing[670]). The Act seems to contemplate a narrative description of the service area, but the Department does not require even this. As a practical matter, the Department is more interested in keeping its computerized GIS "shape file" for the service area reasonably up to date. It is conceivable that a municipal provider could have more than one service area description, if it operated in multiple, distinct geographical areas.

Municipal use encompasses some uses that might be considered "irrigation," such as irrigation of lawns, parks, open space, and greenery around commercial areas. Likewise, it could encompass irrigation of plants in in a greenhouse that was served by the municipal provider. We are not aware of any formal guidance on this subject, but the authors would suggest that any water lawfully provided to a customer of a municipal provider as part of its general delivery system is a municipal right, and this is true irrespective of what the customer does with the water.

On the other hand a separate farming operation that happens to be owned by a municipality, and is not connected to land treatment of municipal discharge, will most likely be viewed as not a municipal use.

On the other hand, a municipal provider plainly has the authority under the 1996 RAFN statute to acquire an irrigation water right and transfer it to municipal use for RAFN purposes. However, if the right is not presently needed, and the municipal

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[669] "The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made." Idaho Code § 42-202(2) (application requirements for municipal service providers).

[670] The proof of beneficial use statement required at the time of licensing shall require "[i]n the case of a municipal provider, a revised estimate of the reasonably anticipated future needs, a revised description of the service area, and a revised planning horizon, together with appropriate supporting documentation." Idaho Code § 42-217(¶4).

provider wishes to continue to operate the farm in the interim, the Department will likely not recognize the right as an irrigation right so long as the farm operation continues. This raises some questions that have not yet been worked out. Should the irrigation right be considered part of the provider's portfolio of municipal rights for "gap analysis"? Is there a way to transfer the right today, so that the provider may be confident that it will be part of its municipal portfolio, even though it continues to be used in the interim for non-municipal purposes?

(7) How long is the planning horizon?

The first step in quantifying future needs is to establish the duration of the planning horizon. The 1996 RAFN statute defines the term 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." Idaho Code § 42-202B(7) (definition of "planning horizon"). The 1996 RAFN statute provides no guidance and sets no limit on the duration of the "planning horizon."[671] It is up to the municipal provider to present its case for what it believes is a reasonable period to fit its circumstances. Thus, the duration of the planning horizon is decided on a case-by-case basis by the Department. Two obvious factors are the size of the community and its rate of growth. For a small, slowly growing town or a private subdivision, this might be as little as 15 years. A mid-sized city or a large planned community might require a somewhat longer time, perhaps 20 to 30 years. For a large growing city, a considerably longer planning horizon would seem to be appropriate. Colorado has recognized 50-year planning horizons for the City of Thornton (a medium-sized Front Range suburb, population 78,000) and for Pagosa Springs area (population 9,500). See discussion in section 23.I at page 445 and the table in section 23.I(14)(b) at page 463 for a discussion of future needs water rights in other states.

[671] The Act's definition of RAFN provides that it includes "future uses of water . . . [that] are reasonably expected to be required within the planning horizon of each municipality." Idaho Code § 42-202B(8). This definition was somewhat garbled during the enactment process. The reference to "the planning horizon of each municipality" makes no sense in the context of a private water utility. This is because cities do not have planning horizons (within the meaning of the Act) unless they are the municipal provider. Where water is provided by a utility, it is the water utility, not the municipality, that has a planning horizon. The original draft of the legislation provided: "'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 the municipal provider and are generally consistent with the comprehensive land use plans for each municipality within the service area." Draft legislation by Christopher H. Meyer (Nov. 27, 1995) (on file with author). The change appears to be inadvertent.

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Idaho's Municipal Water Rights Act imposes on the Department the responsibility to determine the reasonableness of the applicant's asserted planning horizon.

In 2013, the Department issued its first guidance on the subject of the duration of the planning horizon. It was updated in 2014, 2015, and 2021.[672]

The *2021 RAFN Handbook* does not provide any specific criteria or limits on the duration of planning horizons, but does include the following general observations:

> 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 of 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.
>
> . . .
>
> 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 document exists. 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

[672] The full citation is: Shelley W. Keen, IDWR Guidance, *Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (*RAFN Municipal Water Right Handbook*) (Oct. 1, 2021) ("*2021 RAFN Handbook*"). The 2021 guidance replaced prior guidance: Mat Weaver, IDWR Guidance, *Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (Mar. 16, 2015) (which, in turn, replaced Nov. 15, 2014 and Nov. 13, 2013 versions).

> period of time shared between the planning horizons of both documents.

2021 RAFN Handbook at 10-11.[673]

(8) Reasonably Anticipated Future Needs ("RAFN")

The central feature of the 1996 RAFN statute is its provision for "reasonably anticipated future needs" (or "RAFN"). While the statute speaks in terms of "future" needs, the Act expressly recognizes that these rights serve a beneficial use now (by allowing cities to plan for growth in an orderly fashion) despite the fact that they may not be physically diverted for decades.[674]

The statute 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

[673] The last paragraph appears to have been written in contemplation of situations in which the municipal provider is a city. It is unclear how it would apply in the case of a water utility or a water and sewer district that serves multiple municipalities and/or unincorporated areas. First, there is the question of which comprehensive plan controls and what happens when different plans have different planning durations. Next, it is unclear what a "master water plan" is. Presumably this would include a master plan prepared by the non-city water provider itself. The guidance concludes by stating that "the planning document should be consistent with the master plan for the coincident period of time shared between the planning horizons of both documents." This language is difficult to parse. Presumably, "the planning document" refers to the RAFN application, and "both documents" refers to the RAFN application and the master water plan. Thus, it would appear, for example, that the guidance would allow a longer master water plan (e.g., 50-year) to be used to support a 50-year RAFN application, despite the existence of shorter comprehensive plan (e.g., 20-year). Such a reading makes sense. The two documents have different purposes. The 1996 RAFN statute only requires that the quantification of RAFN be based on "planning data . . . [that is] not inconsistent with comprehensive land use plans approved by each municipality. Idaho Code § 42-202B(8). Thus, for example, a future needs projection could not be based on a high population density in an area which the comprehensive plan has designated for open space. Nothing in the Act says that the duration of the planning horizon is capped by the duration of the comprehensive plans. Indeed, some comprehensive plans do not even have clear "durations."

[674] "A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute a beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs." Idaho Code § 42-223(2).

> 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.

Idaho Code § 42-202B(8) (definition of "reasonably anticipated future needs").

As noted above, the concept of "future needs" water rights is derived from the common law growing communities doctrine, which accords considerable latitude to cities and municipal water utilities in acquiring rights for long-term needs. The statute attempts to put some sideboards on the concept by requiring that their future needs be documented with "population and other planning data" provided by the municipal provider to the satisfaction of the Idaho Department of Water Resources.[675]

To date, the Department has considered only a few actual "future needs" water right applications (see table in section 23.G at page 442). Depending on the circumstances of the case, the Department may require sophisticated statistical analyses in connection with approving a municipal provider's planning horizon. In the case of a large set of RAFN applications known as the IMAP (Integrated Municipal Application Package) by United Water Idaho Inc. (a regulated utility now known as Veolia Water

[675] This additional planning burden is found in three places in the statute. *Definition:* "'Reasonably anticipated future needs' refers to the 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 . . . ." Idaho Code § 42-202B(8) (emphasis added). *For new applications:* "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." Idaho Code § 42-202(2) (emphasis added). *For transfers:* "When the nature of the use of the water right is to be changed to municipal purposes and some or all of the water right will be held by a municipal provider to serve reasonably anticipated future needs, the municipal provider shall provide to the department 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." Idaho Code § 42-222(1) (emphasis added). The additional burden was referenced in a 2008 decision by the Department: "To appropriate water for reasonably anticipated future needs, the municipal provider carries an extra evidentiary burden to establish the 'planning horizon' for the municipality or municipalities served, and to submit 'population and other planning data' in support of the anticipated needs within the planning horizon." *In the Matter of Applications To Appropriate Water Nos. 63-32089 and 63-32090 in the Name of the City of Eagle* (IDWR's Final Order Feb. 26, 2008; Order on Reconsideration July 3, 2008), *appeal dismissed as untimely*, *City of Eagle v. IDWR*, 150 Idaho 449, 247 P.3d 1037 (2011).

Idaho, Inc.), these analyses have taken into account such factors as price elasticity of water demand, the availability of non-potable lawn irrigation, shifts in demographics, and the composition of population, changes in lifestyle, and conservation incentives. In contrast, a RAFN projection for a defined number of housing units in a subdivision or planned community to be built by a private developer who qualifies as a municipal provider would be a simpler proposition.

In 2013, the Department issued extensive guidance on the methodologies that should be employed in quantifying an application for a RAFN water right. This was revised is 2014, 2015, and 2021.[676] The *2021 RAFN Handbook* basically codifies the methodologies that were developed in Veolia's IMAP filings.

In order to obtain a new RAFN right (either by appropriation or transfer), the provider must demonstrate that additional diversion quantity is required. This is referred to in IDWR's guidance as a "gap analysis." *2021 RAFN Handbook* at 21. In other words, the applicant for a RAFN right must compare its current and future needs with the size of its existing portfolio. An application for RAFN water rights will be approved only on a showing that the provider's existing portfolio is insufficient to meet its long-term needs.

In some cases, the gap analysis may be as simple as summing the authorized diversion rates for each right in the relevant portfolio and comparing that to the total peak diversion rate required to meet current and future demand (with an appropriate safety factor). In other cases, it may be more complex. For example, the quantification of available rights in the portfolio may need to take into account redundant supplies (e.g., primary and supplemental rights, backup supply systems, flood flow rights and other rights with limited or seasonal availability, and so on). There may be other complications such as storage rights, rental or other temporary rights, exchanges, mitigation plans, subordinations and other special conditions. Evaluating the demand side could also be complicated by different delivery systems (e.g., irrigation and potable systems). Finally, some portfolios may include water rights for non-municipal purposes or for specialized purposes within the municipal system.

As discussed below in section 23.D(9) at page 412, under its 2009 guidance, the Department will look at a municipal provider's entire portfolio in any event—whether the application is for RAFN or only to meet short-term needs under a non-RAFN right. The difference is that if the new right is sought for RAFN, the portfolio quantity will be

[676] The full citation is: Shelley W. Keen, IDWR Guidance, *Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29*, (*RAFN Municipal Water Right Handbook*) (Oct. 1, 2021) ("*2021 RAFN Handbook*"). The 2021 guidance replaced prior guidance: Mat Weaver, *Memorandum – Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (Mar. 16, 2015) (which, in turn, replaced Nov. 15, 2014 and Nov. 13, 2013 versions).

compared against a demand number that includes not just short-term requirements but long-term future needs.

It bears emphasis that the Act does not create any entitlement or obligation on the part of municipal providers to obtain water rights for long-term needs. If establishment of a planning horizon and quantification of RAFN reveals that a municipal provider has inadequate rights in its portfolio to meet those needs, it is the provider's burden to acquire such rights by appropriation, transfer, rental, or otherwise. In doing so, the municipal provider will be subject to all the usual rules and protections regarding injury and the local public interest.

(9) Quantifying a municipal water right at permitting and licensing: Before and after the 1996 RAFN statute

(a) Common law rule for cities: Installed capacity/no annual volume limit

Note: Permitting, licensing, and transfer of both RAFN and non-RAFN municipal water rights sometimes requires a quantification either system-wide installed capacity and system-wide demand (or production). Gap and cap analyses are discussed further in section 23.D(10) on page 429.

For decades before the 1996 RAFN statute, the Department provided special treatment for municipal water rights by quantifying them more generously than other rights. This is one way in which the growing communities doctrine was implemented prior to the 1996 RAFN statute.[677]

First, it has long been the Department's policy to quantify municipal water rights solely in terms of a diversion rate with no annual volume cap.[678] A. Kenneth Dunn,

[677] "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 be omitted from the license for municipal use." A. Kenneth Dunn, *Administrator's Memorandum – Licensing Procedures* at 1 (Apr. 7, 1975) (reproduced in Appendix M). "A municipal right should not be limited by volume. . . . These three preferences allow the city to increase water use under an existing right." Norman Young, *Administrator's Memorandum – Definition of Municipal* (Nov. 5, 1979) (reproduced in Appendix M). "In the past, municipal water right holders generally already utilized the benefits offered by the amended code sections [the 1996 RAFN statute], 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." L. Glen Saxton, *Memorandum – Water Rights for Municipal Use* at 1 (Mar. 18, 1998) (reproduced in Appendix M).

[678] Irrigation and other non-municipal water rights are usually quantified in terms of a maximum diversion rate coupled with a maximum annual volume. The annual volume limit is

IDWR, *Licensing Procedures* at 1 (Apr. 7, 1975) (reproduced in Appendix M); Jeff Peppersack, IDWR Guidance, *Application Processing No. 18; Licensing No. 1*(*Processing Applications and Amendments and Determining Beneficial Use for Non-RAFN Municipal Water Rights*), at 1-2 (Oct. 19, 2009) ("*2009 Peppersack Memo*") (reproduced in Appendix M)[679]; *2021 RAFN Handbook* at 22 (reproduced in Appendix M). Thus, for example, a new well, when first installed, might be used only occasionally to meet peak demand. Over time, however, the city is allowed to "grow into" the right, ultimately using the water right 24 hours a day, every day as part of its full-time base load.

The exemption from the requirement for a volume limit is now reflected in the Department's Beneficial Use Examination Rules, as amended on March, 29, 2012.

> j. . . . The following water uses are exempt from the volume reporting requirement:
> . . .
> vii. Municipal use by an incorporated city or other entity serving users throughout the incorporated city, except the following situations that do require a volume to be reported:
> (1) The permit or amended permit was approved with a volume limitation; or
> (2) The permit was not approved for municipal use but can be amended and licensed for a municipal use established during the authorized development period for the permit.

IDAPA 37.03.02.035.01.j.vii.

Traditionally, at the time of licensing, beneficial use for municipal water rights was measured based on the installed physical capacity of the diverting works, not the extent of actual diversions to customers.[680] This is commonly known as the "installed

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typically a fraction of what would be pumped were the water right to be diverted at its full rate 24 hours a day for 365 days. This reflects the fact that most irrigation water rights are not diverted around the clock; doing so would far exceed beneficial use in most cases. The annual volume is intended to reflect the actual use pattern and to make that a permanent feature of the right.

[679] The *2009 Peppersack Memo* replaced two earlier administrative memoranda: A. Kenneth Dunn, *Administrator's Memorandum – Licensing Procedures* at 1 (Apr. 7, 1975); Norman Young, *Administrator's Memorandum – Definition of Municipal* (Nov. 5, 1979). Both are reproduced in Appendix M.

[680] A 1979 Departmental memorandum stated: "A municipal right should not be quantified by the rate of flow beneficially used at the time of the examination, but rather by the

capacity" rule.[681] This, too, allows the municipal provider to "grow into" a water right over time.

(b) RAFN rights at licensing: the "capacity of the system" standard (repealed in 2020)

Although the 1996 RAFN statute allows a municipal provider to obtain a RAFN water permit based on a long-term planning horizon, the Act does not extend the date on which the permittee must prove beneficial use for licensing purposes. Licensing still occurs five or, at most, 15 years after permit issuance irrespective of the length of the planning horizon. This presents the question: How does a municipal provider prove up a water right in just a few years when the provider will continue to grow into the right over a much longer period?

IDWR struggled with this question for 24 years, before the statute was amended in 2020 (as discussed in section 23.D(9)(d) at page 417 below).

The 1996 RAFN statute did not provide much guidance on how RAFN rights are to be quantified at the time of licensing. Before the 2020 amendment, it stated:

> 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.

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capacity of the diversion works." Norman Young, *Administrator's Memorandum – Definition of Municipal* at 1 (Nov. 5, 1979). A footnote to this sentence provided: "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." *Id*. at 1, n.1. A more recent departmental memorandum described the test as being based on "the volume of water capable of being produced by the installed diverting works." Karl J. Dreher, *Memorandum – Water Rights for Municipal Use* at 1 (Mar. 18, 1998) (superseded by *1999 Dreher Letter*, but rescinded in 2013 by what is now the *2021 RAFN Handbook*. The installed capacity rule is also discussed in other guidance, Jeff Peppersack, IDWR Guidance, *Application Processing No. 18; Licensing No. 1* (*Processing Applications and Amendments and Determining Beneficial Use for Non-RAFN Municipal Water Rights*) (Oct. 19, 2009) ("*2009 Peppersack Memo*") (reproduced in Appendix M).

[681] Despite the name, the installed capacity "rule" is not based on a formal rule, but on guidance documents and longstanding practice.

Idaho Code § 42-219(1) (emphasis added).

If this "capacity of the system" language means that the municipal provider must construct the entire water delivery system by the time of permitting, that would frustrate the purpose of the Act. Accordingly, in 1999, former Director Karl Dreher issued guidance addressing this issue in which he recognized that requiring a municipal provider to have completed construction of its entire diversion and delivery system at the time of licensing would defeat the Act's central objective of allowing the appropriator to gradually, economically, and efficiently develop its system over time within the proven planning horizon.[682] The *1999 Dreher Letter* interpreted the "capacity of the system" language as requiring tangible evidence of the provider's commitment to complete the system within the planning horizon.[683]

In 2013, the Department, under Director Gary Spackman, rescinded the *1999 Dreher Letter* and issued new RAFN quantification guidance.[684] The rejection of the

[682] "Some might construe this [capacity of the system] 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." Karl J. Dreher, IDWR Guidance, *Administrative Memorandum – Application Processing No. 63,* at 2 (June 15, 1999) ("*1999 Dreher Letter*") (emphasis added) (reproduced in Appendix M) (the *1999 Dreher Letter* consists of a letter from Karl J. Dreher to Christopher H. Meyer dated June 14, 1999 which L. Glen Saxton designated as *Administrative Memorandum – Application Processing No. 63* on the following day). As noted, this guidance was rescinded in 2013.

[683] Under the *1999 Dreher Letter*, a bald assertion by the right holder it intended to complete the entire delivery system would not suffice, the Dreher guidance required the municipal provider to provide evidence of "a definitive plan for fully constructing the system" and a "substantial investment in the unconstructed capacity of the total system." *1999 Dreher Letter* at 3. Likewise, a municipal provider of ground water must demonstrate that "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." *1999 Dreher Letter* at 3. The guidance then listed seven criteria that the Department would evaluate in determining whether the "capacity of the system" standard is met, including such things as a detailed overall design, a financing plan, environmental studies, land acquisition, construction of mains, storage, or other system components, and development of an operations protocol. *1999 Dreher Letter* at 3-4.

[684] Mat Weaver, IDWR Guidance, *Memorandum – Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (Nov. 13, 2013). The current version is Shelley W. Keen, IDWR Guidance, *Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (*RAFN*

Dreher guidance resulted in a much stricter view of what could be licensed at the end of the development period—which might be decades before the end of the planning horizon. The 2013 and 2015 RAFN guidance required physical construction of facilities, not mere investment in planning and design. The effect, in some cases, was to nullify the whole point of the 1996 statute—which was to allow municipal providers to grow into their rights over the full duration of the planning horizon.

This conundrum was resolved by the Legislature's 2020 amendment creating an "incremental licensing" process for RAFN rights. (See section 23.D(9)(d) at page 417 below.)

(c) Peaking factor calculation

Note that the discussion in this subsection is applicable equally to RAFN and non-RAFN rights (except for the discussion of storage).

Generally speaking, a water right holder will seek to obtain the highest possible measure of a water right at time of application, permitting, licensing, and adjudication.

Water right diversion rates vary depending on whether measured on the basis of average daily demand (ADD), maximum month average daily demand (MMAD), maximum day demand, i.e., peak day (MDD), peak hourly demand (PHD), or peak instantaneous demand (PID). These measures, and how they are calculated, are discussed in 2015 IDWR guidance on RAFN rights. 2021 RAFN Handbook at 16-20.[685] The portion of the guidance dealing with peaking factors is equally applicable to non-RAFN municipal rights.

The IDWR guidance identifies a default peaking factor of 3.0 for converting ADD to PHD and a peaking factor of 2.0 for converting from ADD to MDD. *2021 RAFN Handbook* at 18. It does not set out a conversion factor for ADD to PHD, but that factor may be interpolated from the above as 1.5. Water users are invited to provide their own calculations grounded in customer demand and other water usage data from their own delivery systems.

Municipal Water Right Handbook) (Oct. 1, 2021) ("*2021 RAFN Handbook*"). The current guidance implements the incremental licensing approach mandated by the 2020 legislation.

[685] The full citation is: Shelley W. Keen, IDWR Guidance, *Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (*RAFN Municipal Water Right Handbook*) (Oct. 1, 2021) ("*2021 RAFN Handbook*"). The 2021 guidance replaced prior guidance: Mat Weaver, IDWR Guidance, *Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (Mar. 16, 2015) (which, in turn, replaced Nov. 15, 2014 and Nov. 13, 2013 versions).

The IDWR guidance contains a discussion of storage (e.g., water tanks or ponds) that are often part of a municipal delivery system. *2021 RAFN Handbook* at 18. The guidance suggests that if storage is available to smooth out demand, it may not be appropriate to boost future demand projections by a mathematical conversion factor to reflect peak hour demand. That is a consideration that will need to be considered based on the particular design and operation of the municipal delivery system. However, it would seem that there would be no reason not to use peak hour production numbers (if they are available) at the time of licensing (or incremental licensing) of a RAFN or non-RAFN right. That is because production numbers are actual historic numbers, and the availability of storage is reflected in what production actually occurred.

(d) Incremental licensing of RAFN rights under the 2020 amendment—based on beneficial use, not installed capacity

In 2020, the Legislature resolved the "capacity of the system" conundrum (discussed in section 23.D(9)(b) at page 414) by amending the 1996 RAFN statute to provide for incremental licensing of RAFN rights with long term planning horizons. S.B. 1316, 2020 Idaho Sess. Laws, ch. 164, codified at Idaho Code §§ 42-204, 42-217, 42-218a, 42-219, 42-220.[686]

The Legislature struck the confusing language in section 42-219 which had called for licensing a quantity "up to the full capacity of the system." Instead it implemented a new mechanism allowing long-term RAFN rights to be licensed incrementally. The legislation pushed out the development period for RAFN rights to correspond to the duration of the planning horizon. It then calls on the permit holder to submit incremental statements of proof (in periods of not less than five years. Idaho Code § 42-204(4)). The Department is then authorized (but is not required) to issue incremental licenses reflecting the additional quantity of water put to beneficial use during that period. Idaho Code § 42-219. Then, at the end of the planning horizon (which is also the development period), the Department will issue a final license reflecting the total beneficial use achieved at that time.

Under the new approach, licensing (incremental and final) is based on actual diversion to beneficial use, not installed capacity. If the actual demand proves to be less than the projected RAFN quantity stated in the permit, the quantity will be cut back at the end of the development period (at final licensing). Idaho Code § 42-219. In other words, the sum of the incremental licenses will be less than the projected RAFN quantity. The

[686] This legislation was drafted with the assistance and involvement of IDWR working in conjunction with a work group of municipal providers and other interested parties assembled by the Idaho Water Users Association. The resulting work product earned the backing of IDWR and the IWUA—and a broad array of municipal entities—and was approved unanimously by both Houses.

statute does not contemplate any mid-course adjustment to the RAFN quantity. In other words, if the growth trajectory in the early years of the planning horizon proves to be slower than anticipated, that will be reflected in relatively small incremental licenses. But the municipal provider will still have the opportunity to "catch up" to the total RAFN projection in the later years of the planning horizon.

The legislation requires that submissions of proof by holders of RAFN rights be prepared by a certified water rights examiner (unless no additional increment of beneficial use is claimed). Idaho Code § 42-204(4). The legislation also contains new lapse provisions stating that failure to submit an incremental statement of proof will result in lapse, but only of that portion of the RAFN right not yet incrementally licensed. Idaho Code §§ 42-204(4), 42-218a.

After 2020, RAFN rights are quantified solely on the basis of actual beneficial use (not installed capacity, which continues to be the measurement for non-RAFN rights). At the licensing stage, it is obvious that sufficient capacity is present, because the licensed amount is for how much was actually diverted at peak. Consequently, there is no longer a need for a cap analysis. At the permitting stage, a gap analysis is used to show future need in excess of the current portfolio. But there is no need for a cap analysis at permitting, because licensing will be based on actual peak beneficial use.

Where a RAFN right has only one POD, the increment of beneficial use would be analyzed on the basis of production out of that well, not on a system-wide production basis.

Where a municipal provider holds multiple water rights with shared APODs (which might include a mix of RAFN and non-RAFN rights), the question arises how to allocate an increase in beneficial use among them. Presumably, the analysis would be on a system-wide basis (across rights that share APODs). Total system-wide production would then be allocated to each right, presumably filling the most senior first. Thus, the more junior rights (typically the RAFN rights) would see an increment of beneficial use only after the more senior rights were deemed fully used. It is conceivable that IDWR could instead allocate total production on a pro rata basis, which would cause more junior RAFN rights to be incrementally licensed more quickly than if production were allocation on a priority basis. Neither the statute nor the Departments *RAFN Handbook* guidance address how this will be done.

(e) Non-RAFN rights for traditional municipal providers after the 1996 RAFN statute

Given the substantial benefits extended by the 1996 RAFN statute, one might think that most municipal providers would want to take advantage of these benefits.

Generally speaking, however, this has not been the case.[687] In any event, the Department views doing so as optional.[688]

In 2009, the Department issued guidance specifically addressing how the Department will handle applications for municipal water rights by municipal providers who elect not to establish RAFN under the 1996 RAFN statute.[689] Jeff Peppersack, IDWR Guidance, *Application Processing No. 18; Licensing No. 1* (*Processing Applications and Amendments and Determining Beneficial Use for Non-RAFN Municipal Water Rights*) (Oct. 19, 2009) ("*2009 Peppersack Memo*").

The *2009 Peppersack Memo* continues the practice of licensing municipal rights for traditional municipal providers (cities and water utilities) based on installed capacity with no annual volume cap—subject to a reasonableness test.[690] But the guidance makes one critically important change. In the past, the Department issued new permits and

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[687] Until the *2009 Peppersack Memo* was issued, many cities saw little benefit in undertaking a more complex RAFN application because they assumed they could continue to get generous treatment under the installed capacity rule without any examination of need for additional quantity. As discussed below, the *2009 Peppersack Memo* brought this to an end.

[688] "If the extent of the proposed development will be completed during the permit development period, the applicant does not need to provide the additional information relative to RAFN/PH [reasonably anticipated future needs/planning horizon]." L. Glen Saxton, *Memorandum – Water Rights for Municipal Use* at 1 (Mar. 18, 1998). "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 . . . ." *2009 Peppersack Memo* at 3.

[689] The 2009 guidance prohibits holders of non-RAFN permits issued after the date of the guidance from amending the permit to allow the right to be held for RAFN purposes. *2009 Peppersack Memo* at 5, 6. As for permits issued before the guidance, the Department retains some flexibility to consider the circumstances. "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." *2009 Peppersack Memo* at 1.

[690] "The permit should not be limited by volume except under circumstances where a volume limitation is necessary to protect the water resource 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)." *2009 Peppersack Memo* at 4. "The license should not be limited by volume except under circumstances where the permit was limited for reasons described above." *2009 Peppersack Memo* at 5. As discussed below, non-traditional municipal providers who elect not to seek RAFN rights get different treatment.

licenses whenever a municipality sought a right for a new well or other diversion. It did so without any evaluation of the size of the municipal provider's existing portfolio of rights vis-à-vis current demand for water. The *2009 Peppersack Memo* signals an important change in policy.

Cities and other municipal water providers are also required to demonstrate at the permit stage that their portfolios are inadequate to meet short-term needs (i.e., customer demand that will materialize within five years[691]):

> An applicant for a non-RAFN municipal application must demonstrate short-term needs to justify the amount of water required for appropriation.
>
> . . .
>
> 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 applicant 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.

2009 Peppersack Memo at 3 (emphasis added).[692]

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 very soon will be in excess of authority to divert under the applicant's existing rights. (The

[691] The Department expects the applicant for a non-RAFN municipal appropriation to demonstrate at the time of application that system-wide need for the permit will materialize (and the ability to divert will be in place) within the five-year "development period" after permit issuance. Although extensions of the proof deadline are often obtained for up to a total of 15 years, the Department will not allow the permit quantity to be premised on needs beyond the first five years. Water rights premised on needs more than five years out require a RAFN application. Telephone conference between Jeff Peppersack, [Former] Chief, Water Allocation Bureau, IDWR and Christopher H. Meyer (March 3, 2015); confirmed by email from Mr. Peppersack to Mr. Meyer (Mar. 19, 2015).

[692] The *2009 Peppersack Memo* speaks to permits and licenses. Presumably, the Department would apply the same standards to a municipal provider seeking to acquire a water right via transfer without establishing RAFN.

need for the right to meet current demand must be shown again at the time of licensing. See below.) System capacity comes into play more prominently at the licensing stage.[693]

Notwithstanding the Department's position described in the footnote above, the Department has on subsequent occasion requested permit applicants for non-RAFN municipal rights to provide information showing that, when the proposed new diversions are added to existing system-wide capacity, there will be sufficient capacity to divert the entire portfolio of municipal rights in the system.[694]

The *2009 Peppersack Memo* also contains very direct language aimed at ensuring that applicants for non-RAFN permits and licenses base their showing of short-term needs on actual customer demand that is not inflated by including water for fire flows.[695] This caution is intended to ensure that cities do not end run the 1996 RAFN statute by claiming large fire flow needs and then, over time, growing into use of that fire flow requirement for ordinary municipal use.[696] After all, no water right is needed to divert water to fight an existing fire. *2009 Peppersack Memo* at 4.

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[693] Telephone conference between Jeff Peppersack, Chief, Water Allocation Bureau, IDWR and Christopher H. Meyer (March 3, 2015); confirmed by and exchange of emails with attachments between Mr. Peppersack to Mr. Meyer (Mar 3, 2015 and Mar. 19, 2015).

[694] An example of IDWR requiring a cap analysis at the permitting stage of non-RAFN rights three City of Nampa rights, Nos. 63-33968, 63-34229, and 63-34742. IDWR's files for these water rights include a comprehensive discussion of this is set out in a memo from SPF Water Engineering dated November 7, 2019 and attached memo from Christopher H. Meyer dated October 30, 2019.

[695] "A non-RAFN application for municipal use that includes additional [diversion] 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." *2009 Peppersack Memo* at 4. "Additional rate for fire protection should be listed as a separate use [on a non-RAFN application] 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 . . . ." *2009 Peppersack Memo* at 5. "As described above, additional rate justified solely for fire protection should be listed as a separate use on the [non-RAFN] permit to ensure that the rate, if approved, does not create a de facto water right for RAFN." *2009 Peppersack Memo* at 6.

[696] This guidance codifies the position the Department took in the litigation culminating in *City of Eagle v. IDWR*, 150 Idaho 449, 247 P.3d 1037 (2011) (city challenged IDWR's ruling on fire flows, but appeal dismissed as untimely). In that case, the City of Eagle sought to appropriate water for municipal purposes, claiming 2.23 cfs for general municipal use and 6.68 cfs for fire protection. The City expressly declined to pursue a future needs (RAFN) component under the 1996 RAFN statute, instead stating that its application was justified on the basis of needs that would be experienced in the next five years. Accordingly, the City established no planning horizon and presented no evidence of long-term need. IDWR responded by limiting

A separate guidance document addressing RAFN rights also prohibits obtaining a municipal right based on firefighting need. *2021 RAFN Handbook* at 21.[697] See discussion of firefighting in section 5.A at page 79. This is counter-intuitive, because including firefighting needs in a RAFN application is, *per se*, not an end-run of the 1996 RAFN statute. Nevertheless, it reflects a level of hostility or suspicion within the Department regarding "inflating" municipal water right claims with firefighting needs. (See footnote 696 at page 421.)

If the applicant cannot show a short-term need for the new permit, then the applicant must either seek a RAFN right or forgo any new system-wide quantity associated with the new right. In other words, instead of obtaining a new appropriation, the non-RAFN applicant may instead change one or more existing rights to allow a new point of diversion to support the new well or surface diversion:

> 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.

2009 Peppersack Memo at 3-4.

If a municipal provider obtains a non-RAFN permit but then fails to develop additional beneficial use during the development period to justify the additional quantity, it will be licensed with zero additional system-wide quantity.

> 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

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general municipal use under the permit to 2.23 cfs and limiting the extra 6.68 cfs to fire protection use. "Recognizing the entire 6.68 cfs for fire protection within the broad municipal definition would create a de facto water right for reasonably anticipated future needs." Final Order at 11. Essentially, the City had hoped to obtain a large water right based on fire protection needs, and then use that water for any municipal purpose. IDWR rejected this approach, noting that the City had elected not to pursue the permit based on its "future needs" under the 1996 RAFN statute.

[697] The full citation is: Shelley W. Keen, IDWR Guidance, *Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (*RAFN Municipal Water Right Handbook*) (Oct. 1, 2021) ("*2021 RAFN Handbook*"). The 2021 guidance replaced prior guidance: Mat Weaver, IDWR Guidance, *Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (Mar. 16, 2015) (which, in turn, replaced Nov. 15, 2014 and Nov. 13, 2013 versions).

> 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.

2009 Peppersack Memo at 5.

This solution is referred to informally as the "Tuthill compromise" after then-Director David Tuthill. It is a compromise in the sense that, rather than deny the license altogether, a license is issued authorizing diversion from the new point of diversion, but with no additional system-wide diversion authority.

The Department has employed the following combined use condition language to implement the Tuthill compromise:

> The diversion rate associated with this water right in combination with all other water rights is limited to the combined diversion rate of all other [name of city] water rights and the diversion rate of this water right shall not be included in any assessment of the combined diversion rate authority of the [name of city] both prior and subsequent to the priority date of this right.

Letter from Mat Weaver, IDWR, to Christopher H. Meyer (Apr. 19, 2011) (on file with author). This is simply a different way of getting to the same place; it accomplishes the same thing as a transfer of existing rights to add a new point of diversion.

Another example is found as a condition on water right No. 63-31949:

> This water right does not represent a rate of diversion in the City of Nampa's municipal water right portfolio. The diversion rate associated with this water right in combination with all other water rights is limited to the combined diversion rate of all other City of Nampa water rights and the diversion rate of this right shall not be included in any assessment of the combined diversion rate authority of the City of Nampa both prior and subsequent to the priority date of this water right.

In sum, the longstanding practice of allowing municipal providers to add additional municipal water rights with no showing of need on an ad hoc, incremental basis has come to an end. From now on, municipal providers—even those seeking non-RAFN rights—will be required to quantify their entire existing portfolio and present evidence that, on a system-wide basis, an additional increment of diversion quantity will be used by the time of licensing. If municipal providers wish to obtain rights to more

water than they will need by the time of licensing, they must undertake the additional burdens of planning and proof mandated by the 1996 RAFN statute.

Despite this sharp change in policy, the *2009 Peppersack Memo* continues to provide some leeway for traditional municipal providers seeking non-RAFN water rights. At the time of licensing, the municipal provider will be allowed to quantify beneficial use based on a modified version of the installed capacity rule.

> When licensing a permit for a 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.

2009 Peppersack Memo at 5.

Under prior practice, the installed capacity rule looked to the capacity of an individual well or other diversion. (This was because a new water right typically was obtained for each new point of diversion.) Under the *2009 Peppersack Memo*, installed capacity is evaluated on a system-wide analysis.

> 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.

2009 Peppersack Memo at 5.

The *2009 Peppersack Memo* adds a key caveat to the installed capacity rule: "However, beneficial use may be further limited if the intended use described in the application as justification for the permit was not accomplished." *2009 Peppersack Memo* at 5. This guidance affords the Department considerable discretion. It allows the Department to license the non-RAFN right based on increased installed capacity (even if demand has not fully materialized) so long as the anticipated development upon which the permit was issued has more-or-less come to fruition. However, the Department has reserved its authority to cut back the licensed quantity where there is a glaring shortfall. For instance, if a city installed new wells to serve a new subdivision, but the subdivision was not completed and some or all of the wells have never been used, one can imagine that the Department would use this language to restrict or eliminate the incremental quantity associated with the new water right(s).

In sum, traditional municipal providers (cities and water utilities) who elect to forgo the benefits and burdens of the 1996 RAFN statute may no longer obtain new water right permits authorizing additional diversion quantity unless they make a showing that their existing portfolio is inadequate. If they can make that showing, however, the municipal provider will be subject to a relatively generous installed capacity evaluation at the time of licensing (but subject to great departmental discretion). But they may not take advantage of the more flexible "capacity of the system" provision applicable to RAFN rights.

(f) Water rights for subdivision developers prior to the 1996 RAFN statute: Stub-in rule

Before the 1996 RAFN statute, a subdivision developer who acquired water rights and built a potable water delivery system for the project was not viewed as a municipal provider (or a public utility, for that matter). Such entities simply obtained ordinary domestic, commercial, and/or irrigation water rights for the system and made proof within the statutory periods for licensure.[698] Often, the system would be turned over to the homeowners association to own and operate.

A strict application of proof requirements would require all the subdivision's water right to be put to beneficial use at the time of proof—that is, the licensed amount would be limited to actual diversions necessary to serve all houses or other facilities built, occupied, and actually using water at the time of licensing. However, the Department has not applied such a strict interpretation of the beneficial use rule to this type of non-municipal appropriator.

Instead, even before the 1996 RAFN statute, the Department extended a degree of leniency to subdivision developers by way of the informal "stub-in" practice, under which the water right would be licensed for the amount of flow necessary to serve each lot in the subdivision to which an actual "water delivery system has been installed" and connected to an operational diversion facility.[699] The stub-in practice refers to having a

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[698] Before the 1996 RAFN statute, the Department's rule was this: "Only the city or its delivery agent, for example Boise Water Corporation [known today as United Water Idaho], 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." Norman Young, *Administrator's Memorandum – Definition of Municipal* (Nov. 5, 1979).

[699] This rule is set out in the Department's draft (but operational) *Field Examiner's Handbook*, which states:

> Many subdivisions are not fully developed at the time of the examination. When in this situation, you should confirm that a water delivery system has been installed to provide water to each lot listed in the subdivision. Then you should confirm that the

service line "stubbed in" to a buildable lot from the water main. Accordingly, a subdivision developer may obtain a license for the diversion rate necessary to serve the lots that are stubbed-in and capable of being served, even if there are no houses or other structures (and therefore no current beneficial use of water) on them. But the right will not include water required to serve those portions of the subdivision that have not yet been stubbed-in.

In 2009 guidance, the Department explained the reason for the stub-in practice this way: "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." Jeff Peppersack, IDWR Guidance, *Application Processing No. 18; Licensing No. 1* (*Processing Applications and Amendments and Determining Beneficial Use for Non-RAFN Municipal Water Rights*) (Oct. 19, 2009) ("*2009 Peppersack Memo*"), at 2 (reproduced in Appendix M).

(g) RAFN rights for non-traditional municipal providers

As noted above, the 1996 RAFN statute added a definition of municipal provider that expanded the class beyond those recognized under the common law and prior departmental practice. Notably, private developers of residential subdivisions and planned communities may now qualify as municipal providers.

A qualifying non-traditional municipal provider who elects to accept the benefits and burdens of the 1996 RAFN statute may establish a planning horizon and quantify its RAFN just like cities and water utilities. "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

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> installed pumping plant capacity will supply the expected demand when the subdivision is fully occupied. If the water delivery system serves each lot and if the pumping plant is capable of supplying the full demand, then recommend all of the lots identified on the permit or subdivision. If the pumping plant is not capable of supplying the full demand, then estimate the maximum number of units that could receive full supply or recommend water for the units developed at the time of inspection.

Field Examiner's Handbook at 4 (emphasis omitted).

demonstrate future needs over an established planning horizon consistent with requirements of [the 1996 RAFN statute]." *2009 Peppersack Memo* at 5. This would enable the developer to secure a water right for a long-term build-out, beyond the 15 year maximum for non-RAFN rights. This is particularly important for planned communities, which may take many years to complete.

However, the Department takes the view that only developers who are presently serving other municipal customers at the time of permit application "qualify" as municipal providers. See discussion in section 23.D(3)(d) at page 400. Under this interpretation, first-time developers would be unable to obtain such RAFN rights and would have to launch the project without a long-term water supply.

(h) Non-RAFN municipal water rights for non-traditional municipal providers

For those subdivision and planned community developers who elect not to pursue RAFN rights, the 1996 RAFN statute has done nothing to clarify how their water right applications should be evaluated. This is because the Act defined "municipal provider" more broadly to encompass some private developers but failed to address permitting and licensing requirements for those applicants who elect to not prove a planning horizon and RAFN.

To date, most developers in Idaho have elected not to seek RAFN protection for their water rights. Instead, they typically file a simple, short-form water right application that offers little in the way of overall design, time horizons for full build-out, engineering designs, and the like.

Under the *2009 Peppersack Memo*, non-RAFN municipal rights sought by non-traditional municipal providers are subject to the same "disclosure of need" requirement at the permit application stage as non-RAFN municipal rights sought by traditional municipal providers. To wit, they must demonstrate short-term needs based on examination of the quantity of their existing portfolio versus system-wide capacity and demand. *2009 Peppersack Memo* at 5-6. As noted before, fire flows may not be used to demonstrate short-term needs. *2009 Peppersack Memo* at 5, 6.

Unlike cities and water utilities, non-traditional municipal providers are not entitled to the "diversion rate only" treatment. Their water rights will be subject to a volumetric cap. *2009 Peppersack Memo* at 6.

Even if they are not seeking RAFN rights, non-traditional municipal providers do get the benefit of the expanding service area definition afforded by the 1996 RAFN statute. *2009 Peppersack Memo* at 6.

At licensing, a non-RAFN right held by a non-traditional municipal provider continues to receive the benefit of the stub-in rule described above. "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 to each lot to hook up to the municipal delivery system)." *2009 Peppersack Memo* at 6. Thus, the right will be licensed to include an additional increment of rate and volume beyond current actual production to existing customers to serve homes or other domestic uses that are physically stubbed-in to an operational delivery system.

The guidance goes on to explain that, as a practical matter, the Department may not insist on such a precise calculation and may agree instead to license based on incremental system-wide installed capacity—but only if doing so would not substantially inflate the amount available under the stub-in practice. "The rate should be determined based on the installed capacity if reasonable to serve the needs within the established service area." *2009 Peppersack Memo* at 6-7. A footnote explains this further: "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." *2009 Peppersack Memo* at 7 n.3. The volume is also based on the stub-in practice. *2009 Peppersack Memo* at 7.

As modified by the *2009 Peppersack Memo*, the stub-in rule has moved closer to the installed capacity rule applicable to traditional municipal providers seeking non-RAFN rights. Both gravitate toward installed capacity as the measure of the right if that is not significantly out of sync with actual current demand plus stub-ins. For traditional municipal providers, the Department starts with installed capacity but may move downward "if the intended use . . . was not accomplished." For non-traditional municipal providers, the Department starts with the stub-in rule but may move upward to installed capacity if not "significantly greater" than the stub-in quantity. Both are rather generous standards in that the municipal provider is allowed to obtain a license to serve homes that are not yet sold or even constructed. However, this is a much less generous approach than the "capacity of the system" standard applicable to holders of RAFN rights.

In summary:

- Private subdividers/planned community developers may obtain municipal water rights that take advantage of the expanding service area provision of the 1996 RAFN statute without seeking to show RAFN or a planning horizon.

- To date, many developers have opted to apply for a municipal water right without identifying a long-term planning horizon or quantifying future needs. In so doing, they forego the principal benefit of the 1996 RAFN statute. Under IDWR's 2009 guidance, these applicants will be subject to

stricter limits in quantifying the right at the time of licensing. Traditional municipal providers seeking non-RAFN rights are subject to the modified installed capacity rule; non-traditional municipal providers are subject to the modified stub-in practice. Neither will get the benefit of the "capacity of the system" standard at licensing.

- Applicants for non-RAFN water rights must demonstrate that they will divert and put to beneficial use the additional increment of capacity within five or at most ten years.

- Applicants for non-RAFN water rights may not inflate the quantity of their water rights by including fire flows. (Note: *2021 RAFN Handbook* at 21,[700] provides that one may not obtain a RAFN right for firefighting either. See also discussion of firefighting in section 5.A at page 79.)

- Non-RAFN permits may not be amended to allow water to be held for RAFN. (See footnote 689 at page 419.)

(10) Gap analysis and cap analysis

At the time of permitting, transfer, or licensing, IDWR sometimes requires a "gap analysis" and/or a "cap analysis" (cap is short for capacity).[701] Both are system-wide analyses looking at water rights, infrastructure, and demand across an integrated municipal delivery system.[702] Gap and cap analyses are directed to a particular year. That might be the current year (or most recent year in which data is available) or

[700] The full citation is: Shelley W. Keen, IDWR Guidance, *Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (*RAFN Municipal Water Right Handbook*) (Oct. 1, 2021) ("*2021 RAFN Handbook*"). The 2021 guidance replaced prior guidance: Mat Weaver, IDWR Guidance, *Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (Mar. 16, 2015) (which, in turn, replaced Nov. 15, 2014 and Nov. 13, 2013 versions).

[701] The term "gap analysis" has been employed by IDWR for many years. For example, IDWR's first RAFN guidance employed the term "gap analysis." Mat Weaver, IDWR Guidance, *Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (Nov. 13, 2013). In contrast, the term "cap analysis" (short for "capacity analysis") is a more recently minted term coined by the author of this Handbook in discussions with IDWR staff, and later employed by IDWR.

[702] Systemwide quantities may be lower than the sum of the individual water rights or well capacities. For example, the total authorized diversion rate may be adjusted downward reflecting combined use conditions and the like. Likewise total system capacity may not be the same as the sum of individual well capacities due to system-wide operation factors.

sometime in the future (for example, the end the development period or planning horizon).

A gap analysis compares the total quantity of water authorized to be diverted by a municipal provider's portfolio of water rights with total demand for water in the relevant year. A "gap" means that there is a shortfall to meet current or future demand. In essence, it answers the question: "Does the municipal provider really need this new water right?"

A cap analysis is similar, but it compares total diversion authority in the provider's portfolio of water rights to the system-wide diversion capacity. It answers the question: "Will the municipal provider have the physical capacity to divert this new right and all of its other water rights?"

These two analyses work in the opposite direction. Under the gap analysis, a municipal provider must show a gap (*i.e.*, a shortfall) in the ability of its water right portfolio to meet system-wide demand. In contrast, under a cap analysis, the provider must show that it has or will have sufficient (or more than sufficient) installed capacity, on a system-wide basis, to divert its system-wide diversion authority under its water rights, including the new right.

IDWR employs a forward-looking gap analysis when permitting a new RAFN right or when transferring an existing non-RAFN right to RAFN status. IDWR will seek to ensure that the duration of the planning horizon does not exceed the time reasonably needed to grow into the right. Stated differently, a provider should not be allowed to appropriate more water for future needs (at the end of the planning horizon) than it can show is likely to be needed.

Prior to 2020, IDWR licensed RAFN rights based on the "capacity of the system" criterion in the RAFN statute (a cap analysis). Since switching to incremental licensing in 2020, IDWR issues licenses for each increment of development based on actual beneficial use at that time. This is essentially a non-forward looking gap analysis, in that IDWR looks to system-wide beneficial use (i.e., current peak demand). That number is compared to the provider's system-wide diversion authority (less the RAFN permit), and a license is issued for the difference (gap). However, IDWR's guidance does not refer to this as a gap analysis. It only uses the term gap analysis in the context of permitting RAFN rights. Shelley W. Keen, IDWR Guidance, *Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (*RAFN Municipal Water Right Handbook*) (Oct. 1, 2021) ("*2021 RAFN Handbook*"), pp. 21-24.

A gap analysis is also employed by IDWR at the time of permitting and licensing non-RAFN municipal rights. (See discussion in section 23.D(9)(e) beginning on page 418.)

This was not the practice decades ago. Back in the day, municipal providers routinely sought a new water right for every new well (or group of wells) as they were added—without regard to system-wide need for additional diversion authority.

Since the enactment of the 1996 RAFN statute, however, IDWR has required, even for non-RAFN appropriations, that the municipal provider demonstrate it has insufficient system-wide water diversion authority in its current portfolio to meet demand by the end of the development period (five years beyond permit issuance[703]).

What is essentially a gap analysis is also employed at the time of licensing a non-RAFN right. However, this is not forward looking. Instead, the Department compares system-wide installed capacity and the system-wide diversion authority at the time of proof.

This is nearly the same as how RAFN rights are incrementally licensed after 2020, except that RAFN rights are incrementally licensed based on actual production (peak diversion), not installed capacity. Since switching to incremental licensing in 2020, IDWR issues licenses for each increment of development based on actual beneficial use at that time. IDWR compares current system-wide beneficial use and total diversion authority (less the RAFN permit), issuing an incremental license reflecting the difference, while simultaneously reducing the quantity of the RAFN permit. This is essentially a non-forward looking gap analysis. However, IDWR's guidance (*2021 RAFN Handbook* and *2009 Peppersack Memo*) only use the term gap analysis in the context of permitting RAFN rights.

Thus, gap analyses (whether called that or not) are now a fixture in <u>all</u> municipal water right applications (RAFN and non-RAFN).

Cap analyses are a different story. Until the enactment of legislation in 2020 calling for incremental licensing of RAFN rights, cap analyses were used by IDWR in the licensing of both RAFN and non-RAFN rights.[704] This is because, before 2020, RAFN

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[703] It is true that the development period may be extended, and often is, up to 15 years. But, at the time of permitting, the gap analysis is not allowed to assume that such an extension will be granted. Thus, for all practical purposes, the gap analysis is focused on whether there is a gap (shortfall) in water right diversion authority in the present timeframe.

[704] For non-RAFN rights, the cap analysis is used primarily at the time of licensing. However, IDWR may also require an applicant for a non-RAFN municipal right to demonstrate at the time of permitting that it will have sufficient installed capacity on a system-wide basis to divert its portfolio of municipal rights. But this only looks five years out (to the end of the development period), and the municipal provider is allowed to add to current system-wide installed capacity the quantity of additional diversion sought by the new non-RAFN permit. In contrast, no cap analysis is required at the time of permitting a RAFN right. Doing so would

rights were licensed just a few years after permitting—often long before they were fully put to use. As discussed further in section 23.D(9) on page 412, until 2020, the Department looked to the "capacity of the system" at the time of licensing RAFN rights.

The 2020 legislation switching to incremental licensing of RAFN rights rendered the cap analysis obsolete for RAFN rights. Because each incremental license and the final license quantity are now based on actual production for beneficial such, it is evident that the system capacity to accomplish that is in place at each licensing stage. This is confirmed by IDWR latest guidance, which eliminates the cap analysis for RAFN rights at both the permitting and licensing stages. Shelley W. Keen, IDWR Guidance, *Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (*RAFN Municipal Water Right Handbook*) (Oct. 1, 2021) ("*2021 RAFN Handbook*").

For non-RAFN rights, IDWR has long employed and continues to employ a cap analysis at licensing. This is based on the system-wide "installed capacity" concept has been reflected in IDWR guidance since 2009.[705] Essentially, this means that, if the right isn't actually producing the full authorized quantity for beneficial use at the time of licensing, the municipal provider must show that its well system is physically capable of producing that quantity.

As for permitting of non-RAFN rights, the Department has sometimes required a cap analysis at that stage as well. See discussion in section 23.D(9)(e) on page 418.

(11) Forfeiture protection for RAFN rights.

In Idaho, water rights not used for five years (with various exceptions) are subject to forfeiture. Idaho Code §§ 42-222(2), 42-223. The 1996 RAFN statute expressly exempts a municipal water provider's municipal water rights held for reasonable anticipated future needs from forfeiture:

> A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to

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make no sense. Why would a municipal provider install capacity today sufficient to divert a RAFN right that might not be fully utilized for another 50 years?

[705] Jeff Peppersack, IDWR Guidance, Application Processing No. 18; Licensing No. 1(Processing Applications and Amendments and Determining Beneficial Use for Non-RAFN Municipal Water Rights), at 1-2 (Oct. 19, 2009) ("*2009 Peppersack Memo*") (reproduced in Appendix M). The *2009 Peppersack Memo* replaced two earlier administrative memoranda: A. Kenneth Dunn, *Administrator's Memorandum – Licensing Procedures* at 1 (Apr. 7, 1975); Norman Young, *Administrator's Memorandum – Definition of Municipal* (Nov. 5, 1979). Both are reproduced in Appendix M. Prior guidance also look to installed capacity, but not on a system-wide basis.

> constitute beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs.

Idaho Code § 42-223(2).

This forfeiture exemption provision is reinforced by the express declaration in the 1996 RAFN statute that water rights held for future needs constitute a present beneficial use:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided . . . the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

Idaho Code §§ 42-222(1).

(12) Conditions to address changed circumstances in RAFN rights.

EDITOR'S NOTE: Former Chief Deputy Attorney General Phillip J. Rassier issued a memorandum evaluating this subject. His analysis differs from that set out below. This section will be revised.

Section 42-223(2) makes clear that the municipal provider's water right becomes subject to forfeiture for nonuse at the end of the planning horizon.[706] But what about

[706] Although somewhat ambiguous, the Department's prior guidance on the subject of forfeiture of RAFN rights appears to contemplate forfeiture evaluation only at the end of the planning horizon. The guidance (which was replaced by other guidance in 2013, which seems to be of the same view on this issue) reads:

> 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

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Printed 10/5/2026 10:07 AM

before? If conditions change during the course of the planning horizon and it becomes apparent that not all the water rights held by the municipal provider are needed to meet RAFN, may the municipal provider be required to relinquish some of its portfolio? In the case of a permit, the Act provides for a downward adjustment if conditions have changed at the time of licensing. But what if conditions change after licensing? Or what if a transfer to RAFN is approved, in which case there is no further mechanism for automatic review?

The Department has articulated the view that once a RAFN right is quantified at licensing it cannot be adjusted downward if it later becomes apparent that the anticipated needs are not materializing. Thus, the concern has emerged that long-term planning may result in overstated RAFN rights being locked in for the duration of the planning horizon.

There appears to be a ready solution to this concern. The Department has authority to impose conditions in approving a permit, license, or transfer that would mandate re-evaluation of long-term need from time to time (perhaps every decade) during the planning horizon.[707] Under this approach, future demand quantification would not be a one-time exercise but, rather, a permanent, ongoing responsibility of the municipal provider. The additional risk imposed on the municipal provider by periodic quantification of future needs presumably could be offset by allowing the municipal provider to provide evidence justifying the need to "push out" its planning horizon for a corresponding period of time. But the municipal provider would still be exposed to risk. If it became apparent that growth was over-projected, a municipal provider could be required to relinquish those water rights that it could no longer justify under a new RAFN

> 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.

Karl J. Dreher, IDWR Guidance, *Application Processing No. 63* ("*1999 Dreher Letter*"), at 5 (June 15, 1999) (footnotes not in original) (reproduced in Appendix M) (the *1999 Dreher Letter* consists of a letter from Karl J. Dreher to Christopher H. Meyer dated June 14, 1999 which L. Glen Saxton designated as *Administrative Memorandum – Application Processing No. 63* on the following day). The citations to definitions have changed over the years as the Legislature has added new defined terms. The reference in the *1999 Dreher Letter* is probably to what is now Idaho Code § 42-202B(8) (definition of "reasonably anticipated future needs").

[707] Idaho Code § 42-219(1) (conditions in licenses); Idaho Code § 42-222(1) (conditions on transfers); Idaho Code § 42-211 (conditions on permit amendments).

quantification based on an extended planning horizon. This sort of rolling review and updating of the planning horizon would balance the municipal provider's need for certainty against the larger community's need to know what water is tied up and what supplies might be freed up as conditions change. In the case where a municipal provider maintains its future needs portfolio but simply extends the date of its planning horizon through such a periodic review, other water users presumably would not be prejudiced because the effect would be to delay full portfolio development.

(13) The Act contains strong anti-speculation provisions

(a) The Act seeks to avoid municipal "water wars" seen in other states.

Cities in other states have engaged in races to lock up huge stockpiles of water rights. Each city's goal is to ensure that it, rather than its neighbor, will be able to grow. The authors of the 1996 RAFN statute were acutely aware of this phenomenon—particularly on the Front Range of Colorado—and took steps to limit the possibility that the special treatment accorded municipal providers would trigger similar "water wars" in Idaho.

For example, in *Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566 (Colo. 1979), the Colorado Supreme Court denied a conditional water right to a private developer who hoped "to sell water to municipalities on the eastern slope for general municipal use but had not obtained firm contractual commitments binding those municipalities to purchase or receive the water." *Vidler*, 594 P.2d at 568-69. The Colorado Legislature codified the *Vidler* rule. 1979 Colo. Sess. Laws (S.B. 481) (codified at Colo. Rev. Stat. § 37-92-103(3)(a)). In doing so, however, the legislature exempted "governmental agencies" from the anti-speculation rule. Colo. Rev. Stat. § 37-92-103(3)(a)(I). The net result is that Colorado cities are incentivized to acquire as much water as possible. If it turns out they do not need it, they may sell it to their neighbors. It is precisely this phenomenon that Idaho's Municipal Water Rights Act was intended to prohibit.

(b) The Act imposes three unique anti-speculation rules.

In order to avoid these problems encountered in other states, the 1996 RAFN statute imposes three anti-speculation requirements. First, the Act requires that the asserted future needs must not be "inconsistent with comprehensive land use plans approved by each municipality" within the service area. Second, the quantification of RAFN may not include "uses of water within areas overlapped by conflicting comprehensive land use plans." Idaho Code § 42-202B(8) (definition of "reasonably anticipated future needs"). Third, RAFN rights may not be sold. Idaho Code §§ 42-219(1), 42-222(1).

(i) Comprehensive plan consistency

The first requirement—that projected future needs be consistent with comprehensive plans—is straightforward and not overly rigorous. Comprehensive plans are broad, conceptual planning documents, not specific descriptions of what is permitted where.[708] Nor do comprehensive plans contain detailed population or economic projections. Thus, not too much should be read into this consistency requirement. On the other hand, the consistency requirement means something. It requires that future needs projections take into account the local government's vision of the future, at least on a macro scale. For example, if the comprehensive plan (or its associated future land use map) described an area as dedicated open space or preserved agricultural use, that, presumably, would be inconsistent with a quantification of RAFN based on high density development in the area.

(ii) Comprehensive plan overlap

The second requirement is a potentially draconian measure designed to provide an incentive to adjacent municipalities to cooperate in planning efforts. Idaho Code § 42-202B(8) (definition of "reasonably anticipated future needs"). To the extent two or more municipalities assert planning authority over the same area and develop conflicting planning scenarios, future needs within that area may not be included in the quantification of any RAFN right. In other words, such areas must be excluded from what is informally known as the "planning area" for RAFN quantification.

As a practical matter, however, such conflicts are rare in Idaho. The Local Land Use Planning Act ("LLUPA"), Idaho Code §§ 67-6501 to 67-6537, does a good job of resolving disputes between cities over the direction of future growth. Each city is required to establish an "area of city impact" that defines the area beyond its current city limits where a city anticipates growing and, more specifically, extending city services and annexing. (See discussion in section 23.K beginning on page 477 regarding the authority of cities to provide water service beyond the city boundary.) LLUPA provides a mechanism for cities and counties to resolve disputes over the boundaries of areas of city impact (to ensure that they do not overlap) and to determine whether the city's or the county's comprehensive plan and zoning ordinances will apply within the area of city impact. Idaho Code § 67-6526. The Act provides mechanisms for negotiation and, if necessary, judicial or political resolution. Even so, LLUPA has not eliminated all such conflicts.

The 1996 RAFN statute's prohibition against serving areas "overlapped with conflicting comprehensive land use plans" (Idaho Code § 42-202B(8)) applies equally to

[708] Virtually all state zoning laws require local governments to adopt comprehensive plans. Idaho's requirement is found in the Local Land Use Planning Act ("LLUPA"), Idaho Code § 67-6508. See the *Idaho Land Use Handbook* for a detailed discussion of this subject.

municipalities and to private utilities providing municipal water. Thus, a water utility cannot base its RAFN quantification on service to lands where two municipalities have an unresolved area of city impact dispute.

It bears emphasis that the "conflicting plans" probation applies only to water rights (or the portion thereof) held for RAFN. Municipal providers may acquire and hold water rights to serve existing or short-term needs within areas overlapping, conflicting plans.

Likewise, there is no prohibition against two municipal providers having overlapping municipal service areas. This would be unusual. But it could occur, for example, if one provided non-potable water and another provided potable water. It could also occur where a municipality's service area included lands outside the city for land application of treated effluent, which might overlap with another municipal provider's service area.

(iii) Prohibition against selling future need water rights

Finally, the Act removed the incentive for hoarding water rights. By making RAFN rights unsalable for new uses, it eliminated the promise of financial gain that has driven municipal water right speculation in other states. To our knowledge, Idaho is the only state in the nation to have enacted such provision. Specifically, the Act prohibits the transfer of RAFN water rights by a municipal provider to a place of use outside its service area or to a new nature of use.

This provision is stated twice in the Act. It appears first in the context of licensing such water rights:

> The director shall condition the license to prohibit any transfer of the place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use of amounts held for reasonably anticipated future needs together with such other conditions as the director may deem appropriate.

Idaho Code § 42-219(1) (emphasis added).

The restriction is repeated in the section of the water code dealing with transfers of water rights:

> When a water right or a portion thereof to be changed is held by a municipal provider for municipal purposes, as defined in section 42-202B, Idaho Code, that portion of the right held for reasonably anticipated future needs at the time of the change shall not be changed to a place of use outside

> the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use.

Idaho Code § 42-222(1) (emphasis added).

The emphasized language in the two provisions quoted above make clear that the prohibition applies only to the portion of a RAFN right that has not been diverted and applied to beneficial use and is held solely for future needs.

In sum, while the statute accords substantial leeway to a city, water utility, or other municipal water provider to hold water rights for long-term future needs, the *quid pro quo* is that the municipal provider may not profit from this arrangement by hoarding water rights and then selling unused rights to another user who would change the nature of use or place of use. Rights acquired under the 1996 RAFN statute are limited to municipal use within the provider's service area. That service area may grow with the city, but the RAFN right may not be transferred to serve a different city or industry outside the provider's service area.

On the other hand, this restriction should not apply where one provider conveys a service area to another provider who continues serving the original customers. For example, Veolia could obtain a RAFN right to serve a new subdivision. Later, Veolia could agree with the City of Nampa that it made more sense for the subdivision to be served by the city. In such a case, the water utility could convey the RAFN right to the city without violating the Act. This is because there would be no change in the nature of use or the service area—the same customers are being served in the same place by the same water right—even though the ownership of the right has changed. This is true even if the subdivision is carved out of the larger service area of the water utility and added to the service area of the city.[709]

In another example, a RAFN right could be obtained by a private developer for a planned community (assuming the developer could qualify as a municipal provider). In the future, that provider might convey the water right (and likely the delivery system) to the city or a municipal provider serving the city. Presumably, the new municipal provider would then integrate the water right into its larger service network.

In sum, this restriction reflects the Legislature's determination to remove one stick from the property owner's bundle of rights (free transferability) in recognition of the fact

[709] In sum, the prohibition on changing the place of use of a RAFN right should not apply where: (1) there is a transfer of service area and associated RAFN rights between two adjacent municipal providers, (2) there is ample demand within the prior place of use, i.e., there is no intent to "sell off" unneeded RAFN rights to another entity, and (3) the purpose of the transfer is only to simplify administration within the acquiring entity's larger service area and not to evade the anti-hoarding purpose of the statute.

that municipal providers hold a stick that other water right holders do not (the right to acquire water rights to meet long-term needs).

As noted, the purpose of this statutory restriction is to eliminate the speculation-based incentive to appropriate water not currently needed for municipal use. Accordingly, the restriction no longer applies to a water right or portion thereof that actually has been diverted and used for municipal purposes. This is clear in the language of the statute. Idaho Code § 42-219(1) says the restriction applies not to the right itself or to water initially acquired for future use, but to "amounts held for reasonably anticipated future needs." This is reinforced by Idaho Code § 42-222(1), which states that the restriction applies to "that portion of the right held for reasonably anticipated future needs at the time of the change." In other words, the restriction applies only to the portion of a RAFN right that has never been actually diverted and applied to municipal use.

The fact that the restriction on transfer of RAFN rights no longer applies to rights or portions thereof actually put to use for municipal purposes does not mean that municipal providers have unconstrained ability to sell their water rights to the highest bidder, particularly those in distant places. First, privately owned municipal providers are subject to substantial regulatory control by the Idaho Public Utilities Commission. Second, all water rights are constrained by limitations on interbasin transfers and out-of-state export. See discussion in section 44.C (Interstate and inter-basin allocation and transfers in Idaho) on page 819.

E. The transition from common law to statutory scheme

Even after the 1996 RAFN statute, the common law growing communities doctrine remains significant in Idaho. Existing municipal water rights held by traditional municipal providers such as cities and regulated water utilities are not affected by the 1996 RAFN statute.[710] Because most municipal providers have not taken the affirmative steps required to bring their water right portfolios within the 1996 RAFN statute, the common law continues to apply to the vast majority of municipal water rights in Idaho.

[710] One might argue that in adopting a codified municipal rights law for some water rights, the Legislature intended to repeal common law protections for other municipal water rights. This does not appear to be the intent of the Legislature, however. As noted above, the Act's *Statement of Purpose* expressly disclaims any intent to change the common law. "The statute does not address those licensed and decreed water rights now held by municipal providers, and the legislation intends no change in the common law with respect to such rights." Statement of Purpose, R.S. 06104, which became, S.B. 1535, enacted as the Municipal Water Rights Act of 1996, 1996 Idaho Sess. Laws, ch. 297. Moreover, the Act contains a savings clause which preserves the common law's protection for pre-1996 municipal rights. Idaho Code § 42-202(11). In the end, of course, the common law is whatever the State's courts say it is.

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The principal effect of this is that the common law doctrine continues to provide defenses from forfeiture to traditional municipal providers that have acquired water right portfolios authorizing diversions in excess of their current peak demand. But this protection is not absolute. A 1999 IDWR guidance suggests that forfeiture and abandonment apply to common law municipal rights when the municipal water provider has no current or future need for them. "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." Karl J. Dreher, IDWR Guidance, *Application Processing No. 63* (Letter to Christopher H. Meyer) ("*1999 Dreher Letter*"), at 5 (June 15, 1999) (reproduced in Appendix M) (the *1999 Dreher Letter* consists of a letter from Karl J. Dreher to Christopher H. Meyer dated June 14, 1999, which L. Glen Saxton designated as *Administrative Memorandum – Application Processing No. 63* on the following day).

Thus, even under the common law, the municipal provider's portfolio should be reasonably sized to meet anticipated future demand. A court could determine that a municipality or water utility holds more municipal water rights than it will ever be able to put to use, and declare the surplus forfeited.[711] By taking steps to establish RAFN protection for its water rights, municipal providers may obtain greater certainty in protection from forfeiture during the planning horizon.

F. Converting non-municipal rights to RAFN rights

How does a municipality or other municipal provider bring its existing portfolio of rights under the protection of the 1996 RAFN statute? The Act does not specifically address this. However, the Department's 1999 guidance concludes that existing municipal permits and water rights may be brought under the 1996 RAFN statute by transfer, for example by adding alternate points of diversion. *1999 Dreher Letter* at 1-2 (reproduced in Appendix M).[712] This 1999 guidance was superseded by new RAFN

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[711] Presumably, the *res judicata* effect of recent SRBA decrees will protect municipal rights for some period of time. (By statute, decrees from a general adjudication are given binding effect. Idaho Code § 42-1420.) At some point, however, courts may find it appropriate to evaluate the continued need for these rights in light of changed conditions.

[712] For instance, a municipality or utility relying on a network of wells with a separate water right for each may wish to make each point of diversion an alternate point of diversion for each of the others. This allows the city the flexibility to pump water anywhere from the system and enhance efficiency, so long as injury is avoided.

Adding alternate points of diversion to a municipal system (or to any water right) raises interesting injury questions. The Department's position on this is quite clear. Let's take a simplified example. Suppose a city owns two wells, one with a 1950 priority for 1 cfs and one with a 1980 priority for 2 cfs. Suppose further that the city transfers the rights to bring them under the 1996 RAFN statute and makes them alternate points of diversion for each other. Next, suppose that the 1980 well becomes involved in a well interference dispute with a nearby 1970

guidance in 2013, now in the form of the *2021 RAFN Handbook*.[713] The current guidance is not as specific as the 1999 guidance on this transition issue, but it appears to be consistent with the 1999 guidance in recognizing that non-RAFN municipal rights may be changed by the municipal provider to RAFN rights through the transfer process.[714] The 2015 guidance is not entirely clear, but it may be read to say that it is sufficient to

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irrigation well. May the city defend the interference claim by asserting that it is pumping 1950 water out of the 1980 well? The answer is clearly no. Despite each well being an alternate point of diversion for each other, the Department will continue to administer the wells on the basis of the pre-transfer priorities for purposes of well interference. But suppose instead that due to declining aquifer conditions, an aquifer-wide regulation of pre-1960 wells was imposed. (Such an aquifer-wide call might result from hydrological conditions, a mandate to protect endangered species, conjunctive administration rules, etc.) Note, this is not a well interference call, but an aquifer-wide regulation of wells. In this case, the city could continue to pump up to 1 cfs of "1950 water" out of either the 1950 well or the 1980 well, as it saw fit. In sum, going through the process of assigning alternate points of diversion will make no difference at all with respect to local well disputes, but can add a great deal of flexibility in the event of a regional regulation of ground water supplies.

How is this implemented? The Department will maintain a record of the original priority date associated with each water right at each well. These would become relevant in the event of a call based on well interference. However, they would not be relevant (and the provider would have the advantage of additional flexibility) in the event of an aquifer-wide call on the reservoir. *1999 Dreher Letter* at 2.

[713] The full citation is: Shelley W. Keen, IDWR Guidance, *Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (*RAFN Municipal Water Right Handbook*) (Oct. 1, 2021) ("*2021 RAFN Handbook*"). The 2021 guidance replaced prior guidance: Mat Weaver, IDWR Guidance, *Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (Mar. 16, 2015) (which, in turn, replaced Nov. 15, 2014 and Nov. 13, 2013 versions).

[714] The RAFN guidance provides:

> 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. Supporting documentation must be included with the transfer application including the same RAFN support material that would be submitted with an RAFN application as outlined and described in Section 2 of this document. As discussed in Section 3, gap analysis including a current portfolio of existing water rights must also be included with the transfer application.

2021 RAFN Handbook at 24 (footnote addressing *M3 Eagle Final Amended Order* omitted.

change the nature of use from non-RAFN municipal to RAFN, without changing any other element. If so, that would be a relaxation of the 1999 guidance, which suggested that it is necessary to change some other element of the right as the vehicle for the transfer application.

G. Early experience with the 1996 RAFN statute

In first two decades following enactment of the 1996 RAFN statute, surprisingly few RAFN municipal water rights were sought. The first application filed under the Act was a massive transfer application covering the entire portfolio of municipal water rights owned by SUEZ Water Idaho ("SUEZ") (then known as United Water Idaho), the privately-owned utility providing water to Boise and surrounding communities. The application, termed the Integrated Municipal Application Package ("IMAP"), sought to transfer SUEZ's portfolio of municipal water rights to achieve alternate points of diversion and to bring them within the 1996 RAFN statute. In so doing, the applicant sought to establish a 50-year planning horizon and RAFN needs that substantially exceeded its total portfolio. This application engendered considerable controversy, some of which may have been due in part to misunderstanding its nature. The IMAP did not seek to appropriate any new water rights. If approved, however, the 50-year planning horizon and RAFN would have authorized SUEZ to acquire other water rights by appropriation or transfer to make up the difference between its current portfolio and its projected needs.

After contentious pre-hearing litigation, the Director of IDWR stayed the proceeding in 2003. He determined that it made more sense to allow the controversial forfeiture issues faced by the applicant to be resolved by the Snake River Basin Adjudication ("SRBA") which was just then getting underway for Ada County. (Resolving forfeiture arguments was the first step toward RAFN approval. Before the Department could determine whether UWID had sufficient rights in its portfolio to serve RAFN, it needed to determine how many of those rights were valid.) The Director's intuition proved correct. SUEZ's claims were reviewed and, for the most part, recommended for approval by IDWR. For reasons that are not entirely clear, perhaps including litigation fatigue, no one objected to SUEZ's claims in the SRBA. The SRBA court then issued decrees (known as "partial decrees" in SRBA parlance) for virtually all of SUEZ's portfolio. Thus, the SRBA court resolved in SUEZ's favor the potentially most difficult issue presented by the IMAP.

Of course, the SRBA process does not establish a planning horizon or quantify RAFN. Instead, the SRBA court approves existing municipal water rights without quantification of future needs under the common law growing communities doctrine. As a result, UWID (like many other water providers) now holds a portfolio of water rights whose total pumping capacity exceeds its current peak demand. In essence, the SRBA has created a common law future needs portfolio for most Idaho water providers on an *ad hoc* basis without benefit or the burden of the 1996 RAFN statute.

This occurred as a result of happenstance. For decades, it was the practice in Idaho for municipal water providers (and everyone for that matter) to obtain new water rights for each new well they drilled—rather than transferring existing water rights to the new point(s) of diversion.[715] As old wells were abandoned, their water rights were retained and added to new rights. This resulted in an accumulation of water rights typically exceeding the current needs of the provider. Rather than going through the rigorous, planning-based evaluation process contemplated by the 1996 RAFN statute, the SRBA simply confirmed the existing municipal portfolios. All this happened, incredibly, without litigation. There were, and continue to be, litigations over side issues regarding municipal water rights in the SRBA.[716] None of them, however, have challenged the quantity of rights in these municipal portfolios. The result is decrees recognizing substantial portfolios of future need water rights with common law forfeiture protection. See footnote 711 at page 440 regarding the res judicata effect of these decrees.

Going forward, however, these municipal providers will need to pursue applications under the 1996 RAFN statute if they wish to expand their portfolios beyond what was decreed in the SRBA (unless they can demonstrate a deficit in their current portfolio to meet short-term needs). Establishing a planning horizon and RAFN for new rights will have the added advantage of better insulating both the new rights and their existing portfolios from any potential attack based on post-SRBA forfeiture arguments.

As of January 2010, the following water rights have been approved for RAFN. This table has not been updated since that date:

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[715] "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." Jeff Peppersack, IDWR Guidance, *Application Processing No. 18; Licensing No. 1* (*Processing Applications and Amendments and Determining Beneficial Use for Non-RAFN Municipal Water Rights*) (Oct. 19, 2009) ("*2009 Peppersack Memo*") (reproduced in Appendix M).

[716] For instance, the City of Pocatello challenged conditions imposed by IDWR on each of its water rights dealing with alternate points of diversion. *In re SRBA,* Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (reproduced in Appendix S), *aff'd, City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) (upholding the position of *amici curiae* regarding alternate points of diversion).

	Municipal Provider	Acquired by	Status	Planning Horizon	Flow Rate	Annual Volume	Water Right Number
1.	Tamarack Resort (originally WestRock)	Appropriation	Permit	15 years	8.6 cfs	1,248 AFA	65-22357
2.	City of Nampa	Appropriation	License	21 years	4.5 cfs		63-33022
3.	City of Nampa	Appropriation	Permit	21 years	5.0 cfs		63-32835
4.	City of Bonners Ferry	Appropriation	License	20 years	3.8 cfs		98-7825
5.	Ross Point Water District	Appropriation	License	20 years	5.25 cfs		95-9009
6.	City of Fruitland	Appropriation	Permit	20 years	8.09 cfs		65-23088
7.	Idaho Transportation Department (highway rest area)	Transfer	Decreed	22 years	0.13 cfs	19.8 AFA	37-20853
8.	Moreland Water & Sewer District	Appropriation	Lapsed	30 years	n/a		35-13365
9.	City of Eagle (conveyed to city by M3 Eagle LLC)	Appropriation	Permit	30 years	23.18 cfs	6535 AFA 1836 AFA 1660 AFA	63-32573
10.	Three Mile Water District	Appropriation	Permit	20 years	4.9 cfs		98-7843
11.	Shoshone Bannock Tribes	Appropriation	License/Decree	n/a[717]	0.5 cfs		27-7000
12.	Harmons Property Owners Association	Appropriation	License	20 years	0.18 cfs		95-8996
13.	Star Sewer & Water District	Appropriation	Permit	25 years	7.31 cfs		63-32644

H. The path forward under the 1996 RAFN statute

The promise of the 1996 RAFN statute remains largely unfulfilled. One would have expected that in all these years, a considerable body of experience, insight, and precedent would have been established. That has not occurred. Only a handful of RAFN applications have been submitted. IDWR shut down the largest RAFN application (United Water Idaho's "IMAP"), deferring instead to an *ad hoc* approach under the SRBA.

The Department's (the *2009 Peppersack Memo* and the *2021 RAFN Handbook* referenced above) demonstrate a renewed commitment by the Department to implement the legislative vision in the 1996 RAFN statute. These documents also reflect, however, a much stricter approach than that employed in prior administrations.

For years, municipal providers failed to take advantage of the benefits of the 1996 RAFN statute, and the Department—by treating RAFN rights as "optional"—did little to

[717] IDWR has listed this right in a PowerPoint identifying RAFN water rights. At some point a condition was added referencing RAFN, but it is unclear why. The right is based on a license issued in 1971 predating the 1996 RAFN statute.

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change that inertia. The 2009 guidance changes the game by making it clear that municipal providers may no longer simply pile on additional water rights as each new well is drilled without showing that the existing portfolio of rights is insufficient. Thus the 2009 guidance should encourage RAFN applications. The 2013 guidance, however, might be seen as working in the opposite direction, particularly with respect to the re-interpretation of the "capacity of the system" issue at the time of licensing. Frankly, this latest guidance appears to reflect a degree of skepticism about the whole idea of long-term water planning.

I. Future needs water rights in other western states

This section discusses the law of other states regarding water held by municipalities for future needs. A table summarizing examples of laws, regulations, and planning horizons used in the western states is included following the discussion. See section 19.D at page 337 for a discussion of the rights of municipalities to recapture and reuse sewage effluent.

A good survey of municipal water rights in the western states is found in Robert E. Beck, *Municipal Water Priorities/Preferences in Times of Scarcity: The Impact of Urban Demand on Natural Resource Industries*, 56 Rocky Mtn. Min. L. Inst. 7-1 (2010).

(1) Arizona

Arizona statutes do not directly address the right of municipal providers to acquire water rights for future needs, but they do so by implication. This is reflected in the requirement to identify future needs in the application to appropriation. This has been a requirement since 1919. 1919 Ariz. Sess. Laws, ch. 164 § 6, at 280 ("if for municipal water supply, it shall give the present population to be served, and, as near as may be the future requirements of the city").[718] The permit application statute now provides: "The application also shall set forth: . . . If for municipal uses, the population to be served, and an estimate of the future population requirements." Ariz. Rev. Stat. § 45-152(B)(4).

Another Arizona statute further provides preferential treatment for municipal water providers. "Applications for municipal uses may be approved to the exclusion of all subsequent appropriations if the estimated needs of the municipality so demand after consideration by and upon order of the director." Ariz. Stat. Rev. Ann. § 45-153(B).[719]

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[718] This statute is not available on Westlaw. The statute's language is set out in Robert E. Beck, *Municipal Water Priorities/Preferences in Times of Scarcity: The Impact of Urban Demand on Natural Resource Industries*, 56 Rocky Mtn. Min. L. Inst. § 7.02[3][a], n.65 (2010).

[719] The annotations to this statute recite that the constitutionality of this legislation was challenged in *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179 (Ariz. 1999). However,

In 2005, Arizona enacted a new, stand-alone statute requiring community water systems to engage in water planning, but this statute does not appear to address water rights. 2005 Ariz. Sess. Laws, ch. 223 (codified at Ariz. Rev. Stat. §§ 45-330 *et seq.*). This statute requires small community water systems to prepare an "analysis of present and future water supply demands for the next five, ten and twenty years." Ariz. Rev. Code § 45-342(H)(5). This is a minimum planning requirement, not a maximum. And it does not apply to a "large municipal provider." Ariz. Rev. Code § 45-342(E).

(2) California

Since 1943, California has recognized by statute the right of municipalities to seek rights for future need: "If for municipal water supply the application shall state the present population to be served, and, as near as may be, the future requirements of the city." Cal. Water Code § 1264 (enacted by 1943 Cal. Stat. ch. 368, p. 1617, § 1264).

Another part of the 1943 act authorized the issuance of temporary permits to other uses allowing them to use a city's future needs water right in the interim: "Where permission to appropriate is granted to any municipality for any quantity of water in excess of the existing municipal needs therefor, the board may, pending the application to beneficial use of the entire appropriation permitted, issue permits for the temporary appropriation of the excess of the permitted appropriation over and above the quantity being applied to beneficial use from time to time by the municipality." Cal. Water Code § 1462 (enacted by 1943 Cal. Stat. ch. 368, p. 1623, § 1262).

In 1983, California adopted the Urban Water Management Plan Act ("UWMPA"). Cal. Water Code §§ 10610 *et seq*. This act requires municipal water providers to prepare urban water management plans with a planning horizon of 20 years "or so far as data is available." Cal. Water Code § 10631(a). The 20-year planning requirement is a mandatory minimum. It does not set an upper limit on how far municipal providers may plan and obtain future need water rights.

The UWMPA provides:

> It is the intention of the Legislature, in enacting this part, to permit levels of water management planning commensurate with the numbers of customers served and the volume of water supplied.
>
> A plan shall be adopted in accordance with this chapter that shall do all of the following:
>
> (a) Describe the service area of the supplier, including current and projected population, climate, and other

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that case challenged a unrelated part of the statute (Ariz. Stat. Rev. Ann. § 45-153(B)) which, in any event, was upheld.

> demographic factors affecting the supplier's water management planning. The projected population estimates shall be based upon data from the state, regional, or local service agency population projections within the service area of the urban water supplier and shall be in five-year increments to 20 years or as far as data is available.

Cal. Water Code §§ 10630, 10631.

The UWMPA was described by the California Court of Appeals as follows:

> "In 1983, the Legislature adopted [UWMPA] to promote the active management of urban water demands and efficient water usage in order to protect the people of the state and their water resources. (Stats. 1983, ch. 1009, § 1, p. 3555.)" (*Friends of the Santa Clara River v. Castaic Lake Water Agency* (2004) 123 Cal. App. 4th 1, 8, 19 Cal. Rptr. 3d 625 (*Friends of the Santa Clara River*).) In UWMPA, the Legislature declared that "[t]he conservation and efficient use of urban water supplies are of statewide concern; however, the planning for that use and the implementation of those plans can best be accomplished at the local level." (§ 10610.2, subd. (a)(2).) "To achieve the goal of water conservation and efficient use, [local] urban water suppliers are required to develop water management plans that include long-range planning to ensure adequate water supplies to serve existing customers and future demands for water. (§ 10610.2, subds. (d) & (e).)" (*Friends of the Santa Clara River*, at p. 8, 19 Cal. Rptr. 3d 625.) A plan is intended to function as a planning tool to guide broad-perspective decisionmaking by the management of water suppliers. "The plans must consider a 20–year time horizon (§ 10631, subd. (a)) and must be updated 'at least once every five years on or before December 31, in years ending in five and zero' (§ 10621, subd. (a))." (*Friends of the Santa Clara River*, at p. 8, 19 Cal. Rptr. 3d 625.)

Sonoma Cnty. Water Coal. v. Sonoma Cnty. Water Agency, 116 Cal. Rptr. 3d 616. 622 (Cal. Ct. App. 2010) (brackets original).

(3) Colorado

As noted above (section 23.A starting on page 379), Colorado is a leader in the development of the growing communities doctrine. E.g., *City & Cnty. of Denver v.*

Sheriff, 96 P.2d 836, 841 (Colo. 1939); *City & Cnty. of Denver v. N. Colorado Water Conservancy Dist.* (the "*Blue River*" case), 276 P.2d 992, 997 (1954); *Metro. Suburban Water Users Ass'n v. Colorado River Water Conservation Dist.*, 365 P.2d 273, 289 (Colo. 1961).

In Colorado, water for growing cities is addressed under the State's mechanism for conditional water rights. Unlike Idaho, which has a fixed "prove-up" period, Colorado provides a more flexible system of due diligence with proof of continued diligence required every six years. Thus, a municipal provider may hold water rights for future use indefinitely, so long as it can pass a due diligence review every six years.

In 1975, the Colorado Legislature enacted a statute limiting the authority of cities to condemn water rights to water that the city would need within 15 years. The Colorado Supreme Court declared the statute unconstitutional in *City of Thornton v. Farmers Reservoir & Irr. Co.*, 575 P.2d 382 (1978). Although the Court relied in large part on a direct constitutional grant of condemnation power to cities, the Court's decision necessarily embodies recognition that cities are entitled to obtain water rights to meet all reasonably anticipated future needs. "We wish to make it clear, however, that we do not hold that a home rule city may condemn water for its needs which cannot reasonably be anticipated." *Farmers Reservoir*, 575 P.2d at 538.

In *Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566 (Colo. 1979), the Colorado Supreme Court denied a conditional water right to a private developer who hoped "to sell water to municipalities on the eastern slope for general municipal use but had not obtained firm contractual commitments binding those municipalities to purchase or receive the water." *Vidler*, 594 P.2d at 568-69. The Colorado Legislature codified the *Vidler* anti-speculation rule. 1979 Colo. Sess. Laws (S.B. 481) (codified at Colo. Rev. Stat. § 37-92-103(3)(a)). In doing so, however, it exempted "governmental agencies" from the provision. Colo. Rev. Stat. § 37-92-103(3)(a)(I). As a result, Colorado municipalities are allowed to acquire future need water rights for their own purposes and later sell those rights to others.

In *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 38 (Colo. 1996), the City of Thornton on Colorado's Front Range (population 78,000 at that time) sought conditional water rights for a new water project expected to cost $427 million. Citing *Sheriff* and *Blue River*, the Court rejected an argument that the City could only obtain water rights for future needs within its existing municipal boundaries. The Court then approved the conditional water rights based on a 50-year planning horizon.[720]

[720] The opinion does not expressly state the duration of the planning horizon. At one point, the Court makes reference to Thornton's projection that its population "can be expected to rise steadily and substantially over the next fifty years." *City of Thornton*, 926 P.2d at 19. Later, however, it appears to base its approval of the water rights on that fact that "demand within Thornton's water service area may exceed 93,000 acre feet by the year 2056." *City of Thornton*,

In *Pagosa Area Water and Sanitation Dist. v. Trout Unlimited* (*"Pagosa I"*), 170 P.3d 307, 315 (Colo. 2007), the Court found statutory support for special treatment of municipalities in the 1979 amendment to the definition of "appropriation" (Colo. Rev. Stat. § 37-92-103(3)(a)) that exempts municipalities from strict anti-speculation rules created under *Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566 (Colo. 1979). From this, the Court concluded that "[a city] may conditionally appropriate water to satisfy a projected normal increase in population within a reasonable planning period." *Pagosa I*, 170 P.3d at 315.

In *Pagosa I*, two water districts serving a small Colorado city and surrounding area (population 9,500) sought a "conditional water right" to meet future needs under Colorado's common law governing municipal water rights. The new water right would supply an off-stream reservoir they hoped to construct. They initially sought to establish a 100-year planning horizon. The Colorado Supreme Court remanded for further evidence regarding the need for such a long planning horizon.

On remand, the applicants changed their request to a 70-year planning horizon, which the water court cut back to 50 years. *Pagosa Area Water and Sanitation Dist. v. Trout Unlimited* ("*Pagosa II*"), 219 P.3d 774 (Colo. 2009). The water court also included in the decree various post-decree "reality checks" requiring re-evaluation of needs every six years. On the second appeal, the Colorado Supreme Court approved a 50-year planning horizon, but remanded to allow development of further evidence that the requested quantity was needed.

> The *Pagosa* court expressed concern that "[t]hose in line behind a conditional appropriation for a long planning period risk losing any investment they may make in the hope that the prior conditional appropriation will fail. They also may not be able to raise the necessary funds in the first instance. . . ." While saying that the *Bijou* 50-year period is "not a fixed upper limit" the court noted that the water court "should closely scrutinize" a planning period longer than 50 years. After the remand, the water court approved a conditional appropriation based on a 50-year planning period. While the

926 P.2d at 19. This was 70 years out from 1986, the priority date of the rights awarded to Thornton. *City of Thornton*, 926 P.2d at 32. However, in a subsequent decision, the Idaho Supreme Court, referring back to the *Bijou* decision, described its approval of a fifty-year planning horizon. "It concluded that the 50-year planning period approved in Bijou is appropriate for the Districts' conditional water rights application." *Pagosa Area Water and Sanitation Dist. v. Trout Unlimited* ("*Pagosa II*"), 219 P.3d 774, 780 (Colo. 2009). Other commentators have also referred to Thornton's planning horizon as a 50-year horizon. Robert E. Beck, *Municipal Water Priorities/Preferences in Times of Scarcity: The Impact of Urban Demand on Natural Resource Industries*, 56 Rocky Mtn. Min. L. Inst. § 7.02[4] (2010).

> supreme court sustained the 50-year planning period, it found fault with amounts of water decreed and again reversed and remanded.

Robert E. Beck, *Municipal Water Priorities/Preferences in Times of Scarcity: The Impact of Urban Demand on Natural Resource Industries*, 56 Rocky Mtn. Min. L. Inst. § 7.03[2][b] (2010).

The Colorado Supreme Court was particularly concerned that the water districts included in the quantification of their future needs a substantial quantity of water to cover reservoir releases to meet instream flow requirements that might be imposed in the future. The Colorado Supreme Court disallowed this portion of the conditional water rights, describing the need for such releases as "speculative" and "hypothetical." *Pagosa II*, 219 P.3d at 780. The Court noted that the districts could have made in-channel water right applications of their own, but chose not to do so. "Instead, they have attempted to appropriate water quantities they may not need within their service system in order to obtain a priority over a potential City of Pagosa Springs kayak course." *Pagosa II*, 219 P.3d at 783. The problem, as the Court saw it, was not with the concept of the water districts appropriating municipal water rights to allow diversion and release to meet instream flow requirements. Rather, it was the hypothetical nature of the instream flow needs. "Thus, an applicant might obtain a conditional water right to benefit Colorado Water Conservation Board instream flow rights, to benefit in-channel diversion rights of another governmental entity, and/or to meet federal bypass flow requirements, if it demonstrates a substantial probability that it will use such amounts during the water supply planning period, thereby justifying the decree award." *Pagosa II*, 219 P.3d at 783.[721]

We are aware of no circumstance in Idaho in which a municipal water provider has sought to appropriate water to meet instream flow needs. On the other hand, United Water Idaho did enter into a stipulation whereby a junior, 1993-priority "flood right" out of the Boise River was subordinated to future instream flow water rights of a particular quantity if and when such instream flow rights are established. Water Right No. 63-12055.

(4) Montana

Montana was one of the Western states to recognize the "progressive growth doctrine." *St. Onge v. Blakely*, 245 P. 532 (Mont. 1926). This doctrine applied in the

[721] For a more detailed look at the *Pagosa* cases, see Casey S. Funk & Daniel J. Arnold, *Pagosa—The Great and Growing Cities Doctrine Imperiled: An Objective Look from a Biased Perspective*, 13 U. Denver Water L. Rev. 283, § 7.03[2][b] (2010); Robert E. Beck, *Municipal Water Priorities/Preferences in Times of Scarcity: The Impact of Urban Demand on Natural Resource Industries*, 56 Rocky Mtn. Min. L. Inst. § 7.02[4] (2010)..

context of irrigation, allowing an irrigator to a reasonable amount of time to grow into (or prove up) his or her water right. "It is not requisite that the use of water appropriated be made immediately to the full extent of the needs of the appropriator. It may be prospective and contemplated, provided there is a present ownership or possessory right to the lands upon which it is to be applied, coupled with a bona fide intention to use the water, and provided that the appropriator proceeds with due diligence to apply the water to his needs." *St. Onge*, 245 P. at 539. This doctrine is seen by some as the predecessor of the growing cities (or growing communities) doctrine. A. Dan Tarlock, *Law of Water Rights and Resources* § 5:71 (2013); Lora Lucero & A. Dan Tarlock, *Water Supply and Urban Growth in New Mexico: Same Old, Same Old or a New Era?*, 43 Nat. Resources J. 803, 829 (2003); Sandra Zellmer, 8 Nev. L. J. 994, 1013-14 (2008).

(5) Nebraska

Nebraska provides statutory protection from forfeiture for municipal rights. Neb. Rev. Stat. § 46-229.04(5).

(6) Nevada

Nevada authorizes municipalities to appropriate water for future use, but does not set any specific duration of the planning horizon. The statute simply requires that the application for a municipal water right shall contain "the approximate number of persons to be served, and the approximate future requirement." Nev. Rev. Stat. § 533.340(3).

(7) New Mexico

Since 1985, New Mexico has provided by statute that municipal water rights held for future use pursuant to a development plan are protected from forfeiture for up to 40 years:

> A. It is recognized by the state that it promotes the public welfare and the conservation of water within the state for municipalities, counties, school districts, state universities, member-owned community water systems, special water users' associations and public utilities supplying water to municipalities or counties to plan for the reasonable development and use of water resources. The state further recognizes the state engineer's administrative policy of not allowing municipalities, member-owned community water systems, counties and state universities to acquire and hold unused water rights in an amount greater than their reasonable needs within forty years.

> B. Municipalities, counties, school districts, state universities, member-owned community water systems, special water users' associations and public utilities supplying water to municipalities or counties shall be allowed a water use planning period not to exceed forty years, and water rights for municipalities, counties, school districts, state universities, member-owned community water systems, special water users' associations and public utilities supplying water to such municipalities or counties shall be based upon a water development plan the implementation of which shall not exceed a forty-year period from the date of the application for an appropriation or a change of place or purpose of use pursuant to a water development plan or for preservation of a municipal, county, school district, member-owned community water system or state university water supply for reasonably projected additional needs within forty years.

N.M. Stat. Ann. §§ 72-1-9 (emphasis added) (first enacted 1985 N.M. Laws, ch. 198).

By statute, municipal rights for future needs are exempt from forfeiture:

> Periods of nonuse when water rights are acquired by incorporated municipalities or counties for implementation of their water development plans or for preservation of municipal or county water supplies shall not be computed as part of the four-year forfeiture statute.

N.M. Stat. Ann. § 72-12-8(F) (first enacted 1985 N.M. Laws, ch. 198) (an identical provision appears in N.M. Stat. Ann. § 72-5-28(C)).

The New Mexico Supreme Court cited N.M. Stat. Ann. § 72-1-9 in noting that "[a] municipality may be given a more substantial 'reasonable time' for its population growth than a typical water user would have to complete an appropriation." *State ex. rel. Martinez v. City of Las Vegas*, 89 P.3d 47, 59 (N.M. 2004).

Even before this statute, New Mexico recognized the common law growing communities doctrine in 1967. Citing *City and Cnty. of Denver v. Sheriff*, 96 P.2d 836 (Colo. 1939), the New Mexico Supreme Court said: "We see no reason why the rule stated should not apply to the future use of water by cities intended to satisfy needs resulting from normal increase in population within a reasonable period of time." *State ex. rel. State Engineer v. Crider*, 431 P.2d 45, 49 (N.M. 1967). The Court continued, "We add, however, that the cities' rights to the appropriation of water for future use is subject to the condition that the needed water be applied to beneficial use within a reasonable time. If not so applied such right may be lost." *Id*.

The Court reiterated this point (albeit in dictum) in 1981: "When determining the extent of a municipal water right, it is appropriate for the court to look to a city's planned future use of water from the well caused by an increasing population. *State v. Crider*, 78 N.M. 312, 431 P.2d 45 (1967). Thus, the amount of water a city is presently using from a well may not be the limit of its water right. Likewise, the size of the well casing at the present may not be the limit of that right." *State v. Rio Rancho Estates, Inc.*, 624 P.2d 502, 506 (N.M. 1981).

In 2004, the Court again reiterated the *Cridler* principle. "We have applied this principle to municipalities in order to allow for "normal increase in population within a reasonable period of time." *State ex. rel. Martinez v. City of Las Vegas*, 89 P.3d 47, 59 (N.M. 2004). In so doing, however, the Court overruled the even more expansive pueblo rights doctrine that allowed certain cities unlimited protection from forfeiture.[722] The Court then noted that this common law special treatment of municipal providers has been codified at N.M. Stat. Ann. § 72-1-9, providing up to 40 years of protection from forfeiture. *Id*.

The municipal water right statute was discussed in *Albuquerque-Bernalillo Cnty. Water Utility Auth. v. New Mexico State Engineer*, 2013 WL 5309895 (N.M. Ct. App. 2013) (unpublished) (cert. denied). Because the issue was not properly presented, the court declined to address the question of whether municipal water rights held unused for more than 40 years should be deemed abandoned.

(8) North Dakota

Since 1985, North Dakota has provided by statute for municipal providers to acquire water rights for "reasonable projections for future water needs":

> The state engineer may issue a conditional permit for less than the amount of water requested, but in no case may the state engineer issue a permit for more water than can be beneficially used for the purposes stated in the application except that water permits for incorporated municipalities or

[722] "In *Cartwright v. Public Service Co. of New Mexico*, 66 N.M. 64, 79–85, 343 P.2d 654, 664–69 (1958), this Court adopted the pueblo rights doctrine. Under this doctrine, municipalities that are the successors-in-interest to colonization pueblos established by antecedent sovereigns possess a pueblo water right. This water right entitles a municipality to take as much water from an adjacent water course as necessary for municipal purposes and permits expansion of the right to accommodate increased municipal needs due to population increases. Upon reexamination, we conclude that the pueblo rights doctrine is inconsistent with New Mexico's system of prior appropriation. As a result, we overrule *Cartwright*. We conclude that municipal water rights must be determined by prior appropriation based on beneficial use regardless of a colonization grant from preceding sovereigns." *State ex. rel. Martinez v. City of Las Vegas*, 89 P.3d 47, 49 (N.M. 2004).

> rural water systems may contain water in excess of present needs if based upon reasonable projections of future water needs of the municipality or the rural water system. The state engineer may require modification of the plans and specifications for the appropriation. The state engineer may issue a permit subject to fees for water use, terms, conditions, restrictions, limitations, and termination dates the state engineer considers necessary to protect the rights of others and the public interest. Conditions and limitations so attached must be related to matters within the jurisdiction of the state engineer; provided, however, that all conditions attached to any permit issued prior to July 1, 1975, are binding upon the permittee.

N.D. Cent. Code § 61-04-06.2 (emphasis added) (enacted as 1985 N.D. Laws ch. 670).

> Any appropriation of water must be for a beneficial use, and when the appropriator fails to apply it to the beneficial use cited in the permit or ceases to use it for the beneficial use cited in the permit for three successive years, unless the failure or cessation of use has been due to the unavailability of water, a justifiable inability to complete the works, or other good and sufficient cause, the state engineer may declare the water permit or right forfeited. For purposes of this chapter, an incorporated municipality or rural water system has good and sufficient cause excusing the failure to use a water permit, if the water permit may reasonably be necessary for the future water requirements of the municipality or the rural water system. The state engineer shall, as often as necessary, examine the condition of all works constructed or partially constructed within the state and compile information concerning the condition of every water permit or right and all ditches and other works constructed or partially constructed thereunder.

N.D. Cent. Code § 61-04-23 (emphasis added) (enacted as 1985 N.D. Laws ch. 670).

However, a 1989 regulation implementing these statutes limits the protection to 30 years:

> "Reasonably necessary for the future water requirements of a municipality or rural water system" means the amount of water estimated to be required thirty years in the future. The total quantity of water a municipality or rural

> water system may hold under all permits for municipal use may not exceed the quantity the municipality or rural water system can reasonably expect to use thirty years in the future.

N.D. Admin. Code 89-03-03-04.

(9) Oregon

Since at least 1991,[723] Oregon has provided by statute that municipalities may appropriate water to meet reasonably anticipated future needs:

> (4) The right of all cities and towns in this state to acquire rights to the use of the water of natural streams and lakes, not otherwise appropriated, and subject to existing rights, for all reasonable and usual municipal purposes, and for such future reasonable and usual municipal purposes as may reasonably be anticipated by reason of growth of population, or to secure sufficient water supply in cases of emergency, is expressly confirmed.

Or. Rev. Stat. § 540.610(4) (emphasis added). The statute sets no time limit for the duration of the planning horizon.

The same statute provides protection from forfeiture for municipal rights:

> (2) Upon a showing of failure to use beneficially for five successive years, the appropriator has the burden of rebutting the presumption of forfeiture by showing one or more of the following:
>
> (a) The water right is for use of water, or rights of use, acquired by cities and towns in this state, by appropriation or by purchase, for all reasonable and usual municipal purposes.
>
> (b) A finding of forfeiture would impair the rights of such cities and towns to the use of water, whether acquired by appropriation or purchase, or heretofore recognized by act of the legislature, or which may hereafter be acquired.

Or. Rev. Stat. § 540.610(2).

[723] The earliest Oregon Session Law amending this act that is available on Westlaw is Or. Laws ch. 370 (1991) (S.B. 204). It shows that the relevant language predates 1991.

Another Oregon statute authorizes municipal providers to take up to 20 years to construct the diversion works:

> (2) The holder of a permit for municipal use shall commence and complete the construction of any proposed works within 20 years from the date on which a permit for municipal use is issued under ORS 537.211. The construction must proceed with reasonable diligence and be completed within the time specified in the permit, not to exceed 20 years. However, the department may order and allow an extension of time to complete construction or to perfect a water right beyond the time specified in the permit under the following conditions: . . .

Or. Rev. Stat. § 537.230(2).

This statute was amended in 2005 in response to the court of appeals' decision in *Waterwatch of Oregon, Inc. v. Water Resources Comm'n,* 88 P.3d 327, 341 (Or. Ct. App. 2004), *decision vacated*, 119 P.3d 221 (Or. 2005). In this case, the Oregon Water Resources Commission approved a permit sought by a municipal provider (the Coos Bay-North Bend Water Board) for municipal water supply based on showing of future needs over 60 year planning period (from 1990 to 2050).[724] It was challenged by an environmental group. The court of appeals read a public interest standard into the state's due diligence statute, Or. Rev. Stat. § 537.230, which at the time required construction of works to be completed within five years. The appeals court concluded that the issuance of a permit for a proposed municipal diversion that would not apply the water to beneficial use many years beyond the statutory period was not in the public interest.

While the case was on appeal to the state supreme court, the legislature amended the statute. Or. Laws ch. 410 (2005). First, the legislation specifically exempted from judicial review permits issued prior to 2005. Based on this action, the Oregon Supreme Court vacated the appeals court decision. 119 P.3d 221 (Or. 2005). Second, the legislation amended section 537.230 exempting municipal providers from the five-year requirement and allowing them up to 20 years to "complete the construction of any proposed works," with further extensions available upon a proper showing.[725] An

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[724] The 2050 endpoint is referenced in the Oregon decisions. The 1990 starting point is referenced in Kathleen Booth, *Court Report-State Court: Oregon*, 8 U. Denver L. Rev. 309, 310 (2004).

[725] This is discussed in Michelle Henrie, *Oregon's Municipalities Can Take the Time They Need to Grow*, 7 Water Resources Impact 12 (2005) and A. Dan Tarlock & Sarah B. Van de Wetering, *Western Growth and Sustainable Water Use: If There Are No "Natural Limits," Should We Worry About Water Supplies?*, 27 Pub. Land and Res. L. Rev. 33, 50, n.75 (2006).

implementing administrative regulation provides for extensions of time for construction of works required for municipal providers.[726]

Note that the 20-year deadline (plus extensions) applies to the construction of works, not to the application of the water to beneficial use. Thus, an Oregon municipal provider may secure a water right for an even longer term so long as the physical diversion works are constructed within 20 years. Indeed, the purpose of the 2005 legislation was to uphold Coos Bay's water permit based on a 60-year planning horizon.

Another statute deals with partial perfection of municipal water rights.[727]

(10) South Dakota

South Dakota provides by statute that a municipal provider "can acquire and hold rights to use water for existing and future uses, but cannot prevent someone else from using the excess in the interim until "necessity therefor exists." Robert E. Beck, *Municipal Water Priorities/Preferences in Times of Scarcity: The Impact of Urban Demand on Natural Resource Industries*, 56 Rocky Mtn. Min. L. Inst. § 7.02[3][a], n.70 (2010) (internal quotations omitted). The text of the referenced statute provides:

> It is the established policy of this state:
> . . .
> (2) That the state may, through its institutions, facilities, and properties, and a water distribution system may acquire and hold rights to use water, which rights shall be protected to the fullest extent necessary for existing and future uses, but neither the state nor any water distribution system may acquire or hold any right to waste any water, to use water for other than its own purposes or to prevent the appropriation and application of water in excess of its reasonable and existing needs for useful purposes by other persons, subject to the rights of the state or a water distribution system to apply the water to use whenever necessity therefor exists.

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[726] "[H]olders of municipal and quasi-municipal water use permits may apply to the Department for an extension of time to complete construction and/or apply the water to full beneficial use pursuant to ORS 537.230 or 537.630. . . . Extension requests for greater than 50 years must include documentation that the demand projection is consistent with the amount and types of lands and uses proposed to be served by the permit holder." Or. Admin. R. 690-315-0070(3)(l).

[727] "A municipality may partially perfect not less than 25 percent of the water authorized by its permit without loss of priority or cancellation of the municipality's permit under this section. . . ." Or. Rev. Stat. § 537.260(4).

S.D. Codified Laws § 46-1-5(2).

Another provision of the water code authorizes municipal providers to "reserve water for contemplated future needs upon a showing of availability of unappropriated water and future need." S.D. Codified Laws § 46-5-38. The legislation further provides for review of such reservations (called "future use permits") every seven years, making them subject to cancellation if the provider cannot show they continue to be needed:

> Water Management Board approval of an application to appropriate water for future use is a reservation of a definite amount of water with a specified priority date and is not a grant of authority to construct the works or to put the water to beneficial use. Before the time that the holder of a future use permit initiates construction of the works and puts water to beneficial use, the holder shall file an application for a water permit pursuant to the procedure contained in chapter 46-2A. If the holder of the future use permit is granted a water permit to develop only a portion of the water reserved by the future use permit, the holder shall apply for and receive an additional water permit, or permits, before developing and using the remaining water reserved in the future use permit. Permits for future uses shall be reviewed by the board every seven years and are subject to cancellation if the board determines that the permit holder cannot demonstrate a reasonable need for a future use permit.

S.D. Codified Laws § 46-5-38.1. The legislation sets no upper limit on the provider's planning horizon.

(11) Utah

In 1945, Utah enacted its first statute providing special treatment of municipal water rights held for future needs. 1945 Utah Sess. Laws, ch. 134, § 1, at 262 (recognizing as reasonable cause for extending time before forfeiture "holding of a water right without use by any municipality, metropolitan water district or other public agencies to meet the reasonable future requirements of the public"). However, this statute did not provide blanket exemption from forfeiture. Instead, it provided an opportunity for cities to affirmatively request an extension of time under the state's forfeiture statute.

In 2008, Utah enacted statutory protection from forfeiture for municipal rights. 2008 Utah Sess. L. ch. 380. Under this statute, water rights held by "a public water supplier" are exempt from forfeiture if "conserved or held for the reasonable future water requirement of the public." Utah Code Ann. § 73-1-4(2)(e)(vii)(B). The statute further provides for a 40-year planning horizon: "The reasonable future water requirement of the

public is the amount of water needed in the next 40 years by the persons within the public water supplier's projected service area based on projected population growth or other water use demand." Utah Code Ann. § 73-1-4(2)(f)(i).

(12) Washington

Washington allows municipal providers to obtain inchoate water rights (the equivalent of a permit in Idaho) sized to meet future needs. However, since 2003, the municipal provider may only obtain a water right certificate (the equivalent of a license in Idaho) for water actually applied to beneficial use.

Under prior administrative practice, the Washington Department of Ecology granted certificates to municipal providers based on the installed capacity of the diversion and distribution system—known as "pumps and pipes." In *State of Washington, Dept. of Ecology v. Theodoratus*, 957 P.2d 1241 (Wash. 1998), the Washington Supreme Court invalidated this practice. It held that a private water right appropriator seeking water for a subdivision must demonstrate actual application of water to beneficial use, not merely construction of "pumps and pipes" capacity to deliver the water once the demand for it arises. In so ruling, the court cautioned that it was not ruling with respect to municipal water rights, which it recognized generally receive more liberal treatment with respect to proof and forfeiture. "[W]e decline to address issues concerning municipal water suppliers in the context of this case. We do note that the statutory scheme allows for differences between municipal and other water use." *Theodoratus*, 957 P.2d at 1247.

The Washington Legislature responded by codifying the rule in *Theodoratus* and extending it to all water right holders, including municipal providers. 2003 Wash. Legis. Serv. 1st Special Sess. Ch. 5. "After September 9, 2003, the department must issue a new certificate under subsection (1) of this section for a water right represented by a water right permit only for the perfected portion of a water right as demonstrated through actual beneficial use of water." Wash. Rev. Code § 90.03.330(4). Thus, as of 2003, all new certificates for perfected rights are limited to actual beneficial use, not system capacity.[728]

This does not mean that there is no such thing as municipal water rights for future needs in Washington, however. It simply means that a municipal provider may not obtain a final certificate (known in Washington as a perfected right) based on future needs. Municipal providers may obtain permits (known in Washington as inchoate rights (Wash. Rev. Code § 90.03.460) for future needs. The court in *Theodoratus* emphasized

[728] The Legislature softened the blow, however, by creating an expansive new definition of "municipal water supply purposes" which included both traditional municipal providers and private developers of subdivisions (Wash. Rev. Code § 90.03.015) and grandfathering water right certificates for such purposes issued prior to the date of enactment (Wash. Rev. Code § 90.03.330(3)). This legislation was challenged as being unconstitutional retroactive legislation, but it survived. *Lummi Indian Nation v. State*, 241 P.3d 1220 (Wash. 2010).

that there is sufficient flexibility under this provision to allow water users to grow into their rights, so long as they are prosecuted with reasonable diligence. *Theodoratus*, 957 P.2d at 1248. *Theodoratus* was speaking there in terms of private water right development. But the same would apply, and presumably all the more so, to municipal providers. "Therefore, although the holder of a system capacity based certificate of water right may not have a vested right in unused water, the certificate holder's inchoate right to the quantity of water in her certificate might not be affected by the decision in Theodoratus. Of course, such an inchoate right is dependent upon the 'reasonable diligence' requirement for perfecting inchoate water rights. Presumably, a certificate holder with 'unused capacity' could preserve that inchoate right by applying for a permit or extension and pursuing the actual beneficial use of the water with reasonable diligence." Darryl V. Wareham, Note, *Washington Water Rights Based on Actual Use or on Delivery System Capacity? Department of Ecology v. Theodoratus*, 24 Seattle U. L. Rev. 187, 210 n.181 (2000).

Washington's water code provides, simply, that municipal water providers may appropriate water to meet the "future requirement of the municipality": "If for municipal water supply, the application shall give the present population to be served, and, as near as may be estimated, the future requirement of the municipality." Wash. Rev. Code § 90.03.260(5) (emphasis added). There is no statutory limit to the time frame that may be considered.

Once an inchoate right is issued, the municipal provider may gradually grow into its full use without risk of forfeiture. Washington has codified a municipal use exemption from its five-year forfeiture statute: "Notwithstanding any other provisions of RCW 90.14.130 through 90.14.180, there shall be no relinquishment of any water right . . . (d) if such right is claimed for municipal water supply purposes under chapter 90.03 RCW." Wash. Rev. Code § 90.14.140(2)(d). Although "a water right for municipal water supply purposes is exempt from statutory forfeiture of water rights through nonuse," a city may nevertheless intentionally abandon the right. *Okanogan Wilderness League, Inc. v. Town of Twist*, 947 P.2d 732 (Wash 1997) (abandonment found based on nonuse of diversion since at least 1948).

Another statutory provision provides additional guidance on water conservation requirements for municipal water providers. This provision reinforced the authority of a municipal provider to hold inchoate rights for future use:

> (3) A municipal water supplier must implement cost-effective water conservation in accordance with the requirements of RCW 70.119A.180 as part of its approved water system plan or small water system management program. In preparing its regular water system plan update, a municipal water supplier with one thousand or more service connections must describe: (a) The projects, technologies, and

> other cost-effective measures that comprise its water conservation program; (b) improvements in the efficiency of water system use resulting from implementation of its conservation program over the previous six years; and (c) projected effects of delaying the use of existing inchoate rights over the next six years through the addition of further cost-effective water conservation measures before it may divert or withdraw further amounts of its inchoate right for beneficial use. When establishing or extending a surface or ground water right construction schedule under RCW 90.03.320, the department must take into consideration the public water system's use of conserved water.

Wash. Rev. Code § 90.03.386(3) (emphasis added).

Another statutory provision instructs the Washington Department of Ecology to develop conservation planning requirements for municipal providers. Wash. Rev. Code § 70.119A.180. These include methodologies for "determining reasonably anticipated future water needs." Wash. Rev. Code § 70.119A.180(4)(a)(E).

In addition, Washington has a separate administrative mechanism enabling municipal providers to "reserve" water for future needs. Wash. Admin. Code § 173-590 (implementing the Water Resources Act of 1971, Wash. Rev. Code § 90.54). This approach, however, provides less certainty for the municipal provider and greater authority for the State to change its mind: "From time to time, any reservation established under this chapter shall be reviewed and, when it appears appropriate to the department in implementing RCW 90.54.050, modified. No change shall be made without consultation of interested parties. The water resource program and the coordinated water system plan shall be reviewed whenever new information, changing conditions, or statutory modifications make it necessary to consider revisions." Wash. Admin. Code § 173-590-140.

(13) Wyoming

An early Wyoming case established the right of municipalities to acquire water rights for future needs. In *Holt v. Cheyenne*, 137 P. 876 (Wyo. 1914), an irrigator challenged the quantity of water decreed to the City of Cheyenne. The court upheld the city's water right, stating: "The city was not limited in the amount of its appropriation to the needs of its citizens at the time of the adjudication." *Holt*, 137 P. at 880. The court further held that "the securing of water sufficient not alone for its present but such as may be necessary for its future inhabitants was and is within its governmental powers." *Holt*, 137 P. at 881.

The Idaho Supreme Court relied on and quoted from the *Holt* case in *Beus v. City of Soda Springs*, 62 Idaho 1, 6, 107 P.2d 151, 154 (1940).

(14) Municipal water supply in the western United States

(a) Texts and handbooks on water planning

Note: The studies in the following table are focused primarily on planning for water infrastructure and physical supply availability purposes, not for water rights acquisition. However, their discussion of water demand planning shows that planning horizons of substantial duration are typically employed. [729]

STUDY	PLANNING HORIZON DURATION	QUOTATIONS
Gordon Fair, *Elements of Water Supply and Wastewater Disposal* (2nd Ed.), John Wiley & Sons, New York, NY (1971).	Up to 50 years	A table lists "Large dams and conduits" under "Type of Structure" and identifies a Design Period, Years" as "25-50." Fair at 18.
Duane Baumann, John J. Boland & W. Michael Hanemann, *Urban Water Management and Planning*, McGraw-Hill, Inc., New York, NY (1997).	50 years or more	"Even today, the need to ensure efficient and reliable water supply leads to periodic assessments of the long-term outlook. Future water use is forecast, sometimes for a planning period of fifty years or more. Based on this forecast, a cost-effective supply system is planned, including the designation of future water sources, if they are needed. These long-range plans are used as a basis for policy and as a framework for shorter-range capital improvement programs and investments." Baumann at 78. "Long-range forecasts should be performed regularly, based on the best available information at the time." Baumann at 79.
David W. Prasifka, *Current Trends in Water-Supply Planning Issues, Concepts, and Risks*, Van Nostrand Reinhold Co., New York, NY (1988).	Up to 100 years	"Since planning, design, and construction of water facilities proceed slowly, and since most facilities are relatively long-lived, water use is customarily forecast over long periods—20, 30, 50, or even 100 years." Prasifka at 62.
AWWA, *Water Resources Planning*, AWWA Manual M50 (2nd Ed.), American Water Works Assn., Denver, CO (2007).	50 years or more	Identifies long-term planning horizons of 50 years or more. "For the very long term (30 to 50 years or more), highly accurate forecasts are usually not critical, especially if a realistic range of demand is developed. Several stepped increments of supply may occur during the lengthy period that allows adjustments to changing projections." AWWA at 42-43.
Andrew A. Dzurik, *Water Resources Planning* (3rd Ed.), Rowman & Littlefield Publishers, Inc., Lantham, MD (2003).	Up to 50 years	"Water use forecasts in most cases are long-range, covering up to fifty years, and typically measure average daily use. Such long-range planning is necessary because water use projections are usually used to plan major facilities such as dams, reservoirs, and treatment plants."
David Stephenson, *Water Resources Management*, Krips The Print Force, Meppel, The Netherlands (2003)	10-20 years	"In planning and design of water supplies the sizing of works, the locality of sources and discharge of wastewater are dependent on a planned demand. The procedure is to plan for a number of years into the future, e.g., 10 to 20 years for unlimited sources and demand. The actual planning horizon can be selected by economic procedures." Stephenson at 171.

[729] The short planning horizon mentioned in passing in the Stephenson book is an outlier. This publication from the Netherlands addresses global water development, with an emphasis on developing nations. In this context, it notes: "In general there appears to be a decline in growth rate and greater uncertainty in projections." Stephenson at 172. Moreover, the demand projection discussion arises in the context of projecting needs for new water supply infrastructure, not water rights.

(b) State-by-state summary

STATE	STATUTE OR CASE LAW	PLAN	CASES / STATUTES / REGULATIONS	EXAMPLES OF WATER SUPPLY PLANNING HORIZONS
Arizona	No fixed upper limit	50 years	Arizona statutes do not directly address the right of municipal providers to acquire water rights for future needs, but they do so by implication. This is reflected in the requirement to identify future needs in the application to appropriation. Ariz. Rev. Stat. § 450152(B)(4). Another Arizona statute further provides preferential treatment for municipal water providers. "Applications for municipal uses may be approved to the exclusion of all subsequent appropriations if the estimated needs of the municipality so demand after consideration by and upon order of the director." Ariz. Stat. Rev. § 45-153(3).	Tucson used a 50-year planning horizon in its 2000 Water Plan: "These water demand projections are developed to ensure that adequate water supplies will be available to meet the needs of the community during the 50-year planning period and to identify the water-resource opportunities and challenges that lie ahead." *City of Tucson's Water Plan: 2000-2050*, at 3-1. http://cms3.tucsonaz.gov/files/water/docs/wp-ch03.pdf
California	20 year minimum, no fixed upper limit	50 years	Since 1943, California has recognized by statute the right of municipalities to seek rights for future need: "If for municipal water supply the application shall state the present population to be served, and, as near as may be, the future requirements of the city." Cal. Water Code § 1264 (enacted by 1943 Cal. Stat. ch. 368, p. 1617, § 1264). Another part of the 1943 act authorized the issuance of temporary permits to other uses allowing them to use a city's future needs water right in the interim. Cal. Water Code § 1462 (enacted by 1943 Cal. Stat. ch. 368, p. 1623, § 1262). In 1983, California adopted the Urban Water Management Plan Act ("UWMPA"). Cal. Water Code §§ 10610 et seq. This act requires municipal water providers to prepare urban water management plans with a planning horizon of 20 years "or so far as data is available." Cal. Water Code § 10631(a). The 20-year planning requirement is a mandatory minimum. It does not set an upper limit on how far municipal providers may plan and obtain future need water rights.	In its 2009 *Water Plan Update*, California forecasted water supply and demand through 2050: "Update 2009 maps out the role of State government and the water community to ensure that California has sustainable water uses and reliable water supplies in 2050 for all beneficial uses." *California Water Plan Update 2009,* at 2-12. http://www.waterplan.water.ca.gov/cwpu2009/index.cfm In its 2009 *Framework For the Implementation of Water Management Planning*, the California Partnership for the San Joaquin Valley Water Work Group used a 50-year planning horizon: "The [framework] effort is critical to identify the Valley water needs and determine water management solutions for a fifty-year planning horizon." *California Partnership for the San Joaquin Valley, Framework for the Implementation of Water Management Planning*, at 2. http://www.sjvpartnership.org/uploaded_files/WG_doc/CWIfinalversionExtractCPSJV10222009.pdf

STATE	STATUTE OR CASE LAW	PLAN	CASES / STATUTES / REGULATIONS	EXAMPLES OF WATER SUPPLY PLANNING HORIZONS
Colorado	50 years, but that is not a "fixed upper limit"		Fifty-year planning horizons were approved in *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 38 (Colo. 1996) and *Pagosa Area Water and Sanitation Dist. v. Trout Unlimited* ("*Pagosa II*"), 219 P.3d 774 (Colo. 2009). In *Pagosa II*, the Court said that 50 years is not a "fixed upper limit" but that the water court "should closely scrutinize" planning periods longer than 50 years. *Pagosa II*, 219 P.3d at 780 (quoting *Pagosa I*, 170 P.3d at 317).	In its 2002 *Integrated Water Resource Plan,* Denver Water (the state's largest water provider) forecasted water demand through 2050: "Analysis was performed to evaluate the forecasts of future demands in relation to the availability of undeveloped land within Denver Water's Combined Service Area including plans for major known future developments and redevelopments. This analysis indicates that the Combined Service Area will be fully developed by 2050." *Denver Water's Water for Tomorrow: An Integrated Water Resource Plan, at 44.* http://www.dcwater.org/pages/conservation/DenverWaterIRP2002MasterDocIRP.pdf
Idaho	No fixed upper limit	50 years	Idaho's Municipal Water Rights Act of 1996 authorizes municipal providers to acquire water rights to meet reasonably anticipated future needs. The 1996 RAFN statute provides no guidance and sets no limit on the duration of the "planning horizon." "'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." Idaho Code § 42-202B(7).	In 2011, the Idaho Water Resource Board adopted the Rathdrum Prairie Comprehensive Aquifer Management Plan, which projected water demand over a 50-year planning horizon: "The Rathdrum Prairie Aquifer Water Demand Projections study provides projections of Rathdrum Prairie water demand over the next 50 years." *Rathdrum Prairie Comprehensive Aquifer* *Management Plan*, at 3. http://www.idwr.idaho.gov/waterboard/WaterPlanning/CAMP/RP_CAMP/pdf/2011/RP_CAMP_final_Adopted_Plan.pdf In 2012, the Treasure Valley Comprehensive Aquifer Management Plan Advisory Committee submitted a proposed plan projecting water demand over a 50-year planning horizon: "The Treasure Valley Comprehensive Aquifer Management Plan (Plan) provides a framework for long-range management of the aquifer. The Plan describes the overarching goals and actions that can be implemented to successfully accomplish the stated goals for local residents and the state of Idaho and to promote productive regional cooperation to benefit the area over the next 50 years." *Proposed Treasure Valley Comprehensive Aquifer* *Management Plan, at 1.* http://www.idwr.idaho.gov/waterboard/WaterPlanning/CAMP/TV_CAMP/pdf/2012/ProposedTVCAMPPlanv5-08-2012_resized.pdf
Kansas		40 years		In its 2010 *Integrated Local Water Supply Plan*, the City of Wichita forecasted water supply and demand through 2050: "The City of Wichita is currently implementing an Integrated Local Water Supply Plan (ILWSP) to proactively develop their water supplies to meet demands through the planning horizon of 2050. The ILWSP was initially approved in 1993 and includes many components to maximize the use of the City's existing water supply sources and ensure the future of those sources." *Wichita Water Utilities Water Supply Plan*, at 1-1. http://www.wichita.gov/NR/rdonlyres/5B8212F3-3601-4075-A412-3C0838F249A2/0/WichitaFinalReport_FINALw_TablesFigures.pdf

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STATE	STATUTE OR CASE LAW	PLAN	CASES / STATUTES / REGULATIONS	EXAMPLES OF WATER SUPPLY PLANNING HORIZONS
Montana	No fixed upper limit		"In a determination of abandonment made under subsection (3), the legislature finds that a water right that is claimed for municipal use by a city, town, or other public or private entity that operates a public water supply system, as defined in 75-6-102, is presumed to not be abandoned if the city, town, or other private or public entity has used any part of the water right or municipal water supply and there is admissible evidence that the city, town, or other public or private entity also has… conducted a formal study, prepared by a registered professional engineer or qualified consulting firm, that includes a specific assessment that using the water right for municipal supply is feasible and that the amount of the water right is reasonable for foreseeable future needs" Montana Code Annotated § 85-2-227	
Nebraska			(None found.)	
Nevada	No fixed upper limit	50 years	Nevada authorizes municipalities to appropriate water for future use, but does not set any specific duration of the planning horizon. The statute simply requires that the application for a municipal water right shall contain "the approximate number of persons to be served, and the approximate future requirement." Nev. Rev. Stat. § 533.340(3)	In 2009, the Southern Nevada Water Authority used a 50+ year planning horizon for their water demand projections: "The 2009 Water Resource Plan forecasts demands through 2060 based on the June 2008 Clark County Population Forecast prepared by the University of Nevada Las Vegas Center for Business and Economic Research" *Southern Nevada Water Authority 2009 Water Resource Plan*, at 40. http://www.snwa.com/assets/pdf/wr_plan_chapter3.pdf
New Mexico	40 years	46 years 60 years	Since 1985, New Mexico has provided by statute that municipal water rights held for future use pursuant to a development plan are protected from forfeiture for up to 40 years. N.M. Stat. Ann. §§ 72-1-9. By statute, municipal rights for future needs are exempt from forfeiture. N.M. Stat. Ann. §§ 72-5-28(C); 72-12-8(F)).	In 2004, the Middle Rio Grande Water Assembly forecasted water supply and demand through 2050: "In 2001 and 2002, the Water Assembly conducted a Water Balancing Exercise to see if the region's water budget could be balanced by the year 2050. Constituency Groups were given a set of baseline numbers assembled from the best available data, and were asked to set targets for each water use sector based on the group's values. . . . With this information, the Constituency Groups worked to balance the water budget by 2050." *Summary of the Middle Rio Grande Regional Water Plan 2000-2050*, at 25-27. http://waterassembly.org/archives/MRG-Plan/C-Summaries/Rio Grande General Summary.pdf In 2009, the U.S. Bureau of Reclamation recognized the validity of planning horizons of up to 60 years: "The planning horizon considered in this EA is 2060, which is within the normal range for water supply projects (40- to 60-year planning horizons are common). The Project is anticipated to supply water well beyond the planning horizon." *U.S. Bureau of Reclamation, Eastern New Mexico Rural Water System Environmental Assessment,* at 1.

STATE	STATUTE OR CASE LAW	PLAN	CASES / STATUTES / REGULATIONS	EXAMPLES OF WATER SUPPLY PLANNING HORIZONS
				http://www.usbr.gov/uc/albuq/envdocs/ea/eastNM/ea.pdf
North Dakota	No fixed upper limit		"For purposes of this chapter, an incorporated municipality or rural water system has good and sufficient cause excusing the failure to use a water permit, if the water permit may reasonably be necessary for the future water requirements of the municipality or the rural water system." North Dakota Code § 61-04-23	
Oklahoma		50 years		In its *2012 Oklahoma Comprehensive Water Plan*, Oklahoma used a 50-year planning horizon: "Projecting water demands 50 years into the future is a difficult task. Nevertheless, this is the foundational element of future water supply planning." *2012 Oklahoma Comprehensive Water Plan Executive Report*, at 59. http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/WaterPlanUpdate/draftreports/OCWP ExecutiveRpt FINAL.pdf In a 2009 paper summarizing Oklahoma's water planning, the U.S. Army Corps of Engineers wrote favorably of Oklahoma's 50-year planning horizon: "The 50 year planning horizon was selected because it represents a reasonable, foreseeable time period and encompasses the minimum life span of most large water resources projects in Oklahoma." *U.S. Army Corps of Engineers, Building Strong Collaborative Relationships for a Sustainable Water Resources Future: State of Oklahoma Summary of State Water Planning*, at 7.

STATE	STATUTE OR CASE LAW	PLAN	CASES / STATUTES / REGULATIONS	EXAMPLES OF WATER SUPPLY PLANNING HORIZONS
Oregon	No statutory limit on appropriations, but 20 years (with extensions) to complete system 60 years approved by grand-fathering	50 years	Since at least 1991, an Oregon statute has provided that municipalities may appropriate water to meet all reasonably anticipated future needs. Or. Rev. Stat. § 540.610(4). The statute sets no time limit for the duration of the planning horizon. The same statute provides protection from forfeiture for municipal rights. Or. Rev. Stat. § 540.610(2). An Oregon statute provides that municipal providers have up to 20 years (with further extensions possible) to complete construction of the physical works required for a municipal water right. Or. Rev. Stat. § 537.230(2). This statute was enacted to overrule the holding in *Waterwatch of Oregon, Inc. v. Water Resources Comm'n*, 88 P.3d 327, 341 (Or. Ct. App. 2004), *decision vacated*, 119 P.3d 221 (Or. 2005). The effect was to approve a water right permit issued to a municipal provider based on future needs over a 60-year planning horizon.	Eugene Water & Electric Board (the municipal water provider for the city of Eugene, Oregon) states that it holds sufficient water rights "to meet projected demand beyond the current 50-year planning horizon." http://www.eweb.org/sustainability/report/water The 2009 Statewide Water Needs Assessment, prepared as a component of the Oregon Water Supply and Conservation Initiative, projected demand through 2050. http://www.oregon.gov/owrd/law/docs/owsci/owrd_demand_assessment_report_final_september_2008.pdf
South Dakota	No fixed upper limit	50 years	South Dakota provides by statute that a municipal provider may acquire and hold rights to use water for existing and future uses, but cannot prevent someone else from using the excess in the interim until necessity therefor exists. S.D. Codified Laws § 46-1-5. Another provision of the water code authorizes municipal providers to "reserve water for contemplated future needs upon a showing of availability of unappropriated water and future need." S.D. Codified Laws § 46-5-38. The legislation further provides for review of such reservations (called "future use permits") every seven years, making them subject to cancellation if the provider cannot show they continue to be needed. S.D. Codified Laws § 46-5-38.	In its 2005 *Future Water Supply Evaluation*, the City of Sioux Falls used a 50-year planning horizon: "A planning period of 50 years beyond the implementation deadline of year 2012 was established due to the complexity, limited expandability, and significant costs associated with the construction of new water supply, transmission, and treatment system infrastructure. As a result, the year 2062 served as the basis to develop concepts for evaluation and consideration by the City of Sioux Falls. The 50-year planning period was divided into two equal 25-year planning periods, thereby creating planning horizons in year 2037 and year 2062." *City of Sioux Falls Future Water Supply Evaluation Executive Summary*, at ES-1. http://www.siouxfalls.org/~/media/Documents/publicworks/water/future_water/final_executive_summary.pdf
Texas		50 years	"The committee is specifically charged to review…(2) projections for Texas' future water and wastewater needs to the year 2050" Texas S.B. No. 1, 1997, Section 8.02(a)	As required by the Texas legislature in 1997, regional water supply planning extends to 2050: "The first step in the regional water planning process is to quantify current and projected population and water demand over the 50-year planning horizon." *Texas 2012 State Water Plan*, at 129. http://www.twdb.state.tx.us/publications/state_water_plan/2012/03.pdf

STATE	STATUTE OR CASE LAW	PLAN	CASES / STATUTES / REGULATIONS	EXAMPLES OF WATER SUPPLY PLANNING HORIZONS
Utah	40 years		In 2008, Utah enacted statutory protection from forfeiture for municipal rights. 2008 Utah Sess. L. ch. 380. Under this statute, water rights held by "a public water supplier" are exempt from forfeiture if "conserved or held for the reasonable future water requirement of the public." Utah Code Ann. § 73-1-4(2)(e)(vii)(B). The statute further provides for a 40-year planning horizon. Utah Code Ann. § 73-1-4(2)(f)(i).	In its 2001 *Utah State Water Plan*, Utah's Division of Water Resources projected water supply demand to 2050: "Estimates of present municipal and industrial water use by basin have been made and are shown . . . . Projections of water use in 2020 and 2050, based on present use rates and future population, are also shown." *Utah's Water Resources Planning For The Future*, at 21. http://www.water.utah.gov/waterplan/
Washington	No fixed upper limit	50 years	Washington allows municipal providers to obtain inchoate water rights (the equivalent of a permit in Idaho) sized to meet future needs. Wash. Rev. Code §§ 90.03.260(5); 70.119A.180(4)(a)(E). These so-called inchoate rights are exempt from forfeiture. Wash. Rev. Code § 90.14.140(2)(d). The statute sets no limit or the duration of the planning horizon for future needs. However, since 2003, the municipal provider may only obtain a water right certificate (the equivalent of a license in Idaho) for water actually applied to beneficial use. Wash. Rev. Code § 90.03.330(4). Washington has a separate administrative mechanism enabling municipal providers to "reserve" water for future needs. Wash. Admin. Code § 173-590 (implementing the Water Resources Act of 1971, Wash. Rev. Code § 90.54). This approach, however, provides less certainty for the municipal provider	The City of Olympia, Washington used a 50-year planning horizon to project future needs and secure adequate supplies in their *Comprehensive Plan*: "Goals and Policies: PF6.1- Reserve water supply rights for at least 50 years in advance of need, so that supplies can be protected from contamination and they are not committed to lower priority uses." *Comprehensive Plan For Olympia And The Olympia Growth Area*, at ch. 5, p. 7. http://olympiawa.gov/plans/comp-plan/utilities
Wyoming		30 years		Wyoming used a 30-year planning horizon in its 2007 Water Plan: "This current Wyoming Framework Water Plan provides information for decision making for a 30 year planning horizon." *Wyoming Water Development Comm'n, The Wyoming Framework Water Plan: A Summary*, at 1. http://waterplan.state.wy.us/plan/statewide/execsummary.pdf The City of Gillette used a 30-year planning horizon in its 2007 water supply study: "[T]he only source that could reliably and economically provide the needed water for the 30-year planning period was the Madison aquifer." *City of Gillette Long-Term Water Supply Study Executive Summary*, at 7-17. http://www.ci.gillette.wy.us/Modules/ShowDocument.aspx?documentid=5428

J. Alternate points of diversion ("APODs")

(1) How APODs work

A point of diversion ("POD") is the location of the well or other diversion structure from which a water right is authorized to divert. The point of diversion is a defined "element" of every water right.

When a water right is allowed to divert from more than one point of diversion, it is said to have "alternate points of diversion" or "APODs" (or "alternate points of diversion" or "additional point of diversion"). APODs are used most commonly for a ground water right diverting from multiple wells. Surface rights also could have multiple points of diversion (e.g., different pumps out of a lake).

Operational advantages

The purpose of identifying APODs is to give the water user the flexibility to "move" its water rights from one well to another as needed. This may be useful in the following circumstances:

- If a well is shut down (permanently or temporarily for any reason), water under the water right associated with that well may be pumped from another well without seeking approval from IDWR.

- If the authorized diversion rate for a particular water right exceeds the installed capacity of its designated POD or PODs, adding additional APODs allows the right to be fully utilized and protected from forfeiture.

- APODs allow the municipal provider to increase the pumping capacity of individual wells beyond the amount originally authorized for the single right associated with the well. However, IDWR's standard APOD condition ensures that doing so may not cause injury to other rights that predate the APOD authorization.

- APODs allow the municipal provider to optimize the use of a well that produces better water quality and to reduce the use of wells that produce poorer quality.

- If a municipal provider has a portfolio of rights authorizing diversions in excess of current demand, the provider may add additional APODs to existing rights via a simple transfer. This would allow expansion of its network of wells without immediately seeking new appropriations. This could be particularly important if a moratorium on new appropriations were in place.

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- APODs coupled with a combined use limit may be employed at the time of licensing a non-RAFN municipal water right where the municipal provider is unable to demonstrate an additional increment of system capacity or beneficial use. The latter is referred to informally as the Tuthill Compromise (after former Director David Tuthill). See discussion in section 23.D(9)(e) on page 418.

- Most importantly, APODs provide flexibility to municipal providers in the context of future water right curtailments. If a city's junior water rights were curtailed, APODs would allow it to employ its remaining non-curtailed rights in the most effective manner to provide at least some level of service under the circumstances. For instance, a city might restrict lawn irrigation on a rotating basis. This flexibility is accomplished in part simply by having all water rights have system-wide service areas. In theory, this would allow water to be diverted from non-curtailed wells and delivered anywhere in the system even without APODs. However, as a practical matter, wells in a complex municipal delivery systems are operated in complex fashion in conjunction with each other, in order to maintain pressure, etc. Thus, as a practical matter, APODs are necessary, in addition system-wide service areas.

Avoidance of injury

Any change in the point of diversion of a water right (including adding an APOD) requires a transfer approved by the Idaho Department of Water Resources ("IDWR" or "Department"). The corresponding mechanism to add an APOD to a permit is an application for amendment of permit. In a general adjudication of water rights such as the Snake River Basin Adjudication ("SRBA") or the Northern Idaho Adjudications ("NIA"), transfers that were never formally sought nonetheless may be recognized under a statutory provision authorizing "accomplished transfers."

The addition of APODs to an existing right will be approved only if the change injures no other water users, including juniors. This will require the inclusion of limiting conditions that avoid injury.

The Department will recognize alternate points of diversion for a water right only if the points of diversion are from the same source. *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. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.).[730]

[730] The synopsis to the published opinion incorrectly refers to this as an appeal from a decision of Judge Wildman.

Historically, water rights (particularly for municipal supply systems) were often acquired one well at a time as the system expands, with a new water right obtained as each well was added. The result is that the municipal provider accumulates a portfolio of water rights with different priority dates, each associated with a different well. It is often desirable to integrate these points of diversion by making each well an APOD for every water right. Thus, for example, if there were 16 water rights associated with 16 wells, the rights could be transferred so that all 16 APODs were listed as points of diversion for each water right. This way, the water right holder may pump any water right from any well, as well as multiple water rights from a single well.

Ordinarily, conversion of single-well water rights to water rights with APODs must be accomplished through a formal transfer proceeding. In a formal transfer, other water users are put on notice and given an opportunity to protest on the basis of injury.

In the SRBA, many municipal providers held multiple one-well water rights that were used in integrated delivery systems in which water diverted from various wells was co-mingled. Thus, as a practical matter, these providers had accomplished an APOD transfer. Accordingly, they claimed "accomplished transfers" of their water rights (under Idaho Code § 42-1425) in which each ground water right was authorized to divert from every well in the integrated delivery system.[731]

The APOD administration condition

These accomplished transfer APODs were recommended for approval by the Department and ultimately decreed in virtually all cases, but with a condition. The condition recognized that, since there was no formal transfer proceeding with notice to the public and an opportunity to protest, the rights should be conditioned to allow senior users the right to allege well interference even after the APODs are approved.

Accordingly, the following language became the standard APOD language for accomplished transfers:[732]

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[731] In the SRBA, APODs were limited to those rights shown to have been used in an integrated delivery system. Otherwise, the municipal providers could not show an accomplished transfer. In a new appropriation or a formal transfer, however, APODs could be established at separate locations outside of an integrated system, so long as they all diverted from the same source (i.e., the same aquifer).

[732] More recently, IDWR has included a modified version of the APOD condition where APODs are added at the time of licensing via an informal "license amendment." Here is an example from the license for No. 95-9129 issued to North Kootenai Water District on 2/5/2021 and subsequently decreed in the CSRBA. The licensing amendment authorized 26 APODs. The APOD condition reads:

> To the extent necessary for administration between points of diversion for ground water, and between points of diversion for

> 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 [name of well] located in [quarter-quarter description].

This condition was developed in the context of accomplished transfers—that is transfers accomplished (informally, by operation of law, without a formal transfer application) by the water user simply putting them into effect on-the-ground without any review or approval from the Department. But for Idaho Code § 42-1425, accomplished transfers would be illegal (at least since 1963 for ground water[733] and since 1971 for surface water[734]). In *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 457-58, 926 P.2d 1301, 1304-05 (1996) (Schroeder, J), the Idaho Supreme Court found the accomplished transfer statute was constitutional because it contained built-in protections that make it unavailable to transfers that result in injury or enlargement. The APOD condition is intended to effectuate this obligation to avoid injury.

The APOD condition was challenged by the City of Pocatello in the SRBA, which claimed that, in the absence of timely objections by other water users, the City's right to pump water from any well should be decreed without any limitation. However, the APOD condition was upheld by the SRBA court and the Idaho Supreme Court. *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. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) (upholding position of *amici curiae* regarding alternate points of diversion in City of Pocatello municipal water rights litigation).[735]

The effect of the APOD condition language is that, where necessary for administration, the Department may look back to the original well location of the water right. Essentially, this allows the Department to roll the clock back, as if the accomplished transfer had not yet been approved, and evaluate whether injury would

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> ground water and hydraulically connected surface sources, this right retains its priority established in the permit reinstatement order issued on 09/04/2008 for well locations authorized under this right as identified in permit 95-9129 dated 03/26/2003.

[733] The Ground Water Act was adopted in 1951, 1951 Idaho Sess. Laws, ch. 200. However, the application process for ground water rights did not become mandatory until the act was amended in 1963, 1963 Idaho Sess. Laws, ch. 216 (codified at Idaho Code § 42-229).

[734] 1971 Idaho Sess. Laws, ch. 177 (codified at Idaho Code §§ 42-103, 42-201).

[735] The synopsis to the published opinion incorrectly refers to this as an appeal from a decision of Judge Wildman.

result if the transfer was sought now for the first time. This may arise in three contexts, each of which is discussed below.

These discussions employ the following hypothetical. Suppose Little City had two water rights, a 1920 right for 1 cfs out of Well A and a 1985 right for 1 cfs out of well B. In the SRBA these were decreed listing both wells as APODs for both rights, subject to the condition quoted above.

Context 1: Well interference

The first context in which the APOD condition might come into play is well interference. Let us suppose that neighbor Bob owns a water right with a 1970 priority that pumps out of Well C, which is near Little City's Well B. The 1 cfs pumped out of Well B has never interfered with Bob's water right. Then, in the year 2015, Little City decides to abandon Well A and improve Well B to pump the full 2 cfs. Bob now complains that the increased pumping from Well B is interfering with his water right. If there were no APOD condition, he would lose. But the APOD language allows the Department to take into account the fact that the city's first water right was originally associated only with Well A. The Department would then ask itself, in effect, will transferring the point of diversion to allow this water to be pumped of Well B result in injury? Under these facts, the answer is "yes" and Bob would prevail.

The same would be true if, for many years Little City pumped its 1985 water right out of Well B for eight hours a day without injury to Bob. Then the City began pumping the right 24 hours a day,[736] thereby causing injury to Bob's right. In a contest between Bob's 1970 right and the City's 1985 right, Bob would win. But could the City, relying on its new APODs say that it was pumping its 1920 water out of the well and thus prevail over Bob? The APOD condition prevents this. Again, APOD language allows the Department to roll the clock back. If the accomplished transfer results in injury to Bob, then the City may not rely on the APOD.

Context 2: Geographically isolated curtailment

The APOD language would also preclude Little City from using its newly acquired APODs to circumvent the curtailment of ground water diversions within a defined geographic area by bringing in water rights from outside the curtailment area. For example, suppose the Department curtailed pumping of post-1980 junior wells in a Ground Water Management Area ("GWMA") that included Little City's Well B. Suppose Little City's Well A was located outside of that area. Could Little City, relying on the APODs associated with its senior 1920 right declare that it was now going to pump its 1920 water from Well B, thereby defeating the effort to restrict pumping in the

[736] Municipal water rights typically have no volume limitation. Thus, cities are allowed to grow into their rights over time, pumping them more and more as needed.

GWMA? If there were no APOD condition, it could do so. But, as in the well interference scenarios, the APOD condition allows the Department to roll the clock back and "undo" an accomplished transfer that is causing this sort of injury. Thus, the city would not be allowed to pump its 1920 water right from the well within the curtailment area because, at the time the 1920 right was issued it was not authorized to be diverted out of that well.

Note, however, that Little City would be allowed to pump its 1985 right from Well A located outside of the curtailment area. Pumping in that remote location does not stress the ground water in the Ground Water Management Area. Thus, it is not undermining or circumventing the curtailment. Consequently, the city would be allowed to take advantage of the APOD for the 1985 right by pumping it from a remote well just as if there were no curtailment.

Context 3: Broad regional curtailment

While the examples discussed above are important considerations for application of the APOD condition, those scenarios are not the driver for why municipal providers seek APODs. In addition to the other operational advantages listed in the bullet points above, the main advantage of APOD authority arises in the context of a broad regional curtailment.

Take this hypothetical. Suppose there is a call by a down-gradient senior surface user. As a result, the Department curtails pumping ground water rights throughout the valley that are junior to 1980. At this point, Little City can no longer pump its 1985 water right, but it can pump its 1920 right out of either well due to the APODs. In responding to the curtailment, the city's ability to move its most senior water rights to its most critical well may be beneficial. Since it makes no difference to the senior surface user whether the city pumps its water out of one well or the other, then the APOD condition does not restrict pumping the senior right out of the junior well. The city, of course, will still have to find make-up or mitigation water elsewhere, or just provide less water. But at least it is able to use those senior water rights that remain in priority in the most efficient manner.

In its approval of the APOD language, the Idaho Supreme Court did not include a detailed explanation of how the condition works. *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.).[737] However, the SRBA decision affirmed by the high court expressly discussed and confirmed the understanding described above. The district court recited the three scenarios and concluded: "The Providers assert that the Special Master's determination could be read too broadly to preclude under any circumstances the use of alternate points of diversion any time priority administration is

[737] The synopsis to the published opinion incorrectly refers to this as an appeal from a decision of Judge Wildman.

implicated. The court concurs that in a circumstance involving regional priority administration a municipal provider may still be able to exercise alternate 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."[738] Memorandum Decision at 16-18, *In re SRBA,* Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009) (Melanson, J.) (reproduced in Appendix S), *aff'd, City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) (upholding the position of *amici curiae* regarding alternate points of diversion).[739]

(2) Situations in which the APOD condition should not be applied

At the outset, it is important to understand what is meant by whether the APOD condition should apply. The APOD condition is not the thing that authorizes diversion from the APODs. The thing that authorizes diversion from APODs is simply listing those points of diversion on the face of the water right. The APOD condition is a limitation on the use of the APODs. Specifically, it authorizes "rollback" of the right to use APOD authority that was added by a subsequent transfer of the water right. Thus, when we say the APOD condition should not apply, that means the rollback should not apply and the right holder should be allowed to divert the full authorized quantity from any and all APODs listed on the water right (subject to any applicable combined use condition).

No APOD condition is necessary for water rights with APODs from the outset

The APOD condition only makes sense in the context of adding new APODs (via accomplished transfer or formal transfer) to an existing water right. If APODs are included in the original permit (and later the license) from the outset, there is APOD authority that might be rolled back by the APOD condition. In other words, the world is on notice from the outset that that water right can be diverted from multiple APODs, and no injury results from the full exercise of that right according to its priority.

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[738] The Providers referenced in the quotation by the district court were three municipal providers (United Water Idaho, the City of Nampa, and the City of Blackfoot) who submitted an amicus curiae brief and were allowed to argue this point. The district court quoted extensively from the Provider's brief in describing the three scenarios. *In re SRBA,* Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (reproduced in Appendix S), *aff'd, City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) (upholding the position of *amici curiae* regarding alternate points of diversion).

[739] The synopsis to the published opinion incorrectly refers to this as an appeal from a decision of Judge Wildman.

Accomplished transfers vs. formal transfers

As noted above, the APOD language was developed in the context of accomplished transfers and are designed to protect against injury in the context of Idaho Code § 42-1425 (which authorizes accomplished transfers to the extent injury is avoided). APODs may also be added via other procedures including formal transfer (Idaho Code § 42-222), an amendment of permit (Idaho Code § 42-211), or a less formal "licensing amendment" in which IDWR modifies the terms of a water right at the time of licensing to reflect current conditions.

Whether the standard APOD condition language is appropriate in the context of a formal transfer is a different question. One could argue that that because the world is put on notice and all users have an opportunity to protest a transfer, failure to protest should result in approval of APODs without condition or limitation. On the other hand, if the Department had information showing that future injury was a real possibility, the Department might be justified in imposing conditional language along the lines of the APOD condition developed in the SRBA context. Likewise, other water right holders might reasonably contend that they should not be expected to evaluate every potential use of APODs (e.g., how "a super-well" authorized by multiple water rights with APODs might affect them). Arguably, they should be allowed to rely on their priority to protect them in the event that injury occurs at some time in the future. In other words, they should not be required to file a protest or forever hold their peace.

The APOD condition in the context of subsequent appropriators

Another question is, which water users are intended to be protected by the APOD language? Plainly, the rollback provision in the APOD condition protects water uses whose rights predate approval of the additional APODs added by accomplished transfer. As suggesting in the discussion immediately above, the same is probably true in the context of formal transfers. Thus, the APOD condition gives these users the ability to bide their time and complain later if and when they experience well interference.

In contrast, if a new water user appropriates water after APODs are established (by transfer or otherwise), it would seem that the new user is on notice of the APOD holder's right to use those APODs. Consequently, the author of this section contends that, even if an APOD condition is attached, it should not have any effect (i.e., there should be no rollback) as rights junior to the creation of the APOD authority. In other words, looking back to the original points of diversion would not be "necessary for administration" because, being junior, the new user suffers no legal injury when a senior diverts water in accordance with the senior's water right.

K. Authority of cities to provide water outside of their city limits

(1) The police power and inherent proprietary authority

Article XII, section 2 of the Idaho Constitution grants the police power directly to cities and counties (without need for implementing legislation). This section states:

> Local police regulations authorized. — Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.

Idaho Const. art. XII, § 2.

Idaho's police power has been read narrowly by Idaho courts. (See *Idaho Land Use Handbook*.) It appears that the police power extends only to regulatory matters, not to what Idaho courts often describe as "proprietary" matters (including the provision of services).

On the other hand, cities generally have the power to provide city services. 56 Am. Jur. 2d *Municipal Corporations* § 516 (2000). Moreover, it is recognized as a general principle of municipal law that cities may provide such services beyond their boundaries where doing so is of benefit to the city. "Municipal corporations that act outside of their territorial boundaries must do so for the benefit of the citizens within those boundaries in order to be public, rather than private, corporations." 56 Am. Jur. 2d *Municipal Corporations* § 521 (2000).

The Idaho Supreme Court has noted the authority of cities "to operate their own utility systems and provide water, power, light, gas and other utility services within the city limits." *Alpert v. Boise Water Corp*., 118 Idaho 136, 143, 795 P.2d 298, 305 (1990) (Boyle, J.) (citing Idaho Code §§ 50-323 and 50-325) (emphasis added). However, this observation was not made in a context that addressed whether cities had authority to deliver water outside of their city limits. Rather, the case dealt with, and affirmed, the authority of cities to charge franchise fees to utilities operating within the city.

(2) Idaho Code § 42-202B(9) (Municipal Water Rights Act of 1996)

Most water rights have a specifically delineated place of use, and any change in the place of use (or any other element of a water right) requires express approval by IDWR in what is known as a "transfer" or "change" proceeding. Idaho Code § 42-222.

The Municipal Water Rights Act of 1996 provides more flexible treatment for holders of municipal water rights. The place of use for a city or other municipal water provider is defined as its "service area," and the service area may change or expand over

time without any requirement for a transfer approval by IDWR. Idaho Code § 42-202B(9).

More importantly, the 1996 act defines "service area" as for a city to include areas outside of its city limits. The statute reads:

> (9) "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 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(9) (emphasis added).[740]

The term "planning area" used in this section is not a defined term in the 1996 RAFN statute.[741] However, it does not appear to be a significant constraint on the authority of cities to serve customers or dispose of their municipal wastewater outside of their city limits so long as the use is generally within the scope of city's water planning process.[742]

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[740] Section 42-202B(9) was enacted as part of the Municipal Water Rights Act of 1996, which deals with "reasonably anticipated future needs" (aka RAFN) water rights. However, IDWR has adopted guidance stating that this definition of service area also applies to non-RAFN municipal water rights. "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." Jeff Peppersack, *Administrator's Memorandum – Processing Applications and Amendments and Determining Beneficial Use for Non-RAFN Municipal Water Rights – Application Processing No. 18; Licensing No. 1* (Oct. 19, 2009) ("*2009 Peppersack Memo*"), at 3 (reproduced in Appendix M)

[741] The term "planning area" is discussed in IDWR's *2021 RAFN Handbook*, pp. 6-8, 28.

[742] A letter seeking the Department's view of this provision in the context of land application of wastewater outside the city stated:

The requirement that the area served outside the city limits "shares a common water distribution system with lands located within the corporate limits" is means that there must be "[a] measure of control and supervision" by the city in

(3) Idaho Code § 50-301 (home rule)

> Cities governed by this act shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; accept grants-in-aid and gifts of property, both real and personal, in the name of the city; acquire, hold, lease, and convey property, real and personal; have a common seal, which they may change and alter at pleasure; may erect buildings or structures of any kind, needful for the uses or purposes of the city; and exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.

> First, the land application must be "within the municipality's established planning area." "Planning area," however, is not a defined term. It is an informal term generally understood to refer to the area used by a city for water rights planning purposes as it plans for current and future water requirements. [footnote: The term 'planning area' in the 1996 RAFN statute should not be confused with the city's 'area of city impact.' The latter is a distinct term meaningful in the context of annexation rules under the Local Land Use Planning Act, Idaho Code § 67-6526.] In other words, the 1996 RAFN statute requires that land application outside the city limits must be undertaken as part of a city's long-term water planning effort.

Letter from Christopher H. Meyer to Garrick L. Baxter (Aug. 18, 2011). Mr. Baxter replied (following further information submissions):

> Based upon the representations in your letter, the Department agrees that the lands served outside the City of McCall's corporate limits share a common water distribution system with lands located within the corporate limits. So as long as the City of McCall is land applying its captured municipal effluent as part of a treatment process to meet adopted state water quality requirements (this issue was discussed in my letter to you dated September 7, 2011), the Department agrees that the use (and location) is in conformance with City of McCall's municipal water right.

Letter from Garrick L. Baxter to Christopher H. Meyer (Sept. 19, 2011) (parentheticals original).

Idaho Code § 50-301 (emphasis added). See discussion of this provision in the *Idaho Land Use Handbook*.

(4) Idaho Code § 50-323 (authorizing municipal water systems)

Title 50, which sets out the powers of municipalities, provides:

> 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. The term "domestic water systems" and "domestic water" includes by way of example but not by way of limitation, a public water system providing water at any temperature for space heating or cooling, culinary, sanitary, recreational or therapeutic uses.

Idaho Code § 50-323 (emphasis added).

This provision authorizes the provision of service "to the inhabitants of the city." It includes no express authorization to serve persons or businesses outside of a city. A letter between Chris Meyer and IDWR confirms the Department's view that this provision should not be read as limiting a city's authority to provide water service outside its city limits:

> After the meeting at IDWR, I reviewed your letter to Mr. Fife. I then called you to confirm that nothing in that letter expresses a contrary view, particularly with respect to location of the infiltration facility outside of city boundaries. The letter to Mr. Fife, of course, addressed a different and more complex question: Can a city provide water to customers in another state? Thankfully, we need not grapple with that issue here. In answering that question, the Fife letter made reference to statutory provisions and case law dealing with the issue of water service by a municipality outside of its boundaries. As I understand it, you agree that none of those authorities pose a problem here. I will step through this conclusion briefly.
>
> The Fife letter references Idaho Code § 50-323 which provides:

> 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. The term "domestic water systems" and "domestic water" includes by way of example but not by way of limitation, a public water system providing water at any temperature for space heating or cooling, culinary, sanitary, recreational or therapeutic uses.

Idaho Code § 50-323 (emphasis supplied).

The first authorizing clause ("Cities are hereby empowered to establish, create, develop, maintain and operate domestic water systems") is not limited to the city limits. The clause mentioned in your letter ("provide for storage, treatment and transmission of the same to the inhabitants of the city") might be read as a geographic constraint but, in context, should not be so understood. First, as noted, other clauses provide express authorization that are not so limited. Second, the reference limiting a city's authority to "inhabitants of the city" is written in terms of water deliveries to customers and should not apply to limit the physical location of post-use water treatment. Instead, post-use water treatment would more properly fall under the final clause ("to do all things necessary to protect the source of water from contamination") which is not limited geographically. In any event, the language in section 50-323 must be read in light of the more recently enacted definition of "service area" in the 1996 RAFN statute, discussed above, which expressly authorizes deliveries outside of a city's boundaries. Moreover, common sense indicates that cities have general police power authority to own and operate facilities outside of their city limits. Surely, for example, a city could operate a garage for city vehicles outside of its boundaries. A treatment facility should be no different.

This is not to say that the "inhabitants of the city" language is meaningless surplusage. The meaning, however, is found in other contexts. For example, the language is meaningful in the context of the authority of a city to enter into franchise agreements, as noted in the case you cited, *Albert v. Boise Water Corp.*, 118 Idaho 136, 143, 795 P.2d

> 298, 305 (1990). Thus, it makes sense that cities should be allowed to enter into exclusive franchise agreements (exempt from anti-trust laws) only within their city limits. Likewise, they could not issue regulations governing water use (such as a requirement to hook up to city water) outside of the city's boundaries. But geographic boundaries should not come into play in other contexts, such as where to locate a treatment facility.
>
> I trust that this letter fairly summarizes our discussion. If, instead, you believe that the City of Nampa may not be authorized to operate a water treatment facility (e.g., an infiltration basin) outside of its city limits, please let me know. I will copy Jeff Peppersack and Garrick Baxter, and ask that they, too, let me know if I have failed to accurately summarize their understandings.

Letter from Christopher H. Meyer to Steven W. Strack (May 19, 2011).

(5) Prior Idaho Code § 49-1132 and current Idaho Code § 50-1030(a)

At one time, the Idaho Code provided very clear authority for cities to provide municipal water service outside of the boundaries. Prior Idaho Code §49-1132 (1932) provided:

> Water, light, and power plants—Acquisition and operation. [Cities have the authority] . . . 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; . . . .

Idaho Code § 49-1132 (1932) (emphasis added).[743]

This statute was relied on by the Idaho Supreme Court in *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940) (Holden, J.). That case upheld the city's right to purchase irrigation water rights and hold them for future municipal needs. The Court

[743] Idaho Code § 49-1132 may be traced back to 1901. H.B. 41, 1901 Idaho Sess. Laws, ch. 41. (This version of the statute was referenced in *City of Idaho Falls v. Pfost*, 53 Idaho 247, 23 P.2d 245 (1933) (Givens, J.)) It was also previously codified to Idaho Rev. Codes § 2315 (which was discussed in *Ostrander v. City of Salmon*, 20 Idaho 153, 117 P. 692 (1911) (Stewart, J.). By 1948, it had been recodified to Idaho Code § 50-1132 (which contained identical language to the 1932 version). The 1901 version does not contain the extra-territorial language. I have not determined when it was added, but it was there in 1932 codification and remained there until the statute was repealed.

found support for this conclusion both in the common law and in Idaho Code § 49-1132, which authorized cities "to supply excess water to persons or corporations outside its corporate limits." *Beus*, 62 Idaho at 7, 107 P.2d at 154.

One would think that the successor to former section 49-1132 would be today's Idaho Code 50-323, which contains the general grant of authorities to cities. Instead, this provision has found its way to the Idaho Revenue Bond Act, Idaho Code §§ 50-1027 to 50-1042.

The Idaho Revenue Bond Act was enacted in 1951.[744] Section 4 of the 1951 act provided:

> Section 4. POWERS.—In addition to the powers which it may now have, any municipality shall have power under and subject to the following provisions of this act:
>
> (a) To acquire by gift, purchase or the exercise of eminent domain, to construct, reconstruct, improve, better or extend any works, within or without the municipality, or partially within or partially without the municipality, or within any part of the municipality, and to acquire by gift, or purchase, or the exercise of the right of eminent domain, lands or rights in lands or water rights in connection therewith, including easements, rights-of-way, contract rights, leases, franchises, approaches, dams and reservoirs.

S.B. 5, 1951 Idaho Sess. Laws, ch. 47 §4 (emphasis added).

This provision is now found in Idaho Code § 50-1030(a). The key language is functionally unchanged:

> In addition to the powers which it may now have, any city shall have power under and subject to the following provisions:
>
> (a) To acquire by gift or purchase and to construct, reconstruct, improve, better or extend any works within or without the city, or partially within or partially without the city, or within any part of the city, and acquire by gift or purchase lands or rights in lands or water rights in connection therewith, including easements, rights-of-way, contract rights, leases, franchises, approaches, dams and reservoirs; to sell excess or surplus water under such terms as are in compliance

[744] S.B. 5, 1951 Idaho Sess. Laws, ch. 47. A successor (the present Act) was enacted in 1967. 1967 Idaho Sess. Laws, ch. 429. Earlier versions were in place early in the last century.

> with section 42-222, Idaho Code, and deemed advisable by the city; to lease any portion of the excess or surplus capacity of any such works to any party located within or without the city, subject to the following conditions: that such capacity shall be returned or replaced by the lessee when and as needed by such city for the purposes set forth in section 50-1028, Idaho Code, as determined by the city; that the city shall not be made subject to any debt or liability thereby; and the city shall not pledge any of its faith or credit in aid to such lessee;

Idaho Code § 50-1030(a) (emphasis added).[745]

While the language of the Idaho Revenue Bond Act is not identical to the earlier section 49-1132, it is very close. The key point is that they both authorize cities to provide water outside of the city limits.

The language of section 49-1132 is a bit more direct in this regard. It speaks of "supplying" excess water and "charging therefor." The language of the current act speaks instead in terms of the right to "sell" excess water. However, given the history of the act, it seems likely that no change was intended. That is, it appears that the current Idaho Revenue Bond Act serves exactly the same function as the original language and thereby authorizes sales outside of the city limits.

It may seem odd that this general authority of cities appears within the in Idaho Revenue Bond Act. This, in turn, might lead one to wonder whether by including the authority in the Idaho Revenue Bond Act, the Legislature intended to limit its applicability to projects that are funded by revenue bonds.

The answer is that it makes no difference where the language is found, and the language is effective irrespective of whether a city issues revenue bonds. This was the conclusion of the Idaho Supreme Court in *Viking Const., Inc. v. Hayden Lake Irr. Dist.*, 149 Idaho 187, 233 P.3d 118 (2010) (Eismann, C.J.). In *Viking*, a land developer challenged a domestic water system connection fee of $2,700 per home imposed by an irrigation district.[746] *Viking* did not arise under the Idaho Revenue Bond Act. Instead, it arose under the functionally identical provisions of the Irrigation District Domestic Water System Revenue Bond Act ("Irrigation District Bond Act") §§ 43-1906 to 43-1920.

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[745] The term "works" referenced in subsection 50-1030 is defined to include "water systems, drainage systems, sewerage systems, recreational facilities, off-street parking facilities, airport facilities, air-navigation facilities, [and] electrical systems." Idaho Code § 50-1029(a) (also traceable to the original 1951 enactment, S.B. 5, 1951 Idaho Sess. Laws, ch. 47 §3(a)).

[746] Unlike many irrigation districts, this one also provided domestic water supplies.

However, the *Viking* Court expressly equated the two provisions.[747] Accordingly, *Viking* is good authority for how both the Irrigation District Bond Act and the Idaho Revenue Bond Act are construed. Although the irrigation district had not issued revenue bonds to construct the facilities, it relied on a provision of the Irrigation District Bond Act, Idaho Code § 43-1909, authorizing the imposition of fees. The plaintiff in *Viking* argued that the irrigation district could not rely on the bond act's authorization of user fees because it had not issued revenue bonds.[748] The Idaho Supreme Court squarely rejected the plaintiff's argument. The Court found that the identical language in both bond acts provides express authority for cities "to construct, reconstruct, improve, better or extend any works." *Viking*, 149 Idaho at 197, 233 P.3d at 128 (construing Idaho Code § 43-1909(a), which is identical to Idaho Code § 50-1030(a)). This is the very provision that I quoted above. Thus, by analogy, the authority of cities to sell excess water outside of their city limits does not rest on any sale of revenue bonds.

(6) Idaho Code § 50-222(4)(b)(ii) (consent to annexation)

Idaho's annexation statute implicitly contemplates that cities may extend water and other services beyond their city limits. Idaho Code § 50-222(4)(b)(ii) deems such extra-territorial service to constitute consent to be annexed if requested in writing or completed before July 1, 2008.

(7) Idaho Code § 50-324 (cooperative operation of out-of-state water system)

Idaho Code § 50-324 authorizes Idaho cities "in cooperation with adjoining cities of states bordering this state" to acquire and operate a privately-owned, out-of-state water distribution system using water "from an out of state source."

> Cities authorized to jointly purchase or lease, maintain or operate a joint water system. All cities of this state are empowered by ordinance to negotiate for and purchase or

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[747] The Idaho Supreme Court noted: "The [district] court compared this provision with the identical language in Idaho Code § 50-1030(f), which this Court held in *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991), authorized a city to collect a sewer and water connection fee. Since there is no basis for giving differing constructions to the identical language in the two statutes, Idaho Code § 43-1909(e) authorizes charging a connection fee to connect to an irrigation district's domestic water system." *Viking*, 149 Idaho at 191, 233 P.3d at 122. Although Viking dealt primarily with Idaho Code § 43-1909(e) (and corresponding Idaho Code § 50-1030(f)), it also relied on Idaho Code § 43-1909(a) (which corresponds to Idaho Code § 50-1030(a)). *Viking*, 149 Idaho at 197, 233 P.3d at 128.

[748] "According to Viking, 'The power granted in I.C. § 43–1909(e) is contingent on the issuance of revenue bonds, after and only after, approval of the electorate.'" *Viking*, 149 Idaho at 191, 233 P.3d at 122.

> lease, and to maintain and operate, in cooperation with adjoining cities of states bordering this state, the out of state water distribution system, plant and equipment of privately owned utilities used for the purpose of supplying water to the purchasing or leasing cities from an out of state source; provided, the legislature of the state in which such water distribution system, plant, equipment and supply are located, by enabling legislation, authorizes its cities to join in such purchase or lease, maintenance and operation. The city council of the cities acting jointly under this section shall have authority, by mutual agreement, to exercise jointly all powers granted to each individual city in the purchase or lease, maintenance and operation of a water supply system.

Idaho Code § 50-324 (emphasis supplied).

An opinion letter provided by IDWR to the City of Moscow observed: "While Idaho Code § 50-234 [sic, should be 50-324] addresses the joint use of out-of-state water sources, it is silent as to use of Idaho water sources to serve out-of-state customers." Letter from Steven W. Strack to Randall D. Fife (June 16, 2005).

(8) Joint Services—Idaho Code §§ 50-1022 to 50-1025

Idaho cities are authorized to enter into joint service agreements with other municipalities where it is more practical to construct and maintain a unified water or sewer system than for each city to provide its own utility service. Idaho Code §§ 50-1022 to 50-1025.

> Joint services. In addition to the authority contained in the foregoing sections and in sections 67-2326 through and including 67-2333, Idaho Code, it shall be lawful for two (2) or more cities, so situated with reference to each other that it is practicable and convenient to furnish the said inhabitants thereof with water, power or sewerage from a single plant and system, to join in the construction or purchase of such plant or system upon a substantial compliance with the provisions of sections 50-1022 to 50-1025, Idaho Code, and not otherwise.

Idaho Code § 50-1022.

> Joint services—Agreement on apportionment. Whenever two (2) or more cities desire jointly to construct water, power or sewage [sewerage] systems, it shall be

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> necessary for the councils to agree among themselves as to the kind and character of construction of the said plant and system, the amount of service to which each city shall be entitled, the approximate cost of such systems and the proportionate part thereof which shall be borne by each city, which proportionate part shall be as nearly just and equitable as possible, and shall be determined in such manner as may be agreeable to all concerned.

Idaho Code § 50-1023. (See also Idaho Code §§ 50-1023 to 50-1025.)

An opinion letter provided by IDWR to the City of Moscow recognized that under the Joint Powers Act, the service area of a water right could be extended to include multiple cities:

> Cities within Idaho are also allowed to enter into joint service agreements with other municipalities where it is more practical to construct and maintain a unified water or sewage system than for each city to provide separately such services to their respective residents. Idaho Code §§ 50-1022 to -1025. In such a case, each city's water rights would presumably be amended so that the service area included all lands within the corporate boundaries of the two cities.

Letter from Steven W. Strack to Randall D. Fife (June 16, 2005).

(9) Joint Exercise of Powers Act (Idaho Code §§ 67-2326 to 67-2333)

The Joint Exercise of Powers Act, Idaho Code §§ 67-2326 to 67-2333, authorizes "public agencies" in Idaho cities to enter into cooperative agreements with other public agencies in Idaho and other states. "Public agencies" is defined to include cities. Idaho Code § 67-2327.

An opinion letter provided by IDWR to the City of Moscow recognized that the Joint Exercise of Powers Act (if combined with an agreement under the Joint Powers Act) could be used to authorize water service across a state line. Letter from Steven W. Strack to Randall D. Fife (June 16, 2005).

(10) Contracts with irrigation districts providing water within cities (Idaho Code §§ 50-1805, 50-1805A)

Where the boundary of an irrigation district overlaps a city, the city and irrigation district are authorized to enter into a contract under which the city assumes the duty of distribution of if irrigation water "to the persons within such city having the right to the

use thereof." The contract may provide for the city to act as agent for the irrigation district in the collection of assessments that the irrigation district is authorized to levy upon land within the city. The city will then remit the money it collects to the irrigation district, less a commission agreed to under the contract. Idaho Code § 50-1805. Provision for pooling of water rights from multiple irrigation districts is made in Idaho Code § 50-1805A.

24. INSTREAM FLOW RIGHTS

A. The traditional diversion requirement

Traditionally, Western states required a "diversion" to beneficial use before a water right could be recognized.[749] Thus, a legally enforceable right to the use of water could be obtained only for water removed from a natural watercourse. A person seeking to protect natural (or, for that matter, artificial) stream flows from subsequent appropriation and diversion simply could not do so.

In a classic early case, a federal court sitting in Colorado denied a water right to a resort town constructed around a cascading waterfall whose spray created an oasis of lush vegetation in the desert mountains near Colorado Springs. The waterfall, the court suggested, was an "inefficient" means of irrigation.[750] The decision would have authorized a hydropower company to destroy the central attraction of a thriving town by diverting the falls. As it turns out, the project was never built.[751] In today's thinking, the decision may seem strangely reasoned. While it is true that using a waterfall may be an inefficient means of irrigating flora, it is certainly an efficient way of supporting a resort community—a point seemingly lost on the court.

As recently as 2000, the Idaho Supreme Court confirmed that the diversion rule still applies in Idaho. In *State v. United States*, 134 Idaho 106, 996 P.2d 806 (2000) ("Smith Springs" case), the Court rejected a "constitutional method" water right claimed by the United States in the SRBA. The claim was for 1.16 cfs of water flowing from

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[749] Although Idaho has no explicit statutory requirement for a diversion, the water code does speak of water rights in terms of diversion, Idaho Code §§ 42-101, 42-202, as does the state constitution, Idaho Const. art. XV, § 3. Likewise, Idaho cases long have spoken of a diversion requirement (though, arguably in *dictum*). "In order to acquire a prior or superior right to the use of such water, it is essential that a riparian owner locate or appropriate the waters and *divert* the same as it is for any other user of water to do so." *Hutchinson v. Watson Sough Ditch Co.*, 16 Idaho 484, 493, 101 P. 1059 (1909); "We deem it clear that until the time of the enactment of the statute in question herein [the 1971 Malad Canyon statute] Idaho's statutory scheme regulating the appropriation of water has contemplated an actual physical diversion." *State of Idaho, Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 530 P.2d 924, 928 (1974).

[750] *Empire Water and Power Co. v. Cascade Town Co.*, 205 F. 123 (8th Cir. 1913). Strictly speaking, this case was not decided on the diversion issue. Indeed, it recognized that a water right could be obtained for natural *irrigation* without a diversion, but not so for aesthetic purposes. *Id.* at 129.

[751] On remand the parties consented, for reasons not recorded, to a decree providing that the town had a senior right for all of the water of Cascade Creek except for one-half cfs. *Empire Water and Power Co. v. Cascade Town Co.*, Case No. 413, In Equity (U.S. District Court for the District of Colorado Decree issued Oct. 15, 1915).

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Smith Springs at the Minidoka Wildlife Refuge. The spring maintains wetlands and other habitat used by migratory birds.[752] However, it has never entailed any manmade diversion structure. The Idaho Supreme Court (reversing the district court) rejected the federal claim, noting that Idaho law has always required a diversion except in three circumstances: (1) stock watering, (2) claims under the minimum stream flow statute (discussed in section 24.C at page 495), and (3) specific legislative directives to appropriate water for instream purposes.[753]

The diversion requirement may seem arbitrary—a sort of Catch-22 for instream uses. In fact, however, the diversion requirement is based on a sensible public policy—particularly in the pre-permit era. It protected against three types of abuse: First, it prevented speculators from obtaining water rights simply by asserting a claim to unappropriated water—and then selling the water to legitimate users arriving later. Second, it served an important notice function. In days prior to sophisticated record keeping and administration, about the only way a user could determine the state of water rights was to take a look at the stream. If people could hold rights for water left flowing in the stream, subsequent users could be misled into thinking that more water was available for appropriation than actually was the case. Third, the diversion requirement eliminated wasteful uses, for instance by users who sought to command the entire flow of a stream simply to run a waterwheel or irrigate adjacent lands by natural overflow.[754]

In addition, the diversion requirement simply reflected the pragmatic view of the early settlers that eking out a living was more important than protecting the natural

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[752] The United States might have claimed a federal reserved right in connection with the executive order creating the refuge. Instead, the claim was filed solely on the basis of state law.

[753] In *Bedke v. City of Oakley*, 10.7 ISCR 77 (March 10, 2020), the Idaho Supreme Court rejected a claim that one water user could claim as his own the diversion of another. In that case, the water user was seen as merely a customer of the city's municipal water system, not a water right holder in his own right.

[754] In *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1912), the U.S. Supreme Court, applying Idaho law, denied relief to a senior appropriator when a junior appropriator built a downstream reservoir which stilled the waters upstream and rendered the senior's waterwheels ineffective. This conclusion was based on the fact that to command the entire flow for a marginal benefit was unreasonable. Likewise, in *Walsh v. Wallace*, 26 Nev. 299, 67 P. 914, 917 (1902), early appropriators claimed a water right in the natural overflow of the Reese River upon which they relied to irrigate their adjoining land. The court rejected the right, declaring "[T]here must be an actual diversion of the same, with intent to apply it to a beneficial use . . . ." *Cf.*, *Thomas v. Guiraud*, 6 Colo. 530, 533 (1883) (allowing an appropriation of bank overflow for irrigation). Clark, ed., *Waters and Water Rights*, vol. 1, § 19.5 (1967), contains an interesting discussion entitled "Judicial tolerance of wasteful practices." The thrust is that the courts tolerate waste until demand outstrips supply. A good example is that irrigation by bank overflow initially was viewed as beneficial, but eventually came to be regarded as wasteful.

environment. Indeed, this clash of values has fueled decades of hostility between traditional consumptive water users and a growing cadre of river activists. Water users have charged that environmentalists simply fail to appreciate the economic benefits we all enjoy as a result of the sweat and determination of those who reclaimed the West. Some environmentalists, on the other hand, have charged that the prior appropriation doctrine callously ignores natural values. Others have come to recognize that the prior appropriation doctrine is well suited to accommodate both environmental and developmental interests.

Today most Western states have determined that these policy goals can be achieved without sacrificing instream values.[755] Recognizing that instream uses serve legitimate economic as well as environmental goals, sixteen of the nineteen Western states—including Idaho—have taken steps to accommodate them within the prior appropriation doctrine. Of these, however, not one puts instream flow water rights on a par with consumptive uses.

Typically, states which recognize instream flow rights have adopted special statutory restrictions. Many states allow only a single state agency—not private parties, municipalities, or others—to hold instream flow rights. Additional procedures, such as special tests or legislative approval, often are required to obtain instream flow rights. A variety of conditions may be attached. They may be sharply restricted in quantity (e.g., to the "minimum" needed to sustain fish life). Their duration may be limited, or they may be subject to subsequent re-evaluation. Some states limit their availability to specific geographic areas. Their transfer may be restricted. Even their priority date may be modified. In short, while most Western states, including Idaho, now have recognized instream water rights, they have been accorded by the Legislatures a "second class" status.

B. The mechanics of instream flows

Instream flow rights are no different in concept from ordinary water rights. They must be approved by the state just like any other right. They are then placed on the state's books with a fixed priority date, a specified quantity, time and place of use, and are administered like any other water right. Thus, if the instream flow right is "in priority," it can "call out" junior users upstream and force them to bypass water to support the instream flow. (To "call out" means to demand that upstream diverters forgo their uses so that water remains available for the downstream senior user). Of course,

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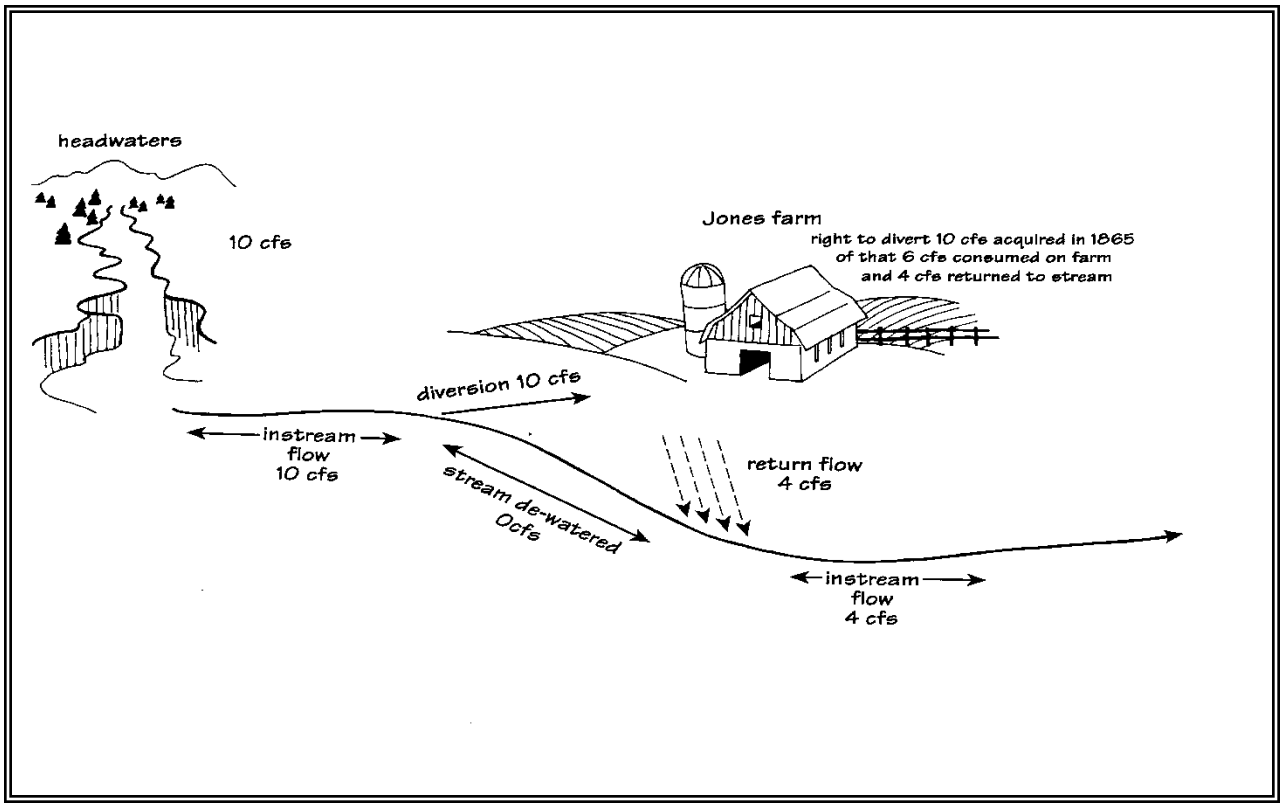
[755] "Most western water experts agree that the actual diversion requirement serves no function that cannot be served by other water law doctrines and statutory procedures. . . . For these reasons instream uses should be valid without the requirement of an actual diversion, and these uses should be presumed beneficial." A. Dan Tarlock, *Appropriation for Instream Flow Maintenance: A Progress Report on "New" Public Western Water Rights*, 1978 Utah L. Rev. 211, 221.

this does not guarantee that enough water will be in priority to meet the instream flow. In this sense, the term "minimum flow" used in the Idaho statute is misleading. Flows may well drop below the minimum. Whether the minimum flow will be met is a function of mother nature and senior rights.

The only difference in administration is that a consumptive water right has one or more discrete points of diversion, while an instream flow right applies throughout a specified reach of the stream (from one point to another). How one determines the endpoints of an instream flow is a matter of judgment. Theoretically, an instream flow could reach all the way from the headwaters to the state line. As a practical matter, they ordinarily are limited to some discrete reach, e.g., the location of an important fishery. If an existing consumptive use is transferred to an instream use, the protected reach might be anywhere downstream of the point of diversion. Arguably it could include the reach upstream of the point of diversion, too. The previous water right served as a sort of *de facto* instream right down to the point of diversion, in that it could call flows to that point. The new owner should be able to claim the same right by stepping into the shoes of the previous owner.

Despite its name, an "instream" right does not have to be in a moving stream. It may also be obtained for a lake (or other standing body of water) or even a wetland. In such a case, the right would be for whatever quantity of water is needed to maintain a particular lake level or other condition.



There are many misconceptions about how instream flow water rights integrate with other water rights. Some people believe that a gallon of water committed to instream use is a gallon of water unavailable for other uses. Other people believe that because instream flow rights consume no water, they have no adverse effect on other users. While either conclusion might be right in a particular situation, neither statement is accurate across the board. The truth generally lies somewhere in between: A junior instream appropriation cannot impair an existing senior water right, but it will serve to lock in the *status quo* thus constraining both new appropriations and changes in existing water rights.

Consider the somewhat oversimplified example illustrated in the figure above. Suppose that the stream flows at 10 cfs. And suppose that Farmer Jones has a senior water right to divert the entire 10 cfs of water from the stream, but that 4 cfs of that diversion finds its way back to the stream as return flow below the Jones Farm. Because instream rights must take their place in the priority system along with all other water rights, instream rights may only be obtained for what is left flowing in the stream. As a matter of law, Farmer Jones *cannot* be injured by a newly appropriated instream flow (or any other new appropriation, for that matter.) Thus, instream flow rights could be obtained today for up to 10 cfs for the reach between the headwaters and the point of diversion, for up to 4 cfs downstream of the Jones Farm return flow, and for none in between. (An instream right would not necessarily be sought or approved for the entire remaining flow. It might claim considerably less if a lesser amount is all that is needed to achieve the beneficial use sought.)

Because instream rights are administered within the priority system, Farmer Jones will always be able to make his diversion first, even if it has the effect of reducing flows below his farm to less than 4 cfs. In short, the prior appropriation system guarantees that existing uses are not to be affected by junior instream rights.

If an instream flow right cannot take water away from existing uses, what is the point of securing an instream flow water right with a junior priority? The answer is that it preserves the *status quo*. It does this in two respects.

First, if there is any water left in the stream after the seniors satisfy their needs, that remaining flow may be protected from subsequent new appropriators. For instance, a new user could not build a hydroelectric diversion project upstream of the Jones Farm. (If it consumed no water and returned the water to the stream prior to the Jones diversion, the project would not injure Jones, but it would injure the instream flow right upstream of the Jones farm). Nor could a new user take additional water out of the protected stretch downstream of the Jones Farm.

Second, and this is important, the junior instream right prevents seniors (like Farmer Jones) from moving their points of diversion upstream into the protected reach. Suppose that in 1995 Farmer Jones decides to sell his water right to Big City, and Big City wants to take out the water farther upstream toward the headwaters (so that it will flow into town without pumping). Even though Big City steps into Farmer Jones' shoes and obtains a senior water right, it may *not* change the point of diversion if to do so would injure any other water right—including junior instream flow rights. In other words, it is possible to protect pristine mountain streams with very junior instream flow water rights.

This point was confirmed in a 2005 decision of the Colorado Supreme Court, *Colorado Water Conservation Board v. City of Central City*, 125 P.3d 424 (Colo. 2005). A commentator summed up the key point this way:

> Instead, the nature of the [instream flow] right appears to be such that it can, in effect, ride on top of the downstream senior water rights to obtain a supply of water despite its junior priority, and it may prevent any new upstream depletion that would reduce the stream flow below the minimum instream quantity decreed, whether such changes result from changes of water rights, augmentation plans, exchanges, or other new water supply arrangements.

William A. Baddock, *Colorado Supreme Court Clarifies Protection for Instream Flow Water Rights*, Rocky Mtn. Mineral Law Foundation Water Law Newsletter, at 3 (Vol. 39, No. 1, 2006).

The long and the short of it is that instream flow rights pose no threat to any existing use of water. On the other hand, they may block or complicate further development (in the form of changes, transfers and new users). But then again, so do all water rights. For example, a major hydroelectric dam or other project downstream on a river has the effect of preventing all new upstream consumptive use of that water. This is the way the prior appropriation doctrine always has operated.

C. Idaho's minimum stream flow act

In 1978, in response to citizen pressure (including an initiative petition drive) the Idaho Legislature enacted the Minimum Flow Act.[756] The legislation expressly recognized that instream flows for "fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality" are beneficial uses. Idaho Code § 42-1501. Thus, minimum flow water rights might be obtained for a variety of purposes, besides fish protection. Permissible purposes would include whitewater recreation, aesthetics, and protection of the assimilative capacity of a stream. The act, by implication, did away with the diversion requirement.[757] The act also requires the Department to take into account established minimum flows or lake levels before granting any new appropriation.[758]

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[756] The Minimum Flow Act was part of a larger piece of legislation dealing with water resources. 1978 Idaho Sess. Laws, ch. 345, §§ 1, 2, 11, amended by 1980 Idaho Sess. Laws, ch. 238, § 14 (codified at Idaho Code §§ 42-1501 to 42-1505, 42-1736A, and 42-1736B). Section 42-1736A (which established minimum flows at Milner, Weiser, and Murphy) was repealed by 1985 Idaho Sess. Laws, ch. 204. The Minimum Flow Act is now codified at Idaho Code §§ 42-1501 to 42-1507, 42-1736A, and 42-1736B.

[757] A similar statutory provision was so construed in Nevada. In 1969 the Nevada Legislature amended the state's water code to recognize recreation as a beneficial use: "The use of water . . . for any recreational purpose, is hereby declared to be a beneficial use." 1969 Nev. Stat. 141 (codified at Nev. Rev. Stat. § 533.030(2)). In 1988 the Nevada Supreme Court ruled unanimously that this action implicitly repealed Nevada's statutory diversion requirement and allowed instream flow water rights to be protected under state law. *State v. Morros*, 766 P.2d 263 (Nev. 1988). The case involved an application for a water right by the U.S. Bureau of Land Management to protect a trout fishery at Blue Lake in northwestern Nevada. While the court did not squarely address the issue, its reasoning would support recognition of instream flow water rights by private parties as well.

[758] "All future filings, permits and decrees on the unappropriated waters of this state shall be determined with respect to the effect such filings, permits and decrees will have on the minimum daily flow of the affected stream or river, or on the maintenance level of the affected lake or reservoir." Idaho Code § 42-1736B. "In addition to the other duties prescribed by law, the director of the department of water resources shall have the following duties: . . . 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,

The act provides that the Idaho Water Resource Board (a policy-making body) may apply to the Department of Water Resource for a permit and license establishing a minimum stream flow or lake level. Idaho Code § 42-1503. Any person may request the Board to file such an application.[759] Idaho Code § 42-1504. The statute expressly precludes judicial review of any denial by the Board of such a request. Idaho Code § 42-1504.

The statute specifies that the amount approved for this use must be found to be the "minimum flow or lake level and not the ideal or most desirable flow or lake level." Idaho Code § 42-1503. The requesting agency often uses the "Instream Flow Incremental Methodology" developed by the U.S. Fish and Wildlife Service to establish the flow upon which to base an application. The use of this methodology may help to ameliorate the otherwise harsh effect of the statute's "not the most desirable" language. In one unusual case (Minnie Miller Springs), the Board and the Department agreed that the "minimum" was the entire amount of flow available.[760] More typically, however, the minimum flow will be set by the State at or even below what is required for a healthy and diverse aquatic habitat.

The act appears to limit instream appropriations natural flow appropriations, and does not encompass the appropriation of storage of water for later release to instream

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Idaho Code, or to prevent violation of minimum flow provisions of the state water plan." Idaho Code § 42-1805(7). A provision in the Minimum Flow Act provides: "Water shall not be deemed to be available to fill any water right of later priority date if diversion of such water would result in a decrease in the flow of the stream or level of the lake below the minimum stream flow or minimum lake level specified in said approved application for appropriation of minimum stream flow at the locations described in said approved application." Idaho Code § 42-1505. The authors read this provision as intended to apply in the context of delivery calls by the holder of the instream right. (Essentially it is a legislative statement that this is a real water right that can call out other water rights.) On the other hand, it could be read to apply in the context of determining whether unappropriated water is available to a new appropriator. In any event, that effect is made explicit in Idaho Code § 42-1736B quoted above.

[759] As a practical matter, however, the Board follows a policy of looking to other *public* agencies, such as the Departments of Fish and Game, Parks and Recreation, and Health and Welfare, as well as county commissions and federal land management agencies for these recommendations.

[760] In a Nebraska Supreme Court decision, *Nebraska Game and Parks Commission v. The 25 Corporation, Inc.*, 236 Neb. 671, 463 N.W.2d 591 (Neb. 1990) (aka *In re Application A-16642*), the court sidestepped the limitation in Nebraska's statute to the "minimum necessary to maintain the instream use", Neb. Rev. Stat. §§ 46-2,107 to 46-2,119. The court observed that the minimum necessary depended upon what the use was. If the use was to keep fish alive, that was not much water. But where, as in this case, the objective was to maintain a high quality trout fishery, the "minimum" flow was necessarily the "optimum" flow.

flow purposes. This is implicit in the definition of minimum stream flow as "the minimum flow of water in cubic feet per second of time or minimum lake level in feet above mean sea level." Idaho Code § 42-1502(f). Storage rights are measured in acre-feet, not cfs. Indeed, this was the conclusion of the SRBA Court in *In re SRB*A, Case No. 39576, Subcase No. 63-3618 (Sept. 23, 2008) (Melanson, J.) (the "Lucky Peak Case").

The statute also provides that the approved minimum stream flow or lake level permit must be submitted to the Legislature by the fifth legislative day of the session to give the body an opportunity to veto the permit.[761] Although such "legislative vetoes" contained in federal laws have been invalidated under the federal constitution,[762] the Idaho Supreme Court has ruled them valid under Idaho's Constitution.[763] In any event, the legislative veto provision has the effect of subjecting minimum stream flow applications to delays and legislative oversight not experienced by most other water right applicants.

As with all other water rights, the application must seek to appropriate only "unappropriated" waters. Idaho Code § 42-1503.[764] Keep in mind, however, that even streams that are "fully appropriated" in the traditional, consumptive-use sense, would be eligible for new appropriations of nonconsumptive water rights. For instance, a stretch of stream might be "fully appropriated" in the sense that substantial downstream rights leave no room for new diversions upstream. Nevertheless, a new, junior nonconsumptive use (such as an instream flow right or a hydropower right) may be placed on the stream without any injury to downstream seniors.

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[761] "Approved applications shall be submitted to each legislature by the fifth legislative day of each regular session, and: (i) shall not become finally effective until affirmatively acted upon by concurrent resolution of the Idaho legislature; or (ii) except that if the legislature fails to act prior to the end of the regular session to which the application was submitted, the application shall be considered approved." Idaho Code § 42-1503.

[762] *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (legislative veto violates the federal constitutional separation of powers requirement).

[763] *Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410 (1990). The decision in *Mead* effectively invalidated a prior Idaho Attorney General Opinion concluding that the legislative approval requirement of the instream flow law was unconstitutional, *Idaho Attorney General Opinions* 87-6. For a critical analysis of *Mead*, see Dale Goble, *Through the Looking-Glass and What the Idaho Supreme Court Found There*, 27 Idaho L. Rev. 81 (1990-91). Despite the scholarly criticism, the principle of legislative vetoes now appears well established in Idaho.

[764] *Cantlin v. Carter*, 88 Idaho 179, 187, 397 P.2d 761, 766 (1964) (only "unappropriated" water is available for appropriation).

D. Statutes appropriating water for specific water bodies to be held by the State in trust

The 1978 minimum stream flow statute was not the Idaho Legislature's first recognition of instream flow rights. Actually, as early as the 1920s, the Legislature enacted statutes which protect lake levels in Idaho's large lakes for "scenic beauty, health, recreation, transportation and commercial purposes."[765]

Moreover, in the early 1970s, the Legislature adopted several more statutes which directed the State Parks and Recreation Board to appropriate "for scenic beauty and recreational purposes" the remaining unappropriated flows in certain scenic springs and streams.[766] These statutes have been interpreted by the Idaho Supreme Court as authorizing the recognition of instream flow water rights (prior to the minimum stream flow act).[767]

The Malad Canyon case[768] arose when the Legislature specifically authorized the Department to "appropriate" water in Malad Canyon for recreational purposes. The Idaho Supreme Court held that the concept of "beneficial use" encompasses "aesthetic and recreational values,"[769] that Idaho's constitutional guarantee of a "right to divert"[770]

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[765] Idaho Code §§ 67-4301 to 67-4303 (Big Payette, 1925); Idaho Code §§ 67-4304 to 67-4306 (Priest, Pend d'Oreille and Coeur d'Alene, 1927).

[766] Idaho Code §§ 67-4307 (Malad Canyon, 1971 & 1974), 67-4308 (Niagara Springs, 1971, 1974 & 2015), 67-4309 (Big Springs, 1971 & 1974), 67-4310 (Box Canyon, 1971 & 1974), 67-4311 (Thousand Springs, 1971 & 1974), and 67-4312 (authorizing permits for appropriation for all protected waters in this Chapter, 1971 & 1974).

[767] *State of Idaho, Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974) (Shepard, C.J.).

[768] Another Idaho decision holding that a diversion is not always required is *R.T. Nahas Co. v. Hulet ("Nahas I")*, 106 Idaho 37, 674 P.2d 1036 (Idaho Ct. App. 1983) (appropriation for stock watering does not require a physical diversion).

[769] *Dep't of Parks*, 96 Idaho at 444, 530 P.2d at 928.

[770] "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." Idaho Const. art. XV, § 3. In implementing this provision, the Idaho Legislature enacted statutes providing that "the right to use any of the waters of the state for useful or beneficial purposes is recognized and confirmed," Idaho Code § 42-101, and that "[t]he appropriation must be for some useful or beneficial purpose." Idaho Code § 42-104. The Idaho Constitution does not place any limiters on the phrase "beneficial uses," and the Legislature's choice of words here does not appear to restrict what "some useful or beneficial purpose" can be.

did not require an actual physical diversion, and that the Legislature must have intended to do away with the diversion requirement, at least for this particular appropriation.[771]

In short, these statutorily-directed appropriations of water create water rights that are enforceable in the priority system just as any other water right.

E. Transfers to instream uses

Another interesting question is whether a person holding a valid consumptive use right, such as an irrigation right, may change the nature of the right to an instream flow use. Although this is done routinely in other states,[772] it has not yet been attempted in Idaho.

The Minimum Flow Act speaks only in terms of appropriation of unappropriated waters, not the transfer, exchange, or rental of existing water rights for instream flow purposes. Idaho Code § 42-1503. This is reinforced by the statement that the priority date shall be the date of the application. Idaho Code § 42-1505.

In the 1991 and 1992 sessions, the Idaho Legislature considered but rejected legislation drafted by the Department of Water Resources which would have established a procedure for transfers to instream uses.[773] The legislation would have allowed a willing holder of a water right to assign or donate the right to the Water Resource Board, which, in turn, would seek approval to hold the right for instream purposes, without loss of priority.[774] The proposed legislation failed to clarify whether "conserved water" (e.g., water saved by lining ditches) may be transferred to an instream use.

As water rights become increasingly scarce, private willing seller transactions may become essential to an effective instream flow program. Indeed, they would benefit not

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[771] *Parks*, 530 P.2d at 929.

[772] As enacted in 1973, Colorado's law also was silent on whether it authorized transfers to instream use. In 1986 the Legislature clarified that instream flow water rights could be obtained by transfer of existing rights as well as appropriation of unappropriated water. Senate Bill 91, 1986 Colo. Sess. Laws, ch. 235 (codified at Colo. Rev. Stat. § 37-92-102(3)).

[773] The 1991 version was designated Senate Bill 1087. The 1992 version was not even printed by the committee.

[774] Strangely, the legislation would have empowered the Department to adjust the priority date if necessary to "prevent injury." Such a concept is foreign to the prior appropriation doctrine, whose central premise is protection of priority of right. Only that portion of a water right which can be changed without injury should be eligible for transfer. Typically, this is the amount of water that is consumptively used. Because no injury results, the priority date should never be changed in a transfer proceeding. (If injury can be shown, and cannot be prevented by conditions or mitigation, the transfer should be denied.)

only those interested in protecting habitat, but also farmers (who could gain income and forestall forfeiture actions), cities and industries (who could buy rights to protect investments in waste discharge permits, parks, and so on), and developers (who increasingly will be called upon to mitigate for habitat loss to obtain federal permits).

In the authors' view, a sound instream flow transfer program would allow transfers of water rights to instream flows when such transfer avoided injury to all other existing or permitted users (junior as well as senior) and satisfied Idaho's public interest criteria.[775] When transferred, either permanently or temporarily, the water right should retain its original priority date, just as other transferred water rights are entitled to, while being conditioned appropriately to prevent injury to other rights.

Just how much of the original water right could be committed to the new instream use would depend on the facts of the particular transaction. For instance, suppose Farmer Jones (in the figure above) sold his 10 cfs water right to the Nature Conservancy. If users downstream relied upon his return flow of 4 cfs, Farmer Jones could convey a water right only for the reach downstream of his return flow equal to his consumptive use (6 cfs). However, he should be able to convey an instream flow right for the full 10 cfs in the reach between his point of diversion and the return flow. This distinction was overlooked in the bill before the Legislature in 1992.

It would seem that, for the same reasons discussed above, rental of water rights (either natural flow or storage) to support instream flow is also problematic. To the authors' knowledge, doing so has never been tried or tested.

F. Water amenity rights

In Idaho, water rights are routinely granted (or, more often, transfers approved) for diversions to man-made water features such as ponds and constructed streams that provide aesthetic amenities, wildlife habitat, and related benefits. These "amenity" water rights—or uses of irrigation water rights for these purposes—are particularly common in new residential developments, particularly those constructed on previously irrigated agricultural land. Although these uses may look a little like "instream rights," they are not instream rights because they entail a diversion from either surface or ground water. New water rights acquired for these purposes, whether from ground or surface water, are processed and approved like ordinary water rights, and the holder is not subject to the

[775] To be approved under the minimum stream flow statute, the instream flows must be found to be "in the public, as opposed to the private, interest." Idaho Code § 42-1503. Other water rights are subjected to a similar test in which they may be denied "where the proposed use . . . 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." Idaho Code § 203A(5)(e).

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statutory restrictions on minimum stream flow rights. On-stream reservoirs for these purposes also entail a diversion, into storage.

These water uses sometimes are assumed to be non-consumptive, and perhaps in some cases they are close to non-consumptive. However, a good rule of thumb is that the surface area of a pond or ditch causes about the same evaporation as the evapotranspiration involved in the same surface area planted with a reasonably consumptive crop. Partly because of this, the Department has adopted guidance that imposes requirements for mitigation and accounting on constructed ponds.[776]

Many of these amenities actually do not obtain new water rights, but rather rely on the irrigation water already delivered to the area by a mutual ditch company or irrigation district. A few of these irrigation water delivery entities have applied for and obtained changes in type of use under their water rights to add aesthetics and wildlife habitat as approved purposes. The South Boise Water Company, Ltd., is an example. However, it appears that, in most cases, the entity's water right continues to be diverted and delivered solely for irrigation, but the residential developer incorporates ponds and retains open ditches as part of the non-potable irrigation system often used in these developments. The surface water features doubtless are seen with the subdivision as serving a double duty, as both aesthetic amenities and (in the case of ponds) as temporary storage and delivery facilities to provide peaking flows to the development's pressurized non-potable irrigation system. .

With regard to new appropriations for "non-consumptive" amenities, there is some law from Colorado considering the question of whether the water is sufficiently "diverted" to create a water right. The first is *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992). The City of Fort Collins sought an instream flow water right of 55 cfs along a segment of the Cache La Poudre river which runs through parks and open space areas within the city. The Colorado Water Conservation Board ("CWCB") objected because, as in Idaho, only the state agency can hold an instream right. The city agreed to amend its application.

The amended application characterized the water right as a traditional "diversion," rather than an instream right, making reference to "the Fort Collins Nature Center Diversion Dam" and "the Fort Collins Power Plant Diversion Dam" as the diversion points. The Nature Dam was then built by the city to divert the river back into its historic channel and away from a channel cut during heavy rains in 1983 and 1984. Despite its name, the Power Dam does not supply hydropower, but is so named after a nearby power plant. The Colorado court found that a kayak chute and fish ladder in the so-called Power Dam each constituted a sufficient "structure or device" to qualify as a diversion because they "concentrate the flow of water to serve their intended purposes." So the city

[776] Lester, Steve, *Ponds in Basin 63*, Idaho Department of Water Resources, Western Region (November 2004)

was able to obtain an essentially instream water right to serve these in-river amenities, based on the finding that a diversion was present. Clearly, if the city had obtained a diversion to an off-river amenity, no such evaluation would have been required.

Another case, decided later that year, went even further. In *Board of Cnty. Comm'rs of the Cnty. of Arapahoe v. Upper Gunnison River Water Conservancy Dist.,* 838 P.2d 840 (Colo. 1992), the court approved a water right for reservoir storage which is used both for irrigation and to enhance a downstream fishery. The court approved an accounting methodology that counted "pass-through" water toward the storage right—in other words, water that could have been stored, but was passed through the reservoir and released for fishery purposes. This pass-through (or instantaneously stored and released) water was deemed a proper storage right that could be held by the water district and was not an instream flow right that could only be held by a statutorily-designated state agency.

These cases offer dramatic evidence both of the ingenuity of western water lawyers and of the willingness of western courts to find ways to accommodate new uses of water that make sense and (of course) cause no injury. In short, instream use is an idea whose time is arriving—even if one has to call it something else.

G. Boise River minimum flow releases

In 2008, the Snake River Basin Adjudication upheld the use of storage rights in Lucky Peak Reservoir held by the United States for purposes of releases to maintain minimum streamflows in the Boise River. *In re SRB*A, Case No. 39576, Subcase No. 63-3618 (Sept. 23, 2008) (Melanson, J.) ("*Lucky Peak Case*").[777]

In this case, numerous irrigation districts, canal companies, and other irrigation entities challenged a storage water right (in the amount of 152,300 acre-feet per annum) claimed in the SRBA by the United States (and recommended by IDWR) for purposes of streamflow maintenance downstream of Lucky Peak Reservoir. The claimed right was consistent with a license issued by IDWR in 2002 (which the irrigators had not bothered to protest). The irrigators contended that the use of water for streamflow maintenance below the dam constitutes a de facto instream flow and was therefore is illegal since it was not obtained by the Idaho Water Resources Board under the Minimum Flow Act.

The SRBA Court rejected this argument. The Court concluded that a storage right is not an instream flow right because it entails a diversion to storage within the reservoir,

[777] The diversion requirement can also be met by removing water from its natural channel and placing it in an artificial stream. For example, privately-held water rights serve trout-rearing water amenities in residential developments in Boise. Colorado has gone even further, recognizing boulders placed in a stream to improve kayaking as meeting the diversion requirement.

even if that water is later released for purposes with "apparent similarities" to instream flow rights. *Lucky Peak Case* at 21. Judge Melanson explained:

> While the subject streamflow maintenance water right accomplishes a number of the same purposes for which the IMSFA [Minimum Flow Act] was created, it does so in a different manner. The water is not an *in situ* right in that the water is not being appropriated in its natural state. Instead, the entire flow of the natural stream has been diverted and stored and become subject to controlled releases. The storage and releases are made possible by the massive and costly structure known as the Lucky Peak dam and reservoir. The BOR has flexibility in releasing the water when needed to accomplish such purposes. Rather than taking no action, as is the case with an IMSFA water right, the BOR monitors and manages the stream flow releases from the reservoir on a day-to-day if not an hour-to-hour basis. This is not the same "no action" water right as is contemplated by the IMSFA.

Lucky Peak Case at 22.

H. Snake River minimum stream flow water rights

In five instances (the gages at Milner, Murphy, Weiser, Johnson's Bar, and Lime Point), the State of Idaho obtained minimum stream flow rights on the Snake River. None of these were created through applications by the Idaho Water Resource Board for water rights pursuant to the Minimum Flow Act.[778] Instead, four of them (Milner, Murphy, Weiser, and Johnson's Bar) were created by legislative fiat in another section of the Minimum Flow Act, which has since been repealed.[779] The fifth, Lime Point, has its origin in the licensing of the Hells Canyon Project.

Moreover, each is included in the State Water Plan.[780] Two of them (Murphy and Weiser) are described in the State Water Plan as "management and permitting constraints"[781] meaning that they may form the basis for delivery calls.[782] The Murphy

[778] Idaho Code §§ 42-1501 to 42-1505.

[779] 1978 Idaho Sess. Laws, ch. 345, § 1 (codified at Idaho Code § 42-1736A), repealed by 1985 Idaho Sess. Laws, ch. 204.

[780] 1996 State Water Plan, § 5B.

[781] 1996 State Water Plan, Comment to § 5B, at 17.

[782] When the 4,750 cfs minimum flow on the Snake River at Weiser was threatened during the 1992 drought, IDWR sent letters to the holders of water rights with priority dates

and Weiser rights may also serve as constraints to new appropriations,[783] although this is not entirely clear.[784] They also have served as the basis for the imposition of moratoriums.

On July 1, 1988, the Idaho Water Resource Board filed SRBA claims on each of the rights. Four received partial decrees (Murphy, Weiser, Johnson's Bar, and Lime Point). The "zero" instream flow right for Milner was disallowed.

Until 2011, these instream flow rights operated like any other water right—with the ability to call out junior surface and tributary ground water rights anywhere upstream. In 2011, the SRBA court added language to each of the Snake River minimum stream flow rights limiting their administration to surface rights or ground water tributary to the

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junior to the December 29, 1976 adoption of the minimum stream flows under the State Water Plan. When the minimum flow was violated, IDWR sent a second letter notifying the junior water users to cease diversions or face civil penalties of up to $100.00 per day. The flows recovered and no enforcement actions were taken.

[783] Two, and possibly three, Idaho statutes could come into play here. They provide: "All future filings, permits and decrees on the unappropriated waters of this state shall be determined with respect to the effect such filings, permits and decrees will have on the minimum daily flow of the affected stream or river, or on the maintenance level of the affected lake or reservoir." Idaho Code § 42-1736B. "In addition to the other duties prescribed by law, the director of the department of water resources shall have the following duties: . . . 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." Idaho Code § 42-1805(7). A provision in the Minimum Flow Act provides: "Water shall not be deemed to be available to fill any water right of later priority date if diversion of such water would result in a decrease in the flow of the stream or level of the lake below the minimum stream flow or minimum lake level specified in said approved application for appropriation of minimum stream flow at the locations described in said approved application." Idaho Code § 42-1505. It appears that this provision is intended to apply in the context of delivery calls by the holder of the instream right. On the other hand, it could be read to apply in the context of determining whether unappropriated water is available to a new appropriator. However, this third statute presumably does not apply in any event, because these rights were not obtained pursuant to the Minimum Flow Act.

[784] Presumably the Department could and would allow new appropriations of available unappropriated water despite occasional anticipated failures to meet the minimum flow targets on the Snake River. The new appropriation would be junior to these minimum flow rights and subject to possible curtailment (at least by the Murphy and Weiser rights). Accordingly, the new appropriation would not impair the senior minimum flow rights. The burden would then fall on the new appropriator to provide a reliable back-up supply for times when the junior appropriation was unavailable—or be prepared to suspend diversions on those occasions when the minimum flow is not met.

river reach immediately below the gage.[785] Thus, for example, violations of minimum flows at Lime Point and Johnson Bar are no longer a basis for curtailing rights diverting from the reach from Murphy to Weiser.

These five Snake River minimum flows are described in more detail below.

(1) Milner Dam (No. 2-200): 0 cfs - 1976 priority

A zero minimum flow at Milner Dam has been reflected in the State Water Plan since the first plan was adopted in 1976 and approved by the Legislature in 1978.[786] In addition, it was codified in 1978 as part of the Minimum Flow Act, which expressly created minimum flow requirements at Milner, Murphy, Weiser, and Johnson's Bar.[787] It continues to be reflected in the current State Water Plan.[788]

The State never filed water right applications for the Milner Dam right pursuant to the Minimum Flow Act. However, the Idaho Water Resource Board filed an SRBA claim for the right on July 1, 1988 seeking a priority date of December 29, 1976. This claim was disallowed by the SRBA court in a final order entered on January 22, 2013.

Of course, a priority date on a zero flow right is meaningless. Indeed, this is not really an instream flow right at all. Rather, it is a statement of policy recognizing the fact that there is no requirement that water be left in the river at this point. Indeed, the Twin Falls and North Side Canals divert nearly all of the flow at Milner Dam during the irrigation season. This reality gives rise to the "Two Rivers" concept on the Snake River discussed in section 21.B on page 356.

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[785] Partial decrees (issued on 9/29/2011 and amended on 9/30/2011 in the case of Nos. 2-201 and 2-203) limit the administration of these instream flow rights as follows: (1) The Lime Point minimum flow (No. 3-8) is administered upstream to the Johnson Bar Gage, but excluding flows from the Salmon River. (2) The Johnson Bar minimum flow (No. 3-7) is administered upstream to Hells Canyon Dam (which is downstream of the Weiser Gage. (3) The Weiser minimum flow (No. 3-6) is administered upstream to the Murphy Gage. (4) The Murphy Gage minimum flows (Nos. 2-201, 2-223, and 2-224) are administered upstream to Milner Dam. The so-called zero flow right at Milner Dam (No. 2-200) was disallowed by the SRBA court on 1/23/2013.

[786] House Concurrent Resolution No. 48 (1978).

[787] 1978 Idaho Sess. Laws, ch. 345, § 1 (codified at Idaho Code § 42-1736A), repealed by 1985 Idaho Sess. Laws, ch. 204.

[788] 1996 State Water Plan, § 5B (reproduced at Appendix F).

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(2) Murphy gage (below Swan Falls) (Nos. 2-201, 2-223, and 2-224): 3,900 cfs / 5,600 cfs – 1976/1985 priorities

The State holds three minimum stream flow rights at the Murphy gage about five miles downstream of Idaho Power's Swan Falls Dam. Combined, these rights establish a minimum flow of 3,900 cfs during the summer (April 1 to October 31) and 5,600 cfs in the winter (November 1 to March 31).

The State holds a year-round minimum flow right at the Murphy Gage with a December 29, 1976 priority date for 3,300 cfs (Water Right No. 2-201). This right dates to the first State Water Plan adopted in 1976 and approved by the Legislature in 1978.[789] In addition, it was codified in 1978 as part of the Minimum Flow Act, which expressly created minimum flow requirements at Milner, Murphy, Weiser, and Johnson's Bar (but was repealed in 1985).[790]

Pursuant to the *Swan Falls Agreement* in 1984, the State added on two additional minimum flow rights with July 1, 1985 priority dates:[791] one for 600 cfs (year round) to bring the Murphy gage minimum flow up to 3,900 cfs during the irrigation season and another for 1,700 cfs (non-irrigation season only) to bring the minimum flow up to 5,600 cfs during the non-irrigation season (Water Right Nos. 2-223 and 2-224, respectively).

The State never filed water right applications for the Murphy gage rights pursuant to the Minimum Flow Act. However, the Idaho Water Resource Board filed SRBA claims for each of these rights on July 1, 1988 seeking a priority date of December 29, 1976 for No. 2-201 and a priority date of July 1, 1985 for Nos. 2-223 and 2-224.

These flow requirements are now embodied in section 5B of the State Water Plan (reproduced under Appendix F). For a history of how these flows were established under the *Swan Falls Agreement*, see discussion in section 35.B at page 683.

(3) Weiser gage (No. 3-6): 4,750 cfs – 1976 priority

Water Right No. 3-6 establishes a year-round minimum flow at the Weiser gage (near the City of Weiser, upstream of Brownlee Reservoir) for 4,750 cfs with a priority date of December 29, 1976. This right dates to the first State Water Plan adopted in 1976

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[789] House Concurrent Resolution No. 48 (1978).

[790] 1978 Idaho Sess. Laws, ch. 345, § 1 (codified at Idaho Code § 42-1736A), repealed by 1985 Idaho Sess. Laws, ch. 204.

[791] The priority date is based on the *Swan Falls Agreement* as implemented in Idaho Code § 42-203B, whose effective date was July 1, 1985. 1985 Idaho Sess. Laws, ch. 17. It is also the effective date of the Legislature's approval of the Idaho Water Resource Board's amendments to Policy 32 of the Idaho Water Plan. 1985 Idaho Sess. Laws, ch. 204.

and approved by the Legislature in 1978.[792] In addition, it was codified in 1978 as part of the Minimum Flow Act, which expressly created minimum flow requirements at Milner, Murphy, Weiser, and Johnson's Bar.[793]

The State has never sought a water right for the flows at the Weiser gage under the Minimum Flow Act. However, the Idaho Water Resource Board filed an SRBA claim for the right on July 1, 1988 seeking a priority date of December 29, 1976. A partial decree in the SRBA was issued for this water right on July 9, 2007. It states, "Place of use is within the reach above and below benefiting from the minimum stream flow at the point of measurement [the Weiser gage] for this right."

(4) Johnson's Bar gage (No. 3-7): 5,000 cfs - 1978 priority

Water Right No. 3-7 establishes a year-round minimum flow of 5,000 cfs at Johnson's Bar with a July 1, 1978 priority date.[794] The Johnson's Bar flow requirement (as well as the Lime Point right discussed below) have their origin in FERC-imposed bypass flow requirements in Article 43 of the license for the Hells Canyon project issued in 1955.[795]

The Johnson's Bar flow requirement was first recognized in Idaho law as part of the Minimum Flow Act of 1978, which expressly created minimum flow requirements at

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[792] House Concurrent Resolution No. 48 (1978).

[793] 1978 Idaho Sess. Laws, ch. 345, § 1 (codified at Idaho Code § 42-1736A), repealed by 1985 Idaho Sess. Laws, ch. 204.

[794] The Johnson's Bar gage is located 17 miles below Hells Canyon Dam at river mile 247.5. Accordingly, this minimum flow controls releases from the Hells Canyon project. The State Water Plan (and other documents) refer to this point as Johnson's Bar. The water right decree (and other documents) refer to it as Johnson Bar.

[795] The original license was issued in 1955 for fifty years. It expired on July 31, 2005, and has been extended by annual licenses while relicensing continues. Article 43 provides: "The project shall be operated in the interest of navigation to maintain 13,000 c.f.s. flow in the Snake River at Lime Point (river mile 172) at a minimum of 95% of the time, when determined by the Chief of Engineers to be necessary for navigation. Regulated flows of less than 13,000 c.f.s. will be limited to the months of July, August, and September, during which time operation of the project would be in the best interest of power and navigation, as mutually agreed by the Licensee and the Corps of Engineers. The minimum flow during periods of low flow or normal minimum plant operations will be 5,000 c.f.s. at Johnson's Bar, at which point the maximum variation in river stage will not exceed one foot per hour. These conditions will be subject to review from time to time as requested by either party." Article 43, FERC Project No. 1971.

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Milner, Murphy, Weiser, and Johnson's Bar.[796] The Johnson's Bar right was not part of the State's first Water Plan approved by the Legislature in 1978, but has been included in every subsequent State Water Plan and is now reflected in section 5B of the 1996 Plan.

The State has never sought a water right for flows at the Johnson's Bar gage under the Minimum Flow Act. However, the Idaho Water Resource Board filed an SRBA claim for the right on July 1, 1988 seeking a priority date of July 1, 1978 (based on the effective date of the Minimum Flow Act). A partial decree in the SRBA was issued for this water right on July 9, 2007. It states, "Place of use is the reach of the river benefited by the minimum flow past Johnson Bar."

As a practical matter, the 5,000 cfs requirement at Johnson's Bar is not much of an additional constraint on other water right holders, given the senior 4,750 cfs minimum flow upstream at the Weiser gage already in effect. Likewise, Idaho Power is typically able to achieve the 5,000 cfs flow. The real constraint on the Hells Canyon project is the Lime Point minimum flow discussed below. Failure to meet Lime Point flows has resulted in Idaho Power agreeing to even higher flow targets at Johnson's Bar, but these do not constrain other water right holders. In addition, there has been discussion about raising the Johnson's Bar bypass flow in Idaho Power's new license for the Hells Canyon Complex. Of course, any changes in Article 43 bypass flow requirements would be applicable only to Idaho Power.

(5) Lime Point gage (No. 3-8): 13,000 cfs – 1985 priority

Water Right No. 3-8 establishes a year-round minimum flow of 13,000 cfs at Lime Point[797] (75 miles below Hells Canyon dam) with a priority date of July 1, 1985.[798] This

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[796] 1978 Idaho Sess. Laws, ch. 345 (codified at Idaho Code § 42-1736A), repealed by 1985 Idaho Sess. Laws, ch. 204.

[797] Lime Point is at river mile 172, about three miles upstream of the mouth of the Grande Ronde River (river mile 168.7) and 75 miles downstream of the Hells Canyon Dam (river mile 247.6) on the Snake River. Until 2003, there was no gage that could measure flows at Lime Point (river mile 172). There is now a gage at China Bar (aka China Garden Creek aka McDuff Rapids) approximately three miles upstream from Lime Point. Prior to 2003, flows at Lime Point could be estimated by taking the flow at Anatone (river mile 167.2) and subtracting the inflows from the Grande Ronde River, which enters the Snake River between Lime Point and Anatone.

[798] The July 1, 1985 priority date derives from the effective date of the act approving the Water Resource Board's amendments to Policy 32 of the State Water Plan. 1985 Idaho Sess. Laws, ch. 204. Ordinarily, State Water Plan amendments are approved by joint resolution, not by statute. In this case, the Legislature acted by statute because it also needed to repeal former Idaho Code § 42-1736A, which set a now obsolete instream flow for the Murphy Gage of 3,300 cfs.

right corresponds to the by-pass flow requirement imposed by FERC on the Hells Canyon project.[799] It must be met 95 percent of the time, with departures allowed only during June, July, and August.

Historical documents show that this flow requirement was included in the Hells Canyon license to ensure that a navigable shipping channel to Lewiston, and from there to Portland, would be available for mining operations proposed at the time.[800] These mining operations were never developed. As a consequence, the motivating concern for establishing the license's 13,000 cfs flow requirement no longer exists.

Despite this fact, the Lime Point flow requirement has been reflected in every State Water Plan since 1982. The 1982 Plan described the FERC flow requirements as

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[799] The terms of Article 43 of the 1995 FERC license are set out in footnote 795 at page 507.

[800] In Idaho Power's pending relicense application for the Hells Canyon project, the company states: "The significance of the 13,000-cfs flow requirement at Lime Point originated when Lower Granite Dam was constructed [from 1965 to 1972]. In hearings held in Boise, Idaho, on June 22, 1944, two separate limestone companies—owners of large lime deposits near the Snake River above Lewiston, Idaho—submitted statements that development of their resources awaited a satisfactory water channel through Lewiston. As a result, a minimum flow of 13,000 cfs at Lime Point was determined to be necessary 95% of the time to allow lime, copper, and iron ore to be shipped downstream to Portland, Oregon." *IPCo Statement of Project Operation and Resource Utilization* at B-18.

In 2006, the Army Corps of Engineers submitted proposed new license conditions for the Hells Canyon project. The submission contained this discussion of the history of the Lime Point flow requirement:

> Basis for 1955 License Requirements.
> An open river navigation channel, 150 feet wide and 6 feet deep at a flow of 13,000 cubic feet per second (cfs), was proposed between river mile (R.M.) 142 near Lewiston and R.M. 172 near Lime Point in Appendix I of the October 1, 1948 Review Report on Columbia River and Tributaries ("308 Review Report") prepared by the U.S. Army Corps of Engineers (Corps) and published as House Document 531, 81st Congress. Studies in connection with the preparation of this "308 Review Report" indicated that a satisfactory navigation condition would exist if a minimum flow of 13,000 cfs was equaled or exceeded for 95 percent of the time. This proposed navigation project on the Hells Canyon reach of the Snake River is interpreted to be the basis for the 13,000 cfs navigation flow requirement at Lime Point in Article 43 of the existing license for Project No. 1971.

Hells Canyon Project, FERC No. 1971-079, Proposed Provisions for Navigation – New License Application, Hells Canyon Reach – Snake River – Idaho, Oregon, and Washington, Walla Wall District, Corps of Engineers, at 2-3 (Jan. 24, 2006).

"in the public interest," but did not establish them as state minimum flow rights. A revision adopted in 1985 (following the *Swan Falls Agreement* of 1984) recognized the Johnson's Bar and Lime Point flow requirements as state policy for the first time. In doing so, however, the 1985 amendment drew a contrast between its treatment of the Murphy and Weiser minimum flows (which are intended to constrain water development) and the Johnson's Bar and Lime Point flow requirements (which were simply reflections of FERC's Article 43 requirements):[801]

> The minimum flows established for the Snake River at Murphy and Weiser gauging stations are management constraints . . . .
>
> The minimum flows established for Johnson's Bar and Lime Point are contained in the original Federal Power Commission license for the Hells Canyon hydropower complex.

Thus, the 1985 amendment expressly recognizes that Lime Point and Johnson's Bar flows are state policy but are not "management constraints." In other words, the Lime Point and Johnson's Bar flows were not intended to operate as water rights with the ability to call out juniors. This distinction has been carried forward through subsequent Water Plans.[802]

In any event, the Lime Point minimum flow is frequently violated. The 13,000 cfs flow target was not achieved more than five percent of the time in fourteen of the years between 1958 and 2006. IDWR has never administered this right. As a practical matter, flow management in the Hells Canyon reach is addressed as a matter of negotiation between Idaho Power and the Corps, as provided in Article 43. Article 43 authorizes Idaho Power to deviate from the flow targets set in the license if it is able to secure Corps approval based on the Corps' assessment of what is in "the best interest of power and navigation." The parties have routinely reached these agreements over the last two decades.

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[801] 1985 Amendment to Policy 32 (emphasis added) (adopted on Mar. 1, 1985) (set out as an appendix to the Minutes of Meeting No. 1-85 dated Jan. 17, 1985, at 1).

[802] The 1996 State Water Plan, at 17, describes only the Murphy and Weiser minimum flows as "management and permitting constraints." The 1996 version expressly noted that modifications of the flow requirement may occur during the summer "as determined by the Corps of Engineers and Idaho Power Company as owner of the Hells Canyon power facilities." 1996 State Water Plan, § 5B at 17. This statement reinforces the conclusion that the Board did not view the Lime Point flow as a water right that could constrain other water users. Rather, it was a matter to be resolved between FERC and Idaho Power. Obviously, a state water right cannot be subject to such informal modifications delegated to third parties.

For instance, pursuant to a 1988 agreement between the Corps and Idaho Power, the Company has maintained a minimum flow of 6,500 cfs at Johnson's Bar during normal operating conditions, resulting in considerably lower flows at Lime Point.[803]

Idaho Power's pending application for relicensing of the Hells Canyon project calls for flows at Johnson's Bar of 6,500 cfs from June 1 through October 20, subject to various exceptions that would allow flows to be reduced to 5,000 cfs.[804]

In the interim, the parties have been successful in working out interim arrangements which take advantage of the flexibility offered by Article 43.[805] This flexibility is important to maximizing competing interests on the river and to allowing experimentation with different flow strategies. Thus, administration of the Water

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[803] A 1991 letter from the Corps to IDWR offers this summary:

> Since Hells Canyon Dam has been in operation, flows less than 13,000 cfs at Lime Point have occurred in numerous low flow years during the July through September period. Each time before that occurred, Idaho Power Company and the Walla Walla District Corps of Engineers jointly determined an operation that was considered to be in the best interest of both power and navigation. Varying schedules and releases have been tried and modified through the years. . . .
>
> During the last few years, Idaho Power Company has been using minimum releases of 6,500 cfs from Hells Canyon Dam for navigation flows during some of the July through September period. This operation often results in flows of approximately 10,000 cfs at Lime Point.

Letter from Robert D. Volz, District Engineer, Corps, to Keith Higginson, Director, IDWR, at 2 (Oct. 17, 1991) (responding to inquiry from Mr. Higginson about how Article 43 is implemented). More recently, with the introduction of larger jet boats in Hells Canyon (resulting from limits on the number of boat trips), the recreational community had argued for higher flows at Johnson's Bar. Idaho Power has endeavored to achieve flows of 8,500 cfs where practicable, but has not always succeeded. See Letter from James C. Tucker, Idaho Power, to Kimberly D. Bose, Secretary, FERC (July 3, 2007) (responding to concerns raised by flow reduction from 8,500 to 6,500 cfs during July 2007).

[804] Letter from James C. Tucker, Idaho Power, to Kimberly D. Bose, Secretary, FERC, at 3 (July 3, 2007).

[805] Article 43 requires that the flow targets be met 95% of the time. However, this requirement is ambiguous. "This exception and wording has resulted in some confusion because the timeframe for the 95 percent is unclear, and there is no defined absolute minimum for Lime Point during July through September." Letter from Robert D. Volz, District Engineer, Corps, to Keith Higginson, Director, IDWR, at 2 (Oct. 17, 1991). As a practical matter, the 95% rule has not served as a constraint at all. After all, Article 43 provides only "when determined by the Chief of Engineers to be necessary for navigation."

Board's Lime Point flow target via delivery calls (which happen in the case of the Murphy or Weiser rights) would be inconsistent with the reality of how the river is adaptively managed today to balance competing interests.

25. THE ORDINARY HIGH WATER MARK (OHWM)

Since 1915, Idaho has recognized that, pursuant to the equal footing doctrine, the State holds title to the beds of navigable waters below the ordinary high water mark ("OHWM"). *Callahan v. Price*, 26 Idaho 745, 146 P. 732 (1915) (reversing *Johnson v. Johnson*, 14 Idaho 561, 95 P. 499 (1908).

Evidence of the OHWM at statehood is found in the original Government Land Office ("GLO") survey of the lake or river. However, these GLO surveys can be wrong. An example of an incorrect GLO meander line is found in the following decision:

> The only direct evidence submitted to the district court by appellants regarding the natural high water mark of Hayden Lake at or prior to statehood consisted of the original survey conducted by the Government Land Office (GLO) in 1880. The 1880 survey does depict the meander line of Hayden Lake. However, as indicated by the district court and admitted by the parties, the GLO meander line is obviously inaccurate and bears no resemblance to the shoreline of the lake.

Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist., 112 Idaho 512, 519, 733 P.2d 733, 740 (1987) (Bakes, J.) (emphasis added).

Moreover the survey instructions have changed over time. For example, under the GLO survey instructions issued on January 1, 1880, the surveyor was to start his survey of the shoreline at the meander corner (the fixed place where the meander corner met the shoreline) and proceed "coursing the banks of boundary line, and measuring the distance of each course from your commencing corner to the next meander corner." *1880 Instructions*, p. 33. The instructions did not tell the surveyor to walk the low or high water line, instead just telling him to walk the shoreline. It stated that where the surveyor encountered a swamp adjacent to the waterbody, he was to use the low-water line of the lake to distinguish between the swamp and the larger body. In contrast, the GLO survey instructions issued on June 30, 1894 instruct the surveyor to establish his shoreline on the "mean high water mark" and to use that high water mark to distinguish lake from swamp.

In 2006, the Idaho Supreme Court reiterated the obvious: the lake level at any given point in time does not fluctuate around the lake. Hence, evidence of lake level at one position on the lake is relevant to a determination of the lake level at another place on the lake.

> The OHWM is a line created by the water in the lake remaining at particular level for a long enough period of time that it deprives the soil covered by the water of its vegetation.

> Since the OHWM is created by the water covering the soil for a period of time, and since water seeks its level, the OHWM will be the same at all places around the lake. As we said in *Raide v. Dollar,* 34 Idaho 682, 690, 203 P. 469, 472 (1921) (emphasis added), "By the term 'high-water *mark*' is meant those *points* along the shore where water rises to such a height as may reasonably be anticipated … ."
>
> The district court's rejection of evidence from other areas around the lake can only be based upon the assumption that under normal conditions the elevation of the water in one part of the lake could be several feet higher than the elevation of the water in another part of the lake. We commented upon that assumption in *Petajaniemi v. Washington Water Power Co.,* 22 Idaho 20, 26, 124 P. 783, 784 (1912), wherein we stated, "The courts will take judicial notice of the fact that water seeks its level; and if a witness should testify that it stood up in hillocks or piles, like stone or earth, a court would not be expected to believe it."

In re Sanders Beach, 143 Idaho 443, 447, 147 P.3d 75, 79 (2006) (Eismann, J.).

26. THE PUBLIC TRUST DOCTRINE

A. The doctrine in a nutshell

Depending on one's perspective, the public trust doctrine may be a powerful tool of judicial oversight over irresponsible governmental action or a narrow rule of law applicable primarily to title disputes over submerged land. Both are true, depending on the jurisdiction and the inclination of the court applying the doctrine. In some states, the doctrine has emerged since the 1970s as a broad overlay over virtually every governmental allocation of public land and water. In others, including Idaho, it has been cut to the bone.

What, then, is the public trust doctrine? It is simply a body of judge-made law holding that title to certain public resources (traditionally, submerged lands) is held in trust by the states (or, possibly, the federal government) for the benefit of the public. It operates, in its classic form, as a limitation on alienation, thus ensuring that no legislative or administrative entity may convey vital public resources to exclusive private use in a way that destroys recognized public values.

The doctrine began as a recognition of the unique property interest that states (and before that, the King) hold in submerged land and shores. In its traditional American form, it served two disparate purposes: (1) to determine title to submerged lands traced to federal or state grants and (2) to ensure that the public interest in submerged lands for navigation, commerce, and fishing was protected from inconsistent private uses. More recently, the doctrine has been expanded to embrace a broader range of public resources (such as public lands and privately held water rights). Likewise, the values it protects have been expanded to embrace a broad range of public environmental values, often focused on preservation.

What is the basis of this doctrine? Despite its lofty name and legendary history, the public trust doctrine, at its core, is simply common law.[806] Accordingly, like all common law, it may be codified, modified, limited, or revoked by statute.

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[806] Justinian said the trust was based on "natural law." (See discussion in section 26.B(1) at page 520.) In the seminal case of *Illinois Cent. R.R. Co. v. Illinois* ("*Illinois Central*"), 146 U.S. 387 (1892) (Field, J.), the Court failed to explain the basis of the law it applied. It spoke in absolute terms, as if it were describing some sort of natural law beyond the control of the other branches of government. Indeed, the New Jersey case which the Court quoted in *Illinois Central* invoked reference to natural law (although it repeatedly spoke elsewhere of the common law). "The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people." *Illinois Central*, 146 U.S. at 456 (quoting *Arnold v. Mundy*, 6 N.J.L. 1, 53 (N.J. 1821)).

It is also important to recognize that the doctrine is based on state common law, not federal law. *Illinois Central* rose through the federal courts and was decided by the U.S. Supreme Court. Federal jurisdiction was based on the framing of the case by the plaintiff railroad, which alleged that Illinois' reneging on its railway charter was an impairment of contract in violation of contract clause in the federal Constitution. While federal contract clause provided jurisdiction, and the federal equal footing doctrine[807]

Whatever lofty language is employed, it boils down to common law because that is the only law that courts can make. For example, the Idaho Supreme Court stated in 1983, "Final determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary." *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 629, 671 P.2d 1085, 1092 (1983). Presumably the Court meant it had the final say because, at the time, there was no statute or constitutional provision to apply. That changed when the Legislature restricted the public trust doctrine in 1996 Idaho Sess. Laws, ch. 342 (codified at Idaho Code §§ 58-1201 to 58-1203).

"From this origin in Roman law, the English common law evolved the concept of the public trust . . . ." *National Audubon Society v. Superior Court of Alpine Cnty.,* 658 P.2d 709, 718 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983). "The public trust doctrine has its roots in English common law. . . . American cases have developed the public trust doctrine in a way that is consistent with its common-law heritage." *Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, 486-87 (1988). "More recently, courts and commentators have found in the doctrine a dynamic common-law principle flexible enough to meet diverse modern needs." *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1083 (D.C. Cir. 1984). Idaho is in accord. "The public trust doctrine is based upon common law equitable principles." *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist.*, 112 Idaho 512, 517, 733 P.2d 733, 738 (1987). This point was reiterated by the Idaho Legislature in 1996. "'Public trust doctrine' means the common law rule relating to the title to the beds of navigable waters . . . ." Idaho Code § 58-1202(5).

[807] The equal footing doctrine was explained in an Idaho case:

> Idaho was admitted to the Union in 1890 on equal footing with its sister states in every respect. Idaho Admission Bill § 1 (1890). The state obtained title to all land below the high water mark of navigable waters within the state at the time of its admission based on this equal footing doctrine. *See Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894). The scope of the state's title in such lands extends to the natural high water mark as it existed at the time the state was admitted into the Union. *Callahan v. Price*, 26 Idaho 745, 146 P. 732 (1915); *Driesbach v. Lynch*, 71 Idaho 501, 234 P.2d 446 (1951); *Kootenai Environmental Alliance v. Panhandle Yacht Club*, 105 Idaho 622, 671 P.2d 1085 (1983); *Heckman Ranches, Inc. v. State*, 99 Idaho 793, 589 P.2d 540 (1979) (which, for purposes of that case, accepted the trial court's application of the definition of natural or ordinary high water mark contained in I.C. § 58–104(9), being "the line which the water impresses on the soil by covering it for sufficient periods to

provided the basis for ownership of submerged lands, the case did not turn on those questions. It turned on a restriction in the alienation of submerged lands found in the public trust doctrine, which is nothing more than state common law.[808] "All questions concerning public trust lands in this state are questions of state law." *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist.*, 112 Idaho 512, 517, 733 P.2d 733, 738 (1987) (Bakes, J.). Indeed, it is precisely because the doctrine is state law that the Idaho Legislature had the power to change it in 1996.

In some instances, however, courts have found a state constitutional foundation (or at least reinforcement) for the doctrine.[809] In these cases, of course, the doctrine is more than common law and could be modified only by constitutional amendment or judicial interpretation of the constitution.

> deprive the soil of its vegetation and to destroy its value for agricultural use").

Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist., 112 Idaho 512, 516, 733 P.2d 733, 737 (1987) (Bakes, J.).

Determining the location of the ordinary high water mark ("OHWM") (sometimes referred to as the natural high water mark or the ordinary high water line) at the time of statehood can be a challenge. Once source of evidence is the original GLO survey maps, which typically depict the meander line of navigable lakes and streams. The meander line is a surveying line used for mapping purposes. If accurately drawn, it may roughly correspond to the OHWM. But meander lines are not always accurately drawn and, even if they were, they depict what the surveyor saw that day, not necessarily the ordinary high water mark. As Justice Bakes noted in *Idaho Forest Indus.*, meander lines on GLO maps are not definitive of the OHWM:

> The only direct evidence submitted to the district court by appellants regarding the natural high water mark of Hayden Lake at or prior to statehood consisted of the original survey conducted by the Government Land Office (GLO) in 1880. The 1880 survey does depict the meander line of Hayden Lake. However, as indicated by the district court and admitted by the parties, the GLO meander line is obviously inaccurate and bears no resemblance to the shoreline of the lake.

Idaho Forest Indus., 112 Idaho at 519, 733 P.2d at 740 (emphasis added).

[808] "The public-trust doctrine is a common-law doctrine that is a matter of state law. *See, e.g., PPL Montana, LLC v. Montana*, 565 U.S. 576, 603, 132 S.Ct. 1215, 182 L.Ed.2d 77 (2012) (affirming that the doctrine is a matter of state law); *Shively v. Bowlby*, 152 U.S. 1, 57-58, 14 S.Ct. 548, 38 L.Ed. 331 (1894) (describing the nature and origin of the public-trust doctrine)." *Chernaik v. Brown*, 436 P.3d 26, 32 (Or. 2019).

[809] E.g., *United Plainsmen Assoc. v. North Dakota Water Conservation Comm'n*, 247 N.W.2d 457 (N.D. 1976); *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 (Ariz. 1999). It is doubtful that there is a constitutional basis for the public trust doctrine in Idaho. That question is discussed in section 26.D(2) at page 535.

What is the nature of the restraint on governmental action with respect to trust property? In other words, if violated, what relief does the doctrine provide? That depends. As noted above, if it is constitutionally based, the trust actually may trump legislative action. Absent a constitutional basis, however, the doctrine cannot be used to overturn a statute or a statutorily mandated action, even one that seems inconsistent with the protection of trust values.

Even in those jurisdictions that recognize the doctrine solely as common law, the doctrine still has teeth—so long as the legislature has not seen fit to overrule it. A common-law-based public trust doctrine may serve a variety of purposes:[810]

1. In its most famous application, the doctrine authorizes the legislature to take back, without paying compensation, a public resource improperly alienated to private use, as occurred with the lake shore of Chicago in *Illinois Cent. R.R. Co. v. Illinois* ("*Illinois Central*"), 146 U.S. 387 (1892) (Field, J.). In this case, the state government (not a citizen group) invoked the public trust doctrine (as a defense). The doctrine served to justify, not attack, the government's action.

2. Another instance in which the doctrine has been employed by government (rather than against it) is in the context of natural resource damage actions. Here the doctrine has been employed successfully to buttress claims for damage to public resources.

3. In other cases, it may be used as a prod against a government reluctant to protect public resources. The classic example of this is the Mono Lake case in which the state court insisted that the California Water Resources Board carefully consider the impact of its actions (including prior actions allocating water rights) on public values. *National Audubon Society v. Superior Court of Alpine County,* 658 P.2d 709, 718 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983). In that case, the court did not dictate any particular outcome, but clothed the water board with authority to reallocate vested water rights to different public uses, if necessary.

[810] Few court decisions contain a broad discussion of the various and different purposes to which the public trust doctrine has been employed; they typically focus on the particular relief sought in the case at hand. A discussion of the range of uses to which the public trust doctrine has been and might in the future be employed is found in various articles including Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. Calif. Davis L. Rev. 269, 310-14 (1980), and Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U. Calif. Davis L. Rev. 233, 243-44 (1980).

4. The doctrine also could be employed to judge the correctness of agency decision-making regarding the management of public resources. This may occur in various permutations:

    - For instance, the doctrine may be seen as a canon of construction (that is, a rule for interpreting statutes or agency rules)—and a powerful one at that. It may provide the hook for a court to read into an otherwise ambiguous statutory or regulatory scheme a clearer mandate to weigh and protect trust values. Likewise, the doctrine may demand clear and express legislative direction to support actions that appear inconsistent with the protection of trust values.

    - In a similar vein, the doctrine may be seen as a limitation on the discretion of agencies. In this way, the doctrine might allow a court to go beyond the usual "arbitrary and capricious" review of agency decision making, allowing the court greater leeway in mandating a substantive outcome favoring well-recognized public trust values. This is sometimes referred to by commentators as enabling the court to take a "hard look" at governmental decision-making.

    - The doctrine could be employed in an action-forcing way to force the government to take steps to protect public resources that are in threat of being lost by the government's inaction. This has been tried, so far without clear success, in the cases described in section 26.F(3) at page 543.

    - Similarly, the doctrine might be employed to challenge the government's decision when it justifies its action (or failure to act) on the basis that it lacks sufficient information. Thus the public trust doctrine might create an affirmative obligation to study a problem or get the information necessary to enable it to carry out its trust responsibilities.

    - Finally, the doctrine may serve as a test for excessive delegation of decision-making authority regarding public resources.

In sum, the doctrine may take various forms. The key is that it has the potential to add a substantive component to any litigation challenging governmental action. Unlike litigation against the government that is predominated by procedural attacks giving rise to remands and more procedural attacks, the public trust doctrine allows litigants to address (or at least get closer to addressing) the merits of the government's action.

B. The doctrine's origins—the State's property interest in submerged lands

(1) Roman law

Courts and commentators routinely describe the public trust doctrine as being of ancient origin.[811] It may be traced from Sixth Century Roman law, to the restoration of the common law by the Magna Carta in 1215, to commentaries by Renaissance-era English legal scholars, to the American Reception of British law. These early sources describe certain public resources, notably the seashore and riverbanks, as being inherently "public" and therefore unalienable.

Here is the law as announced by Emperor Justinian in Constantinople:

> In the preceding book we have expounded the law of Persons: now let us proceed to the law of Things. Of these, some admit of private ownership, while others, it is held, cannot belong to individuals: for some things are by natural law common to all, some are public, some belong to a society or corporation, and some belong to no one. But most things belong to individuals, being acquired by various titles, as will appear from what follows.
>
> Thus, the following things are by natural law common to all--the air, running water, the sea, and consequently the sea-shore. No one is therefore forbidden access to the seashore, provided he abstains from injury to houses, monuments, and buildings generally; for these are not, like the sea itself, subject to the law of nations. On the other hand, all rivers and harbors are public, so that all persons have a right to fish therein.

The Institutes of Justinian, Book II, at D2 (J.B. Moyle, English trans. 5th ed. 1928) (Nov. 21, 533 C.E.).[812] This Roman codification employed the Latin phrase *jus publicum* to describe these rights for the public good, distinguishing them from *jus privatum* (rights held by private persons or by the emperor in his private capacity).[813]

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[811] E.g., Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U. Calif. Davis L. Rev. 195 (1980).

[812] Translations vary, but all say essentially the same thing.

[813] Three major legal texts in Latin comprising the *Corpus Juris Civilis* were issued under Justinian's rule in Constantinople. The third (the *Institutes*) was intended as a legal textbook for law schools. Justinian later issued a number of other laws, mostly in Greek.

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The first American public trust case quoted Justinian, in Latin no less. *Arnold v. Mundy*, 6 N.J.L. 1, 49 (N.J. 1821). Early Supreme Court public trust cases do not cite to these Roman authorities, but they cite *Arnold* as well as noted English commentators who relied on the *Institutes*.[814] It was Professor Sax (see discussion in section 26.C(1) at page 530) who reintroduced these Roman sources into the modern conversation in 1970. Since that time, courts and commentators have come invariably to recite Roman and medieval law whenever explaining the doctrine. [815] One commentator, however, has cast doubt on the historical accuracy of the doctrinal roots, describing the much heralded Roman and English protection of public resources as "mythology."[816]

(2) *Illinois Central* (1892)

Although there are earlier references to a public trust, most agree that the first modern formulation of the doctrine is contained in *Illinois Cent. R.R. Co. v. Illinois* ("*Illinois Central*"), 146 U.S. 387 (1892) (Field, J.). Accordingly, we begin with this case.

Illinois Central dealt with the conveyance by the Illinois Legislature in 1869 of the entire lake shore of the city of Chicago to the Illinois Central Railroad. Four years later,

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[814] For instance, in 1892 the Supreme Court quoted English legal scholar, Lord Hale: "The jus privatum that is acquired by the subject, either by patent or prescription, must not prejudice the jus publicum, wherewith public rivers and the arms of the sea are affected to public use." *Illinois Cent. R.R. Co. v. Illinois* ("*Illinois Central*"), 146 U.S. 387, 458 (1892) (Field, J.).

[815] For example, in the important Mono Lake case, the California Supreme Court recited: "From this origin in Roman law, the English common law evolved the concept of the public trust, under which the sovereign owns 'all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people.'" *National Audubon Society v. Superior Court of Alpine Cnty.,* 658 P.2d 709, 718 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983) (additional internal quotation marks omitted).

[816] "The only problem with these ambitions for the public trust doctrine is that they rely on a mythological history of the doctrine. There was nothing resembling the modern idea of public trust in Roman law and the claimed restraint on alienation of state owned waters and lands is belied by a history of pervasive private ownership in both Rome and England. Magna Carta had little or nothing to do with such public rights, nor is there significant support in Bracton, Hale, or Blackstone for the imagined doctrine." James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 Duke Envtl. L. & Pol'y F. 1, 1-2 (2007). Professor Huffman's writings, by the way, have stirred the hornet's nest. Professor Blumm, responding to one of Huffman's articles, described Huffman's writing as "hyperbole reminiscent of an eighteenth century pamphleteer." Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 Envtl. L. 573, 599 (1989).

the Legislature thought better of its generosity and repealed the grant.[817] The railroad sued. The United States Supreme Court sided with the Legislature. It held that, from the outset, the shoreline property was subject to an unstated, but paramount, public trust. When the land was conveyed to the railroad, it was conveyed subject to this trust, thereby allowing the Legislature to rescind the conveyance—without compensating the railroad.

The Court did not hold that all conveyances of trust lands are void. It recognized that submerged lands could be, and frequently are, conveyed free of the trust to private parties for the construction of wharves, docks, and the like—all uses that are in furtherance of trust purposes. But the Court found that the state legislature lacked the power to convey the entire waterfront free of the trust. This was, in essence, an abdication of the State's responsibility to protect the trust and therefore was void or, at least, voidable by the grantor. The Court explained:

> A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.

Illinois Central, 146 U.S. at 453.

A key feature of the public trust doctrine is to enable the government to reclaim ownership or control of private property without paying just compensation.[818] The state

[817] This tale of greed and corruption, and the implicit need for vigorous judicial oversight, has underpinned the resurgence of the public trust doctrine beginning in the 1970s. One commentator, however, has questioned the accuracy of the story recounted in the Supreme Court's opinion. "That story is a fable, and can justify the doctrine only if we already believe in it for reasons independent of the lesson the case supposedly teaches." Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. Chi. L. Rev. 799, 931 (2004).

[818] The Court said, "Undoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay . . . ." *Illinois Central*, 146 U.S. at 455. The clear implication is that compensation is due for expenses incurred in detrimental reliance only, not for loss of the land itself.

always has the power to take (or to take back) property for public use under its condemnation power. The public trust doctrine is a way of declaring that the property belonged to the state in the first instance, and therefore no compensation need be paid.[819]

Thanks in large part to Professor Sax's influential article,[820] *Illinois Central* has come to be known as the case in which the public trust doctrine protected a public resource from greedy developers. The reality is more nuanced. "[Justice Field's] public trust doctrine was designed to preserve access to the lake for commercial vessels at competitive prices, not to preserve Lake Park or the shoreline from further economic development. . . . Thus, the public trust doctrine, as invoked in the Illinois Central litigation, was scarcely an anti-development doctrine." Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. Chi. L. Rev. 799, 924-25 (2004).

(3) *Arnold v. Mundy* (1821)

In order to understand *Illinois Central* and the modern public trust doctrine, it is necessary to trace several early cases upon which the doctrine traces its origins and upon which *Illinois Central* relied. We begin with *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. 1821), a case generally identified as the foundation of public trust law in the United States.[821]

It dealt with title to an oyster bed in mud flats along the Raritan River in Perth Amboy, the first capital of New Jersey. The plaintiff claimed title to the oyster beds traceable to a grant from King Charles II to this brother, the Duke of York in 1664. The King's grant was for the purpose of establishing the colony of New Jersey. Ownership later was conveyed to 24 "proprietors of East New Jersey" who, in turn, conveyed tracts

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[819] In *Summa Corp. v. California*, 466 U.S. 198, 200 (1984), the Court candidly noted that the City of Los Angeles "indicated that it wanted to dredge the lagoon and make other improvements without having to exercise its power of eminent domain over petitioner's property." The Court sidestepped the public trust issue, however, finding that whatever public trust the state of California obtained in the tidelands did not survive the patenting of the lands under the Act of 1851. Also see the quotation from the Mono Lake decision in footnote 832 on page 532. Commentators, too, have noted this effect. "The property right nature of the public trust is also evident in the second major manifestation of the doctrine: an insulation against takings claims." Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 Envtl. L. 573, 584 (1989).

[820] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970). This article is discussed in section 26.C(1) at page 530.

[821] See, for example, Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 Envtl. L. 573, 580 (1989), describing *Arnold* and *Illinois Central* as the "foundation cases" of the doctrine.

of land to various private parties. The plaintiff sued the defendant for trespassing on his oyster bed and taking the oysters. The defendant responded that the plaintiff's title extended only to the high water mark, and that the defendant was entitled to partake of the common fishery below. The New Jersey court agreed with the defendant, tracing the public trust back through English and Roman law to reach the following conclusion:

> Upon the whole, therefore, I am of opinion, as I was at the trial, that by the law of nature, which is the only true foundation of all the social rights; that by the civil law, which formerly governed almost the whole civilized world, and which is still the foundation of the polity of almost every nation in Europe; that by the common law of England, of which our ancestors boasted, and to which it were well if we ourselves paid a more sacred regard; I say I am of opinion, that by all these, the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purpose of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products (a few things excepted) are common to all the citizens, and that each has a right to use them according to his necessities, subject only to the laws which regulate that use; that the property, indeed, strictly speaking, is vested in the sovereign, but it is vested in him not for his own use, but for the use of the citizen, that is, for his direct and immediate enjoyment.

Arnold, 6 N.J.L. at 52.

Interestingly, *Arnold* was overturned by the New Jersey Supreme Court in *Gough v. Bell*, 22 N.J.L. 441 (N.J. 1850) and by the court of Errors and Appeals in *Bell v. Gough*, 23 N.J.L. 624 (1852),[822] but not before the case became the foundation for the doctrine recognized by the U.S. Supreme Court in *Martin v. Waddell*, 41 U.S. 367 (1842). The fact that *Arnold* had been overturned was overlooked or perhaps unknown to the U.S. Supreme Court which continued to rely on the case in *Illinois Central*, describing it as "entitled to great weight" and a "decision [that] was made with great deliberation and research." *Illinois Central*, 146 U.S. at 456.

[822] Until 1947, the New Jersey Supreme Court was an intermediate appellate court whose decisions were reviewed by the highest state court, the Court of Errors and Appeals of New Jersey.

(4) *Martin v. Waddell* (1842)

Martin v. Waddell, 41 U.S. 367 (1842), is another early a case relied on by the Court in *Illinois Central. Martin* was a case in ejectment. Curiously, it also dealt with title to oyster beds in Perth Amboy. Like the plaintiff in *Arnold*, the plaintiff in *Martin* traced his title to the same royal grant from Charles II. Unlike the defendant in *Arnold*, however, the defendant in *Martin* claimed an exclusive license to the oyster fishery based on state law. The plaintiff sought to eject the defendant, claiming superior title that, if valid, would trump the state-issued license. The question, then, was whether the royal grant, which included the submerged lands in question, authorized subsequent conveyance to private parties.

The Court observed that the King's grant to his brother the Duke retained the character of the King's ownership. The Court concluded that under English law the King held the land in trust, and the trust recognized a right to a common fishery in lands below tidal waters. Because of this, the Court concluded the conveyance to a private party was defective, and New Jersey instead acquired title to the submerged lands.

Ironically, the Court failed to answer why, if the King could not convey an exclusive interest in the submerged lands, New Jersey later could grant an exclusive license to the defendant.[823] The Court in *Illinois Central* also ignored New Jersey's apparent ability to convey an interest in submerged lands to a private party, focusing instead on the limitations seen in the King's ability to alienate trust lands.[824] Citing *Martin*, it said, "Many other cases might be cited where it has been decided that the bed or soil of navigable waters is held by the people of the state in their character as sovereign in trust for public uses for which they are adapted." *Illinois Central*, 146 U.S. at 457-58. Ironies and subtleties aside, *Martin* has come to be recognized as standing for the simple proposition that states hold submerged lands in trust, and that the trust prevents the state from alienating the property to private interests in conflict with trust purposes.

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[823] This irony was not lost on the dissenting justice. "And I must again repeat, if the king held such lands as trustee, for the common benefit of all his subjects, and inalienable as private property, I am unable to discover, on what ground the state of New Jersey can hold the land discharged of such trust, and can assume to dispose of it to the private and exclusive use of individuals." *Martin*, 41 U.S. at 432 (J. Thompson, dissenting).

[824] As one critical commentator has noted, it is "puzzling why *Martin* has persisted as authority for a modern public trust doctrine understood to constrain the state's power to alienate submerged lands." James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 Duke Envtl. L. & Pol'y F. 1, 45 (2007).

(5) *Pollard's Lessee* (1845)

Illinois Central also relied on the case of *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845). To understand this case, it is necessary to digress to a discussion of the "equal footing doctrine." (This doctrine did not arise in *Arnold* or *Martin*, because New Jersey was one of the 13 original colonies, and Alabama was not.)

Pollard's Lessee, like *Martin*, was, at its core, a title dispute between private parties. The dispute involved lands below the ordinary high water mark of the Mobile River in Mobile, Alabama. The plaintiff, claiming title under a federal patent issued after statehood, sought to eject the defendant, who had drained the land and constructed improvements thereon.[825] The Court found the federal patent to be a nullity (notwithstanding the fact that the enabling act for the admission of Alabama expressly reserved to the United States title to submerged lands), because the federal government had nothing to convey. Under the equal footing doctrine, whatever interest the federal government had in the submerged lands passed to the state upon statehood.

What does this have to do with the public trust? Only this: The Court explained that when the lands that now comprise the State of Alabama were ceded to the federal government (in "deeds of cession") by the states of Virginia and Georgia, they were impressed with a trust. The United States held those lands temporarily for the purpose of conveying some of the land to private persons in order to "convert the land into money" to help pay the Revolutionary War debt. *Pollard's Lessee*, 44 U.S. at 224. Thereafter the United States was to "erect new states over the territory thus ceded." *Id*. The Court described this process as a trust. "When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it, to the same extent, in all respects, that it was held by the states ceding the territories." *Pollard's Lessee*, 44 U.S. at 222-23. Professor Wilkinson explains, "Its trust duty was to sell off the lands for the common benefit so that new states, with land in private ownership, could operate as sovereigns on an equal footing with the original states and not as 'colonies.'" Charles F. Wilkinson, *The Public*

[825] The underlying facts in *Pollard's Lessee* are difficult to decipher from the decision. Some of them, which the author derives from secondary sources, do not seem to be in the opinion at all. Some of these additional facts may be found in prior litigation involving some of the parties, e.g., *Pollard's Lessee v. Files*, 43 U.S. 591 (1844). It appears that congressional approval of a patent to Pollard on July 6, 1836 and May 20, 1824 was not a new patent, but confirmation of a patent issued in 1809 by the Spanish government to William Pollard (a predecessor of John Pollard in the litigation). Spain's claim to Florida then extended into what is now the Mobile, Alabama area. (The Court also addressed competing claims by France.) William Pollard's heirs were the plaintiffs in the case (and the losing parties). Hagan was the successor to Curtis Lewis. Hagan evidently claimed title through a grant to Lewis from the State of Alabama. Lewis then drained the formerly submerged tide land and made improvements on it.

Trust Doctrine in Public Land Law, 14 U. Calif. Davis L. Rev. 269, 280 (1980). Although the federal government evidently was allowed to make some money off the land temporarily, it was bound in trust to hold the territory ceded by Georgia and Virginia for the purpose of creating new states on an equal footing with the original 13 states. *Pollard's Lessee*, 44 U.S. at 11. Because the original 13 states held title to submerged lands, the newly created state of Alabama must as well, notwithstanding what the Court called a compact between Alabama and the United States (embodied in the act of admission) by which the United States retained an interest in the submerged lands and Alabama took something less. In reasoning that is difficult to follow, the Court somehow wrapped all this into the U.S. Constitution, thus giving the equal footing doctrine constitutional underpinnings (not limited to the terms of the cession of land by Georgia and Virginia). (The constitutional underpinnings of the equal footing doctrine are explored and confirmed in *Coyle v. Smith*¸ 221 U.S. 559 (Lurton, J.)) In any event, it is now settled law that new states, as a matter of constitutional law (not just the equal footing language typically found in acts of admission) obtain title to beds and banks of navigable waterways upon admission into the union.

What is interesting is that the "trust" in *Pollard's Lessee* obligated the federal government to convey all its interest in the land (including the submerged land) to Georgia. The case had nothing to do with protecting public resources from disposal. Both the federal government and the state government claimed the right to convey the submerged land to private persons. The only question was which government had the right to dispose of the river shore.

Upon this tenuous foundation, and cases similar, today's public trust doctrine rests. When the Court handed down *Illinois Central* 47 years later, it relied on *Pollard's Lessee* for the following proposition:

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.

Illinois Central, 146 U.S. at 435. But did *Pollard's Lessee* really say that? *Pollard's Lessee* supports the first part of that contention—that states have title to submerged lands—and it is consistent with the idea that states have the right to convey or not to convey those submerged lands. But the limitation that the conveyance can occur only if it "can be done without substantial impairment of the interest of the public in the waters"

is found nowhere in *Pollard's Lessee*. The Court in *Illinois Central* addressed the fact that it was extending the reach of the trust from tidewaters to land under non-tidal navigable waters. But it was less forthcoming about the nature of the trust. *Central Illinois* took the "trust" found in *Pollard's Lessee* (the federal responsibility to convey the ceded lands to the new states on equal footing) and, without any real explanation, turned it into a different trust (the state's responsibility to protect the submerged lands from improvident disposal).

(6) *Shively v. Bowlby* (1894)

Two years after its decision in *Illinois Central*, the Court decided the case of *Shively v. Bowlby*, 152 U.S. 1 (1894) (Gray, J.). *Shively* has more recently been described by the Supreme Court as the "seminal case in American public trust jurisprudence."[826] *Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, 484 (1988).

Shively involved a title dispute over submerged lands in the Columbia River in Oregon—a dispute very much like the one in *Pollard's Lessee*. Like the plaintiff in *Pollard's Lessee*, Shively traced his title to a pre-statehood federal patent. Bowlby claimed title under a state grant. For the same reasons as in *Pollard's Lessee*, the Court sided with Bowlby. The Court recognized that "lands flowed by the tide water" were charged with a trust and vested in the states, and that new states have the same rights in such lands as do the thirteen original states.

The *Shively* Court went on to explain that the United States is empowered, under some circumstances, to dispose of submerged land within the territories prior to statehood. *Shively*, 152 U.S. at 48. However, the Court noted the Congress's power to dispose is limited by the public trust and that such lands ordinarily "shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government, but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states."

The quotation above demonstrates that while the case does stand for a public trust, it is not the anti-use one embraced by environmentalists today. Rather, the purpose of the trust was to promote such things as commerce and navigation. In the words of Professor Huffman, "If the Supreme Court majority in *Phillips Petroleum* had in mind to expand the reach of the public trust doctrine in the way advocated by environmentalists, *Shively* is an odd case to have identified as seminal." James L. Huffman, *Speaking of*

[826] From time to time, each of *Arnold*, *Martin, Pollard's Lessee, Illinois Central*, and *Shively* has been awarded the title of being the "seminal" pubic trust case.

Inconvenient Truths—A History of the Public Trust Doctrine, 18 Duke Envtl. L. & Pol'y F. 1, 28 (2007).

(7) *Knight* (1891)

Knight v. United Land Ass'n, 142 U.S. 161 (1891) was yet another case in ejectment, a dispute over title to a block of land in San Francisco that was submerged at the time of statehood in 1850. The details of the dispute (involving such complexities as the Treaty of Guadalupe Hidalgo) are not relevant here. The case is known and cited for its summary of the law of the public trust.

> It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide-waters in the original states were reserved to the several states, and that the new states since admitted have the same rights, sovereignty, and jurisdiction in that behalf as the original states possess within their respective borders. Upon the acquisition of the territory from Mexico the United States acquired the title to tide-lands equally with the title to upland; but with respect to the former they held it only in trust for the future states that might be erected out of such territory. Authorities last cited.

Knight, 142 U.S. at 183 (citation to Martin and other cases omitted).

(8) *Phillips Petroleum* (1988)

The most recent U.S. Supreme Court case to address the public trust doctrine is *Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469 (1988). It is included at this point in the discussion because, despite its youth, it is not a "modern" public trust case. It did not expand the trust, or even comment on the expansion by other courts. Rather, it follows in line with and confirms the teaching of each of the cases discussed above addressing the narrow issue of title to submerged lands.

In this case, the oil company held title to submerged lands in a non-navigable Mississippi bayou influenced by the tide in the Gulf of Mexico. It traced its title to pre-statehood Spanish land grants. When the State of Mississippi issued oil and gas leases located on those submerged lands, the company brought a quiet title suit aimed at blocking the leases. The state contended that it held title to the submerged lands under a public trust by virtue of the equal footing doctrine. Neither Phillips Petroleum nor, apparently, any of the amici curiae argued against the existence of the public trust doctrine. Instead, the whole case turned on whether the doctrine was limited to land under navigable waters or whether it also reached the land here under a non-navigable

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tidal bayou. The majority sided with the State of Mississippi, holding that the trust reached both navigable and non-navigable tidal lands.[827]

What is most interesting is that the case contains not a hint that the state's public trust responsibilities limit its ability to alienate the trust lands. To the contrary, the Court was quite clear that it was up to each state what they wanted to do with the lands. "[M]any coastal States, as a matter of state law, granted all or a portion of their tidelands to adjacent property owners long ago. Our decision today does nothing to change ownership rights in States which previously relinquished a public trust claim to tidelands such as those at issue here." *Phillips Petroleum*, 484 U.S. at 483.

In the words of one commentator, "The supreme irony of the case is that the State of Mississippi did not assert its claim of ownership on the basis of its desire to protect the traditional public uses of navigable waters, nor on the basis of a concern for the ecological integrity of those waters as the modern advocates of the public trust doctrine would have it. The State's belated and opportunistic interest in the lands was based on its desire to derive revenue from the lease of those lands for petroleum development." James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 Duke Envtl. L. & Pol'y F. 1, 68 (2007) (internal quotation marks omitted).

C. Expansion of the doctrine—a trust for the protection of natural resources

(1) The Sax articles (1970 and 1980)

A review of the Supreme Court decisions discussed above, from *Arnold* to *Phillips Petroleum*, would not lead most people to the conclusion that the public trust doctrine is an engine of reform empowering courts to overturn cavalier governmental action that is contrary to public values. *Illinois Central*, after all, employed the doctrine in government's defense. Indeed, the Supreme Court described the doctrine in much more mundane terms as recently as 1988: "Though great public interests and neither insignificant nor illegitimate private interests are present and in conflict, this in the end is a title suit." *Phillips Petroleum*, 484 U.S. 472.

Professor Sax, however, saw a great deal more in the doctrine than a mechanism for resolving title disputes. His seminal 1970 article,[828] followed by another prod in

[827] The dissent complained that this made no sense. "Because the fundamental purpose of the public trust is to protect commerce, the scope of the public trust should parallel the scope of the federal admiralty jurisdiction." *Phillips Petroleum*, 484 U.S. at 488 (J. O'Connor dissenting).

[828] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970).

1980,[829] changed the face of doctrine, leading to its expansion and reinvisioning as a judicial tool for blocking private development of natural resources. Professor Huffman later described the impact of Sax articles:

> At the dawn of the modern environmental movement, on the heels of the first Earth Day and before the enactment of most of today's environmental regulations, Professor Joe Sax published an article that anticipated the challenges environmentalists would face in the legislative process and the successes they would achieve in the courts. The little known public trust doctrine, wrote Sax, could be a powerful tool for "effective judicial intervention" on behalf of environmental protection and natural resource conservation. Sax's article spawned a still raging flood of academic commentary on the public trust doctrine and encouraged environmentalists across the country to petition for judicial intervention in the name of the public trust. Sax later recognized the limited application of the doctrine historically, but he was optimistic about how the general concept of public rights might be expanded to impact all manner of natural resource and environmental management issues.

James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 Duke Envtl. L. & Pol'y F. 1, 3 (2007) (footnotes omitted).

Professor Sax described *Illinois Central* as the "Lodestar in American Public Trust Law." Sax, 68 Mich. L. Rev. at 489. His article collected state court decisions from around the nation[830] that followed suit in some way, and offered them up as a "doctrine." He concluded, "Perhaps the most striking impression produced by a review of public trust cases in various jurisdictions is the sense of openness which the law provides." Sax, 68 Mich. L. Rev. at 553. "Certainly the principle of the public trust is broader than its traditional application indicates. Sax, 68 Mich. L. Rev. at 557.

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[829] Ten years later, he published another article urging again for expansion of the doctrine. Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U. Calif. Davis L. Rev. 185 (1980). Indeed, the entire volume of this law review was devoted to articles about the public trust doctrine, most of which urged its expansion.

[830] In particular, Professor Sax highlighted *Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114 (Mass. 1966) (invalidating a lease of park land for development of a tramway); *Priewe v. Wisconsin State Land and Improvement Co.*, 67 N.W. 918 (Wis., 1896) (invalidating legislative action allowing draining of a lake to allow private land development); *People v. California Fish Co.*, 138 P. 79 (1913) (holding that persons who took title to tidelands in San Francisco took them subject to the public trust and, in particular, the public right of navigation).

To a large extent, Professor Sax's urging has been followed. As a recent commentator, Professor Tuholske of Vermont Law School, has noted, "Courts have focused less on the state's property rights in the lands underlying the water, and more on the state's duty as trustee to balance private property rights in common natural resources against the public's interest in water as a common natural resource." Jack Tuholske, *Trusting the Public Trust: Application of the Public Trust Doctrine to Groundwater Resources*, 9 Vt. J. Envtl. L. 189, 216 (2008).

(2) Mono Lake and other recent state decisions

The most celebrated of the modern public trust decisions is the California Supreme Court's protection of Mono Lake in *National Audubon Society v. Superior Court of Alpine Cnty.,* 658 P.2d 709, 718 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983).[831] In this case the environmental group challenged diversions by the City of Los Angeles from tributaries to Mono Lake, contending that they harmed the lake's ecosystem. The court extended the reach of the public trust doctrine to non-navigable tributaries of navigable rivers and lakes. *National Audubon*, 658 P.2d at 721. Although Los Angeles held water rights authorizing the diversion, the court held those rights could be trumped by the public trust doctrine. "Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water." *National Audubon*, 658 P.2d at 728. The net effect was to subject virtually every water right in the state to potential, ongoing re-distribution, all without compensation.[832]

In so ruling, the court noted that it had earlier extended the reach of the public trust doctrine to embrace not just navigation, commercial, and fishing interests but "environmental and recreational values." *National Audubon*, 658 P.2d at 712 (citing *Marks v. Whitney*, 491 P.2d 374 (1971)). "There is a growing public recognition that one of the most important uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state." *National Audubon*, 658 P.2d at 719 (citing *Marks v. Whitney*, 491 P.2d 374 (1971)).

A handful of other state court decisions have followed suit. A few examples follow.

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[831] The Mono Lake case was foreshowed by an article by Professor Johnson in 1980, in which he argued that the doctrine should be expanded to include water rights. Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U. Calif. Davis L. Rev. 233 (1980).

[832] "Once again we rejected the claim that establishment of the public trust constituted a taking of property for which compensation was required." *National Audubon Society v. Superior Court of Alpine Cnty.,* 658 P.2d 709, 723 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983).

- In extending the doctrine to private sandy beaches, the New Jersey Supreme Court declared, "[T]he public trust doctrine [is] not to be 'fixed or static' but [may be] 'molded and extended to meet changing conditions and needs of the public it was created to benefit." *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984) (internal quotation omitted).

- In *Montana Coal. For Stream Access, Inc. v. Curran*, 682 P.2d 163, 170 (Mont. 184), the Montana Supreme Court extended the reach of the doctrine to all waters of the state in the context of stream access.

- Drawing heavily on *National Audubon Society* as well as recent amendments to its own constitution, the Hawaii Supreme Court extended the public trust doctrine to all waters of the state, including ground water. *In the Matter of Water Use Permit Applications ("Wai' Hole Ditch)*, 9 P.3d 409 (2000).[833]

These decisions and others like them have shaped a modern public trust doctrine that may be used to protect a broad range of public and environmental values, not just the traditional uses of navigation, commerce, and fishing.[834] They have, as Professor Sax urged, liberated the public trust doctrine from its historical shackles.

D. The public trust doctrine in Idaho

(1) Idaho case law

(a) *Callahan* (1915)

Since 1915, Idaho has recognized that, pursuant to the equal footing doctrine, the State holds title to the beds of navigable waters below the ordinary high water mark ("OHWM"). *Callahan v. Price*, 26 Idaho 745, 146 P. 732 (1915) (reversing *Johnson v. Johnson*, 14 Idaho 561, 95 P. 499 (1908).[835] But it was not until 1983 that the State

[833] Also see *Robinson v. Ariyoshi*, 65 Hawaii 641, 658 P.2d 287 (1982), *reconsideration denied* 66 Hawaii 528, 726 P.2d 1133 (1983).

[834] There are limits to how far the public trust doctrine can be stretched. In one case illustrating the dangers of an overly creative legal mind, counsel for a group of publishers argued that a statute extending copyright protection violated the public trust doctrine. The court, citing *Phillips Petroleum* and *Air Florida*, dismissed this argument in one sentence. "Insofar as the public trust doctrine applies to navigable waters and not to copyrights, the retroactive extension of copyright protection does not violate the public trust doctrine." *Eldred v. Reno*, 74 F. Supp. 2d 1, 4 (1999) (in extensive appeals, the public trust doctrine was not discussed again).

[835] For further discussion of navigability, see discussion in section 45 at page 833.

recognized the public trust doctrine. *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.* ("*KEA*"), 105 Idaho 622, 671 P.2d 1085 (1983) (Huntley, J.).

(b) *KEA* (1983)

In *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.* ("*KEA*"), 105 Idaho 622, 671 P.2d 1085 (1983) (Huntley, J.), an environmental group sought judicial review of the State's issuance to the yacht club of a 10-year encroachment permit for a sailboat dock in Lake Coeur d'Alene. Relying extensively on the 1970 article by Professor Sax, the Idaho Supreme Court recognized the applicability of the doctrine in Idaho. Although it recognized the doctrine, the Court found that this particular grant of a temporary permit did not violate the trust. However, the Court, citing *Mono Lake*, emphasized that the grant was subject to the trust and that "the state is not precluded from determining in the future that this conveyance is no longer compatible with the public trust imposed on this conveyance." *KEA*, 105 Idaho at 631, 671 P.2d at 1094. In other words, evidently, the State could change its mind in the future, and revoke the dock permit. The Court also recognized that the trust encompasses and protects a broader range of uses, including fish and wildlife habitat, recreation, aesthetic beauty, and water quality. *KEA*, 105 Idaho at 631, 671 P.2d at 1094. That part of the decision has been legislatively overruled by the 1996 legislation restricting the public trust doctrine to its historical purposes.

(c) *Idaho Forest Indus.* (1987)

Note: See Idaho Road Law Handbook for discussion of Idaho Forest Indus. In the context of adverse possession of submerged lands.

Four years later, in *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist.*, 112 Idaho 512, 516, 733 P.2d 733, 737 (1987) (Bakes, J.), the Court explained that the two doctrines (equal footing and public trust) work in conjunction, but serve distinct functions. The equal footing doctrine establishes the State's title; the public trust doctrine restricts the State's ability to alienate trust lands.[836]

In *Idaho Forest Indus.*,[837] the Idaho Supreme Court reaffirmed its decision in *KEA*,

[836] "[T]he doctrines of equal footing and public trust, though related, are distinct in their functions. The equal footing doctrine grants legal title to the state in all lands below the natural high water mark of navigable waters as they existed at the date of admission into statehood. The public trust doctrine, on the other hand, does not grant title of such lands to the state but merely preserves inviolate the public's use of those lands." *Idaho Forest*, 112 Idaho at 516, 733 P.2d at 737.

[837] In a subsequent appeal, the court applied the law to the facts, holding that lands above a dike were not subject to the public trust. *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist.*, 135 Idaho 316, 17 P.3d 260 (2000).

describing the holding as being that "public trust uses include those of fish and wildlife habitat, recreation, aesthetic beauty and water quality." *Idaho Forest*, 112 Idaho at 516, 733 P.2d at 737. However, the Court limited the applicability of the doctrine to land under navigable waters. "There is no 'public trust doctrine' relating to land which is wholly independent or unconnected with such navigable waters." *Idaho Forest*, 112 Idaho at 516, 733 P.2d at 737.

(d) *Selkirk-Priest* (1995)

In *Selkirk-Priest Basin Ass'n v. State*, 127 Idaho 239, 899 P.2d 949 (1995), the Idaho Supreme Court again confirmed the applicability of the doctrine. This time, the Court found that there were genuine issues of material fact (thus precluding summary judgment) as to whether a timber sale on state lands might violate the public trust due to its environmental impact on a navigable stream.

(e) *ICL I* (1995)

In *Idaho Conservation League, Inc. v. State ("ICL I")*, 128 Idaho 155, 911 P.2d 748 (1995) (McDevitt, C.J.), various environmental groups sought to intervene in the Snake River Basin Adjudication (a general adjudication of water rights) in order to protect the public's interests under the public trust doctrine. The environmental groups contended that the SRBA court should "consider the public trust as an element of each water right subject to the adjudication." *ICL I*, 128 Idaho at 156, 911 P.2d at 749. The *ICL I* Court declared, "The water rights adjudicated in the SRBA, as with all water rights, are impressed with the public trust." *ICL I*, 128 Idaho at 157, 911 P.2d at 750. (Nevertheless, the Court found that the public trust doctrine is not an "element" of a water right, and therefore fell beyond the jurisdiction of the SRBA court.)

(2) 1996 statute limiting the public trust doctrine

(a) Enactment in 1996

In 1996, acting in response to the *ICL I* case, the Idaho Legislature declared that the public trust doctrine does not apply to water rights or anything else besides the beds of navigable waters at statehood. 1996 Idaho Sess. Laws, ch. 342 (codified at Idaho Code §§ 58-1201 to 58-1203) (enacted 3/19/1996). In so declaring, the legislation repeatedly noted that the doctrine is merely common law, which can always be overridden by statute. Idaho Code §§ 58-1201(4), 58-1201(6), 58-1202(5). So far, no litigant has challenged the authority of the Legislature to limit the public trust doctrine in this way.

Three commentators have suggested that the Legislature lacks that power. Michael C. Blumm, Harrison C. Dunning & Scott W. Reed, *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 Ecology L. Q. 461

(1997); *see also*, A. Dan Tarlock, *Law of Water Rights and Resources*, § 5.59. These commentators offer two basic theories.

First, they contend that, under the equal footing doctrine, the Legislature lacks power to abdicate its public trust responsibility over navigable waters and their beds. This argument is difficult to reconcile with the clear statements of the U.S. Supreme Court that states are free to do as they wish in recognizing or abolishing the doctrine. "But it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Phillips Petroleum*, 484 U.S. at 475 (citing *Shively v. Bowlby*, 152 U.S. 1, 26 (1894) (Gray, J.)).

Second, the authors contend that the Idaho Constitution (specifically Article 15, sections 1, 4, 5, and 6) implicitly constitutionalizes the public trust doctrine. These constitutional provisions deal with the sale, rental, and distribution of water, declaring such to be a "public use." These constitutional provisions predate public utility regulation in Idaho and were aimed primarily at protecting irrigation customers of commercial water companies.[838] These companies (which do not exist in Idaho any more[839]) operated in a Wild West environment that the drafters plainly intended to bring under control. For instance, the provisions require ditch companies to provide continuous, fair, and equitable service to their customers.

The Idaho Supreme Court has expressly ruled that these provisions do not shift title to water rights held by commercial water companies (which would be the case if the public trust doctrine applied).[840] To the extent that the Idaho courts have recognized trust-like responsibilities on the suppliers of water rights, those duties are to the entity's customers, not to the public at large.[841] Moreover, sections 4 and 5 of the Article 15 are

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[838] The "public use" constitutional provisions are explored in section 30.H beginning on page 616.

[839] This anachronistic corporate form is discussed in section 30.B beginning at page 602.

[840] "Mr. Chief Justice Morgan, speaking for this court in *Witherding v. Green*, 4 Idaho 733, 45 Pac. 134, in considering the purposes of article 15 of the Constitution, made it very clear that the framers of that instrument were only dealing with the "use" of the waters, and not the property right in the waters. Indeed, it can be of no consequence to the state as to where the property in the waters is vested so long as the people have reserved to themselves the right to regulate the use." *Hard v. Boise City Irrigation Co.,* 9 Idaho 589, 600-01, 76 P. 331, 334 (Justice Ailshie, concurring) (quotation marks and italics appear only in Idaho Reports)*.; See also, Farmers' Co-operative Ditch Co. v. Riverside Irr. Dist.*, 14 Idaho 450, 457-59, 94 P. 761, 763 (1908). See discussion of ownership of commercial irrigation company rights in section 31.C beginning on page 625.

[841] See discussion in section 30.H beginning on page 616. The authors of the Ecology Law Quarterly article acknowledge this: "While the recognized beneficiaries of the fiduciary

expressly limited to agricultural water, making them ill-suited to support a broad public trust doctrine. In conclusion, reliance on these constitutional provisions in support of the public trust doctrine appears to be misplaced.

The effect of the statute is to limit the public trust doctrine to its historical application under *Shively v. Bowlby*, 152 U.S. 1 (1894) (Gray, J.), that is to conveyances or other actions by the State impairing public ownership in lands beneath navigable waters. The 1996 act says the doctrine is "solely a limitation on the power of the state to alienate or encumber the title to the beds of navigable waters." Idaho Code § 58-1203(1).[842]

The upshot is that the Legislature has taken the expanded public trust doctrine (protecting recreational, environmental, and other purposes) out of play and thereby eliminated from Idaho law a major area of potential contention. As a result, the statutory law governing evaluation of the "local public interest" (discussed below in section 27) will provide the primary legal forum for raising public interest issues in connection with water allocation and re-allocation in Idaho.

(b) *Sanders Beach* (2006)

In the Matter of the Ownership of Sanders Beach, City of Coeur d'Alene v. Macklin, 143 Idaho 443, 147 P.3d 75 (2006) (Eismann, J), dealt with public access to a beach in Lake Coeur d'Alene. Owners of lakefront property sought to establish that their littoral rights included the right to exclude the public from the beach (which was originally submerged land before the lake level dropped). The Idaho Supreme Court rejected that argument for a number of reasons, including that exclusion of the public would violate the public trust doctrine. Citing *KEA* and other pre-1996 cases, the Court noted that "the public trust doctrine has been expanded to include uses other than those strictly incident to navigation" and that it now encompasses "fish and wildlife habitat, recreation, aesthetic beauty and water quality." *Sanders Beach*, 143 Idaho 453, 147 P.3d at 85. It appears that both the Court and the litigants were unaware of the 1996 legislation reversing that case law. The 1996 act is not mentioned in either the opinion or

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obligation imposed by the Idaho constitution thus far have been primarily agricultural and municipal water consumers, the public's use of the waters of the state is hardly limited to agricultural and municipal consumption." Blumm, Dunning & Reed, at 499.

[842] In belt and suspenders style, the 1996 statute goes on expressly to disclaim any applicability of the doctrine to the appropriation, use, or transfer of water rights. Idaho Code § 58-1203(2)(b). It also blocks the application of the doctrine in the context of the disposal of school lands. Idaho Code § 58-1203(2)(a). Finally, the act declares the public trust doctrine inapplicable with respect to the "protection or exercise of private property rights within the state of Idaho." Idaho Code § 58-1203(2)(c). However, "private property rights" are defined as rights to property above the beds of navigable waters. Idaho Code § 58-1202(4). The definition neglects to say whether that means today or at the time of statehood."

the briefing. (The Court subsequently recognized the limiting effect of the act in *Newton v. MJK/BJK, LLC*, 167 Idaho 236, 469 P.3d 23 (2020) (Brody, J.) discussed below.)

(c) *Newton* (2020)

In *Newton v. MJK/BJK, LLC*, 167 Idaho 236, 469 P.3d 23 (2020) (Brody, J.), the Court recognized the limiting effect of the 1996 legislation on the scope of the public trust doctrine (which it called the PTD).[843] "The [PTD] as it is applied in the state of Idaho *is solely a limitation on the power of the state to alienate or encumber the title to the beds of navigable waters*." *Newton*, 167 Idaho at 242, 469 P.3d at 29 (emphasis original).

The Court went on to hold that because the trust is a constraint on the State, other persons have no right to enforce the trust.

> In a similar vein, the PTD does not provide an aggrieved private party with the right to seek injunctive relief. Under the PTD Act, the PTD is "solely a limitation on the power of the state" to encumber the beds of navigable waters and does not apply to the protection or exercise of private property rights in Idaho. I.C. § 58-1203(1), (2)(c). While the PTD does not limit or alter other provisions of the Idaho Code—including the LPA—the PTD does not grant an individual the right to pursue civil or injunctive relief. Accordingly, the LPA and PTD do not provide the Newtons with a cause of action to seek injunctive relief.

Newton, 167 Idaho at 244, 469 P.3d at 31.[844]

This is, after all, how the trust was enforced in the seminal cases—by the State. In *Illinois Central*, the Illinois Legislature gave away submerged land and then sought to revoke the grant. In *KEA*, the Court declared that "the state is not precluded from determining in the future that this conveyance is no longer compatible with the public trust imposed on this conveyance." *KEA*, 105 Idaho at 631, 671 P.2d at 1094.

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[843] *Newton* implicitly corrected the oversight in *In the Matter of the Ownership of Sanders Beach, City of Coeur d'Alene v. Macklin*, 143 Idaho 443, 147 P.3d 75 (2006) (Eismann, J), in which the Court relied on pre-1996 precedent describing a broader scope of the public trust doctrine, evidently was unaware of the 1996 act.

[844] While *Newton* recognized the limiting effect of the 1996 legislation, another post-1996 case missed it altogether. See *In the Matter of the Ownership of Sanders Beach, City of Coeur d'Alene v. Macklin*, 143 Idaho 443, 147 P.3d 75 (2006) (Eismann, J).

E. Transfers in violation of the trust are not void, but remain subject to the trust.

The seminal case, *Illinois Cent. R.R. Co. v. Illinois* ("*Illinois Central*"), 146 U.S. 387 (1892) (Field, J.), says that a grant in violation of the trust is voidable, not void *ab initio*.

> A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. …
>
> Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant, which the state ought to pay; but, be that as it may, the power to resume the trust whenever the state judges best is, we think, incontrovertible.

Illinois Central, 146 U.S. at 453 (emphasis added).

Indeed, that is what happened in that case. The Legislature made a grant of submerged land to the railroad, then then sought to revoke it. The Court made clear in the quotation above that the grant is revoked, the State must reimburse the grantee for investments is made in reliance on the grant. The implication is that unless and until the illegal grant is judicially revoked, it is effective.

In Idaho's seminal case, *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.* ("*KEA*"), 105 Idaho 622, 671 P.2d 1085 (1983) (Huntley, J.), the Court did not need to address whether a violation of the trust is void or voidable. This case involved a timely challenge at the time of permit issuance. However, the Court included language suggesting that appropriate relieve is revocation. Specifically, the Court, held that if a grant is made in violation of the trust, "the state is not precluded from determining in the future that this conveyance is no longer compatible with the public trust imposed on this conveyance." *KEA*, 105 Idaho at 631, 671 P.2d at 1094.

Likewise, the Court in *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist.*, 112 Idaho 512, 733 P.2d 733 (1987) (Bakes, J.) did not have need to rule on whether an improper conveyance of trust property is void or merely voidable, because it remanded without deciding if there was any violation. However, the Court observed: "The conveyance generally remains subject to the public trust even after title has passed." *Idaho Forest*, 112 Idaho at 521, 733 P.2d at 742. In other words, the grantee may not impair trust purposes, but the conveyance itself is not void.

This is consistent with holdings of courts in other states. For example, in *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988), the Court explained:

> We adopt the approach employed by our sister states on this question, and hold that any state tideland conveyance which fails to satisfy the requirements of *Illinois Central* will be viewed as a valid conveyance of title subject to continuing public easements for purposes of navigation, commerce, and fishery.

CWC Fisheries at 1118.

Thus, the grantee may occupy and develop the trust property, so long as trust purposes are not impaired. In states like Idaho, where trust purposes are limited to "the paramount right of navigation and commerce" (Idaho Code § 58-1201(1)), the grantee could not impair navigation, would not be obligated to allow public recreational use of the trust property. Between 1983 and 1996, when court decisions briefly expanded the scope of the trust to include such uses, the answer would have been different. But that case law has been overridden by the Legislature.

F. Is there a federal public trust doctrine?

The classic formulation of the public trust doctrine establishes ownership and trust responsibilities in state government. Indeed, in the title-dispute variety of public trust cases (*Arnold*, *Martin*, *Pollard's Lessee, Shively, Knight,* and *Phillips Petroleum*), the public trust doctrine was used to defeat title claimed through the federal government and uphold title claimed through the states. Yet, the push to recognize a broader public trust doctrine at the state level has been accompanied by a push to recognize a public trust doctrine that operates at the federal level applicable to inland federal resources.

Obviously, this requires a departure from the classic formulation of the public trust in a number of ways. It would be held by a different party (the federal government) with respect to different resources (public lands) for different purposes (ranging from the promotion of environmental protection on the one hand to the promotion of public and private utilization of these resources on the other).

(1) The Wilkinson article (1980)

In his 1980 article urging recognition of such a federal trust, Professor Wilkinson admitted, "The federal public lands are at the outer reaches of the public trust doctrine. . . . Put another way, inland federal lands are not 'trust resources' according to the classic formulation of the doctrine." Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. Calif. Davis L. Rev. 269, 273 (1980).

Despite this caution, Professor Wilkinson observed that "some thirty-six opinions over the years have described inland public lands as being held in trust." Wilkinson, 14 U. Calif. Davis L. Rev. at 298.

The article concludes with an interesting examination of potential sources of law for the public trust doctrine. Wilkinson recognizes that if the doctrine is seen as a restraint on the power of Congress, then it must be constitutionally based (presumably in the Property Clause). He concedes that, while there is some authority for that, the proposition is unlikely as "there is nothing in the constitutional debates to indicate such a trust." Wilkinson, 14 U. Calif. Davis L. Rev. at 307. He says that courts "might be more likely to tie the trust to a comprehensive statutory scheme." Wilkinson, 14 U. Calif. Davis L. Rev. at 307. He concludes that even if the doctrine were seen as having a constitutional basis, it is not likely to provide a basis for overturning federal statutes. Wilkinson, 14 U. Calif. Davis L. Rev. at 310.

Whatever its basis, however, Wilkinson suggests that the public trust might prove important in any of several ways. He notes, for instance: "The public trust could also operate as a limitation on the discretion of administrative agencies." Wilkinson, 14 U. Calif. Davis L. Rev. at 310. Wilkinson also suggests that the doctrine could play a role as a rule of construction. Wilkinson, 14 U. Calif. Davis L. Rev. at 313. This, he says, could be true regardless of whether the doctrine is viewed as based on the Constitution or statute. Wilkinson, 14 U. Calif. Davis L. Rev. at 314. Essentially, Wilkinson is saying that the doctrine should be used to construe ambiguous federal land management statutes in a manner that favors protection of the public resource.[845] Finally, Wilkinson notes that the doctrine could be invoked in an "action forcing" role. He gives the example of suing the federal government to force it to assert federal water rights. As discussed in section 26.F(3) at page 543, this has not proved successful to date.

(2) Early federal cases

When Professor Wilkinson wrote his article, he relied on a smattering of early cases describing a federal public trust. None of these provide much detail or analysis of the basis or scope of the trust. Examples include the following.

(a) *Beebe* (1888)

The case of *United States v. Beebe*, 127 U.S. 338 (1888) is cited in cases dealing with the public trust for the following statement: "The public domain is held by the government as part of its trust. The government is charged with the duty, and clothed with the power, to protect it from trespass and unlawful appropriation, and, under certain

[845] It would seem that the doctrine just as well could be applied in the other direction—in support of recognition of the heritage of public use and public access to public lands. Elsewhere in the article, Wilkinson suggests as much. See quotation in section 26.F(4) at page 548.)

circumstances, to invest the individual citizen with the sole possession of the title which had till then been common to all the people as the beneficiaries of the trust. *Beebe*, 127 U.S. at 342. The case involved a challenge to patents issued. It turned primarily on the issue of laches. The commentary on the trust was prologue.

(b) *Trinidad Coal* (1890)

United States v. Trinidad Coal & Coking Co., 137 U.S. 160 (1890), dealt with persons who fraudulently obtained patents to public lands. In construing the statute governing the patenting of coal lands for a low price, the Court invoked trust language in describing the government's role in managing the public lands. "In the matter of disposing of the vacant coal lands of the United States, the government should not be regarded as occupying the attitude of a mere seller of real estate for its market value. . . . [The lands] were held in trust for all the people . . . ." *Trinidad*, 137 at 170.

(c) *Light* (1911)

In *Light v. U.S.*, 220 U.S. 523 (1911), the federal government enjoined a rancher from grazing his cattle on the Holy Cross Forest Reserve in Colorado because he had failed to obtain a permit. The rancher sued, asserting the government lacked the authority to restrict grazing on public lands unless the government fenced the lands in accordance with a state statute. At its core, the case dealt with the issue of supremacy of federal law. However, the case contains important foundational commentary on the public trust responsibility of the federal government with respect to public lands: "It is true that the 'United States do not and cannot hold property as a monarch may, for private or personal purposes.'" *Light*, 220 U.S. at 536 (quoting *Van Broklin v. Anderson*, 117 U.S. 158). The Court continued:

> "All the public lands of the nation are held in trust for the people of the whole country." *United States v. Trinidad Coal & Coking Co.* 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement, or to suffer them to be used for agricultural or grazing purposes, nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose.

Light, 220 U.S. at 537.

Professor Wilkinson described *Light* as "a cornerstone of broad federal management authority over the public lands." Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. Calif. Davis L. Rev. 269, 282 (1980). The case was relied on in *Sierra Club v. Block*, 622 F. Supp. 842 (1985), discussed below.

(3) Modern federal public trust cases

Beginning in 1980, several cases have addressed the idea of a federal public trust applicable to federal lands and/or water rights. Three are negative, but, arguably, not controlling precedent. *Sierra Club v. Andrus*, 487 F. Supp. 443 (D. D.C. 1980), *aff'd, Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir.), *Sierra Club v. Block*, 622 F. Supp. 842 (1985), and *Edmonds Institute v. Babbitt*, 42 F. Supp. 2d 1 (1999).[846] The others are all supportive. None are definitive.

(a) *Sierra Club v. Andrus* (1980)

In *Andrus*, various energy projects were seeking water rights in a Utah general adjudication. The U.S. had not been joined under the McCarran Amendment and was taking no action to assert senior federal water rights. The Sierra Club sued DOI for its failure to join the adjudication and assert federal reserved water rights on various federal lands. The district court granted summary judgment and motions to dismiss against Sierra Club.

The court recognized various statutory duties of the federal agencies to manage federal lands and waters. However, the court rejected Sierra Club's argument that, in addition to these statutory duties, the National Park Service and Bureau of Land Management had independent "trust duties." (Note that the court spoke in terms of "trust obligations" and "trust duties." There is no mention in the opinion of the public trust doctrine as such.) The court held that any "trust duties" are subsumed by the various organic statutes.

With only the statutes to interpret, the court found that DOI had discretion in selecting the most effective way of protecting public resources. The court's key point was that federal reserved water rights, if they exist, would be senior to any new water rights being sought, and that they would be unaffected by the state court proceeding to which the U.S. was not a party. Accordingly, the district court concluded that it was not

[846] In addition, an unreported decision, *Alaska Constitutional Legal Defense Conservation Fund v. Kempthorne*, 2006 WL 2460719 (9th Cir. 2006), states, "The Plaintiffs conceded in the district court that the Public Trust Doctrine is currently applicable only to states . . . ." In *Conservation Law Found. v. Clark*, 590 F. Supp. 1467, 1480 (D. Mass. 1984), the court never reached the environmental group's public trust claim as to federal lands, noting "any further consideration of such general implied public trust duties would be inconsequential to the court's ultimate decision."

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unreasonable for DOI to sit out the state proceedings. The district court held that in the event of a "real and immediate" threat, DOI must take appropriate action.

The Sierra Club took a narrow appeal, limited to the question of whether the Federal Land Policy and Management Act ("FLPMA") created federal reserved water rights. Just prior to oral argument, the U.S. was made a party to the Utah general adjudication. Accordingly, the Court of Appeals reached the merits of this claim. The appeals court found no federal reserved water rights because (1) there was no "reservation" of public lands and (2) the savings clause in FLPMA precluded creation of new federal water rights. The appeals court recited the holdings of the district court regarding trust duties, but it did not address them because they had not been appealed.

Professor Wilkinson criticizes the case, calling it the "leading authority against the existence of a public trust on the public lands." Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. Calif. Davis L. Rev. 269, 290 (1980). He may have accorded the case more dignity that it deserves. The appeals court did not address the trust argument, and the district court's discussion of the trust may be seen as dictum. It appears that the trust duties argument was a throw-away or makeweight argument. The statutes already established that the government had a duty to protect the federal resources. The real holding of the district court case is that federal reserved rights were not threatened by the state court proceeding, in any event. The existence of a public trust would not have changed this. Dictum or not, the case is unhelpful to those seeking recognition of the trust at the federal level. Indeed, it was relied on in *Sierra Club v. Block*, 622 F. Supp. 842 (1985), discussed below.

(b) *Steuart Transportation* (1980)

In *In the Matter of the Complaint of Steuart Transportation Co*., 495 F. Supp. 38 (E.D. Vir. 1980), both the federal government and the Commonwealth of Virginia sought damages for destruction of wildlife caused by an oil spill. With virtually no discussion, the district court concluded: "Under the public trust doctrine, the State of Virginia and the United States have the right and duty to protect and preserve the public's interest in natural wildlife resources." *Steuart*, 495 F. Supp. at 40. The court in *Steuart Transportation* cited *Toomer v. Witsell*, 334 U.S. 385, 408 (1948), which it says upheld a state's right "to conserve or utilize its resources on behalf of its own citizens."

(c) *1.58 Acres of Land* (1981)

In *United States v. 1.58 Acres of Land in the City of Boston,* 523 F. Supp. 120 (D. Mass. 1981), the U.S. Coast Guard sought to condemn property for expansion of its facilities in Boston Harbor. The condemnation action was opposed by the Commonwealth of Massachusetts on the ground that the United States could not obtain fee simple title to land below the low water mark. The district court ruled that the federal government could condemn the entire fee, including the *res publicum* (probably the same

thing as Justinian's *jus publicum*) held by the state and that neither sovereign may alienate this land free and clear of the public trust. The case contains a brief but thoughtful history of the public trust doctrine, taking it back to Roman law. This case is helpful in that it recognizes that public trust principles may operate on the federal level, too. But it does not go so far as to recognize any inherent public trust doctrine that operates on the federal level. Here, the federal government was required to condemn this interest. Moreover, it is very traditional and very explicit in speaking about the trust in the context of unique public resources—submerged lands. On the other hand, it contains no statement that the trust could not reach further.

(d) *Air Florida* (1984)

The case that offers the most comprehensive discussion of the topic, albeit in dictum, is *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077 (D.C. Cir. 1984). In this case, the District of Columbia sued Air Florida for recovery of costs associated with providing extraordinary emergency services in response to an airplane crash in the Potomac River. The district court dismissed the case. On appeal, the city raised for the first time the novel theory that Congress implicitly delegated its federal public trust responsibilities for the Potomac River to the city. In a thoughtful opinion by judge and former law professor Harry Edwards, the appellate court declined to consider this "novel" argument because it had not been raised below. *Air Florida*, 750 F.2d at 1078. Nevertheless, the court included carefully researched and analyzed dictum on the public trust doctrine. Essentially, the court concluded that the public trust doctrine might extend further than its historical roots to embrace federal resources, but that this is too important a question to be resolved without a full record and the United States as a party.

First, the court observed that the doctrine is evolving at the state-law level:

> Traditionally, the doctrine has functioned as a constraint on states' ability to alienate public trust lands and as a limitation on uses that interfere with trust purposes. More recently, courts and commentators have found in the doctrine a dynamic common-law principle flexible enough to meet diverse modern needs. The doctrine has been expanded to protect water-related uses such as swimming and similar recreation, aesthetic enjoyment of rivers and lakes, and preservation of flora and fauna indigenous to public trust lands. It has evolved from a primarily negative restraint on states' ability to alienate trust lands into a source of positive state duties. As the California Supreme Court observed, "the public trust . . . is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands . . . ."

Air Florida, 750 F.2d at 1082-83 (quoting *National Audubon*, 658 P.2d at 724; footnotes omitted).

Next, the court recognized that its scope may be expanded to encompass a federal trust: "In this country the public trust doctrine has developed almost exclusively as a matter of state law." *Air Florida*, 750 F.2d at 1082. "To our knowledge, neither the Supreme Court nor the federal courts of appeals have expressly decided whether public trust duties apply to the United States. There appear to be only two district court cases which explicitly hold that this common-law rule applies to the federal government as well as to the states." *Air Florida*, 750 F.2d at 1083 (citing *Steuart Transportation* and *1.58 Acres of Land)*.

The court clearly recognized that if the public trust doctrine is applicable to federal resources, it is based on federal common law. The court noted, cautiously, that federal common law is subject to preemption and that "Congress has legislated extensively with regard to many of the interests which the public trust doctrine protects." *Air Florida*, 750 F.2d at 1085-86. But, said the court, this is a "complex question" for another day. *Air Florida*, 750 F.2d at 1086.

(e) *Sierra Club v. Block* (1985)

The holding in *Sierra Club v Andrus*, discussed above, was followed in *Sierra Club v. Block*, 622 F. Supp. 842 (1985).[847] The facts of the two cases are similar. In both cases, the Sierra Club sought to force the federal government to assert federal reserved water rights in an ongoing general adjudication. In both cases, the central focus of the case was the extent to which the government's position would be harmed by failing to assert these rights and whether the failure to do so violated statutory responsibilities. In *Block*, the relevant statute was the Wilderness Act. In both cases, the Sierra Club tacked on the public trust doctrine argument as a back-up to the statutory violation argument.

The district court in *Block* expressly recognized that there is a federal public trust over public lands. "Under the 'public trust doctrine', which is a common law concept, 'all the public lands for the nation are held in trust [by the government] for the people of the whole country." *Block*, 622 F. Supp. at 866 (quoting *Light*, 220 U.S. at 537) (brackets original). However, it held that, in this case, those trust duties were subsumed by the Wilderness Act:

[847] The *Block* case dealt with whether the government's failure to claim federal reserved water rights for a wilderness violated the public trust doctrine. It was followed by two others in the same chain of litigation. *Sierra Club v. Lyng*, 661 F. Supp. 1490 (D. Colo. 1987), *rev'd on ripeness grounds*, *Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990). They dealt solely with the reserved rights issue; neither addressed the public trust issue.

> However, "it is not for the courts to say how that trust shall be administered. That is for Congress to determine." *Light*, 220 U.S. 523, 537, 31 S. Ct. 485, 487. Where Congress has set out statutory directives, as in the instant case, for the management and protection of public lands, those statutory duties "compris[e] *all* the responsibilities which defendants must faithfully discharge." *Sierra Club v. Andrus*, 487 F. Supp. 443, 449 (D.D.C. 1980) (emphasis in original) . . . .

Block, 622 F. Supp. 866.

This language sounds like a repudiation of the public trust doctrine with respect to wilderness lands, and perhaps all public lands. But it need not be read so broadly. The *Block* court relies on *Light* for the proposition that it is for Congress to determine how the trust shall be administered. Those words, however, are taken out of context. The Court in *Light* was simply affirming the right of Congress to withdraw land for forest purposes and to impose rules requiring grazing permits, even where inconsistent with state law governing grazing. The rest of the quotation from *Light* makes clear that Congress has discretion in making decisions about how to administer the trust and that it may favor one trust purpose over another. But in the end, it must "devote the property to some other national and public purpose." *Light*, 220 U.S. at 537. Thus, under *Light* and *Block*, it would seem that where the Congress has clearly and affirmatively declared a particular management decision and that decision is consistent with overall trust purposes, the court may not second-guess that decision—hardly a remarkable conclusion. But there may be other times when Congress has been less than clear in mandating a particular management outcome. And there may be times when the public trust doctrine may continue to play a role in interpreting the words of Congress. *Block* recognized as much when it limited its holding to those situations "[w]here Congress has set out statutory directives." *Block*, 622 F. Supp. at 866.

In sum, *Block* is a significant case. It expressly recognizes that federal lands are impressed with a public trust. It recognizes that those trust purposes may be controlled and subsumed by express statutory directives.[848] In the absence of controlling comprehensive federal legislation, however, *Block* may be read to support (or at least be consistent with) a continuing role for the public trust impressed on federal lands.

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[848] This is consistent with the court's citation (without discussion) to *Middlesex Cnty. Sewerage Authority v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981), which held that the federal common law of nuisance was pre-empted by the Clean Water Act and found no implied private cause of action under the Clean Water Act other than the citizen suit provisions contained in the act.

(f) *Burlington Northern* (1989)

In *United States v. Burlington Northern Railroad Co.*, 710 F. Supp. 1286 (D. Neb. 1989), the federal government sued the railroad for damages for loss of wildlife at the Harvard Waterfowl Protection Area resulting from a fire caused by the railroad. The United States claimed these damages based on a public trust doctrine theory. The railroad sought summary judgment, noting that the public trust doctrine has historically been asserted by the states, not by the federal government. The district court declined to grant summary judgment, noting that it has also been applied in the federal context, noting several cases. No appeal is reported.

(g) *Edmonds Institute* (1999)

In *Edmonds Institute v. Babbitt*, 42 F. Supp. 2d 1 (1999), environmental groups challenged the decision of the Department of the Interior to allow "bioprospecting" for microorganisms in geysers in Yellowstone National Park. Along with numerous other legal theories, they claimed that the action violated the public trust. The court noted the similarity of the claim to the one rejected in *Sierra Club v. Andrus.* Technically, however, the court never reached the merits, due to how the case was pled. The environmental groups raised the public trust claim solely as a backup to their statutory claims. Since the court did not dismiss the statutory claims, it found it unnecessary to rule on the public trust claim. *Edmonds Institute*, 42 F. Supp. 2d at 17.[849]

(4) Would a federal public trust doctrine support public access and private utilization of natural resources?

Although they are something of a mixed bag, the cases discussed in the previous section lend some support to the idea of a federal public trust. Each of them, however, arose in a narrow factual setting limiting the value of the precedent. At this point, all that can be said is that there remains potential for application of the doctrine to constrain the management of federally controlled public resources.

Commentators and advocates who have pushed for such recognition see the doctrine as a vehicle for environmental protection and preservation. It would seem just as plausible, however, that a federal public trust doctrine could be employed on behalf of the public's right to use public resources. This might include public access or even consumptive uses such as mining, timber, and grazing.

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[849] Although the court did not rule on the matter, its language does not suggest much enthusiasm for the doctrine. In a subsequent round of litigation, the same judge, reciting the prior procedural history, referred to the "so-called public trust doctrine." *Edmonds Institute v. Babbitt*, 93 F. Supp. 2d 63, 66 (2000).

Indeed, one might suggest that application of the public trust for preservation purposes is more of a stretch than application of the doctrine for traditional use purposes. After all, the doctrine at its very foundation was created to protect and promote private use of public resources—notably navigation, commerce, and fishing. Application of the public trust doctrine to protect uses of the federal lands like grazing, timbering, mining, and road use that are deeply engrained in American development of the West calls for no departure from precedent but rather a return to the doctrine's roots.[850]

Professor Wilkinson recognized as much. "As such, it would be a doctrine advanced by environmentalists and by industry and would have no ideological content. The doctrine could be invoked by industry, for example, to emphasize the high standard of care incumbent on the Forest Service if it mishandled a timber sale, or on the BLM if it unreasonably delayed the processing of competitive bidding on a mineral lease." Wilkinson, 14 U. Calif. Davis L. Rev. at 310.

[850] Although no court has squarely addressed this, one can find statements in the cases that reinforce a use-oriented application of the public trust doctrine. For instance, in *In the Matter of the Complaint of Steuart Transportation Co*., 495 F. Supp. 38 (E.D. Vir. 1980), the court upheld a state's right "to conserve or utilize its resources on behalf of its own citizens." The reference to "utilize" recognizes that the public trust doctrine is not just about protecting public resources but using them.

27. LOCAL PUBLIC INTEREST REVIEW

A. Brief overview of the local public interest review

Note: This section of the *Handbook* deals with the "local public interest" as defined in Idaho Code § 42-202B(3). A separate part of the Water Code sets out "public interest" criteria applicable to certain hydropower applications. Idaho Code § 42-203C(2). The latter is not addressed in this *Handbook*.

Prior to 1978, applications for water right appropriations and transfers were decided solely on the basis of the traditional issues, such as injury, enlargement, beneficial use and speculation. Neither the Department nor affected citizens had authority to address the impacts that a water right appropriation or transfer might have on the environment.[851] Indeed, in the early days of mining development, water uses often had horrific consequences on the local environment. At one time, that was considered a cost of progress, and the law of water rights provided no mechanism for anyone to object.

That changed dramatically in 1978[852] when the Idaho Legislature added a "local public interest" review requirement to the steps required for approval of appropriations of new water rights. 1978 Idaho Sess. Laws, ch. 306, § 1 (codified as amended at Idaho Code §§ 42-202B(3), 42-203A(5)(e)). This test was soon applied in other settings. In 1979, when the water supply bank was created, the local public interest test was made applicable to water bank rentals. 1979 Idaho Sess. Laws, ch. 193, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-1763). In 1981 the Legislature made the test applicable to changes (also known as transfers) of existing water rights. 1981 Idaho Sess. Laws, ch. 147, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-222(1)).

As originally enacted, the public interest provision stated as follows:

> [W]here the proposed use is such . . . 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 may reject such application . . . .

[851] *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981) (in which the Idaho Department of Water Resources had ruled that water quality concerns were an "inappropriate consideration" prior to the adoption of the local public interest test).

[852] There is a pre-1978 ancestor of sorts to the public interest test. An oblique reference to the "public interest" in the context of certain water right applications requiring approval by the Idaho Water Resource Board was made a part of the water code in 1967. 1967 Idaho Sess. Laws, ch. 374, § 2. It was repealed two years later. 1969 Idaho Sess. Laws, ch. 468, § 1. However, this short-lived provision did not provide a basis for a broad public interest review.

1978 Idaho Sess. Laws, ch. 306, § 1 (emphasis added) (formerly codified to Idaho Code § 42-203A(5)(e)).

This broad language opened the door for the Department to consider other matters, such as environmental protection. In the next two decades, there was surprisingly little debate over this provision. Water appropriations and transfers were not routinely challenged on public interest grounds. Only five cases resulted in appellate decisions.[853] Of those, only one contained any real analysis of the scope of the statute, and its language was equally broad.[854]

Beginning in its twentieth year (1998), however, the local public interest statute began to generate a substantial number of contested cases. Concerned citizens, environmental groups, local protective associations, and even municipalities began filing protests of water right applications, contending that the new use would impair the local public interest. This burst of activity coincided with the growth of the large-scale dairy industry in Idaho. Local public interest litigation, however, was not limited to dairy conflicts. Public interest battles were also waged by those opposing such things as ski development, power plants, fish production facilities, and competing municipal water supplies.[855]

In prior years, these cases might have sailed through the administrative process. With active protestants involved, however, applicants were obligated to hire experts, undertake studies, produce reports, and defend their conclusions in a formal contested case.

The instances in which the end result was changed by this process appear to be few and far between. In other words, most applicants received the approvals they sought, albeit sometimes with additional conditions. Where applications have been rejected, the rejection usually has been premised on grounds other than the local public interest. The real impact of the public interest litigation, from the perspective of water right applicants, was transaction costs. These protests often delayed projects for a year or more, and could result in huge bills for technical and legal costs.

These administrative and, occasionally, judicial contests set off a firestorm of debate over the proper scope of the local public interest test. Those bringing the protests insisted that there is nothing wrong in requiring developers to slow down a bit and justify their actions, even if that entails increased costs and delay. After all, they observed, in

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[853] Each of these is discussed in section 27.C beginning on page 560.

[854] *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985) (discussed in section 27.C at page 560).

[855] These cases are summarized in section 27.D at page 571 (district court cases) and in section 27.E at page 574 (IDWR decisions).

many cases there simply was no other forum available to publicly air issues raised by the proposed developments.

Those on the receiving end of the regulatory process, however, complained that the local public interest test was being used to address things far beyond its intended scope and outside the expertise of the IDWR. Applicants were required to present evidence to IDWR officials on issues as far afield as dairy odor, lifestyle impacts, competitive economic impacts, and transportation system impacts. The resulting hue and cry ultimately resulted in an amendment to the local public interest language in 2003, over the vigorous objection of environmental groups and others.

In 2003, the Legislature redefined "local public interest" to limit its scope as follows:

> "Local public interest" is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.

H.B. 284, 2003 Idaho Sess. Laws, ch. 298 (codified in pertinent part at Idaho Code § 42-202B(3)). This definition was made applicable to new appropriations, transfer, water bank transactions, and exchanges. See discussion in section 27.B at page 556.

The effect of the language is to re-focus the Department's local public interest review on issues within its jurisdiction relating to the affected water resource. The Statement of Purpose accompanying the legislation carefully explained this purpose, emphasizing that the local public interest test should not be used as an impediment to the full development of Idaho's water resources. The Statement of Purpose is set out in the footnote.[856]

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[856] The Statement of Purpose reads:

> This legislation clarifies the scope of the "local public interest" review in water right applications, transfer and water supply bank transactions. This legislation is intended to ensure that the Department of Water Resources has adequate authority to require that diversions, transfers and other actions affecting water resources do not frustrate the public's interest in the effective utilization of its water resources. The "local public interest" should be construed to ensure the greatest possible benefit from the public waters is achieved; however, it should not be construed to require the Department to consider secondary effects of an activity simply because that activity happens to use water. For example, the effect of a new manufacturing plant on water quality, resident fish and wildlife and the availability of water for other beneficial uses is appropriately considered under the local public interest criteria. On the other hand, the effect of the manufacturing plant

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Thus, the clear effect of the 2003 change is that an opponent of a development project which happens to require a water right may no longer use the water right application process to complain about the project's environmental or land use impacts unrelated to the water resource itself. It is no longer permissible to put on evidence about dairy odor, noise, dust, traffic, etc. These are land use matters that must be taken up with municipal and other authorities with proper jurisdiction.

> on the air quality is not within the local public interest criteria because it is not an effect of the diversion of water but rather a secondary effect of the proposed plant. While the impact of the manufacturing plant on air quality is important, this effect should be evaluated by DEQ under the EPHA. As noted by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330 (1985), "[i]t is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors—that role is vested" in other agencies.
>
> Water Resources' role under the "local public interest" is to ensure that proposed water uses are consistent with securing "the greatest possible benefit from [the public waters] for the public." Thus, within the confines of this legislation, Water Resources should consider all locally important factors affecting the public water resources, including but not limited to fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality and the effect of such use on the availability of water for alternative uses of water that might be made within a reasonable time. This legislation contemplates that "[t]he relevant impacts and their relative weights will vary with local needs, circumstances, and interests." "The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resources' sound discretion."
>
> In recent years, some transactions have been delayed by protests based on a broad range of social, economic and environmental policy issues having nothing to do with the impact of the proposed action on the public's water resource. Applicants have experienced costly delays and have been required to hire experts to respond to issues at an agency whose purpose has nothing to do with those issues.
>
> This legislation also clarifies that the effect on the local economy of a watershed or local area that is the source of a proposed use of water but not the place of use for the proposed use shall be considered. The purpose of this criteria is to ensure that out of basin transfers do not deprive a local area of use of the available water supply.

Statement of Purpose, H.B. 284 (2003).

The appellate courts have not said much about the 2003 amendment except to recognize that "the legislature narrowed the definition of local public interest considerably." *Chisholm v. IDWR*, 142 Idaho 159, 164 n.3, 125 P.3d 515, 520 n.3 (2005) (Burdick, J.).

The 2003 legislation put to rest a number of vexing issues, but left others unresolved. The following examples illustrate what is clear and what remains to be worked out.

A water diversion that threatened to dewater a trout stream would plainly fall within the scope of the new local public interest test. Dewatering a stream is undeniably a direct impact on the water resource itself, hence falling squarely within the scope of the test.

On the other hand, the legislation provides no real guidance as to how the Department is to weigh that impact. Presumably, opponents would put on evidence of the value of the stream to the community (including both its economic value and its social value), coupled with evidence that the fishery would be severely impacted.

The applicant might counter with evidence showing that the adverse impact would not be so great. In doing so, the applicant might offer conditions to mitigate the impact. Those conditions might limit the timing of the diversion, or affirmatively require the provision of other environmental benefits, such as substitute habitat, for example. The applicant, presumably, also would be allowed to offer evidence showing that other economic benefits to the community outweighed by the impairment of the fishery. The protestant, of course, would be allowed to counter that economic evidence.

How all the evidence would be weighed by the Department (and by appellate courts) remains to be seen. Eventually, however, we can expect the development of a body of precedent. In the meantime, applicants will have a strong incentive to design their projects with the smallest negative environmental consequences, and to add positive features where possible.

Presumably, the new legislation also encompasses water quality impacts. For instance, if a diversion from a stream would reduce the quantity of water remaining, and, thereby, the assimilative capacity of the stream, this impact would appear to fall within the scope of the 2003 language and would be a proper matter for the Department to evaluate.

The examples above dealt with impacts from the diversion of water. What about adverse impacts resulting from the use of the water? For instance, suppose an applicant sought a water right for use in a facility that would contaminate the water with pollutants, and that the resulting waste water would eventually reach a nearby aquifer raising the level of contaminants in the aquifer. The 2003 language speaks in terms of impacts of "a

proposed water use" (and not just the diversion). This suggests that the Department is authorized to consider impacts including contaminated return flow, seepage or waste water.

The scope of the legislation becomes a little less clear when it comes to more remote impacts. Suppose, for instance, that an applicant sought a water right for a computer production facility, and that there would be zero discharge of contaminated waste water. Could a protestant, nonetheless oppose the application on the ground that eventually those computers are likely to end up in landfills, which will then leach contaminants into the ground water? The authors doubt that the Legislature intended to follow the line of causation that far. The "proposed water use" surely applies to the use of water in the manufacture of computers, but was not intended to allow the Department to trace the life of the product through all its possible impacts on rivers and aquifers. As the Legislature noted in the Statement of Purpose: The local public interest test "should not be construed to require the Department to consider secondary effects of an activity simply because the activity happens to use water."

Eventually, the Department and the courts will articulate guidelines establishing the extent to which it is appropriate to inquire into water quality issues. A major issue here is the extent to which the Department will rely in making its determination on other state and/or federal agencies with more specific responsibilities over water quality. Presumably, for instance, the Department will defer to a large extent to other agencies who have substantial expertise and overlapping regulatory authority in this area.

After all, this is what the Court called for in *Shokal v. Dunn*:

> We believe this to be a correct assessment of the law, but add a word of caution regarding the differing functions of Water Resources and the Department of Health and Welfare. Water Resources must oversee the water resources of the state, insuring that those who have permits and licenses to appropriate water use the water in accordance with the conditions of the permits and licenses and the limits of the law. It is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors—that role is vested in the Department of Health and Welfare, including compliance with the water quality regulations and monitoring effluent discharge in our state's waterways. Nevertheless, although these agencies may have separate functions, Water Resources is precluded from issuing a permit for a water appropriation project which, when completed, would violate the water quality standards of the Department of Health and Welfare. It makes no sense whatsoever for Water Resources to blindly grant permit

> requests without regard to water quality regulations. Hence, Water Resources should condition the issuance of a permit on a showing by the applicant that a proposed facility will meet the mandatory water quality standards. Under this rule, Water Resources has the authority to withhold a permit application until it receives a proposed design which appears to be in compliance with the water quality standards. Once the conditional permit is granted, Water Resources has continuing jurisdiction over compliance with the conditions of the permit, including suspension or revocation of the permit for proven violations of the permit's conditions regarding water quality.

Shokal v. Dunn, 109 Idaho 330, 340-41, 707 P.2d 441, 451-52 (1985) (Bistline, J).

Note that as part of the 2003 amendment to the local public interest legislation, the Legislature grafted onto the water code new protections against out-of-basin water uses.[857] Unlike the newly restrictive local public interest test, the basin-of-origin protection is quite broad, allowing IDWR to consider effects on the local economy in the area from which the water will be diverted.

One final note. Idaho Code § 42-234(3) expressly provides that incidental recharge of ground water aquifers is in the public interest.

B. Proceedings in which the local public interest is considered

Idaho's water code references the local public interest test in a variety of contexts. The key ones are discussed below.[858]

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[857] Idaho Code §§ 42-203A(5)(g) (appropriations), 42-222(1) (transfers), 42-240(5) (exchanges), 42-1763 (water bank). Note that the Department's water appropriation rule does not address this requirement.

[858] In addition to those listed below, the water code addresses the local public interest test in two other contexts: temporary changes during drought conditions, Idaho Code § 42-222A(5), and exchanges, Idaho Code § 42-240.

The local public interest also is mentioned (as a legislative finding) in connection with accomplished transfers. Idaho Code § 42-1425 (declaring that such transfers are in the local public interest). There is no independent public interest test for accomplished transfers. *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 911 P.2d 748 (1995).

Finally, a special set of public interest tests (with their own burden of proof rules) apply when "trust water" is sought to be appropriated pursuant to the *Swan Falls Agreement*. Idaho Code § 42-203C; IDAPA 37.03.08.040.04.b.iii, 37.03.08.40.05.h, and 37.03.08.45.03.

(1) Applications for new permits

The first step in the appropriation of a new water right is the submission of an application for a permit to the Department of Water Resources. Section 42-203A(5) of the water code sets out seven criteria that the Department shall use to evaluate such applications, including the local public interest test. When the test was first adopted in 1978, this is the only place it appeared in the Idaho Code.

The Department's Water Appropriation Rules include information submission requirements applicable to large permits[859] and a set of evaluation criteria applicable to all new permits.[860] Note, however, that these rules predate the 2003 amendment and have

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[859] "Information Relative to Conflict with the Local Public Interest, Section 42-203A(5)(e), Idaho Code, shall be submitted as follows: The applicant shall seek comment and shall submit all letters of comment on the effects of the construction and operation of the proposed project from the governing body of the city and/or county and tribal reservation within which the point of diversion and place of use are located, the Idaho Department of Fish and Game, the Idaho Department of Environmental Quality, and any irrigation district or canal company, within which the proposed project is located and from other entities as determined by the director." IDAPA 37.03.08.040.05.g.

This information requirement (and several others) are applicable only to projects seeking 5 cfs or more, 500 acre-feet of storage or more, or over 200 acres of irrigation. IDAPA 37.03.08.040.05.c. Note that this paragraph is difficult to parse. It appears that the final sentence should have begun a new sub-paragraph but instead was collapsed into subsection "c". This makes it difficult to understand what "The following information" refers to. Plainly, however, the additional information requirements (and the 5 cfs exception) apply not only to sub-paragraph c but also to the following sub-paragraphs as well.

[860] The so-called "Evaluation Criteria" for all new permits include this provision dealing with the local public interest:

> e. Criteria for determining whether the project conflicts with the local public interest. The director will consider the following, along with any other factors he finds to be appropriate, in determining whether the project will conflict with the local public interest:
>
> i. The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both short and long term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains;
>
> ii. The effect the project will have on recreation, fish and wildlife resources in the local area affected by the proposed project; and
>
> iii. Compliance with applicable air, water and hazardous substance standards, and compliance with planning and zoning ordinances of local and state government jurisdictions.
>
> iv. An application which the director determines will conflict with the local public interest will be denied unless the director determines

not yet been amended to reflect the narrower scope of the local public interest test in effect today.[861] These rules also establish the burden of proof for evaluation of the local public interest test.[862]

(2) Transfers of existing water rights

Section 42-222(1) of the water code sets out criteria applicable to the transfer of existing water rights (that is, licensed, decreed, or beneficial use water rights).[863] Among these is the local public interest test.

There are no departmental rules for evaluating the local public interest in the context of water transfers. Indeed, the Department has not promulgated any rules governing water transfers.[864] However, the Department has adopted guidance on the subject in James R. Cefalo, *Transfer Processing No. 24* (*Transfer Processing Guidance*) (Oct. 1, 2024). Note that the discussion of the local public interest in this guidance document predates the 2003 amendment and is now obsolete.

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that an over-riding state or national need exists for the project or that the project can be approved with conditions to resolve the conflict with the local public interest.

IDAPA 37.03.08.045.01.e. A separate provision, IDAPA 37.03.08.45.03, deals with the evaluation of the public interest in the context of trust water applications.

[861] For example, the rule's requirement that the effect of the project on the local economy is plainly inconsistent with the current definition of the local public interest. On the other hand, it is possible that some of the factors listed here might properly be considered by the Department under some other applicable authority. The Department has not yet worked this out in new rules. Nor has any appellate court addressed the subject since the 2003 amendments.

[862] IDAPA 37.03.08.40.04.b.ii. See discussion of burden of proof in section 11.H at page 186.

[863] Also see Idaho Code § 42-108, which reiterates the injury rule and adds a special provision requiring legislative approval of certain large water transfers.

[864] One might argue that these rules (applicable to new appropriations) should apply, at least by analogy, to public interest review in the context of water transfers. On the other hand, one might contend that the criteria should not be the same. Arguably a new appropriation (which, in effect, takes water out of the public domain) should be subject to more vigorous public review than the transfer of a water right from one private use to another. Because new appropriations are "free," the marketplace provides no reality check on the purported beneficial use. Water transfers, in contrast, typically are subject to significant marketplace constraints that, to some extent at least, ought to guard against unwarranted uses.

(3) Amendment of issued permits

Where a change in a water permit is sought after permitting but prior to licensing, the applicant proceeds under section 42-211 (paragraph 1).[865] This section authorizes amendment of a permit application, subject to two criteria: "no enlargement" and "no injury."[866]

However, the Idaho Supreme Court ruled in *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993) that the Department should apply the full set of public interest criteria just as in an initial permit application. (See section 27.C(5) on page 569.) This holding is difficult to reconcile with the plain language of the statute (both pre- and post-2003 amendment) which clearly contemplates a more limited scope of review for amendment of permits.

Consequently, despite the more limited statutory language, applicants seeking to transfer permits should be prepared to pass the same hurdles as those seeking to transfer licenses.

(4) Water supply bank rentals

Since the establishment of the water supply bank in 1979, rentals from the bank have required consideration of the local public interest.[867] The local public interest test also appears in the regulations, which make clear that it applies to leases as well as rentals.[868]

(5) Exchanges of surface rights

As discussed in section 15.N at page 296, the Legislature acted in 1998 to codify the practice of exchanging surface water rights. (An exchange is basically two transfers

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[865] In *Shokal*, the Department conditionally issued a permit, and required the applicant to revise its construction plan to accommodate effluent limitations. In response, the applicant made substantial changes to its proposed fish farm, and submitted a new plan to the Department. The Department approved the new plan, without holding a hearing on it. The Idaho Supreme Court found that this procedure violated the hearing requirement in section 42-211 (first paragraph). The court apparently viewed the conditional grant of a permit as a permit. Thus, the changed plan was submitted after the permit had been issued, bringing the applicant into paragraph 1 of the section. The result would be the same, however, under paragraph 2 (if the applicant sought to amend an application for permit after hearing, but prior to permit issuance). In either case, the applicant must undergo a new hearing process.

[866] Idaho Code § 42-211.

[867] 1979 Idaho Sess. Laws, ch. 193, § 3 (codified at Idaho Code § 42-1763).

[868] IDAPA 37.02.03.025.06.f; IDAPA 37.02.03.030.01; IDAPA 37.02.03.040.01.i.

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folded into one.) The exchange statute repeats the criteria applicable to other water transfers, including the requirement that the Department determine that the exchange is in the "local public interest."[869]

(6) Minimum stream flows

As mentioned above, Idaho's minimum stream flow law contains its own "public interest" standard. To be approved, the proposed instream flow must be found to be "in the public, as opposed to the private, interest."[870] It is not clear whether this is the same as the "local public interest" standard referenced elsewhere in the water code, or is intended to establish a different standard.

C. Appellate case law applying the local public interest test

The statutes quoted above provide no clear guidance as to what the local public interest means or how the Department should evaluate a water right's impact on public interest. Only a handful of cases have even touched on the question. This discussion will address each of the five Idaho cases that have addressed the subject.[871] Bear in mind that each was decided before the 2003 amendment.

(1) *Hidden Springs Trout Ranch* (1981)

The first case to apply the local public interest test was *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981) (Donaldson, J.). The case addressed only the threshold issue of applicability of the newly enacted local public interest statute to an ongoing proceeding.

A downstream appropriator challenged an application for a water permit by Hidden Springs on the basis that the company's proposed trout farm would impair water quality. The Department declined to take evidence on the subject, noting that water quality was an "inappropriate consideration." *Hidden Springs*, 102 Idaho at 623, 636 P.2d at 745. However, while the application was still pending, the Legislature amended the water code to add the local public interest criterion. In response, the Department allowed protestants to reopen the proceeding to raise water quality issues under this rubric. On appeal, the Idaho Supreme Court held that an applicant for a water permit has no vested right to the water at the time of the application (even though the permit application did reserve the priority date). Consequently, the Court determined that the

[869] Idaho Code § 42-240.

[870] Idaho Code § 42-1503.

[871] Burden of proof issues are discussed in section 15.L(2) at page 290.

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legislation could properly be applied to an ongoing permit application proceeding.[872] In so ruling, the *Hidden Springs* Court distinguished its holding in *Cooper v. Ada Cnty. Comm'rs*, 101 Idaho 407, 412, 614 P.2d 947, 952 (1980) (Donaldson, C.J.) in which it held that land use applications (an application for a zone change in this case) must be evaluated on the basis of the law, ordinances, and comprehensive plan in effect at the time of application. See *Idaho Land Use Handbook* for a more detailed discussion of retroactive legislation.

The case did not directly address the scope of the local public interest evaluation. However, the Court apparently assumed that the local public interest included water quality impacts resulting from the diversion and return flow, because that was the sole issue raised by the protestants.

(2) *Shokal v. Dunn* (1985)

The first appellate case to substantively explore the application of the local public interest review as *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985) (Bistline, J.). The applicant, a trout raising facility known as Trout Co., applied for a water right to divert 100 cfs from Billingsley Creek to supply a fish propagation facility and hydropower project it planned to build in the Thousand Springs area. Numerous protests were filed. After hearing, appeal, and rehearing, the Department ultimately issued the permit.

The permit was issued conditionally, contingent upon the applicant submitting a new construction and operation plan showing compliance with prescribed effluent limitations. The applicant did so. Despite requests by protestants, the Department refused to hold a hearing on the new plan. The Court ruled that the changes proposed by

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[872] This decision contrasts with the result reached in the following cases. *Chisholm v. Twin Falls Cnty.,* 139 Idaho 131, 134-35, 75 P.3d 185, 1988-89 (2003) ("It is well established that an applicant's rights are determined by the ordinance in existence at the time of filing an application for the permit."). *Urrutia v. Blaine Cnty.,* 134 Idaho 353, 359, 2 P.3d 738, 744 (2000) ("Idaho law is well established that an applicant's rights are determined by the ordinance in existence at the time of filing an application.") (citing *Payette River Property Owners Ass'n v. Bd. of Comm'rs of Valley Co*., 132 Idaho 551, 555, 976 P.2d 477, 481 (1999)); *South Fork Coalition v. Bd. of Comm'rs of Bonneville Cnty. ("South Fork II")*, 117 Idaho 857, 865-86, 792 P.2d 882, 885-86 (1990) ("Although a majority of courts from other jurisdictions have adopted that line of reasoning and held that a change in the law following an application for a building permit will be applied to the application, Idaho law is well established that an applicant's rights are determined by the ordinance in existence at the time of filing an application for the permit.") (footnote omitted). See also the discussion of *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993) elsewhere in this Handbook. In that case, the Idaho Supreme Court ruled that when an applicant submits an application to amend an existing permit, the Department is empowered to impose new conditions on the permit. This case did not involve the retroactive application of new legislation, but it did discuss the prior precedents on that subject.

the applicant were so substantial as to require an amendment to its permit under Idaho Code § 42-211. The Idaho Supreme Court then remanded the matter for further hearings.

The rest of the Court's opinion addressed what should be considered by the Department at that upcoming rehearing. The Court focused on two items: the "financial resources" evaluation (under Idaho Code § 42-203A(5)(d)) and "local public interest" evaluation (under Idaho Code § 203A(5)(e)). This discussion will address only the latter.

Noting that this was a case of first impression, the Court took on what it described as the "difficult task" of defining the local public interest. *Shokal*, 109 Idaho at 337, 707 P.2d at 448.

Justice Bistline led off with a footnote noting that the statutory local public interest review process is "related to" the common law public trust doctrine. *Shokal*, 109 Idaho at 336 n.2, 707 P.2d at 447 n.2. The authors suggest, however, that resemblance is superficial at best. Although they both deal at some level with the public interest, they share few genetic traits.[873] In any event, the public trust doctrine was effectively eliminated from water rights considerations by legislative fiat in 1996.[874] The Legislature expressly noted that the doctrine is merely common law, which can always be overridden by statute.

The Court then briefly surveyed decisions and statutes from other western states.[875] Citing California's *East Bay Municipal Utility Dist. V. Dept. of Public Works*,[876] Utah's

[873] The local public interest requirement is a specific, codified, unqualified instruction from the Idaho Legislature to a particular state agency acting on particular matters. The public trust doctrine is an amorphous, gap-filling, judge-made rule with historical roots in England and ancient Rome whose modern function, in large part, is prodding legislative bodies to be more clear about what exactly they intend to convey when they confer private rights in the beds of navigable streams and lakes and, perhaps, the water itself.

[874] 1996 Idaho Sess. Laws, ch. 342 (codified at Idaho Code § 58-1201 to 58-1203).

[875] For instance, the Court referenced Alaska's public interest review statute—which contains a list of explicit factors—and seemed to suggest that it should serve as a model for interpreting Idaho's terser statute. The court's wholesale embrace of a statute from a different state, as a guide to interpreting the state's own legislation, was sharply criticized by the Nevada Supreme Court in *Pyramid Lake Paiute Tribe v. Washoe Cnty.,* 918 P.2d 697, 700 (Nev. 1996).

[876] *East Bay Municipal Utility Dist. v. Dept. of Public Works*, 35 P.2d 1027 (Cal. 1934). In *East Bay* the California Supreme Court upheld the state's decision to subordinate a water right to future agricultural and municipal development.

Tanner v. Bacon,[877] and *Young & Norton v. Hinderlider*,[878] Justice Bistline concluded that that the Department of Water Resources is authorized to force an applicant to subordinate its position (or even be denied the right to appropriate altogether) in favor of other potential water uses that the Department, in its wisdom, determines are of "greater importance—in effect prioritizing among uses according to the public interest." *Shokal*, 109 Idaho at 337, 707 P.2d at 448.

The Court noted that the local public interest statute provided "little guidance" on the scope of the evaluation. *Shokal*, 109 Idaho at 337, 707 P.2d at 448. However, the Court concluded that Idaho's minimum flow law[879] provided insight into what the local public interest test encompassed. *Id*. The Court determined that the two statutes could be read together because both contain the phrase "public interest" and were passed on the same day.[880] The Court declared:

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[877] *Tanner v. Bacon*, 136 P.2d 957 (Utah 1943). Utah has long recognized the state engineer's authority to deny a water right application on the basis that it "will prove detrimental to the public welfare." Utah Code Ann. § 73-3-8 (1980). (A predecessor statute enacted in 1903 provided authority to reject an application which "threatens to prove detrimental to the public interest". 1903 Utah Laws ch. 100 § 40.) This provision was construed in *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943), a case involving a choice between two competing applications. Tanner filed the first application. Subsequently, another applicant sought a water right from the same source for a much larger multipurpose project to serve irrigation, municipal and industrial uses. The state engineer granted the first permit, but subordinated the water right to the filing for the subsequent larger project.

[878] *Young & Norton v. Hinderlider*, 110 P. 1045 (N.M., 1910). In *Young & Norton*, the Court determined that a statutory instruction to determine "the public interest" authorized the territorial engineer to choose between two competing applications for water projects (without reference to which was filed first). The determination is not a narrow one "limited to cases in which the project would be a menace to the public health or safety", but a broad one including the economic feasibility of the project and project cost. For instance, the engineer might chose the smaller of the two projects if the larger is likely to fail. *Young & Norton*, 110 P. at 1050. The court then remanded for a determination of the facts. The court recognized the need for an active determination of the public interest: "If it were a matter of private interest alone, a question simply between two rival applications for the right to use the waters in question, we should content ourselves with affirming the decision of the district court. But the question is much broader than that, and includes the public interest as well . . . ." *Young & Norton*, 110 P. at 1050.

[879] 1978 Idaho Sess. Laws, ch. 345 §§ 2, 11, amended by 1980 Idaho Sess. Laws, ch. 238 § 14 (codified at Idaho Code §§ 42-1501 to 42-1505, 42-1736B).

[880] Reading two statutes together merely because they were passed on the same day and contain common words may be stretching it a bit, as a form of statutory construction. As it turns out, however, the Court probably was justified in doing so in this case. As discussed above, the two statutes were each drafted in response to strong political pressure from the conservation

> Clearly, the legislature in § 42-203A must have intended the public interest on the local scale to include the public interest elements listed in § 42-1501: "fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality."

Shokal, 109 Idaho at 338, 707 P.2d at 449.

The list did not stop there, however. The Court continued:

> The above elements of the public interest are not intended to be a comprehensive list. . . . By using the general term "the local public interest," the legislature intended to include any locally important factor impacted by proposed appropriations.
>
> . . .
>
> The determination of what elements of the local public interest are impacted, and what the public interest requires, is committed to Water Resources' sound discretion.

Shokal, 109 Idaho at 338-39, 707 P.2d at 449-50.

Essentially, it seems, the court gave the Department carte blanche to consider whatever it determined appropriate. The Idaho Supreme Court concluded by quoting the district court:

> [I]f the Department gives weight to the economic benefits of the project, it should also give consideration to the economic detriments. The effect of the project on water quality should be considered. . . . The effect of the project on alternative uses of the watercourse should be considered—e.g., the impact on recreational and scenic uses. The effect on vegetation, wildlife, and other fish should be considered. This is not a catalogue of all factors that may relate to the public interest element, but is a suggestion of factors to be weighed in determining whether the project will or will not be in the public interest.

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community to do something about the destruction of stream habitat in the state. Moreover, as a matter of historical fact, instream flow protection measures and the creation of mechanisms for public interest review emerged simultaneously and out of the same political mix in this period in many states throughout the West. Thus, there is a sound basis for linking public interest review and instream flow protection. In terms of legal history, they are two sides of the same coin.

Shokal, 109 Idaho at 339, 707 P.2d at 450 (quoting District Judge Schroeder, later a Supreme Court Justice).

Despite these far-reaching descriptions of the Department's authority, in the end, the Court ordered the Department to take evidence on only three items: (1) the finality of design (whether the proposed diversion was clearly enough defined), (2) the effect of de-watering the source stream on fish, and (3) the health effects resulting from de-watering the source stream.

While the Court accorded the Department substantial latitude in evaluating the public interest,[881] it did set some bounds. For instance, the Court drew a bright line limiting responsibility for review along agency lines. While the Department of Water Resources was authorized to consider "health" issues directly resulting from the diversion itself, it was not authorized to invent its own regulatory system.

The distinction is significant. The Court held that IDWR should take steps to ensure that the applicant will comply with existing environmental laws. In doing so, however, the Department is expected to defer to regulatory entities charged with protecting the environment. Here is the critical language, in full:

> Judge Smith opined that the law will not allow Billingsley Creek to become a nuisance or a health hazard, adding also that "a permit cannot issue which would allow construction of a project contrary to the authority of the Board of Health in policing water for pollution." Hence, Judge Smith concluded that the Director had authority to consider whether the design of any particular facility will meet all environmental requirements.
>
> We believe this to be a correct assessment of the law, but add a word of caution regarding the differing functions of Water Resources and the Department of Health and Welfare. Water Resources must oversee the water resources of the state, insuring that those who have permits and licenses to appropriate water use the water in accordance with the conditions of the permits and licenses and the limits of the law. It is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors—that role is vested in the Department of Health and Welfare, including compliance with the water quality regulations and monitoring effluent discharge in our state's waterways.

[881] "The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resources' sound discretion." *Shokal*, 109 Idaho at 339, 707 P.2d at 450.

> Nevertheless, although these agencies may have separate functions, Water Resources is precluded from issuing a permit for a water appropriation project which, when completed, would violate the water quality standards of the Department of Health and Welfare. It makes no sense whatsoever for Water Resources to blindly grant permit requests without regard to water quality regulations. Hence, Water Resources should condition the issuance of a permit on a showing by the applicant that a proposed facility will meet mandatory water quality standards. Under this rule, Water Resources has the authority to withhold a permit application until it receives a proposed design which appears to be in compliance with the water quality standards. Once the conditional permit is granted, Water Resources has continuing jurisdiction over compliance with the conditions of the permit, including suspension or revocation of the permit for proven violations of the permit's conditions regarding water quality.
>
> The Department of Health and Welfare continues to have the primary responsibility for policing water quality control in this state, and can exercise *in personam* jurisdiction over those who violate the state's water pollution laws. While it often may be both more feasible and more reasonable for Health and Welfare to take remedial steps against one violating the pollution laws, either by forcing compliance or shutting down a facility, than to resist an application for a permit in the first instance, Health and Welfare certainly has the right to be heard in proceedings before Water Resources. And, as appointed guardian of the quality of Idaho water, its views are entitled to consideration.
>
> In sum, we agree with the district court, Judge Smith, that Water Resources cannot issue a permit which would allow construction of a project violative of the laws regulating water quality. However, later compliance with those laws after construction of a facility generally will be a proper concern of the Department of Health and Welfare.

Shokal, 109 Idaho at 340-41, 707 P.2d at 451-52.

Thus, IDWR may require an applicant for a water right to be in compliance with environmental standards set by other agencies. However, the quoted language suggests that the Department should not make up new regulatory standards, nor hear evidence on

the need for new regulatory programs that the Legislature and other agencies with appropriate regulatory authority have not seen fit to create.

See further discussion of the issue of agency deference in section 27.H (Deference to other agencies in evaluating the local public interest) on page 586.

Although the *Shokal* case pre-dated the 2003 amendment to the local public interest statutes, it remains good law in most respects. Most notably, its instruction to defer to other state agencies with expertise in environmental matters continues to make sense and comports well with the 2003 amendments. Indeed, the Statement of Purpose for the 2003 amendments expressly embraces this part of *Shokal*.[882] However, the portion of the *Shokal* decision giving IDWR carte blanche to consider any public interest matter under the sun is plainly and directly overridden by the 2003 legislation. Indeed, that was the whole purpose of the legislation.

(3) *Collins Bros. Corp. v. Dunn* (1988)

Three years later, the Idaho Supreme Court addressed the issue again in *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 759 P.2d 891 (1988). Collins Brothers sought a water right for geothermal water. The company intended to use the hot water to heat 110 homes and for irrigation purposes. The Department issued the permit for heating use only, disallowing the proposed irrigation use (except for supplemental use). The restriction was based on the premise that it is not in the public interest to deplete a geothermal aquifer for irrigation.

On appeal the restriction was upheld. The Court said, quoting *Shokal*, that the determination of what elements are part of the local public interest is committed to the "sound discretion" of the agency.[883]

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[882] The Statement of Purpose included this observation:

> While the impact of the manufacturing plant on air quality is important, this effect should be evaluated by DEQ under the EPHA. As noted by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330 (1985), "[i]t is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors—that role is vested" in other agencies.

Statement of Purpose, H.B. 284 (2003).

[883] If the issue is one of agency discretion, one would think that the decision would be subject to review based on the "abuse of discretion" standard. That is, since there were no facts in dispute, the issue here was really one of policy, i.e., discretion. Instead, however, the Court reviewed and upheld the agency's action under the "clearly erroneous" standard. (The "clearly erroneous" standard was then codified at Idaho Code § 67-5215(g)(5). Its functional replacement is the "substantial evidence" standard found today at Idaho Code § 67-5215.)

What does this case add to our understanding of the local public interest? Very little. While it contains the broad suggestion that determining the scope of the public interest is committed to agency discretion, the Court offers no guidance on the bounds of that discretion. In short, the case certainly charted no new ground.

Arguably, denying a permit for geothermal water could have been justified even without reference to the public interest. It would seem that this case could be approached more simply and directly under the more traditional rubric of "waste." In its classic form, the public interest test involves an effort to balance various goods and harms which the free market and other governmental programs fail to address. The waste concept is much simpler. It is a one-dimensional concept: Does the proposed use yield a benefit which reasonably exploits (i.e., does not waste) the resource's potential? A simple rule rejecting any use of geothermal water for non-heating purposes fits squarely into the waste concept, because most of the value of the water (the heat) is not utilized at all.

The core point of the *Collins Bros.* decision—prohibiting use of geothermal water for non-heating purposes—readily survives the 2003 amendment to the local public interest statutes. That consideration falls squarely within the new definition's focus on "the effects of such use on the public water resource." Idaho Code § 42-202B(3).

(4) *Dovel v. Dobson* (1992)

In the case of *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992) (Johnson, J.), Dobson sought both a new water right and to change a decreed right he held. Another farmer, Dovel, challenged both applications on various grounds. Among them was his claim that both violated the "local public interest" because use of the ditch carrying the existing water right had on occasion caused flooding where the ditch crossed a road. The Department rejected the protest, and granted the applications. Dovel appealed.

The Court easily disposed of the local public interest challenge saying that it "fail[ed] to see the logic" in the claim. The Court might have stopped there. Oddly, it went on to state that the conditions attached to the permit were sufficient to protect the public interest, the protection of which is "committed to the department's sound discretion." In fact, the conditions were all standard conditions which had nothing to do with the local public interest claim (flooding of the road). It would have been more accurate for the Court to say that the Department properly rejected the local public interest claim and declined to attach conditions addressing the issue. The broad language about agency discretion—essentially dictum—was attributed to *Shokal v. Dunn*.

Apparently the facts supporting Dovel's claim about road flooding were weak, and were rejected for that reason, rather than because they fell entirely outside the scope of the public interest test. But the facts of the case—alleged flooding caused by the diversion—do not call for any broad extension of the local public interest test. The impact alleged was direct and immediately related to the diversion itself.

In any event, whether dictum or not, the teaching of the case is that the Court is likely to defer largely to the Department's judgment when it comes to determining the scope and applicability of the local public interest test.

To the extent the *Dovel* case stands for the proposition that protection against flooding caused by the proposed new water use falls within the local public interest, that would not appear to violate the 2003 amendment to the definition of the local public interest—at least where it appears that the flooding is a direct, immediate, and unavoidable consequence of the new water use. On the other hand, the new definition of local public interest probably does not authorize the Department to look much further down the road when it comes to flood protection. Likewise, it is probably appropriate for the Department to condition approval of the application on compliance with federal and other flood control requirements.

(5) *Hardy v. Higginson* (1993)

In 1993, the Idaho Supreme Court decided *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993) (Reinhardt, J. Pro Tem.), the "Box Canyon" case. Just like the applicants in *Hidden Springs* and *Shokal*, Hardy was seeking to develop a trout farm near Hagerman. (There is no connection between the applicants or their projects.) Hardy sought to amend two water permits which had been issued in 1971 and 1975. The changes were sought to correspond to a new right of way granted by the BLM. (The amendment itself was probably environmentally beneficial.) Various protestants, who did not live in the area, opposed the amendment on the basis of impacts of the project on recreation, fishing and aesthetics. The Director granted the application, but imposed certain conditions (aimed at protecting a sculpin pool) based on protection of the "local public interest" to which Hardy objected.

The Court relied heavily on *Shokal v. Dunn* for its reasoning about the scope of the local public interest. The Court did not specifically delineate the bounds of the public interest concerns that may be considered, but noted that the Box Canyon area had been designated an Area of Critical Environmental Concern by the BLM, and that the area included four candidate threatened and endangered species. The Court concluded (without any real analysis): "Clearly, the protection of this habitat falls within the local public interest as defined in *Shokal*."[884]

This holding added little if anything to the understanding of the reach of the public interest review. In any event, the 2003 amendment to the definition of local public interest clearly embraces the concern raised in the *Hardy* case—the impact of the project on local aquatic species using the water resource.

[884] *Hardy*, 123 Idaho at 490, 849 P.2d. at 951.

The case is more important for its procedural rulings.

The case involved an application for amendment of permits under Idaho Code section 42-211. As discussed above, this statute does not mention the local public interest. The Court ruled that the Director nonetheless may consider the local public interest under section 42-211. This ruling ignores the plain language of the statute (pre- and post-2023 amendment), which provides that permit amendments are subject to a more limited review (addressing injury and enlargement). The 2003 amendments continued to omit any reference to the local public interest review in Idaho Code § 42-221 (dealing with amendment of existing permits). Whether *Hardy* is good law after the 2003 amendment remains to be tested. (See section 27.B(3) on page 559.)

The Court also ruled that the Director may consider habitat issues raised by persons who do not live in Box Canyon, despite the pre-2003 language in the statute defining the local public interest as "the affairs of the people in the area directly affected by the proposed use." This aspect of the local public interest definition does not appear to have materially changed under the 2003 amendment. In any event, this question is better addressed under the law of standing.

Finally, the Court found that the Department could impose new conditions on the permit, based on the public interest, despite the fact that the original permits had been obtained prior to the adoption of the local public interest statute in 1978.

In conclusion, each of the appellate cases discussed above involve an application of the public interest test focused on the water itself—the direct effects of the diversion and return flow. Despite some broad language in *Shokal v. Dunn*, the local public interest test has not been employed to date by the Department of Water Resources to serve as a justification either for second-guessing other regulatory agencies or for overriding marketplace-driven economic allocation decisions.

(6) *Chisholm v. IDWR* (2005)

In *Chisholm v. IDWR*, 142 Idaho 159, 125 P.3d 515 (2005) (Burdick, J.) two *pro se* anti-dairy protestants challenged IDWR's approval of a water right transfer issued to Adrian Boer and the K&W Dairy. The applicant sought to transfer irrigation water to a new dairy operation. The Department took extensive evidence on the local public interest, including the potential impact of the proposed dairy operation on the local economy, potential ground water contamination, and potential odor issues.

After the hearing, the Department approved the application, with the condition that the applicant switch from a "flushing" system to a mechanical scraping system for removing dairy waste. The latter was determined by the Department to produce less objectionable odor.

Protestants appealed the approval to the district court. Judge Wood, of the Fifth District, upheld most of the Department's order, but reversed on the odor issue, finding that the Department's findings and conclusions were insufficient. The district court ruled that the Department should have determined what is an acceptable level of odor, and measured the proposed dairy against that standard. The district court also ruled that the Department may not satisfy its obligations to address the odor issue simply by requiring the applicant to comply with Idaho Department of Agriculture rules on odor management: "IDWR cannot legally 'side-step' this statutory standard at the transfer application stage and 'pass it down the line' to the next agency to subsequently regulate."[885] In this regard, the district court went considerably further than the outcome in *Box Canyon Dairy*. Finally, the district court ruled that IDWR failed to take into account the cumulative impact of other dairies in the Magic Valley.

On remand, IDWR issued a second approval of the water right transfer. This time the district court (Judge Butler) affirmed IDWR's order, and the protestants appealed to the Idaho Supreme Court, which affirmed IDWR's transfer approval. By this time, the local public interest test had been modified and limited, but the appeal proceeded on the basis of the pre-2003 statute. The Court affirmed.

The Legislature's enactment of the 2003 amendments was in direct response to IDWR's consideration of odor issues in cases like *Chisholm*. Plainly, consideration of such issues is now out-of-bounds for IDWR.

D. District court rulings

There have been no appellate cases interpreting the local public interest since *Hardy v. Higginson* in 1993. However, several recent decisions at the district court level have called for a broad application of the provision. These cases provide historical context to the policy discussion, but should not be considered good law after the 2003 amendment.

(1) *Box Canyon Dairy* (2000)

The first of the recent local public interest cases to reach the district court was *Halper v. IDWR ("Box Canyon Dairy")*.[886] Box Canyon Dairy sought to transfer a water right to facilitate the expansion of its Dairy No. 3 from 300 to 1,000 cows. The application was protested on local public interest grounds (among others). When IDWR approved the transfer applications, the protestants brought suit.

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[885] *Bill Chisholm and Lee Halper v. IDWR (the "K&W Dairy" case)* at 20, Fifth Judicial Dist., Idaho, Case No. CV 01-00239 (Order on Judicial Review, Nov. 30, 2001).

[886] *Lee Halper and Bill Chisholm v. IDWR and Box Canyon Dairy*, Fifth Judicial Dist., Idaho, Case No. CV-00-00300 (Nov. 29, 2000).

The district court, Judge Higer, overruled the IDWR's approval, finding that its analysis of the local public interest issue was insufficient. The court remanded to the agency, instructing it to weigh and consider evidence on a broad range of specific issues, including "obnoxious odors."

On remand, the Department again approved the transfer, but this time with two conditions relating to environmental quality. The conditions simply required the applicant to obtain necessary permitting and approvals from the Idaho Division (now Department) of Environmental Quality, from the Idaho Department of Agriculture and from local zoning officials.

(2) *DeKruyf Dairy* (2001)

In *Halper v. IDWR ("DeKruyf Dairy")*,[887] the Department approved a water right transfer for an existing dairy, the sole protestant appealed. The district court, Judge Wood, upheld the Department's approval of the transfer, concluding that the evidence of environmental harm was purely speculative. "Any future environmental degradation potential must, like future damages in a regular civil case, be proven to a reasonable degree of certainty . . . ."[888] In so doing, the court applied a very broad reading of the local public interest standard. (The court also rejected an argument based on violation of the Clean Water Act.)

(3) *Wybenga* (2002)

In April, 2002, Judge Wood handed down a similar decision in *Wybenga v. IDWR*, Fifth Judicial Dist., Idaho, Case No. CV 01-00577 (Apr. 11, 2002). The Wybengas purchased a small dairy in 1996, and expanded its operation from 200 to 950 cows. They failed to obtain the necessary water rights to support the expanded operation. In 1999 the IDWR notified the Wybengas that they must obtain additional water rights. In response, the Wybengas filed an application to transfer additional water rights to the dairy to bring it into compliance. The transfer was protested on local public interest grounds alleging that the dairy had serious odor and fly problems. After a hearing, in which graphic testimony was presented by the protestants, IDWR denied the transfer application. The Wybengas appealed.

Judge Brown found that the Department properly applied the local public interest standard. Relying primarily on *Shokal v. Dunn*, the Court found that the focus of the local public interest test was not limited to water quantity and quality issues. The court further ruled that IDWR was not obligated to craft conditions on the transfer to address

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[887] *Lee Halper v. IDWR and Calvin and Mark DeKruyf*, Fifth Judicial Dist., Idaho, Case No. CV-SP TO 00-00120 (Aug. 28, 2001).

[888] *DeKruyf* at 11.

the odor and fly issues, but was entitled to deny the transfer application outright. Finally, the court rejected the argument that odor issues are the concern of another agency.

This decision was appealed to the Idaho Supreme Court, but was settled while the appeal was pending. Consequently, there will be no appellate decision.

(4) *Eden's Gate v. IDWR* (2022)

In *Eden's Gate LLC v. IDWR*, Case No. CV14-21-10116, Idaho Dist. Ct., Third Judicial Dist. (June 9, 2022) (Wildman, J.), the district court overturned IDWR's denial of water right applications on local public interest grounds. No appeal was taken. Although the case involves some unique facts, the district court's ruling has broader implications for local public interest review.

Note: For a broader discussion of the law and practice regarding IDWR's "surface water first" policy, see section 47 on page 860.

The original applicant, One More Mile, LLC, sought 14 ground water permits, one for each two-acre lot in a subdivision in Canyon County that it hoped to develop for residential housing. The lots had been platted in 1910, but never developed. At the time, the land was irrigated based on shares of surface water from Farmer's Co-Operative Ditch Company.[889] After the contested case hearing and before the decision was issued, One More Mile sold the land to a new developer, Eden's Gate. The sale, however, included the land only. The original owner stripped off and retained the shares of the ditch company.

Director Spackman found all this contrary to the local public interest. He noted that Idaho's Local Land Use Planning Act ("LLUPA"[890]) encourages the use of surface water, when available, requiring that it be used when land use changes are made. Idaho Code § 67-6537(1). Director Spackman recognized that this statute was not applicable to his consideration of a water right application, but he concluded that this legislatively expressed preference for the use of surface water to be "a relevant and important factor when analyzing the local public interest." *Eden's Gate* at p. 6.

The district court rejected this analysis. The court emphasized that the 2003 amendment to the local public interest criterion "was intended in part to limit the

[889] The Farmer's Co-Operative Ditch Company, apparently, is a mutual irrigation company. The district court noted: "It is undisputed that the Ditch Company shares are not appurtenant to any particular parcel of land and can freely be moved by a shareholder within the service area." *Eden's Gate* at p. 2. "In the Court's experience this fact is unique to the bylaws of the Ditch Company, as delivery entity shares are generally made appurtenant to the land on which they are used." *Eden's Gate* at p. 8, n.4.

[890] The act is usually referred to by the acronym LLUPA. IDWR and the district court referred to it as LUPA.

Department's ability to consider impacts to the local public interest delegated to other state and local agencies." *Eden's Gate* at p. 7. The court quoted from the Statement of Purpose for the 2003 amendment: "[A]s noted by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330 (1985), '[i]t is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors—that role is vested' in other agencies." *Eden's Gate* at p. 7. The court concluded that allowing IDWR to independently evaluate this LLUPA factor would result in "duplicative litigation and potential inconsistent results." *Eden's Gate* at p. 7. See discussion in section 27.H (Deference to other agencies in evaluating the local public interest) on page 586.

The court went on to say, "Even if the Director correctly relied on the legislative policy set forth in Idaho Code § 67-6537 in reaching his decision, the Court finds the Director's findings with respect to the local public interest are not supported by substantial evidence. The Court is unaware of any stated 'blanket' state-wide legislative policy setting forth a preference for the use of surface water over unappropriated ground water in the context of an application to appropriate water." *Eden's Gate* at pp. 6-7.

E. Unappealed IDWR contested case decisions on the public interest

A number of water right transfer applications have been protested and gone to hearing on local public interest issues. A summary of notable decisions (which have not been appealed to district court) is provided below.

Water Right	Applicant	Protestants	Dates	Outcome
Transfer No. 5197	*Applicant:* F.F. Gunning and G.C. Gunning *Counsel:* Patrick D. Brown	*Protestant:* City of Wendell (*et al.*) *Counsel:* Craig D. Hobdey	*Final Order:* Sept. 26, 1999 *Application:* Apr. 3, 1997	The City and other challenged the expansion of a dairy operation. It is unclear from the order what evidence was presented. The Department concluded that the application was in the local public interest, so long as the applicant complied with zoning requirements and environmental regulations.
Transfer No. 5401 (Sandy Right)	*Applicant:* Jerome Cheese Co. *Counsel:* Christopher H. Meyer	*Protestants:* Bill Chisholm, Lee Halper, Michael Ihler, & Darcy Thornborrow *Protestants' Counsel:* None *Objecting Public Witness:* City of Jerome *City's Counsel:* Robert E. Williams	*Preliminary Order (now final):* Oct. 12, 1999 *Application:* Dec. 23, 1998	The hearing officer denied Applicant's motion to limit the scope of the hearing on public interest issues. Consequently, the Applicant presented a broad public interest case in response to the Protestants' assertions that the cheese plant will promote dairies which are not in the public interest. IDWR found that the transfer was in the public interest and approved the application.

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Water Right	Applicant	Protestants	Dates	Outcome
Transfer No. 5436 (Hincks Right)	*Applicant:* Jerome Cheese Co. *Counsel:* Christopher H. Meyer	*Protestants:* Bill Chisholm, Lee Halper, Michael Ihler, & Darcy Thornborrow *Protestants' Counsel:* None *Objecting Public Witness:* City of Jerome *City's Counsel:* Robert E. Williams	*Amended Preliminary Order (now final):* Nov. 12, 1999 *Application:* Mar. 8, 1999	Same as Transfer No. 5401 (cases were consolidated for hearing). IDWR found that application was in public interest, but denied the application on unrelated hydrological grounds (injury to Snake River).
Transfer No. 5464	*Applicant:* Salmon Falls Land & Livestock Co. *Counsel:* Roger Ling and Timothy J. Schneider	*Protestant:* William K. Chisholm *Counsel:* None	*Preliminary Order:* Mar. 7, 2001 (administrative appeals underway) *Application:* Mar. 12, 1999	Applicant seeks to construct a new dairy adjacent to the Snake River overlooking Thousand Springs. The planning and zoning commission originally denied the application for Livestock Confinement Operation ("LCO"). The applicant then reduced the size of the proposed operation (to 2,142 dairy cows) so that the local hearing requirements did not apply. The downsized facility was then automatically approved by the county. IDWR denied the transfer application on the basis that the dairy's location, near important recreational areas, was not in the local public interest.
Transfer No. 5487	*Applicant:* Tony Visser c/o Big Sky Dairy *Counsel:* Robert E. Williams	*Protestants:* Michael Miketa, Luke Phillips & Vonnie L. Peterson *Counsel:* None	*Preliminary Order (now final):* Dec. 29, 1999 *Application:* Mar. 2, 1999	The applicant sought water for a new dairy of over 6,000 cows. Protestants expressed concern about the concentration of dairies in the vicinity, and expressed concern about air and water quality, but offered no technical evidence. The Department ruled that the application was in the local public interest.
Transfer Nos. 5522 & 5523	*Applicant*: Southfield Dairy *Counsel*: Robert E. Williams	*Protestant:* Bill Chisholm *Counsel:* None	*Preliminary Order (now final):* Dec. 30, 1999 *Application:* June 3, 1999	The applicant sought to construct a dairy of nearly 6,000 cows. The protestant raised concerns about the concentration of dairies in the area, and cumulative effects on air quality, water quality and the overall environment. The protestant offered no technical evidence. The Department approved the application, conditioned upon compliance with environmental permitting requirements.

Water Right	Applicant	Protestants	Dates	Outcome
Transfer No. 5510	*Applicant:* Gary R. & Carolyn Coleman *Counsel:* Robert E. Williams	*Protestant:* Lee Halper *Counsel:* None	*Preliminary Order (now final):* Jan. 24, 2000 *Application:* Apr. 1, 1999	Applicants proposed a 3,000 cow dairy near Wendell. The protestant raised concerns about the concentration of dairy cows in the vicinity and the cumulative effect of the dairies on air quality, water quality and the general environment. The Department approved the application, conditioned upon compliance with IDEQ rules and other environmental requirements.
Transfer Nos. 5474 & 5475	*Applicant:* Henry C. Haflinger *Counsel:* None Stated	*Protestant:* Max D. Hatfield *Counsel*: None	*Final Amended Order:* Mar. 13, 2000 *Application:* Not Stated	The Department overrode a local public interest challenge and approved the application.
Permit No. 47-08429	*Applicant:* Leo and Judity Ray *Counsel:* Lloyd Webb	*Protestant:* Fred Kippes and Floyd Kaufman *Counsel:* None	*Preliminary Order (now final):* Mar. 23, 2000 *Application:* May 7, 1999	Applicant sought to construct fish propagation facility. Water right was sought for mitigation of phosphorous, as required by IDEQ. Protestants contended that fish farms generally have degraded water quality in the area. The Department approved the application, conditioned on compliance with water quality standards.
Transfer No. 5503	*Applicant:* Jack or John Van Beek *Counsel:* Robert E. Williams	*Protestant:* Colin Maxey *Counsel:* None	*Preliminary Order (now final):* Mar. 27, 2000 *Application:* May 7, 1999	Applicants sought to enlarge an existing dairy near Jerome (from 360 to 660 milking cows). The protestant objected that there are too many diaries in the area, and that the enlargement will impact water quality and the general environment. The Department approved the application, subject to compliance with environmental regulations.
Transfer No. 5538	*Applicant:* Jack or Margaret Verbree *Counsel:* Robert E. Williams	*Protestant:* Lee Halper *Counsel:* None	*Preliminary Order (now final):* Mar. 28, 2000 *Application:* July 12, 1999	The applicant sought to add 1,187 dairy cows to an existing dairy of 463 cows. The protestant contended that existing statutes and rules are not sufficient to protect the ground water quality. The application was approved, conditioned on compliance with environmental regulations.

Water Right	Applicant	Protestants	Dates	Outcome
Transfer No. 5691 (Bragg Right)	*Applicant:* Jerome Cheese Co. *Counsel:* Christopher H. Meyer	*Protestant:* City of Jerome *Counsel:* Robert E. Williams	*Final Order:* Nov. 24, 2000 *Application:* Mar. 15, 2000	Cheese plant sought independent water supply. City protested water right transfer, complaining that loss of revenue from sale of municipal water was not in public interest (and related issues). The hearing officer rejected motions to limit the scope of the public interest determination. Applicant put on case addressing broad range of economic, technical and public financing issues. IDWR ruled that transfer was in the public interest and approved application. IDWR denied motion for attorney fees against City, but recognized that attorney fees could be awarded under Idaho Code § 12-117.
Transfer No. 5804 (Hincks Right)	*Applicant:* David Bloxham *Counsel:* Robert E. Williams	*Protestant:* Idaho Rural Council (with Bill Chisholm as public witness) *Counsel:* Richard A. Carlson	*Preliminary Order (now final):* Mar. 6, 2001 *Application:* July 27, 2000	Applicant sought water right for proposed dairy of 2,100 cows. Case focused primarily on hydrological issues. Although the denial of the application was framed in terms of the local public interest, it was really based on traditional hydrological issues. IDWR never reached the broader local public interest issues presented.
Transfer No. 69051	*Applicant:* John & Agnes Schilder *Counsel:* Robert E. Williams	*Protestant:* Bill Chisholm *Counsel:* None	*Amended Preliminary Order:* Oct. 18, 2001 *Application:* Apr. 18, 2001	Applicant sought water right to enable expansion of existing dairy, from 775 cows to 1,900 cows. The county approved a Livestock Confinement Operation ("LCO") permit. The Idaho Dept. of Agriculture approved a nutrient management plan. IDEQ water quality requirements were met. Protestant, who lives 15 miles from dairy, objected that there were too many cows in the Magic Valley and their cumulative effect may impair water quality and air quality. IDWR ruled that the transfer application was in the local public interest. Application was approved subject to various environmental conditions.
Permit No. 95-09086	*Applicant:* Kootenai Generation LLC *Counsel:* Robert A. Maynard	*Protestants:* REBOUND and a number of others *Counsel:* Teresa Hampton and Rachael Osborne	*Preliminary Order:* July 18, 2002 *Application:* May 8, 2001	Applications were denied because the proposed gas-fired power project employed water-based cooling technologies where other technologies were available. The Department determined that this inefficient use of water threatened the Rathdrum Prairie Aquifer. NOTE: This decision was based on the "conservation of water" test (Idaho Code §§ 42-203A(5)(f), 42-222(1)), not the local public interest test.

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Water Right	Applicant	Protestants	Dates	Outcome
Permit No. 95-09069	*Applicant:* Cogentrix Energy, Inc. *Counsel:* Kevin J. Beaton	*Protestants:* REBOUND and a number of others *Counsel:* Teresa Hampton and Rachael Osborne; C. Matthew Anderson and Mark E. Wilson	*Preliminary Order:* July 18, 2002 *Application:* Mar. 29, 2001	This was a competing power project. Same result as in Kootenai Generation LLC (see above). NOTE: This decision was based on the "conservation of water" test (Idaho Code §§ 42-203A(5)(f), 42-222(1)), not the local public interest test.
Transfer No. T69606	*Applicant:* C.E. Brackett Cattle Co. (Chet Brackett) *Counsel:* Robert E. Williams	*Protestants:* John K. and Pat Courtnay *Counsel:* None	*Amended Preliminary Order (now final):* Aug. 27, 2002 *Application:* Nov. 5, 2001	Applicant sought water right for beef cattle feeding operation for 999 animal units (mostly calves). Most of the attention in the hearing focused on traditional hydrological issues, but the parties also presented evidence on the public interest. IDWR approved the transfer application, conditioned as follows: (1) Applicant to obtain county land use approval, (2) Applicant to remain in compliance with zoning requirements, (3) Applicant to comply with IDEQ water quality requirements.
Permit No. 65-22357	*Applicant:* WestRock Associates LLC (now Tamarack Resort, Inc.) *Counsel:* Jeffrey C. Fereday, John M. Marshall & Deborah E. Nelson	*Protestant:* Citizens for Valley County *Counsel:* William M. Eddie	*Final Order:* Dec. 20, 2002 *Application:* Mar. 16, 2001	Applicant sought new "future needs" municipal water right (8.6 cfs) to support proposed four season resort in Valley County. On September 16, 2002, the hearing officer rejected a challenge to the application on local public interest grounds. The permit was granted after hearing.

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Water Right	Applicant	Protestants	Dates	Outcome
Permit No. 61-11954	*Applicant:* Rocky Mountain Land & Cattle Co. *Counsel:* Kent W. Foster	*Protestants:* BLM; King Hill Domestic Water & Sewer Assn. (KHDW); Bross Family *BLM Counsel:* Floyd P. DeWitt *KHDW Counsel:* Richard A. Carlson	*Preliminary Order:* Oct. 21, 2002 *Application finalized on:* Jan. 14, 2002	The Applicant sought a new appropriation of water (1) to cover an existing cattle feedlot for 2,800 head in Elmore County (whose water rights were inadequate), and (2) to provide for expansion of the CAFO to 15,000 head. Protestants raised a broad range of concerns under the local public interest, from odors to traffic impacts. IDWR granted the application only for the existing CAFO operation. However, IDWR denied additional water sought for the expansion of the CAFO as in violation of the local public interest. Specifically, IDWR found that the expanded CAFO: (1) would present a traffic hazard, (2) would be a nuisance to local residents, and (3) was contrary to the public interest review undertaken by the county in rejecting a "request for variance" necessary for the CAFO expansion. NOTE: It was not necessary for IDWR to reach these public interest issues; IDWR also rejected the application the independent statutory ground that the project was "speculative" because local land use requirements could not be met without a change in an ordinance.
Permit No. 13-7697	*Applicant:* Twin Lakes Canal Co. ("TLCC") *Counsel:* Robert L. Harris	*Protestants:* Idaho Rivers United PacifiCorp Great Salt Lake Keeper IDFG Bear Lake Watch Trout Unlimited Franklin Cnty. F & G Assn. Greater Yellowstone Coalition Oneida Narrows Organization	*Final Order* Oct. 18, 2012	TLCC sought a permit to appropriate water from the Bear River for power and irrigation. Environmental entities protested, contending that the project would harm fisheries. Relying on *Shokal*, TLCC contended that IDWR should defer to FERC with respect to its evaluation of the local public interest. Director Gary Spackman denied the application on public interest grounds, saying that deferring to FERC (on a hydro license application that had not even been filed yet) would be an abdication of the Department's statutory responsibility. In so ruling, the Director considered harms and benefits of the project, including other uses that could be made of the water. This appears to be the only post-*Shokal* decision addressing the role of deference to other agencies.

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F. Historical background on the local public interest test

Historically, in Idaho and throughout the West, the allocation of water under the prior appropriation doctrine has involved little if any governmental direction or interference. So long as the applicant could demonstrate that the proposed use was beneficial, feasible and not speculative, and involved no injury or enlargement, that was the end of the matter. It was not considered the government's job to critique the applicant's business plans or decide who, among competing applicants, could make the best use of the resource. Rather, the determination of which is the highest and best use of water is left to the competition of private initiatives in the marketplace.[891]

In the decades beginning in the 1960s, however, considerable attention has been directed to the question of whether the government ought to play a more active role in the allocation of water rights and the protection of the public's water resources. This was driven by two strong political factors.

First, there was a growing perception that something must be done to stem environmental losses and protect remaining vital habitat. The objection was made that the playing field was not level, particularly with respect to the protection of instream flows. Throughout the West, the diversion requirement stood as a barrier to those who wished to obtain water rights to protect river flows and lake levels.[892] Today, statutes and judicial decisions have addressed this perceived imbalance to some extent at least. Idaho, like virtually all western states, has incorporated protection of instream flows into the

[891] The Idaho Constitution does provide preference for certain water uses. Idaho Const. art. XV, § 3. However, this so-called "preference" is a misnomer. Courts consistently have interpreted these provisions–which are common throughout the West–as conferring a right of condemnation on certain uses. Thus, a higher preference user can buy out a lower preference user (in a forced sale), but a higher preference user cannot simply demand that water be allocated or reallocated to it on the basis of preference.

[892] The rule, as traditionally stated, is that a water right requires a "diversion to a beneficial use." That is, it is necessary to artificially remove (or impound) water to obtain a legally protected right to its use. The Idaho Supreme Court recently confirmed that the diversion requirement remains a part of Idaho water law (except as provided under the minimum flow statute). *State v. United States*, 134 Idaho 106, 996 P.2d 806 (2000) ("Smith Springs" case).

prior appropriation system.[893] Nevertheless, the perception that the prior appropriation doctrine is "anti-environmental" is difficult to shake.[894]

Second, there was fear of "water grabs." During this time, water policy was strongly influenced by concern that Idaho (and other intermountain states) were vulnerable to massive water transfers to thirsty and powerful out-of-state interests.[895] The late 70s and 80s were dominated by proposals and rumors of proposals for all manner of trans-basin diversions, from coal slurry pipelines, to water barges, to re-engineered rivers, to towing icebergs.

These seemingly disparate political forces—for environmental protection, local control, and states' rights—combined and gained momentum. Some might characterize the combination of political forces as improbable or coincidental, but the result was real. Water codes throughout the West were amended in the 1970s to give local citizens a stronger voice in water allocation decisions.

The result was often a three-pronged reform. The first prong was express legislative recognition of instream flow rights. The second prong was a requirement that water right applications be subjected to "public interest" scrutiny. The third prong was

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[893] Idaho's minimum stream flow act was adopted in 1978. 1978 Idaho Sess. Laws, ch. 345, §§ 2, 11, amended by 1980 Idaho Sess. Laws, ch. 238 § 14 (codified at Idaho Code §§ 42-1501 to 42-1505, 42-1763B). This was not the first legislative recognition of the role of instream flows. As early as the 1920s, the Legislature enacted statutes which protect lake levels in Idaho's large lakes for "scenic beauty, health, recreation, transportation and commercial purposes." Idaho Code §§ 67-4301, 67-4302, 67-4303 (Big Payette), 67-4304, 67-4305, 67-4306 (Priest, Pend d'Oreille and Coeur d'Alene). Moreover, in the early 1970s the Legislature adopted several more statutes which directed the State Parks and Recreation Board to appropriate for scenic beauty and recreational purposes. The remaining unappropriated water flows in certain scenic springs and streams. Idaho Code §§ 67-4307 (Malad Canyon), 67-4308 (Niagara Springs), 67-4309 (Big Springs), 67-4310 (Box Canyon), 67-4311 (Thousand Springs), 67-4312.

[894] An abiding distrust of the prior appropriation doctrine is reflected, for example, in the writing of Professor Charles Wilkinson. Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* (1992) (in which Prof. Wilkinson describes the prior appropriation doctrine as one of five "Lords of Yesterday"); Charles F. Wilkinson, *In Memoriam: Prior Appropriation*, 21 Envtl L. v (1991) (in which Prof. Wilkinson announces the "death" of the prior appropriation doctrine at age 152).

[895] "In late 1963, public attention was directed toward a proposal by out-of-state interests to divert water from the Snake River in Idaho south through Nevada for use in California and the Southwest. The proposal was firmly opposed within the state, and it was generally recognized that as long as Idaho had 'surplus' water it would continue to be viewed as a source for supplying other states' increasing needs." *Idaho Power Co. v. State ("Swan Falls I")*, 104 Idaho 570, 571, 661 P.2d 736, 737 (1983).

the provision of additional procedural and substantive protections specifically aimed at deterring out-of-state or out-of-basin water transfers.

Idaho was no exception. Legislation on each of these subjects was enacted in the final decades of the last century.

In 1978, the Legislature responded to citizen pressure (in the form of a grassroots petition drive) by adopting the state's minimum stream flow law.[896] The provision expressly recognized that instream flows for "fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality" are beneficial uses.[897] In so doing, the act implicitly did away with the diversion requirement.[898]

In the same year, the local public interest law was made applicable to all new appropriations.[899] When the water supply bank was created in 1979, the local public interest test was made applicable to water bank rentals.[900] In 1981, the local public interest test was extended to apply to transfers of existing water rights.[901] Public interest consideration also arises today in the context of exchanges, temporary changes during droughts, accomplished transfers, and trust water appropriations (see discussion in section 27.B at page 556).

In 1980, the Legislature established special rules for "out-of-basin" uses for ground water rights involving over 5,000 acres or 10,000 acre-feet per year. Such uses must meet special tests related to "the local economic and ecological impact" and must be specifically approved by the Legislature.[902]

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[896] 1978 Idaho Sess. Laws, ch. 345 §§ 2, 11 (codified at Idaho Code §§ 42-1501 to 42-1505, 42-1736B).

[897] Idaho Code § 42-1501.

[898] Idaho's minimum stream flow law contains its own "public interest" standard. To be approved, the proposed instream flow must be found to be "in the public, as opposed to the private, interest." Idaho Code § 42-1503.

[899] 1978 Idaho Sess. Laws, ch. 306, § 1 (codified as amended at Idaho Code §§ 42-202B(3), 42-203A(5)(e)).

[900] 1979 Idaho Sess. Laws, ch.193, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-1763).

[901] 1981 Idaho Sess. Laws, ch. 147, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-222(1)).

[902] 1980 Idaho Sess. Laws, ch. 186, § 1 (codified at Idaho Code § 42-226).

In 1981, the Legislature enacted two more "anti-water-grab" protections. First, it prohibited any change in the nature of use of a water right (e.g., a change from agricultural to industrial or municipal) that "would significantly affect the agricultural base of the local area."[903] Second, it required affirmative legislative approval of any change in the nature or period of use of any water right involving over 50 cfs or 5,000 acre-feet of storage.[904]

In 1990, the Legislature enacted detailed legislation specifically dealing with any new out-of-state uses of water.[905] The Water Export Act was intended to bring the state into compliance with *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.), which set constitutional standards under the federal commerce clause for the circumstances under which states may restrict water exports to other states.[906] The Water Export Act included two primary elements. First, it added a requirement applicable to all water right applications (not just those out-of-state): Every new water right appropriation or transfer must be shown to be consistent with (or not contrary to) the "conservation of water resources within the state of Idaho." Idaho Code §§ 42-203A(5)(f), 42-222(1). Second, the Water Export Act repealed earlier measures aimed

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[903] 1981 Idaho Sess. Laws, ch. 147, § 3 (codified at Idaho Code § 42-222(1)).

[904] 1981 Idaho Sess. Laws, ch. 147, § 1 (codified at Idaho Code § 42-108). This provision applies only to changes involving a change in period or change in nature of use. An "agriculture" to "agriculture" transfer of over 50 cfs or 5,000 acre-feet of storage would not require legislative approval. (Legislative approval, presumably, would come in the form of a concurrent resolution.) Thus, the Act appears to be aimed at transfers from agricultural use to new industrial or municipal uses. By its own terms, the provision applies equally to in-state and out-of-state transfers. This even-handed treatment is required to comply with the Commerce Clause of the U.S. Constitution. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.).

[905] 1990 Idaho Sess. Laws, ch. 141 (codified at Idaho Code §§ 42-222, 42-401(3) and elsewhere).

[906] In *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.), the Supreme Court struck down parts of Nebraska's water export statute which violated the "dormant commerce clause" of the U.S. Constitution. U.S. Const. art. I, § 8, cl. 3. The Court voided Nebraska's absolute ban on water exports to "non-reciprocating" states, but upheld those provisions reasonably relating to the "conservation" of water. Thus, so long as restraints on exportation are expressed in terms of legitimate state concerns (which the Court found to include conservation), a limited preference for in-state use may not constitute an unconstitutional burden on commerce. In Nebraska's case, the Court commended the state's objective "to conserve and preserve diminishing sources of groundwater," ruling that "[t]he purpose is unquestionably legitimate and highly important" and that this purpose was "advanced" by the conservation requirements imposed on exporters of water. 458 U.S. at 954-55. Accordingly, for Idaho to make the restrictions on export stick, it was necessary to add the water conservation test to the requirements for all new and transferred water rights.

particularly at water use in Oregon, and replaced them with a set of rules applicable to all out-of-state water transfers. Such out-of-state uses were required to follow special procedures and to satisfy five additional tests aimed generally at evaluating the relative availability of water in the sending and receiving states. Out-of-state water bank rentals were made subject to the same five tests in 1992.[907]

In 2003, the Legislature included a new basin-of-origin protection measure as part of the bill amending the local public interest review. 2003 Idaho Sess. Laws, ch. 298 (codified at Idaho Code §§ 42-203A(5)(g), 42-222(1), 42-240(5), 42-1763).

In sum, the local public interest test as enacted in 1978 was part of a broad package of legislative measures responding to a series of perceived threats to Idaho's water resources.

G. Making sense of the public interest test

In Idaho and throughout the West, water is recognized as a public resource. But what does this mean? Rights in water are distributed on a first-come, first-served basis to private parties, at no cost. Once acquired, water rights are valuable private property, which may be traded on the market and sold to the highest bidder.

Is this consistent with the "public" nature of the resource? Or, as some would suggest, is there an inherent conflict between public and private values in water?

The authors suggest this is no fundamental conflict. The simple answer is that the people of Idaho have determined that the public interest is best advanced by placing control of this public resource to a very large extent in private hands. A fundamental premise of the prior appropriation doctrine is that, by and large, the public benefits when water is put to use privately.

This is not a novel concept. As with so much of our nation's wealth, we trust the marketplace more than the government to allocate this natural resource to its highest and best use. Thus, in processing applications for appropriations, the Department of Water Resources asks whether the proposed use is a beneficial use. It does not inquire whether some other use of the water might be "more" beneficial.

On the other hand, however, the allocation of water rights is in one sense fundamentally different from other resources allocated within a free market system. That unique feature, of course, is the "use it or lose it" requirement.

[907] 1992 Idaho Sess. Laws, ch. 101, § 1 (codified at Idaho Code § 42-1763).

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The rules of abandonment and forfeiture do not ensure, nor are they intended to, that every use made of water will be its highest and best use. But these rules are intended to ensure that some beneficial use is made.

As virtually all uses these days are deemed "beneficial," the rule serves primarily to ensure that water remains "in play" somewhere in the economic system. The holder of a water right may not take that water right out of economic circulation, like a trunk load of coins stored in the attic. Water must work, one way or another, or its holder loses all rights therein. Except for certain, statutory exceptions, the prior appropriation doctrine requires that water be subjected to the rigors of the marketplace, day in and day out.

The marketplace, not the government, lets Grandpa and Grandma decide, after a lifetime of farming, whether they would be better off trading in their farm and water for a condominium in Arizona and a nest egg for their children. If they decide to sell, the marketplace will select the next use for that water, whether that be washing dairy equipment, providing water amenities in a new residential community, cleaning microchips, or flushing salmon to the sea.

Those are hard choices. But few would rather have the government make those decisions for them. This is not to say that the government does not influence the allocation of resources. It does. Tax policies, trade rules, zoning regulations, environmental rules, subsidies, grants, outlays and a host of other regulations substantially influence what shows up in the marketplace and for what price. But despite all the regulatory prodding, the consumer still makes the choice in the end.

Yet, when it comes to water transactions, the guiding hand of the government is a little closer. The Legislature has expressly provided that in both new water appropriations and in transfers of existing rights, the Department of Water Resources shall insure that the outcome is in the "local public interest."

Just what this means, and how far this intrusion into the marketplace reaches, is the subject of this discussion. Is this a *carte blanche* for governmental second-guessing of the marketplace? Or is its goal more discrete? Is there a logical boundary that can be put on this analysis? Or is it a slippery slope with no real bounds?

As the 2003 amendment made clear, the meaning of the local public interest, though broad, is not unbounded. Most importantly, it should not be construed to undermine the prior appropriation doctrine's basic commitment to marketplace allocation. Rather, the goal of the public interest evaluation is to enable the Department to scrutinize the environmental and social impacts of the proposed diversion of water and

return flows that are not addressed by the marketplace or by other governmental programs.[908]

H. Deference to other agencies in evaluating the local public interest

As discussed above, the 2003 amendment limited the scope of IDWR's evaluation of the local public interest, but did not eliminate it. IDWR retains authority to evaluate the impact on the local community of effects the proposed project on the water resource itself.

This presents two questions (one substantive, one procedural):

- To what extent should the Department rely on or defer to other state and federal regulatory entities with expertise and jurisdiction over issues pertinent to the local public interest?

- Can and should the Department employ "forward-looking" conditions requiring the water right applicant to comply with yet-to-be determined environmental and mitigation requirements imposed by other agencies in other permitting contexts?

Although there are dozens of cases addressing the local public interest test, as of this writing, there are only three addressing these particular questions. The first is the Idaho Supreme Court's seminal decision on the local public interest, *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985) (Bistline, J.). This well-known case provides a careful analysis of the issue. Although decided before the 2003 amendment, nothing in that amendment would alter the basis of the Court's reasoning. Indeed, the Statement of Purpose accompanying the 2003 amendment expressly embraces *Shokal*. See footnote 856 on page 552. The second is IDWR's unappealed decision a contested case known as *In the Matter of Application for Permit No. 13-7697 in the Name of Twin Lakes Canal Co.*, Final Order Denying Application for Permit (Oct. 18, 2012) (G. Spackman, Director) ("*Twin Lakes*"). The third is *Eden's Gate LLC v. IDWR*, Case No. CV14-21-10116, Memorandum Decision, Idaho Dist. Ct., Third Judicial Dist. (June 9, 2022) (Wildman, J.). These cases are discussed, in turn, below.

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[908] Economists call these "externalities." For instance, if a company is allowed to pollute freely (at no cost to the company), the company will likely choose to pollute more and more, even if the cost borne by the public in the form of impaired health and environmental degradation outweighs the company's profit. This is a classic externality. The marketplace will not and cannot correct this error on its own: Because the cost of the pollution to the manufacturer is zero, the marketplace equation will necessarily be lopsided. The government must step in, in some form. It may add the public costs to the company's ledger. It may simply ban or restrict the pollution. Or it may mandate a technological fix.

(1) *Shokal v. Dunn* (1985)

In *Shokal*, a trout raising facility known as Trout Co. applied for a water right to divert 100 cfs from Billingsley Creek to supply a fish propagation facility and hydropower project it planned to build in the Thousand Springs area. When the Department issued the permit, those who had protested the application appealed. The district court reversed, and the applicant appealed.

The Idaho Supreme Court remanded to IDWR, instructing the Department to hold a new hearing on the permit (due to other procedural concerns). The Court included extensive direction for how the Department should consider and apply the local public interest test and the financial viability test.

The Court noted that the local public interest statute provided "little guidance" on the scope of the evaluation. *Shokal*, 109 Idaho at 337, 707 P.2d at 448. It went on to conclude that the scope of the evaluation is broad. *Shokal*, 109 Idaho at 338-39, 707 P.2d at 449-50.

While the Court accorded the Department substantial latitude in evaluating the public interest,[909] it did set some bounds. Most notably, the Court drew a bright line limiting responsibility for review along agency lines. While the Department of Water Resources was authorized to consider "health" issues directly resulting from the diversion itself, it was not authorized to invent its own regulatory system.

The distinction is significant. The Court held that IDWR should take steps to ensure that the applicant will comply with existing environmental laws. In doing so, however, the Department is expected to defer to regulatory entities charged with protecting the environment. Here is the critical language, in full:

> Judge Smith opined that the law will not allow Billingsley Creek to become a nuisance or a health hazard, adding also that "a permit cannot issue which would allow construction of a project contrary to the authority of the Board of Health in policing water for pollution." Hence, Judge Smith concluded that the Director had authority to consider whether the design of any particular facility will meet all environmental requirements.
>
> We believe this to be a correct assessment of the law, but add a word of caution regarding the differing functions of Water Resources and the Department of Health and Welfare.

[909] "The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resources' sound discretion." *Shokal*, 109 Idaho at 339, 707 P.2d at 450.

Water Resources must oversee the water resources of the state, insuring that those who have permits and licenses to appropriate water use the water in accordance with the conditions of the permits and licenses and the limits of the law. It is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors—that role is vested in the Department of Health and Welfare, including compliance with the water quality regulations and monitoring effluent discharge in our state's waterways. Nevertheless, although these agencies may have separate functions, Water Resources is precluded from issuing a permit for a water appropriation project which, when completed, would violate the water quality standards of the Department of Health and Welfare. It makes no sense whatsoever for Water Resources to blindly grant permit requests without regard to water quality regulations. Hence, Water Resources should condition the issuance of a permit on a showing by the applicant that a proposed facility will meet mandatory water quality standards. Under this rule, Water Resources has the authority to withhold a permit application until it receives a proposed design which appears to be in compliance with the water quality standards. Once the conditional permit is granted, Water Resources has continuing jurisdiction over compliance with the conditions of the permit, including suspension or revocation of the permit for proven violations of the permit's conditions regarding water quality.

The Department of Health and Welfare continues to have the primary responsibility for policing water quality control in this state, and can exercise *in personam* jurisdiction over those who violate the state's water pollution laws. While it often may be both more feasible and more reasonable for Health and Welfare to take remedial steps against one violating the pollution laws, either by forcing compliance or shutting down a facility, than to resist an application for a permit in the first instance, Health and Welfare certainly has the right to be heard in proceedings before Water Resources. And, as appointed guardian of the quality of Idaho water, its views are entitled to consideration.

In sum, we agree with the district court, Judge Smith, that Water Resources cannot issue a permit which would allow construction of a project violative of the laws regulating water quality. However, later compliance with those laws

> after construction of a facility generally will be a proper concern of the Department of Health and Welfare.

Shokal, 109 Idaho at 340-41, 707 P.2d at 451-52.

Thus, IDWR may require an applicant for a water right to be in compliance with environmental standards set by other agencies. However, the quoted language suggests that the Department should not make up new regulatory standards, nor hear evidence on the need for new regulatory programs that the Legislature and other agencies with appropriate regulatory authority have not seen fit to create.

(2) The *Twin Lakes* decision (2012)

In the *Twin Lakes* proceeding, Twin Lakes Canal Company ("TLCC") sought a permit to appropriate water from the Bear River for power head storage, power, irrigation storage, and irrigation. Director Gary Spackman denied the application, concluding that the project was not in the local public interest.

Relying on *Shokal v. Dunn*, the canal company took the position that IDWR should not make an independent determination of the overall local public interest but should instead defer to FERC's overall evaluation of the public interest. The canal company urged IDWR to simply issue the water right permit conditioned upon subsequent FERC issuance of the hydropower license and the applicant's compliance with any conditions therein. In other words, according to the canal company, there was no need for the Director to independently weigh and balance the various factors bearing on the local public interest; instead, the Director should defer to FERC's overall assessment of the public interest. Director Spackman adamantly rejected this approach:

> TLCC's reading of Shokal is too broad and if adopted, would result in an impermissible, wholesale abdication of the director's responsibilities related to the local public interest. TLCC would have the state skip any evaluation of the local public interest when considering an application for a hydropower project in Idaho, leaving the evaluation and determination of the local public interest to a federal entity. It is an incredible argument that the Idaho legislature intended to abdicate to FERC – a federal entity – the state's authority to weigh the local public interest when considering a water right application. . . . . This suggestion of abdication is even more surprising in the present case because TLCC asked IDWR to consider its water right application prior to submitting a final application to FERC for a FERC license. IDWR has a responsibility to consider all the criteria contained in Idaho Code § 42-203A, including the local

> public interest. This is particularly true when no other jurisdiction has made any determination on the subject. Furthermore, the interpretation suggested by TLCC cannot be sustained in light of Idaho's constitutional and statutory authorizations to the Department to regulate the use of water in Idaho for power purposes. Idaho Const. Art. XV, § 3; Idaho Code § 42-203B(l).
>
> The present case is factually distinguishable from *Shokal*. In *Shokal*, the protestants raised a question about whether a proposal for water use would satisfy water quality standards. Water quality was one small aspect of the local public interest criterion. In contrast, TLCC is attempting to extend *Shokal* to eliminate all public interest review by the director. Nothing in *Shokal* can be read to suggest such a complete abdication of authority.

Twin Lakes at 6-7.

Thus, it is evident that any deference to other agencies sought by the applicant must not be to the overall public interest determination. But *Twin Lakes* does not appear to preclude deference to individual evaluations undertaken by agencies with expertise and authority found in environmental regulatory frameworks.

Reading *Shokal* and *Twin Lakes* together, it is evident that IDWR is the ultimate "decider" when all pros and cons are weighted. But an applicant may ask IDWR to defer to other state and federal agencies (through enforceable conditions requiring compliance with any requirements those agencies impose) with respect to findings on specific factors that would be factored into IDWR's overall weighing of the local public interest. Thus, for example, IDWR could defer to agencies with expertise and regulatory authority over issues such as wetland mitigation and fish and wildlife protection.

Where the other agency already has completed its evaluation and established permit or other requirements, deference by IDWR to that decision is straightforward. It is a trickier matter when the other agency is proceeding in parallel with the IDWR proceeding, and even more so when the other agency action will be completed subsequent to IDWR's action on the application. *Shokal* plainly requires that the project design be sufficiently settled that IDWR knows what it is evaluating. Thus, the applicant appearing before IDWR must be in a position to articulate with sufficient clarity the nature of the environmental review that will be undertaken by the other agency and the range of possible outcomes. IDWR might then be able to impose a forward-looking condition on the water right requiring a satisfactory resolution of the environmental issue through mitigation or otherwise, the specifics of which would be subsequently determined by another agency. IDWR could then complete its overall evaluation of the

local public interest based in the assumption and condition that the environmental issue will be addressed and resolved.

Having first rejected the canal company's argument that it should defer to FERC's overall assessment of the public interest, the Director engaged in his own assessment. He concluded that the project was not in the local public interest because, among other things, it eliminated the opportunity to develop irrigation water storage at the site. "Granting a permit to TLCC for its proposed dam and storage that is dominated by a hydropower use would limit the ability of the state to utilize the Bear River Narrows as a future storage site for uses other than hydropower." *Twin Lakes* at 14.

(3) *Eden's Gate v. IDWR* (2022)

The most recent decision touching on this subject is Judge Wildman's decision in *Eden's Gate*. Language in that case, and its specific reference to the Statement of Purpose for the 2003 Act, reinforces the conclusion the 2003 amendment "was intended to limit the Department's ability to consider impacts to the local public interest delegated to other state and local agencies." *Eden's Gate* at p. 7. See further discussion of *Eden's Gate* in section 27.D(4) on page 573.

28. STANDING

See the *Idaho Land Use Handbook* for a more complete discussion of the law of standing.

A. Standing in matters before the IDWR

A principal effect of the local public interest test is to expand the grounds upon which one may protest a water right application.

If one's protest is based on injury, for example, it is necessary to own a water right which will be injured. The law of standing will not permit one to protest a water right application on the basis that it might injure someone else's water right.

When it comes to the local public interest, however, anyone who can legitimately demonstrate the he or she is affected by the alleged adverse impact on the local public interest has standing to raise the claim. Thus, the practical effect of the local public interest test is to broadly expand the number of potential protestants to a water right application.

This does not equate to a *carte blanche*, however, for anyone to protest any water right on any basis. The federal case law on this subject is becoming increasingly restrictive, requiring evidence of actual impact on the person raising the protest.[910] Idaho law may not be far behind. In the past, the Department of Water Resources has been quite liberal in this area. In response to an increasing volume of transfers and public interest protests in recent years, however, there is some indication that the Department is beginning to more rigorously review a protestant's standing and basis for objection.

B. Standing in general adjudications

There are two controlling Idaho appellate cases on the issue of standing in general adjudications: *Bray v. Pioneer Irr. Dist.*, 144 Idaho 116, 157 P.3d 610 (2007) (Schroeder, C.J.) and *Fort Hall Water Users Ass'n. v. United States*, 129 Idaho 39, 921 P.2d 739 (1996) (Silak, J.). The teaching of these cases is that we must forget everything we know about the law of standing. Instead, standing in a general adjudication is defined by statute. Specifically, Idaho Code § 42-1401A(1).

In *Bray*, the Court held that Idaho's general adjudication statute broadens the scope of standing. In this case a group of "conservation-minded water right claimants" were found to have standing to challenge the water rights of others.

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[910] *Lujan v. National Wildlife Federation ("Lujan I")*, 497 U.S. 871 (1990): *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

> The Boise Project Control Board contends that Bray, *et al*. lack standing to participate in this matter since they have failed to show that any decision by this Court could affect their water rights, reasoning that Bray, *et al*. does "not point to any injury that is not shared alike by all citizens," as required under *Young v. City of Ketchum*, 137 Idaho 102, 106, 44 P.3d 1157, 1161 (2002). However, adjudication statutes define the standing requirements for the SRBA. *In re: SRBA, Fort Hall Water Users Assoc.*, 129 Idaho at 42, 921 P.2d at 742. Idaho Code § 42–1412 provides that any "claimant" can file an objection or response to a water right reported in the director's report. This Court agrees with the SRBA court that Bray, *et al*. have standing to pursue their claims.

Bray, 144 Idaho at 118, 157 P.3d at 612. In short, anyone with a water right claim in a general adjudication may challenge the water right of any other claimant, without any particular showing of injury.

In an earlier case, *Fort Hall Water Users Ass'n. v. United States*, 129 Idaho 39, 921 P.2d 739 (1996) (Silak, J.), the Court ruled that the statutory definition of standing in general adjudications narrows the definition of standing. In *Fort Hall*, an association of non-Indian water users filed objections in the SRBA to the Director's Report of water rights that earlier had been agreed upon in a settlement between an Indian tribe, the State, and numerous other parties. The Idaho Supreme Court held that because the association was not itself a water right "claimant" within the meaning of Idaho Code § 42-1401A(1), it lacked standing to file objections to the proposed water rights of others. Specifically, the Court found only those asserting an ownership right (or on whose behalf ownership rights are being asserted) are claimants. While the United States asserted ownership of the rights "for use on land owned by non-Indian individual," but that was not good enough. These were only contractual rights, not ownership rights.

Justice Schroeder wrote a most interesting concurrence, pointing out that this seemingly anomalous holding is strictly a function of the statute:

> On its face it might appear that this case is inconsistent with the decision in *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 913 P.2d 1141 (1996), in which this Court found standing to adjudicate an issue when only one plaintiff stated a conclusory and speculative potential injury. It is obvious in this case that a very large body of water users have a clear interest in the events that have taken place and that rights which they have may be adversely impacted by those events. It appears incongruous that this Court has opened its doors to a vaguely defined possible injury that

> almost certainly will not occur in *Boundary Backpackers* and closed its doors to water users in this case whose contract rights are well-defined and whose futures are clearly threatened. The apparent discrepancy is explained by the fact that in this case standing is determined by statute, I.C. § 42–1401A(1), not the policy of this Court. I concur in this case because the water users are precluded by statute from being heard, though their interests are clearly at stake. No similar statute limited the plaintiff in Boundary Backpackers.

Fort Hall, 129 Idaho at 42-43, 921 P.2d at 742-43 (Schroeder, J., concurring).

It would seem that the decision in *Fort Hall* may be called into question by *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) (Schroeder, J.), which held that the federal government holds bare "legal" title to water rights in federal projects, while irrigation districts hold "beneficial use" title as trustees on behalf of the water users within the district. *Pioneer Irrigation* would seem to suggest that water users may hold some sort of actual ownership interest, as opposed to mere contract rights.

In two unappealed decisions, Special Master Terrance A. Dolan ruled that the principles of associational standing (e.g., *Glengary-Gamlin Protective Assn., Inc. v. Bird*, 106 Idaho 84, 675 P.2d 344 (Ct. App. 1983) (Burnett, J.)) are not applicable in a general adjudication.[911] Accordingly, the Idaho Ground Water Appropriators (an organization that represents water right claimants, but does not itself own water rights) was not allowed to participate in 51 subcases in the SRBA. Ironically, IGWA's standing was challenged by the Surface Water Coalition, another organization that represents water right claimants, but does not itself own water rights. The Surface Water Coalition, however, was careful to file its objections in the names of its members, and only then, for purposes of convenience, was allowed to litigate collectively in on behalf of its party-members. Ultimately, IGWA did the same thing.

[911] *In re SRBA, Case No. 39576 (Subcases 01-1J, et al.),* Order Denying Motion to Participate and Setting Status Conference (Idaho Dist. Ct., Fifth Jud. Dist. Aug. 28, 2007); *In re SRBA, Case No. 39576 (Subcases 01-1J, et al.),* Order Denying IGWA's Motion for Reconsideration (Idaho Dist. Ct., Fifth Jud. Dist. Jan. 3, 2008).

29. THE WATER SUPPLY BANK

Idaho's Water Supply Bank (usually referred to simply as the "water bank") was created by the Legislature in 1979 to provide a mechanism to facilitate the movement of "excess" water rights to those who could put them to use, particularly on a short-term basis. Such arrangements could always be made independently of the water bank through private lease agreements, but that would entail IDWR approval of transfer applications, which do not contemplate "re-transfer" of the water back to the original use at the end of the lease term. The water bank is intended to provide a convenient and efficient clearinghouse function, to streamline the approval process, and to provide a degree of state oversight.

The Water Supply Bank is administered by the Idaho Water Resource Board through the Idaho Department of Water Resources. The Department operates under rules adopted by the Idaho Water Resource Board.[912]

The practice of leasing and renting water rights predates the establishment of the water bank in 1979. After Idaho's irrigation storage reservoirs began to come on line in the early part of the twentieth century, it became evident that in many years there was more storage available than the contract holders of the storage space would need for the upcoming irrigation season. (This is not surprising. A central purpose of storage is to provide for supplies in dry years, not necessarily all years.) Consequently, there developed a market for at least a portion of the annually unneeded storage water. Beginning in the 1930s, informal annual leases began to occur, some perhaps without formal transfer proceedings, primarily within water delivery organizations in Eastern Idaho.[913] In 1979, the practice was formalized and authorized by the same statute establishing the water bank.[914]

The water bank handles both natural flow water rights (the definition of which includes ground water right[915]) and storage rights.[916] To be eligible for lease, the water

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[912] IDAPA 37.02.03 (Water Supply Bank Rules); IDAPA 37.02.04 (Shoshone-Bannock Tribal Water Supply Bank Rules).

[913] The first known rental occurred in 1932, when 14,700 acre-feet of water were rented for 17 cents per acre- foot.

[914] Idaho Code §§ 42-1761 to 42-1766.

[915] Natural flow rights are defined to include ground water rights. IDAPA 37.02.03.010.07.

[916] Storage rights are defined in terms of surface storage. IDAPA 37.02.03.010.10. It is not clear how an "aquifer storage and recovery" water right might be handled.

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right must be decreed, licensed or permitted.[917] Thus, an unadjudicated "beneficial use" right may not be leased to the Water Supply Bank. Although the Water Supply Bank handles primarily leases and rentals, it may also acquire water rights on a permanent basis (by sale or gift) and sell them to others.

Transactions involving non-storage water rights are handled directly by the Board; most storage right transactions occur through local rental pools.

The Water Resource Board's rules speak in terms of "lease" and "rental" of rights in a way that departs from the ordinary meaning of these terms. The rules provide that water right holders may "lease" a water right to the water bank, and that others may "rent" those rights from the water bank.[918]

The process begins with the holder of the right offering the water right to the Board for sale or lease. (Forms for lease and rental are available from the Department.) The holder may attach conditions, such as a minimum rental price and the duration of the rental period. The statute authorizes the Board to pay the holder for the lease or sale of the right. In practice, however, the Board typically accepts the water right on a contingency basis under which no payment is made to the lessor unless a third person steps forward to rent (or purchase) the right.[919]

The Board is not required to accept every water right offered to it for lease, sale, or gift. It will consider each offer based on criteria set out in the implementing rules, including whether the right has previously been abandoned or forfeited,[920] the reasonableness of the proposed price[921] consistency with the State Water Plan,[922] consistency with the local public interest,[923] likelihood that the right will be sold or rented,[924] and other factors deemed appropriate.[925] Although the rules have not yet been

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[917] IDAPA 37.02.03.025.02(a). Technically a water permit is not a water right, but they may be traded through the water bank nonetheless.

[918] This terminology is found in IDAPA 37.02.03.010.05; 37.02.03.010.08; Idaho Code §§ 42-1762(2), 42-1763.

[919] IDAPA 37.02.03.025.06(h).

[920] IDAPA 37.02.03.025.06(c).

[921] IDAPA 37.02.03.025.06(d).

[922] IDAPA 37.02.03.025.06(e).

[923] IDAPA 37.02.03.025.06(f).

[924] IDAPA 37.02.03.025.06(g).

[925] IDAPA 37.02.03.025.06(i).

updated, the statute was amended in 2003 to add an additional criterion dealing with interbasin transfers.[926] If the Board determines to accept the right, it will issue a resolution to that effect, which may be accompanied by conditions.[927] If the holder finds the conditions unacceptable, he or she may withdraw the right from the Water Supply Bank within 30 days.[928]

The water bank regulations make no special provision for public notice or hearing with respect to a lease to the water bank, however, leases are considered at public meetings of the Board.[929] Once a water right is accepted by the Board and placed into the bank, the holder of the right must cease using the right, even if it is not rented out to another.[930] However, the forfeiture provisions are tolled during the time the right is in the water bank, even if it is not rented out.[931]

Water right holders typically see the water bank procedures as providing three primary benefits. First, while a water right is in the water bank, it is protected against forfeiture. Second, the rental and use of water under a right that has been placed in the bank may proceed without going through the statutory transfer process.[932] Third, the water bank helps to identify buyers and match them with sellers. The water right holder who places a right in the bank receives a lease payment if the right is rented.

Rental of a water right from the water bank is initiated by an application to the Director. There are no rules governing how the Department matches up water rights leased to the Board with renters seeking the water. As a matter of Departmental practice, this is handled on a first-in, first-out basis. Although water bank rentals are not subject to the "change" requirements under Idaho Code § 42-222, they are nonetheless subject to

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[926] Idaho Code § 42-1763.

[927] IDAPA 37.02.03.025.07.

[928] IDAPA 37.02.03.025.08(a).

[929] IDAPA 37.02.03.025.05.

[930] IDAPA 37.02.03.025.08(b). There is an exception to this rule for water used for hydropower which is rented by the federal government for salmon flow augmentation. *Id*.

[931] Idaho Code §§ 42-223(5) and 42-1764(2); IDAPA 37.02.03.025.08(e).

[932] The statute provides that "[t]he approval of a rental from the water supply bank may be a substitute for the transfer proceeding requirement of section 42-222, Idaho Code." Idaho Code § 42-1764(1). In actual practice, rentals have not been required to undergo a transfer proceeding. In addition, the statute establishes no limit on the duration of a water bank transaction; however, the rules governing local rental pools typically restrict water bank leases and rentals to one year. While the District 01 rental pool allows longer term transactions, none have occurred as of this writing.

substantial scrutiny by the Director. The Director evaluates proposed rentals to ensure no injury, no enlargement, beneficial use, sufficient supply, and consistency with the local public interest.[933] Although forfeiture is not evaluated at the rental stage, it is considered by the Board when the water right was offered for lease.[934]

The Director is authorized to act on his own with respect to rentals of up to five years; Board approval is required of all sales and rentals in excess of five years.[935] Public notice and hearing with respect to rentals discretionary with the Director (unless for a rental period five years or more).[936]

The Department charges a ten percent fee for all water bank rentals.[937]

The statute also authorizes the Board to appoint "local committees," as that term is used in the water distribution statute,[938] to manage local rental pools for the banking and rental of storage water under the auspices of the water supply bank.[939] As it has turned out, almost all of the activity pursuant to the Idaho water bank statute occurs through the local committees that the Board has authorized to manage storage water rental pools on the Boise River, the Payette River, and the Snake River above Milner Dam.[940] As the statute provides, the local committee meets yearly to set the amount of the administrative fee the committee will charge per acre-foot for rentals from the pool.[941] Typically, the

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[933] Idaho Code § 42-1763; IDAPA 37.02.03.030.01.

[934] IDAPA 37.02.03.025.06(c).

[935] IDAPA 37.02.03.030.05.

[936] IDAPA 37.02.03.030.02 ("The Director may give notice . . . .").

[937] IDAPA 37.02.03.035.

[938] Idaho Code § 42-605(6).

[939] Idaho Code § 42-1765. This provision entitles a local committee to "market stored water" between space holders and renters "under rules and regulations adopted by the [Idaho Water Resource] board."

[940] Pursuant to a settlement of its on-reservation reserved water rights, the Shoshone-Bannock Tribe also has authority to operate a rental pool. The Shoshone-Bannock Water Supply Bank is governed by a separate set of rules. IDAPA 37.02.04.

[941] The provision states that the local committee "shall determine . . . that portion of the proceeds for the year from the lease of stored water to be paid to consenting contract holders of the storage rights as reimbursement for their costs and that portion to be retained by the district in which the committee is located." Idaho Code § 42-1765. The statute does not expressly empower the local committee to set rental rates; these are set by means of the Water Board's rules and regulations under which the local committee operates.

storage water spaceholder places a specified number of acre-feet of water with the bank in the spring when he or she is confident that the leased amount will not be needed that year.

No fixed price is set for non-storage water leased through Board-managed portion of the water bank. Rather, the lessor names a minimum rental price when the water right is offered to the Board. Renters then have the option to rent at that price. In contrast, the price of stored water leased through the local rental pools is set by each rental pool with the approval of the Water Resource Board. Prices vary from pool to pool and are based on conditions set for each pool. Rental prices for 1999 in the Upper Snake (Water District 01) were $2.95 per acre foot for water use above Milner Dam and $10.50 per acre foot for use below Milner Dam. (See discussion of "Two Rivers Concept" in section 21 at page 355.) The rental price in the Boise River basin (Water District 63) was $6.50 per acre-foot for in-basin use and $6.93 for out-of-basin use. In the Payette basin (Water District 65) it is $3.20 per acre-foot in-basin and $5.65 out-of-basin. The rental price of storage waters from federal reservoirs is subject to the approval of the Bureau of Reclamation which operates the facilities. When a water right is leased from the bank, the Water Board or local committee extracts a small transaction fee from the rental payment; the balance then goes to the owner/lessor.[942]

Although the water bank and local committee statutes make no distinction between classes of water users, the local rental pools all have rules preferring rentals to irrigators over non-irrigators,[943] and in-basin rentals over out-of-basin rentals. For example, the rental of one's irrigation storage right for a non-irrigation purpose results in the storage space involved being accounted the next year as the last to fill.

The water bank is currently being used as the mechanism for making substantial quantities of storage water—up to 427,000 acre-feet per year—available for rental by the federal government from a combination of the three local rental pools mentioned above in connection with salmon recovery efforts.[944]

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[942] Idaho Code § 42-1765 (authorizing local committee to determine the portion to be "retained by the district in which the committee is located"); IDAPA 37.02.03.035.01.

[943] For example, Rule 3.2 of the Water District #63 Rental Pool Procedures states: "Operation of the Rental Pool will be by and for the irrigators within the district through the Committee. These procedures are designed to assure that stored water is maintained and first made available for irrigation use."

[944] Idaho Code §§ 42-1763B. This legislation sunsetted in January 2005, but is expected to be renewed.

30. WATER DELIVERY AND MANAGEMENT ENTITIES

Note: See section 31 beginning on page 618 for a discussion of water rights ownership issues.

A. The basic types of water delivery organizations

A variety of institutions are involved in the development and distribution of water. State government, municipalities, for-profit corporations, non-profit corporations, quasi-municipal entities, individuals, and the federal government all have a hand in the business of water supply. This section provides an overview of the basic forms of water delivery entities listed below.[945]

Commercial water companies. Unlike most other entities discussed in this chapter, commercial water companies are organized for profit. This *Handbook* and the *Idaho Land Use Handbook* use the term "commercial water companies." Others employ the terms commercial irrigation companies, commercial ditch companies, or carrier ditch companies. They all refer to the same thing: private, for profit companies in the water delivery business. These are in contrast to mutual irrigation companies, irrigation districts, and other non-profit water providers (discussed below).

Commercial water companies are in the business of delivering irrigation water, which they divert under water rights they hold, to consumer-irrigators under a rental, sale or similar contract arrangement. Commercial water companies are either "private contract companies" or public utilities.[946] Private contract companies (predating public utility regulation[947]) were common in Idaho's formative days, but few remain.[948] Most, if

[945] Names of irrigation entities can be confusing. One should be careful not to reach conclusions about the type of entity involved on the basis of its name. Occasionally, one will encounter a mutual canal company with a name ending in the word "District" (for example, the Capital View Irrigation District in Boise). More often, one will observe canal and ditch companies referring to themselves informally as "irrigation districts."

[946] *Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc.*, 165 Idaho 467, 475, 447 P.3d 915, 923 (2019) (Burdick, C.J.) (identifying private contract companies and public utility companies as being types of commercial ditch companies).

[947] "The public utilities commission was created by act of the legislature in 1913. 1913, S.L. Chap. 61. By that act such powers as municipalities may have had to control and regulate public utilities was withdrawn and transferred to the commission." *Village of Lapwai v. Alligier*, 299 P.2d 475, 478 (Idaho 1956) (Taylor, C.J.).

[948] In the early days of Idaho's settlement, commercial water companies were very common. Few remain. "The commercial ditch company's heyday was in the 1880's; almost none persist today." *Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc.*, 447 P.3d 915,

not all, commercial water companies today are private utilities. There is no difference between the two with respect to their ownership of the water rights. *See*, *Eagle Creek*, 165 Idaho at 474-75, 447 P.3d at 922-23.

Mutual irrigation companies (aka mutual canal companies or mutual ditch companies) and Carey Act operating companies. These entities, often simply called "canal companies," are not-for-profit corporations that deliver irrigation water at cost to their shareholder-members. They are formed by a group of irrigators who join together for the purpose of constructing and/or assuming the management of a water project and delivering water to themselves for mutual benefit. In the early days of Idaho, for profit commercial water companies created so-called "operating companies" (essentially mutual irrigation companies) to take advantage of the land settlement program established by the Carey Act.

Irrigation districts. These are quasi-governmental entities formed pursuant to a statutory election process. They rely on taxing authority to undertake and manage water delivery efforts. They provide irrigation water to all irrigable lands desiring such within a prescribed boundary.[949] They can be analogized to school districts or sewer districts.

Bureau of Reclamation. This federal agency, within the Department of the Interior, plays a substantial role in the delivery of water throughout the West. Its history and structure is discussed in section 33 at page 664.

In addition, the reader should be aware of other organizational forms which play a significant role in connection with the delivery and management of water supplies. They include:

Water districts and ground water districts. "Water districts" and "ground water districts" sound like synonyms for irrigation districts, but they are completely different forms of governmental entity. (See discussion in sections 30.F and 30.G starting on page 614.) These statutorily created entities do not hold water rights for delivery purposes.

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922 (Idaho 2019) (Burdick, C.J.). To the author's knowledge, only two large commercial water companies operate in Idaho today: Veolia and PacifiCorp. Based on IPUC filings, it appears that another 20 small commercial water companies (such as Capitol Water Corporation in Boise) provide municipal water to much smaller service areas. All of these are utilities regulated by the IPUC. Veolia and Capitol Water Corporation are municipal water providers serving the Boise area. PacifiCorp is an electric power company that also provides irrigation water, but no municipal water.

[949] There of course are many types of irrigation water delivery organizations in the West. One treatise reports that, as of 1978, there were at least 7,000 irrigation water delivery organizations in the 17 Western states, which together delivered about half of the irrigation water in the region. Robert E. Beck, 3 *Waters and Water Rights* § 25.01 at 470 (1991), *see also* Meyers, Tarlock, Corbridge and Getches, *Water Resource Management* at 704 (1988).

Nor do they supply irrigation water. They may, however, hold water rights for other purposes, such as to facilitate their members' mitigation obligations.

Water measurement districts. In 1995 the Idaho Legislature enacted Idaho Code § 42-706 which authorized IDWR to create water measurement districts to facilitate measurement and reporting of diversions outside of established water districts. In 1996, the Director created three such districts within the Eastern Snake Plain Aquifer. These entities do not hold water rights, and are not discussed further in this section.

Unique entities. The reader should also be aware of various unique or hybrid water entities. For instance, the Boise Project Board of Control was formed to manage the delivery systems for the Bureau of Reclamation's Boise Project. The Board of Control is made up of representatives of the various irrigation districts which have water supply contracts along with other officials.

The Water Supply Bank. Naturally, the water bank and the local rental pools are involved in the provision of irrigation water. These are discussed in section 29 at page 595.

Idaho Department of Water Resources. Of course, a major player in the management of irrigation water is the state agency which oversees the administration of water rights. The organization of the IDWR and the Idaho Water Resource Board which oversees it are discussed in section 12 at page 190.

Municipal Water Providers. Although this chapter and the next deal primarily with entities supplying irrigation water, some of the same principles could be applicable (or at least analogous) in evaluating the ownership of municipal water rights. Consequently, a brief discussion of this topic is included in section 31.G at page 658. A more detailed exploration of municipal water rights is found in section 23 at page 379.

B. Commercial water companies (aka commercial irrigation companies, commercial ditch companies, or carrier ditch companies)

In the early days of western development, commercial water companies (historically known as commercial irrigation companies, commercial ditch companies, or carrier ditch companies) were prevalent in the business of supplying irrigation water to newly-settled lands.

The early homesteaders lacked the capital required to construct irrigation projects. In those days, there were no governmental entities to turn to. The first wave of settlement pre-dated the federal laws and programs that were to become critical to Idaho's agricultural development, such as the Carey Act (1894), and, especially, the federal Reclamation Act of 1902. Idaho did not enact its irrigation district laws until 1903. Consequently, many of the first western water projects were constructed with private

investment money. Investors in places as far away as New York and London often undertook the expense and risk of constructing diversion facilities. (For example, the New York Canal in Boise was named after the home of its investors.) Irrigators were then encouraged to settle the lands under one of the homestead acts and begin farming, with the promise of reliable irrigation water. In the end, if all went right, the commercial water company could make a profit.

Today, we would recognize these private carrier companies as having many of the attributes of investor-owned public utilities. (And most of those that have survived are public utilities today.) In the early days, however, they operated before the concept of public utility regulation took hold. (Idaho's public utility law was enacted in 1913,[950] although there were some earlier attempts at utility regulation.) Predictably, there were abuses, miscalculations, and shattered expectations—such as when a carrier company went bankrupt and the foreclosing bank sought to repossess the company's water right. Just as predictably, government institutions of the day (legislatures, courts and constitution-framers) responded to these problems as best they could, without the benefit of experience in public utility regulation.

In 1889, following California's lead, Idaho adopted constitutional provisions imposing a form of utility regulation on the private irrigation water suppliers. In Colorado, the courts did essentially the same thing, using common law principles.

The heyday for these ventures in private, for-profit irrigation water systems was the 1880s, but their glory was short-lived.[951] The advent, beginning at the turn of the last century, of massive federal assistance and extensive state involvement in the facilitation of irrigation reduced the need for for-profit commercial water companies.[952]

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[950] "The public utilities commission was created by act of the legislature in 1913. 1913, S.L. Chap. 61. By that act such powers as municipalities may have had to control and regulate public utilities was withdrawn and transferred to the commission." *Village of Lapwai v. Alligier*, 299 P.2d 475, 478 (Idaho 1956) (Taylor, C.J.).

[951] "Irrigation development in Idaho passed through four somewhat overlapping stages, "first was individual effort, then corporate enterprise, then government aid to private enterprise [1894 Carey Act], and finally large-scale federal reclamation [1902 Newlands Act]." The Ditch Companies which so dominated the development of water resources at the time of the 1889 Convention were burdened heavily by the Water Article incorporated into the Constitution. The companies were further damaged in the financial crash of 1893, and disappeared from Idaho shortly after the turn of the century. This, in turn, rendered much of the language in Article XV dead letter." Dennis C. Colson, *Water Rights in the Idaho Constitution*, 53 Advocate 20, 21 (Dec. 2010) (footnote omitted) (brackets original).

[952] *See, e.g.,* Barton H. Thompson, *Institutional Perspectives on Water Policy and Markets*, 81 Cal. L. Rev. 103, 118, Table 2 (1993) (indicating that the state with the greatest reliance on commercial irrigation companies is Colorado, where they now supply only 1.6% of

The nineteenth-century experience with commercial water companies left a legacy of case law and constitutional provisions that remains in play today. This body of law deals with the often confusing concept of "public use" in the delivery of irrigation water. This subject is explored in section 31.B at page 620.

In any event, and as background for understanding this legacy, it is appropriate to explore the commercial water company concept. Beck defines a commercial water company (aka commercial irrigation company, commercial ditch company, or carrier ditch company) as an entity that holds a water right in its own name, for its own benefit, pursuant to which it rents or sells water to consumers for a profit. Robert E. Beck, 2 *Waters and Water Rights* § 26.03 (1991). Hutchins noted their essential features this way: "The commercial irrigation company is an organization designed to construct and operate irrigation works for the profit of persons who build the works and retain temporary or permanent ownership. It thus differs essentially from the mutual irrigation company and the irrigation district, which are nonprofit community enterprises." Wells A. Hutchins, *Commercial Irrigation Companies*, USDA Tech. Bull. 177 (1930). Notably, the commercial water company's shareholders could live in places like New York, and in any event were not the persons making use of the water that the company delivered. (E.g., the New York Canal in Idaho was funded by investors from New York City.)

Commercial water companies were organized in any of three ways. See discussion in section 31.C on page 625 (in particular, the Fereday quotation from the *Eagle Creek* case). In some instances, they were temporary entities that would later transfer their water rights to the irrigators, a mutual irrigation company or a Carey Act operating company, where after the commercial water company would be dissolved. In other instances, the commercial water company might continue to operate permanently as a private contract company or a public utility.[953]

C. Mutual irrigation companies (aka mutual canal companies or mutual ditch companies) and Carey Act operating companies

The next form of water distribution entity we take up is the mutual canal company (aka mutual ditch company, mutual irrigation company, or cooperative ditch or canal company). In contrast to the commercial water companies discussed in the preceding section, these are companies "formed expressly for the purpose of furnishing water to

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the irrigation water delivered in that state). "No known commercial companies are being organized now." Robert E. Beck, 2 *Waters and Water Rights* § 26.03 at 496, n. 110 (1991).

[953] For an early discussion of the nature and duties of commercial irrigation companies in California, *see* Kenneth L. Blanchard, *The Relation Between Irrigation Water Users and Distributing Companies With Special Reference to Right Arising Out of Contract*, 7 Cal. L. Rev. 295 (1919).

shareholders, not for profit or hire." *Jacobucci v. Dist. Ct. in and for Jefferson Cnty*, 541 P.2d 667, 671 (Colo. 1975). They are formed by and for the irrigators themselves. They are engaged in the business of storing and/or transporting irrigation water for use by its shareholders, in return for payment of assessments levied on the shares to meet operating expenses of the company (without profit). *Nelson v. Lake Canal Co.*, 644 P.2d 55, 57 (Colo. App. 1982). The water users hold shares in the company, the number of shares is based on the amount of irrigation water the shareholder requires. The mutual canal enterprise—and not the commercial or carrier company—is the type of non-profit, corporate irrigation supplier we see in Idaho today.

Dean Trelease notes that "a mutual water company is a non-profit corporation that owns diversion or storage works and delivers water at cost to users who own its stock, and that derives its operating funds from assessments levied against the stockholders." Trelease, *Water Law, Resource Use and Environmental Protection*, ch. 6 at 612, n. 1.

Trelease notes that mutual irrigation companies come in a variety of forms; he considers Carey Act operating companies (see below) to be mutual irrigation companies. Trelease, *Water Law, Resource Use and Environmental Protection*, ch. 6 at 613. The Idaho Supreme Court has said, "In form, [Carey Act] operating companies acted much like mutual irrigation companies because they operated to deliver water to their shareholders at cost." *Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc.*, 165 Idaho 467, 4756, 447 P.3d 915, 923 (2019) (Burdick, C.J.). The only difference between Carey Act operating companies and other mutual irrigation districts pertains to whether the water rights held by the irrigators are appurtenant to individual tracts of land. See discussion in section 31.D beginning on page 630.

According to Trelease, the distinguishing feature of a mutual canal company appears to be its direct control by its shareholders, and its lack of any purpose beyond supplying the shareholders with irrigation water (meaning no profit motive, even though, in some cases, these may be organized under the state's general corporation laws).

Hutchins' view is to the same effect: "The distinctive feature of the mutual irrigation company is service rendered at cost to the lands of members only." Wells A. Hutchins, *Mutual Irrigation Companies*, USDA Tech. Bull. No. 82 at 3 (1929).

Wiel describes mutual canal companies as "a special kind of private service companies . . . [which] are usually such that shares of stock represent rights to specific quantities of water, and the stockholder's right to a supply rests upon his stock and not upon his status as a member of the public, the company being formed to supply water to its stockholders only." Samuel C. Wiel, 2 *Water Rights in the Western States* § 1266 at 1170-71 (1911). Wiel's treatise distinguishes mutuals from ordinary "public service" entities:

> [I]t is very important to note that, being in private service only, [mutual irrigation companies] are not subject to the public control which obtains as to public service companies. Nor can a mutual company be forced to deliver water to others than its stockholders.

Samuel C. Wiel, 2 *Water Rights in the Western States* § 1266 at 1171 (1911).

As discussed above in connection with commercial water companies, a company engaged in public service is subject to special requirements and obligations, including most notably the obligation to continue to supply all those to which service has been initiated. Samuel C. Wiel, 2 *Water Rights in the Western States,* ch. 54 at 1179 (1911). *See also* Kinney, 3 *Irrigation and Water Rights* § 1480 (2d ed. 1912). (See footnote 981 at page 623.)

Many mutuals were formed by individual water right holders who pooled assets, incorporated the ditch company and conveyed their water rights to it in return for stock. *See, e.g.,* historical discussion in *Jacobucci v. Dist. Ct. in and for Jefferson Cnty*, 541 P.2d 667, 671 (Colo. 1975). This pattern was followed in establishing the "cooperative" ditch company—another term sometimes used to describe this form of company—which was the subject of *Fuller v. Azusa Irrigating Co. Fuller v. Azusa Irrigating Co.*, 71 P. 98 (Cal. 1902). However, it is clear that mutuals were formed in a "variety of ways." Robert E. Beck, 2 *Waters and Water Rights* § 26.02 at 477 (1991). There seems to be no reason, in law or logic, to distinguish between a mutual canal company formed in such a way and one formed before any shareholder had acquired water rights. In either case, the resulting arrangement is the same. The shareholders own the company and the water rights.

A unique type of mutual canal company is the Carey Act company. The federal Carey Act of 1894, as amended, 43 U.S.C. § 641, is a homestead law under which Congress guaranteed to make up to 1,000,000 acres of public domain available for settlement in each of the seventeen Western states, provided the state would carry out a water development and land settlement program as specified in the statute. The state would contract with a for-profit "construction company" (a commercial water company) which would obtain water rights in its own name, build the irrigation project and sell to settlers stock in a successor "operating company"—a private water delivery corporation formed pursuant to state statutory procedures established to implement the Carey Act.

In other words, the construction company was the promoter of the project; the operating company, through its shareholders, purchased the promoter's interest in the facilities and water rights. The construction company operated the project only in the interim, before this conveyance occurred. Once the project was completed and all (or nearly all) of the operating company stock sold to entrymen, the construction company departed (presumably with its profit), conveying to the operating company all of its

remaining interest in the project facilities and water rights. The federal government issued land patents directly to the settlers, who proceeded with the non-profit stock company in place.[954]

The Idaho Supreme Court provided this helpful summary of the Carey Act:

> In 1894, Congress passed the Carey Act, a homestead law that guaranteed up to a million acres of the public domain to Western states if the states would carry out a water development and settlement plan. Mikel H. Williams, Idaho Dep't of Reclamation, *the History and Development and Current Status of the Carey Act in Idaho* 1 (1970). The Carey Act was enacted to encourage westward expansion into desert lands when the 1890's land rush stalled because most areas with readily available water had been settled. *Id*.
>
> To implement the Act, the federal government agreed to convey lands to the states once an ample supply of water was furnished to areas. *Id*. at 2-3. To provide the supply of water, for-profit "construction companies" would seek the state's approval to build irrigation projects. *Id*. at 6. The state would then determine whether there was enough unappropriated water for the venture. *Id*. If satisfied by the proposal, the State would determine the water rights that the construction company could sell. *Id*. The construction company would then sell stock in a nonprofit "operating company" (formed according to state statutory procedure) to settlers who would perfect the water right by putting the water to beneficial use on the land. *Id*. (citing *In re Robinson*, 61 Idaho 462, 103 P.2d 693 (1940)). In form, operating companies acted much like mutual irrigation companies because they operated to deliver water to their shareholders at cost. *Id*. Once the irrigation system was completed and the construction company had sold all (or most) of the stock in the operating company, the construction company would convey all its interest in the irrigation system and water rights to the operating company. *Id*. The federal government would then issue land patents directly to the settlers. *Id*.
>
> As a result, the "origin and purpose of Carey Act companies are distinct from those of ordinary water corporations [and] have been generally recognized by the

[954] For a discussion of the Carey Act process, *see* Robert E. Beck, 3 *Water and Water Rights* § 26.02(g) (1991).

> statutes and by the court as forming a distinct class of water corporations." *In re Johnston*, 69 Idaho 139, 145, 204 P.2d 434, 438 (1949). Under Idaho law, "water rights to all lands acquired under the [the Carey Act implementation chapter] shall attach to and become appurtenant to the land as soon as title passes from the United States to the state." I.C. § 42-2025. Thus,
>
> > [i]t seems clear that by virtue of the statutory conditions and these contracts, and the certificate issued pursuant to them, that the company sells, and the purchaser buys a water right dedicated to his land . . . It seems clear that the certificate in carrying out the whole plan represents and must represent a water right sold to the settler and dedicated to his land, and of which he is the beneficial owner. And further, at least in the absence of any showing of separation, the water right is an appurtenance to the land to which it was dedicated and is part of that property.
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> *Leland v. Twin Falls Canal Co*., 51 Idaho 204, 3 P.2d 1105, 1107 (1931). Thus, a Carey Act operating company's shares document the settler's ownership of the water right. *See* Williams, *supra*, at 7 ("It must be remembered that corporations organized to construct irrigation systems under the Carey Act do not become owners of water rights or irrigation systems; but are only given the right to sell water rights for the purpose of recovering the cost of the construction of the works with a reasonable profit.") (citing I.C. 42-2504 (1917)).

Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc., 165 Idaho 467, 475-76, 447 P.3d 915, 923-24 (2019) (Burdick, C.J.) (brackets original).

Idaho, Wyoming, Montana, and Oregon saw the most lands patented under the Carey Act process, with 630,000, 200,000, 92,000 and 73,000 acres patented, respectively. The other Western states each patented less than 40,000 acres under the Act, and therefore today have relatively few Carey Act operating companies. In Idaho, water lawyers frequently encounter Carey Act operating companies.[955] In other western states, such as Colorado, these companies are rare.

[955] Four prominent examples of mutual canal companies created in Idaho pursuant to the Carey Act are the North Side Canal Company, Twin Falls Canal Company, Aberdeen-Springfield Canal Company, and the Big Wood Canal Company.

The Carey Act operating company provides water deliveries on a per-share basis in return for an assessment. It operates not for profit, but merely to deliver irrigation water at cost to its shareholders. Shareholder-irrigators control the company. Thus, Carey Act operating companies are mutual irrigation companies. The Idaho Supreme Court also has referred to a Carey Act operating company as a "mutual irrigation company, not organized for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water for use upon their lands in proportion to their respective interests . . . ." *Ireton v. Idaho Irrigation Co., Ltd.*, 30 Idaho 310 (1917). However, the statutory scheme under which they were formed entitles them to powers in dealing with their shareholders which other mutuals may not have absent a charter, article, or by-law provision (such as the right to impose liens against lands and water rights of shareholders for failure to pay assessments).

Interestingly, the Carey Act program was carried out using both a commercial irrigation corporation (the construction company which sold water entitlements to settlers), and a mutual canal company (the operating company established to take over from the construction company and operate the project on behalf of the stockholders/entrymen).

D. Lateral Ditch Water Users' Associations

Idaho Code sections 42-1301 through 1309 establish and set forth the powers and duties of lateral ditch water users' associations. Section 42-1301 states that "[w]here three (3) or more parties take water from the same canal or reservoir at the same point to be conveyed to their respective premises for any distance through a lateral or distributing ditch or laterals or distributing ditches such parties shall constitute a water users association…." Accordingly, such associations arise as a matter of statutory mandate when these conditions are met, not through the ditch users' own initiative. These "lateral ditch associations" (or "lateral water users associations") thus manage a ditch system that is subsidiary to, and receives irrigation water from, a primary canal operated by an irrigation district or canal company.

The statute requires the lateral ditch association to elect a board of directors, and authorizes it to "adopt rules and regulations for the management of said lateral or laterals or distributing ditch or ditches and the delivery of water therefrom as they deem best,"[956] to combine or abandon ditches, to elect a manager, assess fees for ditch maintenance and repair, borrow money for projects[957] and to carry out other actions pertaining to operating the association's water delivery system.

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[956] Idaho Code § 42-1301.

[957] Idaho Code § 42-1309 (authorizing lateral water users' associations to borrow money and mortgage or otherwise pledge their assets as security).

Lateral water users' associations often are informally operated, may not have published rules or bylaws, may not have regular meetings. They often consist of very few water users (as noted, the statute requires only three) and may lack the assessment base to fund the operation, repair, maintenance, and facility improvement normally associated with larger canal companies or irrigation districts.

E. Irrigation districts

The term "irrigation district" as used here is a generic term including any type of quasi-municipal entity with taxing authority that was formed pursuant to statute to deliver water from an irrigation project to landowner-consumers within a specific geographic boundary. The term distinguishes this type of entity from mutual irrigation companies and includes water conservancy districts, reclamation districts and other similar forms of "special water districts" that are concerned with irrigation supply.[958]

Irrigation districts are water distribution organizations formed pursuant to state statutory procedures which vest them with quasi-municipal powers, the most important of which are the powers to issue bonds and to levy assessments, backed up by liens, on lands within the district.[959] These lands typically are the irrigable lands within certain boundaries that could be served by the district's canal system.[960] Irrigation districts are governed by boards elected by property owners within the district.[961] Districts also often have authority to operate drainage or power facilities, or to carry out other water-related purposes. Irrigation district facilities are tax-exempt.

Each irrigation district was established through a petition process which designated specific irrigable lands which are to be served by the district. These lands are eligible for irrigation water deliveries from district facilities, which typically consist of a main canal, subsidiary canals and related facilities.

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[958] This chapter does not investigate any issues that may be peculiar to special districts concerned only with municipal water supply. Note also that the term "irrigation district" is to be distinguished from special statutory entities in Idaho known as "water districts" and "ground water districts." These are discussed below.

[959] Title 43 of the Idaho Code is devoted to irrigation districts. Idaho Code §§ 43-101 to 43-2501.

[960] Procedures for exclusion of lands from an irrigation district are codified at Idaho Code §§ 43-1101 to 43-1121.

[961] Because the Supreme Court has found irrigation districts to be special purpose entities which do not exercise normal governmental functions, it has affirmed their entitlement to restrict voting to landowners, despite the constitutionally-grounded "one-person, one-vote" rule. *Ball v. James*, 451 U.S. 355 (1981).

Irrigation districts may operate their own storage reservoirs. In Idaho, however, most have entered into long-term contracts with the Bureau of Reclamation which entitle them to receive storage water from federal reservoirs. In some cases, such as on the Boise River system and in the Upper Snake, several districts will form an operating board which contracts with the Bureau with regard to the operation of those federal projects which serve large areas encompassing several irrigation districts and other water delivery entities. In addition to providing irrigation water, districts often operate drainage facilities or carry out other drainage functions for lands within the district.

In general, legal authority for the formation of irrigation and other special water districts in the West (such as water conservancy districts) can be traced to the Wright Act,[962] an 1887 California law, and to *Fallbrook Irr. Dist. v. Bradley,* 164 U.S. 112 (1896), which upheld the Act's constitutionality.[963]

In Idaho, irrigation districts rarely allow transfers of water use to areas outside their boundaries. However, such transfers are typically permitted within district boundaries. This technique has been used to provide "supplemental" water to some district lands during droughts, for example. Moreover, state approval of a water right transfer is not required for such intra-district transfers (owing to a special statutory exception to the transfer requirement, codifying longstanding practice.)[964] See discussion in section 15.E(7) at page 237.

Three Idaho cases deal with the question of whether an irrigation district may deliver water outside the boundary of the district.[965] They hold that a district may do so if

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[962] 1887 Cal. Stat., ch. 34 at 29.

[963] For discussions of irrigation and other special water districts, *see* John Leshy, "Special Water Districts—The Historical Background," in James Corbridge, Ed., "Special Water Districts: Challenge for the Future," Natural Resources Law Center, Boulder, Colorado (1983); Wells A. Hutchins, "Irrigation Districts, Their Organization, Operation and Financing," U.S. Dept. of Agriculture Technical Bulletin No. 254 (1931); Comment, "Desert Survival: The Evolving Western Irrigation District" 1982 Ariz. St. L. J. 377 (1982); and Robert E. Beck, 3 *Waters and Water Rights* § 27.02 (1991).

[964] Idaho Code § 42-219(7). This provision provides, in part: "Subject to other governing law, the location of the acreage irrigated within a generally described place of use, as defined in accordance with subsections (5) and (6) of this section and as filed with the department pursuant to sections 42-323, Idaho Code, may be changed without approval under the provisions of section 42-222, Idaho Code. However, the change shall not result in an increase in either the rate of flow diverted or in the total number of acres irrigated under the water right and shall cause no injury to other water rights." The process for establishing an irrigation entity's "generally described place of use" is set forth in the referenced subsections.

[965] In *Yaden v. Gem Irr. Dist.*, 37 Idaho 300, 216 P. 250 (1923), the an irrigation district sought to be relieved from a contract it had entered to deliver water to Ms. Yaden whose land

and only if the water is not needed to serve landowners within the district. While these cases recognize an important exception allowing delivery of excess water beyond district boundaries, they also suggest that if conditions change and the water becomes needed to irrigate district lands, the district may stop serving the lands outside the district.

In any event, an Idaho statute enacted in 1946 (after *Yaden* but before *Jensen* and *Jones*) makes a far broader declaration of the authority of an irrigation district to provide water for irrigation of lands outside of its boundary. The statute holds that a district may serve lands outside its boundary so long as the district's board of directors makes a determination of feasibility: "Service through such system may be provided both to lands within the district and to other lands that the district's board of directors determines can be served feasibly and economically." Idaho Code § 43-1901.

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was outside the boundary of the irrigation district. The court sided with the irrigation district, declaring that the contract was *ultra vires* (beyond the authority of the board) because, under applicable statutes, the district held its water rights in trust for the benefit of landowners within the district. However, the Court noted an important exception: "However, the foregoing provisions of the statutes do not prohibit the delivery of water to users outside of the district when the same is not needed by users within the district." *Yaden*, 37 Idaho at 308, 216 P. at 252. Thus, *Yaden* established the principle, albeit in dictum, that service beyond district boundaries is authorized where the water is not needed within the district.

In *Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 269 P.2d 755 (1954), the irrigation district contracted to supply seepage and waste water collected within the district boundary to a landowner outside of the district. The Court ruled that since seepage and waste water, by definition, is not needed by the landowners within the district, the district was authorized to enter into a contract with the landowner outside of the district. The Court relied on and quoted extensively from *Yaden* in reaching this conclusion. Thus the dictum in *Yaden* became the holding in *Jensen*.

The third case, *Jones v. Big Lost River Irr. Dist.*, 93 Idaho 227, 459 P.2d 1009 (1969), was more narrowly decided. It dealt with a claim for damages by Jones, an irrigator who previously had been served with water from the Big Lost River Irrigation District ("Big Lost"). During a drought, Big Lost stopped delivering water to Jones. The court sided with Big Lost, finding that it "had no duty or obligation to deliver storage water outside the boundaries of the district." *Jones*, 93 Idaho at 229, 459 P.2d at 1011. In so ruling, the Court relied extensively on *Yaden* and *Jensen*. The *Jones* case, however, did not present the issue of delivery of excess or unneeded water. Accordingly, it does not appear to contradict the exception laid out in those cases. Big Lost, by the way, is not an irrigation district. Despite its name, it is actually a mutual canal company. The court ignored this difference, with the implication that the rule is the same for all types of irrigation entities—a conclusion that overlooks the fact that the earlier cases were based on statutory provisions dealing with irrigation districts.

The issue was presented in a fourth case, *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 856 P.2d 868 (1993), but the Court never reached the issue deciding the case instead on a technical point of jurisdiction.

It is odd that *Jensen* and *Jones* do not mention this statute. The statute plainly goes beyond the exception first laid out in *Yaden* (that water not needed within the district may be delivered outside the district). The statute establishes a more flexible standard that delivery outside the district is permissible any time the board determines that the action is feasible and economical. Given that *Yaden*, *Jensen*, and *Jones* were based on statutory authority rather than an immutable constitutional limitation,[966] it appears that the grant of authority found in Idaho Code § 43-1901 overrides and expands the narrower rule laid out in the case law.

The cases and statute discussed above address only Idaho law. Many irrigation districts and canal companies provide only water under water rights that they own outright, in which case Idaho law is all that matters. In other cases, however, irrigation districts firm up their own water supplies with storage water from federal reservoirs pursuant to contract with the Bureau of Reclamation.[967]

Although the Reclamation Act of 1902 expressly provides that water rights in these federal projects shall be acquired pursuant to state law, there is authority that the United States may impose additional conditions in the contracts they enter into with irrigation districts and others.[968] A common condition prohibits delivery outside of the district's boundaries without permission of the Bureau's contracting officer. In addition to contract constraints, the authorizing legislation for specific projects sometimes contains site-specific statutory limitations.

In the case of municipal entities that have contracted with irrigation districts, another state statute comes into play. The statutory title dealing with city irrigation systems was amended in 1981 to authorize pooling of irrigation district water for delivery. 1981 Idaho Sess. Laws, ch. 31 (codified in relevant part at Idaho Code §§ 50-1805 and 50-1805A). Since pooling inherently involves service outside of district boundaries, this statute reflects further legislative approval of the practice. On the other hand, one might argue that the restrictions on delivery of water outside district boundaries do not apply to a pooling situation. With pooled water rights, the city may be able to show through accounting that all the water from each district is being used (at least in an

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[966] The *Yaden* Court noted: "Irrigation districts are creatures of the statutes. They are quasi public or municipal corporations, and as such have only such power as is given to them by statute, or such as is necessarily implied." *Yaden*, 37 Idaho 300, 308, 216 P. 250, 252 (1923).

[967] Curiously, the *Jensen* case discussed above dealt with the Boise-Kuna Irrigation District which, unlike the irrigation entities involved in *Yaden* and *Jones*, does deliver federal reclamation water and, so far as we know, did so at the time the case was decided. Yet the issue of federal constraints on delivery outside of district boundaries was not mentioned in that decision.

[968] A. Dan Tarlock, *Law of Water Rights and Resources,* § 5:81 (2009).

accounting sense) on that district's lands. No court, however, has addressed this question.

F. Water districts

Unlike irrigation districts and canal companies, water districts do not hold water rights or operate water projects. Rather, in Idaho, a water district is a legal entity designated according to statute to administer water rights through a watermaster.[969] The watermaster oversees water distribution within the district boundaries and is also responsible for record keeping, measurement, and general district management. Watermasters are state employees and are under direction of the Director; however, they are elected and compensated directly by district water users, and their annual budgets are approved by the water users. In essence, a water district is an administrative area constituting a specific drainage basin or aquifer area (or both) where water rights are interrelated and have been adjudicated.

The watermaster, acting under the supervision of the Director, delivers water rights according to the prior appropriation doctrine.[970] However, the statute expressly provides that beneficial use water rights (see section 11.B at page 180) are treated as junior to all decreed, licensed, or permitted rights.[971]

By statute, water districts may be created only on those streams and/or aquifers where water rights have been adjudicated.[972] However, water districts also may be established on an interim basis during the pendency of an adjudication.[973] Before the

[969] Idaho Code §§ 42-602 to 42-619 (not to be confused with a different type of water district, which provides domestic water to customers, as provided for under Idaho Code §§ 42-3201 to 42-3239).

[970] Idaho Code §§ 42-602, 42-607.

[971] Idaho Code § 42-607.

[972] Idaho Code § 42-604.

[973] Two water districts have been created on an interim basis pending resolution of the SRBA. "On November 19, 2001, the State of Idaho sought authorization from the SRBA District Court for interim administration of water rights by the Director in all or parts of the Department's Administrative Basins 35 and 41 overlying the ESPA in the American Falls area and all or parts of Basins 36 and 43 overlying the ESPA in the Thousand Springs area. On January 8, 2002, the SRBA District Court issued an order authorizing the interim administration by the Director. After notice and hearing, the Director issued two orders on February 19, 2002 creating Water District 120 and Water District 130 pursuant to the provisions of Idaho Code § 42-604. Subsequent orders of November 19, 2002, October 29, 2003, and August 29, 2003 expanded and altered the boundaries these water districts to include parts of Administrative Basins 29 and 37. Further adjustments are anticipated at this writing. See maps in Appendix D.

SRBA resulted in decrees for thousands of Idaho ground water rights, most water districts historically administered only surface water rights. That is changing due to the adjudication of ground water rights, particularly those in the Eastern Snake Plain Aquifer that now are being administered together with surface water rights on the Snake River and in springs situated between the Aquifer and the River. Elsewhere, the State is still in the process of working adjudicated ground water rights into the priority system through conjunctive administration.

The boundaries of each water district correspond to the particular adjudicated area of water rights and follow watershed lines.[974] Most of the adjudications upon which water districts are based occurred early in the 20th century, so most of the districts have been in existence for many years. New water districts are being formed as a result of the adjudication of previously unadjudicated water rights in the Snake River Basin Adjudication.

Large portions of Idaho are now divided into over 100 non-overlapping water districts. Of these, more than 70 are currently active. Some are as small as the watershed of a moderately-sized creek system; others are quite large. For instance, Water District 01 covers most of the Upper Snake River basin above Milner Dam and includes numerous streams and tributaries with thousands of individual water users.

The statute controlling water districts provides that the holders of decreed water rights, licenses and permits within a district shall elect a watermaster and establish the water master's budget. Voting is by these individuals or entities only, and the number of votes one has corresponds to the amount, in cubic feet per second, of one's water right. (Special rules apply for "non-consumptive" water rights.) Technically, the watermaster is an employee of the state and can be removed for cause by the Director of the Department of Water Resources. As a practical matter, watermasters are agents of the water users, primarily irrigators, within their districts.

Water districts are entitled to establish certain rules for water administration within the district. Business is conducted during an annual water users' meeting, usually held early in the year and prior to the irrigation season. The statute refers to "rules and regulations of the respective districts, adopted at the annual water users' meeting," but does not make clear the type of rules that the water users might adopt beyond those pertaining to the annual term during which the watermaster is to perform services. Idaho Code § 42-608.

[974] Water districts should not be confused with IDWR Administrative Basins, which also follow watershed lines. See discussion in section 14.A beginning on page 197.

G. Ground water districts

In response to growing attention and concern among water users about conjunctive management issues, particularly within the Eastern Snake River Plain, the Idaho legislature enacted legislation authorizing the creation of ground water districts. 1995 Idaho Sess. Laws, ch. 290; Idaho Code § 42-5200 *et seq.* The primary purposes of these special districts were to provide a mechanism for ground water users within a given area to organize and assess themselves for the costs of measuring and reporting annual ground water withdrawals from wells, and as necessary, responding collectively to delivery calls, curtailment orders, or other forms of administration. Thus, ground water districts, unlike water districts, are not water delivery entities.

The Ground Water District statute also specifically authorizes these districts to acquire water rights and water delivery facilities, to enter into contracts with the United States and Indian tribes, to develop and operate mitigation plans designed to mitigate material injury to senior water rights that might be caused by ground water withdrawals within the district, to develop and operate aquifer recharge projects, and to represent district members in general stream adjudications such as the Snake River Basin Adjudication and in other legal or administrative proceedings. Idaho Code § 42-5224-25.

As of 2010, nine ground water districts, all situated within the Eastern Snake River Plain, have been formed under this statute.[975] These districts have been active in measuring and reporting ground water withdrawals, and in cooperation with the Department of Water Resources and interested water user groups, attempting to accurately quantify the effects of ground water withdrawals on surface and spring sources through computer modeling, and developing long-term plans for conjunctive management and administration.

In 2001 the North Snake, Magic Valley, Bonneville-Jefferson, Bingham, and Aberdeen-American Falls Ground Water Districts were instrumental in negotiating an interim agreement on behalf of their members that avoided a threatened curtailment of ground water withdrawals for irrigation, industrial and municipal uses by the Department of Water Resources. Among other things, the interim agreement required these three districts to acquire and provide up to 68,500 acre-feet of surface water to surface and spring water users in the 2002 and 2003 irrigation seasons.

H. City irrigation systems

Idaho law allows cities "to establish a city irrigation system" to supply irrigation water "within the limits of such city." Idaho Code §§ 50-1801 through 50-1835.

[975] These are the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, Bonneville-Jefferson, Madison County, Carey Valley, Jefferson-Clark, and Raft River Ground Water Districts.

Although the code is not completely clear on this subject, it appears that a city can form such a system essentially in the abstract, and then go about acquiring the water rights and facilities, such as ditches and pipes, necessary to provide irrigation service to city residents. The statute also provides that landowners within a city who receive irrigation water "from any ditch or canal" may petition to have the city "regulate, control and supervise the distribution of all water used by the inhabitants thereof for irrigation purposes." Idaho Code § 50-1802. A city is not required to act on the petition.

If a city's residents own shares in a mutual ditch company and wish to be served by a city irrigation system, the citizens are required to convey their stock shares in the company to the city to be held in trust. Then the city represents the interests of these citizens in all ditch company matters. Idaho Code § 50-1803. Boise, Nampa, and Caldwell have used this authority. They often refer to these systems as "municipal irrigation districts," although that term does not appear anywhere in the Idaho Code.

31. WHO OWNS THE WATER DIVERTED BY WATER DELIVERY ENTITIES?

Note: See discussion in section 30 beginning on page 600 for additional background information on the various forms of water entities. The table below briefly summarizes the law of ownership of water rights among the common types of irrigation water delivery entities.

Summary of ownership rules for various water delivery entities in Idaho

Type of water delivery organization	Legal title held by	Beneficial title held by	Comment
Commercial water companies (aka commercial irrigation companies, commercial ditch companies, or carrier ditch companies)	Company	Company	These for-profit companies hold full legal title to their water rights. In this type of organization, the shareholders are investors; they are not the consumer-irrigators served by the company. However, the consumer-irrigator is protected by express constitutional provisions requiring these private companies to charge fairly and to continue to serve paying customers that are in compliance with their obligations. Some commercial water companies (especially in the early days) were created as temporary entities for construction and financing purposes, in which case their water rights were later conveyed to individual irrigators, Carey Act operating companies, or mutual irrigation companies whereupon the commercial water company dissolved. Other commercial water companies were created as permanent operating entities (private contract companies or public utilities), in which case they permanently retain full ownership of the water rights. This is not unfettered ownership, however. Commercial water companies owe duties of continued service to their consumer-irrigators under to Article 15, §§ 1 4, 5, and 6 of the Idaho Constitution.
Mutual irrigation companies (aka mutual canal companies or mutual ditch companies)	Company	Depends on whether the water rights are deemed appurtenant.	These are non-profit entities. They do not provide service to the public at large, but only to their shareholders. The unique aspect of these companies is that the shareholders are not investors; they are the very irrigators served by the company. In some cases (depending on the governing documents), the company's water rights are deemed appurtenant to the individual irrigated tracts. In that case, each shareholder-irrigator holds equitable title to the portion of the company's water right that is appurtenant to their land. In other cases, the company owns water rights with a "general" appurtenance to the large permissible place of use served by the company and the rights are not deemed appurtenant to individual tracts. In that case, the irrigators hold only an undivided, collective interest in the water rights reflected in their ownership of stock, and those rights may be terminated in accordance with the governing documents.

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Summary of ownership rules for various water delivery entities in Idaho			
Type of water delivery organization	**Legal title held by**	**Beneficial title held by**	**Comment**
Carey Act operating companies	Company	Shareholder-irrigators	Carey Act operating companies are also non-profits, created pursuant to the Carey Act. They are generally thought of as a type of mutual irrigation company or, as the *Eagle Creek* Court put it, they act "much like mutual irrigation companies." Unlike other mutual irrigation companies, the water rights held by Carey Act companies are always appurtenant. Hence, irrigators always hold equitable title.
Bureau of Reclamation (BOR) (aka Bureau or USBR)	BOR	Irrigators	*Ickes v. Fox* and its progeny have established that the federal government owns only "legal title" to the water rights, while the landowner-irrigators within the project own the "beneficial" interest in the rights. *Pioneer*, however, did not employ this split ownership language. Instead, it recognized that irrigators hold some sort of undefined "title to the use of water" that is appurtenant to the entire irrigation district, not to individual water users.
Irrigation districts holding spaceholder contracts for storage in BOR reservoirs	BOR	Irrigators	The Court in *Pioneer* was vague about what interest, if any, irrigation districts hold in BOR water rights. However, the Court's recognition that the rights are appurtenant to the entire district (rather than to individual farms and urban residences) evidently means that the irrigation districts retain practical control of the water.
Irrigation districts holding natural flow, ground water, or drainage rights	Districts	Irrigators	When an irrigation district appropriates natural flow water rights in its own name, those rights are subject to a constitutional duty not to cut off supplies to its users who maintain their payments.
Municipal water providers	Provider	Provider	Municipal water providers stand in the same position as mutual irrigation companies. They hold full title to water rights used to serve their customers. This is not unfettered ownership, however. Municipal water providers owe duties of continued service to their consumer-irrigators under to Article 15, §§ 1 and 6 of the Idaho Constitution. In the case of a private municipal provider, it is also subject to regulation by the Idaho Public Utilities Commission.

A. Overview

An interesting question about the various irrigation water delivery entities is, who owns the water right which is being delivered? Unfortunately, much of the discussion on this subject occurs in the abstract, without any clear articulation of what is meant by "ownership."[976] In fact, the term can mean a number of things—all of which compose the

[976] For a discussion of the nature of "ownership" in the context of water resources, see Dean Release's amusing and insightful article, *Government Ownership and Trusteeship of Water*, 45 Cal. L. Rev. 638 (1957). While not dealing with the subject of water right ownership

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Printed 10/5/2026 10:07 AM

"bundle of sticks" making up a real property right. Differences of opinion about ownership are sometimes based on inconsistent understandings about which "stick" one is talking about.

For instance, a person may "own" a water right in the sense of being able to exclude others from its use and demand that it be delivered to him or her. Then again, it might be said that a person does not "own" the right, if she lacks the ability to convey it to a third person and effect a transfer thereof (despite the absence of injury).[977] Moreover, the discussion may be sprinkled with talk of "rights" (such as the right to nondiscriminatory service) which are not real property rights at all. Consequently, one should always ask "for what purpose?" before answering a question about ownership of a water right or other rights to water.

Because the answer to the ownership question depends, at the outset, on the type of entity involved, we discuss them separately. (See section 30 at page 600 for an overview of the nature of each entity.) "There are three main types of water-delivery organizations in Idaho: the mutual irrigation company, the commercial ditch corporation, and the irrigation district." *Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc.*, 165 Idaho 467, 447 P.3d 915 (2019) (Burdick, C.J.).

B. The "Public Use" concept in Idaho's Constitution

Before launching into an entity-by-entity analysis of the ownership issue, it is necessary to digress into a discussion of a series of obscure but potentially important constitutional provisions on the subject.

An interesting, and today seemingly curious, development relative to the delivery of irrigation water concerns the "public use" concept. We discuss it here because it provides useful background on the development of Idaho constitutional language pertaining to water rights and water delivery systems; it also bears on the questions of ownership of water rights in water delivery organizations.

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within irrigation delivery organizations, the article provides useful insights on this sometimes evasive concept.

[977] Here are some of the other rights which have been litigated under the broad rubric of "ownership" of a water right: May the water delivery entity file for water rights in its own name in a general stream adjudication? Must the individual irrigators be named as parties in such a suit? Is an irrigator entitled to move his or her place of use within the boundaries or reach of the delivery entity? May the irrigator move his or her interest in the water to a location outside of the boundaries or reach of the delivery entity? May a private, regulated delivery entity include the value of its water rights in its rate base? May an irrigator refuse to pay an assessment or fee for water which he or she is not using? May a supply entity refuse to accept a new customer, even though water is available? May a supply entity curtail service to a current customer?

The delivery of water to water users, for irrigation or otherwise, in certain circumstances can be deemed a "public use" pursuant to which the appropriation is found to be subject to some degree of public control. In these circumstances "all who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not." Samuel C. Wiel, 2 *Water Rights in the Western States* § 1261 at 1160 (1911) (*quoting Hildreth v. Montecito Water Co.*, 72 P. 395, 398 (Cal. 1903)). Essentially, the "public use" language in Idaho's Constitution was a product of an era before there was a law regulating public utilities. The language was intended to impose a type of constructive trust for the benefit of water users who were ready and willing to pay for service but were dependent upon a delivery organization for their water supply.

Wiel points out that "[t]he common law of public service agencies is, since *Munn v. Illinois*, familiar, being, in general terms, that property devoted to the public service or use is affected with the public duty of performing reasonable service to all; that to secure this end, rates and terms of service must be reasonable, and service is compulsory upon tender of a reasonable rate; that there must be no discrimination; that the courts will enforce these things, and it needs no statute to give them the power." Wiel § 1247 at 1145 (footnote citation to *Munn* omitted). The case Wiel refers to, *Munn v. Illinois*, 94 U.S. 113 (1876),[978] spelled the end of the era when "companies of capitalists" distributed water supplies according to contracts, on a *laissez faire* basis. As Wiel noted, *Munn* was "to the effect that one who devoted his property to public use owes the public corresponding duties, even at common law . . . ." Wiel § 1247 at 1146. The "public use" language in Idaho's Constitution arose from such a theory.

Idaho's Constitution, which was adopted in 1889, contains four sections that relate to the public use or public dedication concept. The sections quoted below declare certain types of irrigation water deliveries to be a "public use."[979] The pertinent sections are Article 15, section 1, 4, 5, and 6:

> **§ 1. Use of waters a public use.** — The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use,

[978] *Munn v. Illinois* did not deal with water delivery or water rights. Rather, it broadly upheld the authority of states to regulate public utilities, rejecting the argument that such regulation unconstitutionally deprived the utilities of their property.

[979] The first of the "public use" constitutional provisions (Idaho Const. art. XV, § 1) apparently applies to municipal water providers. *Murray v. Public Utilities Comm'n,* 27 Idaho 603, 619-20, 150 P. 47, 50-51 (1915). In contrast, Sections 5, 6 and 7 are limited by their own terms to entities providing water for agricultural purposes.

and subject to the regulations and control of the state in the manner prescribed by law. . . .

§ 4. Continuing rights to water guaranteed. — Whenever any waters have been, or shall be, appropriated or used for agricultural purposes, under a sale, rental, or distribution thereof, such sale, rental, or distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have been once sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors, or assigns, shall not thereafter, without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and time of use, as may be prescribed by law.

§ 5. Priorities and limitations on use. — Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of this article provided, as among such persons, priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.

§ 6. Establishment of maximum rates. — The legislature shall provide by law, the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented, or distributed for any useful purpose.

Idaho Const. art. XV, §§ 1, 4, 5, and 6.

Note that sections 4 and 5 are limited to water supplied for agriculture, while sections 1 and 6 have no such limitation and presumably would apply, for example, to municipal water providers.

These provisions are similar to, although perhaps more elaborate than, those adopted in some other Western states, evidently because of problems that irrigators experienced in the early years of Western settlement with a plethora of private commercial water companies that either failed financially or were not scrupulously managed.[980] As noted above, the framers of the Idaho Constitution were deeply concerned with curbing potential abuses of consumers by commercial water companies. Consequently, they grafted onto the Idaho Constitution these remarkably specific provisions aimed at solving the problem.

At the time of the adoption of the Constitution, the framers were primarily concerned with problems associated with the then-common commercial water companies. Indeed, Carey Act companies and irrigation districts did not even exist then. However, the applicable constitutional language ("sale, rental or distribution" of water) arguably applies to all forms of irrigation water delivery entities now in existence, including mutual canal companies, irrigation districts, and the Bureau of Reclamation.[981] To understand these provisions, however, the reader should keep in mind the historical influence of the commercial water company.

To some extent, the constitutional provisions discussed below are superfluous with respect to the more modern entities (Carey Act operating companies, irrigation districts, and the Bureau), due to the fact that irrigators under those systems (individually or collectively) are deemed to hold a property interest (equitable title) in the water right itself. Nevertheless, these constitutional provisions reinforce the idea that all irrigators served by delivery entities are entitled, at a constitutional minimum, to continued service at reasonable, nondiscriminatory rates.

The Idaho Supreme Court, in construing the "sale, rental, or distribution" language of art. 15, §§ 4, 5 and 6 of the Idaho Constitution, has ruled: "Companies or individuals may appropriate and take out the water of a stream for sale, rental or distribution, for any beneficial purpose. When so taken out, it becomes a public use, and the sale or rental of it for pay is a franchise." *Wilterding v. Green*, 4 Idaho 773, 45 P. 134, 135 (1896) (Morgan, C.J.). Because the Idaho Constitution declares that appropriation of waters for sale, rental or distribution is a "public use," the Court found that deliveries under a

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[980] *See* Samuel C. Wiel, 2 *Water Rights in the Western States* at §§ 1244-46 (1911); Paul Lloyd Murphy, *Irrigation in the Boise Valley, 1863-1903: A Study in Pre-Federal Irrigation* at pp. 55-56 (College of Idaho thesis, 1947).

[981] On the other hand, one might argue that these constitutional provisions do not apply to a mutual canal company. Read in historic context, the "public use" provisions are plainly aimed at abuses of irrigators by shareholders. In the case of a mutual, these are one and the same; hence there is substantially less potential for abuse. Whether this is enough to take them out of the constitutional "public use" provisions remains to be seen. The Idaho Supreme Court has never addressed the question.

commercial water company gave rise to the "exclusive dedication" to the consumer's use mentioned in Article 15, section 4.

California's Constitution provided the basis for the above provisions in Idaho's Constitution. California's Constitution provides:

> The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner prescribed by law.

Calif. Const. art. X, § 5.

In *Glenn Colusa Irr. Dist. v. Paulson*, 242 P. 494, 499 (Cal. App. 1925), a commercial water company became insolvent and transferred its water rights and canal facilities to an irrigation district. A customer of the carrier company argued that he held a perpetual easement—that is, a water right[982] that the district was bound to honor under the original scheme. The court disagreed. Construing this California constitutional provision, it concluded that a water delivery such as that being made by the carrier company constitutes a public use, and it is the company, not the landowner, who holds the water right, because "no private estate can be created in property devoted to a public use." At least in such situations, the landowner in California holds only a "right of service."

Idaho and California implemented the "public use" principle through explicit constitutional provisions. Colorado, whose jurisprudence also has influenced the development of the appropriation doctrine in Idaho, is an example of a state that did so by interpreting more general constitutional language. *E.g., Wheeler v. Northern Colorado Irrigating Co.*, 17 P. 487 (Colo. 1888). Both approaches reach essentially the same result in terms of the obligations placed on the commercial water company, though they vary somewhat on the "ownership" analysis.[983]

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[982] For the notion of a water right being a "perpetual easement," *see Ruhnke v. Aubert*, 113 P. 38, 40 (Or. 1911).

[983] Colorado's Constitution, art. XVI, § 8, authorizes county commissioners to establish "rates to be charged for the use of water, whether furnished by individuals or corporations." Section 5 declares that waters within the state are "the property of the public," and is "dedicated to the use of the people of the state." See also Colo. Rev. Stat. § 37-85-110 (protecting a distributees entitlement to continue receiving water).

The Colorado Constitution does not contain the explicit "public use" language which the California and Idaho Constitutions apply to those entities appropriating water "for sale, rental, or distribution." Nevertheless, the Colorado Supreme Court still has found these commercial entities to be subject to essentially the same duties as those imposed in these other states. In *Combs v. Agricultural Ditch Co*., 28 P. 966 (Colo. 1892), quoting *Wheeler v. Northern Colo.*

C. Water right ownership in commercial water companies

Commercial water companies—owned by investors, not by the farmers—were important in Idaho's early days. They are rare today, except for those that survive as public utilities, such as power companies that also provide irrigation water via contracts. See background discussion of these entities in section 30.B beginning on page 602.

The majority rule throughout the West,[984] and the rule in Idaho, is that the water rights vest in the commercial water company (historically referred to as commercial irrigation company, commercial ditch company, or carrier ditch company), while the consumer-irrigator has only a right of service.

The Idaho Supreme Court provided this overview (which cites this Handbook):

> In contrast to the mutual irrigation company, a commercial ditch company [aka commercial water company] holds water rights for profit. Jeffrey C. Fereday, *Ownership of Water Rights in Irrigation Water Delivery Organizations: An Outline of the Major Issues, in Water Organizations in a Changing West* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1993). The shareholders of a commercial ditch company are those who built it, not those who make use of the water. *Id*. This was the main type of irrigation company in operation when the framers of Idaho's Constitution imposed Constitutional restrictions on ditch companies. *See* Fereday, Jeffrey C., et al., *Water Law Handbook* 345-46 (2019). The commercial ditch company's heyday was in the 1880's; almost none persist today. *Id*.
>
> Commercial ditch companies were generally organized in one of three ways:

Irrigating Co., 17 P. 487 (Colo. 1888), the Colorado court ruled that the Colorado Constitution requires a carrier ditch company to supply water to anyone whose lands are susceptible of being supplied from the canal and who tenders the established rate for water delivery; the court forbade the commercial carrier from imposing additional costs or "unreasonable regulations or demands."

[984] In contrast, a minority of states have sought to protect the consumer-irrigator served by a for-profit commercial irrigation company by shifting ownership of the water right away from the commercial irrigation company. *Wheeler v. Northern Colorado Irrigating Co.,* 17 P. 487, 490 (Colo. 1888). This essentially transforms the commercial irrigation into a mutual for purposes of analogizing ownership of water rights. Kinney's treatise identifies *Wheeler* as using "strained" reasoning, but concludes that it stands for the proposition that Colorado adheres to the rule that commercial irrigation companies do not hold title to water rights. 3 Kinney, *Irrigation and Water Rights* § 1476 at 2653 (2d ed. 1912).

> (1) The first form is a "construction or development company," a carrier ditch company that would construct the canals and other facilities, convey lands to farmers, and enter into water delivery contracts with these settlers. Once all lands had been irrigated and the canal's capacity fully subscribed, the carrier ditch company would convey the water rights and facilities to the farmers or, more likely, to a mutual irrigation company that the construction company would set up with the settlers as its shareholders. At this point, the carrier ditch construction company would go out of business, presumably at a profit for its backers. This is precisely the formula used in implementing the Carey Act.
>
> (2) The "private contract company" is one set up for perpetual service to farmers with whom it would contract; they would pay for the water delivery at established rates, whether they used the water or not. The users never acquire any interest in the water rights or facilities. Historically [before state Constitutional provisions provided otherwise], such a company was not subject to state control of rates.
>
> (3) A true "public utility company," is one which holds itself out to serve all comers, so long as there is adequate water supply, on an annual fee for service based primarily on the amount of water used. The deliberate entry into public service caused a dedication to public use and subjected these companies to public utility regulation (at least after public utility commissions came into being).
>
> Fereday, *Ownership of Water Rights in Irrigation Water Delivery Organizations: An Outline of the Major Issues* at 4 (citing Wells A. Hutchins, *Commercial Irrigation Companies* USDA Tech. Bull. 177 at 5–6 (1930)).

Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc., 165 Idaho 467, 474-75, 447 P.3d 915, 922-23 (2019) (Burdick, C.J.) (emphasis supplied).[985]

[985] The Eagle Creek Irrigation Company is a mutual irrigation company formed in 1973. Eagle Creek held decreed water rights that served a permissible place of use within its water delivery system. The issue in this case was whether shares of stock representing a fractional share of the company's water rights were appurtenant to the individual irrigated tracts and hence passed with a deed that was silent as to water rights and appurtenances. The Court held that

In sum, commercial water companies (aka commercial irrigation companies, commercial ditch companies, or carrier ditch companies) always acquire and own the water rights, at least at the outset. Depending on the circumstances, those rights later may be passed to the individual irrigators, or not.

- Commercial water companies that are formed solely as a construction and financing entity (and that are intended to later go out of business) always pass their water rights to the irrigators (either individually or to a mutual irrigation company). This is particularly true in the case of Carey Act entities, whose water rights are deemed appurtenant to the individual farm tracts.

- In contrast, commercial water companies that are intended to continue as a permanent operating entity or as a public utility continue to hold full legal title to the water rights.

The Idaho approach to commercial water companies is strongly influenced by the "public use" language of the Idaho Constitution discussed in the previous section. Idaho Supreme Court precedent, built on these constitutional provisions, guarantees protection for irrigation water consumers while also definitively stating that the commercial water company retains full title to the water right. The key cases are discussed below.

Wilterding

In *Wilterding v. Green*, 4 Idaho 773, 45 P. 134 (1896) (Morgan, C.J.), the Court found that the Idaho Constitution, Article 15, sections 1 and 4, mean that "all waters appropriated before or after the adoption of the constitution, for sale, rental or distribution, are declared to be a public use, and are exclusively dedicated to such use." *Wilterding*, 45 P at 135. The Court further observed that individuals "who are in a condition to use such waters, have a constitutional right to the use of such waters, under such reasonable rules and regulations, and upon such payment, as may be prescribed,

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water rights held by irrigators served by Carey Act operating companies are always appurtenant to the land (owing to language in the Carey Act). In contrast, the Court held that water rights held by all other mutual irrigation companies may or may not be appurtenant, depending on the governing documents. It remanded to the district court for a determination of whether the governing documents of the mutual irrigation company direct that the water be appurtenant to the land. In undertaking this analysis, the Court began with a comprehensive overview of the three basic types of water right entities and their water right ownership. The *Eagle Creek* Court did not speak in terms of title. Had it used that terminology, it presumably would have said that the mutual irrigation company holds either full title (if the rights are not appurtenant) or holds only nominal title (if the shares are appurtenant).

which payments and regulations must at all times be reasonable." *Wilterding*, 45 P. at 135. The Court noted that Article 15, section 4 also means that:

> a party, having once used the water upon his land, cannot be thereafter deprived of it without his consent, if needed, when he shall pay therefor, and shall comply with such equitable terms and conditions as the law prescribes. This section also gives the party using such water under the conditions a perpetual right to such use.

Wilterding, 45 P. at 135.

The *Wilterding* Court also concluded that the Idaho Constitution was intended "to deal only with the 'use' of water, and not with the property rights of appropriators therein . . . . The sale, renting, and distributing of the water is a dedication, and brings its use under the control of the state, but it in no sense destroys or abrogates the property rights of the appropriator therein." *Wilterding*, 45 P. at 138.

Thus, the Court in *Wilterding* indicates that the public use provisions in the Idaho Constitution do not address the question of water right ownership, but specify only that the use by consumers or distributees is a dedication to their lands that cannot thereafter be interrupted so long as they pay reasonable assessments.

Hard

The Court in *Hard v. Boise City Irrigation and Land Co.*, 9 Idaho 589, 76 P. 331 (1904) (Ailshie, J., concurring) underscored that the right to continued service and ownership of the water right are different things, and the Constitution addresses only the former:

> Mr. Chief Justice Morgan, speaking for this court in *Wilterding v. Green*, 4 Idaho 733, 45 Pac. 134, in considering the purposes of article 15 of the Constitution, made it very clear that the framers of that instrument were only dealing with the "use" of the waters, and not the property right in the waters. Indeed, it can be of no consequence to the state as to where the property in the waters is vested so long as the people have reserved to themselves the right to regulate the use.

Hard, 9 Idaho at 600-01, 76 P. at 334 (Ailshie, J., concurring) (quotation marks and italics appear only in Idaho Reports).

The *Hard* Court said that both the canal owner and the water user have rights: "The fundamental law, as well as the statutes of our state, have both attempted to protect

the canal owner as well as the user in their respective rights." *Hard,* 9 Idaho at 596, 76 P. at 332 (Stockslager, J., for the majority). Specifically, the Court determined that Article 15 assured the customer-irrigator of a commercial water company a perpetual right to use the water, upon payment of annual rentals, and also the right to change its place of use to another location served by the same ditch.[986]

Farmer's Co-Operative

The clearest statement on ownership of water is found in *Farmers' Co-Operative Ditch Co. v. Riverside Irr. Dist.*, 14 Idaho 450, 94 P. 761 (1908) (Ailshie, C.J.). The Court, relying on *Wilterding* and *Hard*, ruled squarely that the owner of the ditch is the owner of the water right.[987] The Court stated:

> Whatever the differences may be in the facts with reference to the use and application of the water, the ditch owners in every instance are necessarily the appropriators of the water within the meaning of the constitution and the statute. . . .
>
> . . . The appropriation of waters carried in the ditch operated for sale, rental and distribution of waters does not belong to the water users, but rather to the ditch company.

[986] Although the water user is free to move the water about on lands lying under the canal, the Court said that the consumer-irrigator could not move his or her water right "if it were shown that the change would in any manner interfere with the rights of the canal company." *Hard ,* 9 Idaho at 596, 76 P. at 332 (Justice Stockslager, for the majority). Thus, by strong implication at least, it appears that the Court has adhered to the majority rule that a consumer-irrigator of a commercial irrigation company may not transfer his or her interest in the water right off the canal system, thereby depriving the canal company of its right to payment. Consequently, whatever label one might apply to the interest of the consumer-irrigator, it is not a full fee ownership. Although Justice Ailshie speaks in *Hard* of the consumer's water right, it is evident that he and the author of the majority opinion were speaking only of the perpetual right of continued service by the canal company secured by the Idaho Constitution. This is made all the more clear by Justice Ailshie's opinion four years later in *Farmers' Co-Operative*, discussed below.

[987] Interestingly, in making this pronouncement about ownership, the court drew no distinction between commercial irrigation companies and mutuals. This can be reconciled, however, with subsequent decisions of the Idaho Supreme Court (discussed below) which have held that, in the case of mutual canal companies, the shareholder-irrigators are the owners of the water rights. In the case of mutuals, the owners of the ditch (the shareholders) are also the irrigators. Consequently, the court's statement in *Farmers' Co-operative* that in either case the owners of the ditch also own the water right remains accurate.

Farmers' Co-operative, 14 Idaho at 457-59, 94 P. at 763 (emphasis supplied) (quoted in *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916, 919 (1935) (Ailshie, J.).

In sum, the Idaho Supreme Court has applied the "public use" provisions of the state Constitution to ensure fair treatment of and continued service to irrigators served by commercial water companies. But these provisions accomplish that task without any shifting of the title, which remains in the hands of the commercial water company. Thus, the commercial water company may not use or transfer the rights to the disadvantage the irrigators. But the company continues to hold title to the rights and may use them in ways that do not disadvantage the irrigators' perpetual right to continued service.

D. Water right ownership in mutual irrigation companies (including Carey Act operating companies)

Unlike commercial water companies, which are rare today (except for those operating as public utilities), significant quantities of Idaho water are controlled today by mutual irrigation companies.

> The mutual irrigation company is formed expressly for the purpose of furnishing water to shareholders, not for profit or hire. *Jacobucci v. Dist. Court In & For Jefferson Cnty*., 189 Colo. 380, 386, 541 P.2d 667, 671 (1975). Thus, the defining feature of the mutual irrigation corporation is that it operates to supply and transport water, at cost, for the lands of its members. *See* Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States* Vol. I, at 479 (1971). The mutual irrigation company should be distinguished from ordinary "public service" entities, because "being in private service only," it is "not subject to the public control which obtains as to public service companies." Samuel C. Wiel, *Water Rights in Western States* Vol. II, at 1266 (3rd ed. 1911). As such, a mutual irrigation company cannot be "forced to deliver water to others than its stockholders." *Id*. They are largely autonomous, subject to their own bylaws, articles of incorporation, the law generally applicable to corporations, and a few specific statutes and Constitutional provisions. *Gasser v. Garden Water Co*., 81 Idaho 421, 425, 346 P.2d 592, 593 (1959).

Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc., 165 Idaho 467, 474, 447 P.3d 915, 922 (2019) (Burdick, C.J.).

The position of "shareholder-irrigators" of mutual irrigation companies stands in stark contrast to the position of "consumer-irrigators" in commercial water companies. Consumer-irrigators served by commercial water companies are entitled to fair treatment and continued service, but they do not "own" the water rights under Idaho law. In contrast, water rights held by mutual irrigation entities are owned by the irrigators either individually or collectively (through their ownership in the company).

Whether the rights are held individually or collectively depends on whether they are appurtenant to the individual farm properties. Where the rights are deemed appurtenant to the land, the individual farmers hold equitable title to that portion of the water right held by the company that is appurtenant to their land. For Carey Act operating companies, this is always the case (based on language in the Carey Act itself). For other mutual irrigation companies, the water may or may not be deemed appurtenant, depending on the governing documents of the mutual irrigation company. See *Eagle Creek* decision discussed above and in footnote 985 on page 626

Where the rights are appurtenant, the Idaho Supreme Court has held their shareholder-irrigators actually "own" that portion of the water rights corresponding to their shares.

For instance, in *In re Dep't of Reclamation*, the Idaho Supreme Court ruled squarely:

> And where a ditch is used in common for the conveyance of water for two appropriations, each owner may sell or abandon his right to the ditch, separate from the other [citation], the same right belongs to a stockholder in a mutual ditch company [citation].

In re Dep't of Reclamation, 50 Idaho 573, 579, 300 P. 492, 494 (1931) (the Pacific Report version entitles this case "*In re Johnson et al.*" and employs slightly different punctuation).[988]

In other cases, the water rights are not deemed appurtenant to the land. In that situation, the mutual irrigation company holds full title and the individual irrigator holds no title (equitable or other) to the water rights. However, in such case, all irrigator-shareholders hold an undivided, collective interest (represented by their shares of stock) in the water rights held by the mutual irrigation company.

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[988] *In re Dep't of Reclamation* involved a single ditch shared by (1) a mutual ditch company and its shareholders and (2) another family who owned a distinct water right using the same canal. As noted in the quotation above, however, the rule is the same when dealing with transactions among shareholders.

> [M]utual irrigation companies, like Eagle Creek, own water rights with a "general" appurtenancy—that is, the water right is appurtenant to all of their serviceable land. Determining whether a particular share is appurtenant to a specific tract of land depends upon the factual inquiry into the mutual irrigation company's governing documents and the history of the water right. While a share in a mutual irrigation company can be appurtenant to a specific tract of land within an irrigation company's serviceable area, such specific appurtenancy is not an integral feature.

Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc., 165 Idaho 467, 474, 447 P.3d 915, 922 (2019) (Burdick, C.J.).

> Because no appurtenancy statutes apply specifically to mutual irrigation companies, whether a share is appurtenant to specific tract of land is a matter of contract and corporate governance. See Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States*, Vol. I, at 479 (1971). ("Appurtenance of a water right, which is a legal matter . . . is to be distinguished from appurtenance of mutual-company stock to land, which is a contractual matter between the company and its shareholders."); Samuel C. Wiel, *Water Rights in Western States*, Vol. II, at 1173 (3rd ed. 1911) ("Whether the water right is appurtenant to the stockholder's land is a question of fact in each case, as is also whether on a sale of the land the water right passes as an appurtenance."); *cf. Gasser v. Garden Water Co.*, 81 Idaho 421, 425, 346 P.2d 592, 593 (1959) (stating that the relationship between a mutual irrigation company and a shareholder is contractual).
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> . . .
>
> The physical shares are part of this contractual inquiry. A mutual irrigation company's shares can either be attached to specific tracts or they can "float" among all the tracts within the mutual irrigation company's system . . . .

Eagle Creek, 165 Idaho at 476-77, 447 P.3d at 924-25.[989]

[989] For example, in *Eden's Gate LLC v. IDWR*, Case No. CV14-21-10116, Memorandum Decision, Idaho Dist. Ct., Third Judicial Dist. (June 9, 2022) (Wildman, J.), the district court concluded that the Farmer's Co-Operative Ditch Company is a mutual irrigation company. The court noted: "It is undisputed that the Ditch Company shares are not appurtenant to any particular parcel of land and can freely be moved by a shareholder within the service area." *Eden's Gate* at p. 2. "In the Court's experience this fact is unique to the bylaws of the Ditch

In contrast, shares in a Carey Act mutual irrigation company are always appurtenant to the land. This owes to the nature of the Carey Act.

> As noted, Idaho statutes which implement the Carey Act (and the Carey Act-based contract at issue in *Ireton*) declare that the water rights attach to the land as soon as the federal government issues the patent. Thus, shares in a Carey Act company "evidence title" to particular land because the water right is statutorily granted to the individual settlors (and their specific parcels of land), and thus reflect individual water rights. However, this logic does not mesh with the concept of floating shares because floating shares do not "evidence any title" to specific land.

Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc., 165 Idaho 467, 476-77, 447 P.3d 915, 924-25 (2019) (Burdick, C.J.).

The Idaho position is in line with that taken in other western states. For example, in *Jacobucci v. Dist. Ct. in and for Jefferson Cnty*, 541 P.2d 667, 672-73 (Colo. 1975), the Colorado Supreme Court observed there is some authority for the proposition that the ditch company holds the water right subject only to a trust in favor of the shareholders. *Jacobucci*, 541 P.2d at 673 (quoting Kinney, *Irrigation and Water Rights* § 1482 (2d ed. 1912)[990]). However, the Colorado Court rejected the trust theory in favor of "actual ownership . . . in the shareholder." *Jacobucci*, 541 P.2d at 673. The Colorado Court explained:[991]

Company, as delivery entity shares are generally made appurtenant to the land on which they are used." *Eden's Gate* at p. 8, n.4. (See footnote 889 on page 573 discussing the Farmers Co-Operative Ditch Company. The district court noted that its shares are not appurtenant to any individual parcel of land within the service area, describing this as "unique to the bylaws of the Ditch Company.")

[990] Kinney states that, in a mutual water corporation, "legal title to these rights is in the corporation, while the equitable title remains in the original owners, or their grantees. In other words, the company holds the legal title to the property in trust for its respective shareholders, the terms of the trust to be governed by the articles of incorporation, or the by-laws of the same." Kinney, 3 *Irrigation and Water Rights* § 1481 at 2661-62.

[991] The court in *Jacobucci* also emphasized that the shares of stock represent, in addition to "a definite and specific water right," "a corresponding interest in the ditch, canal, reservoir, and other works by which the water right is utilized." *Jacobucci*, 541 P.2d at 672. For a comment on this subject, *see* Jeffrey J. Kahn, "Who Owns Mutual Ditch Company Assets," publication available from Natural Resources Law Center, Boulder, Colorado.

> As a mutual ditch company, Farmers is "merely the vehicle by which its owners operate and manage its affairs." . . . The ownership of the shares of stock is merely incidental to the ownership of the water rights by the shareholders. . While the "naked title" may stand in the name of [the mutual ditch corporation], the ditch, reservoir, and water rights are actually owned by the farmers who are served thereby.

Jacobucci, 541 P.2d at 672-73.

The dispute in *Jacobucci* was about whether the ditch company's shareholders were indispensable parties in a city's action seeking to condemn the ditch company's water rights. Because individual shareholders are the "owners" of the water rights, the court ruled that they should have been joined.[992]

Most of the attention in Idaho has focused on a particular type of mutual known as a Carey Act company. Under the Carey Act land settlement program, the state entered a contract with the project construction company. The terms of this contract (to take one example described in *Leland v. Twin Falls Canal Co.*, 51 Idaho 204, 3 P.2d 1105 (1931) (McNaughton, J.)) were that the construction company's contracts with settlers would involve a "sale or contract of the water right to the [settler, which] shall be a dedication of the water to the land to which the same is applied and the water right so dedicated shall be a part of and relate to the water right belonging to the said system of canals." In turn, the stock certificate issued to the settler entitled him or her "to proportionate interest in the dam, canal, water rights and all other rights and franchises of the [Carey Act operating company], based upon the number of shares finally sold . . . ." The Carey Act operating company received deeds from the construction company for both the water rights and the irrigation water delivery system; the local county records will reflect this "naked title." However, the operating company is a mutual irrigation company, and beneficial title to the water rights and facilities rest with the shareholders.

In *Leland*, the Court ruled:

> It seems clear that the certificate [for shares of stock] in carrying out the whole plan represents and must represent a water right sold to the settler and dedicated to his land, and of which he is the beneficial owner. And further, at least in the absence of any showing of separation, the water right is an

[992] This argument was also raised in Farmers' *Co-Operative Ditch Co. v. Riverside Irr. Dist., Ltd.*, 14 Idaho 450, 456-57, 94 P. 761, 762-63 (1908), discussed in the previous section dealing with commercial irrigation companies. However, the question was not properly preserved by the appellant in that case, so the Idaho Court declined to answer it.

> appurtenance to the land to which it was dedicated, and is part of that property.

Leland, 3 P.2d at 1107 (emphasis supplied). The Court continued:

> It was clearly the intention of the Legislature, as well as the construction company, that the individual contract holder or settler should be the owner of the water right upon the completion of the construction works.

Leland, 3 P.2d at 1108 (quoting *Adams v. Twin Falls-Oakley Land & Water Co,* 29 Idaho 357, 161 P. 322, 326 (1916) (Budge, J.)).

The Court in *Leland* also stated that, under the contract, the settler obtains "an interest in the remaining property of the corporation, to wit: the dam, franchises and other remaining property to be used in connection with the water right."[993] *Leland*, 3 P.2d at 1108.

Despite these judicial statements to the effect that the stockholder-irrigator "owns" the water right, the nature of that ownership is not as straightforward as an ordinary fee interest in land. There is still something of a tug-of-war between the interests of the company and its shareholders. This becomes evident when the shareholder tries to do something different with her water right.

The *Jacobucci* Court noted that "[t]he relationship between the mutual ditch corporation and its shareholders arises out of contract, implied in a subscription for stock and construed by the provisions of a charter or articles of incorporation." *Jacobucci* at 671 (citing *Supply Ditch Co. v. Elliot,* 10 Colo. 327, 15 P. 691 (1887) and C. Kinney, *Irrigation & Water Rights* § 1482 (2d ed. 1912)). Kinney's perspective is that "[t]he relations between private incorporated water companies, whether organized as mutual corporations, or as corporations for profit or hire, is that of contract, and the rights and duties of both parties grow out of the contract implied in a subscription for stock, and construed by the provisions of their charters, or articles of incorporation." Kinney, *Irrigation and Water Rights* § 1482 at 2662 (footnotes omitted). It follows that the exact dimensions of a shareholder's ownership, or what flexibility that ownership affords (such as the conditions that may limit transferring the right) may depend upon the terms of the corporation's "contract" with the water user.

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[993] *But see, Hobbs v. Twin Falls Canal Co.*, 24 Idaho 380, 394 (1913), where the Court at first appears to presume that a Carey Act operating company is a commercial irrigation corporation whose duty to supply water arises from the constitutional "public use" provisions. However, the Court ultimately concludes that the corporation "is nothing more than a holding company" for the interests of the irrigators.

For example, the courts and the legislature have both dealt with the extent to which a mutual canal company effectively can limit a shareholder's right to deal freely with his water right.

Idaho statutes support the proposition that Carey Act company shareholders, as opposed to the corporation itself, own the water rights.[994] Idaho Code § 42-2025 provides that "[t]he water rights to all lands acquired under [the state's Carey Act procedures] shall attach to and become appurtenant to the land as soon as title passes from the United States to the state."

Idaho Code § 42-219(5) provides that, in the case of large canal companies (serving over 25,000 acres) and all irrigation districts, the water license shall be issued to the company which, in turn, shall submit final proof to the Department. This provision, however, speaks only to the administrative issues of licenses and proofs, and would appear to have no conclusive effect on the question of actual ownership. Logically, one of the mutual canal company's roles would be to file for water rights on behalf of its shareholders, rather than having each shareholder (or all of them jointly) do so in their own names. However, to follow the *Jacobucci* rationale, a shareholder still would be a proper party to litigation affecting the water right.

In some cases, statutory provisions provide the primary authority for imposing these limitations on ownership. Idaho Code § 42-108, which grants general authority for holders of water rights to change the place of use, nature or time of use, or point of diversion under a water right, contains the following proviso:

> [I]f the right to the use of such water, or the use of the diversion works or irrigation system is represented by shares of stock in a corporation or if such works or system is owned and/or managed by an irrigation district, no change . . . shall be made or allowed without the consent of such corporation or irrigation district.

Idaho Code § 42-108.

In *Bishop v. Dixon*, 94 Idaho 171, 175, 483 P.2d 1327, 1331 (1971), this proviso was held inapplicable to a lateral ditch association because it was not a corporation. Therefore, the association's bylaw prohibiting any transfer was held to violate section 42-108's grant of authority to make such a change.

[994] *See, e.g.*, Idaho Code §§ 42-2501 through 42-2509, which recognize a Carey Act corporation stockholder's right to transfer the " water right" appurtenant to his land to other lands within the same Carey Act system.

However, in *Johnson v. Pleasant Valley Irrigation Co., Ltd.*, 69 Idaho 139 (1949), the proviso in section 42-108 was enforced in favor of the mutual canal company which opposed shareholder's proposed change. Shareholder appealed, asserting primarily constitutional arguments. The Idaho Supreme Court ruled that section 42-108 does not violate the 14th amendment to the U.S. Constitution because the administrative procedure involved in considering the transfer afforded plaintiff a hearing. Furthermore, absent a statute to the contrary, a mutual irrigation corporation is not required to hold a hearing on a matter having to do with "the handling of its affairs and in dealing with its stockholders." *Johnson*, 69 Idaho at 145.

Section 42-108 does not impermissibly delegate legislative power. The stockholder in *Johnson* had cited land use cases overturning legislation granting consent power to neighboring landowners. The court found the analogy inapt:

> [T]here is no analogy between the relation of a property owner to his neighbors and the relation existing between a stockholder and his corporation. The refusal of a corporation to permit one of its shareholders to substantially withdraw from the corporation and change his relationship to the other stockholders without its consent, does not involve legislative power but is concerned with the internal affairs of the corporation."

Johnson, 69 Idaho at 145-46. The Court found no authority recognizing the right of

> a shareholder in a water corporation to change his point of diversion and place of use *without the consent of the corporation*, to a place where he could not be served by the irrigation system of the corporation. The exercise of such a right would tend to disrupt the unity of the corporation, and to impair the very purpose for which the same was formed. Carried to excess, it would destroy the usefulness of the corporation.

Johnson, 69 Idaho at 145 (emphasis in original). The Court cited no facts to support the conclusion that Johnson's proposal would "disrupt the unity of the corporation."

It would appear that, despite the language of *Johnson*, there would be solid legal and public policy arguments for the position that statutes like Idaho's section 42-108 should be interpreted to mean that the company can withhold permission only for reasons of actual injury to the corporation or other shareholders. In other words, the company's consent, while required, cannot be unreasonably withheld.

In sum, the Idaho Supreme Court, the Legislature, and the founders have been solicitous of the interests of both the irrigator-shareholder and the irrigator-consumer. But they have accomplished the task in fundamentally different ways, giving the first a true property interest and the second something substantially less.

E. Water right ownership in irrigation districts

Irrigation districts often are the primary contracting party for water supply from Bureau of Reclamation projects in Idaho. In these instances, the irrigation districts enter into contracts with the United States which assure particular quantities of water for their members during the contract period. The ownership of these water rights is discussed in section 31.F on page 641.

In other cases, irrigation districts directly hold title to irrigation works and the associated water rights. These are most often maintained for natural flow surface water delivery systems, however irrigation districts may also operate ground water delivery systems or even reservoir projects.

(1) Natural flow, ground water, or drainage rights held by irrigation districts

As to the later, at least, the Idaho Supreme Court has been clear that water rights acquired and held by drainage districts (which are presumably in the same position irrigation districts) belong to the districts, not to the farmers receiving the water. In *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916 (1935) (Ailshie, J.), the issue was whether the irrigators are necessary parties to litigation concerning rights to water the district delivers. The Idaho Supreme Court held: "The appropriation of waters carried in the ditch operated for sale, rental, and distribution of waters does not belong to the water users, but rather to the ditch company. . . . The consumers possess no water right . . . ." *Barclay*, 47 P.2d at 918-19 (1935) (quoting *Farmers' Co-Operative Ditch Co. v. Riverside Irr. Dist.*, 14 Idaho 450, 94 P. 761, 763 (1908) (Ailshie, C.J.) (emphasis supplied). The Court explained, however, that even though the irrigator does not "own" the water right, she has substantial rights under the Idaho Constitution—a perpetual right of continued service so long as payments are made. *Id*. (See further discussion of *Barclay* in section 31.F(2)(c) on page 650.)

Idaho Code § 43-316 provides that water rights (and all property) owned by an irrigation district are held in trust for "the uses and purposes set forth in this title."[995]

[995] The statute provides in full: "The legal title to all property acquired under the provisions of this title shall immediately and by operation of law vest in such irrigation district, and shall be held by such district in trust for, and is hereby dedicated and set apart to, the uses and purposes set forth in this title. Said board is hereby authorized and empowered to hold, use,

Saying that the water rights are held "in trust" is not the same as saying that the irrigators hold equitable title. The language of the trust says no such thing. Rather, it imposes the obligation on the irrigation district to use the water rights to advance "the uses and purposes set forth in this title." That presumably means that the district must ensure that needs of the irrigators are satisfied before any other use of the water is made. This is essentially a statutory codification of the principles underlying the constitutional protections set out in Idaho Const. art. XV §§ , 4, 5, and 6. The fact that this trust does not convey formal equitable title is made clear in *Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 269 P.2d 755, 759 (1954) (Taylor, J.) ("However, the foregoing provisions of the statutes do not prohibit the delivery of water to users outside of the district when the same is not needed by users within the district.") (quoting *Yaden v. Gem Irr. Dist*., 37 Idaho 300, 216 P. 250, 252 (1923) (Budge, J.)). See also, *Barclay* discussed above.

Aside from this "trust" interest, users of irrigation district water are also entitled to protection under the "public use" provisions of the Idaho Constitution discussed above (Idaho Const. art. XV, §§ 1, 4, 5, and 6). As the Idaho Supreme Court has said:

> The defendant [irrigation] district, having acquired by purchase the rights of the original appropriator and having itself made subsequent appropriations and purchases of water, stands in the position of appropriator for distribution to the landowners within the district, within the meaning of Const., Art. 15, § 1 . . . . The landowners, to whose lands the water has become dedicated by application thereon to a beneficial use, have acquired the status and rights of distributees under Const., Art. 15, §§ 4 and 5.[996]
> The framers of Idaho's Constitution clearly intended that whenever water is once appropriated by any person or corporation for use in agricultural purposes under a sale, rental or distribution, that it shall never be diverted from that use and purpose so long as there may be any demand for the water and to the extent of such demand for agricultural purposes.

Mellen v. Great W. Beet Sugar Co., 21 Idaho 353, 359, 122 P. 30, 31 (1912).

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acquire, manage, occupy and possess said property as herein provided." Idaho Code § 43-316 (emphasis added).

[996] *Bradshaw v. Milner Low Lift Irrigation District*, 85 Idaho 528, 545, 381 P.2d 440, 457 (1963). *See also Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916 (1935).

Thus, the right to continue to use the water delivered by the district is a perpetual entitlement, subject only to continued demand—and, presumably, the ability to place it to beneficial use and the payment of any fees or charges.[997]

In sum, the irrigation district holds title to water rights held in its name, subject to a trust to use those water rights consistent with the uses and purposes of the governing statute. As shown in *Yaden*, *Jensen*, and *Barclay,* the irrigators have a right to continued service, but they do not hold equitable title to the district's water rights.

(2) Storage rights in federal reservoirs held by irrigation districts

In *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) (Schroeder, C.J.)., the Court held that beneficial title to Bureau of Reclamation storage water delivered by irrigation districts to irrigators is held by the irrigators. See discussion in section 31.F(2) on page 646.

In a post-*Pioneer* decision, the Idaho Supreme Court said that landowners served by irrigation districts do not hold individual water rights:

> Lastly, irrigation districts are formed pursuant to statute. I.C. §§ 43-101–2554; *Yaden v. Gem Irr. Dist*., 37 Idaho 300, 216 P. 250, 252 (1923) ("Irrigation districts are creatures of the statutes."). Thus, irrigation districts "are quasi public or municipal corporations, and as such have only such power as is given to them by statute, or such as is necessarily implied." *Id*. Landowners served by irrigation districts do not hold individual water rights in connection with their service.

Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc., 165 Idaho 467, 475, 447 P.3d 915, 923 (2019) (Burdick, C.J.) (emphasis supplied).

The quoted statement, by the way, was dictum; *Eagle Creek* did not deal with irrigation districts. Perhaps it should be understood to be in reference to natural flow water rights held by irrigation districts. See discussion above in section 31.E(1) on page 638.

Alternatively, it may be understood mean that the irrigators hold beneficial title collectively. If so, that would be consistent with the second holding in *Pioneer* (part IV

[997] See footnote 994 and accompanying text at page 636 dealing with the effect of recently enacted Idaho Code § 42-219(5), providing that irrigation districts shall hold the license and submit the requisite proof.

of the opinion), in which the Court held that it was unnecessary to include a "remark"[998] in the Bureau of Reclamation's water rights identifying each irrigation entity (much less, which individual farmers) and the quantity of water beneficially owned by each irrigation entity. *Pioneer*, 144 Idaho at 115-16, 157 P.3d at 609-10. Moreover, the *Pioneer* Court ordered the inclusion of a "remark" stating: "The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations." *Pioneer*, 144 Idaho at 115, 157 P.3d at 609. Thus, while the water right is appurtenant to the land, it is not appurtenant to individual tracts of land, but rather to the land within the irrigation district boundaries as a whole. Thus, an individual farmer or a residential homeowner serviced by the district does not own an individual water right, and may lose the right to service by failing to pay fees or electing to be excluded from the district, in which case that water would become available to other users served by the district.

F. Water right ownership in federal reclamation projects

(1) Federal reclamation law background

Over the last century, the Bureau of Reclamation ("Bureau," "BOR," or "USBR") has built water reclamation projects throughout the West.[999] The federal government has acquired water rights for its projects in the various states in two ways. Primarily, the Bureau has applied to state authorities and received a permit, license, or decree, as the case may be, recognizing the water right pursuant to state law. In other instances, the federal government has obtained water rights by conveyance from entities or individuals (such as those who either failed to fully develop their own storage project or chose for other reasons to throw in with the federal project).

In either case, the United States holds the water rights in its name. In the past, the United States contended that it held the entire ownership interest in those water rights, and that the only interest held by others existed by virtue of and under terms of repayment contracts with irrigation districts. However, that theory did not prevail in federal court. The U.S. Supreme Court has consistently held that, while the federal government holds legal title to project water rights, the private landowners within the project lands (i.e., the irrigators) own "beneficial" or "equitable" title to project water.

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[998] Idaho Code § 42-1411(2)(j) authorizes the Director to include in the Director's Report setting out recommended water rights in a general adjudication "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." If approved by the adjudication court, these remarks will be included in the partial decree and become part of the water right.

[999] Bureau of Reclamation projects constructed in Idaho include Anderson Ranch, Arrowrock, Black Canyon, Boise River Diversion Dam, Cascade, Deadwood, Jackson Lake, Ririe Reservoir, Lake Walcott, American Falls Reservoir, and Palisades Reservoir.

Underpinning this conclusion is the observation that the United States, in carrying out the mandates of the Reclamation Act of 1902, must proceed pursuant to state water law, at least so long as such law does not frustrate the purposes of the federal act.[1000]

The first case to test the ownership issue was *Ickes v. Fox*, 300 U.S. 82 (1937) (Sutherland, J.). In that case, the Bureau of Reclamation attempted to reduce long-standing water deliveries to irrigators, who received their water under repayment contracts. The United States argued that it had acquired water rights in its own name under state law in compliance with section 8, and that its distribution of water under the rights gave the irrigators no property interest in the water rights, but only "contract rights against the distributor."

The Supreme Court disagreed. It held that the appropriation was made for the irrigators, not for the government:

> Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. The government was and remained simply a carrier and distributor of the water with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefor, it was provided that the government should have a lien thereto—a provision which in itself imports that the water-rights belong to another than the lienor, that is to say, to the landowner.

[1000] "The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right. Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or in any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such law, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or waters thereof." Section 8 of the Reclamation Act of 1902, 43 U.S.C. §§ 372 and 383.

Ickes v. Fox, 300 U.S. at 94-95 (citations omitted).

The rule in *Ickes* was reaffirmed in *Nebraska v. Wyoming*, 325 U.S. 589 (1945) (Douglas, J). This was an original jurisdiction case arising out of a dispute between Nebraska, Wyoming, Colorado and the United States regarding the waters of the North Platte River. The United States claimed it owned all of the unappropriated water in the river, and that its entitlement was derived not from appropriation but from its underlying ownership of the lands and waters—all acquired by cessions from foreign governments—which entitled it to an apportionment free from state control. The Court rejected the federal assertion, noting that the water rights in the North Platte Project all had been obtained in compliance with state law, and that "[t]he property right in the water rights is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator." *Nebraska v. Wyoming*, 325 U.S. at 614. The Court found that the appropriators were the ones who put the water to beneficial use, thus perfecting the water right that had been issued in the name of the United States. In this way, the landowners had "become the appropriators of the water rights, the United States being the storer and the carrier." *Nebraska v. Wyoming*, 325 U.S. at 615.

The third Supreme Court case to address the subject was *Nevada v. United States*, 463 U.S. 110 (1983) (Rehnquist, J.). This case involved an attempt by the United States to obtain additional water rights for the Pyramid Lake Indian Reservation by undoing the 1944 Orr Ditch decree for Truckee River waters. After reviewing *Ickes* and *Nebraska v. Wyoming*, the Court concluded that the landowners, not the government,[1001] hold the beneficial interest in the water rights. Therefore, said the Court, the government is not at liberty to reallocate the project water rights as if it owned these rights in fee. *Nevada*, 463 U.S. at 128. The Court concluded:

> [T]he Government is completely mistaken if it believes that the water rights confirmed to it by the Orr Ditch decree in 1944 for use in the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, the government's "ownership" of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land.

[1001] The Court concluded that the federal government retains legal title to the water rights. *Nevada*, 463 U.S. at 127.

Nevada, 463 U.S. at 126 (emphasis added).

It is worth noting that the U.S. Supreme Court's decisions all speak in terms of the ownership interest held by the ultimate landowner (i.e., irrigator). Thus, no one has suggested that the irrigation districts which have contracted with the Bureau for repayment and water supply have thereby become "owners" of the water rights used to meet those supply obligations. Rather, the irrigation districts serve as a sort of "pass through" from the federal government to the irrigators. This conclusion is confirmed by the Idaho Supreme Court in *Pioneer*, discussed in section 31.F(2) on page 646.

These federal decisions have repeatedly stated that legal title is held by the United States while beneficial title is held by the end user, but what does this mean? One commentator contends this simply means that the United States has some responsibility to treat its irrigation customers fairly. According to Professor Sax, the irrigator relying on federal water project supplies has no more than "a right to fair treatment" by the federal government, which is "essentially the same as that to which he is entitled as a public utility user."[1002]

The more predominant view, however, appears to be that beneficial ownership is a true ownership interest, in the property law sense. The federal government holds title as trustee for the landowner-irrigator who actually applies the water to beneficial use on a particular parcel of land. Thus, the landowner-irrigator's interest is analogous (if not identical) to the interest held by the beneficiary of a trust.

The Interior Department Solicitor has opined that, as to waters held in Bureau of Reclamation storage reservoirs, the state-granted water right—the "paper" entitlement—rests "exclusively with the distributor," that is, with the United States.[1003] However, the opinion also notes that "it is [the individual irrigators] and not the distributor who actually put the water to a beneficial use as required by state law," and concludes that *Nevada v. United States* "conclusively reaffirmed the concept that beneficial ownership of a reclamation project water right is in the water users who put the water to a beneficial use."[1004]

On the other hand, the Solicitor also concluded that the federal government's "legal title" interest is not meaningless. The Solicitor concluded, based on the ruling in

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[1002] According to Professor Sax, the irrigator relying on federal water project supplies has no more than "a right to fair treatment" by the federal government, which is "essentially the same as that to which he is entitled as a public utility user." Joseph L. Sax, *Federal Reclamation Law,* in 2 *Waters and Water Rights* § 118.3 at 187 (R. Clark ed., 1967).

[1003] *Filing of Claims for Water Rights in General Stream Adjudications*, Dept. of the Interior Solicitor's Opinion No. M-36966, 97 I.D. 21, 23 (July 6, 1989).

[1004] *Filing of Claims for Water Rights in General Stream Adjudications*, 97 I.D. at 27.

Nevada v. United States, that the legal title held by the Bureau carries with it an obligation "to preserve, maintain, protect, or have confirmed project water rights that are held in the name of the United States."[1005] Thus, the Bureau has the obligation to file for and defend project water rights in any general stream adjudication in which the federal government might be joined.[1006] The Solicitor noted that such a filing is the means by which the water user, the beneficial title holder, can effectively participate in the proceeding with actual proof of beneficial use to back up the agency's filing.[1007]

Accordingly, the Solicitor's opinion found that *Ickes* did not contradict the Supreme Court's earlier ruling in *Ide v. United States,* 263 U.S. 497, 505 (1924) (Van Devanter, J.),[1008] and that, primarily to protect project water entitlements and the project itself, the federal government retains some "control over the water" in federal reclamation projects, as well as those rights "incident to the appropriation" not placed in the hands of the appropriator. Likewise, the Solicitor cited *United States v. Humboldt Lovelock Irrigation Light & Power Co.,* 97 F.2d 38 (9th Cir. 1938), *Hudspeth Cnty. Conservation & Reclamation Dist. v. Robbins,* 213 F.2d 425 (5th Cir. 1954), and *United States v. Tilley*, 124 F. 850 (8th Cir. 1942) for the proposition that the federal government retains some control over the water right and is entitled and obligated to protect it.

It is also clear that the Secretary of the Interior is empowered to transfer the operation and management of irrigation works in a reclamation project to project landowners once payments for a major portion of the project lands are made. Even then, title to the reservoirs and works remains in the government, despite any transfer of operation and management responsibility. 43 U.S.C. § 498. "The lack of mention of water right title in this section implies that title to the water right had already passed to the farmers with their land patents."[1009]

In *Madera Irr. Dist. v. Hancock,* 982 F.2d 1397 (9th Cir. 1993), the circuit court ruled that the federal government may end subsidies to federal water project beneficiaries despite the fact that the beneficiaries hold "a vested property right to a permanent water

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[1005] *Filing of Claims for Water Rights in General Stream Adjudications*, 97 I.D. at 28.

[1006] *Filing of Claims for Water Rights in General Stream Adjudications*, 97 I.D. at 28.

[1007] *Filing of Claims for Water Rights in General Stream Adjudications*, 97 I.D. at 28.

[1008] In *Ide* at 505, the Court noted that the Bureau operated the Shoshone Project in Wyoming subject to state water law, which recognized the "beneficial use is the basis, measure and limit of all appropriation."

[1009] *United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877, 879 (D. Nevada 1980). *See* also *U.S. v. Union Gap Irrigation Co.*, 209 F. 274 (1913); *Westside Irrigation Co. v. U.S.,* 246 F. 21 (D. Wash. 1916), both holding that the United States is the appropriator of water in reclamation projects and others have merely contract rights against the U.S.

supply." For further comment on this issue, *see* Richard Roos Collins, *Voluntary Conveyance of the Right to Receive a Water Supply from the United States Bureau of Reclamation,* 13 Ecology L. Quarterly 773, 835 (1987).

(2) The *Pioneer* decision

(a) The irrigators hold "title" (of some sort) to Bureau water.

Most Idaho irrigation districts rely in part on storage water rights in federal reclamation projects. These rights are acquired under state law by the Bureau of Reclamation and held in the name of the United States. In *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) (Schroeder, C.J.), the Idaho Supreme Court held that the irrigators receiving the Bureau water hold "title to the use of the water" stored in Bureau of Reclamation projects.[1010] Chief Justice Schroeder's decision affirmed Judge Melanson's ruling below, except that it substituted a new "remark" to be included in the water rights.[1011]

Pioneer arose in the context of the SRBA. The Bureau of Reclamation filed water right claims in connection with its three Boise River Project facilities (Arrowrock, Lucky Peak, and Anderson).[1012] IDWR recommended that water rights be issued in the Bureau's name and that competing claims filed by irrigation districts and other entities be denied.

[1010] The decision in *Pioneer* should come as no surprise. The U.S. Supreme Court has repeatedly held that BOR holds only nominal title to its water rights. *Ickes v. Fox*, 300 U.S. 82 (1937); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Nevada v. United States*, 463 U.S. 110 (1983). BOR argued in *Pioneer* that Idaho was different from all other states and that Idaho law granted BOR full legal title. That argument did not prevail.

[1011] There were three decisions below: *In re SRBA,* Case No. 39576, Consolidated Subcase No. 91-63 (Idaho, Fifth Judicial Dist., Sept. 1, 2004) (Melanson, J.) ("*Melanson #1*") (instructing the parties to negotiate a "remark"); *In re SRBA,* Case No. 39576, Consolidated Subcase No. 91-63 (Idaho, Fifth Judicial Dist., Jan. 7, 2005) (Melanson, J.) ("*Melanson #2*") (ordering inclusion of a "remark"); *In re SRBA,* Case No. 39576, Consolidated Subcase No. 91-63 (Idaho, Fifth Judicial Dist., Mar. 3, 2004) (Melanson, J.) ("*Melanson #3*") (on reconsideration, modifying the "remark"). These decisions are not available on Westlaw, but may be found in the SRBA website under "Presiding Judge Documents."

[1012] "Water right claim 63-00303 was filed by the BOR and pertains to the Arrowrock Dam and Reservoir Project. IDWR recommended the right in the name of BOR based on a former decreed right. The individual corresponding claims filed by the Irrigation Entities recommended as disallowed include 63-05262A (Pioneer Irrigation District), 63-05262B (Settlers Irrigation District), 63-05262C (Nampa Meridian Irrigation District), and 63-00303A (Farmers Cooperative Ditch Co.). The BOR also filed 63-05262 which IDWR recommended as disallowed but included the right in the recommendation for the 63-00303 right." *Melanson Decision* at 2-3, n.2.

The SRBA court rejected IDWR's recommendation. Instead it issued an order declaring that the federal government holds nominal legal title and the irrigation entities hold equitable title in trust for their landowners. The United States appealed and irrigation entities cross-appealed.

On appeal, the Idaho Supreme Court largely agreed with the SRBA court. The holding is summed up in the "remark"[1013] that Court ordered be placed in the Bureau's water rights:

> The name of the United States of America acting through the Bureau of Reclamation appears in the Name and Address sections of this partial decree. However, as a matter of Idaho constitutional and statutory law title to the use of the water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations.

Pioneer, 144 Idaho at 115, 157 P.3d at 609 (emphasis added).

Although the Court largely affirmed the SRBA Court's decision, it rejected District Court Judge Melanson's "remark" and substituted its own—without any explanation.[1014] Judge Melanson's "remark" expressly articulated the concept of divided

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[1013] Idaho Code § 42-1411(2)(j) authorizes the Director to include in the Director's Report setting out recommended water rights in a general adjudication "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." If approved by the adjudication court, these remarks will be included in the partial decree and become part of the water right.

[1014] The changed remark is described in a law review article by Clive Strong and his fellow deputy attorneys general:

> The SRBA Court's "remark" was modified, however, to set forth the Idaho Supreme Court's analysis. The Court deleted the reference to "divided" ownership, and replaced the statement that the irrigation districts held "[b]eneficial or equitable title . . . in

title, in which the United States held bare legal title and the irrigators held beneficial or equitable title.[1015] *Pioneer*, 144 Idaho at 109, 157 P.3d at 603. Chief Justice Schroeder avoided all use of the divided title terminology (except in summarizing reclamation law precedent). Instead, he simply said the irrigators held "title to the use of the water" without explaining the nature of that title. Whether that is different or the same as equitable title is anyone's guess.

It may be that the Justice Schroeder's "remark" was just a different way of saying the same thing as Judge Melanson said his "remark." Or the Court may have intended to provide something less than full equitable title to the irrigators. The latter is supported by two observations.

First, the Court spoke about the irrigators' interest as being "stronger than a mere contractual expectancy," noting that Article XV, § 4 of the Idaho Constitution and Idaho Code § 42-220[1016] (both of which ensure that irrigators who pay their contract charges may not be cut off but instead have what the Court called a "perpetual right" to service). *Pioneer*, 144 Idaho at 114, 157 P.3d at 608. The "perpetual right" arising under those provisions is not a property right. It is no more than the right to continued service that commercial water companies owe their water users under the Idaho Constitution and Idaho Code § 42-220. In keeping with this, Justice Schroeder's "remark" says merely that the irrigators' "interest is derived from law and not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations." *Pioneer*, 144 Idaho at 115, 157 P.3d at 609. In other words, the irrigators have something more than a contract, but not necessarily a full property right.

> trust" with provisions stating that "as a matter of Idaho constitutional and statutory law title to the use of the water is held by the consumers or users of the water," and the irrigation entities "act on behalf of the consumers or users to administer the use of the water for the landowners" in the quantities specified in federal spaceholder contracts.

Ann Y. Vonde, et al., *Understanding the Snake River Basin Adjudication*, 52 Idaho L. Rev. 53, 117 (2016) (brackets original, citation footnotes omitted). The article offers no insight as to why the change was made.

[1015] The terms "equitable title" and "beneficial title" (held by the beneficial user of the water) are synonymous. Likewise, the terms "legal title" and "nominal title" held by the trustee are synonymous.

[1016] The referenced statute is entitled "Effect of license." It provides, in pertinent part: "The right to continue the beneficial use of such waters shall never be denied nor prevented for any cause other than the failure, on the part of the user or holder of such right, to pay the ordinary charges or assessments which may be made or levied to cover the expenses for the delivery or distribution of such water . . . ." Idaho Code § 42-220.

Second, Justice Schroeder's "remark" says: "The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations." *Pioneer*, 144 Idaho at 115, 157 P.3d at 609. Thus, while the irrigators' interest is appurtenant to the land, it is not appurtenant to individual tracts of land. Rather, this interest is appurtenant to the land within the irrigation district boundaries as a whole. Thus, an individual farmer or a residential homeowner[1017] serviced by the district does not own an perpetual entitlement to a portion of the storage water, and may lose the right to service by failing to pay fees or electing to be excluded from the district, in which case that water would become available to other users served by the district. That is fundamentally different from and less than a full-blown property right held by the individual irrigator.

In sum, the *Pioneer* Court gave some sort of "title to the use of water" to irrigators, which title is "more than a mere contractual expectancy." Although the term title is ordinarily associated with a property right, the Court never referred to the irrigator's "interest" as a property right. It would appear that the Court has left the nature and extent of irrigators' interest as a matter for future courts to decide.

(b) Why did ownership matter to the irrigators in *Pioneer*?

One might ask, why did the irrigation districts think it so important to litigate the ownership issue in *Pioneer*? After all, the Bureau has long acted as a cooperative partner and supporter of the irrigation entities, and there has never been any substantial disagreement with respect to project operation.

The *Pioneer* Court mentioned two recent cases that were of particular concern to the irrigators, motivating them to confirm they held an actual title to the water rights. The first was *Klamath Irr. Dist. v. United States*, 67 Fed. Cl. 504 (2005). In that case, the federal court of claims rejected a takings claim brought by irrigators in response to temporary reductions in the amount of project water made available for irrigation. The federal court rejected the claim, saying that the property remedy lay in breach of contract, not a taking claim. The other was *Orff. v. United States*, 545 U.S. 596 (2005) (Thomas, J.), in which the Supreme Court rejected a third-party beneficiary claim by irrigators on sovereign immunity grounds. See also, *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001) (restrictions on water use required by the Endangered Species Act result in a compensable "physical taking" of contractual water rights).

[1017] Irrigation districts do not serve only farmers. Vast areas of former irrigation land is now within cities, where the irrigation districts provide non-potable irrigation water to homeowners and businesses for lawns, open space, etc.

(c) The holding in *Pioneer* should be limited to water rights for Bureau projects.

For reasons discussed below, the authors conclude that the holding in *Pioneer*, whatever it is, does not apply outside the context of federal reclamation law and other situations in which Idaho law has recognized enhanced rights for irrigators served by other entities (such as mutual irrigation companies, including Carey Act operating companies).

The Court's decision in *Pioneer* consists of a recitation of the facts, the constitutional and statutory law, and the prior case law followed by a holding in the form of a "remark"[1018] to be included in the Bureau's partial decrees. The Court did not explain how the recited law led to the holding, nor did it address the extent to which its holding should serve as precedent in contexts other than federal reclamation projects.

The authors conclude that the holding in *Pioneer* is applicable only in the context of federal reclamation law and other situations in which Idaho law has recognized enhanced rights for irrigators served by other entities (mutual irrigation companies, including Carey Act operating companies). The *Pioneer* Court discussed but did not overturn prior precedent that has consistently held that commercial water companies hold full title to their water rights, subject to constitutional guarantees of continued service and fair dealing for the irrigators the companies serve. This conclusion is reinforced by a post-*Pioneer* decision (*Eagle Creek*, discussed below in section 31.F(2)(c)(iv) on page 657).

This conclusion is supported by four lines of reasoning, discussed below.

(i) First reason – *Pioneer* is grounded in reclamation law.

First, the *Pioneer* decision is articulated by the Court with extensive reference to the law, history, and purpose of the Reclamation Act. The Court said:

- "The Reclamation Act of 1902 set in motion a massive program to provide federal financing, construction, and operation of water storage and distribution projects to reclaim arid lands in many Western States." *Pioneer*, 144 Idaho at 109, 157 P.3d at 603.

[1018] Idaho Code § 42-1411(2)(j) authorizes the Director to include in the Director's Report setting out recommended water rights in a general adjudication "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." If approved by the adjudication court, these remarks will be included in the partial decree and become part of the water right.

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- "The Reclamation Act provides that 'the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and limit of the right.' 43 U.S.C. § 372." *Pioneer*, 144 Idaho at 110, 157 P.3d at 604.

- "The intent of the Reclamation Act was to allow large projects to be built, providing federal funds to states that were not able to build and maintain storage facilities alone. This is particularly significant in this case since the contracts between the United States and the irrigation districts provide for the repayment to the United States for the cost of constructing the federal facilities and the continuing operation and maintenance costs. The irrigation districts have fully repaid the construction costs, except for Lucky Peak, and they have paid for development of the stored water." *Pioneer*, 144 Idaho at 114-15, 157 P.3d at 608-09.

In short, the federal government did not undertake these projects for its own benefit, but for the sole benefit of the irrigators. The whole reclamation undertaking was aimed at providing water to irrigators, with water rights based on beneficial use that would be appurtenant to the irrigated land.[1019]

Thus, under the Reclamation Act and the Carey Act, the entity undertaking the irrigation project is a mere conduit of the water right to the farmers for whom the projects are undertaken. The situation is similar for other mutual irrigation companies. (See section 31.D beginning on page 630.) The situation is different, however, for commercial water companies and irrigation districts, which are subject to different legal principles respecting ownership of the subject water rights. The *Pioneer* Court's emphasis on the history and role of reclamation law supports the conclusion that its holding should be limited to that context.

(ii) Second reason – *Pioneer* left the commercial irrigation district cases intact.

The second reason that the *Pioneer* holding arguably does not apply in other contexts is that prior precedents calling for a different outcome in the context of commercial water companies were acknowledged by the Court and left in place. Specifically, the Bureau of Reclamation drew the Court's attention to three Idaho cases

[1019] The discussion of reclamation law in *Pioneer* dovetails with the Court's description in both pre- and post-*Pioneer* cases of how irrigators served by Carey Act entities ultimately become the title holders to the water rights. See, e.g., *Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc.*, 165 Idaho 467, 476-77, 447 P.3d 915, 924-25 (2019) (Burdick, C.J.); *Leland v. Twin Falls Canal Co.*, 51 Idaho 204, 3 P.2d 1105, 1107 (1931) (McNaughton, J.). (See discussion in section 31.D beginning on page 630.)

which it said showed "that Idaho law does not require a beneficial user to hold title to water rights." *Pioneer*, 144 Idaho at 114, 157 P.3d at 608. Those cases are:

- *Wilterding v. Green*, 4 Idaho 773, 45 P. 134 (1896) (Morgan, C.J.),
- *Washington Cnty. Irr. Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943 (1935) (Ailshie, J.), and
- *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916 (1935) (Ailshie, J.).

These cases demonstrate that, outside the context of water rights held by the Bureau of Reclamation, Carey Act companies, and other mutual irrigation companies, water delivery entities may appropriate water and hold full title to the water rights, notwithstanding that the water is used by someone else.[1020] These water rights are subject to constitutional and statutory obligations to treat irrigators fairly and to assure continued delivery of water to them so long as they pay reasonable charges. But those obligations do not shift ownership of the rights to the irrigators.

These three cases are discussed below.

Wilterding (1896)

In *Wilterding*, a farmer sought a writ of mandate to compel the owner of the Ridenbaugh Canal to rent surplus water to him at the prevailing rate of $1.50 per acre rather than the new rate of $10.00 per acre demanded by the commercial water company. Before sustaining the defendant's demurrer based on a pleading defect, the Court opined on the constitutional provisions in article XV protecting irrigators and the effect of those provision on ownership of the underlying water right. (See discussion in section 31.B beginning on page 620.) The Court concluded that the Idaho Constitution was intended "to deal only with the 'use' of water, and not with the property rights of appropriators therein . . . . The sale, renting, and distributing of the water is a dedication, and brings its use under the control of the state, but it in no sense destroys or abrogates the property rights of the appropriator therein." *Wilterding*, 45 P. at 138 (emphasis added). Thus, the Court held that the public use provisions in the Idaho Constitution do not address the question of water right ownership; they specify only that the use of water by consumers

[1020] In addition to these three cases, two other cases reinforce this conclusion: *Hard v. Boise City Irrigation and Land Co*., 9 Idaho 589, 594, 76 P. 331, 332 (1904) (Ailshie, J., concurring) and *Farmers' Co-Operative Ditch Co. v. Riverside Irrigation* ., 14 Idaho 450, 458, 94 P. 761, 763 (1908) (Ailshie, C.J.). These are discussed in section 31.C beginning on page 625.

or distributees is a dedication to their lands that cannot thereafter be interrupted so long as they pay reasonable assessments.

Talboy (1935)

In *Talboy*, the Court held that the water rights associated with an irrigation reservoir were owned by the companies that owned the reservoir, not the "consumers" (farmers) to whom water was delivered.[1021] The project was owned by three water supply entities that owned the facilities as joint tenants. Two of them were called "irrigation districts" and one was called a "company." All three were entities that distributed the water to consumers for a rental payment.[1022] In short, notwithstanding their nomenclature, they fell into the category known as "commercial water companies" (aka "commercial irrigation companies," "commercial ditch companies," or "carrier ditch companies") at least to the extent that they engaged in water rentals to farmers outside their own district boundaries.

The *Talboy* Court held that these delivery entities were the sole owners of the water rights they had acquired for the project:

> Appellant, respondent, and Weiser Bench Irrigation Company had a water right or water rights in the waters of Crane creek sufficient for the full capacity of the reservoir and to supply each its amount of water provided for by the contract. . . .
>
> After the water was diverted from the natural stream and stored in the reservoir, it was no longer "public water" subject to diversion and appropriation under the provisions of the Constitution (article 15, § 3). It then became water "appropriated for sale, rental or distribution" in accordance with the provisions of sections 1, 2, and 3, art. 15, of the Constitution. The waters so impounded then became the property of the appropriators and owners of the reservoir, impressed with the public trust to apply it to a beneficial use.

[1021] The *Talboy* case involved a damage claim by one of the three joint-tenants of the project against the other joint-tenants and against the water master. The Court ruled that the plaintiff was entitled to damages to reimburse it for the extra water taken by the others.

[1022] "Now it appears from the record here that these irrigation districts were not actually using this water on their own lands but were each distributing their appropriations to the landowners in their respective districts and collecting rents therefor; or, possibly more accurately stated, assessments. *Talboy*, 43 P.2d at 946.

Talboy, 43 P.2d at 945. As noted in the quotation, the water rights held by these companies were subject to the obligations spelled out in the Constitution that are protective of the farmers receiving the water. But there is no ambiguity in this decision that the distributing entities, not the farmers, held the water rights.

Barclay (1935)

In *Barclay*, Nampa & Meridian Irrigation District sued various persons and entities including Drainage District No. 4 of Ada County, which is described as a quasi-municipal corporation. *Barclay*, 47 P.2d at 918. The Drainage District obtained an order from the district court requiring the Irrigation District to ensure that all individuals served by the Irrigation District be made parties. On appeal, the Idaho Supreme Court overturned this ruling. The Court made clear that water rights acquired and held by the Drainage District belong to the District, not to the farmers receiving the water. (This case was dealing with natural flow water rights held by the Irrigation District and drainage water appropriated by the Drainage District; no Bureau storage water was involved.)

> The question was mooted [argued] in Farmers', etc., D. Co. v. Riverside Irr. Dist., 14 Idaho, 450, 94 P. 761, 763, and this court said: "The appropriation of waters carried in the ditch operated for sale, rental, and distribution of waters does not belong to the water users, but rather to the ditch company. The right to the use of such water, after having once been sold, rented, or distributed to any person who has settled upon or improved land for agricultural purposes, becomes a perpetual right, subject to defeat only by failure to pay annual water rents and comply with the lawful requirements as to the conditions of the use. Section 4, art. 15 of the Constitution . . . ." . . .
>
> . . . The consumers possess no water right which they can assert as against any other appropriator; their rights are acquired from the district which is the appropriator and owner and it is the district's business to protect the appropriation and defend it in any litigation that arises. One who acquires the right to use water from an appropriator, whose right was initiated by appropriation under section 1, art. 15, "for sale, rental or distribution," is not the owner of the appropriation and does not acquire the rights of an appropriator, but he simply acquires the rights of a user and consumer, as distributee of the water under sections 4 and 5, art. 15, of the Constitution.

Barclay, 47 P.2d at 918-19 (emphasis added) (additional citations and internal quotation marks omitted).

As noted in the quotation above, even though the irrigator does not "own" the water right, she has substantial rights under the Idaho Constitution—a perpetual right of continued service so long as payments are made. Thus the Drainage District (which is not a mutual irrigation company or a Carey Act operating company) was given treatment similar to that of commercial water company.

Importantly, the *Pioneer* Court did not overrule the holdings in *Wilterding*, *Talboy*, or *Barclay*. Instead, it found them inapplicable in the context of water rights secured under the Reclamation Act. It began by noting that *Wilterding* was "issued prior to the creation of the Reclamation Act." *Pioneer*, 144 Idaho at 114, 157 P.3d at 608. It then continued:

> Notably, none of these cases deals with the BOR or the Reclamation Act. In fact, the United States Supreme Court has indicated through *Ickes* and its progeny that a strong argument exists that the framers of the Reclamation Act did not intend to deprive the irrigation entities of an equitable interest in project water rights. The intent of the Reclamation Act was to allow large projects to be built, providing federal funds to states that were not able to build and maintain storage facilities alone. This is particularly significant in this case since the contracts between the United States and the irrigation districts provide for the repayment to the United States for the cost of constructing the federal facilities and the continuing operation and maintenance costs. The irrigation districts have fully repaid the construction costs, except for Lucky Peak, and they have paid for development of the stored water.

Pioneer, 144 Idaho at 114-15, 157 P.3d at 608-09.

In short, the *Pioneer* Court acknowledged that, in contexts other than the Reclamation Act and other situations in which Idaho law has recognized enhanced rights for irrigators served by other entities (such as mutual irrigation companies, including Carey Act operating companies), Idaho law holds that title to water rights remains in the water delivery entity notwithstanding any constitutional or statutory obligations requiring the continued delivery of water to irrigators using that water. It did not overrule that precedent, because it was not applicable to the *Pioneer* case.

(iii) Third reason – Judge Melanson expressly recognized that the outcome would be different in the context of commercial water companies.

As noted in "Second reason" above, Chief Justice Schroeder determined that the commercial water company cases were not applicable to his analysis because "none of these cases deals with the BOR or the Reclamation Act." *Pioneer*, 144 Idaho at 114, 157 P.3d at 608. Thus it is evident that the Idaho Supreme Court concurred with the district court on this point.

While the Chief Justice merely swept aside commercial water company cases, the underlying decision by Judge Melanson was more thorough in its analysis of the issue. Judge Melanson explained the United States urged that BOR should be given the same treatment as a commercial water company. Judge Melanson recognized that commercial water companies hold full title to its the water rights, but said concluded BOR is not entitled to that treatment under the reclamation law.

> A commercial ditch company . . . owns the water rights and rents or distributes the water to end users. Any interest the end water users have in the water rights is solely limited to their service contracts or leases. The ditch company is not the actual beneficial user of the water right.
>
> The BOR would argue that its relationship with the Irrigation Entities (or end water users) is similar to the relationship between a commercial ditch company and the parties who contracted for use of the water owned by the company. The BOR argues that because the Idaho Constitution allows this manner of appropriation (most states do not) that state law dictates that the BOR should be named the exclusive owner of the water right. The BOR argues that any interest that the Irrigation Entities may have is limited to the contract and that any relief for the BOR's failure to perform is limited to a breach of contract action. The problem with this argument is that was the very issue and concern which was addressed by the United States Supreme Court in *Ickes v. Fox*, *Nebraska v. Wyoming*, and *Nevada v. United States*. Those cases specifically defined the relationship between the BOR and the project water users. The very essence of those decisions is that the project water users have more than simply a rental or contractual interest in the project rights. As discussed earlier, the Act, the regulations issued in accordance with the Act and the solicitor's opinion regarding the treatment of project water in

> general adjudications all support this conclusion. Therefore, the BOR is not free to do as it pleases with the water and leave the water users to resort to a breach of contract action against the BOR as the sole remedy. Simply put, the relationship between the BOR and the Irrigation Entities or end water user is not the same as the relationship between a commercial ditch company and the water users to which it distributes water.

Melanson #1, at 28 (emphasis added).

This conclusion was affirmed on appeal in *Pioneer*. Chief Justice Schroeder's opinion did not provide this level of analysis, but it reached the same conclusion. As discussed in the "Second reason" above, the Chief Justice acknowledged the holdings to this effect the commercial water company cases, but said they were not applicable to his analysis because "none of these cases deals with the BOR or the Reclamation Act." *Pioneer*, 144 Idaho at 114, 157 P.3d at 608. Thus it is evident that the SRBA court and the Idaho Supreme Court concur that the *Pioneer* holding does not apply to commercial water companies, and the opposite result would be reached in that context.

(iv) Fourth reason – The *Eagle Creek* decision confirms that commercial water companies may hold full title to their water rights.

Finally, the need to limit the application of *Pioneer* to reclamation projects, Carey Act operating companies, and mutual irrigation companies is confirmed by the Idaho Supreme Court's more recent decision in *Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc.*, 165 Idaho 467, 447 P.3d 915 (2019) (Burdick, C.J.). (See further discussion of this case in 31.C beginning on page 625.)

In *Eagle Creek*, the Court described the various types of irrigation water delivery entities and the law applicable to each. It confirmed the longstanding Idaho case law recognizing that for-profit commercial water companies (including private contract companies and public utilities) that deliver irrigation water hold full title to their water rights:

> The "private contract company" is one set up for perpetual service to farmers with whom it would contract; they would pay for the water delivery at established rates, whether they used the water or not. The users never acquire any interest in the water rights or facilities.

Eagle Creek, 165 Idaho at 475, 447 P.3d at 923 (citing the *Idaho Water Law Handbook* and quoting from an article by Handbook author Jeffery C. Fereday).

The fact that this 2019 decision—which discusses *Pioneer*—continues to recognize that commercial water companies hold title to their water rights is further confirmation that *Pioneer*'s holding should not be applied outside of its Bureau of Reclamation context.

(v) In sum

There is broad language in *Pioneer* that could be read to suggest that title to irrigation rights is held by the irrigator in all contexts.[1023] But that conclusion cannot be reconciled with the *Pioneer* Court's decision to distinguish, rather than overrule, *Wilterding*, *Talboy*, and *Barclay*. Indeed, the *Pioneer* case affirmed the SRBA's decision, which explicitly recognized that commercial water companies hold full title to their water rights. It is further reinforced by the *Pioneer* Court's emphasis on the law, history, and policy of the Reclamation Act, as discussed above. And the limited applicability of the decision is confirmed by the Court's subsequent decision in *Eagle Creek*.

G. Water right ownership for municipal providers

The ownership of municipal water rights held by private municipal providers is analogous to that of ditch companies. Like ditch companies, these are private, for-profit entities subject to regulation by the Idaho Public Utilities Commission. In *Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc.*, 165 Idaho 467, 475, 447 P.3d 915, 923

[1023] The *Pioneer* Court's references to general principles of beneficial use are summarized in this article:

> The Idaho Supreme Court's analysis was based on Idaho's "well-settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law." It was undisputed "that the [Bureau of Reclamation] does not beneficially use the water for irrigation. It manages and operates the storage facilities." Rather, "[i]rrigation of the lands serviced by the irrigation districts was the basis upon which original water right licenses were issued." Thus, "[w]ithout the diversion by the irrigation districts and beneficial use of water for irrigation purposes by the irrigators, valid water rights for the reservoirs would not exist under Idaho law." The Court also concluded "[t]he underlying principle" of the United States Supreme Court decisions--that application of water to beneficial use is required to perfect a water right--"is the same" as Idaho law, and "[b]eneficial use is enmeshed in the nature of a water right" under Idaho law.

Ann Y. Vonde, et al., *Understanding the Snake River Basin Adjudication*, 52 Idaho L. Rev. 53, 117 (2016) (brackets original, citation footnotes omitted).

(2019) (Burdick, C.J.), the Court described the third category of mutual irrigation company as follows:

> (3) A true "public utility company," is one which holds itself out to serve all comers, so long as there is adequate water supply, on an annual fee for service based primarily on the amount of water used. The deliberate entry into public service caused a dedication to public use and subjected these companies to public utility regulation (at least after public utility commissions came into being).

Eagle Creek, 165 Idaho at 475, 447 P.3d at 923.

Although this description was in the context of irrigation entities, it would seem to apply equally to municipal water delivery. Accordingly, there should be no doubt that water rights held by such entities are owned by those entities, not by the individual customers who come and go. Indeed, it is entirely unthinkable that every home or business served by a municipal provider has a property interest in the provider's water rights.

Although we are aware of no law on the subject, the same would surely apply to a municipal provider who is a municipality rather than a private company.

There is very little law on whether the constitutional principles of "public use" apply to municipal providers. Sections 4 and 5 of Article 15 are expressly limited to entities providing agricultural water, and therefore do not apply to municipal providers. Sections 1 and 6, however, do not contain this limitation.

In a 1915 decision involving application of the public utility act to water rights, the Idaho Supreme Court held that sections 1, 2 and 3 of Article 15 do apply to municipal providers. *Murray v. Public Utilities Comm'n,* 27 Idaho 603, 150 P. 47 (1915). The issue in that case was not the rights of the water customers. Rather, the question was whether the utility owned the water rights and was entitled to include them in its rate base. The state Supreme Court answered with a definitive "yes" to both questions:

> When the provisions of the Constitution and statutes of this state relating to water rights are carefully read together, it is apparent that, if one appropriates water for a beneficial use, and then sells, rents, or distributes it to others who apply it to such beneficial use, he has a valuable right which is entitled to protection as a property right. This right has been recognized in almost every adjudication of water rights by the courts of this state . . . . To be sure, the person who takes water from the water company or carrier also acquires a right

> to the use of it, dependent upon user and payment, but this does not alter the fact that the water company has a right.

Murray, 27 Idaho at 619-20, 150 P. at 50-51 (emphasis added).

In other words, the water right is the municipal water provider's "property right," but the customer has some rights, too. Just what "right" the municipal customer holds was not described by the Court. Presumably, it is simply the right, as provided in public utility law, to fair, nondiscriminatory, continued service upon payment. This is essentially the same as the right constitutionally conferred upon customer-irrigators served by commercial water companies under Article 15, section 4.

A city entering into a franchise agreement with a private water provider (which provider, of course, would be a regulated public utility) would have whatever rights are in the franchise contract. But the existence of the franchise would not have the effect of shifting title to the provider's assets.

Note: The law of utility franchises is addressed in the *Idaho Land Use Handbook*.

In analyzing the water right ownership issue, caution should be exercised in drawing analogies between irrigation water providers and municipal water providers. There are fundamental differences between the two.

Take irrigation water providers first. They provide a supply of agricultural water to a relatively fixed group of irrigators. Available supplies would be allocated to the irrigators to irrigate lands specified in a district's charter (in the case of landowner-irrigators within an irrigation district), on the basis of stock ownership (in the case of a mutual canal company), or pursuant to contract entitlement (in the case of commercial water companies. In contrast to the municipal provider, an irrigation water provider owns a fixed canal system that typically has been in place for decades and which is not changed or extended to meet new demand. The irrigation water provider often does not even deliver directly to the headgate of a shareholder or district landowner (in the way a municipal provider delivers directly to the home or business), but rather to a lateral ditch operated informally by the landowners. The irrigation water provider has no obligation to provide service to new customers, to persons outside a district's boundaries, or to non-shareholders. It is not in the business of serving all those who might set up homes or businesses in a growing community, and certainly is not obligated to construct an ever-expanding system of reservoirs, wells, pipes and pumps.

In contrast, a municipal water provider (like any public utility) is obligated to serve all comers and to serve a growing population of domestic, commercial, municipal and industrial users, and their incidental irrigation needs. To meet this obligation, it is apparent that the water utility must own and control (and judiciously augment) its portfolio of water rights. If every departing customer could take with her a fractional

interest in the company's water rights portfolio, its water portfolio would dwindle and there would be no sense to the requirement that a "public" or "municipal" water provider have the water available to serve a growing community.

Of course, one irrigation supply entity does have parallels to the municipal provider: the commercial water company. They were common in the late 19th century and gave rise to concerns about protecting the consumer-irrigator against unfair treatment or company bankruptcy. As indicated above, the courts in Colorado and the constitution framers in Idaho and California declared such for-profit, commercial enterprises to be, in essence, "public utilities" before public utility regulation had been invented. Now, as then, commercial water companies (including municipal water providers) are deemed to hold full title to the water rights, but are bound to provide fair and reasonable service to their customers.

32. FLOOD CONTROL DUTY

The owner/operator of an on-stream or off-stream reservoir capable of providing flood control has a right and obligation to release water for flood control purposes. In the case of federal reservoirs, this duty arises under federal statutes governing the reservoir. For non-federal reservoirs, this duty arises under Idaho common law, which requires all owners and operators to operate reservoirs reasonably. The three Idaho cases on this subject are discussed below.

The obligation to manage for flood control arises where one assumes a duty of flood control. In *Kunz v. Utah Power & Light Co*. ("*Kunz I*"), 526 F.2d 500 (9th Cir. 1975), flooded landowners sued a power company that operated an off-stream reservoir (Bear Lake fed by the Stewart Dam on the Bear River). The plaintiffs contended that the company should have kept more reservoir space empty so that water could be stored later to prevent the flooding. The power company insisted that it owed no duty of flood control and that it released no more water at any time than was entering the reservoir. The Ninth Circuit held that the power company had assumed a duty of flood control. Ordinarily, one owes no affirmative duty to prevent harm to another, so long as he or she has not brought about the condition that threatens the harm. An exception arises, however, where one voluntarily undertakes to assist another, which Utah Power had done in this case by consulting with landowners about flood-control efforts.

However, the assumed flood control duty does not give rise to strict liability. In *Kunz v. Utah Power & Light Co*. ("*Kunz II*"), 117 Idaho 901, 792 P.2d 926 (1990) (Bakes, C.J.), the Idaho Supreme Court, responding to certified questions from the Ninth Circuit, held that the power company operating Bear Lake "is only held to a standard of reasonableness, i.e., negligence" in operating the reservoir, thereby rejecting recovery based on various strict liability theories. *Kunz II*, 117 Idaho at 906, 792 P.2d at 931. In so ruling, the Court distinguished a line of cases calling for strict liability where a landowner alters a natural channel by placing barriers to prevent flooding on its property that diminishes the carrying capacity of the stream and causes flooding on other properties.[1024] The Court said the distinction found in these two lines of cases is based on broad policy considerations. "Because Idaho receives little annual precipitation, Idahoans must make the most efficient use of this limited resource. 'The policy of the law of this State is to secure the maximum use and benefit, and lease wasteful use, of its water resources.'" *Kunz II*, 117 Idaho at 904, 792 P.2d at 929 (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 502 P.2d 61, 65 (1960) (Smith, J.)). Thus, the need for

[1024] The dissent by Justice Bistline complained that the majority failed to address two cases holding the power company is held to a strict liability standard for flood damage, *Johnson v. Utah Power & Light Co*., 215 F.2d 814 (9th Cir. 1954) and *Grossner v. Utah Power & Light Co*., 612 P.2d 337 (Utah 1980).

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maximum use of water resources justifies not holding reservoir and canal operators strictly liable for flood damage.

More recently, the Idaho Supreme Court held that even reservoir operators that do not affirmatively assume a duty of flood control are held to a duty of reasonable care. This amorphous standard is something less that the flood control duty assumed by Utah Power in *Kunz I* and *Kunz II*. In *Burgess v. Salmon River Canal Co., Ltd.*, 119 Idaho 299, 305, 805 P.2d 1223, 1229 (1991) (McDevitt, J.), the Idaho Supreme Court distinguished *Kunz I* on the facts, concluding that the operators of the Salmon Falls Dam had not undertaken a duty of flood control. "Diversion of a stream by itself without other overt actions does not indicate a voluntary assumption of a flood control duty. To hold as the trial court did would impose a duty of flood control upon every dam operator in this state." *Burgess*, 119 Idaho at 304, 805 P.2d at 1228. The *Burgess* Court nonetheless held that the owners have a "duty of reasonableness" in discharging water from the reservoir. *Burgess*, 119 Idaho at 305, 805 P.2d at 1229. Many factors must be weighed, said that Court, and the fact that "it did not release any more water than was flowing into the reservoir" does not prevent it from being held liable. *Burgess*, 119 Idaho at 306, 805 P.2d at 1230. *Burgess v. Salmon River Canal Co., Ltd.*, 127 Idaho 565, 903 P.2d 730 (1995) (McDevitt, C.J.). Ultimately, upon remand, the dam operator paid millions of dollars in damages.

33. FEDERAL RECLAMATION LAW

By the turn of the century, settlers of the West already had demonstrated their remarkable resourcefulness and stamina. In the inhospitable mountains and plains, they scratched out mines, farms and towns. Despite the odds, these hardy folk survived, and many prospered. But their ability to transform the Western landscape was limited—by water. Monumental change required monumental water projects. And monumental water projects required monumental financing.

Enter the U.S. Congress. In 1902 it created the federal reclamation program,[1025] a plan of great vision and enormous proportions. The newly created Bureau of Reclamation[1026] quickly embarked on the construction of hundreds of reservoirs—many larger than anything ever before conceived—at every promising site across the desert. The plan to reclaim the desert has been achieved with such success that it would astonish the minds of Lewis, Clark, Powell, and Fremont, not to mention Captain Bonneville.

In undertaking this great enterprise, the federal government might have chosen to develop a *federal* law for the allocation of water. It certainly has the power.[1027] Instead the Congress stated from the outset that it would look primarily to state law to allocate water from the federal projects:

> Nothing in . . . this title shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in

[1025] Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 372, 373, 381, 383, 391, 392, 411, 414, 419, 421, 431, 432, 434, 439, 461, 491, 498, 1457).

[1026] The Service has undergone several bureaucratic transmutations. In July 1902, the Secretary of the Interior created the "Reclamation Service" under the Geological Survey. In March 1907, the Service was separated from the Survey. In June 1923 the name was changed to the "Bureau of Reclamation." The name was changed again to the "Water and Power Resources Service" in November 1979 (under the Carter Administration) by Secretarial Order No. 3042, and was changed back again to the "Bureau of Reclamation" by Secretary James Watt in May 1981 by Secretarial Order No. 3064. 52 Fed. Reg. 3354 (Feb. 3, 1987).

[1027] U.S. Const. art. I, § 8, cl. 3 (commerce clause); U.S. Const. art. IV, § 3, cl. 2 (property clause); U.S. Const. art. VI, cl. 2 (supremacy clause).

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> carrying out the provisions of such sections, shall proceed in conformity with such laws . . . .[1028]

Reclamation Act of 1902, § 8, 43 U.S.C. § 383.

Of course, nothing is that simple. It was easy enough for Congress to say that it was deferring to state law. It was another matter to say what that meant. When push comes to shove, the courts have held in some very limited instances that federal law may override state water law if the state law frustrates the purposes of the federal program.[1029]

Despite the ambiguity and uncertainty surrounding the interaction of federal reclamation law and state water law, however, the general premise still holds true. The federal government complies with state water law (at least the formalities of state law) when it builds reclamation projects: It files for and obtains water rights in the name of the federal government.

But who actually owns the water? This subject was treated extensively in section 31.F at page 641. To briefly re-cap, in *Ickes v. Fox*, 300 U.S. 82, 95 (1937), the Supreme Court declared that reclamation water rights are held by the user, not by the federal government.

In *Nebraska v. Wyoming*, 325 U.S. 589, 615 (1945), the Court followed *Ickes* and declared, "Pursuant to that procedure individual landowners have become the appropriators of the water rights, the United States being the storer and the carrier." Similarly, in *Nevada v. United States*, 463 U.S. 110 (1983), the Court held that equitable title to water provided by the Bureau is held by individuals who put the water to beneficial use, not by the Bureau or the contractors.

This much appears plain. While the federal government holds paper title to Bureau water rights, the actual users of those rights have an equitable interest in those rights. The nature and contours of that interest are not so easy to determine.

Part of the difficulty is the sheer quantity of relevant law. The core federal legislation, the 1902 Act, is surrounded by an additional body of law and policy represented by statutes including reclamation related legislation[1030] and other

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[1028] A most useful compendium of federal reclamation laws is contained in the multi-volume set, *Federal Reclamation and Related Laws Annotated (Preliminary)* (2001), published by the U.S. Department of Reclamation.

[1029] *California v. United States*, 438 U.S. 645 (1978); with respect to hydropower licensing see, *California v. FERC*, 495 U.S. 490, *red's denied*, 110 S. Ct. 3304 (1990).

[1030] The following is a list of selected reclamation statutes:

1894: Federal Desert Lands Act (aka the Carey Act), ch. 301 § 4, 28 Stat. 422 (codified at 43 U.S.C. § 641). N.B., This is not truly a federal reclamation statute. Rather, it provides

for the transfer of federal lands to private ownership to assist states in developing arid lands.

1902: Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 372, 373, 381, 383, 391, 392, 411, 414, 419, 421, 431, 432, 434, 439, 461, 491, 498, 1457). [N.B., legislative history at 35 Cong. Rec. 6677 (1902).]

1906: Townsite Act of 1906, ch. 1631, 34 Stat. 116 (codified at 43 U.S.C. §§ 561-562, 566-567): Amended 1902 Act, which limited reclamation water to agricultural purposes, to authorize the Department of the Interior ("DOI") to furnish water to new towns in the immediate vicinity of irrigation projects).

1911: Act of Feb. 2, 1911, ch. 32, 36 Stat. 895 (codified at 43 U.S.C. § 374): Sale of lands acquired in connection with irrigation project.

1911: The Warren Act (Act of Feb. 21, 1911), Pub. L. No. 61-406, 36 Stat. 925 (codified at 43 U.S.C. §§ 523-525): Provides authority to sell surplus water to non-project lands.

1911: Act of Feb. 24, 1911, ch. 155, 36 Stat. 930 (codified as amended at 43 U.S.C. § 522): Lease of water power.

1914: Act of Aug. 13, 1914, ch. 247, 38 Stat. 686 (codified at 43 U.S.C. §§ 373 *et seq.*).

1920: Miscellaneous Purposes Act of 1920 (Surplus Water), 43 U.S.C. § 521 (Pub. L. No. 66-796, ch. 86, 41 Stat. 451): Allowed delivery of water to non-irrigators meeting three criteria: (1) approval by water users associations, (2) no other practicable source of water, and (3) no impairment of service to irrigators). The act was construed in *El Paso Cnty. Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894 (W.D. Texas 1957), *aff'd,* 243 F.2d 927 (5th Cir. 1957), *cert. denied* 355 U.S. 820 (1957), in which the court upheld the authority of the Bureau of Reclamation to enter into contracts with El Paso to supply water under an agreement entailing the city's purchase of up to 2,000 acres of irrigated land.

1920: Act of May 20, 1920, ch. 192, 41 Stat. 605 (codified at 43 U.S.C. § 375): Provides for the sale of land improved at the expense of the reclamation fund.

1928: Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. § 617ff (enacted Dec. 21, 1928).

1926: Omnibus Adjustment Act of 1926: Ended the ability of the United States to contract with individuals for water rights in reclamation projects and required the United States to enter into contracts with irrigation districts.

1939: Reclamation Project Act of 1939, ch. 418, 53 Stat. 1187 (codified at 43 U.S.C. §§ 485-485k): First general reclamation statute to recognize multi-purpose projects. Authorizes DOI to furnish water "for municipal or miscellaneous purposes" from an irrigation project provided that "it will not impair the efficiency of the project for irrigation purposes". Requires municipal user to pay its appropriate share of costs and O&M.

1956: Colorado River Storage Project Act ("CRSPA"), ch. 203, 70 Stat. 105 (codified as amended at 43 U.S.C. §§ 620-620o).

1956: Small Reclamation Projects Act of 1956, ch. 972, 70 Stat. 1044 (codified at 43 U.S.C. §§ 422(a) *et seq.*).

1958: Water Supply Act of 1958, Pub. L. No. 85-500, title III, 72 Stat. 319 (codified at 43 U.S.C. § 390b): Allowed local interests to contract with Bureau and the Corps for the inclusion of excess storage capacity in dams to provide for domestic, municipal, industrial, and other purposes. This Act provides a "separate and distinct" procedure which the Secretary may employ for the letting of an M&I water contract. *Environmental Defense Fund v. Morton*, 420 F. Supp. 1037, 1044 (D. Mont. 1976),

environmental and planning acts,[1031] as well as project operations plans, contracts and contracting procedures, solicitor opinions, court opinions, and interstate compacts.

The bigger problem is that little of that law is dispositive. This is largely a function of the fact that few people worried much about it until quite recently. Projects were built with particular lands in mind. Users outside project lands (e.g., municipalities) frequently turned to the federal government seeking a share of *excess* supplies—requests which Congress often satisfied. (See footnote 1030 at page 665.) Until recently, however, there has not been much interest in transferring rights in use for irrigation to other purposes. We are still at the cutting edge of determining how that can be accomplished.

Generally speaking, transfers of water rights are governed by state statutes. In Idaho, that requires application to the Director of the Department of Water Resources, who must review and approve the application.[1032] Presumably, water rights acquired by the federal government pursuant to state law also are subject to the state transfer provisions. The Bureau of Reclamation recently sought approval of a transfer—actually a change—of some of its storage rights in Idaho to allow them to be released to enhance flows for Salmon migration. The application has been protested.

Contracts for reclamation water may inhibit the free transfer of project water. Typical contract language for water in Snake River reclamation projects states that "no assignment or transfer of this contract, or any part thereof, or interest therein, shall be

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modified on other grounds sub. nom. Environmental Defense Fund v. Andrus, 596 F.2d 848 (9th Cir. 1979). Under the Water Supply Act the Secretary must apply for and receive congressional approval for modification of a pre-1958 project if the project requires "substantial modification". Act contemplates that municipal users will pay no more for the water than agricultural users.

1965: Federal Water Project Recreation Act of 1965, 79 Stat. 216 (codified at 16 U.S.C. § 4601-18): Authorizes DOI to operate reclamation projects to provide for recreational, fish or wildlife benefits "in a manner coordinated with the other project purposes".

1968: The Colorado River Basin Project Act, Pub. L. No. 90-537, 82 Stat. 885 (codified throughout 43 U.S.C. including §§ 1521-1528, 1551-1556): authorized the Central Arizona Project and numerous others.

1982: Reclamation Reform Act of 1982, Pub. L. No. 97-293, title II, 96 Stat. 1263 (codified at 43 U.S.C. §§ 373a, 390aa to 390zz-1, 425b, 485h).

1987: Reclamation Reform Act, Pub. L. No. 100-203, Title V, § 5302(a) and (b), 101 Stat. 1330-268m 1330-269 (codified at 43 U.S.C. §§ 390uu, 390ww).

[1031] For example, the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667e, the Federal Power Act, ch. 285, 41 Stat. 1063 (codified at 16 U.S.C. §§ 791a-825r), and the Northwest Power Planning Act.

[1032] Idaho Code § 42-222.

valid until approved by the Secretary." The Department of Interior has taken the position that this means the Secretary has discretion whether to approve a transfer or not. An opinion by the Department of Interior's legal counsel suggests that where a transfer would result in a change in the project's operating regime and would be controversial, without clear congressional authority, the change could be barred.

On December 16, 1988 the Department of Interior released its written policy to govern voluntary water transfers which affect Department of Interior facilities. This policy reiterates that primacy in water allocation and management decisions rests principally with the states. The policy also states that the Department of Interior will become involved in voluntary transfers of water only when the involvement will not affect other parties being served by the federal project and the transfer will affect federal project operations and only when requested to participate by a state or tribal authority. The Department of Interior's goal is to facilitate transfers in accordance with state and federal law.

The policy of the Northwest Region of the Bureau of Reclamation is to allow local irrigation district committees (such as the Committee of Nine in the Upper Snake and the Boise Project Board of Control on the Boise River) to oversee temporary transfers of water through their respective water banks.

34. HYDROPOWER SUBORDINATION

REFERENCES TO MATERIAL ADDRESSING HYDROPOWER SUBORDINATION AND THE *SWAN FALLS AGREEMENT*:

Clive J. Strong & Michael C. Orr, *Understanding the Swan Falls Settlement*, 52 Idaho L. Rev. 223 (2016).

Clive J. Strong & Michael C. Orr, *The Origin and Evolution of Hydropower Subordination Policy on the Snake River: A Century of Conflict and Cooperation*, 46 Idaho L. Rev. 119 (2009).

Jeffrey C. Fereday & Michael C. 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 (1991-92).

Susan M. Stacy, *Legacy of Light: A History of the Idaho Power Company*, ch. 17 &18 (1991) (published by the Idaho Power Company).

Dennis Colson, *Idaho's Constitution, The Tie That Binds* at 161-79 (1991) (addressing the 1928 constitutional amendment).

A. The meaning and effect of subordination

Holders of water rights may enter into subordination agreements in which the senior right is subordinated to one or more named junior water rights (a "selective subordination"). A water right may also be subordinated to all other existing and future junior water rights (a "general subordination").[1033] The effect of the subordination is that the senior water right will be treated as if were junior to the other water rights in all respects.

Subordination of water rights may be implemented by agreement or may be imposed by regulatory authority. If subordination is imposed by governmental action (e.g., a condition on a license), the effect is the same as in a private subordination agreement.

[1033] In *Idaho Power Co. v. State ("Swan Falls II")*, 104 Idaho 575, 587, 661 P.2d 741, 753 (1983) (Shepard, J.), the Court rejected an argument that private subordination of water rights is unlawful in Idaho.

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In Idaho, there is relatively little precedent for private subordination agreements.[1034] Most subordinations are imposed by governmental action (e.g., conditions imposed on permits and licenses issued by IDWR). Or they are agreed to as part of a global settlement of complex litigation. For example, the *Swan Falls Agreement*[1035] or the *Refill Stipulation*.[1036]

A senior who has entered into a private selective subordination agreement may still call for water against other juniors that are not parties to the agreement. This could affect those third parties. IDWR will recognize and enforce private selective subordination agreements with an important caveat: The Department will enforce them in a manner that avoids disadvantage to third parties. Thus, the holder of the senior subordinated water right may not issue a call for water that simply "skips over" the junior water right benefiting from the subordination so that some other less junior water right is called out instead. IDWR will enforce the call, but will treat the junior's quantity as if it had been called out and delivered to the senior.[1037]

[1034] In contrast, in Utah (which has no government-imposed subordination of hydropower rights), private subordination agreements are common. In Utah, they are called power loss compensation agreements. In these agreements, a power company agrees to subordinate its senior hydropower rights to a farmer's junior rights in exchange for compensation paid by the farmer for the loss of power production.

[1035] *Agreement between State of Idaho and Idaho Power Company*, § 7(D) (Oct. 25, 1984) ("*Swan Falls Agreement*"). The *Swan Falls Agreement* resolved litigation and legislative battles regarding Idaho Power's unsubordinated Swan Falls water rights.

[1036] Litigation known as the Refill Litigation resolved augments over how to apply Idaho's "one-fill" rule for on-stream storage reservoirs. In 2018, the parties settled the litigation pursuant to an agreement that recognized two water rights for the Bureau of Reclamation's Boise River projects. The "Refill 1" right (No. 63-33734A) was subordinated to all existing and future rights (the "free river right")—subject to certain "carve-outs" allowing the Refill 1 right to be exercised under priority against certain rights, including all hydropower rights. The "Refill 2" right (No. 63-33734B) was subordinated to specific existing water rights.

[1037] Here is a hypothetical example of how this might work. Suppose Hydrosystems, Inc. held a senior water right which it subordinates to Farmer Jones' junior water right of 2 cfs. Then, in time of drought, Hydrosystems makes a delivery call. In response to the call, IDWR would first curtail the most junior users (junior to Farmer Jones). Let's suppose that totaled 3 cfs. Farmer Jones would be next in line to be curtailed. Due to the subordination agreement, IDWR would not curtail Farmer Jones but would treat her as if she had been curtailed and her 2 cfs had been delivered to Hydrosystems. At this point, Hydrosystems has obtained 5 cfs (on paper). IDWR would then curtail the remaining juniors (those senior to Farmer Jones but junior to Hydrosystems) to the extent necessary to satisfy Hydrosystems' call. The end result is that, due to the subordination, Hydrosystems will receive 2 cfs less that the amount it would have received absent the subordination.

B. No-call agreements distinguished (upstream and downstream effects)

A true subordination adjusts the priority date of the subordinated right rendering it junior vis-à-vis whatever water rights are named as the beneficiaries of the subordination. This has a two-way effect. First, it means that the subordinated senior may not call out junior. Second, it means that the junior may call out the subordinated senior.

A variant of the subordination agreement is the "no-call" agreement, which has a more limited effect than a full-blown subordination.[1038] As the name implies, the senior gives up the right to call out the junior. But the no-call agreement does not give the junior the right to call out the senior.

Either a subordination or a no-call agreement might limit the ability of the holder of the senior right to effectively protest the transfer of any covered junior right (unless it could be shown that the change somehow impaired the now limited senior right). The same could be true for new appropriations, if the subordination or no-call provision were applicable to future water rights (as in a "general subordination").

In a surface water context, subordination plays out differently depending on which right is upstream. Typically, the subordinated senior is downstream and the benefited juniors are upstream.[1039] In this situation, the thing that matters is that the subordinated

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[1038] The distinction between a true subordination and a no-call agreement was explored by the Colorado Supreme Court:

> No-call agreements and subordination agreements are similar in that senior appropriators in each are effectively contracting away part of the bundle of sticks that compose their water rights, with the general result that water that could otherwise go to the senior appropriator is made available to some or all junior appropriators. However, the agreements are fundamentally different in terms of what is being contracted away by the senior appropriator. . . . Thus, a no-call agreement contracts away the right to place a call to the Division Engineer requesting more water to fulfill the senior right whereas a subordination agreement contracts away the senior appropriator's more senior priority status (either to specific junior appropriators in a selective subordination or all junior appropriators in a general subordination).

City of Englewood v. Burlington Ditch, Reservoir & Land Co., 235 P.3d 1061, 1068 (Colo. 2010) (emphasis original) (citations omitted).

[1039] For example, the hydropower subordination authority in Idaho Code § 42-203B(6) operates only vis-à-vis "upstream beneficial depletionary uses." In contrast, IDWR's implementing rule arguably operates in both directions. (See footnote 1054 on page 677 and discussion in section 34.F on page 675.)

senior may not call out the upstream junior. The junior has no need to call out the downstream senior; it may simply take the water before it reaches the senior. Thus, where the subordination is directed to the benefit of upstream juniors, it functions essentially as a "no-call" agreement (coupled with restrictions on protests directed to the junior). If instead (or in addition) the subordination is set up to benefit downstream juniors, it would give them the right to call water past the subordinated senior.[1040]

Similarly, in a groundwater context, a no-call agreement is only a promise not to call out the junior; it does not include a promise not to assert seniority if the junior seeks to call out the senior.

For surface water rights, the absence of subordination has effect only with respect to upstream junior rights because those are the only rights that could be called out. Thus, for example, Idaho Power's senior unsubordinated hydropower rights located far downstream on the Snake River (near Boise) had the potential to curtail upstream juniors in much of the Snake River Plain prior to the *Swan Falls Agreement*. In contrast, unsubordinated hydropower rights higher in the basin, such as PacifiCorp's Bear Lake rights, have comparatively less potential impact because there are fewer upstream juniors subject to curtailment. (Moreover, in PacifiCorp's case, some of the upstream juniors have subordination protections imposed by the *Amended Bear River Compact* and the *Three-State Agreements*.)

C. 1928 amendment to the Idaho Constitution

Until 1928, Idaho law provided no special treatment for hydropower rights. Today, however, all new appropriations of water for hydropower purposes are subordinated and limited in duration.[1041]

In 1928, the provision of the Idaho Constitution stating that the right to divert shall never be denied was amended to add the proviso "except that the state may regulate and limit the use thereof for power purposes."[1042] Idaho Const. art. XV, § 3 (proposed by

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[1040] In the case of a non-consumptive hydropower right, this less consequential. The hydropower right may still generate power as it passes water to the downstream junior. But it would limit the ability of the hydropower right to store water when the call is in effect.

[1041] In contrast to Idaho, there is no Utah statutory hydropower subordination. Parties may subordinate priority by agreement. Sometimes the Utah State Engineer will issue a subordination condition when approving an application, certificating a perfected right, or adjudicating a right.

[1042] "The 1928 amendment was, in large part, a reaction to a group of proposals in the early 1920s to develop private hydropower facilities at a number of sites on the Snake River downstream from Milner Dam." Clive J. Strong & Michael C. Orr, *The Origin and Evolution of Hydropower Subordination Policy on the Snake River: A Century of Conflict and Cooperation*, 46 Idaho L. Rev. 119, 124 (2009). "It seems the Pacific Power & Light Company decided that it

H.J.R. No. 13, 1927 Idaho Sess. Laws, p. 591, ratified Nov. 6, 1928). Thus, if it chooses, the State may impose special burdens or limitations on hydropower water rights. For instance, the State may attach conditions to hydropower rights subordinating them to other water uses, limiting their duration, or otherwise relegating them to second-class status. This constitutional authority has been implemented by statute in 1985 and rule in 1993, as discussed below.

D. Not self-executing

The 1928 amendment authorizes the State to regulate (i.e., subordinate) hydropower. Presumably, this requires some sort of implementing legislation.[1043] No such legislation was enacted until 1985 (see discussion below). In the interim, Idaho Power's C.J. Strike and Hells Canyon water rights were issued subject to subordination. See footnotes 1049 and 1050 beginning on page 675. However, those subordinations were agreed to by Idaho Power, so it cannot be said that they were imposed pursuant to authority directly granted by 1928 amendment.

In any event, the 1928 constitutional amendment did not itself subordinate any hydropower right. It simply authorized the State to do so. Absent some affirmative act by the State, hydropower rights remain equal in status with other water rights.

E. Retroactive subordination

The language of the 1928 amendment is not expressly prospective or retroactive. In other words, it does not say whether the State has the power to retroactively subordinate an existing hydropower right.[1044] However, the question appears to be

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wanted to appropriate some of those vacant sites in the Seven Devils canyon of the Snake river [where Idaho Power eventually constructed the Hells Canyon Dam]. Now the reclamation department has no authority to refuse the permit, but it successfully fought the question before the federal power commission . . . . Then, it occurred to the powers that be that an amendment giving specific control over power sites to the state might be in order." Strong & Orr, at 124 n.22 (quoting a column in the *Idaho Statesman* from October 20, 1928). For further discussion of the history of this constitutional provision see Dennis C. Colson, *Idaho's Constitution, The Tie That Binds* at 161-79 (1991) and Susan M. Stacy, *Legacy of Light: A History of the Idaho Power Company* at 191-92 (1991) (published by the Idaho Power Company).

[1043] Conceivably, IDWR could take the position that the 1928 amendment is self-executing in the sense that it directly authorized the Department (acting on behalf of the State) to regulate and limit hydropower rights irrespective of the existence or scope of authorizing legislation. However, the Department has never acted in that manner.

[1044] Idaho courts deem legislation to be prospective unless expressly stated otherwise. *State v. Leary*, 160 Idaho 349, 353, 372 P.3d 404, 408 (2016) (W. Jones, J.) ("Accordingly, statutory amendments are not deemed to be retroactive unless there is an express legislative

academic. This provision has never been applied retroactively, and the implementing legislation and IDWR rule operate prospectively only.

In response to the Swan Falls controversy (in which Idaho Power sought to curtail junior irrigation rights), the Idaho Legislature briefly contemplated legislation that would have retroactively subordinated Idaho Power's rights. However, it was broadly recognized that retroactive application, assuming it was even authorized by the constitutional amendment, would constitute a taking.[1045] Ultimately, the issue was avoided when Idaho Power agreed to a limited and extraordinarily convoluted subordination in the *Swan Falls Agreement*.

In contrast to the 1928 constitutional provision, the implementing legislation adopted in 1985 (see below) appears to authorize subordination only with respect to newly issued permits and licenses. In any event, the last sentence of subsection (6) explicitly limits the subordination authorization to post-1985 licenses. See footnote 1052 on page 676.

Whether the 1985 legislation "occupies the field" and sets the limit for IDWR's authority to subordinate hydropower rights has never been tested (see footnote 1043 above). And it is unlikely ever to be tested. Given the likelihood of a successful taking claim, it is doubtful that the State (for example, acting through IDWR) would seek to retroactively subordinate existing hydropower rights.

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statement to the contrary."). It would seem that the same should apply to constitutional amendments.

[1045] "Subordination was seized upon as a possible remedy in part because of the 1928 amendment to Article 15, section 3 of Idaho's constitution. This section guarantees that the right to divert and appropriate the unappropriated waters "shall never be denied"; the 1928 amendment added the clause, "except that the state may regulate and limit the use thereof for power purposes." The 1928 amendment presumably provides the State with authority to subordinate or otherwise limit any water right granted for hydropower purposes, and this has been done with several of Idaho Power's other water rights, such as that for the powerplant at C.J. Strike Dam, which was completed in 1952 upstream from Swan Falls. But since Idaho Power's Swan Falls rights predate the 1928 amendment and carry no limitation in any event, the retroactive application of a subordination condition would have been problematic for the State, and obviously would have given rise to a claim of taking without compensation, a point that Idaho Power made repeatedly during the public debates over Swan Falls." Jeffrey C. Fereday & Michael C. 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, 597 n.104 (1991-92).

F. Idaho statutes, regulations, and other regulatory actions

Idaho Power's early reservoirs, beginning with Swan Falls in 1901,[1046] obtained water rights with no subordination or other special restrictions.[1047] The fact that these rights were not subordinated gave rise to the Swan Falls controversy and litigation discussed in section 35 on page 681.[1048] The resolution of the Swan Falls controversy, in turn, gave rise to the Snake River Basin Adjudication.

Subsequent to 1928, the State of Idaho has acted in the following ways to implement its constitutional authority to regulate hydropower:

- On occasion, even prior to the enactment of section 42-203B(6) in 1985, IDWR has issued new hydropower licenses that were subject to subordination. These were voluntary subordinations agreed to by Idaho Power. The first subordination of a hydropower right came in 1953 when the C.J. Strike Reservoir water right was licensed.[1049] Subsequently, Idaho

[1046] Swan Falls was constructed as a private hydropower project by a predecessor of Idaho Power.

[1047] The Federal Power Commission imposed a limited subordination of Idaho Power's Twin Falls project in 1934. However, this subordination apparently is not reflected in the water rights issued by the state for the project. *Idaho Power Co. v. State ("Swan Falls II")*, 104 Idaho 575, 579, 661 P.2d 741, 745 (1983).

[1048] Idaho Power's pre-1953 water rights were either unsubordinated or contained subordination language with provisions rendering them essentially illusory. However, for decades, Idaho Power engaged in a practice of informal subordination coupled with subordination effectuated through the Bureau of Reclamation and FERC. See, Clive J. Strong & Michael C. Orr, *Understanding the Swan Falls Settlement*, 52 Idaho L. Rev. 223 (2016); Clive J. Strong & Michael C. Orr, *The Origin and Evolution of Hydropower Subordination Policy on the Snake River: A Century of Conflict and Cooperation*, 46 Idaho L. Rev. 119 (2009); Jeffrey C. Fereday & Michael C. 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 (1991-92).

[1049] Responding to pressure from Governor Len Jordan, Idaho Power agreed to subordinate its water right for C.J. Strike Reservoir (No. 21671). "Idaho Power agreed to subordinate their state water right license at C.J. Strike to future upstream depletion. That water license was issued in 1953 and contained the first unrestricted subordination language on record." *Idaho Power Co. v. State*, 104 Idaho 575, 580, 661 P.2d 741, 746 (1983). The subordination language reads: "The rights herein granted are subject to the condition that the Project shall be operated in such manner as will not conflict with future depletion in flow of the waters of Snake River and its tributaries, or, prevent or interfere with the future upstream diversion and use of such waters, for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed." This amounts to an upstream no-call provision. It might

Power's three dam Hells Canyon complex, built in the 1960s, was subordinated to future upstream development.[1050]

- Idaho Code § 42-203B(6)[1051] gives the Director of IDWR the authority to subordinate newly issued hydropower rights,[1052] though it does not require

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also be read to limit Idaho Power's ability to object to new appropriations or transfers on the basis of this subordinated right.

[1050] The Hells Canyon project subordination was also voluntary (albeit with some arm twisting). It occurred by way of both the federal power license for the project and state water right conditions. For some reason, only two of the state water licenses contained the subordination. This did not matter to the Idaho Supreme Court: "Whether the subordination language was omitted from the state water licenses through administrative oversight or because the appropriate state officials felt its insertion unnecessary in light of the federal license language, we need not speculate. We hold only that when the FPC has authorized the obtention [obtaining] of only subordinated state water rights, and where, as here, the state and the licensee power company both intended the subordination of those water rights, failure to include a subordination clause in the state water licenses does not render those rights unsubordinated." *Idaho Power Co. v. State*, 104 Idaho 575, 588, 661 P.2d 741, 754 (1983) ("*Swan Falls II*").

[1051] Section 42-203B was first enacted in 1985 as part of larger legislation (including sections 42-203C and 42-203D) designed to implement the *Swan Falls Agreement*. H.B. 186, Idaho Sess. Laws, ch. 224 (superseding S.B. 1008, Idaho Sess. Laws, ch. 17). Subsections (1) through (5) implement the so-call "trust water" concept in the *Swan Falls Agreement*. Subsections (6) through (9) authorize IDWR to impose subordination and term limits on hydropower rights that are permitted or licensed after 1985. The key language is in subsection (6), which reads (as amended):

> 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 term, which may be in the form of a fixed date or by reference to a federal energy regulatory commission (FERC) license or other authorization issued or contract executed, in connection with the power project.
>
> Subsection (6) of this section shall not apply to licenses which have already been issued as of July 1, 1985.

Idaho Code § 42-203B(6). The provision regarding the duration of the term was amended in 2012 to add the reference to FERC. H.B. 50, 2013 Idaho Sess. Laws ch 45, § 1. Subsections (7), (8), and (9) also address the term (duration) of a subordinated hydropower right.

[1052] The authority to subordinate applies to "the rights granted in a permit or license." Permits and licenses (in contrast to transfers and adjudications) are issued for new appropriations not existing rights. Saying that the subordination applies to "rights granted" reinforces the idea

the Director to do so. It also gives the Director the authority to specify a term (duration) for the new hydropower permit or license. In other words, the water right might include an "expiration date." The statute provides that the expiration date may be a fixed date or it may be set to correspond to the duration of a FERC license or a contract. The fact that it is limited to permits and licenses shows that it does not apply to decreed rights or to rights based on beneficial use.

- IDWR's water appropriation rules provide that new appropriations for hydropower will be subordinate to all non-hydropower rights initiated later than the priority date of the hydropower application or permit.[1053] The rule also mandates that the new permit or license include a term (i.e., "expiration date"). The rule basically tracks the 1985 legislation.[1054] In other words, the discretionary authority to subordinate granted by the

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that the subordination is to occur when rights are granted, not sometime later. Even if this language were interpreted to allow retroactive subordination of previously issued licenses, the last sentence of subsection (6) makes clear that such retroactive effect could apply only to post-1985 licenses.

[1053] IDWR's subordination rule states:

> 03. Applications And Existing Permits That Are Junior And Subordinate. Applications and existing permits approved for hydropower generation shall be junior and subordinate to all rights to the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of the application or existing hydropower permit. A subordinated permit shall not give rise to any right or claim against future rights to the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of the application or existing hydropower permit. A permit issued for hydropower purposes shall contain a term condition on the hydropower use in accordance with Section 42-203B(6), Idaho Code.

IDAPA 37.03.08.050.03 (adopted July 1, 1993).

[1054] IDWR's rule deviates from the "upstream only" language in the statute, instead declaring the hydropower right subordinate to all water rights. This deviation may have been inadvertent. If so applied, it would have the effect of going beyond the upstream "no-call" restriction contemplated by the statute. If also allow a downstream junior to call for water controlled by an upstream hydropower right. If the hydropower facility operates run-of-river, that is of little practical consequence. But it could matter (in terms of timing) with respect to hydropower storage. (One cannot make a delivery call for release of previously stored water, but one could call for pass-through of water that the power facility would have preferred to store.) If that is the effect, it would exceed the authority granted by the statute to the Director.

statute is converted to a nondiscretionary requirement for subordination under the rule. The rule expressly applies only to new appropriations.[1055]

- Pursuant to the *Swan Falls Agreement*,[1056] Idaho Power's early water rights were made subject to subordination. This agreement grew out of The Swan Falls litigation which confirmed that Idaho Power's Swan Falls rights were not subordinated.[1057] A central feature of the agreement was to establish a

[1055] The rule calls for subordination with respect to "applications and existing permits approved for hydropower generation." IDAPA 37.03.08.050.03. Thus, it applies only to new appropriations.

[1056] *Agreement between State of Idaho and Idaho Power Company* (Oct. 25, 1984) ("*Swan Falls Agreement*"). See discussion of the *Swan Falls Agreement* in section 35 at page 681.

[1057] The Swan Falls controversy has its roots in a successful campaign by citizens opposed to the proposed Pioneer coal-fired power plant that Idaho Power sought to build near Boise. In 1976, the Idaho Public Utilities Commission ("IPUC") denied permission to build the plant. In 1977, fresh off the Pioneer victory, a group of Idaho ratepayers filed a petition with the IPUC demanding that Idaho Power make better use of its Swan Falls water rights by enforcing their priorities against other users.

Idaho Power essentially took the side of the petitioners. In doing so, it reversed course after decades of acquiescence to new upstream ground water irrigation reliant on electric pumps served by Idaho Power. In 1978, while the IPUC matter was pending, it filed with IDWR a blanket protest against "all past and future water applications" below Milner Dam. This came on the heels of a declaratory judgment action filed by Idaho Power in 1977 seeking "a decree that its Swan Falls rights were not subject to upstream depletion [i.e., were not subordinated]." *Idaho Power Co. v. State ("Swan Falls II")*, 104 Idaho 575, 582, 661 P.2d 741, 748 (1983) (Shepard, J.). A related appeal growing out of the same lawsuit was decided a day earlier; it dealt with the State Water Plan and did not address subordination. *Idaho Power Co. v. State ("Swan Falls I")*, 104 Idaho 570, 661 P.2d 736 (1983) (Huntley, J.).

To everyone's surprise, the Idaho Supreme Court ruled in *Swan Falls II* that the Swan Falls rights were not subordinated. But the Court remanded for a determination of affirmative defenses that Idaho Power had abandoned, forfeited, or waived its right enforce its Swan Falls rights against upstream irrigators. *Idaho Power Company v. State*, Ada County Civil No. 81375 (4th Judicial Dist.).

In 1983, while the remand was underway, Idaho Power filed a second lawsuit against the State and several thousand water right holders upstream. *Idaho Power Co. v. IDWR*, Ada County Civil No. 81375 (4th Judicial Dist.). This suit, which came to be known as "*Idaho Power versus the World*" or the "*7,500 suit*" because of the approximate number of defendants, sought injunctive relief enforcing the company's Swan Falls rights. This second suit went further that the first lawsuit and its blanket protest. For the first time Idaho sought to curtail irrigators above Milner Dam. This violated the sacrosanct "two rivers concept" and was the Idaho equivalent of crossing the Rubicon. This provoked an angry legislative response. Negotiations followed. The two pending lawsuits were settled and the parties entered into the

new "minimum flow" at the Murphy Gage (immediately below Swan Falls Dam) on the Snake River. It was believed that the river could absorb about 600 cfs in additional development without violating the new minimum flow. The water that was thought to be available for new appropriation (that would not impair the minimum flow at Murphy Gauge) came to be known as "trust water." As it turns out, very little of that was developed before a moratorium was put into place.

- Water rights known as "Refill 1" and "Refill 2" decreed to the United States as part of the settlement of the Refill Litigation contain complex subordination provisions. See footnote 1036 on page 670.

- The *Three-State Agreements*[1058] entered into by Idaho, Utah, Wyoming, and PacifiCorp, recite the "historic practice" of PacifiCorp not making a delivery call.[1059] This amounts to a no-call agreement prohibiting PacifiCorp from placing calls solely for hydropower purposes against any existing or future upstream junior.[1060] The reference to "PacifiCorp's water rights" should be understood as applying solely to PacifiCorp's natural flow rights for its hydroelectric plants on the Bear River downstream of Stewart Dam. These are the only PacifiCorp rights that could make a delivery call solely for hydropower purposes.[1061] PacifiCorp's Bear Lake Reservoir

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Swan Falls Agreement. Implementing legislation following (including Idaho Code § 42-203B(6) and the initiation of the Snake River Basin Adjudication ("SRBA")).

[1058] The *Three-State Agreements* consist of (1) *Agreement Regarding the Bear River System* (October 5, 1999) ("*System Agreement*") and (2) *Operations Agreement for PacifiCorp's Bear River System* (April 18, 2000) ("*Operations Agreement*"). A third agreement entitled *Addendum Interpreting Agreement Regarding the Bear River System* (December 7, 1999) ("*Addendum*") followed the *System Agreement* of October 5, 1999. The *Addendum* simply extended the 60-day deadline for the parties to enter into the *Operations Agreement*.

[1059] "PacifiCorp's water rights are constrained by the historic practice of not making a delivery call for hydropower generation." *System Agreement*, ¶ 1(a), p. 1 (emphasis added). This provision is repeated (quoted in full) in the Sixth Whereas of the *Operations Agreement*, pp. 1-2. It is referenced again in paragraph 1(B) the *Operations Agreement*.

[1060] This provision limiting calls for hydropower use only should not be confused with other provisions in the *Amended Bear River Compact*, the *Three-State Agreements*, and elsewhere addressing circumstances in which water stored in Bear Lake Reservoir is to be released primarily for irrigation purposes and only incidentally for hydropower purposes. Those are important, but they are not subordination provisions.

[1061] PacifiCorp's downstream power rights are listed in Attachment N, Tables 12 and 13, of the *Idaho Transfer Application Package* (Transfer No. 85695) ("*ITAP*").

Decreed Rights are diverted and used for a combination of hydropower and other purposes, and would thus not be subject to the no-call provision.

- The *Bear River Compacts*[1062] authorize two blocks of new storage upstream of Bear Lake.[1063] The *Compacts* provide that storage rights for this new construction shall "not be subordinate to any water in Bear Lake or elsewhere below Stewart Dam." *Original Compact*, art. V, § A; *Amended Compact*, art. VI, § A, p. 8. Although the phraseology is odd, saying that new storage shall "not be subordinate" means, in effect, that new storage rights will not be treated as junior to downstream rights including PacifiCorp's Bear Lake Decreed Rights. Essentially, the new storage blocks are given "super-priority." The practical effect is to make all downstream rights (including PacifiCorp's rights) subordinate to the new blocks of storage.

[1062] The first Bear River Compact, Pub. L. No. 85-348, 72 Stat. 38 (1958) ("*Original Compact*") was approved by Congress and signed by President Eisenhower on March 17, 1958. The Bear River Compact as Amended, Pub. L. No. 96-189, 94 Stat. 4 (1980) ("*Amended Compact*") was approved by Congress and signed by President Carter on February 8, 1980. They are referred to collectively as the "*Bear River Compacts*" or "*Compacts*."

[1063] The original compact authorized 35,500 acre-feet of new storage above Bear Lake. The amended compact authorized another 74,500 acre-feet. Of this, only 30,000 acre-feet has been developed. Wallace N. Jibson, *History of the Bear River Compact* (Nov. 1991), p. 11.

35. THE *SWAN FALLS AGREEMENT*

A. History of the controversy

In the 1970s, Idaho Power Company ("Idaho Power") faced increasing agricultural development on the Snake River, particularly projects relying on high-lift pumping in the reach below Milner Dam. This, and other factors, increased demand for hydropower while at the same time reducing the Company's ability to produce power. Meanwhile, the Company's actions in encouraging upstream surface and ground water development over the last fifty years had contributed at least in part to the development of the "Two Rivers" concept, which meant that the Company had to rely on discharges from the Snake River Plain Aquifer and below-Milner tributaries to satisfy its hydropower rights below Milner Dam. (See discussion of the Two Rivers concept in section 21 at page 355.)

In response to these pressures, Idaho Power proposed to construct the Pioneer coal-fired power plant near Boise. The Idaho Public Utilities Commission turned down the project in 1976.[1064] During the course of that proceeding, however, public attention was focused on Snake River flow conditions.

[1064] Idaho Power announced its plans to construct the Pioneer project in November 1974. The coal-fired power plant was to be located near Orchard, Idaho, 24 miles southeast of Boise. Idaho Power had recently been a partner in the successful construction of the Jim Bridger coal-fired project in Wyoming. There were no significant opportunities to build new hydroelectric dams, and the Company was facing rapidly growing power demand in its south Idaho service area. To Idaho Power, it seemed only logical to move forward with a thermal plant closer to home.

The increasing demand was fed, in large part, by large new agricultural undertakings based on high lift pumping. These operations, including many more than planned, were increasing power demand at the same time they were reducing water availability for hydropower production. Opponents of Pioneer pointed out that Idaho Power was acquiescing in the invasion of its senior water rights, while proposing what was then a very costly new thermal source that would drive up prices for all Idaho power consumers.

Idaho Power seemingly failed to anticipate the strength of the opposition, and declined to acknowledge the need for any kind of emission scrubber, proposing only basic electrostatic precipitators. Stacy at 184 . The Company also did not effectively answer economic criticisms, which ultimately came not simply from the environmental community but from agricultural interests and main street businesses in several communities. The opposition exploded into a referendum on energy conservation, consumer control, and electricity rate stability.

Ultimately, Governor Cecil Andrus, who had kept his powder dry during the many months of the controversy, testified against the project in an unprecedented appearance before the IPUC. The IPUC denied the Company's application for a certificate of convenience and necessity.

The Swan Falls controversy was initiated in the aftermath of the Pioneer controversy by a group of Idaho ratepayers. Informed by the information that emerged during the Pioneer proceedings, they filed a petition with the Idaho Public Utilities Commission alleging that the Company had failed to protect and enforce its senior water rights at Swan Falls.[1065] This failure, they alleged, was pushing the Company toward new thermal power construction and higher electric rates.[1066]

Idaho Power response was, essentially, to agree with the ratepayers' contention that the company was failing to fully exercise its water rights. The Company took three actions. First, in January 1978, it filed a blanket protest with the Idaho Department of Water Resources objecting to "all past and future water applications" below Milner Dam.[1067] (For why the call was limited to below Milner Dam, see discussion of the Two Rivers concept in section 21 beginning on page 355.) Second, the Company filed a declaratory judgment action in district court seeking confirmation that its Swan Falls water rights were not subordinated and thus could call out virtually every below-Milner water right.[1068] Third, after winning the first round in the Idaho Supreme Court (discussed below), the Company filed a second lawsuit in district court, an action that came to be known as "Idaho Power Versus the World."[1069]

Two years later, Idaho Power engaged in a limited effort to revive the project in a location further to the east. However, the Company made no changes in the project design. This did not go anywhere, and the Company eventually abandoned the project.

[1065] The Swan Falls Dam is located well downstream on the river; its rights could call out or prevent licensing of potentially thousands of junior rights upstream. However, Idaho Power had never acted to prevent developments that depleted flows at Swan Falls.

[1066] Reportedly, Idaho Power was planning to act even before the ratepayers' petition. "The ratepayers beat us to the courthouse, in the sense that they got to the PUC before we got to district court." Deposition of Thomas G. Nelson, *Higginson v. United States*, No. 39576, District Court of the Fifth Judicial District in and for the County of Twin Falls 53 (1987).

[1067] Protest of Idaho Power Company to Applications for Permit to Divert and Consumptively Use Water, *In the Matter of Applications Filed for Water Diversions for Consumptive Use on the Surface and Subterranean Tributaries of the Snake River Between Milner Dam and Hells Canyon* (Dec. 30, 1977, filed with the Idaho Dept. of Water Resources Jan. 5, 1978).

[1068] Amended Complaint, *Idaho Power Co. v. State of Idaho*, No. 62237, In the District Court for the Fourth Judicial District, in and for the County of Ada (filed Nov. 8, 1977).

[1069] *Idaho Power Co. v. IDWR*, No. 81375 (Ada County District Court, filed Mar. 30, 1983). This suit was brought against approximately 7,500 defendant water right holders, holding rights tributary below Milner Dam.

Idaho Power's position was vindicated by the Idaho Supreme Court in 1983.[1070] Although the Company's FERC licenses (as well as its water rights[1071]) for its Hell's Canyon, Oxbow and Brownlee dams (the "Hell's Canyon complex") included an express subordination of Idaho Power's water rights in favor of future upstream development, the state Supreme Court found that Idaho Power's Swan Falls rights had not been subordinated to upstream junior depletions. This caused a furor and led to the Department's decision to impose a moratorium on new water right approvals.

However, the Supreme Court only decided the first question—whether Idaho Power's Swan Falls rights were subordinated. Idaho Power still faced a court trial on remand on the question of whether it had waived, abandoned or would be estopped from asserting that portion of its rights that it had allowed upstream juniors to divert over many years of irrigation development. There was substantial historical evidence that Idaho Power had stood by, and in some instances, encouraged the recent development in the upper Snake (particularly high-lift surface water pumpers below Milner Dam and well pumpers in the Eastern Snake Plain Aquifer, much of which is tributary to the Snake River above Swan Falls Dam).

B. Terms of the agreement

Despite its Supreme Court victory, Idaho Power still had some exposure. Rather than litigate against thousands of upstream irrigators and the State of Idaho—which took the side of the irrigators and other upstream water users—Idaho Power settled the Swan Falls litigation through an agreement known as the *Swan Falls Agreement* with Idaho's Governor and Attorney General.[1072]

[1070] *Idaho Power Co. v. State ("Swan Falls II")*, 104 Idaho 575, 661 P.2d 741 (1983).

[1071] Water right No. 3-10247 (for Hells Canyon dam), No. 3-10246 (for Oxbow dam), and No. 3-2018 (for Brownlee dam) all contain subordination language to which Idaho Power voluntarily agreed. A detailed discussion of the subordination provisions is found in an IDWR order issued on 6/28/2013 available on IDWR's website (*In the Matter of Water Right Nos. 03-2018, 03-10246, and 03-10247*).

[1072] The *Swan Falls Agreement* is simply titled, "Agreement." It is dated October 25, 1984 and was executed by Governor John V. Evans, Attorney General Jim Jones, and Idaho Power Company CEO James E. Bruce. A copy of the *Swan Falls Agreement* is set out as Appendix J.

The parties signed a second agreement on the same day entitled "Contract to Implement Chapter 259, Sess. Laws, 1983," which provided, among other things, for dismissal of the pending lawsuits in accordance with the provisions of Senate Bill 1180, Idaho Code § 61-540. Chapter 259 refers to S.B. 1180, 1983 Idaho Sess. Laws, ch. 259 (codified at Idaho Code §§ 42-639 and 640).

The *Swan Falls Agreement* subordinated Idaho Power's water rights to all below-Milner,[1073] pre-October 1, 1984 water rights, under all stream flow conditions.[1074] Thus, pre-1984 rights are completely protected from call by Idaho Power, even if Idaho Power were unable to meet its stipulated minimum flow. Idaho Power also subordinated its water rights to future development (that is, to post-October 1, 1984 water rights) when flows at Murphy gage are in excess of 3,900 cfs during the irrigation season and 5,600 cfs during the non-irrigation season.[1075] Thus, post-1984 rights are subject to call by Idaho Power whenever flows in the Snake River fall below the stipulated minimum. The body of potential new water rights made available for appropriation under this subordination is referred to as "trust water."

A central feature of the Agreement was to establish a new "minimum flow" at the Murphy Gage (immediately below Swan Falls Dam) on the Snake River: 3,900 cfs during the irrigation season and 5,600 cfs during the non-irrigation season.[1076] At the time, the river had never experienced flows that low. Indeed, it was believed that the river could absorb about 600 cfs in additional development without violating the new minimum flow.[1077] The water that was thought to be available for new appropriation (that would not impair the minimum flow at Murphy Gauge) came to be known as "trust

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The Agreement followed an earlier document in the nature of a term sheet entitled "Framework for Final Resolution of Snake River Water Rights Controversy" dated October 1, 1984 and executed by the same parties. A copy of the Framework is set out as Appendix I.

Based on the Agreement, the two pending district court actions were dismissed with prejudice with respect to Idaho Power and the State, and without prejudice with respect to all the other parties. Consent Judgment, *Idaho Power Co. v. State*, Idaho Fourth Judicial District Court, Case No. 62237 (entered Mar. 7, 1990); Consent Judgment, *Idaho Power Co. v. State*, Idaho Fourth Judicial District Court, Case No. 81375 (entered Feb. 12, 1990).

[1073] The Agreement did not expressly limit its scope to below-Milner rights. However, this limitation was inherent in the litigation (which only applied to below-Milner rights) and was well understood by the parties. It had been reflected since 1976 in the State Water Plan and was codified 1985 in response to the *Swan Falls Agreement* in Idaho Code § 42-203B(2). See discussion of "Two Rivers Concept" in section 21 at page 355.

[1074] The *Swan Falls Agreement* defines the subordination beneficiaries according to whether or not they "have beneficially used water prior to October 1, 1984" and "have filed an application or claim for said use by June 30, 1985."

[1075] The irrigation season flows are specified for April 1 through October 31 (7 months); the non-irrigation season flows are specified for November 1 through March 31 (5 months).

[1076] The new minimum flow of 3,900 cfs replaced a prior minimum flow target of 3,300 cfs adopted in a prior state water plan.

[1077] See discussion in section 35.B at page 683 for explanation of how the 3,900 cfs flow compromise was reached.

water." As it turns out, very little of that was developed before a moratorium was put into place.

It is critical to understand, however, that the 3,900 cfs so-called minimum flow is not a guarantee of that flow. Idaho Power is not entitled to call out pre-1984 uses upstream or up-gradient to meet that flow at Swan Falls.

The reason is that in a separate provision of the *Swan Falls Agreement*, Idaho Power subordinated its water rights to all uses in place in 1984:

> The Company's rights . . . are also subordinated 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.

Agreement between State of Idaho and Idaho Power Company, § 7(D) (Oct. 25, 1984) ("*Swan Falls Agreement*").

By all appearances, this section 7(D) language is an absolute subordination to all uses existing on that date in 1984.[1078] This is confirmed by the language of the State Water Plan subsequently adopted to implement the *Swan Falls Agreement*:

> The 8,400 cfs claimed 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 use would violate the minimum flows established in Policy 5B [the 3,900/5,600 cfs minimums]. Any remaining water above these minimum flows may be reallocated to new uses by the state providing such use satisfies existing Idaho law. [1079]

Thus, the minimum flow of 3,900/5,600 cfs operates as a prospective subordination solely with respect to post-1984 water rights. If flows fall below 3,900 cfs at Murphy Gage, Idaho Power may call out post-1984 rights (i.e., trust water rights that were granted due to the existence of the subordination of portions of the Company's water rights in trust), but may not call out any right in effect prior to 1984. Put differently, the minimum flow has a 1984 priority (not the 1901 priority associated with Idaho Power's Swan Falls rights). The bottom line is that rights falling under the section

[1078] The requirement that the rights to which the subordination applies must be reflected in "an application or claim for said use by June 30, 1985" would exclude beneficial use claims for which no claim was filed by that date.

[1079] The 1996 State Water Plan at 18 (adopted Dec. 1996, ratified by the Idaho Legislature March 1997) (emphasis added).

7(D) subordination (basically all rights with licensed priority dates prior to October 1, 1984)[1080] are not subject to call by Idaho Power.

In evaluating the impact of the Swan Falls subordinations on particular situations, bear in mind that the subordinations apply only to the eleven Idaho Power Projects listed in the Agreement. This consists of every project except C.J. Strike and the Hells Canyon complex.[1081] C.J. Strike and the Hells Canyon complex have their own unqualified subordination provisions.

There is no provision in any of these laws that subordinates any other water rights, such as the rights of spring users in the Hagerman reach or the irrigation diverters at Milner; these senior water right holders remain entitled to seek curtailment of any junior ground or surface water right causing material injury to the seniors' water rights.

The term "trust water" is misleading because it might suggest that a "block of water" was so designated, or that Idaho Power placed a part of its water rights portfolio in trust for use by others under Idaho Power's priorities. If the block of water theory were correct, the State would be seen as having designated certain waters as subject to special appropriation rules, even though the water was subject to Idaho Power's senior priorities. If the trust portfolio theory were correct, those obtaining permits and licenses subject to the Swan Falls statutes would step into the shoes of Idaho Power and would receive Idaho Power's senior priority. This is not how the trust works, however. The trust idea placed a portion of Idaho Power's water rights in a trust administered by the State, which is entitled to subordinate this portion, piece by piece, as new water rights are permitted and licensed that otherwise would be blocked by Idaho Power's senior priority. The effect of the subordination was to free up a tightly allocated—arguably over-appropriated—resource to some extent (though not as much as was believed at the time of the Agreement.) While an actual trust exists in the traditional sense of the word, its effect is to enable water right subordinations under which new appropriators may appropriate new junior rights in the same fashion as any other appropriator, but with the benefit of knowing they cannot be called out by the still-existing but subordinated Idaho Power water rights.[1082]

[1080] The *Swan Falls Agreement* defines the subordination beneficiaries according to whether or not they "have beneficially used water prior to October 1, 1984" and "have filed an application or claim for said use by June 30, 1985."

[1081] The projects falling within the scope of the *Swan Falls Agreement* are: (1) Thousand Springs, (2) Lower Malad, (3), Upper Malad, (4) Clear Lake, (5) Sand Springs, (6) Upper Salmon, (7) Lower Salmon, (8) Bliss, (9) Twin Falls, (10) Shoshone Falls, and (11) Swan Falls.

[1082] Those seeking to make new appropriations of "trust water" are required to meet a special set of more stringent criteria for appropriation. See discussion in section 35.C at page 689.

The *Swan Falls Agreement* also gave rise to the concept of the "trust water area." This is the geographic area from which ground water is determined by IDWR to be tributary to the Snake River in the reach between Milner Dam and Swan Falls Dam. The trust water area also includes surface water between Swan Falls and Milner. A map of the area is set out in Appendix H. The trust water area includes most but not all of the Eastern Snake Plain Aquifer (see map in Appendix G) and continues further west all the way to Swan Falls. Somewhat counter-intuitively, much of this area lies to the northeast of Milner dam. Why would land up-gradient of Milner Dam be tributary below Milner? This is because the trust water area is defined to include any place where at least some portion of a ground water withdrawal would impact the river below Milner. Areas up-gradient from Milner will likely impact the Snake River above Milner, but, to some extent at least, they are also tributary to the Snake below Milner. In contrast, wells pumped in the "non-trust water area" (which lies along the Snake River in the vicinity of American Falls to Idaho Falls and further to the east) are exclusively tributary to the Snake River above Milner Dam. The trust water area is relevant today to the trust water appropriation rules (see section 35.C at page 689) and certain moratoria (see section 20 at page 352.

The compromise on the irrigation season flow was the hardest fought. The range for potential compromise fell between 3,300 and 8,400 cfs. The lower number was the existing instream flow at Murphy Gage, imposed by the Idaho Water Resource Board in 1976 (based on its assessment at that time of how much water would be left in the river if all water permits then issued were developed). The higher number was Idaho Power's entitlement under its unsubordinated water rights.

At first, Idaho Power offered to drop its entitlement from 8,400 to 6,100 cfs, but the offer did not fly.[1083] Eventually, the parties settled on 3,900 cfs. This was arrived at by splitting the difference between the state's 3,300 cfs legal minimum flow and 4,500 cfs, which was then perceived to be the "current actual minimum" flow on the Snake at Swan Falls.[1084] Since the compromise number was 600 cfs below the perceived "current

[1083] Susan M. Stacy, *Legacy of Light: A History of the Idaho Power Company* at 198 (1991) (published by the Idaho Power Company).

[1084] "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. . . . [B]y setting the irrigation season minimum flow at 600 c.f.s. below the current actual minimum [4,500 cfs], the state can allow a significant amount of further development of water uses without violating the minimum streamflow." *Framework for Final Resolution of Snake River Rights Controversy* at 2 (Oct. 1, 1984) (signed by representatives of Idaho Power and the State of Idaho). According to historian Susan M. Stacy, the actual minimum flow was 4,530 cfs, which was experienced on June 18, 1981. Apparently the 4,500 cfs number also reflected the Department's revised estimate of what flows would be at Murphy gage if all existing permits were developed. (Recall that the 3,300 cfs minimum imposed in 1976 was also based on this.)

actual minimum" for the river, the parties believed at the time that an additional 600 cfs in new consumptive use—measured at Murphy Gauge (i.e., just below Swan Falls Dam)—could be developed without violating the new minimum flow.

Prior to the Agreement, Idaho Power presumably could have "called out" (sought the curtailment of) all junior upstream rights tributary below Milner to fill its 8,400 cfs Swan Falls water rights. As a result of the *Swan Falls Agreement*, Idaho Power now has a right to call only up to 3,900/5,600 cfs, and that call may be placed only against post-October 1, 1984 water rights (again, below Milner).

The following chart summarizes Idaho Power's water rights at Swan Falls, as affected by the *Swan Falls Agreement*:

IDAHO POWER COMPANY'S WATER RIGHTS AT SWAN FALLS		
	When flows are <u>below</u> 3,900 (5,600 in non-irrigation season), Idaho Power's water rights:	When flows are <u>above</u> 3,900 (5,600 in non-irrigation season), Idaho Power's water rights:
As to <u>pre</u>-October 1, 1984 below-Milner rights held by others:	SUBORDINATED. Idaho Power subordinated its rights to all pre-1984 rights, irrespective of stream flow.	SUBORDINATED. Idaho Power subordinated its rights to all pre-1984 rights, irrespective of stream flow.
As to <u>post</u>-October 1, 1984 below-Milner rights held by others:	NOT SUBORDINATED. Idaho Power may call out post-1984 rights to the extent required to maintain flows at 3,900/5,600 cfs.	SUBORDINATED. Idaho Power subordinated its rights to post-1984 rights, when the river is above the established minimum. This is the amount giving rise to the term, "Trust Water," the amount (measured at Swan Falls) supposedly made available for new appropriation.

Pursuant to the settlement,[1085] the Idaho Legislature enacted a package of legislation. That legislation codified the 3,900/5,600 cfs "minimum flow" at the Murphy Gage and established a procedure by which additional new irrigation and DCMI (domestic, commercial, municipal, and industrial) development could proceed on the Snake River Plain despite the presence of the Swan Falls rights.

The Department's implementation of the actions of the Legislature and the State Water Board, however, did not exactly mimic the *Swan Falls Agreement*. Instead, it retained the prior state-held minimum flow at the Murphy Gage with a 1976 priority date

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Susan M. Stacy, *Legacy of Light: A History of the Idaho Power Company* at 200 (1991) (published by the Idaho Power Company).

[1085] The settlement was challenged by an Idaho ratepayer in *Miles v. Idaho Power Company*, 116 Idaho 635, 778 P.2d 757 (1989). The Supreme Court found that the ratepayer had standing to litigate but rejected his argument that the settlement violated the Equal Protection clause of the Constitution.

for 3,300 cfs (Water Right No. 2-201). It then added on two additional minimum flow rights with 1985 priority dates: One for 600 cfs (year round) to bring the Murphy Gage minimum flow up to 3,900 cfs during the irrigation season and another for 1,700 cfs (non-irrigation season only) to bring the minimum flow up to 5,600 cfs during the non-irrigation season (Water Right Nos. 2-223 and 2-224, respectively).

The combined effect of the Idaho Power water rights (as subordinated) and the State's instream flows at the Murphy Gage are shown below:

COMBINED EFFECT OF IDAHO POWER'S RIGHTS AND STATE'S MINIMUM FLOW RIGHTS			
Priority	Flows at Murphy Gage		
	Flows below 3,300 cfs	Flows between 3,300 and 3,900 cfs	Flows above 3,900 cfs
Post-1985 water rights (very junior)	Subject to call by both Idaho Power and the State	Subject to call by both Idaho Power and the State	Not subject to call by Idaho Power or State
1977-1984 water rights	Subject to call by the State	Not subject to call by Idaho Power	Not subject to call by Idaho Power
Pre-1976 water rights (very senior)	Not subject to call by Idaho Power or State	Not subject to call by Idaho Power or State	Not subject to call by Idaho Power or State

C. Appropriations in the "trust water area" pursuant to the Swan Falls statutes

The *Swan Falls Agreement* was ratified and implemented by statutory program.[1086] The Swan Falls statutes placed Idaho Power's subordinated water rights in trust for both Idaho Power and for the people of the State. The statutes establish a procedure by which proposed new rights that will have a significant effect on hydroelectric generation dependent upon Swan Falls flows must undergo a special "public interest" evaluation. The Department developed regulations for processing new permit applications within the so-called "trust water area" that would affect Swan Falls flows,[1087] and began processing several thousand long-delayed applications for permit pursuant to these rules. (See map of trust water area in Appendix H and discussion of it in section 35.B at page 683.) The Department's imposition of a moratorium on processing applications in 1992, however, effectively meant no significant new development of water rights has occurred—under the trust water concept or otherwise.[1088]

The Swan Falls statutes and rules require that each application in the area where Swan Falls flows could be affected (most seek ground water diversions from the Snake Plain Aquifer) first must be evaluated according to the standard considerations applicable

[1086] Idaho Code §§ 42-203B, 42-203C and 40-203D

[1087] IDAPA 37.03.08 (Water Appropriation Rules).

[1088] This remains the case today, not so much because of the Swan Falls statutes but because of the delivery calls and related litigation concerning the ESPA.

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to every proposed new right. But, as indicated above, the Department also will evaluate whether its proposed diversions would result in a "significant reduction" in water available for hydropower production. In the context of the area upstream from Swan Falls, the department will evaluate whether Idaho Power's Swan Falls generation capacity will be significantly affected.

If a significant reduction is predicted, then the application must undergo a *second* level of review to gauge how the proposal matches up against five criteria, including economic impact, impact on utility rates, "promotion of the family farming tradition," promotion of full economic development of Idaho's water, and whether the proposed development conforms to a "staged development policy of up to twenty thousand acres per year" of new agricultural development. The Department has adopted both formal rules and an informal "policy" concerning the processing of applications for new rights in the part of the state where diversions would affect Swan Falls flows. (However, due to a prohibition in the Swan Falls statutes, diversions that would affect river flows above Milner Dam are not to be considered in the evaluation of whether the proposed diversion would affect Swan Falls flows.)[1089]

Because of the creation of a trust containing a portion of Idaho Power's water rights, and the use of the term in a portion of the Swan Falls statutes, the Department refers to those areas whose waters are tributary to the below-Milner, above-Swan Falls reach of the Snake River as the "trust water" area, and it suggests that the Swan Falls statutes effectively set aside for future development a "block of water" (primarily tributary ground water in the ESPA). It refers to this as "trust water."

The Department has determined that the first 43,000 acres of irrigation development affecting this below-Milner reach would not have a significant effect on flows for hydropower. Consequently, the Department has not yet processed any of these permit applications under the more searching second level review. However, the Department's 1992 moratorium order ceased processing of pending and new applications to appropriate water in the trust water area and other areas of the state due to an extended drought. (See discussion in section 20 at page 352.) This moratorium, through subsequent amendments, remains in effect. In addition, the Department's Conjunctive Management Rules, which establish extensive criteria for determining and mitigating injurious impacts to senior surface rights attributable to junior wells, may play a larger role in any future evaluation of the effects of trust water diversions on Idaho Power's rights at Swan Falls.

[1089] Idaho Code § 42-203B(2).

36. GENERAL ADJUDICATIONS

Five general adjudications are now underway in Idaho, covering virtually the entire state. In each case, the Legislature has played an active role in structuring and funding the adjudications.[1090] They are briefly identified below.[1091]

A. SRBA (Snake River Basin Adjudication) (No. 39576)

The first and the largest is the SRBA, which was initiated in 1987.[1092] After 27 years, the SRBA concluded the adjudication of over 158,600 non-deferred water right claims with the issuance of a 275,000-plus page *Final Unified Decree* on August 25, 2014. The Court retained jurisdiction over the unfiled *de minimis* claims.

B. NIA (North Idaho Adjudication) (Nos. 49576, 59576, and 69576)

Meanwhile, in 2006, the Idaho Legislature authorized a petition to commence what is collectively known as the NIA.[1093] The NIA consists of three separate adjudications:

[1090] The statutes governing general adjudications make up an entire chapter of the Idaho Water Code, Idaho Code §§ 42-1401 to 1428.

The SRBA legislation provided that the Director of IDWR "shall petition the district court to commence an adjudication." (See footnote 1092.) The legislation for the NIA and BRBA provided that the Director "is authorized to petition the district court." (See footnotes 1093 and 1097.) In fact, no legislation is required to authorize the Director to petition a court to initiate a general adjudication. Before the SRBA, general adjudications were initiated without any legislative prompting or oversight. But the precedent set in the SRBA has been followed in all subsequent adjudications.

[1091] Curiously, the five adjudications were assigned case numbers with the first digit in sequence: 39576, 49576, 59576, 69576, and 79576.

[1092] Legislation authorizing a petition for commencement of the SRBA was enacted in 1985. 1985 Idaho Sess. Laws, ch. 18, § 1 (formerly codified at Idaho Code § 42-1406A), as amended by 1985 Idaho Sess. Laws, ch. 118, § 1, and then amended and uncodified by 1994 Idaho Sess. Laws, ch. 454, § 11). The SRBA was commenced on November 19, 1987. *Commencement Order*, *In re SRBA*, Case No. 39576 (Idaho, Fifth Judicial Dist., Nov. 19, 1987) (Hurlbutt, J).

[1093] 2006 Idaho Sess. Laws, ch. 222 (codified at Idaho Code § 42-1406B), as amended by 2008 Idaho Sess. Laws, ch. 149 and 2008 Idaho Sess. Laws, ch. 159.

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- Phase 1: Coeur d'Alene-Spokane River Basin Adjudication ("CSRBA") (Basins 91-95) (No. 49576)[1094]

- Phase 2: Palouse River Basin Adjudication ("PRBA") (Basin 87) (No. 59576)[1095]

- Phase 3: Clark Fork-Pend Oreille River Basins Adjudication ("CFPRBA") (Basins 96-97) (No. 69576)[1096]

C. BRBA (Bear River Basin Adjudication) (No. 79576)

The last adjudication to get underway is the BRBA. In 2020, the Legislature enacted legislation authorizing a petition to commence the BRBA.[1097] The State's petition to commence was filed seven months later.[1098] The adjudication was commenced on June 15, 2021.[1099]

D. The deferral process

(1) Overview

In all recent Idaho general adjudications, beginning with the SRBA in 1987, the District Court has established a mechanism that defers (postpones) the mandatory

[1094] The CSRBA was commenced on November 12, 2008. *Commencement Order for the Coeur d'Alene-Spokane River Basin General Adjudication, In re CSRBA*, Case No. 49576 (Idaho, Fifth Judicial Dist., Nov. 12, 2008) (Melanson, J.).

[1095] The PRBA was commenced on March 1, 2017. *Commencement Order for the Palouse River Basin General Adjudication, In re PRBA*, Case No. 59576 (Idaho, Fifth Judicial Dist., Mar. 1, 2017) (Wildman, J.).

[1096] The CFPRBA was commenced on June 15, 2021. *Commencement Order for the Clark Fork-Pend Oreille River Basins Adjudication, In re CFPRBA*, Case No. 69576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.).

[1097] 2020 Idaho Sess. Laws, ch. 50 (Mar. 9, 2020) (codified at Idaho Code § 42-1406C).

[1098] *Petition to Commence Bear River Basin Adjudication, In re BRBA*, Case No. 79576 (Idaho, Fifth Judicial Dist., Nov. 20, 2021).

[1099] *Commencement Order for the Bear River Basin Adjudication, In re BRBA*, Case No. 79576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.).

adjudication of *de minimis* domestic[1100] and stockwater claims.[1101] The deferral process enables the adjudication court to focus its attention on the more significant water rights, while deferring actions on the smallest rights. In the SRBA, *de minimis* water rights were estimated to account for over half of the anticipated claims while constituting less than one percent of the volume of all water rights within the basin.[1102]

The federal challenge to the deferral process alleges non-compliance with the McCarran Amendment, 43 U.S.C. § 666. That is the statute that waives sovereign immunity allowing the United States to be joined in general adjudications in state courts. In order to comply with the McCarran Amendment, the state adjudication must be comprehensive. That means it must include all ground and surface rights within the designated basin.

The deferral process was initially worked out by the parties in the SRBA. In subsequent adjudications, it has been legislatively mandated.[1103]

[1100] The *SRBA Stipulation* (described in footnote 1103) defined *de minimis* domestic claims by reference to the definition then codified at Idaho Code § 42-1401A(5) (based on 1986 Idaho Sess. Laws, ch. 234). That definition was amended and recodified by 1990 Idaho Sess. Laws, ch 319 to Idaho Code § 42-111 while Idaho Code § 42-1401A(5) was changed to a mere cross-reference. The cross-reference in Idaho Code § 42-1401A(5) was recodified to Idaho Code § 42-1401A(4) by 1997 Idaho Sess. Laws, ch. 374.

[1101] The *SRBA Stipulation* (described in footnote 1103) defined *de minimis* stockwater claims by reference to the definition then codified at Idaho Code § 42-1401A(12) (based on 1986 Idaho Sess. Laws, ch. 234). That definition was recodified by 1997 Idaho Sess. Laws, ch 374 to Idaho Code § 42-1401A(11).

[1102] *Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses, In re SRBA*, Case No. 39576 (Idaho, Fifth Judicial Dist., Jan. 17, 1989) (Hurlbutt, J.), § 1, pp. 1-2; Ann Y. Vonde, et al., *Understanding the Snake River Basin Adjudication*, 52 Idaho L. Rev. 53, 62 (2016).

[1103] In the SRBA, the deferral of *de minimis* claims was not required by statute, but was negotiated with the United States in the early stages of the general adjudication. The SRBA commenced on November 19, 1987. Just over a year later, Idaho and the United States entered a stipulation agreeing to the deferral process. *Stipulation for Establishment of Procedure for the Adjudication of Domestic and Stock Water Claims, In re SRBA*, Case No. 39576 (Idaho, Fifth Judicial Dist., Dec. 20, 1988) ("*SRBA Stipulation*"). The stipulation effectively waived the claim filing deadline for holders of small domestic and stockwater rights. Thus, holders of *de minimis* claims had the option to file claims on the same schedule as non-deferred claims, but were not required to do so.

Subsequent stipulations filed in the CSRBA (see footnote 1108) and the PRBA (see footnote 1112) are functionally identical.

For over three decades, the United States affirmatively and expressly acquiesced in this deferral process. (The only exception being its tacit support for the tribal challenge to the process in 2008. See footnote 1109.) Recently, however, it reversed course and raised objections to the deferral process in the CFPRBA and the BRBA.

(2) Legal status of deferred claims

Deferred *de minimis* rights are still water rights. Water may be lawfully diverted under those rights (as is true of any other beneficial use right that has not been extinguished by an adjudication). They are entitled to protection from interference caused by new appropriations or transfers.[1104] However, holders of deferred rights are not

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In more recent general adjudications, the Idaho Legislature included a requirement for deferral of *de minimis* claims. Idaho Code § 42-1406B (Northern Idaho Adjudication; Idaho Code § 42-1406C (Bear River Basin Adjudication).

In each adjudication, the District Court has established procedures regarding the deferral of *de minimis* claims. These procedures follow the procedures set out in the stipulations. This is true even for the adjudications in which there was no stipulation (the CFPRBA and the BRBA).

For example, the implementing orders in the SRBA are as follows: *Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses, In re SRBA*, Case No. 39576 (Idaho, Fifth Judicial Dist., Jan. 17, 1989) (Hurlbutt, J.) (adopting the procedures agreed to in the stipulation); *Administrative Order No. 10, In re SRBA*, Case No. 39576 (Idaho, Fifth Judicial Dist., Mar. 22, 1995) (Hurlbutt, J.) (authorizing claimants with deferred claims to have such claims adjudicated); *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims, In re SRBA*, Case No. 39576 (Idaho, Fifth Judicial Dist., June 28, 2012) (Wildman, J.); *Order Granting State of Idaho's Motion for Interim Order Implementing the Order Governing Procedures of Adjudication of Deferred De Minimis Domestic and Stock Water Claims, In re SRBA*, Case No. 39576 (Idaho, Fifth Judicial Dist., Dec. 18, 2013) (Wildman, J.); *Order Amending Procedures in the SRBA for Adjudication of Deferred De Minimis Stockwater Claims, In re SRBA*, Case No. 39576 (Idaho, Fifth Judicial Dist., Oct. 17, 2017) (Wildman, J.). Similar orders are found in each of the subsequent adjudications.

[1104] A protestant to a water right application alleging injury to a deferred right would need prove the validity of the deferred right. If that proof is made, the deferred right should be treated as any other. So long as it was established prior to the date of the competing application for appropriation or change, the deferred right is entitled to protection from injury.

allowed to transfer (change) those rights[1105] or to place a delivery call[1106] until such time as the deferred right is decreed.[1107]

There is a mechanism for holders of deferred rights to seek adjudication of their *de minimis* rights after the deadline has passed for other claims and even after the final unified decree has been issued for that basin. Water users employ this from time to time (typically when they wish to transfer the right, place a delivery call, or simply firm up the right for financing, sale, or other purposes). As of now, however, no deadline has been established for doing so.

(3) Deferral in the CSRBA and PRBA

Although the United States stipulated to the deferral process in the CSRBA,[1108] the deferral issue was challenged and litigated by the Coeur d'Alene Tribe.[1109] On November 12, 2008, the District Court entered an order rejecting the Tribe's challenge and holding that the deferral process satisfies the requirement for a comprehensive adjudication under the McCarran Amendment.[1110] No party appealed.[1111]

[1105] See, e.g., *SRBA Stipulation*, §3, p. 3.

[1106] See, e.g., *SRBA Stipulation*, §3(B), p. 4. Technically, the stipulation provides that the Director is not obligated to deliver water.

[1107] It is curious and seemingly inconsistent that deferred rights cannot place a call or be transferred, but are entitled to injury protection in a contested case initiated by another water right holder (see footnote 1104).

[1108] *Stipulation for Establishment of Procedure for the Adjudication of Domestic and Stock Water Claims, In re CSRBA*, Case No. 49576 (Idaho, Fifth Judicial Dist., July, 8, 2008) ("*CSRBA Stipulation*").

[1109] The tribal objection to the deferral process put the United States in an awkward position. When the United States stipulated to deferral in the CSRBA (see footnote 1108), it inherently acted on behalf of itself and as trustee for any affected tribe. This may explain why the United States, in response to the Tribe's challenge to deferral, filed a post-hearing brief insisting that the Court was not bound by the stipulation and that the Court should consider the jurisdictional issue independent of the stipulation. In so doing, the United States implied that the Tribe's substantive arguments had merit and expressly supported the Tribe's procedural arguments against commencement. *United States' Post-Hearing Memorandum, In re CSRBA*, Case No. 49576 (Idaho, Fifth Judicial Dist., Sept. 8, 2008). This shift in position in 2008 foreshadowed the actions taken by the United States in 2021.

[1110] *Memorandum Decision on Petition to Commence, In re CSRBA*, Case No. 49576 (Idaho, Fifth Judicial Dist., Nov. 12, 2008) (Melanson, J).

[1111] When the United States later challenged the deferral process in the CFPRBA and BRBA, the State argued that the unappealed decision in the CSRBA is *res judicata* (issue

In 2017, the United States agreed by stipulation to the deferral of *de minimis claims* in the PRBA.[1112]

(4) Challenges by the United States in the CFPRBA and BRBA

After stipulating to deferral in the SRBA, the CSRBA, and the PRBA, the United States reversed course in 2021.

The two most recently initiated general adjudications are the CFPRBA and the BRBA (both of which were ordered commenced on June 15, 2021, but which orders are currently on appeal to the Idaho Supreme Court). The United States has opposed deferral in both.

On April 30, 2021, the United States filed its opposition to the deferral process in the CFPRBA and the BRBA.[1113] Following briefing and an oral argument on May 24, 2021, Judge Wildman issued decisions in both adjudications on June 15, 2021 rejecting the United States' position and confirming that the deferral process complies with the

preclusion) binding on the United States in all adjudications. *State of Idaho's Reply in Support of the Proposed Deferral Procedures for De Minimis Domestic and Stockwater Claims, In Re CFPRBA and BRBA*, Case Nos. 69576 and 79576 (Idaho, Fifth Judicial Dist., May 14, 2021), pp. 18-20. In ruling against the United States on the merits, the District Court found it unnecessary to address this argument. *Memorandum Decision on Optional Deferral Process, In re CFPRBA*, Case No. 69576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.), p. 10.

[1112] *Stipulation for Establishment of Procedure for the Adjudication of De Minimis Domestic and Stock Water Claims, In re PRBA*, Case No. 59576 (Idaho, Fifth Judicial Dist., Mar. 1, 2017) ("*PRBA Stipulation*").

[1113] *United States' Special Appearance and Opposition to State of Idaho's Proposal to Defer Adjudication of Certain Water Rights, In re CFPRBA and BRBA*, Cases No. 69576 and 79576 (Idaho, Fifth Judicial Dist., Apr. 30, 2021).

McCarran Amendment.[1114] The decisions were accompanied by commencement orders.[1115]

(5) Appeal in the CFPRBA and BRBA

On July 27, 2021, the United States filed notices of appeal to Judge Wildman's decisions in the CFPRBA and BRBA.[1116] The appeals are in the initial stages; the United States has asked for a 120 day extension on its opening brief—presumably to give time for its motion to the SRBA Court to play out. Although no order has been issued as of this writing, the delay in Supreme Court briefing is likely to be approved, and further extensions could follow. The appeals could be resolved in as little as six months after the proceedings resume.

The challenge to the deferral process now on appeal is particularly troublesome because, if found to be valid, it is not simple to fix. As noted in footnote 1103, in the SRBA, the deferral process was negotiated by the parties and adopted by the District Court. In all subsequent adjudications, however, the deferral process is statutorily mandated. Thus, it may not simply be dispensed with if found to be improper. Moreover, if the deferral process is determined to not be in compliance with the McCarran Amendment, the validity of all decrees issued to date would be called into question.

It is curious, by the way, that the United States is pursuing these appeals in State Court. In both cases, the United States entered special appearances so as to avoid

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[1114] *Memorandum Decision on Optional Deferral Process, In re CFPRBA*, Case No. 69576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.); *Memorandum Decision on Petition to Commence Clark Fork-Pend Oreille River Basins Adjudication, In re CFPRBA*, Case No. 69576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.); *Order Establishing Procedures for the Adjudication of De Minimis Domestic and Stockwater Claims, In re CFPRBA*, Case No. 69576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.); *Memorandum Decision on Optional Deferral Process, In re BRBA*, Case No. 79576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.); *Order Establishing Procedures for the Adjudication of De Minimis Domestic and Stockwater Claims, In re BRBA*, Case No. 79576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.); *Memorandum Decision on Petition to Commence Bear River Basin Adjudication, In re BRBA*, Case No. 79576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.).

[1115] *Commencement Order for the Clark Fork-Pend Oreille River Basins Adjudication, In re CFPRBA*, Case No. 69576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.); *Commencement Order for the Bear River Basin Adjudication, In re BRBA*, Case No. 79576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.).

[1116] *United States' Notice of Appeal, In Re CFPRBA*, Case No. 69576 (Idaho, Fifth Judicial Dist., July, 27, 2021); *United States' Notice of Appeal, In Re BRBA*, Case No. 79576 (Idaho, Fifth Judicial Dist., July, 27, 2021).

subjecting itself to jurisdiction. The basis of the challenge is that the Court has no jurisdiction over the United States. Thus, it would seem, the United States could simply ignore the state proceedings (as it routinely does when entities ignore the Federal Quiet Title Act and litigate R.S. 2477 roads in Idaho courts). Or it could file suit in federal court seeking declaratory or other relief to establish that the state adjudications are not binding on the federal government. But, for one reason or another, it has not done so and is instead subjecting itself to the Idaho appellate process (with the possibility of review by the U.S. Supreme Court review).

(6) Motion to adjudicate deferred claims in the SRBA

In its briefing in opposition to the United States in the CFPRBA and BRBA,[1117] Idaho suggested that setting a deadline for filing *de minimis* claims was premature in those adjudications because they are just getting underway. "If what the United States is really seeking is closure of *de minimis* claims in the SRBA, its remedy is to file a motion with the Court in that action asking for such relief."[1118]

On November 15, 2021, the United States did just that. It filed a motion in the SRBA asking the Court to set a deadline for filing deferred *de minimis* claims.[1119] The United States contends that it entered into the stipulation for deferral in the SRBA in good faith, with the understanding that deferral would not be forever. It contends, not unreasonably, that the Court should set a deadline for the filing of deferred claims

It is our understanding that the federal motion followed efforts by the counsel for the United States and the Idaho Attorney General's office to agree to a schedule for the adjudication of deferred claims. We are informed that the Attorney General's office agrees that the claims should not be deferred indefinitely, but was unable to agree to the more aggressive timetable sought by the United States. One would expect that there will be more behind-the-scene efforts to resolve this prior to a ruling by Judge Wildman. But the fact that the motion was filed indicates that the parties are far apart.

(7) Reasons for the federal challenge

The reason stated on the face of the pleadings in the various challenges to deferral is that the United States has grown tired of waiting for the *de minimis* claims to be addressed. The United States points out that it has been seven years since the final

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[1117] *State of Idaho's Reply in Support of the Proposed Deferral Procedures for De Minimis Domestic and Stockwater Claims, In Re CFPRBA and BRBA*, Case Nos. 69576 and 79576 (Idaho, Fifth Judicial Dist., May 14, 2021), pp. 10, 16.

[1118] *Id*. at 17.

[1119] *Motion to Adjudicate Deferred De Minimis Domestic and Stockwater Claims, In Re SRBA*, Case No. 39576 (Idaho, Fifth Judicial Dist., Nov. 15, 2021).

unified decree was issued for the SRBA,[1120] and there has been no movement toward setting a deadline for *de minimis* claims. That is a legitimate observation (albeit one that ignores the fact that the State has been busy with four other general adjudications).

It has been suggested that the federal action amounts to a tit-for-tat in response to Idaho's enactment of Idaho Code § 42-224 in 2020, which provides a mechanism for forfeiture of federal stockwater rights.[1121] Indeed, the United States says as much in its briefing, which sets out a litany of perceived hostile actions by Idaho with respect to federal stockwater rights.[1122]

[1120] The Unified Final Decree in the SRBA was signed on August 25, 2014 and filed in district court the following day.

[1121] The United States' federal reserved water rights have been litigated in the SRBA and were upheld by the Idaho Supreme Court. *United States v. State* ("*Basin-Wide Issue 9*"), 131 Idaho 468, 959 P.2d 449 (1998) (Walters, J.). Meanwhile, the United States pursued and obtained partial decrees for thousands of stockwater rights on non-reserved BLM land based on beneficial use (as opposed to federal reserved rights). These de minimis stockwater claims were subject to deferral, but the United States elected to pursue them. Then, in 2007, the Idaho Supreme Court ruled water rights for stockwatering on unreserved federal land (BLM land) are held by the grazing permittee, not by the federal government. *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007) (Eismann, J.). That shut down any new federal stockwater claims on BLM land, but left the thousands of rights already obtained intact. In 2020, however, the Idaho Legislature enacted Idaho Code § 42-224, which provides a mechanism for forfeiture of federal stockwater rights in accordance with the holding in *Joyce Livestock*. This action is said to have infuriated the federal land managers, giving rise to the recent challenge to the deferral process.

[1122] *United States' Special Appearance and Opposition to State of Idaho's Proposal to Defer Adjudication of Certain Water Rights, In re CFPRBA and BRBA*, Cases No. 69576 and 79576 (Idaho, Fifth Judicial Dist., Apr. 30, 2021), pp. 17-19.

37. THE SNAKE RIVER BASIN ADJUDICATION ("SRBA")

Note: A comprehensive overview of the SRBA is found in Ann Y. Vonde, et al., *Understanding the Snake River Basin Adjudication*, 52 Idaho L. Rev. 53 (2016). See also, Clive J. Strong, *SRBA Retrospective: A 27-Year Effort*, The Advocate (Nov./Dec. 2014) and Eric J. Wildman, *Completion of the SRBA and Status Update Regarding the CSRBA* at 8 (Aug. 25, 2014), http://legislature.idaho.gov/sessioninfo/2014/interim/resources0917_wildman.pdf.

A. Overview

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.[1123] The SRBA is a statutorily-created lawsuit to inventory all surface and ground water rights in the Snake River Basin.

The Idaho Supreme Court originally appointed District Judge Daniel C. Hurlbutt, Jr., as Presiding Judge for the SRBA and designated Twin Falls as the county of venue. Following Judge Hurlbutt's retirement from the bench in December 1998, the Supreme Court appointed Barry Wood who served as presiding judge until December 2000. Roger Burdick was appointed to preside over the SRBA December 15, 2000. In June 2003, Judge Burdick joined the Idaho Supreme Court, and Judge John Melanson was appointed SRBA Presiding Judge. When Judge Melanson was appointed to the Idaho Court of Appeals at the end of 2009, Judge Eric Wildman took his place as Presiding Judge of the SRBA.

A special court system was created to manage this large and complex case. The court uses Special Masters to conduct hearings and make recommendations on contested rights. Partial and final decrees are entered by the Presiding Judge. The case is governed by the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence. Under authority granted by the Idaho Supreme Court to modify portions of these rules, the SRBA has adopted Administrative Order 1.

The establishment of the SRBA was called for in the *Swan Falls Agreement*:

[1123] Legislation authorizing a petition for commencement of the SRBA was enacted in 1985. 1985 Idaho Sess. Laws, ch. 18, § 1 (codified at Idaho Code § 42-1406A), as amended by 1985 Idaho Sess. Laws, ch. 118, § 1, and then amended and uncodified by 1994 Idaho Sess. Laws, ch. 454, § 11). The District Court issued an order commencing the SRBA on November 19, 1987. Commencement Order, *In re SRBA Case No. 39576* (November 19, 1987).

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> 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 the 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. [1124]

The adjudication is the largest general stream adjudication in the history of the West. It involves claims to some 175,000 water rights in the 53 separate sub-basins comprising Idaho's portion of the Snake River Basin, including over a thousand instream flow claims filed by Indian tribes and federal agencies on the basis of the federal reserved rights doctrine. The SRBA involves over 80 percent of all of Idaho's water sources. All ground water rights within the basin also are included.

Ordinarily the federal government may not be sued in state court. To resolve federal and tribal claims, however, the United States was made a party to the suit pursuant to a federal statute known as the McCarran Amendment.[1125]

B. Post-commencement claims

All persons claiming to own water rights are required to file their claims in the SRBA, or lose them. Idaho Code §§ 42-1409(4), 42-1420. (The same is true in the Northern Idaho Adjudication ("NIA"), see discussion in section 38 at page 722.) This requirement applies to (1) all beneficial use water rights (including statutory claims) and (2) all permits and licenses for which proof of beneficial use was filed as of the commencement of the SRBA (November 19, 1987).[1126] Those holding "post-

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[1124] *Framework for Final Resolution of Snake River Water Rights Controversy* at 6 (Oct. 1, 1984).

[1125] In 1952 the Congress enacted the McCarran Amendment, 43 U.S.C. § 666, which waived sovereign immunity and allowed the United States to be joined in state court actions to quantify water rights. The act applies, however, only to general stream adjudications of an entire river basin, and not to lawsuits over individual water rights. The act also does not waive the federal government's sovereign immunity for administrative proceedings. *U.S. v. Puerto Rico*, 287 F.3rd 212 (1st Cir. 2002).

[1126] Holders of licensed rights, permits, or applications for permit for which proof of beneficial use was not filed as of the date of commencement (November 19, 1987) were not required to file a claim in the SRBA. Idaho Code §§ 42-1409(4), 42-1420(1)(b) to (d). The SRBA statute, Idaho Code §§ 42-1420(1)(c) and (d), authorizes the Director of the Department

commencement" applications, permits, and licenses are not required to file SRBA claims, but may do so at their option. The only reason to file such a claim would be to obtain a judicial decree confirming the right, which may have certain res judicata effects. (See discussion of res judicata in section 14.B(9) at page 204.) Where claims for post-commencement applications and permits have ripened into licenses by the time they are ready to be reported by the Department, the Department will report them based on their status as licenses. However, if they are still at the permit stage, the SRBA statute calls for them to be decreed subject to ultimate approval by the Department.[1127]

C. Domestic and stock water rights in the SRBA

Small domestic and stock water claims are in something of a limbo. Plainly, holders of domestic and stock water claims are subject to the SRBA, just like any other water right holder—despite the fact that these rights may be exempt from permitting and licensing requirements. (See discussion in section 7.F(1) at page 108.) This means that they are parties to the general adjudication and are bound by all of the determinations of other rights, even if they do not file a claim or otherwise participate.

A provision in the SRBA statute authorizes the SRBA Court to "exclude" certain domestic and stock water rights.[1128] Initially, no action was undertaken pursuant to this authority, and, consequently, many domestic and stock water claims were filed. This resulted in complaints that the Department and the court were wasting time dealing with minor claims with little impact on the system, instead of focusing their resources on more significant water rights.

Subsequently, the court issued an order allowing domestic and stock water rights claimants to "postpone" their adjudication.[1129] This was generally understood to mean that these rights did not have to be claimed at all. Now, however, there has been some discussion that the court may need to require these rights to be claimed at some point before the conclusion of the SRBA to ensure that the SRBA is a proper McCarran Amendment proceeding capable of binding the federal government.

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to order such "post commencement" claims to be filed. To date, however, he has not done so, nor is any such order anticipated.

[1127] Idaho Code § 42-1421(3).

[1128] Idaho Code § 42-1420(1)(a).

[1129] SRBA Court Order No. 89-01-012 (Jan. 17, 1989) (Judge Hurlbutt presiding).

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D. Procedure

The SRBA proceeds under Idaho's adjudication statute.[1130] The SRBA Court has adopted special rules covering a variety of matters in the case, such as pleading requirements, forms for various motions, rules for reconsidering special masters' ruling, and the like. *See* SRBA Court Administrative Order No. 1 (Amended October 10, 1997).

The SRBA Court has consolidated the 53 subbasins into 22 "reporting areas" for which the Department, acting through its Director, will produce reports to submit to the court ("Director's Reports") detailing the facts the Department's investigation has shown as to current uses under each state-law-based water right claimed. As to claims arising under federal law—that is, federal and Indian reserved rights claims—the Director's Reports provide only an abstract of what is claimed.

The Director's Reports contain the foundational information about each water right; unless successful objections are received, these will form the basis for the decrees for each water right in each reporting area. Ultimately, all of these "partial decrees" will be consolidated into one enormous final decree.

Claimants may object to the way their water right was recommended in a Director's Report, and they may file responses to objections filed by others. The litigation over objections and responses occurs in "subcases," individual cases involving discovery, motions and ordinary trial practice which usually are heard first by special masters appointed by the SRBA Court. (Currently there are three special masters.)

The SRBA Court posts large amounts of information about the case (including water right claims, rules, orders, and recent decisions) on the web at www.srba.state.id.us.

E. Post-commencement legislation affecting the SRBA

In 1994, the Legislature amended several portions of Idaho's water adjudication statutes[1131] to remedy several perceived problems with the SRBA. Among other things, the Legislature did the following:

1. It removed the Department (and, thus, the Director) as a party to the adjudication, instead designating the Director an "independent expert and technical assistant to assure that claims to water rights . . . are accurately reported . . . [1132]." Removing the Director as a party may have caused more

[1130] Idaho Code §§ 42-1401 to 1428.

[1131] Idaho Code §§ 42-1401 to 1428.

[1132] Idaho Code § 42-1401B.

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problems than it solved. (See discussion of "one-party subcases" in section 37.H at page 705.)

2. It declared that the Director's Reports no longer are pleadings in the case, but are to be received by the court as "prima facie evidence" of the nature and extent of the water rights they describe.[1133] The statute still places the ultimate burden of persuasion on the claimant to establish each element of the claimed water right,[1134] and authorizes the Department to conduct fact-finding hearings as necessary "for a full and adequate disclosure of the facts."[1135] To date, the Department has not yet conducted any such hearings, and the SRBA court has not indicated that it would welcome such hearings.

3. Enacted two "amnesty" provisions for those water right holders who, prior to 1987, changed or transferred a water right without going through the statutory procedure (Idaho Code § 42-1425) or who enlarged the use under their water right without increasing the rate of diversion (Idaho Code § 42-1426). Both of these provisions include conditions designed to prevent injury to any existing water rights—including those water rights existing on the date the statutes were enacted. The more controversial of these two provisions, section 42-1426 (amnesty for certain enlargements) was the subject of two Idaho Supreme Court rulings and is discussed below. See section 37.I(8) at page 710.

4. Enacted a provision stating that, where a prior decree is "ambiguous," the Department is to look to conditions existing in 1987 (when the SRBA began) to determine the elements of a water right. This provision promises to generate more controversy in the case. It is being advanced by some water users to assert that the Department essentially is supposed to don blinders and ignore any other facts that come to light about a water use other than those occurring in 1987.[1136] The Idaho Supreme Court also has spoken, if briefly, about this provision, indicating that the Department is not limited to those facts existing in 1987.

[1133] *See* Idaho Code § 42-1411(4).

[1134] Idaho Code § 42-1411(5).

[1135] Idaho Code § 42-1410(1).

[1136] Idaho Code § 42-1427.

F. Early history and initial perceptions

In 1992 and 1993, Director's Reports were filed for the first three reporting areas (Subbasins 34, 36, and 57). The SRBA Court refers to these three subbasins as "test basins" because they were selected on the presumption that they would give rise to a wide variety of issues that should be resolved early in the process. That presumption proved correct. A lot of litigation has arisen from these three reports, including some so-called "Basin-Wide Issues," discussed below.

The Department also has produced Director's Reports for certain categories of claims, such as federal and tribal instream flow claims and *de minimis* domestic and stock water claims, that are handled outside of the reporting area structure. So far, more than half of the water right claims in the SRBA have been decreed, most of these small and unopposed domestic and stock water claims. The federal and tribal claims, with the exception of the on-reservation water rights claims of the Shoshone-Bannock Tribe in eastern Idaho, are mostly all now in active litigation (also discussed further below).

One of the more significant single achievements in the SRBA to date is the final decree accepting the settlement between the Shoshone-Bannock Tribes, the State, and water users. This partial decree approved 27 federal water rights claims for these Tribes for on-reservation uses.

The SRBA is perceived by many, including some legislators and water users, as a protracted process with little to show for itself and no end in sight. It likely has given rise to far more litigation—including litigation of seemingly basic water law questions—than many observers or participants expected. With the appointment in 1996 of Karl Dreher as the Department's new Director, the working relationship between the SRBA Court and the Department improved. Certainly, a productive relationship between the court and the Department is essential. Nonetheless, there are varying levels of frustration over the costs, to the state and to the parties, the perceived slow pace, and the concern that one-party subcases or other circumstances will lead to overstated water rights. Many water users are not convinced that the process will result in an accurate accounting of actual water rights based on actual beneficial use and a reasonable duty of water.

G. Basin-wide issues

The SRBA Court also has designated and decided several "Basin-Wide Issues"—questions of law seen to have overriding importance. All of those raised to date have been decided by the Idaho Supreme Court. As noted below, the high court also has decided other important legal questions outside of the Basin-Wide Issue format.

H. The "One-Party Subcase" and the limited role of the Director

Since the 1994 legislation the Department has not been a party to the SRBA. Consequently, many of the subcases proceed as "one-party subcases," where only the

claimant objects to his or her water right (invariably arguing that the Director's report understated it) and no other claimants enter the case as respondents. The special masters generally have afforded little opportunity for testimony from the Department beyond the Director's Report itself, and often have allowed no real examination of the claimant's position in these one-party affairs.

However, as noted above, the Legislature designated the Department an "independent expert and technical assistant" in the SRBA and charged it with the duty to "assure that claims to water rights . . . are accurately reported," and retained its authority to hold its own fact-finding hearings to produce "a full and adequate disclosure of the facts" supporting each water right. It would seem that this and similar statutory language would afford the court ample latitude to involve the Department in a meaningful way as it determines the facts about each objecting claimant's water right.

Most claimants outside the one-party subcase are unaware of the precedent the case might set, or are unable to afford getting in. Others may simply believe that somehow the process will end up with water decrees for reasonable, supportable amounts and uses of water, but this remains to be seen. Although the Idaho Supreme Court ruled that these one-party subcases are inappropriate for summary judgment (because that presumes an adversarial process), many of these cases continue to proceed to a "trial" of sorts where the claimant faces little contrary factual evaluation.

I. Significant SRBA decisions

The SRBA has given rise to several important water law issues, and promises to produce more. Some of the more noteworthy are listed below:

(1) Can one forfeit a portion of a water right?

One of the central decisions so far in the case, designated by the SRBA Court as Basin-Wide Issue No. 10, is whether Idaho's water right forfeiture law, Idaho Code § 42-222(2), allows the court to find forfeiture of only a part of a water right, or whether the use of any water under a right protects the entire right from forfeiture. The SRBA Court ruled that there is no such thing as "partial forfeiture" under Idaho law —in other words, the use of any portion of a water right maintained the validity of a long-unused (or even unusable) portion.

Obviously, there was a grave concern among many water right claimants—especially juniors—that a ruling upholding the SRBA Court would result in the decreeing of thousands of "paper" water rights in the SRBA and placing rights at risk. Not surprisingly, the Idaho Supreme Court found that a water right can be forfeited either in whole or in part and overturned the SRBA Court.

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(2) What is the effect of prior decrees in the SRBA?

Are decrees in prior private water rights adjudications, though affecting only those who were parties, nonetheless "conclusive" and "binding" on the Department and on all SRBA parties as the Department investigates actual beneficial uses under water rights today, absent a finding of forfeiture or abandonment? This was one of several questions in *Hagerman II.*[1137]

The Supreme Court, overturning the SRBA Court, ruled that such prior decrees are not binding on the Department or other parties. Also involved in the *Hagerman II* case was the issue whether the Director's Report should be treated as a mere "presumption" in the adjudication which can be overcome by virtually any evidence offered by the claimant. The Idaho Supreme Court ruled that the report is actual evidence that must be weighed against any other evidence.

(3) Inclusion of "general provisions" in the water rights decree

Idaho's general stream adjudication statute under which the SRBA proceeds states that the decree of water rights is to include, in addition to the basic elements of each water right, "such general provisions necessary for the definition or efficient administration of the water rights."[1138] In Basin-Wide Issues 5, 5A and 5B, the SRBA Court had rejected as unnecessary several general provisions the Department had recommended. The SRBA Court also had suggested that a general provision should not be included unless it applied to all water rights in the basin equally. The general provisions rejected by the SRBA Court included guidance on the use of water for firefighting, the definition of "irrigation season" for particular areas, the practice of using "excess water" outside the irrigation season, the use of irrigation water for incidental stock watering, and language regarding the relationship between ground and surface waters.

In *A&B Irrigation District*[1139] the Idaho Supreme Court rejected the SRBA Court's view that a general provision must apply to all rights or none, finding instead that such a provision could apply to less than all water rights in the basin.

The court upheld some of the Department's general provisions and rejected others: for example, a general provision authorizing the use of water for firefighting without a water right was held permissible because it was deemed necessary for the efficient

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[1137] *State v. Hagerman Water Right Owners, Inc. ("Hagerman II")*, 130 Idaho 736, 947 P.2d 409 (1997) (Schroeder, J.).

[1138] Idaho Code § 42-1412(6).

[1139] *A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d. 568 (1998).

administration of water rights. But a provision addressing the practice of diverting "excess water" was improper because such diversions could not be protected by a water right.

The court also held that, with respect to each irrigation water right, the decree must identify a "specific period of use setting forth a beginning date and an ending date." Consequently, the court rejected the SRBA Court's determination that the period of use should simply be generally described as "the irrigation season."[1140] *See also State v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1998) (pertaining to general provisions regarding rotation of diversions, treating a stream as two separate sources, and specially addressing storage water rights in a particular system).

(4) Conjunctive management of ground and surface water rights

An important part of the Supreme Court's decision on Basin-Wide Issue 5 was its ruling vacating the SRBA Court's order rejecting the Department's general provision addressing conjunctive management of ground and surface waters.[1141] The Idaho Supreme Court stated that the Legislature, in launching the SRBA, intended ground and surface water rights to be decreed and managed together, and ordered the SRBA Court to conduct hearings to determine whether general provisions on this subject are necessary. On remand, the court and the parties were faced with the prospect of complex and lengthy hearings concerning the specific interrelationships among thousands of water rights. Following the court's denial of the parties' cross-motions for summary judgment the parties stipulated to the inclusion of a generic general provision that simply provides notice to water users whether their rights are from interconnected sources and may be subject to conjunctive administration.[1142]

The conjunctive management issue also arose, at least implicitly, earlier in the SRBA in response to *Musser v. Higginson*.[1143] There, the Idaho Supreme Court ruled on a narrow point: that the Director has a mandatory duty under the version of Idaho's water

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[1140] *See* In re SRBA Case No. 39576, Subcase 91-00005, Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits (July 2, 2001); Connected Sources General Provision Memorandum Decision and Order of Partial Decree (February 27, 2002).

[1141] *A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d. 568, 580 (1998).

[1142] *See* In re SRBA Case No. 39576, Subcase 91-00005, Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits (July 2, 2001); Connected Sources General Provision Memorandum Decision and Order of Partial Decree (February 27, 2002).

[1143] *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

distribution statute then in force[1144] to deliver water upon demand to a holder of decreed water right.

The court upheld the SRBA Court's writ of mandate requiring the Director to deliver water to serve Mr. Musser's decreed entitlement, even though the delivery statute applies to adjudicated streams where there are watermasters to administer rights in priority. In this case the adjudicated stream was a canyon-wall spring fed by the vast Snake Plain Aquifer, and rights in the aquifer had not yet been adjudicated, declared part of the spring water source, or placed under the management of a watermaster. While there were others who diverted from the spring, the presumed real targets of the action were the ground water pumpers up-gradient.

The court's opinion in *Musser* does not address how the statute was to apply to the ground water right holders, who had not yet had an opportunity to have their rights adjudicated as against the spring diverters' water rights, or how the ground water pumpers would be provided some sort of due process in the matter.

The *Musser* decision was one of the factors leading to the Department's adoption of conjunctive management rules, which set forth the considerations that are to apply when a delivery call is imposed on ground water rights by senior surface rights. As to the writ of mandate itself, the matter became moot when Mr. Musser received a supply of water from another source.

(5) Geographic scope of the SRBA

Early on in the SRBA the Idaho Supreme Court ruled that the Idaho Legislature intended to include, in the adjudication, water rights on previously adjudicated tributaries. Part of the court's decision was based on the observation that the Legislature intended to leave no doubt that it would have McCarran jurisdiction.[1145]

(6) Can the United States be required to pay filing fees in the SRBA?

The Idaho Supreme Court thought so, but the U.S. Supreme Court gave this question a unanimous "no."[1146]

[1144] Idaho Code § 42-602.

[1145] *In re Snake River Basin Water System*, 115 Idaho 1, 832 P.2d 289 (1992), *cert. denied* 490 U.S. 1005 (1989).

[1146] *United States v. Idaho*, 113 S. Ct. 1893 (1993).

(7) Is it Constitutional for the Legislature to make changes in the SRBA after this court case has begun?

As noted above, in 1994, seven years after the SRBA began, the Legislature mandated certain procedural changes in the SRBA and removed the Director as a party. The Idaho Supreme Court upheld virtually all of the significant changes.[1147]

(8) Amnesty for illegal enlargements of water rights

Beginning in 1971 for surface water diversions, and 1963 for ground water, the Idaho Legislature prohibited the use of the "beneficial use" or "constitutional" method of appropriation. After these dates, all water rights could be acquired only by obtaining a permit and, ultimately, a license, from the Department. However, when it was writing the general adjudication statute to govern the SRBA, the Legislature became aware that many water users had, after the 1963 or 1971 dates, enlarged the number of irrigated acres in violation of the mandatory permit requirements by (in the typical case) irrigating additional acres outside the authorized place of use under the water right license or decree. These illegal enlargements often were accomplished through water conservation resulting from more efficient irrigation techniques, such as sprinklers and pipelines, that seemingly made more water available. In other cases, drain water was recaptured and reused. This water was then applied to newly developed land in a practice known as water spreading. In other words, they were able to irrigate more acres with the same quantify of diversion.

This may seem to be of zero practical consequence to other water users, but it is not. As more acres are brought under irrigation, consumptive use increases even if the quantity diverted remains the same. The increased consumptive use has to some for somewhere. It means that less water will remain in the aquifer and/or surface supplies to support other water rights.

In structuring its general adjudication statutes, the Legislature recognized that thousands of acres have been enlarged in violation of the mandatory permit requirements due to water "conservation or other means" whereby the same diversion under the original right is used to serve an enlarged use, such as new, unlicensed acres.[1148] One

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[1147] *State ex rel. Higginson v. United States* ("*Basin-Wide Issues 2 and 3*"), 128 Idaho 246, 912 P.2d 614 (1995).

[1148] Idaho Code § 42-1426(1)(a). The current enlargement statute, Idaho Code § 42-1426, is part of a trilogy of amnesty statutes aimed at shielding otherwise illegal water uses. Each of these also has a predecessor. The Legislature substituted the new versions when the older versions were declared unconstitutional by Judge Hurlbutt of the SRBA Court in 1994, thus mooting an appeal to the Idaho Supreme Court. They are:

- The "Accomplished Transfer Statute," Idaho Code § 42-1425 (formerly, Idaho Code §42-1416A).

option, of course, was to cut off these uses altogether. But, by enacting section 42-1426, the Legislature opted to allow these uses to continue, and to receive recognition in an adjudication as valid water rights, provided they were commenced before the 1987 date the Snake River Basin adjudication began.

Usually referred to as the "enlargement" or "amnesty" statute, section 42-1426 retroactively waives the mandatory permit requirements of the water code and provides that "a new water right may be decreed for the enlarged use," provided measures, including mitigation or advancement of the new right's priority, can be imposed to prevent injury to other water rights, including those existing on the statute's 1994 effective date but having priorities junior to the date enlargement took place (the authors refer to these as "post-enlargement rights").[1149]

Enlargement rights are conditioned so that they authorize irrigation of acres not previously authorized. But they do not allow any addition in total diversion quantities. This is accomplished by combined use conditions. Thus, the quantities stated on the face of the enlargement right add nothing when those rights are used in combination with the enlarged rights.

In *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J), the Idaho Supreme Court was asked to consider the constitutionality of the amnesty for these illegal enlargements. The question was whether the Legislature retroactively can validate illegal enlargements of water rights by such a waiver. The Idaho Supreme Court's answer is yes, but with a substantial caveat that sharply limits the result. The court cautioned that a waiver cannot operate so as to injure, such as by dilution of priority, any water right existing on the 1994 date the amnesty statute was enacted. The effect of this ruling is to require mitigation or a condition, such as a subordination, before an enlargement can be given a date-of-enlargement priority.

- The "Enlargement Statute," Idaho Code § 42-1426 (replacing the second presumption in the presumption statute, 1985 Idaho Sess. Laws, ch. 19 (formerly codified at Idaho Code § 42-1416(2)).
- The "Ambiguous Decree Statute," Idaho Code § 42-1427 (replacing the first presumption in the presumption statute, 1985 Idaho Sess. Laws, ch. 19 (formerly codified at Idaho Code § 42-1416(1)).

These precursor statutes are discussed briefly in *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 456-57, 926 P.2d 1301-02, 1304 (1996) (Schroeder, J).

[1149] Idaho Code § 42-1426(2).

Based on the statute and the court's ruling in *Fremont-Madison*, the Department, which recommends water rights to the adjudication court, added this "subordination remark" to all of these new enlargement water rights:

> This water right is subordinate to all other water rights with a priority date earlier than April 12, 1994, that are not decreed as enlargements pursuant to section 42-1426, Idaho Code. As between water rights decreed as enlargements pursuant to section 42-1426, Idaho Code, the earlier priority right is the superior right.

Thus, these otherwise illegal water appropriations can be recognized as new water rights in the Snake River Basin Adjudication, but they are treated as junior to all other non-enlargement water rights existing as of the April 12, 1994 date the amnesty statute became effective.

Nevertheless, a few holders of enlargements resisted this conclusion. For example, ground water pumpers in the A&B Irrigation District contended, first, that the Court's decision in *Fremont-Madison* did not establish a *per se* injury rule, thus allowing some room to argue that their recapture of waste water and use on expanded acreage did not injure other users. They also argued that, under the common law, water right holders are entitled to recapture and reuse waste water even if it does injure other users. The Idaho Supreme Court, upholding both the IDWR and the SRBA Court, unanimously rejected both arguments.[1150]

The SRBA Court's order affirmed in *A&B* clearly explains why the subordination condition is important in these amnesty cases—to protect priority among rights:

> [T]o 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.[1151]

The court noted that at the time an enlargement occurs the enlargement's effect on other appropriators "may not be physically apparent" because there may be sufficient

[1150] *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P.3d 78 (2005) (Schroeder, C.J.).

[1151] Order on Challenge (*A&B Irr. Dist.*) at 25.

water at that point to satisfy all.[1152] But when there is insufficient water for all rights on the system, the court observed that priority dates are significant.

> 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 [i.e., the subordination remark] 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.[1153]

In *A&B*, the Supreme Court upheld the SRBA Court. First, it held that *Fremont-Madison* did indeed create a *per se* injury rule requiring that expansions seeking protection under the amnesty statute are subject to a mitigation condition subordinating the expanded portion of the right to all rights existing on April 12, 1994 (the enactment date of the amnesty statute, Idaho Code § 42-1426). Second, the court ruled the amnesty statute does not apply at all to recapture of waste water. Third, it held that to the extent recapture of waste water is allowed, it is limited to reuse on the "original appropriated lots," not on expanded acreage.[1154] Indeed, the court observed that if recapture of waste water results in the user "having more excess drain and/or waste water than it can reuse on its appropriated properties, Idaho water law requires the district to diminish its diversion."[1155]

(9) Accomplished transfer statute upheld

In *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 457-58, 926 P.2d 1301, 1304-05 (1996) (Schroeder, J), the same "Basin-Wide Issue 4" case that addressed enlargements, discussed above, the Idaho Supreme Court upheld the "accomplished transfer" statute, Idaho Code § 42-1425, noting that it contained built-in protections which make it unavailable to transfers that result in injury or enlargement.

[1152] Order on Challenge (*A&B Irr. Dist.*) at 25.

[1153] Order on Challenge (*A&B Irr. Dist.*) at 25.

[1154] *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho at ___, 118 P.3d at ___ (2005)

[1155] *Id*.

In *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. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.),[1156] SRBA Judge Melanson (who retained the case after his appointment to the Idaho Court of Appeals) rejected the City of Pocatello's argument that the accomplished transfer statute does not apply to pre-1969 water rights. The Court noted that, while it is true that the current transfer statute (Idaho Code § 42-222) dates to May 26, 1969, a prior statute required transfer proceedings and even longer-standing common law imposed a no-injury rule on transfers. Accordingly, the Court ruled that IDWR has authority to recommend water rights that had been changed before 1969 without complying with the transfer statute and, more importantly, the agency has authority to evaluate those rights and recommend conditions to prevent injury.

The same Court also held that the accomplished transfer statute does not allow changes in the source of water, but only changes in place of use, point of diversion, nature or purpose of use, or period of use. The Court observed: "A change in source is essentially the appropriation of a new water right." *Id*. at 11.

Relying on *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 461, 926 P.2d 1301, 1308 (1996) (Schroeder, J), the Court again ruled that injury to priority is *per se* injury under the accomplished transfer statute. *Id*. at 12. Finally, the Court concluded that the accomplished transfer statute is, by its terms, unavailable to licenses issued subsequent to the commencement of the SRBA. *Id*. at 15.

(10) Public trust doctrine's applicability to water rights: The Court says yes, the Legislature says no

Conservation groups sought to intervene in the SRBA to assert public interest and public trust concerns. They argued that the SRBA Court is to consider and apply the public trust doctrine as a part of its evaluation of water right claims in the adjudication. The Idaho Supreme Court agreed with the SRBA Court that the public trust doctrine is not properly considered in the SRBA, and therefore upheld the denial of intervention. However, the high court stated that "the water rights adjudicated in the SRBA, as with all water rights, are impressed with a public trust."[1157] The Idaho Legislature responded to this ruling by abrogating the public trust doctrine's application to water in Idaho.[1158]

[1156] The synopsis to the published opinion incorrectly refers to this as an appeal from a decision of Judge Wildman.

[1157] *Idaho Conservation League v. State*, 128 Idaho 155, 911 P.2d 748, 750 (Idaho 1995).

[1158] *See* Idaho Code § 58-1201.

(11) State common law instream water right for wildlife refuge

In 1996, the SRBA Court concluded that the United States had obtained a "beneficial use" or "constitutional method" state water right in the instream flows of a stream and creek system by creating a wildlife refuge and managing wildlife there, despite the fact that it diverted no water. The State and several water user organizations appealed.

In the "Smith Springs" opinion issued March 9, 2000, the Idaho Supreme Court reversed the district court, thus denying the United States' claim to a water right under Idaho law for an instream wildlife use.[1159] Although the holding applies specifically to the federal claim involved, the decision presumably would apply to any party claiming a "private" instream flow water right under Idaho's "constitutional method." The *Smith Springs* decision lends weight to the argument that the Idaho minimum flow statute provides the only way to establish instream flows under Idaho law, at least where no diversion is involved. (This case is discussed further in section 23.E at page 439.)

(12) Whether federal reserved water rights were created by public water reserve no. 107

President Coolidge's 1926 Executive Order withdrew and reserved thousands of tracts of public land containing water holes and other water sources used by the public for watering purposes. In Basin-Wide Issue No. 9, the SRBA Court concluded that the Executive Order did not create a federal reserved water right. The Idaho Supreme Court reversed, ruling that the Executive Order was an express statement showing an intent to reserve federal water rights in the waters on these lands. *United States v. State* ("*Basin-Wide Issue 9*"), 131 Idaho 468, 959 P.2d 449 (1998) (Walters, J.).

(13) Denial of federal reserved right for instream flow in the Snake River to protect islands within wildlife refuge

In 1937 President Franklin Roosevelt established the Deer Flat National Wildlife Refuge near the Snake River, and included within it numerous islands in the river itself. The U.S. Fish & Wildlife Service claimed that Roosevelt's executive order established federal reserved water rights to instream flows in the Snake River to preserve these lands as islands, including channel scouring flows and flows necessary to maintain patterns of land accretion on them. The SRBA Court ruled that there is no federal reserved water right for these purposes.[1160] The U.S. Fish & Wildlife Service appealed to the Idaho

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[1159] *State v. United States*, 134 Idaho 106, 996 P.2d 806 (2000) ("Smith Springs" case).

[1160] *Memorandum Decision Granting State of Idaho's Motion for Summary Judgment*, In re SRBA, Deer Flat Wildlife Refuge Claims, Consolidated Subcase No. 02-10063, Idaho Fifth Judicial District Court (December 31, 1998).

Supreme Court, which upheld the lower court ruling.[1161] The United States did not seek certiorari to the United States Supreme Court, so the decision is final. This decision is discussed further in section 40.D(7) at page 748.

(14) Municipal water rights

A special master's ruling in 1995 noted that there is substantial authority in Idaho that municipal water suppliers have flexibility, under the prior appropriation doctrine, to acquire water rights for future, reasonably projected growth even though they have not yet fully developed them. While the decision did not rule on this point, it did conclude that the city's water right at issue would not be restricted to specified boundaries as the place of use other than the general notation of the "city limits."[1162] The decision was consistent with the position advanced in the case by United Water Idaho Inc., a municipal water supplier serving the Boise area. In 1996 the Idaho Legislature passed a statute specifically recognizing, and placing limitations upon, water rights for municipal purposes.

(15) Whether the United States has federal reserved water rights for wilderness areas and other special designations

Wilderness areas.[1163] The SRBA Court ruled in favor of the federal government on the wilderness reserved water rights question.[1164] On appeal, the Idaho Supreme Court first upheld this ruling, then reheard the matter in early 2000 and reversed its earlier ruling. This issue is discussed further in section 40.D(3) at page 739.

National Recreation Areas. The Idaho Supreme Court ruled that in establishing the Hells Canyon National Recreation Area in 1975,[1165] Congress expressly reserved sufficient water to satisfy the purposes of the reservation. The court noted that the Hell's

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[1161] *United States v. Idaho*, 135 Idaho 655, 23 P.3d 117 (2001).

[1162] *Special Master's Report, Findings of Fact and Conclusions of Law*, In re SRBA, Case No. 39576, Subcase No. 10030 (April 8, 1997).

[1163] *Potlatch Corporation v. United States*, Idaho Supreme Court Docket Nos. 24545-48 and 24557-59 (appeal filed February 24, 1998).

[1164] The SRBA Court's decision finding federal reserved water rights for wilderness can be found at In re SRBA, Consolidated Subcase No. 75-13605 *Order Granting in Part and Denying in Part United States' Motions for Summary Judgment,* Idaho Fifth Judicial District Court (Dec. 17 1997).

[1165] Hells Canyon National Recreation Act of 1975, Pub. L. No. 94-199, 89 Stat. 1117 (1975) (codified at 16 U.S.C. §§ 460gg(1)-(13)).

Canyon reservation was of both "land and water"[1166] and contained language exempting claims of water rights on certain rivers and tributaries. This issue is further discussed below at 40.D(4). On the other hand, in *Idaho v. United States*,[1167] the court found no reserved water rights were created for the Sawtooth National Recreation Area.[1168] The government had not asserted an express reserved right, so the case turned on whether the establishment of these recreation areas carried with it an implied reservation of water rights.[1169] This issue is discussed further in section 40.D(6) at pages 745 and 747. [1170]

Wild and scenic rivers.[1171] The SRBA Court found that the language in the Wild and Scenic Rivers Act, 16 U.S.C. § 1284(c), expressly created a reserved water right, but denied the United States' motion for a ruling that the reservation was for all unappropriated flows—leaving this second question for trial.[1172] The Idaho Supreme Court upheld this ruling, noting that the Wild and Scenic River Act expressly created federal reserved water rights for wild and scenic river designations.[1173] This decision is discussed further in section 40.D(5) at page 746. The State, the Forest Service, and various private water right holders mediated and ultimately settled the quantification question.

[1166] 16 U.S.C. § 460gg(b).

[1167] *Idaho v. United States*, 134 Idaho 940, 12 P.3d 1284 (2000) ("Smith Springs" case).

[1168] *Idaho v. United States*, 134 Idaho 940, 12 P.3d 1284 (2000) ("Smith Springs" case). The statute involved was the Act creating the Sawtooth National Recreation Area, Pub. L. No. 92-400, §§ 1-15, 86 Stat. 612 (codified at 16 U.S.C. §§ 460aa *et seq*.).

[1169] The State and Hecla Mining Company urged that the "no claim or denial" language contained in virtually all recent federal reservations—the "section 4(d)(6)" language in the Wilderness Act, for example—constitutes an express denial of water rights. The court rejected this claim, essentially saying that this statutory boilerplate (which commentators have debated for years) means nothing at all. *Idaho v. United States*, 12 P.3d at 1288.

[1170]For the SRBA District Court's rulings on these claims, *see* SRBA Consolidated Subcase Nos. 79-123597 (Hell's Canyon) and 65-20766 (Sawtooth).

[1171] *Potlatch Corporation v. United States*, *In re SRBA (Wild and Scenic Rivers Claims,* Nos. 25153 and 25154, (Idaho Supreme Court) (appeal filed November 25, 1998) (currently being briefed to the Idaho Supreme Court).

[1172] *Memorandum Decision Granting in Part and Denying in Part the United States' Motion for Summary Judgment*, Consolidated Subcase No. 75-13316, Idaho Fifth District Court (July 24, 1998).

[1173] Wild and Scenic Rivers Act of Oct. 2, 1968, Pub. L. No. 90-542, 82 Stat. 906 (codified as amended at 16 U.S.C. §§ 1271-1287).

Channel maintenance flows in National Forests under 1897 Organic Act. The SRBA Court denied the State of Idaho's motion for summary judgment seeking a ruling that the United States had no claim to channel maintenance flows under the Forest Organic Act of 1897.[1174] Accordingly, the United States was entitled to put on evidence at trial on the necessity for channel maintenance flows in streams in National Forest reservations. The State and other parties appealed this decision to the Idaho Supreme Court (appeal filed January 5, 1999). However, the matter was settled, with the United States withdrawing its claims.

Federal reserved water rights in National Forests under 1960 Multiple Use-Sustained Yield Act. The SRBA Court ruled that the Multiple Use-Sustained Yield Act ("MUSYA"), 16 U.S.C. §§ 528-531, did not establish any reserved water rights. The United States appealed this decision to the Idaho Supreme Court, which affirmed the SRBA Court's decision. The Idaho Supreme Court found that the United States Supreme Court had already rejected such claims in its 1978 decision in *United States v. New Mexico*.[1175] The United States did not seek review of this decision by the United States Supreme Court. This decision is discussed further in section 40.D(2) at page 739.

(16) Whether the Nez Perce Tribe has Indian reserved water rights for substantial instream flows at off-reservation locations in the Snake River, the Clearwater River, the Salmon River, and most of their tributaries

These claims raise the question whether the "Stevens Treaty" of 1855, particularly in light of subsequent treaties and agreements, reserved any instream flow water rights in favor of the Nez Perce Tribe. The claims encompass vast portions of the Snake River Basin in Idaho, including the Salmon River drainage, the Clearwater, and significant portions of the Snake. (See discussion in section 40.D(8) at page 750.)

(17) Duty of water

Several disputes have been fought about the duty of water question. Probably the most notorious to date have been the disputes in the Hagerman Valley along the Snake River west of Twin Falls where many claimants assert a right to more than three miner's inches of water per acre. (A miner's inch in Idaho is .02 cfs; 3 inches per acre would account for diversions of about 18 acre-feet per acre in a 150-day irrigation season.) There are instances of claimants asserting the right to over 6 inches per acre. In other

[1174] *In re SRBA, Case No. 39576, Organic Act Claims Consolidated Subcase 63-25243*, Memorandum Decision Denying State of Idaho's Motion for Summary Judgment (5th Dist. Idaho Dec. 22, 1998).

[1175] *United States v. City of Challis*, 133 Idaho 525, 988 P.2d 1199 (1999).

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instances, claims have been filed on more water than a pipeline or other conveyance system can accommodate.

Other examples:

Decrees for aesthetic and fish propagation dating back to the original priority date based on an early-century decree that specified only domestic, irrigation and "other uses."

Decrees for more water than claimed, due to the theory that each water right on a ditch is entitled to have a decree for the entire amount of carriage water needed to deliver the water to the claimant's place of use, and should not be limited to a sharing of conveyance water with other rights.[1176]

(18) Jurisdiction of the SRBA

The Idaho Supreme Court has held that the commencement of the SRBA in 1987 precluded all private actions for adjudication of water rights within the Snake River Basin water system.[1177] As a result, persons asserting a right to the use of water within the Snake River Basin that accrued prior to November 19, 1987 are required to file a claim for such right in the SRBA. (See discussion of post-commencement claims in section 37.B at page 701.)

To the extent a water right claim is within the SRBA's jurisdiction, an action that would involve the determination of the nature or extent of the claimed right must be brought there. This exclusive jurisdiction also extends to actions for the supplemental adjudication of water rights originally heard in the SRBA.[1178] However, although an action may involve a water right within the SRBA's jurisdiction, if the issues to be determined at trial do not involve a determination of the water right's elements, the SRBA does not have jurisdiction.[1179]

Regarding the SRBA court's authority to hear other water right matters, see the discussion of judicial review in section 14.B(11) at page 205.

[1176] *See, e.g., Findings of Fact and Conclusions of Law, Subcase Nos.36-0003A et al.,* SRBA District Court, Special Master Haemmerle (July 29, 1998).

[1177] *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 81, 856 P.2d 868, 871 (1993).

[1178] Idaho Code § 42-1424.

[1179] *Bischoff v. Salem Union Canal Co.*, 130 Idaho 455, 943 P.2d 45 (1997) (until underlying issues of fraud and self-dealing are determined by the trial court, determination of water right elements is not necessary and the SRBA Court has no jurisdiction).

J. General observations about Idaho's SRBA

General water rights adjudications pose a simple question to the claimant: What is your water right? With the exception of the legal issues raised by some of the federal and Indian reserved water rights claims (or an occasional dispute between private claimants), the answer to this question usually is not difficult to answer, and is tied as much to physics as to law: how many acres actually have been irrigated? What is the capacity of your diversion facility? What is the actual annual volume of water used in your manufacturing plant? When did the use begin? Is it continuing today?

The question may be simple, but in the SRBA achieving the answer often has proved difficult to wrest from the process. With respect to the state-law-based claims, most of the problems, and most of the costs to the parties, can be traced to one or more of the following:

- ✓ The difficulty and contentiousness that arise when one claims a larger water right than one has, "mistakes paper for water," disputes the usufructuary nature of water rights, or does not know (or neglects to tell) the truth about one's water right and its use. Coupled with this is the fact that there is no incentive for claimants not to overstate their water rights.

- ✓ A failure of the fact-finder to cut through the hail of legal arguments and procedural wrangling that litigants marshal in defense of what they believe their water rights to be—in other words, a failure to zero in on the essential simplicity of the proceeding as to most disputes.

- ✓ The problems inherent in determining or implementing the judicial procedures for carrying out a general water rights adjudication. These actions are *sui generis* (one-of-a-kind); in large measure, they have to be invented especially for this purpose and often adjusted as they go along. And they are of such a large size that they are bound to be slow and unwieldy in the best of circumstances. There are strong arguments that an adjudication based on initial administrative fact-finding would be more efficient than the formal judicial model, and Idaho's statute actually allows the Department to conduct hearings as necessary. Idaho Code § 42-1410(1) (in carrying out his investigation of a claimant's use, the Director "may conduct any fact-finding hearing necessary for a full and adequate disclosure of the facts.") However, so far there has been no attempt to use this power.

- ✓ The Legislature attempting to override or shade the appropriation doctrine in favor of certain groups, practices, or types of uses. Such efforts often lead to more litigation. An example in Idaho is the passage of the so-called "amnesty" statutes, whereby the Legislature retroactively waived the

mandatory permit requirement for enlargements of use under existing water rights.[1180] It took two trips to the Idaho Supreme Court for junior water right holders to show that they could not have additional water rights created now with priorities ahead of them. See section 37.I(8) at page 710.

[1180] Idaho Code § 42-1426.

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38. NORTHERN IDAHO ADJUDICATION ("NIA")

The Northern Idaho Adjudication ("NIA") consists of three separate river basin adjudications:

- Phase 1: Coeur d'Alene-Spokane River Basin Adjudication ("CSRBA") (Basins 91-95)[1181]
- Phase 2: Palouse River Basin Adjudication ("PRBA") (Basin 87)[1182]
- Phase 3: Clark Fork-Pend Oreille River Basins Adjudication ("CFPRBA") (Basins 96-97)[1183]

The CSRBA is the first of three adjudications that will occur within the larger Northern Idaho Adjudication. The Northern Idaho Adjudication will later extend to the Palouse River Basin and the Clark Fork-Pend Oreille River Basins.

In 2006, the Idaho Legislature authorized IDWR to proceed with planning and designing the mechanisms for implementing an adjudication of water rights in the Coeur d'Alene and Spokane River drainages. Idaho Code § 42-1406B.[1184] This is known as the Coeur d'Alene Spokane River Basin Adjudication ("CSRBA").

[1181] The CSRBA was commenced in 2008. Commencement Order for the Coeur d'Alene-Spokane River Basin General Adjudication, Case No. 49576 (Nov. 12, 2008).

[1182] The PRBA was commenced in 2017. Commencement Order for the Palouse River Basin General Adjudication, Case No. 59576 (Mar. 1, 2017).

[1183] The CFPRBA was commenced in 2021. On October 23, 2020, the State of Idaho filed a Petition to commence the CFPRBA (Case No. 69576). A commencement order was issued in 2021. Commencement Order for the Clark Fork-Pend Oreille River Basins Adjudication, *In re CFPRBA Case No. 69576* (June 15, 2021).

[1184] The legislation authorizing the adjudication was amended in three ways in 2008. First, the Legislature provided for the deferral of the adjudication of small domestic and stock water claims. 2008 Idaho Sess. Laws, ch. 149 (codified at Idaho Code § 42-1406B(1)). Under this provision, holders of these rights are given the option of not filing adjudication claims at this time. Similar deferral is provided in the SRBA adjudication. Second, the Legislature carved out the Kootenai River Basin from the scope of the adjudication. 2008 Idaho Sess. Laws, ch. 148 (codified at Idaho Code § 42-1414). A major motivation for the Northern Idaho Adjudication is the desire to strengthen Idaho's position in documenting its water use and management vis-à-vis the State of Washington. The Kootenai River is tributary to the Columbia River, which in turn flows through Washington. However, the Kootenai joins the Columbia in Canada, not Washington. Moreover, there are no significant water right conflicts on the Kootenai River. (There are significant environmental and flood management issues concerning water flows and storage releases on the Kootenai, particularly with respect to the operation of Libby Dam. But

The State of Idaho petitioned the district court to initiate the CSRBA litigation on July 3, 2008. *Petition* (July 3, 2008). The CSRBA was commenced by order of the district court on November 12, 2008. *Commencement Order for the Coeur d'Alene-Spokane River Basin General Adjudication* (Nov. 12, 2008); *Memorandum Decision on Petition to Commence Coeur d'Alene-Spokane River Basin General Adjudication* (Nov. 12, 2008); *Order Establishing Procedures for the Adjudication of DeMinimus [sic] Domestic and Stockwater Claims in the Coeur d'Alene-Spokane River Basin Adjudication* (Nov. 12, 2008).

On September 29, 2006 the Idaho Supreme Court issued a provisional order assigning the SRBA Judge (then John M. Melanson) to serve as presiding judge over the Northern Idaho Adjudication. The presiding judge is now Eric J. Wildman.

Like the SRBA, the Northern Idaho Adjudication is a McCarran Amendment proceeding. 43 U.S.C. § 666. This means that the federal government has waived its sovereign immunity, and that federal water rights may be adjudicated in this state court proceeding.[1185]

This adjudication will be modeled largely on the SRBA process, which has been underway for decades in southern Idaho and is now nearing its completion. A big difference, however, will be how the Department handles beneficial use claims. In the SRBA, a claimant simply filed a form asserting the existence of such a right. The Department initiated an often time-consuming process of soliciting and evaluating evidence in support of the claim. The Department has learned, the hard way, to demand such evidence up front. The end result is expected to be a more streamlined process (from the Department's perspective) and a more rigorous process (from the applicant's perspective).

The process is also expected to move much faster because the parties can build on the substantial body of law developed in the course of the SRBA. That process was stalled for years as the Idaho Supreme Court heard a series of "basin-wide" issues on interlocutory appeal. That cumbersome process, one would hope, need not be repeated.

Finally, the state of computer technology and data interconnection is far superior to what it was when the SRBA was initiated. IDWR will now be able to take advantage

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these are not conflicts driven by water rights.) Consequently, it was felt unnecessary to adjudicate the Kootenai River at this time. Third, the Legislature reduced the fees charged for claims to match the fees set for the SRBA in 1987. 2008 Idaho Sess. Laws, ch. 148 (codified at Idaho Code § 42-1406B(1)).

[1185] This entailed the negotiation of a stipulation with the federal government confirming that the State may defer domestic and stock water claims consistent with the McCarran Amendment, as contemplated under 2008 Idaho Sess. Laws, ch. 149 (codified at Idaho Code § 42-1406B(1)).

of extensive data bases at the local government level (which often bear indirectly on water use).

This is a general adjudication of water rights in which every person claiming to own a water right must file a *Notice of Claim* for each right. As was the case with the SRBA, the obligation to claim *de minimis* domestic and stockwater rights (as defined Idaho Code §§ 42-111 & 42-1401A) is "deferred," meaning that they need not be filed now. Idaho Code § 42-1406B(1).[1186] Relatively modest fees are required for each claim, which are set out in Idaho Code § 42-1414.

Except for deferred claims, claims must be filed for all water rights based on a license, decree, or historic use in existence on the date of commencement (November 12, 2008), or on a permit for which proof of beneficial use was filed on or before the date of commencement (November 12, 2008).[1187] Idaho Code § 42-1420(c). If no claim is filed, the water right will be lost forever once the adjudication is completed. Claims may be filed, but are not required to be filed, for permits for which proof of beneficial use has been filed after November 12, 2008.

[1186] The deferral of these claims in the Northern Idaho Adjudication is authorized in Idaho Code § 42-1406B(1), which instructs IDWR to including in the petition for commencement a request for such deferral. This deferral is also described extensively in the *Commencement Order for the Coeur d'Alene-Spokane River Basin General Adjudication* (Nov. 12, 2008) and a separate *Order Establishing Procedures for the Adjudication of De Minimis Domestic and Stockwater Claims in the Coeur d'Alene-Spokane River Basin Adjudication* (Nov. 12, 2008). This deferral could be indefinite. Filing of such claims is still allowed, but is optional. Given the value of these rights, and the value of their documentation for purposes of sales or borrowing, it would be foolish, in the authors' view, not to file a claim.

[1187] "All claimants asserting rights to the use of surface or ground waters under state law from the above-described water system, including pursuant to state license, historic use, federal or state court decree and holders of permits for which proof of beneficial use was filed on or prior to the date of entry of this Commencement Order for the Coeur d'Alene-Spokane River Basin Adjudication ('Commencement Order'), shall file a notice of claim with the director as provided in Idaho Code § 42-1409 (Supp. 2008), unless claimants elect to defer the adjudication of domestic and stock water rights as defined in subsections (4) and (11) of Idaho Code 42-1401(A). All claimants asserting rights to the use of surface and ground waters under federal law from the above-described water system shall file a notice of claim as required by the *Notice of Order Commencing a General Adjudication* prepared by the Director or as otherwise ordered by the Court, unless claimants elect to defer the adjudication of domestic and stock water rights as defined in subsections (4) and (11) of Idaho Code 42-1401(A)." *Commencement Order for the Coeur d'Alene-Spokane River Basin General Adjudication* at 5 ¶ 7 (Nov. 12, 2008).

Note that the *Notice of Claim* is filed with the IDWR.[1188] *Objections* and *Responses to Objections* (discussed below), and everything else in the adjudication, are filed in District Court for the Fifth Judicial District.[1189]

IDWR sent a notice of commencement to the owner of each water right of record. That notice specified a deadline for filing a *Notice of Claim* for that water right. Each of the deadlines (typically in 2011) for filing a *Notice of Claim* in the CSRBA has passed. (There are ways to still file a late claim. See discussion below.)

For non-federal claims, the next step is for the Director of IDWR to prepare a *Director's Report* in which he evaluates each claim and makes a recommendation to the CSRBA Court as to whether and how it should be decreed. This is done in an iterative process in which the Director first issues a *Preliminary Director's Report*. This allows minor errors to be called to the attention of the IDWR and corrected administratively without judicial action.[1190]

Once the *Director's Report* issues, any water right claimant may file an *Objection* (known as Standard Form 1) to any water right listed in the *Director's Report*. For example, if a water right owner filed a *Notice of Claim* claiming a water right for 0.5 cfs, and the Director issued a *Director's Report* recommending approval of the right but only for 0.25 cfs, the owner should file an *Objection* to the *Director's Report* if he or she

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[1188] This is confusing, because the *Notice of Claim* form itself (which is prepared by IDWR) has a caption reading "In the District Court . . .". But it is not filed with the District Court. It is filed with the IDWR, which then forwards the *Notice of Claim* to the District Court. Indeed, the *Notice of Claim* may be filed in hard copy or online at IDWR's website.

[1189] This, too, is curious, because the Fifth Judicial District does not cover North Idaho. The Fifth Judicial District Court, in Twin Falls, was designated as the court to handle the Snake River Basin Adjudication. Indeed, they built a separate building for it. That court, including Judge Wildman, the Special Masters, and entire staff will now be the court handling all of the Northern Idaho Adjudication, including the CSRBA. To the extent required, the Judge and the Special Masters will travel to North Idaho for hearings. However, many of the proceedings will probably be conducted via video linkups with the courtroom in Twin Falls.

[1190] As noted in my June 18, 2014 memorandum, this is known as the error correction process. Neither the Idaho Code nor the *CSRBA's Administrative Order 1* address this process. However, early on in the Snake River Basin Adjudication, the IDWR filed a motion with the District Court seeking authorization to implement a "notice of error" process to informally resolve disagreements claimants had with the IDWR's recommendation of their water rights. No order approving use of the notice of error process has been entered in the CSRBA. However, Carter Fritschle, with IDWR's Adjudication Bureau, informed my partner, Mike Creamer, that the notice of error process is being used in the CSRBA even though it is not provided for in any order of the Court. This error correction process, by the way, is not to be confused with the "error correction process" addressed in *CSRBA Administrative Order 1* at page 15, which deals with the correction of errors in partial decrees.

objects to the downsizing. Likewise, any other water right claimant (such as a neighbor) could file an *Objection* to the recommendation. The *Objection* identifies the particular "element" of the water right that is objected to and also allows the objector to generically object by checking a box saying, "This water right should not exist." This terminology is a bit confusing, because both the proponent of the right (the owner/claimant) and someone who opposes the right (e.g., the neighbor) would file a document called an *Objection*. This terminology reflects the fact that they are not objecting to the water right; they are objecting to the *Director's Report.*

The next step is for water right claimants to file something called a *Response to Objection* (known as Standard Form 2). This might be filed by the claimant responding to an *Objection* filed by another party. Or it might be filed by another party. Following the example above, the neighbor might agree with the *Director's Report* recommending downsizing to 0.25 cfs and therefore file no *Objection*. But after the owner/claimant filed an *Objection* saying that the right should be decreed for the full 0.5 cfs, it is incumbent on the neighbor to file a *Response to Objection*. Otherwise, IDWR might agree with the owner/claimant's *Objection* and allow the water right to be decreed for the full 0.5 cfs, and the neighbor would have no standing to object.

In other words, the only way to get a seat at the table (that is, to secure a right to receive notice of further actions, to disagree, and to litigate) is to file either an *Objection* or a *Response to Objection* (or both). This is the equivalent of intervening in a lawsuit. Even though every water right claimant is a party to the adjudication as a whole, the water right holder has no right to participate in any sub-case (that is, the determination of any particular water right) unless he or she files an *Objection* or *Response to Objection* to the water right.

Note, however, that the Director includes only non-federal claims in the *Director's Report*. The various federal claims, including the tribal claims, go directly to adjudication without any recommendation from the Director. This is the reason that the tribal and other federal claims are on a faster track.

Persons who filed claims in the CSRBA received a *Notice of Filing Federal Reserved Water Right Claims*. That notice established a deadline of September 29, 2014 to file an *Objection* and November 28, 2014 to file a *Response to Objection*. However, CSRBA Administrative Order 1 at page 7 requires notification of the Court seven days earlier where the more than 25 *Objections* or *Responses to Objections* are involved.

In order to file an *Objection* or *Response to Objection*, it is necessary first to file a *Notice of Claim*. In other words, persons not claiming water rights may not participate in the CSRBA.

There is a mechanism for filing a *Motion for Leave to File a Late Notice of Claim* (known as Standard Form 4). *CSRBA Administrative Order 1* at page 8. Certain

additional fees apply to late claims. Idaho Code § 42-1414(3). Based on the prior general adjudications, it is safe to assume that these late claims routinely will be allowed, at least during the early stages of the adjudication. Moreover, prior to the filing of the *Director's Report*, it is not even necessary to file a motion. Instead, the claimant may simply file the *Notice of Claim* along with the late fee.[1191]

[1191] An order issued by the District Court Judge provides: "In reporting areas where a Director's Report has not been filed, a late notice claim shall be filed with IDWR. A *Motion to File a Late Notice of Claim* is not required to be filed with the Court." *CSRBA Administrative Order 1* at page 8.

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39. BEAR RIVER BASIN ADJUDICATION ("BRBA").

In 2020, the Legislature enacted legislation authorizing a petition to commence the Bear River Basin Adjudication ("BRBA").[1192] The petition to commence was filed seven months later.[1193]

[1192] H.B. 382, 2020 Idaho Sess. Laws, ch. 50 (Mar. 9, 2020) (codified at Idaho Code § 42-1406C).

[1193] Petition to Commence Bear River Basin Adjudication, *In re BRBA Case No. 79576* (Nov. 20, 2020).

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40. FEDERAL RESERVED WATER RIGHTS

A. Recent decisions

Note the following decisions, which are not reflected in the discussion of this topic below.

See the following decision on limiting the transfer of federal reserved rights held by Indian Tribes from irrigation to instream uses: *United States v. Truckee-Carson Irr. Dist.*, 429 F.3d 902 (9th Cir. 2005). This case has not yet been incorporated into the discussion below.

In 2006, SRBA Judge Melanson rejected a novel argument by the City of Pocatello that it was entitled to a federal reserved water right based on the Pocatello Townsite Act. *In re SRBA* Case No. 39576, Subcase No. 29-11609, City of Pocatello – Federal Law Claims, (Idaho, Fifth Dist. Ct., Memorandum Decision and Order Oct. 6, 2006).

The reader should also note other recent decisions, such as *Skokomish Indian Tribe v. United States*, 401 F.3d 979 (9th Cir. 2005) (Tribe's reservation of the right to fish in the usual and accustomed fishing grounds under 1855 treaty did not establish a reserved right to water under the Winters doctrine.), *superseded by* 410 F.3d 506 (2005) (deleting section dealing with federal reserved water rights).

B. Introduction

The federal reserved rights doctrine has become deeply ingrained in lore of western water law. It is a favorite of law professors and law students, of Native Americans, of environmentalists, and, generally, of those who support bigger government. It is not so popular with just about everybody else.

Like the weather, people love it or cuss it, but no one ever does anything about it. Not until a series of recent cases in Idaho, that is.

C. Background

(1) Federal deference to State water law

The federal reserved rights doctrine is a curious example of the exercise of a federal power which is at once great and restrained.

It is great, in that the federal government has the authority to preempt state law when it acts under its delegated powers (e.g., the commerce and property powers of the

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Constitution) coupled with the Supremacy Clause of the Constitution.[1194] Given the breadth of the commerce power, in particular, there is little doubt that Congress has the power to override state water law where it chooses to do so.[1195] When it exercises that

[1194] U.S. Const. art. VI, cl. 2 (Supremacy Clause); U.S. Const. art. I, § 8, cl. 3 (Commerce Clause); U.S. Const. art. IV, § 3, cl. 2 (Property Clause).

[1195] For six decades, the U.S. Supreme Court upheld every federal statute challenged on the basis of exceeding the Congress' power under the Commerce Clause. U.S. Const. art. I, § 8, cl. 3 (Commerce Clause). E.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (federal crop limitations applying to wheat grown and consumed on farm are a proper exercise of the commerce power because the wheat consumed may have displaced interstate wheat which the farmer otherwise would have had to purchase on the interstate market); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (application of the Civil Rights Act as a proper exercise of the commerce power where the only effect on interstate commerce was purchase of interstate meat and serving of interstate customers by Ollie's Barbecue).

In 1995 the Supreme Court startled some in the legal community with its decision in *United States v. Lopez*, 514 U.S. 549 (1995). This 5-4 decision (with two concurrences and three dissents) struck down a federal law which made it a crime to possess a gun within 1,000 feet of a school. The Justice Department argued that guns near schools hinder students' ability to learn, which hinders their ability to compete in the global economy. This connection was so general and so broad that it would sustain federal regulation of virtually any activity, said the Court. If this sort of "but-for" logic was sufficient to sustain the connection to interstate commerce, it would "obliterate the distinction between what is national and what is local and create a completely centralized government." *Lopez*, 514 U.S. at 557.

The perception of a sea change in constitutional law was substantially diminished one week later, however, when the Supreme Court handed down its unanimous, two-page long, per curium decision in *United States v. Robertson*, 514 U.S. 669 (1995). Robertson (who happened to be a decorated Vietnam veteran, former prosecutor, and former criminal defense lawyer) was a drug dealer who invested the proceeds of his illegal activity in an Alaska gold mine. The federal government charged him with RICO violations. The mine plainly was engaged in interstate commerce, the Court concluded. Despite the fact that the gold produced primarily was sold within the state, Robertson had hired miners and purchased equipment from outside the state.

Five years later, the Supreme Court took another, but somewhat more careful, swipe at the broad application of the Commerce Clause. In *United States v. Morrison*, 120 S. Ct. 1740 (2000), the Court struck down, again, by 5-4, the Violence Against Women Act. This law provided a new federal cause of action to victims of gender-based violence. The Court said the problem, though serious, is essentially local, that is, a matter of state concern and not a proper subject for federal legislation.

Interestingly, the *Morrison* Court did not question—much less overturn—*Wickard* and the other broad-application cases. Rather, it limited them to situations in which Congress was regulating commercial activity. *Morrison*, 120 S. Ct. at 1740 n.4. Thus, it appears that the Court will continue to allow federal regulation of commercial activity "based solely on that conduct's aggregate effect on interstate commerce." *Morrison*, 120 S. Ct. at 1754. But it will not employ this looser chain of causality where the activity to be regulated is not commercial activity at all, but activity which falls within areas of traditional state control, most notably criminal and family law. *Morrison* pointedly omitted saying anything about federal regulation of the environment, so

power, the result is to upset often settled expectations of property rights. Those on the losing end are left without recourse.[1196]

On the other hand, the Congress has long hesitated to use this great power. Congress, particularly in earlier years, kept mostly to the sidelines when it came to western water disputes by deferring to state law.[1197]

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it remains to be argued whether that is ordinary commerce (federal) or general welfare (state). Opponents of federal regulation might use *Morrison* as a wedge. They might challenge certain environmental laws on the basis that, at their core, their objective is not to regulate commerce, but to protect human health and enjoyment (thus falling more within the States' traditional welfare power). However, absent a further shift in the Court, this appears to be a long shot.

On a separate constitutional track, the *Morrison* decision continues to prop up federal regulation resting on the more traditional regulation of the "instrumentalities" of interstate commerce (e.g., navigable waters) as well as "persons or things" in commerce. But the door remains open for challenges at the edge of navigability, e.g., the regulation of isolated wetlands.

In 2005, the Court decided *Gonzales v. Raich*, 545 U.S. 1 (2005) (Stephens, J.), the medical marijuana case. Plaintiffs grew marijuana at their homes for personal consumption in accordance with medical treatment by their doctors pursuant to California's Compassionate Use Act. When the federal agents seized their plants, they sought a declaratory judgment that the federal Controlled Substances Act, as applied to them, was an unconstitutional exercise of the Commerce Clause. Plaintiffs argued that the Controlled Substances Act was similar to the laws struck down in *Lopez* and *Morrison*. The Supreme Court rejected that analogy, emphasizing that the Controlled Substances Act regulates economic behavior. The Court explained that *Lopez* dealt with "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." *Gonzales*, 545 U.S. at 24 (Stevens., J.). The Court said that "our 'substantial effects' cases generally have upheld federal regulation of economic activity that affected interstate commerce." *Gonzales*, 545 U.S. at 44 (Scalia, J., concurring). "Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. 'Economics' refers to 'the production, distribution, and consumption of commodities.' Webster's Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Gonzales*, 545 U.S. at 25-26 (Stevens., J.).

Thus, despite the initial excitement (or panic) caused by the *Lopez* decision, it now appears that the Supreme Court intended a more modest correction with respect to what remains a broad application of the Commerce Clause. Consequently, it appears safe to assume that most federal environmental and natural resource statutes will continue to pass muster under the Commerce Clause—so long as they are perceived as regulating commercial activity.

[1196] The central, but unstated, purpose of the reserved rights doctrine is to allow government action without compensation under the Takings Clause.

[1197] "When Congress has addressed expressly the subject of water rights, it generally has deferred to state law. *See*, *e.g.*, Reclamation Act of 1902, 43 U.S.C. § 383 (1982); Forest Service Organic Act of 1897, 16 U.S.C. § 481 (1982); Desert Land Act of 1877, 43 U.S.C. § 321 (1982); Act of July 9, 1870, 43 U.S.C. § 661 (1982); Mining Act of 1866, *Id.* The leading judicial

When one considers the broad range of natural resource matters that Congress has subjected to national control—from mineral extraction to hydropower to air pollution—it is perhaps surprising that Congress has been so reluctant to do likewise with respect to water allocation. Indeed, while Congress has moved aggressively to preempt the field of water *quality* by enacting the Clean Water Act and other statutes, it has historically given the states relatively free rein with respect to water *quantity* (i.e., water allocation).

This dichotomy is founded not so much in logic or policy, as in history. The first settlers in the West were really squatters. The land and all of its resources, including water, were owned almost entirely by the federal government. Miners, farmers, and ranchers took what they needed from the federal land, usually scratching out an existence and occasionally amassing great wealth.

When Congress got around to actively managing the nation's vast western estate, resource use patterns already had been established by local custom. Although Congress quickly passed laws controlling (and encouraging) the exploitation of its land resources through such legislation as the Homestead Act of 1862[1198] and the General Mining Law of 1872,[1199] when it came to water, Congress enacted statutes deliberately not repudiating the pattern of development established by the settlers.[1200] In the language of the day, by these land statutes Congress "severed" the water flowing on public lands from the land itself. Thus, for instance, when Congress issued patents conveying land to homesteaders and miners, those conveyances did not include water rights. Water was "severed" from the land, so that it might remain a public resource, subject to appropriation on the basis of beneficial use by private parties under state law.

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interpretations of these statutes are *California v. United States*, 438 U.S. 645 (1978); *United States v. New Mexico*, 438 U.S. 696 (1978) (Rehnquist, J.); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); and *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899)." Brian E. Gray, *No Holier Temples: Protecting the National Parks through Wild and Scenic River Designations*, 58 U. Colo. L. Rev. 551 (1988).

[1198] Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392 (previously codified in part at 43 U.S.C. §§ 161-163) (repealed by FLPMA).

[1199] General Mining Law of 1872, 30 U.S.C. § 22.

[1200] This deference to state water laws and established allocation systems was articulated in three federal statutes governing the allocation of water on federal lands. The Act of July 26, 1866, ch. 262, § 9, 14 Stat. 253 (codified at 30 U.S.C. § 661) ("the Lode Law"); the Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218 (also codified at 43 U.S.C. § 661) ("the Placer Law"); and the Desert Land Act of Mar. 3, 1877, ch. 107, 19 Stat. 377 (codified at 43 U.S.C. § 321). Of course, other statutes reflected congressional deference to state water law in other contexts. *See*, *e.g.*, Reclamation Act of 1902, quoted in section 33 at page 664.

In so doing, the Congress seemingly washed its hands of any role in allocating water in the West—or at least so thought a lot of Western water lawyers. In fact, the federal government's power over water on federal lands was merely dormant.

(2) Origins of the reserved rights doctrine

Federal power over water was first articulated in a once-obscure Indian law decision handed down by the U.S. Supreme Court in 1908 known as *Winters v. United States*, 207 U.S. 564 (1908) (McKenna, J.). In 1888 the United States entered into a treaty with the Gros Ventre and Assiniboine bands or tribes of Indians creating the Fort Belknap Indian Reservation along the Milk River in Montana. In the Court's words, the purpose of the treaty was to convert "a nomadic and uncivilized people" into a "pastoral and civilized people."[1201] The Court found that the Indians' former means of subsistence was made impossible by their forfeiture of lands under treaty, and that their only opportunity for survival was irrigated agriculture. The Court then concluded that while the treaty failed to reserve explicitly any water rights for the Indians, such a reservation must have been implied for the Indians to sustain themselves. The Court construed the treaty to mean that water was intended.

For many decades, Westerners viewed the *Winters* case as an anomaly of Indian law, and nothing more. The first clue that this might not be so came in 1955. In the Pelton Dam case,[1202] the Court first hinted that this implied reserved rights doctrine might extend to other federal reservations. It held that the Desert Land Act[1203] (which made water on public land subject to private appropriation) was inapplicable to reservations for purposes of developing hydroelectric power. While Pelton Dam was not decided under the rubric of the reserved water rights doctrine, and did not involve the government's use of water on a federal reservation, it implied that the federal government's private licensee was exercising a water right held by the United States that had been withheld from state control as a function of the power site reservation.

What Pelton Dam presaged was confirmed in 1963 by the Supreme Court's holding in *Arizona v. California*, 373 U.S. 546 (1963) (Black, J.). The so-called Winters doctrine, said the Court, could be applied to all federal "reservations" where water was necessary. Suddenly national parks, forests, and wildlife refuges—any federal land area "reserved" from settlement, sale, or entry under the mining and homestead laws—were

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[1201] *Winters*, 207 U.S. at 576.

[1202] *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955) (Burton, J.) (the "Pelton Dam" case).

[1203] See footnote 1200 at page 732 for citations to the Desert Land Act and related statutes.

seen as potentially carrying federal reserved water rights just like the Fort Belknap Tribes won in 1908.

The federal reserved water rights doctrine now has been applied by the U.S. Supreme Court eight times[1204] and may be condensed to this simple principle quoted from a 1976 case:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.

Cappaert v. United States, 426 U.S. 128, 138 (1976) (Burger, J.).

Some may see this "doctrine" as a substantive rule of law, with the effect that whenever federal land is reserved, a federal reserved water right is automatically created. But it clearly is not a substantive rule of law. Rather, it is a rule that guides a court's construction of a statute, treaty, or executive order whose text fails to address the water question. This rule of construction comes into play in those cases where Congress or the Executive, in creating a reservation, inadvertently failed to address the question of water in the situation where water is necessary to carry out the primary purposes of the reservation. More on this below.

Once established, these federal reserved water rights share many of the attributes of private appropriative rights under state law. First and foremost, they fit into the state priority system. They may be quantified in state court proceedings[1205] to a specific flow at a particular place with a fixed priority date. In this respect, federal reserved rights operate very much like ordinary appropriative rights.

In other significant respects, however, federal water rights differ from appropriative rights acquired under state law. Most importantly, federal reserved rights

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[1204] *Winters v. United States*, 207 U.S. 564 (1908) (McKenna, J.); *United States v. Powers*, 305 U.S. 527 (1939) (McReynolds, J.); *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955) (Burton, J.); *Arizona v. California*, 373 U.S. 546 (1963) (Black, J.); *United States v. District Court for Eagle Cnty.,* 401 U.S. 520 (1971) (Douglas, J.); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (Brennan, J.); *Cappaert v. United States*, 426 U.S. 128 (1976) (Burger, J.); *United States v. New Mexico*, 438 U.S. 696 (1978) (Rehnquist, J.).

[1205] In 1952 the Congress enacted the McCarran Amendment, 43 U.S.C. § 666, which waived sovereign immunity and allowed the United States to be joined in state court actions to quantify water rights. The act applies, however, only to general stream adjudications of an entire river basin, and not to administrative proceedings or lawsuits over individual water rights.

arise by implication drawn from federal statute, not through notice, an express intent to appropriate water or other compliance with state procedures. They are then inserted into the state's priority line-up of water rights, carrying a priority essentially "back-dated" to the date of the federal reservation, making them senior to any private state water rights arising after that.

Federal reserved rights also need not conform to state substantive law. For instance, a federal reserved right may be obtained for instream flow rights even in a state which does not recognize instream rights or which recognizes them only when held by a state agency.[1206] Federal reserved water rights thus intrude on the authority of states to grant or deny water rights, they arise by implication and without any express quantity element, and they carry a priority potentially disruptive to existing water rights.

Note that federal reserved water rights must be based on a "reservation" of land. In *Sierra Club v. Watt*, the court of Appeals for the District of Columbia ruled that the Federal Land Policy Management Act of 1976 (which governs non-reserved BLM lands) does not create federal reserved water rights.[1207]

[1206] For instance, the Idaho Supreme Court recently rejected claims for instream rights asserted by the federal government under state law. *Idaho v. United States*, 134 Idaho 106, 996 P.2d 806 (2000) (the "Smith Springs" case). The Idaho court determined that the diversion requirement is alive and well, and is excused only for water right claims made pursuant to specific state instream flow statutes. Those statutes authorize only certain state agencies to hold these instream rights.

[1207] In *Sierra Club v. Andrus*, 487 F. Supp. 443 (D. D.C. 1980), *aff'd, Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir.), the Sierra Club sued DOI for its failure to assert federal reserved water rights on various federal lands. Various energy projects were seeking water rights in a Utah general adjudication. The U.S. had not been joined under the McCarran Act and was taking no action to assert senior federal water rights. The district court granted summary judgment and motions to dismiss against Sierra Club. The court held that alleged "trust duties" are subsumed by the various organic statutes and that DOI had discretion as to most effective way of protecting public resources. (The court spoke in terms of "trust obligations" and "trust duties." There is no mention in the opinion of the public trust doctrine as such. Court's basic point was that federal reserved water rights, if they exist, would be senior to any new water rights being sought, and that they would be unaffected by the state court proceeding to which the U.S. was not a party. Accordingly, the district court concluded that it was not unreasonable for DOI to sit out the state proceedings. The district court, however, did not gut the idea of the federal government's responsibility to take action. It held that in the event of a "real and immediate" threat, DOI must take appropriate action. The Sierra Club took a narrow appeal, limited to the question of whether FLPMA created federal reserved water rights. Just prior to oral argument, the U.S. was made a party to the Utah general adjudication. Accordingly, the Court of Appeals reached the merits of this claim. The appeals court found no federal reserved water rights because (1) there was no "reservation" of public lands and (2) the savings clause in FLPMA precluded creation of new

(3) Primary purposes only

By 1978, the reserved rights doctrine was firmly in place. What was unsettled at that point was how much water was reserved—more specifically, for what purposes were water rights reserved? That question was addressed in *United States v. New Mexico*, 438 U.S. 696 (1978) (Rehnquist, J.), the first Supreme Court case to substantially cut back on the doctrine. The case arose in a general adjudication of water in New Mexico, which included claims of the United States for rights to the water of the Rio Mimbres in the Gila National Forest.

The state district court and later the New Mexico Supreme Court recognized the federal government's claim to a reserved right, but not for the broadly claimed environmental, recreational, and other purposes (including instream flows) asserted by the federal government. The U.S. Supreme Court affirmed, holding that the designation of the national forest in 1899 by President McKinley pursuant to the Organic Administration Act of June 4, 1897, 30 Stat. 34 (codified at 16 U.S.C. § 473 *et seq.*) (which created the U.S. Forest Service) was limited to two narrow purposes identified in the original legislation. The Court rejected the argument that the more recent Multiple Use Sustained Yield Act of June 12, 1960, Pub. L. No. 86-517, 74 Stat. 215 (codified at 16 U.S.C. §§ 528-531) ("MUSYA") expanded the reservation to include more water for a broader range of purposes. In essence, the Court held that MUSYA has no retroactive effect.

The Court began by recognizing its holding in *Cappaert* that "Congress reserved 'only that amount of water necessary to fulfill the purpose of the reservation, no more.'" *New Mexico* at 700 (quoting *Cappaert* at 141). The Court then held that a doctrine built on mere implication of congressional intent should only go so far.

> Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.
>
> This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. Where water is necessary to fulfill the very purposes for which a federal reservation

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federal water rights. The appeals court recited the holdings of the district court regarding trust duties, but it did not address them because they had not been appeal.

> was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

New Mexico at 700-02 (footnotes and citations omitted).

The Court concluded that the Organic Act authorized the designation of national forests for two and only two primary purposes: "timber preservation and enhancement of water supply." *New Mexico* at 713 n.21.[1208] On this basis, the Court concluded that water rights for other purposes, including instream flows and stock watering, were not impliedly reserved.[1209]

It should be kept in mind that *New Mexico* dealt only with the primary purposes of national forests, not other reservations.[1210] Indeed, the decision expressly noted that other reservations (such as those for national parks) were made for more extensive primary purposes.

It would appear that the *New Mexico* Court may have had an incomplete understanding of the practical impact of federal reserved water rights on other water users. Early in the decision, the Court describes a "gallon-for-gallon" reduction in water available to others:

[1208] The repeated references in the decision to the importance of national forests to water supply is best understood in historical context. In early days of settlement, forests were stripped bare. The result was catastrophic flooding to communities hundreds and even thousands of miles downstream. Thus, the reference to "securing favorable conditions of water flows" in the Organic Act was not a reference to securing instream flows within the forest. It was a reference to the role of forest vegetation in stabilizing flows downstream.

[1209] Justice Powell's dissent in this 5-4 decision includes a compelling rejoinder to Justice Rehnquist's conclusion that only two primary purposes where mentioned in the Organic Act. The dissent notes that the first-listed purpose is to "improve and protect the forest within the boundaries." *New Mexico* at 720 (quoting the Organic Act, 16 U.S.C. § 475).

[1210] The *New Mexico* Court applied an essentially nationwide standard to all national forests. The Court's cookie-cutter approach was criticized in Meg Osswald, *Seeing the Forest for the Trees: The Case for Individualized Analysis of Implied Federally Reserved Water Rights on National Forests*, 7 Ariz. J. Envtl. L. & Pol'y (2016). Ms. Osswald urges that courts should take into account not only the Organic Act, but any legislation specific to the designation of the particular national forest.

> The quantification of reserved water rights for the national forests is of critical importance to the West, where, as noted earlier, water is scarce and where more than 50% of the available water either originates in or flows through national forests. When, as in the case of the Rio Mimbres, a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators. This reality has not escaped the attention of Congress and must be weighed in determining what, if any, water Congress reserved for use in the national forests.

New Mexico at 705 (emphasis added, footnote omitted).

That effect on other water users is a possible, but relatively rare case. Non-consumptive uses, such as instream flows, have zero effect on the water available to downstream water users. To the extent the reservation lies in the headwaters, reserved rights for instream flows have no impact downstream. On the other hand, where reservations are located downstream of existing or future development, instream flow protections would be senior to any water right created after the date of the reserved water right. This is discussed further below in the context wilderness reserved rights. (The Colorado battle was purely academic—albeit precedent setting, involving headwater wilderness. The Idaho litigation involved downriver wilderness that had real implications for upstream water development.)

D. Federal reserved rights litigation in Idaho

Idaho, long an important source for the development of new theories of water law,[1211] again finds itself on the front lines. In the last few years, more federal reserved rights jurisprudence has been produced by the Idaho Supreme Court than any other.

(1) Stock watering on federal land

In 1998, the Idaho Supreme Court ruled on Public Water Reserve No. 107 ("PWR 107") in *United States v. State* ("*Basin-Wide Issue 9*"), 131 Idaho 468, 959 P.2d 449 (1998). In that case, the United States asserted claims in the SRBA to federal reserved water rights under PWR 107, a federal executive order issued by President Calvin

[1211] *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912) (reasonable means of diversion); *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973) (optimum development of water resources); *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985) (local public interest).

Coolidge in 1926. The executive order withdrew and reserved to the United States all springs and watering holes on unreserved federal land.

The government's claims were denied by the district court, but the Idaho Supreme Court reversed, holding that the 1926 executive order created federal reserved water rights. Whether the court viewed this as an express or an implied right is somewhat unclear. The state supreme court recited the law of implied reserved rights as the basis for the decision. Yet, the court declared: "After considering the plain and ordinary words of the enabling statutes and executive order underlying PWR 107, we conclude that PWR 107 evidences an express intention by Congress that reserves a water right in the United States." *Basin-Wide Issue 9*, 131 Idaho at 471, 959 P.2d at 452.

First, the language is oxymoronic. If it is merely an intention (something unstated), how can it be express? Moreover, if it were an express reservation, then what was the point of reciting all the law of implied federal reserved rights? The more sensible understanding of what the court said is that it meant that there was an "express intention by Congress to protect the water resource which gives rise to an *implied* reserved right." The unfortunate upshot of all this is that the Idaho Supreme Court's language did not clarify, but further confused the debate over the nature of the reserved rights doctrine.

(2) MUSYA

Whether the Court's discussion of MUSYA in *New Mexico* was dictum or not, the Idaho Supreme Court caught the U.S. Supreme Court's drift, and rejected any notion of federal reserved rights under MUSYA in *United States v. Challis*, 133 Idaho 525, 988 P.2d 1199 (1999). The Idaho Court ruled that the reserved rights doctrine only applies to "reservations" of land. Whatever MUSYA did, it did not reserve (or "re-reserve") land. Hence, no implication of reserved rights could follow.

Neither the PWR 107 nor the MUSYA cases offered any startling new insights into the reserved rights doctrine. These cases set the tone, however, for a more measured and skeptical application of the doctrine. This tone would more fully resonate in the cases that followed.

(3) Wilderness areas

Note: Two of the authors of this Handbook published an article on this subject, focusing on the Idaho litigation: Jeffery C. Fereday & Christopher H. 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). A rebuttal to that piece was published simultaneously (and without notice to the authors of the first article): Michael C. Blumm, *Federal Reserved Water Rights as a Rule of Law*, 52 Idaho L. Rev. 369 (2016).

No doubt, the highest visibility battles over water rights in Idaho have been fought over wilderness water rights. The issue has always inflamed passion, and Idaho proved no exception.

The Idaho courts were not writing on a blank slate. The question of whether wilderness areas carry implied reserved water rights was vigorously debated during the 1980s. First, in 1984 the Sierra Club brought suit in Colorado to force the federal government to claim reserved water rights on existing wilderness areas in that state. The federal district court issued an opinion finding that reserved rights indeed arise from wilderness reservations. The court ordered the federal government to develop a plan to protect water flows in wilderness areas (which might or might not include adjudication of these rights). *Sierra Club v. Block*, 622 F. Supp. 842 (D. Colo. 1985). In another iteration in the same litigation, *Sierra Club v. Lyng*, 661 F. Supp. 1490 (D. Colo. 1987), the court reiterated that with Wilderness Act implicitly created federal reserved water rights. On appeal, however, the Tenth Circuit dismissed the case and vacated the opinion on the ground that the matter was not ripe for review (because Sierra Club had not pointed to any imminent harm). *Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990).

In the Idaho litigation, not even the federal government cited the vacated *Ling* opinion as precedent for what the Idaho courts should do. Consequently, this line of litigation left no clear judicial statement on the status of reserved rights for wilderness areas.

Meanwhile, a federal court in New Mexico reached the opposite conclusion with respect to both wilderness areas and wild and scenic rivers. *New Mexico v. Molybdenum Corp. of America ("Red River Adjudication")*, CV No. 9780 C (D. N.M., Order Approving and Affirming Report of Special Master, Feb. 2, 1988).

On yet another front, Democratic and Republican administrations issued predictable "pro" and "con" opinions on the subject. The latest in this line of flip-flops was issued in 1988 by then-Attorney General Edwin Meese who joined with then-Secretary of the Interior, Donald Hodel, in issuing a non-binding advisory opinion on the subject of wilderness water rights during Mr. Meese's final week in office under the Reagan Administration.[1212] Mr. Meese concluded that in enacting the Wilderness Act, the

[1212] Federal Reserved Water Rights in Wilderness Areas, Opinion M-36914, Supp. III (July 26, 1988) (by Solicitor Ralph W. Tarr). This opinion followed a series of opinions on the subject of federal water rights issued by the Interior Department. Much of the discussion in these opinions focused on the theory of "nonreserved water rights"—a theory conceived in the Carter Administration, but which has never gotten off the ground. The nonreserved rights theory argues that the federal government may appropriate water notwithstanding state law not only to achieve the primary purposes of federal reservation (under the reserved rights doctrine), but also for secondary purposes and for the purposes of nonreserved lands.

The first and the broadest articulation of the administrative authority to appropriate was that found in the Krulitz Opinion in 1979. Federal Water Rights of the National Park Service,

Congress intended to defer to Western water law and create no implied water rights.[1213]

None of this, nor any of the thousands of pages of law review articles on the subject, bothered to explore the fundamental nature of the federal reserved rights doctrine we outline above—that is, its status as only a rule of statutory construction, a tool to determine Congressional intent when Congress fails to address the water question. Instead, one partisan after another recited the mantra of the U.S. Supreme Court—if land

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Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management (Opinion M-36914), 86 Interior Dec. 553 (June 25, 1979) (by Solicitor Leo Krulitz) ("Krulitz Opinion"). Solicitor Krulitz determined that the federal government is empowered to preempt state law as necessary when four conditions are met: (1) the Congress assigns a land management function to a federal agency, (2) the Congress did not expressly prohibit the preemption, (3) unappropriated water is available, and (4) the water is in fact put to use.

This was followed, in the same year, by the *Martz Opinion*, which embraced the general reasoning of the Krulitz Opinion, but concluded that as applied to the Taylor Grazing Act and FLPMA, no authority to preempt state law was intended. This left the theory intact but of vastly diminished applicability. *Supplement to Solicitor Opinion No. M-36914, on Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation and the Bureau of Land Management (Opinion M-36914, Supp.)*, 88 Interior Dec. 253 (Jan. 16, 1981) (by Solicitor Clyde O. Martz). (The first supplement is called "Supp." The second is called "Supp. I.")

Solicitor Coldiron did an about-face with his 1981 Opinion which flatly announced, "[T]here is no federal 'non-reserved' water right." *Nonreserved Water Rights—United States Compliance with State Law (Opinion M-36914, Supp. I)*, 88 Interior Dec. 1055, 1064 (Sept. 11, 1981) (by Solicitor William H. Coldiron). Even Solicitor Coldiron, however, did not doubt the Congress' power to preempt, but he concluded that Congress has not exercised it beyond the scope of reserved rights and the navigation servitude.

The next to be released—with great fanfare by the Department of Justice—was the *Olson Opinion*. *Legal Memorandum: Federal "Non-Reserved" Water Rights*, Office of Legal Counsel, U.S. Dep't of Justice (June 16, 1982) (by Assistant Attorney General Theodore B. Olson). The agency's press releases announced, "The nightmare is over." The Opinion itself, however, was a far cry from what the public posturing on both sides would have suggested. In fact, the Opinion is a thoughtfully reasoned rejection of the Coldiron Opinion; it articulates a theoretical basis for asserting preemptive federal appropriative water rights. After 80 pages of analysis, however, the Opinion stopped short of applying its reasoning to particular statutes, settling instead for the observation that "such rights probably cannot be asserted under the current statutory schemes."

See also a subsequent opinion by Solicitor Coldiron, Purposes of Executive Order of April 17, 1926, *Establishing Public Water Reserve No. 107 (Opinion M-36914, Supp. II)* (Feb. 16, 1983) (by Solicitor William H. Coldiron). (N.B., this opinion does not appear in the appropriate volume of Interior Decisions.)

[1213] A thoughtful rebuttal to the Meese/Hodel opinion was issued by the Congressional Research Service, *CRS Report for Congress: Wilderness Areas and Federal Water Rights* (Jan. 4, 1989) (by staff attorney Pamela Baldwin).

reservation and primary purpose needing water, then implied water right—hoping to put just the proper spin on it.

The Idaho litigation contrasts with the shadow boxing over wilderness rights in the *Sierra Club v. Block* line of cases. In *Block*, an environmental group sought to provoke a fight, but never managed to engage. It was, from start to finish, an academic dispute over access to water in headwaters wilderness areas. Because these wilderness areas were in the headwaters, the wilderness act itself prevented any real threat to the water. (Only the President, in a national emergency, could overcome that protection.) Tacking on a federal water right was, thus, a belt and suspenders operation.

The situation in Idaho is far different, and prompted a fresh look at what the doctrine really entails. Three wilderness areas were at issue: the Frank Church-River of No Return, the Gospel-Hump, and the Selway-Bitterroot. The first two of these are anything but headwater areas. Significant resorts, industries, agricultural properties, and even whole towns are located upstream of these areas. Indeed, a significant part of the debate over the boundaries of the Frank Church Wilderness was aimed at making sure that certain upstream mining properties were excluded through the time-honored "cherrystem" technique of gerrymandering.

Thus, federal reserved rights with priority dates reaching back to 1964 (Selway-Bitterroot), 1978 (Gospel-Hump), and 1980 (Frank Church) would have the power to curtail uses upstream that have come on line since that date, and potentially to block all future development in these upstream valleys and inholdings—despite the fact that these areas had been excluded from the wilderness specifically so that they could continue to grow. Indeed, the claims reached not only upstream surface users, but up-gradient ground water users.

Needless to say, it came as quite a shock to many who had participated in this compromise when the federal government showed up some twenty years later in the Snake River Basin Adjudication claiming all the water.[1214]

Perhaps the most curious thing about the federal claims in Idaho is their flip side. On the one hand, they posed very real threats to upstream water users. Indeed, in response to the federal wilderness claims, the Director of the Idaho Department of Water Resources issued a moratorium on all new appropriations upstream and up-gradient of the wilderness areas. On the other hand, the impact of the reserved rights (had they been recognized) on the environment was (as in Colorado) purely academic.

[1214] After winning the first round before the Idaho Supreme Court, and facing a motion for reconsideration (and a mountain of bad publicity), the federal government backed off its claim for all the water, insisting that it never expected that much.

Even the United States conceded that there was no threat, current or foreseen, to Idaho wilderness values as a result of any reasonably predicted upstream ground or surface water diversions. Thus, while these federal water right claims would have had immediate adverse economic effect on hundreds of upstream users outside the wilderness, they would do nothing to improve the wilderness. They were sought by the government on a purely "just in case — you never know" basis. Or on the basis that the principle was what mattered.

When the issue reached the Idaho Supreme Court, it at first upheld the federal government's claims, in a 3 to 2 decision. *Potlatch Corp. v. United States* ("*Potlatch I*"), 1999 WL 778325 (Oct. 1, 1999) (unpublished opinion). A year later, following the grant of a motion for reconsideration, further briefing and argument, the Court reversed itself and rejected the federal claims, again by a 3 to 2 vote, one justice having changed her mind.[1215] *Potlatch Corp. v. United States ("Potlatch II")*, 134 Idaho 916, 12 P.3d 1260 (2000).

In the end, the Court did what no other court or commentator had done before. It rejected the wooden application of the reserved rights doctrine, in favor of recognition that the "doctrine" is nothing more than means to divine congressional intent. No mechanical test based on the application of primary and secondary purposes was necessary. In briefing and oral argument, the Court was asked to recognize that after the Pelton Dam decision Congress no longer was silent on the water rights issue, and in fact began debating it in the process of passing every subsequent land reservation or management statute. In stark contrast to the pre-Pelton Dam reservations, Congress vigorously debated the water issue before enacting the Wilderness Act and the two other Idaho wilderness statutes enacted thereafter. Given this, the essential point made in the briefs submitted on behalf of Potlatch was that Congress could not have intended to create federal reserved water rights by implication when it debated the point but did not include an express water reservation in the statute. Potlatch pointed out that Congress' intentional inaction on the water question was doubly confirmed by the "neither yes nor no" language in section 4(d)(6) of the Wilderness Act: "Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws."[1216] Which amounts to Congress saying, "We're not

[1215] All this took place against the backdrop of intense political discussion. Justice Silak, who authored the original majority opinion, was challenged in her retention election by then District Judge Daniel Eismann, who openly criticized the water rights decision and ultimately prevailed in the election. Following the election, on rehearing of the decision, Chief Justice Trout changed sides and became the author of the new majority opinion. The makeup of the Court had not changed at this point. Justice Silak was still on the Court at the time of the rehearing, and authored the new dissenting opinion.

[1216] 16 U.S.C. § 1133(d)(6).

saying whether we intend to create a federal reserved water right for these purposes." This is not language that creates anything.

The practical reality also was not lost on the Idaho Supreme Court. Idaho's former Senators Frank Church and Jim McClure would never have promoted legislation containing a preemptive federal water right whose very existence would require shutting down all new water-dependent activity upstream of the wilderness areas being created. On rehearing, the Idaho Supreme Court recognized as much:

> Congress could not and would not have passed a bill that implied a water right that would prevent the appropriation of water under state law beyond the boundaries of the wilderness areas. There was no more important person than Frank Church in the development of wilderness legislation. A review of the Frank Church papers brings home the reality that Senator Church would not have advocated or voted for the Wilderness Act but for his understanding that the Act would not cripple the economic growth of portions of Idaho outside the wilderness.[1217]

This "focus on Congress' intent" analysis is a far cry from the wooden application of a law-review based doctrine that has dominated the debate for the last thirty years or more. As Justice Schroeder said, "Little about the background and principles of *Winters* is applicable to this case."[1218]

The concurrency by Justice Trout (whose vote changed the result) was even more direct: "I have come to question the continued vitality of the doctrine."[1219] In the end, the "implication" at the center of the reserved rights doctrine was turned on its head by the Idaho court:

> Because [at the time of *Winters*] Congress was not yet aware of the potential conflict between state and federal water rights, it was understandable that Congress could have remained silent about the existence of a water right, and yet still intended to reserve water for purposes of the reservation. Thus, through the holding in *Winters* and its progeny, the

[1217] *Potlatch II*, 12 P.3d at 1268 (Justice Schroeder for the majority).

[1218] *Potlatch II*, 12 P.3d at 1264.

[1219] *Potlatch II*, 12 P.3d at 1270 (Chief Justice Trout, concurring). Presumably, Chief Justice Trout was questioning the vitality of the doctrine to interpret post-*Pelton* reservations, where the reserved water issue was debated and, typically, evasive words such as "neither claiming nor denying" water rights were inserted.

> United States Supreme Court recognized a federal reserved water right where, had Congress thought about it, it would have believed water was necessary to accomplish the purposes of the reservation.
> . . . Where, as in this case, Congress has chosen for whatever reason, not to create an express water right despite its knowledge of a potential conflict, I believe it can no longer be inferred that such a water right is necessary to fulfill the purposes of the reservation.[1220]

The United States—whose briefing and argument had studiously avoided debating the points Potlatch raised about legislative intent in light of Congress' post-Pelton Dam attention to the water question—determined not to seek U.S. Supreme Court review of this decision.

(4) Hells Canyon National Recreation Area

In the very same decision, *Potlatch II*, the Idaho Supreme Court ruled that in establishing the Hells Canyon National Recreation Area in 1975,[1221] Congress expressly reserved sufficient water to satisfy the purposes of the reservation. The court noted that the reservation was of both "land and water"[1222] and contained language exempting claims of water rights on certain rivers and tributaries.

The Court remanded for a determination of quantity, the minimum necessary to fulfill the purpose of the reservation. Here the court cited *Cappaert*. The federal reserved rights doctrine, it seems, is being converted from a theory for implying new water rights into a mechanism for filling in the details of unartfully articulated but nonetheless express water rights. This is consistent with how the Idaho court handled the PWR 107 claims, discussed above.

The United States, the State of Idaho, and various water users ultimately settled the federal government's claims to various amounts and locations of instream flows and lake levels under this reserved right. Adopting the stipulation, the SRBA Court decreed some 25 separate reserved water rights, all for streams and lakes within the Hells Canyon NRA that are tributary to the Snake River in this reach; the rights do not include any

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[1220] *Potlatch II*, 12 P.3d at 1270-71 (J. Trout, specially concurring).

[1221] Hells Canyon National Recreation Act of 1975, Pub. L. No. 94-199, 89 Stat. 1117 (1975) (codified at 16 U.S.C. §§ 460gg(1)-(13)).

[1222] 16 U.S.C. § 460gg(b).

flows in the Snake River itself.[1223] The decree subordinates the reserved rights to all water rights and permits existing when the SRBA began in 1987, and also to future domestic and stock water rights. Due to the scant private land ownership in the area, there likely is only limited opportunity for conflict between such future uses and the reserved water rights decreed by the SRBA Court.

(5) Wild and scenic rivers

In *Potlatch Corp. v. United States ("Potlatch III")*, 134 Idaho 912, 12 P.3d 1256 (2000) (Schroeder, J.) (a companion case to *Potlatch II*), the Idaho Supreme Court recognized federal reserved water rights for wild and scenic river designations.[1224] This, too, however, was done on the basis of an express reservation, found in section 13(c) of the Act.[1225]

Potlatch had urged that the odd, negative language employed by the Wild and Scenic Rivers statute reflected a common misunderstanding about how the doctrine worked, and was intended merely to set an upper limit on quantity—in the event that a court might someday find reserved water rights were intended for the reservation. The Idaho Supreme Court rejected this argument, concluding that while the language is awkward, it was clear enough to constitute an express, affirmative federal reserved right. (This is consistent with what the majority of commentators have suggested over the years.[1226])

In a subsequent settlement similar to that reached in the Hells Canyon case—but significantly more complicated with respect to the instream flows established for certain of the rivers—the federal government, the state, and private water users stipulated to the decree of wild and scenic reserved water rights in the following rivers: Salmon, Middle

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[1223] *Order Approving Stipulation and Entry of Basin 79 Partial Decrees,* Subcase No. 79-13597, Hells Canyon National Recreation Area Act Claims, In re SRBA, District Court for the Fifth Judicial District of Idaho (November 16, 2004).

[1224] Wild and Scenic Rivers Act of Oct. 2, 1968, Pub. L. No. 90-542, 82 Stat. 906 (codified as amended at 16 U.S.C. §§ 1271-1287).

[1225] "Designation of any stream or portion thereof as a national wild, scenic or recreational river area shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this chapter, or in quantities greater than necessary to accomplish these purposes." Section 13(c), 16 U.S.C. § 1284(c).

[1226] E.g., Pamela Baldwin, *Water Rights and the Wild and Scenic Rivers Act*, Congressional Research Service Report for Congress (Mar. 30, 1990).

Fork Salmon, Rapid, Selway, Lochsa, and Middle Fork Clearwater.[1227] This settlement contained similar subordinations of the federal water right in favor of future domestic and stock water rights. With respect to some of the rivers, it also set forth limited subordinations to future municipal, commercial, and industrial uses.

(6) Sawtooth National Recreation Area

In *Idaho v. United States*,[1228] the court found no reserved water rights were created for the Sawtooth National Recreation Area.[1229] No party asserted an express reserved right.[1230] The case turned on whether the establishment of these wilderness and recreation areas in 1972 carried with it an implied reservation of water rights.

The court's conclusion was consistent with its analysis in the companion case, *Potlatch II*. In reaching its decision on the Sawtooth, however, the court reverted to a more traditional analysis under the reserved rights doctrine.

The court began with a recitation of the traditional reserved rights analysis (primary versus secondary purpose; entire defeat of primary purpose). It then divided the Sawtooth into its wilderness and non-wilderness components. (This national recreation area contains both.) In each case, the court identified a relatively limited primary purpose (e.g., "protect that area from the dangers of unregulated mining") and then concluded that the purpose could be accomplished without a reserved water right.

While this "primary-secondary/entirely defeat" analysis seems logical, in practice it provides minimal structure to guide a court's analysis of the reserved water right question. For instance, the district court seized on references to fish and wildlife, took judicial notice of the fact that "fish need water," and then concluded that a reserved right was essential to prevent the entire defeat of a primary purpose. The Supreme Court rejected this analysis: "While we agree that fish require water, we do not agree judicial notice of this fact establishes that without such water the purposes of the non-wilderness

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[1227] *Order Approving Stipulation and Entry of Partial Decrees*, Consolidated Subcase No. 75-13316, In re SRBA, Case No. 39576, District Court for the Fifth Judicial District of Idaho (November 16, 2004).

[1228] *Idaho v. United States ("Sawtooth")*, 134 Idaho 940, 12 P.3d 1284 (2000).

[1229] Act creating the Sawtooth National Recreation Area, Pub. L. No. 92-400, §§ 1-15, 86 Stat. 612 (codified at 16 U.S.C. §§ 460aa *et seq*.).

[1230] The State and Hecla Mining urged that the "no claim or denial" language contained in virtually all recent federal reservations constitutes an express denial of water rights. The Court rejected this claim, essentially saying that the boilerplate (which commentators have debated for years) means nothing at all. *Idaho v. United States, 12 P.3d at 1288*.

portion of the Sawtooth NRA will be entirely defeated."[1231] The Idaho Supreme Court's simultaneous ruling in *Potlatch II* appears to present a more predictable and appropriate analysis: instead of attempting to divine what purposes are "primary" or which would be "entirely defeated," the court indicated that the real question is whether Congress *intended* to establish a federal purposes water right where it actively debated the point and then declined to insert statutory language clearly doing so. With regard to post-*Pelton* legislation such as the 1972 Sawtooth National Recreation Area Act, and given the Idaho Supreme Court's decision in *Potlatch II,* it is not clear why this same court used a traditional "purposes" analysis in *Sawtooth.*

This may be explained in part by the fact that Potlatch Corporation, whose briefing was reflected in the court's decision in *Potlatch II*, was not a party to the *Sawtooth* litigation—the parties to which argued the case on the more traditional theories adopted by the court. Nevertheless, it is odd that decisions in such high visibility litigation would not be more thoughtfully integrated.

In any event, the court in *Sawtooth* stepped through a traditional analysis, beginning with a ritual separation of primary and secondary purposes, before reaching the ultimate question: did Congress intend to create reserved water rights?

In this opinion, Justice Schroeder did not repeat his observation that *Winters* has little to do with these modern, post-*Pelton* statutes. Nor did Justice Trout, author of *Sawtooth*, question the continued vitality of the reserved rights doctrine as it applies to this post-*Pelton* statute. One is left with the question why, if the implied reservation of water rights doctrine has no vitality in these modern land statutes, did the court apply it at all in the very next case, on the very next page in the reporter?

Perhaps the answer is that the implied reserved rights doctrine is deeply ingrained in the thinking of water lawyers; its status as a "doctrine" is difficult to criticize when it comes to pre-*Pelton* land reservations. It likewise is difficult to shake the doctrine's inherent elegance, or perhaps its talismanic appeal. Like the recitation of Latin phrases, the doctrine has a certain constancy, and it surely provides some intellectual comfort. With respect to modern statutes, however, it is time to recognize that the doctrine must be treated for what it really is: a canon of statutory construction. In each of these, Congress could not reasonably be seen as having implied a federal reserved water right by statutory silence (or dissembling) when the matter was front-and-center in the lawmakers' debates and in the national debate carried out by various interest groups.

(7) Deer Flat National Wildlife Refuge

The cases above suggest that the courts, at least those in Idaho, will no longer be as willing to indulge Congress when, in modern (post-1955) land legislation, it invariably

[1231] 134 Idaho at 946, 12 P.3d at 1290.

grapples with the issue of federal water rights, but then fails to expressly state its intentions. But what of the "old" reservations? Is the reserved water right question still just a question of determining whether water is necessary, or is there a willingness to look beyond that and attempt to actually divine congressional *intent* as to the question of a federal water right? If the most recent Idaho cases on the subject are any clue, the answer is "yes, the courts may be willing to look at what Congress must have intended, and put the water right question in the context of the overall purpose of the land designation.

In *United States v. Idaho*,[1232] the Idaho Supreme Court rejected a claim for federal reserved water rights associated with the Deer Flat National Wildlife Refuge on the Snake River in 1937. The federal government asserted that the establishment of the refuge—and particularly the inclusion of certain river islands—carried with it implied reserved water rights; islands need water to remain islands.

In rejecting this argument, the Idaho Court stepped through a traditional analysis of the doctrine, identifying the primary purposes and then determining whether water was essential to their achievement. In clinging to this rigid outline, the court appears, at first glance, to be more concerned with the rituals of the doctrine than with the ultimate goal of divining congressional intent. But when we turn to the merits of what the Court did, we find it focusing once again on what Congress intended.

Here is an example:

> It is inconceivable that President Roosevelt in 1937, in the context of the dust bowl years, intended to give preference to waterfowl, or any other migratory bird over people. The reclamation projects themselves assure that water in the Snake River will be controlled for the benefit of agriculture. . . . The presidents and other executives promulgating policy had the ability, and most likely the knowledge, that they could reserve a federal water right if that were essential. They did not do so expressly. And they did not do so by implication, considering the historical context in which they acted.[1233]

This strongly suggests that the Idaho Court's adherence to the rigid analysis of the implied reservation of water rights doctrine is more cosmetic than substantive. The Court may continue to step through the minuet dictated by the doctrine. At the end of the

[1232] *United States v. Idaho*, 135 Idaho 655, 23 P.3d 117 (2001).

[1233] *United States v. Idaho*, 135 Idaho at 666-67, 23 P.3d at 128-29.

dance, however, it is plainly more interested in the political reality of the congressional grant—what did Congress intend, and what was the context?

Thus, it appears that in Idaho both "old" and "new" reservations are being subjected to an increasingly vigorous inquiry when it comes to the implication of federal reserved water rights. Simply reciting that "this reservation needs water" no longer appears to be sufficient.

(8) Nez Perce tribal claims

This conclusion is accentuated by the district court's decision in the *Nez Perce* litigation. *In re Case No. 39576, Consolidated Subcase 03-10022 ("Nez Perce")*, Idaho Fifth Judicial District Court. (Order on Motions for Summary Judgment, Nov. 10, 1999). This decision by Judge Wood, who was then presiding judge in the Snake River Basin Adjudication, dismissed arguments by the Tribe that it was entitled to off-reservation, instream flow reserved water rights under *United States v. Winans*, 198 U.S. 371 (1905), a variant of the reserved rights doctrine.

Judge Wood's analysis is grounded in the same reality checking as expressed in the Idaho Supreme Court's recent decisions:

> It is inconceivable that the United States would have intended or otherwise agreed to allow the Nez Perce to reserve instream flow off-reservation water rights appurtenant to lands intended to be developed and irrigated by non-Indian settlers. . . . [I]t defies reason to imply the existence of a water right that was both never intended by the parties and inconsistent with the purpose of the Treaty. The Nez Perce submit that the issue pertaining to the quantity of water reserved is beyond the scope of these proceedings. However, for illustrative purposes it is helpful to point out that the Nez Perce's amended instream flow claim for the lowermost point on the Snake River is for 105% of the average annual flow of the Snake, Clearwater, and Salmon Rivers combined.

Id. at 38.

The parties subsequently entered into a settlement of the Nez Perce claims. The "settlement" actually is a framework for settlement contained in an unsigned document entitled "Mediator's Term Sheet" dated April 14, 2004, herein referred to as the "Agreement" or the "Term Sheet." Federal and state legislation, as well as certain actions by the SRBA Court and federal agencies, later rendered the settlement final.

(9) Shoshone-Bannock tribal claims

The Shoshone-Bannock Tribes of the Fort Hall Indian Reservation reached an agreement with the State of Idaho and irrigators designed to settle their claims to water in the Upper Snake River. The Shoshone-Bannock claims to this water derive from the Second Treaty of Fort Bridger of July 3, 1868, and supplemental executive orders and agreements. The agreement involves over a million acre-feet per year of Tribal natural flow, storage and ground water rights.

(10) National forest reservations

The United States also filed reserved rights claims on various national forests throughout Idaho. These claims were ultimately withdrawn as part of a settlement.

E. Conclusion as to reserved water rights

There is no turning back the clock to the days of single-minded development of water resources. At both the state and federal level, we should expect to see environmental evaluation increasingly integrated into water allocation decisions.

On the other hand, it is likely that courts are less willing to accomplish this goal by a doctrine relying on implication. One might say the courts are tiring of congressional failure to deal with the hard questions, and are increasingly reluctant to read meaning into statutory silence amounting to informed legislative avoidance. Where the silence occurs in legislation where the debates reveal no discussion about water, the traditional reserved water rights analysis presumably will be in play—though perhaps subject to more scrutiny. However, those statutes enacted after debate on exactly the point of whether to establish a reserved federal water right likely will not get the traditional treatment. Indeed, in the wilderness and similar land-designating statutes enacted since 1980, Congress has expressly dealt with the issue of creating water rights, either expressly doing so or expressly disclaiming them. It is unlikely that Congress ever again will enact a statute where it is silent on the water right question, or where such silence could be said to give rise to an implied federal entitlement. The water question is too much a front-and-center issue now.

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41. CLEAN WATER ACT AND OTHER FEDERAL REGULATION OF WATER

Fifty or a hundred years ago, a fight over water meant a fight over water rights. Increasingly, however, the question of who owns the water right is proving to be only a part of the larger water puzzle. Control of water today is a function not just of *ownership* of the water right, but also of the extent of government *regulation* of the activities involved.

Over the years, the federal government has enacted a host of environmental laws that significantly affect the allocation of water. While these laws do not create water "rights" as such,[1234] they clearly affect water allocation. For instance, ownership of the water is a moot question if the Corps of Engineers refuses to issue a permit for a proposed diversion project.

Three federal laws deserve special attention: the Clean Water Act, the Federal Power Act[1235] and the Endangered Species Act.[1236]

A. The Clean Water Act

(1) Overview of the Act

The states have always had the power (under the general police power) to regulate water quality. Historically, however, they did so on a limited basis.

Beginning in the 1970s (and to some extent earlier), the federal government took the lead in regulating water quality. Of the many federal statutes dealing with water quality, the one which has the most potential to affect water rights and related activities is

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[1234] One legal scholar has suggested that federal laws, such as the Clean Water Act's section 404 program, should be viewed as creating a new breed of "federal regulatory water rights." Tarlock, *The Endangered Species Act and Western Water Rights*, 20 Land & Water L. Rev. 1 (1985). If that argument were taken to its logical extreme, virtually any governmental regulation—from zoning restrictions to dumping regulations to the fire code—may as well be viewed as creating "property" rights in the government. (Could not they all be viewed as government "easements"?) These new labels really add nothing to our understanding. The sounder intellectual approach is to maintain the legal distinction between property rights and government regulation of property.

[1235] Federal Power Act, 16 U.S.C. §§ 791a-825r. Originally the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063.

[1236] Endangered Species Act, 16 U.S.C. §§ 1531-1543. The Endangered Species Act applies both to private development requiring a federal permit (such as section 404) and to federal water projects (for example, those built by the Corps of Engineers or the Bureau of Reclamation).

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the Clean Water Act ("CWA" or, in this section, the "Act"), as it has been known since 1977.[1237]

The Act contains some mechanisms for addressing nonpoint sources, primarily through incentives and trading programs.[1238] It regulatory program, however, is limited to point sources of pollution.[1239]

Traditionally, point sources might be thought of pollution coming from the end of an industrial pipe, while nonpoint sources might be thought of as diffused sources of water pollution. The definition of point source, however, has been expanded by Congress, EPA, and the courts to include much more than pollution at the end of a pipe. Indeed, point sources include many things that, intuitively, would seem to be nonpoint sources, for example, CAFOs, stormwater, and dredge and fill activities.

[1237] Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 to 1387. The precursor to the modern CWA was enacted in 1948. Federal Water Pollution Control Act, ch. 458, 62 Stat. 1155 (1948). It emphasized state enforcement of water quality standards. The Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965), marked the first assertion of primary federal authority in national water pollution control efforts. Its approach allowed some pollution, up to ambient standards set by the states. When this approach proved ineffective, Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 (1972). This Act adopted direct restrictions on discharges and made it unlawful to discharge a pollutant without obtaining a permit. The 1972 Act also created federal minimum effluent standards. The Act established goals which have not been met (e.g., "fishable and swimmable" waters by the year 1983, and zero discharge by the year 1985). The Act was amended in 1977, Pub. L. 95-217, 91 Stat. 1567 (1977) (renaming it the Clean Water Act), and again in 1987, Pub. L. No. 100-4, 101 Stat. 60 (1987).

[1238] The term nonpoint source is not defined in the Act. It is generally understood to be any source of water pollution that is not a point source. Conceptually and traditionally, a nonpoint source is pollution from diffuse runoff. There are many statutory and regulatory exceptions, however, such as CAFOs and stormwater, which are regulated as point sources. "Although nonpoint source pollution is not statutorily defined, it is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. Because it arises in such a diffuse way, it is very difficult to regulate through individual permits. The most common example of nonpoint source pollution is the residue left on roadways by automobiles. Small amounts of rubber are worn off of the tires of millions of cars and deposited as a thin film on highways; minute particles of copper dust from brake linings are spread across roads and parking lots each time a driver applies the brakes; drips and drabs of oil and gas ubiquitously stain driveways and streets. When it rains, the rubber particles and copper dust and gas and oil wash off of the streets and are carried along by runoff in a polluted soup, winding up in creeks, rivers, bays, and the ocean." *Northwest Envtl. Defense Ctr. v. Brown*, 617 F.3d 1176, 1181-82 (9th Cir. 2010).

[1239] "Point source" is defined at CWA § 502(14), 33 U.S.C. § 1362(14).

The basic scope of the Act is quite broad: it flatly prohibits the "discharge of any pollutant" from a point source into waters of the United States[1240] unless the discharge is permitted under section 402 (NPDES permits) or section 404 (dredge and fill permits).[1241] Moreover, in addition to requiring a section 402 or 404 permit, the applicant must obtain from the affected state a "water quality certification" under section 401 of the Act confirming compliance with state water quality standards.[1242]

(2) Waters of the United States

As noted above (See footnote 1240 at page 754), the Clean Water Act prohibits discharges of pollutants from point sources to waters of the United States. But what, exactly, are "waters of the United States"?

This jurisdictional question arises under both section 402 (administered by EPA) and section 404 (administered by the Corps of Engineers). In 1979, the U.S. Attorney General issued an opinion to the effect that the jurisdictional reach of the Act is identical under both sections, and that since EPA is charged with administering the Act, EPA would have final authority to determine the scope of federal jurisdiction for section 404 as well as section 402.[1243]

The administrative and judicial interpretation of this phrase has evolved considerably over the years. Initially, the Corps interpreted its jurisdiction narrowly—interpreting the word "navigable" as meaning navigable in some literal sense. Gradually, as a result of numerous challenges, the courts began to extend that jurisdiction. Over the years, the limitation to physically navigable waters was eroded, and the meaning of the

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[1240] Like everything in the Act, it takes some parsing to get there: The Act declares that "the discharge of any pollutant by any person shall be unlawful." CWA § 301(a), 33 U.S.C. § 1311(a). This section says nothing about where or into what a person must not discharge. Nor does it contain a limitation to point sources. However, in another section, the Act defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." CWA § 502(12)(A), 33 U.S.C. § 1362(12)(A). "Point source," in turn, is defined at CWA § 502(14), 33 U.S.C. § 1362(14). Finally, the term "navigable water" is defined as "waters of the United States." CWA § 502(7), 33 U.S.C. § 1362(7). Section 404 also speaks in terms of discharges to "navigable waters" CWA § 404(a), 33 U.S.C. § 1344(a).

[1241] "Except as in compliance with this section and sections [402 and 404, among others], the discharge of any pollutant by any person shall be unlawful." CWA § 301(a), 33 U.S.C. § 1311(a); CWA § 402(k), 33 U.S.C. § 1342(k) (compliance with section 402 permit satisfies section 301); CWA § 404(p), 33 U.S.C. § 1344(p) (compliance with section 404 permit satisfies section 301). See footnote 1240 above for discussion of definition of discharge.

[1242] CWA § 401, 33 U.S.C. § 1341.

[1243] 43 Op. Att'y Gen. 197 (1979). Accordingly, the Corps amended its regulations in 1986 to adopt EPA's definition of "navigable waters." 51 Fed. Reg. 41206 (Nov. 13, 1986).

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definition was expanded to include virtually anything reachable under the Commerce Clause of the U.S. Constitution.[1244] For a while, it seemed that anything "wet" was a "water of the United States" including virtually all wetlands.[1245] As one commentator noted, "In the years leading up to the Supreme Court's pivotal decision in *SWANCC*, the Corps of Engineers exerted federal jurisdiction to 'the maximum extent possible under the Commerce Clause' as ordered years ago by the *Calloway* Court."[1246]

Then the pendulum began to swing back. In *United States v. Riverside Bayview Homes, Inc.*,[1247] the Supreme Court upheld the Corp's jurisdiction over adjacent wetlands, but left hanging the authority of the Corps to regulate isolated wetlands. The Supreme Court took a much more aggressive swipe at the Corps' jurisdiction in *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Engineers ("SWANCC")*.[1248]

SWANCC held that, as a matter of statutory construction, Clean Water Act jurisdiction does not extend as far as the Commerce Clause permits. This came as a surprise to many courts and commentators who, for decades, have debated the CWA's reach with reference to the contours of the Commerce Clause, only to discover that it is not the applicable standard under the Act. The upshot was that the Supreme Court invalidated a guidance document (inspired by *Callaway* and its progeny) that claimed jurisdiction over every wetland or isolated pond used by migratory birds (*SWANCC* involved a former gravel pit that had become a pond).[1249] Although *SWANCC* did not

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[1244] *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D. D.C. 1975). In a terse, one-page opinion, the court invalidated the Corp's restrictive reading of its jurisdiction in its 1974 regulations, declaring "Congress by defining the term 'navigable waters' in [the CWA] to mean 'waters of the United States, including the territorial seas,' asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution." *Calloway*, 392 F. Supp. at 686.

[1245] For a history of these the early cases, see Christopher H. Meyer, *Navigating the Wetlands Jurisdiction of the Army Corps of Engineers*, 9 Resource L. Notes 3 (Nat. Resources L. Center, 1986).

[1246] Tyler Moore, *Defining "Waters of the United States": Canals, Ditches and Drains*," Summer Water Law and Resources Issues Seminar, Idaho Water Users Association, at 3 (June 21, 2004) (Mr. Moore is a lawyer in the Corps' Walla Walla office).

[1247] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

[1248] *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Engineers ("SWANCC")*, 531 U.S. 159 (2001).

[1249] The Court stated: "Permitting respondents to claim federal jurisdiction over ponds and mudflats falling with the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use. Rather than expressing a desire to readjust the federal-state balance in this matter, Congress chose to 'recognize, preserve, and

overrule *Bayview Homes*, it seems to have limited that decision to wetlands or isolated ponds that are very closely connected, geographically and hydraulically, to navigable waters. What is clear under *SWANCC* is that the Corps has no jurisdiction over truly isolated wetlands.

Just how the *SWANCC* decision plays out remains to be seen. Although the authors read it as a dramatic reversal of decades of thinking about the CWA's jurisdictional limits, the majority of courts are reacting to it more cautiously.[1250] For example, in *Idaho Rural Council v. Bosma*,[1251] Judge Winmill acknowledges *SWANCC*, but goes on to rely on older precedents that are difficult to reconcile with *SWANCC*. Thus, most courts continue to view the agency's jurisdiction as reaching wetlands and ground water where any clear physical and hydraulic connection with jurisdictional surface streams can be shown, no matter how geographically remote.

The most significant post-*SWANCC* bombshell is the *Talent Irrigation District* case, a case involving section 402, not 404.[1252] In *Talent*, the Ninth Circuit ruled that the Talent Irrigation District in Oregon was in violation of the Clean Water Act because it failed to seek and obtain an NPDES permit before applying aquatic herbicides to its canal water (which it discharged to prevent weed growth in the canals). The court reasoned that the irrigation canals in that case divert from and (more significantly) flow into rivers that are indisputably waters of the United States. Thus, said the court, they are "tributaries" that fall within EPA's definition of waters of the United States at 40 C.F.R. § 122.2.[1253] The courts have long held that the Act reaches not only navigable waters but tributaries thereto. This was the first time, however, that a court declared a manmade canal to be a tributary of a navigable stream. The *Talent* court, however, made that leap effortlessly, and concluded that the longstanding inclusion of tributaries within the reach of the Act was not affected by *SWANCC*, which overruled only the extension the Clean Water Act to isolated wetlands.

In *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002), the Ninth Circuit relied on *Talent* in determining that

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protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .'" *SWANCC*, 121 S. Ct. at 684 (citations omitted).

[1250] A number of federal courts have issued rulings interpreting *SWANCC* – inconsistently. They are summarized in Raymond Takashi Swenson, *Continuing Chaos at the Corps: The Turbulent State of Clean Water Act Jurisdiction*, Idaho Advocate (Aug. 2004).

[1251] *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Idaho 2001).

[1252] *Headwaters, Inc. v. Talent Irr. Dist.*, 243 F.3d 526 (9th Cir. 2001).

[1253] The court also rejected that argument that the labeling provisions of Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) overrode the CWA's NPDES requirement.

discharges by a CAFO into a canal (that eventually reached the Yakima River) constitute a discharge into waters of the United States.

In 2005, the Ninth Circuit limited the applicability of *Talent* in *Fairhurst v. Hagener*.[1254] The *Fairhurst* court distinguished *Talent* on the basis that *Talent* involved residual chemicals left in the canal water after the weed control purpose was completed. In *Fairhurst*, the Ninth Circuit ruled that "pesticides that are applied to water for a beneficial purpose and in compliance with FIFRA, and that produce no residue or unintended effects, are not 'chemical wastes,' and thus are not 'pollutants' regulated by the CWA."[1255] While *Fairhurst* took a narrow view of what constitutes a pollutant, nothing in the case called into question the jurisdiction analysis in *Talent* regarding what are waters of the United States.

Thus, under *Talent* and subsequent cases, the courts are continuing to extend the geographic reach of the CWA far from historically navigable streams, despite the limitations imposed by *SWANCC*. Ironically, they are doing it through the very system of manmade irrigation canals that crisscross the West and once were seen as reflecting western independence. Indeed, if the decision in *Talent* ultimately holds, the Act's reach may extend to many of the same isolated wetlands, so long as they are near enough to an irrigation canal.

All this assumes that *Talent* remains good law under *Rapanos*. A quick take is that it remains good law under Kennedy's concurrence, but perhaps not under the plurality decision. This is being fought out in the courts below now, in cases which have not been tracked in this section. It would appear, however, that the Kennedy approach is prevailing.

(3) Applicability to ground water

It was established early on that the Clean Water Act does not apply to ground water.[1256] However, there is a big exception to this general statement. EPA states in its guidance: "As a general matter, ground water is not considered a water of the United

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[1254] *Fairhurst v. Hagener*, 422 F.3d 1146 (9th Cir. 2005).

[1255] *Fairhurst*, 422 F.3d at ___.

[1256] *Exxon Corp. v. Train*, 554 F.2d 1310, 1329 (5th Cir. 1997); *United States v. GAF Corp.*, 389 F. Supp. 1379 (S.D. Tex. 1975). Shortly after the Fifth Circuit decided *Exxon Corp.*, the Seventh Circuit reached the opposite conclusion in *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977). However, EPA adopted the conclusion reached by the Fifth Circuit, and it is now viewed as settled law that the CWA does not apply to ground water. In another irony, while the EPA has no direct authority over ground water itself, it requires states seeking delegation of NPDES authority to adopt rules regulating the discharge of pollutants to wells. This does not apply in Idaho, however, because Idaho has no delegated NPDES program.

States; therefore, discharges to ground water are not subject to NPDES requirements. If, on the other hand, there is a discharge to ground water that has a 'hydrological connection' to a nearby surface water, the discharger may be required to apply for an NPDES permit because the discharge is then considered a water of the United States."[1257]

The courts are divided on the correctness of EPA's view.[1258] However, the *Bosma* (discussed above) followed the principle that a hydrological connection to navigable surface water is sufficient to create jurisdiction.[1259]

The Ninth Circuit is likely to rule on these issues on the appeal of the *City of Healdsburg* case, now before it.[1260]

The bottom line is that, unless one is willing to shoulder the burden and substantial risk of challenging EPA's current position, an NPDES permit (or exemption there from) should be obtained where pollutants may be discharged into ground water. This is so even if the operator already has obtained the necessary water rights under state law.

[1257] *Water Permitting 101* (EPA, Office of Wastewater Management, Water Permitting, undated).

[1258] "*Compare, e.g., Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir.), *cert. denied*, 115 S. Ct. 322 (1994) (EPA has no jurisdiction over discharges to ground water regardless of hydrological connection to surface water); *Umatilla Water Quality Protective Ass'n v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312 (D. Or. 1997) (NPDES program does not apply to discharges to ground water); *Kelley v. U.S.*, 618 F. Supp. 1103 (W.D. Mich. 1985) (discharges to ground water not within Act's prohibition even though contaminants eventually were discharged into bay); *with Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428 (D. Colo. 1993) (Act's prohibition on discharges to navigable waters extends to discharges reaching navigable water as result of discharge to connected ground water); *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F. Supp. 1182, 1193-96 (E.D. Cal. 1988), *vacated on other grounds*, 47 F.3d 325 (9th Cir.), *cert. denied*, 116 S. Ct. 51 (1995) (discharge to ground water that has effect on surface water may violate Act); *United States v. GAF Corp.*, 389 F. Supp. 1379, 1383 (S.D. Tex. 1975) (permit not required for disposal of wastes into ground water which does not flow into or otherwise affect surface waters)." *Clean Water Handbook, Third Edition*, 14, n. 36 (2003) (Government Institutes).

[1259] *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Idaho 2001).

[1260] *Northern California River Watch v. City of Healdsburg*, 2004 WL 201502 (N.D. Cal., Jan. 23, 2004) (now on appeal to the Ninth Circuit).

(4) Section 402 (NPDES permits)

(a) Overview

Section 402 establishes the National Pollutant Discharge Elimination System ("NPDES"), requiring a permit for all point source discharges, other than those covered by section 404. The NPDES (section 402) program is implemented by the U.S. Environmental Protection Agency ("EPA"). In most cases, EPA has delegated its NPDES authority to state environmental regulatory agencies.[1261] Idaho, however, has not sought such authority. Consequently, NPDES matters in Idaho are handled by the local EPA office.

Any discharge requiring a section 404 permit does not require a section 402 permit. 40 C.F.R. § 122.3(b).

Under the *Talent* decision discussed in section 41.A(2) at page 754, farmers are required to obtain NPDES permits if they apply herbicides to water in irrigation canals. The *Talent* case involved the direct addition of herbicides to canal water. Presumably, this ruling would not apply (though other restrictions would) to the application of herbicides to the sides of a canal or elsewhere, because that would be a nonpoint application.

In 2004 the United States Supreme Court ruled that an entity that moved water from a canal into a reservoir may be required to obtain an NPDES permit, where the transported water contained pollutants (even though no additional pollutants were added).[1262] The *Miccosukee* cased involved a flood water project in which ground and runoff water were collected in a canal and then pumped into a wetland. The collected water contained phosphorous from fertilizers, which resulted in increased algae and foreign plant growth in the wetland area. The Court remanded for a determination of whether the canal and wetland were distinct water bodies, because of a factual dispute over whether the polluted water would have entered the wetland in any event.[1263]

[1261] Delegation to the states is authorized under CWA § 402(b), 33 U.S.C. § 1342(b).

[1262] *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

[1263] In 2006, a district court in Florida handed down *Friends of the Everglades, Inc. v. South Florida Water Management Dist.*, Case No. 02-80309-CV-Altonga/Turnoff (D. Fl. Dec. 11, 2006), which found, in accord with *Miccosukee*, that transfer of water containing pollutants to a new water source requires an NPDES permit.

(b) Components of the NPDES permit

The NPDES permit system is administered by EPA or, where properly delegated, by individual states. NPDES permitting authority has been delegated in Washington and Oregon (and most other states), but not in Idaho.

NPDES permits (like 404 permits) may be individual permits or general permits. General permits are established through rulemaking and apply to broad classes of dischargers. Individual NPDES permits are tailored to individual permit-holder based on information about that particular discharge. Individual NPDES permits establish specific standards and requirements governing the discharge of pollutants by the permit-holder.

These standards and requirements include (1) technology-based limitations and (2) water quality-based effluent limitations.

Technology-based limitations are established by regulation for various categories of industry and other sources of pollution based on EPA's determination of the availability and cost of various pollution control technologies.

The NPDES permit reflects the particular technology-based requirements applicable to a particular permit-holder. Although some interpretation may be involved, the identification of technology-based requirements for a particular NPDES permit is a largely ministerial function in which the permit issuer simply applies the regulation.

The technology-based standards apply irrespective of and without consideration of the quality of the water body into which the discharge is made. In other words, the same requirements apply to discharges into pristine and contaminated water bodies. Thus, for example, if the discharger is a cheese-maker, the NPDES permit will dictate certain technologies that all cheese-makers must employ to reduce or eliminate water pollution caused by various stages of the cheese-making process. In effect, the technology-based requirements describe the minimum set of pollution-control measures that must be employed by the point-discharger.

Congress determined, however, that technology-based controls alone are not always sufficient to address all water pollution problems. Accordingly, Congress overlay the technology-based controls with water quality-based limitations.

Unlike technology-based limitations, water quality-based limitations are based on the impact that a discharge has on its receiving waters. Water quality-based controls are focused on the quality of the water being discharged by the permit-holder measured "at the pipe" where the discharge is made to the waters of the United States or, in some cases, at another "point of compliance."

Water quality-based limitations come in various forms. The first is based on maintaining ambient water quality standards established by EPA and the states for

particular water bodies.[1264] The first type of water quality-based limitation prevents the discharger from discharging effluent that would violate any of those ambient standards.

The Act requires each state to adopt water quality standards for all water bodies within the state.[1265]

Water quality-based limitations also take into account the quality of the water in the water body to which the discharge is made. Unlike technology-based requirements, water quality-based limitations are absolute requirements that do not take into account technological feasibility or economic reasonableness.

(c) CAFOs

Given the common understanding of a point source being a discharge coming from a pipe or other discrete conveyance, most people would not think of CAFOs as point sources—particularly where the discharge occurs because of a rain event that moves manure off of a field into a nearby stream. But common usage does not control. The Clean Water Act expressly defines "point source" to include a discharge from a CAFO.[1266] Thus, even "uncollected" discharge from a CAFO (such as precipitation draining off a feedlot) is a point source.

EPA has promulgated regulations governing NPDES permits for CAFOs.[1267] Under the rule, a CAFO operator is obligated either to apply for an individual NPDES permit or to file a Notice of Intent ("NOI") for a general permit, unless the operator affirmatively demonstrates to the satisfaction of EPA that the operator has "no potential to discharge" (under a standard that is very hard to achieve).[1268]

[1264] These ambient standards are set to ensure that, where possible, water quality provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water. CWA § 101(a)(2), 33 U.S.C § 1251(a)(2). In addition, the Act provides that water quality standards will take into account the use and value of public water supplies, propagation of fish and shellfish, recreational purposes, and agricultural, industrial, navigation, and other purposes. CWA § 303(c)2)(A), 33 U.S.C. § 1313(c)(2)(A).

[1265] CWA § 303(c), 33 U.S.C. § 1313(c).

[1266] CWA § 502(14), 33 U.S.C. § 1362(14).

[1267] 40 C.F.R. § 122.23; 68 Fed. Reg. 7,179 (Feb. 12, 2003) (preamble and final rule).

[1268] 40 C.F.R. § 122.23(d)(2) and (f).

In *Waterkeeper Alliance, Inc. v. EPA*, the federal appeals court invalidated this and other aspects of EPA's CAFO Rule.[1269] As a result, under *Waterkeeper*, a CAFO operator may elect not to seek NPDES coverage if the operator is confident that no discharge will result under any circumstance. In other words, so long as no discharge does result, the operator is not in violation of the Act. However, the operator who relies on *Waterkeeper* as a basis for avoiding application for an NPDES permit does so at his or her peril. Under *Talent*, the CAFO operator must not only avoid discharges to rivers and streams but discharges to any irrigation canal. Moreover, by forgoing NPDES coverage, the operator foregoes the permit shield defense.[1270] If a CAFO operator with an NPDES permit designs his or her facility to withstand a 25-year rain event (as the permit requires), and then experiences a 50-year event that causes a discharge, the operator will be protected by the "permit shield" defense. If the same operator with the same well-designed facility relied on *Waterkeeper* and decided not to seek an NPDES permit, the defense will be unavailable when the 50-year event occurs.

(d) Stormwater

In addition to CAFOs, stormwater discharge permits under section 402 are also required for certain industrial facilities and construction projects.[1271] Unlike CAFOs which are specifically listed as point sources, these "wet weather" discharges are not expressly defined as point sources under the Act. However, the Act was amended in 1987 to add section 402(p) creating a regulatory program for industrial and municipal stormwater discharges.[1272]

[1269] *Waterkeeper Alliance, Inc. v. EPA*, 2005 WL 453139 (2nd Cir. Feb. 28, 2005). The environmental plaintiffs sought rehearing on April 14, 2005.

[1270] The CWA excludes "agricultural stormwater discharges" from the definition of point source. CWA § 502(14), 33 U.S.C. § 1362(14)—a provision that seems to contradict the definition of CAFOs as point sources. EPA has sought to reconcile the two provisions through the permit shield defense. The CAFO rule provides that CAFO operators are not subject to the CWA for precipitation-related discharges so long as the operator has and is operating in compliance with an NPDES permit. The federal court of appeals upheld this part of the regulation in *Waterkeeper*.

[1271] Stormwater is defined in EPA regulations as "storm water runoff, snow melt, runoff, and surface runoff and drainage" that crosses over an industrial site on its way to a surface water source. 40 C.F.R. § 122.26(b)(13).

[1272] Water Quality Act, Pub. L. No. 100-4, 101 Stat. 1987 (codified at CWA § 402(p), 33 U.S.C. § 1342(p)). The 1987 amendments did not refer to stormwater, but instead to industrial activity. EPA defined industrial activity to include stormwater discharges from certain construction activities. 40 C.F.R. § 122.26(b)(14)(x). "Construction, as described in 40 C.F.R. § 122.26(b)(14)(x), is a point source activity." *Na Mamo O 'Aha'ino v. Galiher*, 28 F. Supp. 2d 1258, 1261 (D. Hawaii 1998).

EPA has implemented the stormwater regulation program in two phases. The first phase required permits for certain categories of industrial facilities[1273] as well as construction activity of five acres or more.[1274] The second phase, effective only after 1994, expanded the construction activity to cover activity on as little as one acre and added coverage for "Small Municipal Separate Storm Sewer Systems" (known as "MS4").[1275] Both are codified at 40 C.F.R. § 122.26.

Even if a permit is required, an industrial facility may be exempt from the permit requirement if it falls into the "no exposure" exemption.[1276] No exposure means all industrial materials and activities are protected by storm resistant shelters to prevent exposure to rain, snow, snowmelt and/or runoff.

If the "no exposure" exemption does not apply, the industrial facility may be able to seek coverage under the Multi-Sector General Permit ("MSGP"), which is a general NPDES permit EPA has promulgated to cover industrial runoff. This general permit obviates the need to obtain an individual NPDES permit for stormwater. To obtain coverage under the MSGP, the facility operator must submit to EPA a Notice of Intent ("NOI") and a Storm Water Pollution Prevention Plan ("SWPPP").

EPA has also promulgated general permits for construction activity. They require each of the parties involved in construction activity to file an NOI (Notice of Intent). To qualify for the permit, the applicant must meet a variety of other requirements, notably submission of a Storm Water Pollution Prevention Plan ("SWPPP") that incorporates Best Management Practices ("BMPs").

The regulations governing construction activities (under both phases) contain a key provision requiring a stormwater permit even if the construction activity is under the size cutoff when the activity is part of a "larger common plan of development or sale." 40 C.F.R. § 122.26(b)(15)(i). This phrase is not defined in the regulation, but is addressed in guidance issued by EPA:

> If your smaller project is part of a larger common plan of development or sale that collectively will disturb one or more acres (e.g., you are building on 6 half-acre residential lots in a 10-acre development or are putting in a fast food

[1273] Industrial facilities are specifically defined by regulation and include industrial activities defined by Standard Industrial Classification codes, including "food and kindred product" and "general warehouse and storage." 40 C.F.R. § 122.26(b)(14)(xi).

[1274] 55 Fed. Reg. 47,990 (Nov. 16, 1990).

[1275] 64 Fed. Reg. 68,722 (Dec. 8, 1999).

[1276] 40 C.F.R. § 122.26(g).

> restaurant on a 3/4 acre pad that is part of a 20 acre retail center) you need permit coverage. "Common plan" is broadly defined as any announcement or piece of documentation (including a sign, public notice or hearing, sales pitch, advertisement, drawing, permit application, zoning request, computer design, etc.) or physical demarcation (including boundary signs, lot stakes, surveyor markings, etc.) indicating construction activities may occur on a specific plot. You must still meet the definition of operator in order to be required to get permit coverage, regardless of the acreage you personally disturb. As a subcontractor, it is unlikely you would need permit coverage.

EPA Fact Sheet, "Large and Small Construction Activities" at 6 (Jan. 21, 2005) (emphasis added).

In *Hughey v. JMS Development Corp.*, 38 ERC 1568, 1993 WL 738623 (N.D. Georgia 1993) (not reported in F. Supp.), the defendant developer was sued by a downstream landowner under the Clean Water Act's citizen suit provision. The developer had disturbed less than five acres of land in the course of road construction and readying lots for sale. (This was before EPA's regulation requiring permits for disturbances of over one acre.) The court ruled that the developer should have obtained a stormwater permit because the construction activities were part of the common plan for development of the 19-acre subdivision. The court rejected the developer's argument that all subsequent construction activity would be undertaken by individual homeowners who purchased lots, that the developer had no control over their activities, and that such construction was therefore not part of a common plan.

(e) Agricultural return flows exempted (Section 402)

In 1977, Congress amended definition of "point source" to state: "This term does not include agricultural stormwater discharges and return flows from irrigated agriculture."[1277] Thus, pesticide-laden irrigation water discharged by drains back into canals and rivers is not subject to CWA regulation. The purpose of the exemption was to alleviate EPA's burden in having to permit "every source or conduit returning water to the streams from irrigated lands," which was what the text of the statute had required. 123 Cong. Rec. 38949, 38956 (Dec. 15, 1977) (Statement of Rep. Roberts); see CWA §§ 402(l), 502(14), 33 U.S.C. §§ 1341(l), 1362(14).

[1277] "Point source" is defined at CWA § 502(14), 33 U.S.C. § 1362(14).

(f) Silvicultural rule invalidated

In 1976, EPA promulgated the Silvicultural Rule which exempted from permitting certain discharges from silvicultural (forestry) activities. 40 C.F.R. §§ 122.3(e), 122.27.[1278] The rule defined "silvicultural point source" to include certain activities (rock crushing, gravel washing, log sorting, or log storage facilities) but to exclude all others. In *Northwest Envtl. Defense Ctr. v. Brown* ("*NEDC*"), 617 F.3d 1176 (9th Cir. 2010), NEDC challenged this rule as violative of the broader definition of point source in the CWA. The Ninth Circuit agreed with NEDC, holding that EPA cannot define whole categories of point sources out of the Act. The case dealt with forest roads in California that were maintained by logging companies under the direction of the U.S. Forest Service. A system of ditches, culverts, and channels collected sediment-laden runoff from the roads and delivered it to adjacent streams. The Ninth Circuit ruled that the stormwater collection system constituted a point source subject to section 402 notwithstanding the Silvicultural Rule.

The same logic would appear to apply to other roads, such as mining roads. (Technically, mining roads never had the protection of the Silvicultural Rule to begin with.) In any event, under the reasoning of *NEDC*, it would seem that any stormwater collection system entailing a "discernible, confined and discrete conveyance" to waters of the United States would be subject to section 404. On the other hand, it appears that roads could still be built and maintained without section 404 permitting if they entail no ditches and other man-made structures for controlling stormwater and delivering it to waters of the United States.

(g) Dams as point sources

The Clean Water Act ("CWA") requires either a section 402 or a section 404 permit for any "addition" of a "pollutant" from a "point source" to "waters of the United States." Section 404 permits are limited to dredge and fill operations (including filling of wetlands) and are issued by the U.S. Corps of Engineers. Section 402 permits cover everything else, and are issued by the U.S. Environmental Protection Agency. Given this simple statutory directive, one might think that a section 402 permit would be required to operate a dam (which releases sediment, high temperature water, and other pollutants into navigable waters through a point source).

Two early federal appellate cases held otherwise. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (1982); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (1988). Those cases were not based on the merits of what the statute requires. Rather, they were based on deference to the federal agency's interpretation of the CWA. Thy have been criticized since for misapplying the deference standard. E.g., Jeffrey G. Miller, *Plain Meaning, Precedent, and Metaphysics: Interpreting the*

[1278] The rule was originally codified at 40 C.F.R. § 124.85 (1976).

"Addition" Element of the Clean Water Act Offense, 44 Env't L. Rep. News & Analysis 1-0770 (Sept. 2014).

In more recent years, a handful of other federal cases have held that section 402 permits are required in varying contexts involving dam-like water conveyances. *E.g.*, *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990) (sluice box discharges from placer mining require section 402 permit); *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (water transfer from one meaningfully distinct water body to another requires a section 402 permit).

In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. EPA*, 2017 WL 192707, ___ F.3d ___ (2nd Cir. 2017), the Second Circuit upheld EPA's Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. Part 122). The rule concludes that transfers of water from one navigable water body to another, without subjecting the transferred water to intervening industrial, municipal, or commercial use, do not fall within the scope of the Clean Water Act and thus do not require a section 402 permit. The court's ruling was based on *Chevron* deference to EPA's unitary waters theory, which treats all navigable waters of the United States as a single water body.

(5) Section 404 (dredge and fill permits)

(a) Background

In contrast to section 402 (which is administered by the EPA), section 404[1279] is administered by the U.S. Army Corps of Engineers ("Corps").[1280] Its scope is limited to the discharge of "dredged or fill material," requiring that persons obtain a permit before any such discharge. Dredged material is anything which is lifted up out of the water (or wetland). The regulatory definition of dredged material is found at 40 C.F.R. § 323.2(c) and 40 C.F.R. § 232.2. The regulatory definition of fill material is found at 40 C.F.R.

[1279] CWA § 404, 33 U.S.C. § 1344. Section 404 is by no means the only legal authority for federal regulation of private activities affecting rivers. The Corps' section 404 authority parallels its authority under section 10 of the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 403. Indeed, the Corps typically issues a combined section 10/404 permit. Private hydropower projects are licensed by the Federal Energy Regulatory Commission. Federal Power Act, 16 U.S.C. §§ 791a-825r as amended by the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (1986). Moreover, any water project involving public lands is subject to a variety of controls by the federal land manager.

[1280] The EPA is the primary implementing agency of the Clean Water Act, and logically should have been assigned the role of administering section 404 of the Act as well. However, a political compromise resulted in the section 404 responsibility being handed to the Corps, while the EPA retains a veto power over all 404 permits and is responsible for promulgating some of the regulations governing the program. CWA § 404(c), 33 U.S.C. § 1344; 40 C.F.R. part 231. EPA is also the entity responsible for bringing enforcement actions under section 404.

§ 323.2(e) and 40 C.F.R. § 232.2. To put it simplistically, fill material includes pretty much everything solid (including a dams, culverts, and other infrastructure).

Section 404 permits are often referred to as wetland permits, because that is such an important part of their application today. However, the application of section 404 to wetlands was really something of an afterthought not articulated in the Act itself. Although some would dispute this, it is fair to say that the principal congressional purpose behind section 404 was dredging and filling operations in bays, harbors, and rivers, not wetlands.[1281] Be that as it may, it is indisputable that the CWA applies at least to some if not most wetlands today (see discussion in section 41.A(2) at page 754).

Under the Clean Water Act, the Corps is obligated to consider the effect of proposed activities on the broad public interest in determining whether to issue or deny a section 404 permit. This means that the Corps may prohibit a dam project, the filling of wetlands, or any other activity requiring a 404 permit, if it determines that the project is not in the public interest. Of course, figuring out what is in the public interest is a rather subjective task. Consequently, courts tend to defer to the Corps' public interest determinations.

Section 404(b)(1) of the Clean Water Act mandates that the Corps evaluate the proposed project pursuant to guidelines developed by the EPA in conjunction with the Corps.[1282] These guidelines are known as the 404(b)(1) guidelines and are codified at 40 C.F.R. Part 230.[1283]

[1281] "Respondents refer us to portions of the legislative history that they believe indicate Congress' intent to expand the definition of 'navigable waters.' . . . [N]either this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation." *SWANCC*, 121 S. Ct. at 680.

[1282] When section 404 of the Clean Water Act was first adopted in the 1970s, there was a fierce battle in Congress over whether it would be administered by the Corps or by EPA. The result, predictably, was a compromise. The Corps is the primary implementing agency. However, EPA has veto power over all section 404 permits issued by the Corps. And, as discussed here, EPA was charged with developing the alternatives analysis.

[1283] In addition to EPA's 404(b)(1) guidelines, the following regulations are also applicable: 33 C.F.R. Part 320, in particular § 320.4(b)(4) (Corps' "General Regulatory Policies"); 33 C.F.R. Part 325 (Corps' regulations on "Processing of Department of the Army Permits"); 33 C.F.R. Part 230 (Corps' NEPA regulations); 40 C.F.R. Part 1500 to 1508 (Council on Envtl. Quality's NEPA regulations). The following guidance materials are also applicable: U.S. Army Corps and EPA, *Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines* (Nov. 15, 1989); U.S. Army Corps, Walla Wall District, *Proposed Mitigation and Monitoring Guidelines* (Dec. 16, 2003).

The central feature of the 404(b)(1) guidelines is the establishment of a presumption against filling wetlands if there is a practicable alternative to the proposed discharge that would have less adverse environmental impact. Consequently, the 404(b)(1) analysis is all about alternatives.[1284]

A key threshold question is what alternatives must be evaluated. This, in turn, is largely determined by the articulation of the "purpose and need" for the project. If the project's need is narrowly defined (e.g., to build a housing project on this site) then there are few or no alternatives. If it is defined broadly (e.g., to expand available housing opportunities in Ada County), then there will be many alternatives to review.

Historically, the Corps has favored the narrow description (based on deference to the applicant's stated need) while the EPA has favored the broader description (based on an independent determination of the public's need). In 1988, the Corps came around, in large part, to adopt the EPA's broader approach.

The Corps' regulation now provides: "[W]hile generally focusing on the applicant's statement, the Corps, will in all cases, exercise independent judgment in defining the purpose and need for the project from both the applicant's and the public's perspective." 53 Fed. Reg. 3136 (Feb. 3, 1988), codified at 33 C.F.R. § 325, App. B § 9(c)(4).

This debate over the proper way to describe the project's need has been and continues to be much litigated.[1285] The decisions are conflicting, and there is still no clear-cut answer. Much depends upon what can be negotiated with the Corps on a case-by-case basis.

(b) Farming, silviculture, and ranching exemption

Congress exempted a variety of dredge and fill activities from section 404 permit requirements, notably "discharge of dredged or fill material from normal farming, silviculture, and ranching activities." CWA § 404(f)(1)(A), 33 U.S.C. § 1344(f)(1)(A).[1286]

[1284] "Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a).

[1285] The seminal case is *Bersani v. EPA*, 674 F. Supp. 405 (N.D. N.Y. 1987), *affirmed,* 850 F.2d 36 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989) (the "Sweden's Swamp" case, aka "Attleboro Mall" case). Many other cases are discussed in William L. Want, *Law of Wetlands Regulation* §§ 6.13 to 6.21 (2003).

[1286] In the last sentence of section 404(f)(1), there is a reference to these activities also not being subject to regulation under section 402. This appears to be surplusage, because the

Both the Corps and EPA have adopted implementing regulations.[1287]

EPA's implementing regulations expressly limit this exemption to nonpoint source activities in the context of NPDES permitting.[1288] Thus, the exemption does not protect point source agricultural activities such as the direct discharge of herbicides into canals involved in cases like *Talent Irrigation District*[1289] discussed below. The agricultural exemption expressly does not apply to confined animal feeding operations (CAFOs), which in most cases are required to obtain NPDES permits.[1290]

Another exemption applies to discharges "for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures."[1291] A third exemption applies to "construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches."[1292] The fourth applies to the "construction of temporary sediment basins . . . ."[1293] The fifth applies to certain roads.[1294]

Note, however, that each of these exemptions is subject to a "recapture"

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exemption applies only to discharge of dredged or fill material, which is only covered by section 404.

[1287] The implementing regulations are found at 33 C.F.R. § 323.4 (Corps dredge and fill regulations); 40 C.F.R. § 122.3(e) (EPA NPDES regulations); 40 C.F.R. § 232.3(c)(1)(i) (EPA dredge and fill regulations).

[1288] 40 C.F.R. § 122.3(e).

[1289] *Headwaters, Inc. v. Talent Irr. Dist.*, 243 F.3d 526 (9th Cir. 2001).

[1290] The exemption provision does not mention CAFOs, CWA § 404(f)(1)(A), 33 U.S.C. § 1344(f)(1)(A). However, the definition of point source expressly includes CAFOs, CWA § 502, 33 U.S.C. § 1362(14), and EPA has interpreted the agricultural exemption to apply only to nonpoint sources, 40 C.F.R. § 122.3(e).

[1291] CWA § 404(f)(1)(B), 33 U.S.C. § 1344(f)(1)(B). The Corps' implementing regulation for this exemption further provides: "Maintenance does not include any modification that changes the character, scope, or size of the original fill design." 33 C.F.R. § 323.4(a)(2). *See, United States v. Sargent Cnty. Water Resource Dist.*, 876 F. Supp. 1081 (D. N.D. 1992) (the activity is not "maintenance" if "improvements" were made).

[1292] CWA § 404(f)(1)(C), 33 U.S.C. § 1344(f)(1)(C).

[1293] CWA § 404(f)(1)(D), 33 U.S.C. § 1344(f)(1)(D).

[1294] CWA § 404(f)(1)(D), 33 U.S.C. § 1344(f)(1)(D).

provision.[1295] If the purpose of the activity is "bringing an area of the navigable waters into a use to which it was not previously subject …" the exemption is not applicable.

(c) Incidental fallback

Dredged material is defined in the Corps' regulations as "material that is excavated or dredged from waters of the United States." 33 CFR § 323.2(c). However, a discharge of dredged material does not include what is known as "incidental fallback." "Discharge of dredged material" is defined as "any addition of dredged material into, including any redeposit of dredged material other than incidental fallback within, the waters of the United States." 33 CFR § 323.2(d)(1).

"Incidental fallback" is defined as "the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed." 33 C.F.R. § 323.2(d)(2)(ii) (emphasis in original). The Corps has implemented the incidental fallback exemption cautiously. The regulations state that a discharge of dredged material does not include "[a]ctivities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chain sawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposited excavated soil material" 33 CFR § 323.2(d)(2)(ii). Thus, the incidental fallback exemption does not apply, for example, to the side spill from a bulldozer blade excavating in waters of the United States.

(d) *Rapanos v. United States*

On June 19, 2006, the U.S. Supreme Court handed down its decision in *Rapanos v. United States*, 547 U.S. 715 (2006). The discussion in the sections that follow this one have not yet been re-written in light of *Rapanos* and should be read with this new case in mind.

The first step in reading *Rapanos* is trying to figure out which opinion controls. There is no clear answer. The Court was split four to four, with Justice Kennedy casting the deciding vote. He sided with the Justices Scalia, Roberts, Thomas, and Alito on the outcome, but did not join their plurality decision. Instead, he wrote a separate opinion concurring in the judgment but rejecting the fundamental rationale of Justice Scalia's

[1295] CWA § 404(f)(2), 33 U.S.C. § 1344(f)(2); 33 C.F.R. § 323.4(c).

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plurality opinion.[1296]

As Chief Justice Roberts said in his own concurring opinion, "It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis." *Rapanos*, 547 U.S. at 758. The Chief Justice cites two cases dealing with how to interpret splintered decisions. In *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation omitted), the Court laid down a simple rule: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." This rule suggests that the narrower Kennedy opinion now constituted the "holding of the Court." However, Chief Justice Roberts also cited *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003), which observed that "[t]his test is more easily stated than applied."

Thus, the Chief Justice seems to be warning the agencies and lower courts not to assume that the Kennedy Opinion controls. However, there is every reason to believe that the Kennedy opinion is indeed the controlling one.[1297]

In any event, the direction of the Court is unmistakable. The days of an expansive reading of the Act are over. It is just a question of whether the decision reflects a minor or major retrenchment. Given the uncertainty, however, we discuss both the plurality opinion and Justice Kennedy's concurrence.

If it is the controlling precedent from the case, the plurality opinion would substantially shrink the Corps' authority under section 404 of the Clean Water Act in two

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[1296] In fact, there were five opinions: a four-justice plurality, two individual concurrences, and two dissents.

[1297] "The standards set forth in Justice Kennedy's concurrence and the plurality should both be used in the lower courts to find that the Corps has jurisdiction over wetlands, but Justice Kennedy's opinion is broader than the plurality's, so it will usually suffice on its own. Under the analysis laid out by the Supreme Court in *Marks v. United States*, where there was no majority opinion, the narrowest holding that can gain the support of a majority of Justices is binding on lower courts. Because Justice Kennedy's opinion is the only holding that could be supported by at least five Justices-- Justice Kennedy and the four Justices who dissented--the Kennedy concurrence is binding. The dissent by Justice Stevens, joined by three other Justices, would have upheld broad deference to the Corps' judgment on what constitutes "waters of the United States" under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* as applied by Riverside Bayview, but it also explicitly states that it would prefer Justice Kennedy's standard to the plurality's narrower bright-line rule." Samuel P. Bickett, *The Illusion of Substance: Why Rapanos v. United States and its Resulting Regulatory Guidance Do Not Significantly Limit Federal Regulation of Wetlands*, 86 N.C. Law Rev. 1032, 1037-38 (2008) (footnotes omitted).

respects. First, it says that wetlands are not subject to section 404 jurisdiction unless they are physically touching a water of the United States. Second, it would reverse thirty years of court and agency interpretation of waters of the United States, substantially narrowing the definition.

The plurality agreed that the Act's definition of "navigable waters" as "waters of the United States," is broader than the traditional "navigability in-fact" test first articulated in *The Daniel Ball*, 77 U.S. 557 (1870), but not by much. The Court offered this summary:

> In sum, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.

Rapanos, 547 U.S. at 739.

Rapanos (actually two consolidated cases) involved the filling of wetlands adjacent to drains, drainage ditches, and tributaries which, in turn, led to lakes and rivers. No irrigated farmland was involved, so the Court did not discuss irrigation ditches, canals, or drains.

Next, the plurality addressed whether the subject wetlands might nevertheless be subject to Corps jurisdiction on the basis that they were close enough to other legitimate waters of the United States. Here, the plurality answered with a definitive "no." It clarified its earlier pronouncements, rejecting the earlier reference to "reasonable proximity" in *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Engineers ("SWANCC")*, 531 U.S. 159 (2001). In the plurality's opinion, the only wetlands reached by the Clean Water Act are those physically touching navigable waters:

> Therefore, *only* those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands, are "adjacent to" such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to "waters of the United States" do not implicate the boundary-drawing problem of *Riverside Bayview,* and thus lack the necessary connection to covered waters that we described as a

> "significant nexus" in SWANCC. 531 U.S., at 167. Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: First, that the adjacent channel contains a "wate[r] of the United States," (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.

Rapanos, 126 U.S. at 742.

The practical effect of this is enormous, if the plurality controls. It would mean that wetlands connected to waters of the United States only through waterways that are not "relatively permanent" are not within the Act. This approach would substantially reduce the Corps' jurisdiction, particularly in the western United States.

The plurality was careful to point out that its decision under section 404 of the Act does not restrict EPA's authority to regulate the discharge of pollutants to navigable waters under section 402 of the Act. Section 402 will continue to prohibit the discharge of pollutants not just directly into navigable waters, but to conduits (such as drains) that eventually reach navigable waters. Indeed, the plurality points out that these conduits, although not themselves navigable waters, are point sources when they reach navigable waters.

This, in turn, raises questions about the liability of canal companies and irrigation districts for discharges from their water delivery and collection systems into navigable waters. Could they be liable for pollutants in their canals deriving from municipal POTWs, street drains, and housing developments? Will the agricultural exemption (which EPA has interpreted to apply only to nonpoint sources, 40 C.F.R. § 122.3(e)), protect them when the canal point source reaches a navigable river? These are open questions.

The Kennedy concurrence is far more modest in limiting the CWA's reach. Kennedy rejects the plurality's conclusion that an intermittent stream or ditch can never be a water of the United States and that only wetlands with a direct physical connection can be regulated.

Justice Kennedy essentially says that *Riverside Bayview* and *SWANCC* form a sound foundation for reading the Clean Water Act and no dramatic departure from the Corps' current case-by-case approach is required. He concludes that the operative premise of these cases is not to mandate any hard and fast rules (as the plurality does), but to allow regulation of tributaries, ditches, and wetlands where it can be shown, as a matter of ecological science, that "a water or wetland [possesses] a 'significant nexus' to

waters that are or were navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759. Justice Kennedy explains what he means by "nexus" this way:

> Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."

Rapanos, 547 U.S. at 780.

Thus, under the Kennedy approach, the Corps would continue to have considerable leeway in evaluating the extent of their jurisdiction.

(e) Post-*Rapanos* circuit court decisions addressing CWA jurisdiction: Justice Kennedy's approach predominates

Given the Supreme Court's starkly divided and inexact declarations in *Rapanos*, the law could be seen as unsettled in the area of CWA jurisdiction, at least when the situation presents complicated or ambiguous facts. However, the following sampling of post-*Rapanos* opinions from the circuit courts of appeal indicates that the Kennedy approach is seen as the operative holding from the case.

(i) *United States v. Gerke Excavating, Inc.*[1298]

In *Gerke* the court concluded that Justice Kennedy's approach in *Rapanos* is the one to be applied because it is the only one which "will command the support of five justices" and "is the least common denominator."[1299]

[1298] 464 F.3d 723, 725 (7th Cir. Sept. 22, 2006), petition for rehearing and rehearing en banc denied Dec. 1, 2006, petition for certiorari denied Oct. 1,2007.

[1299] Actually, the Circuit Court could have described the math in terms of the Kennedy position being the "greatest common numerator." The denominator remains 9; Kennedy's concurrence combines with 4 to make 5/9ths.

(ii) *United States v. Charles Johnson*[1300]

In *Johnson* the circuit court remanded a lower court decision that was decided while *Rapanos* was pending. The appeal court ruled that the lower court may find CWA jurisdiction in the matter if the facts meet "either Justice Kennedy's legal standard or that of the plurality."

(iii) *San Francisco Baykeeper v. Cargill Salt Division*[1301]

The court in this case ruled there was no CWA jurisdiction over a "non-navigable, intrastate pond . . . not determined to be a wetland"—a pond that was the company's own man-made water body—even though it was adjacent to a slough that is waters of the United States. The court concluded that "mere adjacency provides a basis for CWA coverage only when the relevant waterbody is a 'wetland'. . . ." *Id*. However, the court confirmed that if the pond were to leak pollutants into the slough, discharges into the pond would be subject to section 404. *Id.* at 708 n. 7.

(iv) *United States v. Moses*[1302]

The Ninth Circuit upheld a criminal conviction for illegal fills in the "often dry portion of Teton Creek." The court observed that all nine justices in the *Rapanos* ruling agreed that "intermittent streams (at least those that are seasonal) can be waters of the United States." *Id.* at 991. The creek into which Mr. Moses deposited fill is tributary to Idaho's Teton River, which is tributary to the Snake River.

(v) *Northern California River Watch v. City of Healdsburg*[1303]

In *Healdsburg* an abandoned quarry pit that had filled with ground water was subject to CWA jurisdiction, even though it usually had no surface connection to the nearby Russian River, because 1) the pond has "an underground hydraulic connection" with the river; 2) the pond "significantly affects the physical, biological, and chemical integrity" of the Russian River (i.e., it meets one of the tests in the Kennedy

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[1300] 467 F.3d 56, 60 (1st Cir. Oct. 31, 2006), petition for rehearing and rehearing en banc denied Feb. 21, 2007, petition for certiorari denied Oct. 9, 2007.

[1301] 481 F.3d 700, 702 (9th Cir. Mar. 8, 2007).

[1302] 496 F.3d 984, 989 (9th Cir. Aug. 3, 2007), petition for rehearing en banc denied September 24, 2007, petition for certiorari denied June 23, 2008.

[1303] 496 F.3d 993, 1000-01 (9th Cir. Aug. 6, 2007), petition for certiorari denied Feb. 19, 2008

concurrence); and 3) the pond is "part of a larger wetland that is 'adjacent' to the River within the meaning of *Riverside Bayview Homes*."

Healdsburg is one of several post-*SWANCC* cases that have found water bodies to be waters of the United States even though they are man-made. In *Headwaters, Inc. v. Talent Irr. Dist.*, 243 F.3d 526, 533 (9th Cir. 2001), the appeals court ruled that irrigation canals are waters of the United States because they "receive water from natural streams and lakes, and divert water to streams and creeks," and therefore "are connected as tributaries to" jurisdictional waters. Likewise, even in *SWANCC* the fact that the abandoned gravel pit was man-made did not appear relevant to the Court's decision, which instead rested on the "significant nexus" concept. *See also* above discussion about the footnote in the *Cargill* opinion.

(vi) United States v. Robison[1304]

In Robison the court adopted the Justice Kennedy "significant nexus" test as the controlling standard from *Rapanos* and remanded the case for consideration consistent with that test.

(vii) *United States v. Robert J. Lucas, Jr.*[1305]

The circuit court found the record showed that a wetland was connected to navigable waters through three drainage areas, and therefore found all the tests listed in Justice Kennedy's *Rapanos* concurrence to be satisfied. Therefore, the wetland was subject to CWA jurisdiction.

(viii) *United States v. George Rudy Cundiff*[1306]

In this case defendant had constructed a ditch through a wetland, sidecasting the dirt into the wetland. The court agreed that the wetland was subject to CWA jurisdiction under either the plurality or concurring (i.e., Justice Kennedy) opinion in *Rapanos* because the wetland was connected to a creek which in turn reached a navigable river, and because the wetland performed important ecological functions that protected these waterways.

[1304] 505 F.3d 1208 (11th Cir. Oct. 24, 2007), petition for rehearing en banc denied, 521 F.3d 1319 (Mar. 27, 2008), petition for certiorari denied Dec. 1, 2008.

[1305] 516 F.3d 316 (5th Cir. Feb. 1, 2008), petition for certiorari denied Oct. 15, 2008.

[1306] 555 F.3d 200 (6th Cir. Feb. 4, 2009), petition for certiorari denied October 5, 2009.

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(ix) *United States v. Gary Bailey*[1307]

The court in *Bailey* found a wetland subject to CWA because it was "adjacent to navigable-in-fact waters."

(f) EPA's 2011 Draft Guidance interpreting *Rapanos*

In April 2011 EPA and the Corps issued a draft guidance on *Rapanos* to update their 2008 memorandum[1308] on this subject ("2011 Guidance"). In the draft guidance, the agencies state that they "continue to believe, as expressed in previous guidance, that it is most consistent with the *Rapanos* decision to assert jurisdiction over waters that satisfy either the plurality or the Justice Kennedy standard, since a majority of justices would support jurisdiction under either standard."[1309]

(6) General permits (section 402 and 404)

The Corps and EPA can expedite the permitting process by issuing what are called "general permits" for minor-impact activities. The Act provides that general permits for section 404 discharges may be issued on a state, regional, or nationwide basis "for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment."[1310]

Interestingly, the Act contains no similar provision for general permits for section 402 discharges. EPA has issued them nonetheless, based on general principles of administrative law, following the suggestion of federal courts beginning in the 1970s.[1311]

[1307] 571 F.3d 791, 802 (8th Cir. July 9, 2009).

[1308] Before *Rapanos*, the agencies issued a Joint Memorandum in 2003 on the definition of waters of the United States, 68 Fed. Reg. 1991, 1995. In 2008, they issued their paper entitled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States"* (December 2, 2008).

[1309] 2011 Guidance at 2.

[1310] CWA § 404(e), 33 U.S.C. § 1344(e) (authorizing general permits for section 404).

[1311] "Courts . . . specifically suggested the use of area-wide and general permits as a mechanism for addressing the Agency's need to issue a substantial number of permits. See *NRDC v. Train*, 396 F. Supp. 1393, 1402 (D. D.C. 1975); *NRDC v. Costle*, 568 F.2d 1369, 1381 (D.C. Cir. 1977). Adopting the courts' suggestion, EPA has made increasing use of general permits in its CWA regulatory program, particularly for storm water discharges." 63 Fed. Reg. 52430, 52462 (Sept. 30, 1998). Courts continue to look to general permits in the section 402 context as a practical solution: "Congress intentionally passed a 'tough law.' [*Natural Res. Def.*

> NPDES permits come in two varieties: individual and general. An individual permit authorizes a specific entity to discharge a pollutant in a specific place and is issued after an informal agency adjudication process. *See* 40 C.F.R. §§ 122.21, 124.1-124.21, 124.51-124.66. General permits, on the other hand, are issued for an entire class of hypothetical dischargers in a given geographical region and are issued pursuant to administrative rulemaking procedures. *See id*. §§ 122.28, 124.19(a). General permits may appropriately be issued when the dischargers in the geographical area to be covered by the permit are relatively homogenous. *See id*. § 122.28(a)(2). After a general permit has been issued, an entity that believes it is covered by the general permit submits a "notice of intent" to discharge pursuant to the general permit. *Id*. § 122.28(b)(2). A general permit can allow discharging to commence upon receipt of the notice of intent, after a waiting period, or after the permit issuer sends out a response agreeing that the discharger is covered by the general permit. *Id*. § 122.28(b)(2)(iv).

Natural Resources Defense Council v. EPA, 279 F.3d 1180, 1183 (9th Cir. 2002).

A person may engage in an activity covered by a general permit without obtaining an individual permit so long as he or she meets all the conditions spelled out in the permit.[1312] In some cases, an activity covered by a general permit may simply be undertaken without paperwork or notification. In other cases, the permit requires notice to the agency (called a "Notice of Intent" or NOI).

The Corps has published implementing regulations for its general permits.[1313] However, neither Corps nor EPA general permits themselves are codified in the Code of

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Council v. Costle, 568 F.2d 1369, 1375 (D.C. Cir. 1977).] But Congress did not intend that the law impose an unreasonable or impossible burden. Congress has carefully exempted certain categories of point source discharges from the statutory definition. For those discharges that continue to be covered by the definition, the permitting process is not necessarily onerous, either for EPA or for an entity seeking a permit. For example, in appropriate circumstances a discharge may be allowed under a 'general permit' requiring only that the discharger submit a 'notice of intent' to make the discharge." *Northwest Envtl. Defense Ctr. v. Brown*, 617 F.3d 1176, 1197 (9th Cir. 2010).

[1312] 33 C.F.R. §§ 330.1(c), 330.2(c).

[1313] 33 C.F.R. § 323.2(h) (Corps' definition of general permit); 33 C.F.R. § 325.2(e)(2) (regional 404 permits generally); 33 C.F.R. part 330 (nationwide 404 permits generally).

Federal Regulations, because they are not rules.[1314] Rather, they appear as notices in the Federal Register.[1315]

A summary of the Corps' 43 nationwide permits, and their conditions, appears in Appendix R. Of particular note are NWP No. 3 (maintenance activities), NWP No. 13 (bank stabilization), NWP No. 18 (minor discharges—up to 1/10 acre fill), NWP No. 19 (minor dredging), NWP No. 29 (single family home). Note that former NWP No. 26 (isolated wetlands) expired in 2000.

Like individual permits, general permits are issued for a fixed period of time, not to exceed five years. Note that this period runs from the date the agency issued the permit, not the date that the individual sought coverage under the permit. Ordinarily the issuing agency will provide continuing coverage to holders of expired general permits, if the agency fails to issue a replacement general permit in a timely fashion.

Even if a general permit is available, the applicant must still obtain a section 401 certification from the state. In some instances, the state will certify the general permit itself, so that no further action is required of the application. In other cases, the state has declined to certify the general permit, in which case the applicant must seek certification from the state on an individual basis.

(7) Section 401 certification

Section 401 of the CWA requires that any applicant for a federal license or permit (including a section 402 or 404 permit) authorizing a discharge into the navigable waters must first obtain a certification from the state in which the discharge will occur. CWA § 401(a)(1), 33 U.S.C. § 1342(a)(1). The state certification must provide that the discharge will comply with all applicable water quality provisions of the CWA and all applicable state laws (unless the state waives the 401 certification). EPA or the Corps typically provide a draft permit for state review. The state may then grant or deny certification, or it may grant certification conditionally based on the inclusion of more stringent provisions.

In *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 547 U.S. 370 (2006), the operator of a group of small hydroelectric facilities licensed by the Federal Energy Regulatory Commission ("FERC") sought a section 401 certification from the State of Maine under protest. The operator contended that the renewal of a FERC license was not

[1314] "On the basis of its review, EPA has concluded that NPDES general permits are permits under the APA [Administrative Procedures Act] and thus not subject to APA rulemaking requirements . . . ." 63 Fed. Reg. 52430, 52462 (Sept 30, 1998).

[1315] 67 Fed. Reg. 2020 (Jan. 15, 2002) (Corps' section 404 nationwide permits); 67 Fed. Reg. 6692 (Feb. 13, 2002) (minor corrections to Corps permits). EPA's general permits are not collected into a single Federal Register notice.

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a section 401 event because the project involved no discharge of a pollutant to waters of the United States. Maine nonetheless issued certifications with conditions requiring minimum streamflows in the stream segments that would otherwise have been dewatered by the projects. (The projects removed water from the stream, generated power, and returned the water downstream.)

The decision turned on parsing the language in section 401. The Supreme Court noted that section 401 speaks only of a "discharge into the navigable waters" in contrast with section 402, which keys into the defined term "discharge of a pollutant." *S.D. Warren*, 547 U.S. at 380-81. Section 401 is broader, said the Court. While the term "discharge of a pollutant" is a defined term under the Act (CWA § 502(12), 33 U.S.C. § 1362(12)), the term "discharge" is not. Moreover, the Court concluded that the reference to "discharge" as something that "includes a discharge of a pollutant (CWA § 502(16), 33 U.S.C. § 1362(16)) was not intended to equate "discharge" with "discharge of a pollutant." Instead, the Court gave the word "discharge" its "common and ordinary meaning". *S.D. Warren*, 547 U.S. at 387. Accordingly, the discharge of the same water back to the stream is a "discharge" requiring section 401 certification, even if it does not require a section 402 permit.

The case of *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143 (9th Cir. 2011), also addressed the scope of section 401, finding that it was limited to point source discharges. In this case, environmental groups challenged the approval by the BLM and the Forest Service of the expansion of the J.R. Simplot Smoky Canyon Mine in eastern Idaho. Plaintiffs raised a number of issues including the failure to secure a section 401 certification. The Ninth Circuit ruled no 401 certification was required because there was no point source discharge. "The district court correctly concluded that Simplot did not fail to acquire a § 401 certification as required under the CWA. The § 401 certification requirement applies only to discharges from point sources. *See Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1095–97 (9th Cir. 1998). Simplot was not required to obtain a § 401 certification because the mining pits protected by the cover do not qualify as a point source." *Greater Yellowstone*, 628 F.3d at 1152. In reaching this conclusion, the Ninth Circuit parsed the statute as follows:

> Pursuant to § 401 of the CWA, "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates." 33 U.S.C. § 1341(a)(1). The CWA defines "discharge" as including "any addition of any pollutant to navigable waters from any point source." *Id*. § 1362(12)(A). A point source is defined by the CWA as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id*. § 1362(14).

Greater Yellowstone, 628 F.3d at 1152. Curiously, neither the parties nor the district court nor the appellate court explored whether *Greater Yellowstone* is consistent with *S.D. Warren*. *Greater Yellowstone* was cited and followed in *Ecological Rights Foundation v. Pacific Gas and Electric Co.*, 2011 WL 1302229 at *5 (N.D. Cal. 2011).

In an unreported decision, a federal district court in Oregon held that the approval of plans of operation ("PoO") for mining was a section 401 event. *Hells Canyon Preservation Council v. Haines*, 2006 WL 2252554 (D. Or. 2006). In this case, two environmental groups challenged a decision by the Forest Service to approve a group of 49 new PoOs and amended PoOs for gold mining in the Wallowa-Whitman National Forest in eastern Oregon. The Forest Service prepared a single EIS and ROD for all the mining operations. The action did not actually approve the individual PoOs. However, subsequent PoO approvals would follow as a matter of course based on the ROD. By the time of the decision, 29 PoOs had been approved in accordance with the ROD, and none of them entailed section 401 certification. Plaintiffs in *Hells Canyon* contended that the Forest Service violated the CWA when it issued the ROD without first requiring the applicants to obtain section 401 certification.

The district court then concluded that the ROD and/or the subsequent PoO approvals constitute a "license or permit that would trigger § 401." *Hells Canyon* at *4. "The agency's responsibility under the CWA is clear and, as here, the Forest Service has not complied with the § 401 requirement of certification prior to permitting miners to begin mining operations. . . . Thus, mining activities that may result in discharges of pollutants into navigable waters will commence without § 401 certification, a violation of the CWA." *Hells Canyon* at *4.

In *Hells Canyon*, the parties and the court simply assumed that the federal action would result in discharges to navigable waters. "The Forest Service does not dispute that mining activities may result in discharges into navigable waters." *Hells Canyon* at *4.[1316] It would seem that this factual premise could be a basis for distinguishing *Hells Canyon* in other contexts. Notably, a particular PoO (or other federal action) might include express conditions prohibiting any discharge that is not covered by a then-existing or to-

[1316] Rather than arguing that the PoOs did not authorize any discharge, the Forest Service argued that the ROD did not itself approve any PoOs, and the PoO approvals would happened subsequently based on their own merits. The district court rejected this argument, noting that the PoO approvals were largely pro forma so long as they PoO was consistent with the terms of the ROD. Thus, the Court never discussed how it was that the PoOs actually "authorized" any discharges. It is also curious that no issue was raised in the case about the lack of a section 402 or 404 permit. If there is a problem with section 401, would not section 402 and 404 permits also have been required? In any event, the premise of the decision seems to be that the PoO itself (not a 402 or 404 permit) is a "Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters." *Hells Canyon* at *3-4 (quoting CWA § 401(a)(1), 33 U.S.C. § 1342(a)(1)).

be-obtained section 402 or 404 permit. In that case, the PoO approval would not be a permit or license "which may result in any discharge into the navigable waters." CWA § 401(a)(1), 33 U.S.C. § 1342(a)(1).

(8) Section 313 (sovereign immunity waiver; subjects federal facilities to CWA permit requirements)

The CWA applies to all "persons." However, that term is defined to exclude the United States (section 502(5), 33 U.S.C. § 1362(5)).

The CWA was amended in 1977 to add a waiver of sovereign immunity similar to that found in other pieces of environmental legislation. Specifically, section 313(a) of the CWA, 33 U.S.C. § 1322(a), requires federal agencies to comply with all federal and state requirements respecting the control and abatement of water pollution, including permit requirements. Note that section 404(r) of the CWA, 33 U.S.C. § 1344(r), sets out a special exemption from section 402 and 404 for the construction of congressionally authorized projects. It does not apply, however, to the operation of such federal projects.

Thus, when the federal government engages in actions that cause discharges, it too must obtain appropriate permits. "The Clean Water Act requires that a government agency obtain a NPDES permit before discharging any pollutant from any point source into navigable waters of the United States. 33 U.S.C. § 1323(a)." *Fairhurst v. Hagener*, 422 F.3d 1146, 1148 (9th Cir. 2005). For example, when the Forest Service itself applies pesticides to waters of the United States, is bound to comply with the CWA. *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir 2002). In 2017, the Center for Environmental Law and Policy successfully sued U.S. Fish & Wildlife for discharging without an NPDES permit (or more precisely, discharging with an NPDES permit that expired about 35 years earlier). *Center for Envtl. Law & Policy v. U.S. Fish & Wildlife*, No. 2:15-CV-00264-SMJ, 2017 WL 80254 (E.D. Wash. Jan. 9, 2017). See discussion in Peter McKenna, *Constitutional Law—Sovereign Immunity—States May Not Impose Civil Penalties on the United States Government for Violations of State Statutes Promulgated under the Authority of the Clean Water Act and the Resource Conservation and Recovery Act—United States Dep't of Energy v. Ohio, 112 S. Ct. 1627 (1992)*, 23 Seaton Hall L. Rev. 762 (1993).

A few cases have applied this provision in situations where the federal government does nothing more than approve a private action on federal land. These cases fail to analyze this section, and their conclusion appears to be incorrect.[1317]

[1317] "Plaintiffs point to *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1153 (9th Cir. 1998), *overruled on other grounds by Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008), and *Oregon Natural Resources Council v. United States Forest Service*, 834 F.2d 842 (9th Cir. 1987) (*ONRC*), two cases in which the Ninth Circuit reviewed the Forest Service's sale of timber on federal land to a third party. Although these cases were brought for alleged violations

In a separate part of its decision in *Hells Canyon Preservation Council v. Haines*, 2006 WL 2252554 (D. Or. 2006), the court found that the Forest Service's approval of the PoOs violated section 313(a), 33 U.S.C. § 1323(a). This is a little-discussed provision that requires all branches of the federal government to comply with the CWA "to the same extent as any nongovernmental entity." This provision is a waiver of sovereign immunity similar to those found in other environmental statutes. Without explanation, the *Hells Canyon* Court assumed that it imposed an obligation on the Forest Service to comply with state anti-degradation requirements every time it issues a PoO.

A similar, and similarly confusing, passing reference to section 313 appears in *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1149 (9th Cir. 2011) ("The CWA requires federal agencies to determine that approved actions do not result in pollution in violation of state water quality standards. 33 U.S.C. § 1323(a)."). See also *Center for Native Ecosystems v. Cables*, 509 F.3d 1310 (10th Cir. 2007), finding section 313 triggered by the issuance of grazing authorizations to private parties.

Other decisions which have grappled with the issue, rather than merely reciting section 313, reach the seemingly obvious conclusion that the waiver of sovereign immunity applies only where the federal government is itself the polluter:

> On its face, Section 313 acts to waive sovereign immunity only where an arm of the federal government is an alleged polluter. *See also Colorado Wild, Inc. v. United States Forest Service*, 122 F. Supp. 2d 1190 (D. Colo. 2000) (no waiver of sovereign immunity under Section 313 where plaintiffs did not allege that Forest Service was engaged in polluting at a federal facility). In those instances, Congress indicated its intent to require governmental entities to comply with pollution requirements to the same extent as nongovernmental polluters. *See United States Dep't of Energy v. Ohio*, 503 U.S. 607, 112 S. Ct. 1627, 118 L.Ed.2d 255 (1992) ("The federal-facilities sections of the CWA and RCRA govern the extent to which federally operated facilities, such as DOE's Fernald facility are subject to . . . statutes . . . and regulation and enforcement programs."). There is no indication in the

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of § 1323, neither decision directly addresses the CWA's waiver of sovereign immunity with regard to the permitted activities of a private third party on federal land." *Center for Biological Diversity v. Wagner*, 2009 WL 2176049 at *15 (D. Oregon 2009), *R & R approved*, 2009 WL 2208023 (D. Oregon 2009). The *Idaho Sporting Congress* decision was sharply criticized in Robin Kundis Craig, *Idaho Sporting Congress v. Thomas and Sovereign Immunity: Federal Facility Nonpoint Sources, the APA, and the Meaning of "In the Same Manner and to the Same Extent as any Nongovernmental Entity*, 30 Envtl. L. 527 (2000), an article cited with approval in *Center for Biological Diversity*, 209 WL 2176049 at *16.

> statute that Congress intended to waive sovereign immunity with respect to agency enforcement decisions over third parties, such as those at issue in this case.

City of Olmsted Falls v. U.S. EPA, 233 F. Supp. 2d 890, 897 (N.D. Ohio 2002) (challenge to issuance of section 404 permit for an airport on municipal land).

In the *Colorado Wild* case (cited by the court in *Olmstead Falls*), the court rejected an argument that section 313 applied where the Forest Service approved a master plan for a ski area located on federal land:

> First, the language of Section 313 appears to be limited to requiring a federal facility to comply with pollution control measures in the same fashion as a nongovernmental entity. Cases interpreting this section have addressed the issue of whether sovereign immunity was waived in cases involving the operation of federal facilities. *See United States Dep't of Energy v. Ohio*, 503 U.S. at 612, 112 S. Ct. 1627 (alleging violations of CWA arising from the operation of a uranium processing plant); *Lujan*, 972 F.2d at 316 (alleging violations of CWA arising from operation of a mine drainage tunnel); *Metro. Sanitary Dist. v. United States Dep't of Navy*, 722 F. Supp. 1565, 1567 (N.D. Ill. 1989) (alleging the United States Department of the Navy failed to comply with the terms of its sewage discharge permit). In fact, Section 313 is entitled "Federal facilities pollution control." 33 U.S.C. § 1323. . . . Here, there is neither a federal facility, nor a federal activity resulting in the discharge of pollutants which invokes Section 313. Therefore, the Court feels that waiving sovereign immunity in this case where the only alleged action involves the approval of a Master Development Plan would improperly enlarge the waiver of sovereign immunity beyond what Section 313 requires.

Colorado Wild, Inc. v. U.S. Forest Service, 122 F. Supp. 2d 1190, 1194-95 (D. Colo. 2000).

Olmstead Falls and *Colorado Wild* are thoughtfully discussed in *Center for Biological Diversity v. Wagner*, 2009 WL 2176049 at *15 (D. Oregon 2009), *R & R approved*, 2009 WL 2208023 (D. Oregon 2009). Ultimately, however, that court found it unnecessary to reach the issue.

(9) Indirect discharge regulation (aka pretreatment regulation)

Industrial users[1318] who do not discharge directly to waters of the United States are not required to obtain an NPDES permit. However, municipal operators of publicly owned treatment works ("POTW") are obligated under the Act to regulate "significant industrial users" who increase the load to their POTW by discharging to the municipal sewage system. These are called "indirect dischargers." They are required to obtain an "indirect discharge permit" from the city.[1319] These are sometimes referred to under the rubric of pretreatment regulation, based on the idea that the industrial user may be required to pretreat its discharge to some extent before discharge to the POTW. However, this is a bit of a misnomer, because the thrust of the program is demand that the industrial user meet a variety of often complex limitations on what can be discharged. This may or may not require pretreatment to achieve. It may be, for instance, that the industrial user can comply simply by modifying its production process or limiting its volume.

Although industrial users that discharge to a POTW need not obtain an NPDES permit, they may still have liability under the Clean Water Act for their discharges under two circumstances.

[1318] A note on terminology: "Industrial User" is defined at 40 C.F.R. § 403.3(h) as the source of an Indirect Discharge to a POTW. Practitioners often refer to industrial users by the acronym "IU." "Indirect Discharge" is defined at 40 C.F.R. § 403.3(g) as a discharge to a POTW from a non-domestic source. There is no such thing as an Indirect Discharger; the correct term is Industrial User. Nevertheless, one frequently encounters the phrase Indirect Discharger, e.g., *Clean Water Act Handbook* at 83 (ABA 2001). Indeed, EPA uses the term indirect discharger in its own guidance. Note also that there is a different definition of "industrial user" in the CWA, which does not appear to relate to persons discharging to a POTW. CWA § 502(18), 33 U.S.C. § 1362(18).

[1319] Note that the permit discussed here is distinct from an industrial wastewater discharge agreement, which may also be required. The industrial wastewater discharge agreement (which is sometimes folded into the permit as a single document) is a contract between the city and the industrial user of the POTW and established discharge fees based on the volume of wastewater discharged and other factors.

First, industrial users are prohibited from discharging pollutants to a POTW if the discharge results in a violation of the POTW's own NPDES permit because of "interference"[1320] or "pass through."[1321]

Second, if the POTW has adopted what are known as "local limits"[1322] and imposed them on the industrial user by ordinance or through an industrial waste water discharge permit, these limits are directly enforceable by EPA and by citizens.

Both of these prohibitions are regulatory creations under EPA's pretreatment regulations. The first (prohibition of pass through and interference) was plainly authorized by the Act.[1323] The second (federal enforceability of local limits) arguably was not. The Clean Water Act does not even mention local limits.[1324] Rather, the Act expressly authorizes EPA to promulgate national "pretreatment standards" to prevent pass through and interference.[1325] These pretreatment standards are made federally

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[1320] 40 C.F.R. § 403.3(j) (definition of "interference" – essentially a discharge that inhibits or disrupts the operation of the POTW).

[1321] 40 C.F.R. § 403.3(n) (definition of pass through – essentially a discharge that the POTW is unable to treat).

[1322] Local limits are intended to take into account local conditions and concerns. "[C]ategorical standards [promulgated by EPA] are developed to achieve a nationally-uniform degree of water pollution control for selected industries and pollutants. Local limits [imposed by the POTW] are intended to prevent site-specific plant and environmental problems resulting from any nondomestic user." *Guidance Manual on the Development and Implementation of Local Discharge Limitations Under the Pretreatment Program* (Dec. 1987) at 1-11.

[1323] The Act instructs EPA to promulgate regulations to prevent interference and pass through. CWA § 307(b)(1), 33 U.S.C. § 1317(b)(1). The agency has done so in its "general prohibition" section of its pretreatment regulations, which states: "A User may not introduce into a POTW any pollutant(s) which cause Pass Through or Interference." 40 C.F.R. § 403.5(a)(1). Such discharges are also prohibited under the "specific prohibitions" section. 40 C.F.R. § 403.5(b)(4).

[1324] The terms "specific limits" and "local limits" do not appear in the CWA. Although they are employed in the regulations, they are not formally defined. The closest thing to a definition of "local limits" is section 403.5(c) where the words "local limits" appear only in the heading. EPA's guidance employs the term "local limits" to describe the specific limits discussed in section 403.5(c). Accordingly, this Handbook employs the term "local limits."

[1325] The Clean Water Act did not establish any pretreatment standards itself. Rather, it instructed EPA to promulgate "regulations establishing pretreatment standards." CWA § 307(b)(1), 33 U.S.C. § 1317(b)(1). The CWA contains no formal definition of "pretreatment standards." However, the Act refers in numerous places to "pretreatment standards under section 1317" or, in some cases, "under section 1317(b)" or "1317(b)(1)." E.g., CWA § 402(m), 33 U.S.C. § 1342(m). Thus, it is clear that under the Act "pretreatment standards" means any

enforceable.[1326] Thus, there is no doubt that federally promulgated pretreatment standards (such as EPA's categorical pretreatment standards[1327]) are enforceable by EPA and citizens.

The Act says nothing about federal enforcement of local limits imposed by municipal POTW operators.[1328] The Act does not authorize EPA to delegate its authority to adopt pretreatment regulations to individual municipalities. Nor does the Act contain any definition or other language suggesting that limits adopted by operators of a POTW fall within the meaning of "pretreatment standards" under section 307. Nevertheless, EPA has promulgated regulations making local limits enforceable under the Act by EPA

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standards adopted under section 307. That is as close as the Act gets to defining pretreatment standards.

[1326] The CWA provides that citizen suits may be brought against any person for violations of "an effluent standard or limitation under this chapter." CWA § 505(a)(1)(A), 33 U.S.C. § 1365(a)(1)(A). The citizen suit section of the Act defines "effluent standard or limitation under this chapter" as any "prohibition, effluent standard or pretreatment standards under section 1317 of this title." CWA § 505(f)(4), 33 U.S.C. § 1365(f)(4) (emphasis added). Thus, citizen suits may be brought to enforce "pretreatment standards." (The Act contains a separate and more limited definition of "effluent limitation" in its main definition section, CWA § 502(11), 33 U.S.C. § 1362(11), but the more broader definition of "Effluent standard or limitation under this chapter" contained in the citizen suit provision controls here.)

EPA may also directly enforce violations of pretreatment standards in federal court. CWA § 309(f), 33 U.S.C. § 1319(f); *Clean Water Act Handbook* at 96 (AGA 2001).

[1327] "Categorical standards" are technology-based standards adopted by EPA on an industry-by-industry basis. They are described generally in section 403.6. 40 C.F.R. § 403.6. Specific standards are set out for various subcategories of industrial users. 40 C.F.R. §§ 405 to 471.

[1328] The conclusion that the pretreatment standards contemplated by Congress were to be issued by EPA is reinforced by the language in subsection 307(d), which declares that it is unlawful for any owner or operator to operate a source in violation of a "pretreatment standard promulgated under this section." CWA § 307(d), 33 U.S.C. § 1317(d) (emphasis added). The promulgated standards referred to in section 307(d) are presumably the very pretreatment regulations EPA was instructed to promulgate in section 307(b)(1) ("the Administrator shall promulgate such pretreatment standards"). The federal regulatory nature of pretreatment standards is further reinforced by the Act's proviso that the pretreatment regulations should be tailored to industry groups, not to individual users. "When proposing or promulgating any pretreatment standard under this section, the Administrator shall designate the category or categories of sources to which such standards shall apply." CWA § 307(b)(3), 33 U.S.C. § 1317(b)(3). EPA has implemented this requirement through the adoption of categorical pretreatment standards.

and private citizens. Thus, whether intended by Congress or not, the fact is that EPA's implementing regulations have federalized local limits.

The regulations do this in two ways. The first is by expanding the definition of pretreatment standard.[1329] The second is through a separate provision expressly dealing with the enforcement of local limits.[1330]

[1329] EPA's regulations define "National Pretreatment Standard" and "Pretreatment Standard" as interchangeable terms meaning (1) any regulation adopted by EPA imposing limits on industrial users pursuant to section 307 of the Act or (2) "prohibitive discharge limits established pursuant to § 403.5" 40 C.F.R. § 403.3(j). It is the second part of that definition (referring to section 403.5) that picks up local limits. The terms "prohibitive discharge limits" and "prohibited discharges" are not found in the CWA and appear only in the regulations. (The only other similar reference is the term "prohibitive discharge standards," which appears in 40 C.F.R. § 403.13(c)(2)(ii). (Both "prohibitive discharge limits" in section 403.3(j) and "prohibitive discharge standards" in section 403.13(c)(2)(ii) refer back to section 403.5. Presumably, then, they are the same thing.) Although the reference to "prohibitive discharge limits" in section 403.3(j) refers to section 403.5, section 403.5 does not employ the term "prohibitive discharge limits." However, it does contain the words "*prohibited* discharges" in its heading. Thus, apparently, the terms are interchangeable and encompass anything within section 403.5.

Section 403.5 sets out two types of "prohibitive discharges": "general prohibitions," 40 C.F.R. § 403.5(a), and "specific prohibitions," 40 C.F.R. §§ 403.5(b), (c) and (d). These are referred to collectively as "general pretreatment requirements." *Clean Water Act Handbook* at 85 (ABA 2002).

The term "general prohibitions" actually consists of a single, catch-all prohibition: "A User may not introduce into a POTW any pollutant(s) which cause Pass Through or Interference." 40 C.F.R. § 403.5(a)(1). The "specific prohibitions" are set out in the regulations as a list of eight additional prohibitions. These include a prohibition against "[a]ny pollutant, including oxygen demanding pollutants (BOD, etc.) released in a Discharge at a flow rate and/or pollutant concentration which will cause Interference with the POTW." 40 C.F.R. § 403.5(b)(4). By the way, it is odd that this provision only mentions "Interference" and not "Pass Through."

The next subsection (40 C.F.R. § 403.5(c)) requires POTWs, under certain conditions, to implement "specific limits" to supplement and/or implement the general discharge requirements described above. Although referred to in section 403.5(c) as "*specific* limits," they are referred to in section 403.5(d) as "*local* limits." They mean the same thing.

The requirement to develop local limits applies in two circumstances. First, every POTW with a design flow of over 5 mgd is required to adopt local limits. 40 C.F.R. § 403.5(c)(1). Second, other POTWs (i.e., those below 5 mgd, such as the Jerome POTW) are required to adopt local limits if there has been a recurring pattern of interference or pass through. 40 C.F.R. § 403.5(d)(2).

[1330] As shown above, the regulation's definition of "pretreatment standards" includes "prohibitive discharges" encompassing everything spelled out in section 403.5 This alone should be sufficient to federalize locally-implemented limits under section 403.5(c). However,

By federalizing local limits in the absence of statutory authority, it appears that EPA's regulations may exceed the agency's authority under the CWA. This may even constitute an unconstitutional delegation of administrative authority to non-federal entities. However, the regulations have been in place since the 1980s and have never been challenged.

In any event, not every effluent limit contained in a locally-issued industrial waste water discharge permit is a local limit. To be a local limit under EPA's regulations, the standard must have been crafted by the local entity specifically to prevent "interference" and "pass through."[1331] Making this calculation is not a trivial exercise.[1332] EPA has provided hundreds of pages of detailed technical guidance on how these local limits are to be developed. *Guidance Manual on the Development and Implementation of Local*

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the regulations contain another provision expressly stating that these are enforceable under the Act:

> *Local limits*. Where specific prohibitions or limits on pollutants or pollutant parameters are developed by a POTW in accordance with paragraph (c) above, such limits shall be deemed Pretreatment Standards for the purposes of section 307(d) of the Act.

40 C.F.R. § 403.5(d) (italics original). Section 307(d) is the prohibition against violating any pretreatment standard. CWA § 307(d), 33 U.S.C. § 1317(d). As discussed above, the citizen suit provision allows enforcement of violations of pretreatment standards under section 307. CWA §§ 505(a) and (f)(4), 33 U.S.C. §§ 1365(a) and (f)(4).

Thus, the regulations adopt a belt-and-suspenders approach to making these locally-imposed standards part of the federally enforceable pretreatment standards.

[1331] The CWA clearly provides that pretreatment standards are to be aimed specifically at addressing interference and pass through. CWA § 307(b)(1), 33 U.S.C. § 1317(b)(1); CWA § 307(b)(1), 33 U.S.C. § 1317(b)(1). EPA's regulations are consistent with the scope of section 307 in that they limit pretreatment standards to effluent limits aimed at preventing interference or pass through.

[1332] One commentator offers this summary:

> POTWs establish local limits through a process that first requires the POTW to use site-specific data to identify pollutants of concern that might reasonably be expected to be discharged in quantities sufficient to cause plant or environmental problems. These pollutants of concern may be identified by characterizing industrial discharges, monitoring POTW influent, effluent and sludge, and reviewing pollutant effects on plant operations and environmental protection criteria. Once the pollutants of concern and the sources discharging them have been identified, the POTW will choose the most effective technical approach for limit development.

Clean Water Handbook at 116-17 (Gov't Institutes 2003).

Discharge Limitations Under the Pretreatment Program (Dec. 1987). Moreover, local limits must be adopted in accordance with certain notice requirements.[1333]

(10) Oil and hazardous substance spills

The sections of the Clean Water Act discussed above—notably section 402—deal with anticipated, ongoing, routine releases to navigable waters, typically in the context of industrial, commercial, or agricultural operations. The Act also contains a section dealing with accidental releases and spills—section 311.[1334] Note that section 311 interacts with the Oil Pollution Act of 1990.[1335]

Section 311(b)(3) prohibits the discharge of "oil or hazardous substances" into waters of the United States.[1336] (This section does not apply to discharges pursuant to an NPDES permit (section 402), which are exempted from section 311.[1337])

When a release of hazardous substances to waters of the United States occurs, violators will be subject both to section 311 of the CWA and to CERCLA. Note, however, that the definition of hazardous substances is not the same under the two acts. Thus, as a practical matter, Section 311 is employed primarily to address oil spills.

[1333] Subsection, 403.5(c)(3), mandates: "Specific effluent limits shall not be developed and enforced without individual notice to persons or groups who have requested such notice and an opportunity to respond." 40 C.F.R. § 403.5(c)(3). Thus, affected parties have a right to be engaged in the process of developing these limits. EPA's guidance states that all "affected persons" are entitled to notice, not just those requesting such notice. "Federal regulations require POTWs to provide individual notice and an opportunity to respond to affected persons and groups before final promulgation of a local limit." *Guidance Manual on the Development and Implementation of Local Discharge Limitations Under the Pretreatment Program* (Dec. 1987) at 1-19 (citing 40 C.F.R. § 403.5(c)(3)).

[1334] CWA § 311, 33 U.S.C. § 1321.

[1335] The Oil Pollution Act of 1990 ("OPA"), Pub. L. No. 101-380 (Aug. 18, 1990), was adopted by a remarkable unanimous vote of the House and Senate in response to the Exxon Valdez oil spill in Alaska. It is codified primarily at 33 U.S.C. §§ 2701 to 2761). However, it also amended section 311 of the CWA. The interaction between the two statues can be confusing. For instance, section 311 contains limitations on liability that have been overridden by section 2002 of the OPA.

[1336] CWA § 311(b)(3), 33 U.S.C. § 1321(b)(3).

[1337] CWA § 311(a)(2), 33 U.S.C. § 1321(a)(2).

The Act requires the person in charge to immediately notify the National Response Center of any spill in violation of section 311.[1338]

Violators of section 311 are liable for penalties,[1339] response costs,[1340] and natural resource damages.[1341] Operators are strictly liable for cleanup costs, except for a few exceptions.[1342] Criminal sanctions for violations of section 311 are also provided.[1343] Enforcement of section 311 is the dual responsibility of the EPA and the U.S. Coast Guard.

(11) Federal enforcement of the Clean Water Act

The holder of a section 404 or NPDES permit is subject to enforcement action by EPA for failure to comply with conditions spelled out in the permit. The government's enforcement tools include administrative, civil, and criminal sanctions.[1344] Penalties may be as high as $32,500 per day.[1345]

In determining the amount of any civil penalty, the court will take into account six factors set out in the statute: "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith

[1338] CWA § 311(b)(5), 33 U.S.C. § 1311(b)(5).

[1339] CWA § 311(b)(6) and (7), 33 U.S.C. § 1311(b)(6) and (7).

[1340] CWA § 311(f), 33 U.S.C. § 1311(f).

[1341] CWA § 311(f)(4), 33 U.S.C. § 1311(f)(4).

[1342] For example, CWA § 311(f)(2)(D), 33 U.S.C. § 1311(f)(2)(D), exempts owners or operators of onshore facilities (which is defined to include vehicles) from responsibility for federal cleanup of spills caused solely "by an act or omission of a third party" (even where the third party was not negligent). Similar exemptions apply to spills from vessels and offshore facilities. However, this "third party defense" has been construed narrowly by the courts. E.g., *Kyoei Kaiun Kaisha, Ltd. v. M/V Bering Trader*, 795 F. Supp. 1054, 1056 (W.D. Wash. 1991) ("any conduct, however slight, on the part of the owner or operator contributing to a spill negates relief, even though such conduct might have operated in concert with greater third-party conduct to produce the spill").

[1343] CWA § 309(c), 33 U.S.C. § 1319(c); Oil Pollution Act § 4301(c).

[1344] CWA § 309, 33 U.S.C. § 1319.

[1345] CWA § 309(d), 33 U.S.C. § 1319(d); 69 Fed. Reg. 7121 (Feb. 13, 2004).

efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require."[1346]

Many enforcement actions are settled with agreements employing "Supplemental Environmental Projects" (SEPs).[1347] These are employed in settlement of both government enforcement actions and now, increasingly, private citizen suits. In a typical SEP, the defendant funds an environmentally beneficial project in lieu of (or as an offset to) civil penalties. SEPs are usually related in some way to the alleged violation or to the resource alleged to be adversely affected.[1348]

Enforcement actions may be brought by both the EPA and the State, where the program has been delegated.[1349] Idaho, however, is one of a few states that has not been delegated authority under the Clean Water Act. Consequently, all enforcement is federal.

The defendant is entitled to a trial by jury for determination of liability under the Clean Water Act, but not as to the determination of the specific amount of any penalty.[1350] That determination falls within the discretion of the trial judge, subject to the statutory guidelines discussed above.

One final point, unlike CERCLA and other federal environmental statutes, the Clean Water Act focuses on the actor who engaged in the unlawful discharge, not the owner of the property. (Section 311, discussed in section 41.A(10), is an exception.) Thus, a party who acquires a property on which an illegal fill occurred may not be responsible for the violation (assuming there was no collusion between buyer and seller).[1351] However, there is case law to suggest that the beneficiary of an estate may be

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[1346] CWA § 309(d), 33 U.S.C. § 1319(d). Various judicial approaches to the assessment of penalties are explored in Erin Belk & Sarah Kern, *Assessing Civil Penalties in Clean Water Act Citizen Suit Cases*, 10 Hastings West-Northwest Journal of Envtl. L & Policy 71 (2003).

[1347] See *Final EPA Supplemental Environmental Projects Policy*, 63 Fed. Reg. 24796, 24797-98 (May 5, 1998).

[1348] SEPs are discussed in Edward Lloyd, *Supplemental Environmental Projects Have Been Effectively Used in Citizen Suits To Deter Future Violations as Well as to Achieve Significant Additional Environmental Benefits*, 10 Widener L. Rev. 413 (2004).

[1349] CWA §§ 309, 33 U.S.C. §§ 1319, 1342(b)(7).

[1350] *Tull v. United States*, 481 U.S. 412 (1987).

[1351] *In re Carsten*, 211 B.R. 719, 730 (D. MT. 1997) (owners were not liable for construction of pond by prior owner: "Thus, where a party has no decision making authority, does not participate in the planning of a project, and whose will has no impact on a [sic] whether and to what extent dredge materials are discharged into waters of the United States, that party cannot suffer liability under [sic] CWA.").

responsible for the violations of the deceased.[1352] Conceivably the same principle might apply to a successor corporation. Unfortunately, there is little case law on the subject of successor liability, and these principles are not well established.

(12) Criminal sanctions

The Act provides for criminal as well as civil penalties. CWA § 309(c), 33 U.S.C. § 1319(c). Criminal penalties may be based on a "negligent violation" in which a violation of a wastewater discharge permit condition causes the POTW to violate its own NPDES requirements. In other words, intent to violate the Act need not be shown. Penalties include fines and imprisonment for up to three years, per violation.

(13) Citizen suits under the Clean Water Act

Congress envisioned the EPA and the states as the primary enforcement entities for the Clean Water Act. However, Congress also authorized private enforcement of the Act through citizen suits.[1353] Such citizen suits may be directed to the state or federal agencies for failing to perform their duties. Or, as is more often the case, such suits may be directly against the polluting entity.[1354]

As a prerequisite to such suits, the would-be plaintiff must give 60 days' advance notice to the would-be defendant as well as specified governmental bodies.[1355] "[T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into compliance with the Act and thus . . . render unnecessary a citizen suit."[1356] Note that if a third person (such as the permit holder) intervenes as a defendant, the intervenor may not complain that he or she did not also receive 60-day notice. *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1295 n.26 (1st Cir. 1996). Likewise, an intervenor-plaintiff need not provide 60-day notice to the existing plaintiffs. *Dubois*, 102 F.3d at 1296, n.27. The *Dubois* case also suggests, in dictum, even if the 60-day notice requirement had not

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[1352] *United States v. Norris*, 937 F.2d 286, 288 (6th Cir. 1991) (bank is unaware of violation and obtains title through mortgage foreclosure, but is ordered to allow access for restoration); *United States v. Lambert*, 915 F. Supp. 797, 801, 805 (S.D.W. Va. 1996) (court orders estate of deceased violator to remove all fill and riprap beyond what is necessary for bank stabilization); *United States v. Edwards*, 667 F. Supp. 1204, 1215 (W.D. Tenn. 1987) (court orders estate of deceased violator to totally restore wetland, including filling in ditches).

[1353] CWA § 505, 33 U.S.C. § 1365.

[1354] A citizen suit may be brought to enforce any violation of an NPDES permit. CWA § 505(f)(6), U.S.C. § 1365(f)(6).

[1355] CWA § 505(b), 33 U.S.C. § 1365(b). Narrow exceptions to the 60-day notice rule are set out in the statute.

[1356] *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 60 (1987).

been satisfied, the CWA claim could be addressed in the context of the NEPA claim. "This is because, as noted *supra*, NEPA requires the Forest Service to identify in its EIS all federal permits that the project needed in order to comply with applicable federal law." *Dubois*, 102 F.3d at 1296.

Citizen plaintiffs may obtain injunctive relief against the defendant and/or the imposition of civil penalties payable to the United States Treasury.[1357]

Although the Clean Water Act establishes a private right of action for such suits, citizens must nevertheless establish that they have standing to litigate.[1358] The law of standing derives from the U.S. Constitution's "case or controversy" limitation on judicial authority as well as court-recognized prudential concerns, the full exposition of which is beyond the scope of this Handbook. The basic principles, however, were summarized by the U.S. Supreme Court in *Friends of the Earth v. Laidlaw*:[1359]

> [T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

In *Laidlaw*, plaintiffs demonstrated standing by submitting affidavits that they lived near the facility in question and that they would make recreational use of a river into which the facility discharged but for their concerns about the discharge of pollutants. *Laidlaw* also noted that plaintiffs must establish standing separately for each form of relief sought.[1360] Nevertheless, the Court found that the deterrent effect of fines that

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[1357] CWA §§ 309(d), 505(a), 33 U.S.C. §§ 1319(d), 1365(a).

[1358] On the other hand, there is no private right of action under the Clean Water Act outside of the citizen provisions, and the Act preempts the common law of nuisance. *Middlesex Cnty. Sewerage Authority v. Nat'l Sea Clammers Assn.*, 453 U.S. 1 (1981). See discussion of private rights of action in the *Idaho Land Use Handbook*.

[1359] *Friends of the Earth, Inc. v. Laidlaw Envtl. Services* (TOC), Inc., 528 U.S. 167, 180-81 (2000).

[1360] *Laidlaw* at 185 (2000).

might be assessed against the defendant could provide a basis for standing, even when those fines would not be paid to plaintiffs.[1361]

Apart from Article III standing, citizen plaintiffs must demonstrate that their lawsuit falls within the bounds of the private cause of action established by the Congress. In a pivotal case decided in 1987, the U.S. Supreme Court ruled that citizen suits under the Act do not lie to address wholly past violations of the permit.[1362] Thus, if the defendant had stopped violating the permit by the time the suit was filed, and is not likely to resume, the plaintiff has no cause of action under the citizen suit provision. To establish a cause of action, plaintiffs must "make a good-faith allegation of continuous or intermittent violation."[1363] The Court emphasized that the Act is intended to encourage violators to come into compliance.[1364] Moreover, the Act contemplates giving agency prosecutors the discretion to enter into compliance orders with past violators in which past violations are forgiven.[1365]

Next, there is the question of mootness. May a defendant moot a citizen suit and obtain its dismissal by ending the offensive behavior? The *Gwaltney* Court said that this could happen, where "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[1366] The availability of the mootness strategy was reconfirmed by the Court in 2000. In that case, however, the Court noted that "[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case."[1367] The Court emphasized that the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness."[1368] In 2001, the Ninth Circuit recognized *Gwaltney*, but concluded that it provides no protection to a defendant engaged in a continuing violation of the Act, even where the defendant had taken steps to ensure that a pesticide introduced

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[1361] *Laidlaw* at 185 (2000).

[1362] *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987).

[1363] *Gwaltney* at 64.

[1364] "It follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." *Gwaltney* at 60.

[1365] "If citizens could file suit, months or years later, to seek the civil penalties that the Administrator chose to forego, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Gwaltney* at 61.

[1366] *Gwaltney* at 66.

[1367] *Laidlaw* at 174.

[1368] *Laidlaw* at 189 (internal quotations omitted).

into a canal system would no longer kill fish. It is not enough to mitigate the harm; the defendant must stop violating the Act period.[1369]

While providing for private enforcement, the Act preserves "the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution.[1370] Thus, Congress bars citizen suits where the EPA or the State has commenced and is diligently prosecuting a civil or criminal action in a court[1371] or administratively[1372] (so long as the administrative enforcement action was initiated prior to the citizen suit notice).[1373] In one case, a federal court ruled that EPA's issuance of a compliance schedule satisfied the requirements of diligent prosecution and barred a citizen suit (despite the fact that the compliance schedule expressly stated that it did not bar citizen suits).[1374]

(14) Attorney fee recovery

In citizen suits brought under the CWA the court is authorized to award litigation costs, including attorney and expert witness fees, to "any prevailing or substantially prevailing party, whenever the court determines such an award is appropriate."[1375] Thus, a defendant who unsuccessfully defends a citizen suit may be subject not only to penalties and injunctive relief, but also may be obligated to pay the plaintiff's attorney fees.[1376] On the other hand, a citizen who brings a losing citizen suit may be required to shoulder the defendant's litigation costs.

The amount of fees awarded is based on what is called a "loadstar" calculation, equal to the number of hours of attorney time reasonably expended on the matter multiplied by a reasonable hourly rate. The U.S. Supreme Court ruled that a prevailing

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[1369] *Headwaters, Inc. v. Talent Irr. Dist.*, 243 F.3d 526, 529 (9th Cir. 2001).

[1370] CWA § 101(b), 33 U.S.C. § 1251(b).

[1371] CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B).

[1372] CWA §§ 309(g)(6)(A), 505(a), 33 U.S.C. §§ 1319(g)(6)(A), 1365(a). This provision was added in 1987; prior to that time, only judicial enforcement actions barred citizen suits.

[1373] CWA § 309(g)(6)(B), 33 U.S.C. § 1319(g)(6)(B).

[1374] *Atlantic States Legal Foundation v. Tyson Foods, Inc.*, 682 F. Supp. 1186 (N.D. Ala. 1988).

[1375] CWA § 505(d), 33 U.S.C. § 1365(d).

[1376] Attorney fee awards can be substantial. In *National Wildlife Fed'n v. Hanson*, 18 Envtl. L. Rep. 20008 (E.D. N.C. 1987), *aff'd*, 859 F.2d 313 (4th Cir. 1988), the court awarded $398,006 to lawyers for the environmental group. In *City of Burlington v. Dague*, 505 U.S. 557 (2001), the Supreme Court allowed $198,027 (the plaintiff had sought more).

plaintiff is not entitled to the award of an "enhanced" fee beyond the loadstar amount where the plaintiff's counsel undertook the representation on a contingent basis.[1377] Where public interest attorneys charge a reduced fee to their clients, the loadstar calculation may be based on a higher prevailing rate in the community.

In *Gwaltney*, the Supreme Court warned that the "suddenly repentant defendant" who succeeded in mooting a citizen suit might nonetheless be obligated to pay plaintiff's attorney fees.[1378] This has come to be known as the "catalyst" theory of attorney fees.[1379] In 2001, however, the Supreme Court expressly ruled that attorney fees may not be awarded pursuant to the a "catalyst" theory under two civil rights statutes that, like the CWA, are based on a "prevailing party" standard.[1380] Thus, it appears, that awards of attorney fees should be disallowed where the defendant succeeds in mooting the litigation by taking sufficient corrective steps.

Some courts have suggested that there may be a double standard, in which it is more difficult for a successful defendant to recover fees against the plaintiff than it is for a successful plaintiff to recover fees against the defendant.[1381]

In addition to section 505(d) of the CWA, parties may be able to obtain recovery of attorney fees against the government under the Equal Access to Justice Act.[1382]

[1377] *City of Burlington v. Dague*, 505 U.S. 557 (1992).

[1378] *Gwaltney* at 67 n.6.

[1379] In *Laidlaw*, the Supreme Court again discussed, but declined to rule on, the "catalyst" theory of attorney fees, in which the plaintiff in a mooted lawsuit is deemed a "prevailing party" because he or she was the catalyst that triggered the favorable outcome. *Laidlaw* at 194-95. Attorney fees were awarded under this theory in *Armstrong v. Asarco, Inc.*, 138 F.3d 382 (8th Cir. 1998) and in a number of other federal cases.

[1380] *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001).

[1381] *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 240 (9th Cir. 1995) (prevailing defendant must show plaintiff's action was frivolous, unreasonable, or without foundation); *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1094 (9th Cir. 1999) (In Razore, "[w]e adopted . . . for the CWA the Christiansburg civil rights standard for frivolousness.").

[1382] *Roanoke River Basin Ass'n v. Hudson*, 991 F.2d 132 (4th Cir 1993); *United States v. Moseley*, 761 F. Supp. 90 (E.D. Mo. 1993); *Sierra Club v. U.S. Army Corps of Engineers*, 776 F.2d 383, 391 (2nd Cir. 1985).

(15) EPA audit policy

EPA has adopted a policy of limited protection for industries and persons who undertake "environmental audits" and then promptly report regulatory violations to the agency. The guidance requires disclosure within 21 days. *Incentives for Self-Policing; Discovery, Disclosure, Correction and Prevention of Violations*, 65 Fed. Reg. 19,618 (Apr. 11, 2000). This policy applies to section 402 violations.

B. The Endangered Species Act

The discretion accorded government agencies under the Clean Water Act disappears when it comes to the Endangered Species Act, 16 U.S.C. §§ 1531-1543.[1383] No federal environmental statute is as absolute as the Endangered Species Act.[1384] It requires without exception that federal agencies not permit activities which are likely to jeopardize the survival of endangered or threatened species or will destroy or adversely modify their critical habitat. It is not a matter of balancing; the government may not consider whether the advantages of a particular project outweigh the potential loss of a species.[1385] Consequently, when endangered or threatened species are involved, the Endangered Species Act can combine with section 404 or other federal environmental statutes to frustrate or prohibit water development activities.

A case in point occurred in Colorado in the 1980s when the Riverside Irrigation District proposed to build Wildcat Dam on a tributary of the South Platte River. The Corps refused to issue the district a section 404 permit because of the potential adverse impact of the dam on downstream whooping crane habitat.[1386] The district sued, claiming

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[1383] The key provision of the Endangered Species Act is section 7(a)(2), 16 U.S.C. § 1536(a)(2).

[1384] "One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies 'to *insure* that actions *authorized, funded* or *carried out* by them do not *jeopardize* the continued existence' of an endangered species or '*result* in the destruction or modification of habitat of such species . . . ." *TVA v. Hill*, 437 U.S. 153, 173 (1978) (citation omitted, emphasis supplied by Court).

[1385] Following the celebrated snail darter case, *TVA v. Hill*, 437 U.S. 153 (1978), which blocked construction of the Tellico Dam in Tennessee, the Congress amended the Act in 1978 to allow an "Endangered Species Committee" of top federal officials to approve projects despite jeopardy to endangered species. 16 U.S.C. § 1536(e); 50 C.F.R. Parts 450-453 (1988). Despite this authority, the committee (often referred to as the "God Squad" because of its power over the life or death of entire species), has never exempted a project. Most political analysts doubt the committee ever will.

[1386] *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985).

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that the "Wallop Amendment" to the Clean Water Act[1387] prohibited the Corps from interfering with anyone's water rights, and that denying a section 404 permit because the water was needed for some other purpose (e.g., protection of endangered species) was illegal. The court rejected the argument, declaring that the Wallop Amendment was merely a policy statement that does not override the Clean Water Act's clear and explicit mandate that the Corps regulate the disposal of material in water to maintain the ecological integrity of rivers. The case appears to have put to rest the argument that Western water rights are simply exempt from federal regulation.

C. Hydropower project licensing by FERC

Non-federal hydroelectric projects—that is, those owned by state and local governments and private parties—are regulated under the terms of the Federal Power Act ("FPA").[1388] The act is administered by the Federal Energy Regulatory Commission ("FERC").

Developers of hydropower projects must comply with an elaborate permit and licensing process which examines all aspects of a project's impacts, including fish and wildlife, and which may involve formal evidentiary hearings. Some small-scale hydropower projects may be exempted from licensing, although they still are subjected to a "consultation" process.[1389] In all cases, the hydropower projects must comply with applicable federal laws including the National Environmental Policy Act's environmental impact statement requirements, the Wild and Scenic Rivers Act, and the Clean Water Act.

Under the Electric Consumers Protection Act of 1986 ("ECPA"), FERC is required to take into consideration "comprehensive state plans" for the development and protection of its rivers and streams. Moreover, in considering projects for licensing (or relicensing), ECPA requires FERC to evaluate environmental matters much more thoroughly than was previously required.

There has been a long history of struggle between FERC (and its predecessor, the Federal Power Commission) and the states regarding the states' authority over hydropower development. The FPA includes language similar to that found in the

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[1387] The Wallop Amendment to the Clean Water Act provides, in pertinent part: "It is the policy of Congress that the authority of each State to allocate water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." CWA § 101(g), 33 U.S.C. § 1251(g) (enacted in 1977).

[1388] 16 U.S.C. §§ 791a - 825r.

[1389] 16 U.S.C. §§ 2705 - 2708.

Reclamation Act recognizing the primacy of state water laws. However, the United States Supreme Court has interpreted the two provisions differently.[1390] Apparently the only state laws that continue to bind FERC are laws relating to proprietary water rights.[1391] Thus, for example, it may be that FERC could impose instream flow requirements in contravention of state water law.

Although it appears that states may not override FERC-imposed flow requirements, states may impose their own additional minimum flow requirements on FERC-licensed projects pursuant to section 401(d) of the Clean Water Act "insofar as necessary to enforce a designated use contained in a state water quality standard."[1392]

Moreover, section 10(a) of the FPA requires FERC to consider comprehensive waterway plans when making its licensing decisions. The comprehensive state water plan adopted by the Idaho Water Resource Board pursuant to Idaho Code § 42-1734A is such a plan.

As a final note, hydropower projects in navigable rivers also must obtain State Land Board permission to utilize the State's lands underlying navigable waters.

FERC licenses have terms that extend from thirty to fifty years. Between 1997 and 2010, 20 large hydropower projects in Idaho are due for relicensing by FERC. The total annual energy produced at these projects is equivalent to more than half of the energy consumed by all customers in Idaho. The relicensing process involves a comprehensive review of each hydropower project and requires FERC to balance the competing uses of a waterway. These relicensing decisions in Idaho will represent the first time may Idaho projects have been reviewed under the new environmental laws and standards. Relicensing is a rigorous process that can affect both project operations and economics.

[1390] *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n,* 328 U.S. 152 (1946).

[1391] *California v. FERC*, 495 U.S. 490 (1990).

[1392] *PUD No. 1 of Jefferson Cnty. v. Washington Department of Ecology*, 511 U.S. 700, 723 (1994). In this case, the Supreme Court upheld Washington's imposition of minimum flow requirements on a proposed FERC-licensed hydropower project pursuant to section 401 of the Clean Water Act. The power company argued, among other things, "that the Clean Water Act is only concerned with water 'quality' and does not allow regulation of water 'quantity.'" 511 U.S. at 719. The Court rejected this argument. "This is an artificial distinction. In many cases, water quantity is closely related to water quality …." *Id*. The Court sidestepped the question of what would happen if the state-imposed minimum flow conflicted with FERC-imposed requirements, saying that it would not address this "hypothetical" question.

42. IDAHO STREAM CHANNEL PROTECTION ACT (STREAM ALTERATION PERMIT)

The Idaho Stream Channel Protection Act, Idaho Code §§ 42-3801 to 42-3813, requires that the stream channels of the state and their environment be protected against alteration for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. To comply with the act, one must obtain a Stream Channel Alteration Permit from IDWR in advance any work being done within the beds and banks of a continuously flowing stream. The Stream Channel Protection Act applies to any type of alteration work, including recreational dredge mining, done inside the ordinary high water marks of a continuously flowing stream.

Applicants must demonstrate that their project will be installed and maintained in accordance with applicable regulations of the Idaho Stream Channel Protection Act and Idaho Forest Practices Act.

Implementing regulations are found at IDAPA 37.03.07.

The Army Corps of Engineers, IDWR, and Idaho Department of Lands (IDL) have established a joint process for activities impacting jurisdictional waterways that require review and/or approval of both the Corps and the State of Idaho. The Stream Application Alteration Permit is the same application as the Walla Walla District Corps of Engineers 404 Joint Application. The joint permit application process covers

- Army Corp permits required by Section 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act
- Stream alteration permits required under the Idaho Stream Protection Act, §§ 42-3801 to 42-3813
- Encroachment permits for navigable lakes required under the Idaho Lake Protection Act, Idaho Code §§ 58-1301 to 58-1312

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43. FEDERAL WATER RIGHT ACQUISITIONS FOR SALMON FLOW ENHANCEMENT

A. Current BOR water acquisition program

Since 1991, the Bureau of Reclamation ("Bureau," "BOR," or "USBR") has been authorized to rent up to 427,000 acre-feet per annum of water via the water bank for salmon-related flow augmentation "[n]otwithstanding the legislative approval required in section 42-108." This authority derives from a state statute, Idaho Code § 42-1763B, which is set to sunset in 2005. Under this program, water may be acquired from anywhere on the Snake River system. The Bureau has acquired flows in the Upper Snake, the Payette River, the Boise River and the Malheur River in Oregon.

The governing Idaho statute limits the Bureau to acquisition of storage rights, that is, water held in reservoirs. Since 1996, however, the Bureau has acquired natural flow rights on the Malheur River in Oregon. Beginning in 2002, the Bureau has also acquired natural flow rights on the Snake River in Idaho.

To avoid circumventing the statute's limitation to storage rights, the Bureau has acquired the Snake River natural flow rights with the assistance of Idaho Power. Idaho Power signs the paperwork (as renter) to acquire water from the water bank controlled by the Idaho Water Resource Board. This is done pursuant to a special statute (Idaho Code § 42-108A) authorizing rentals for hydropower purposes. The Bureau then cuts the check to compensate the farmers who lease the water to the water bank. All this has been done with the knowledge and blessing of the Governor and the Legislature. The water then runs through Idaho Power's dams all the way through Hells Canyon. From there, it continues on down the Lower Snake where it benefits the salmon.

The tables attached as Appendix Q tally the flows acquired in each year since 1991.

Due to drought conditions and other factors, no storage water on the Upper Snake was available to the Bureau during the years 2002 to 2004. This is the reason the Bureau has been driven to acquire natural flow rights via Idaho Power.

The Bureau purchases no ground water rights.

B. Changes to BOR program under the Nez Perce settlement

The authority to acquire 427,000 acre-feet per year originally set to sunset in 2005 was extended for another thirty years.

For the first time, the Bureau will be authorized to rent in its own name up to 60,000 acre-feet per year of consumptive natural flow water rights from below-Milner diverters. Agreement § III.C.6. This is in addition to the 427,000 acre-feet per year.

Thus, the total amount the Bureau can control and use for flow augmentation in any one year is increased from 427,000 acre-feet per year to 487,000.

In addition to renting the 60,000 acre-feet per year in its own name, the Bureau will continue its current practice of acquiring instream uses via Idaho Power (as part of the original 427,000 acre-feet per year).

The Agreement provides that the Bureau is authorized to secure a stable, permanent supply for the 60,000 acre-feet per year, but must still run it through the water bank on an annual basis. Thus, for the first time, the Bureau may purchase water rights from farmers outright. However, it is still required to go through motions of running the water through the water bank.

C. Bureau prices

The Bureau pays varying amounts for its one-year storage rentals. Rates paid for storage water are rather low. They are not set by the marketplace, but by the "rental pools" under the water bank. Payette River storage: $8.50/per acre-foot per year; Boise River storage: $6.93/ per acre-foot per year ; Water District 1 (i.e., above-Milner Snake River): $14.55/ per acre-foot per year (all figures include water bank or rental pool administrative charges).

The Bureau currently offers up to $50 per acre-foot per year for rentals of natural flow water rights from high lift pumpers in Idaho and Oregon.

44. INTERSTATE ALLOCATION

A. Overview

State and federal water law is designed, by and large, to allocate and administer water rights within state boundaries. A separate body of law governs the allocation of water between states.

If you imagine a water resource common to two states as a pie, interstate allocation divides that pie into two pieces. Each state, in turn, allocates its portion of the pie to individual water users within the state. In other words, interstate allocation of water, by and large, operates at the macro level. With some exceptions discussed below, it addresses disputes between states, not disputes between individual water users located in different states.

The effect of an interstate allocation of water is to require one state (typically the upstream or up-gradient state) to deliver water on an aggregate basis to the neighboring state. In order to meet this obligation, the upstream state may have to curtail uses of that water within that state. Which individual users are curtailed in order to meet the upstream state's obligation to the downstream state is a matter of state law (mostly) within the upstream state. Once the water arrives in the downstream state, the water is allocated according to the rules of allocation within the downstream state. As a result, it is entirely possible that a senior water right in an upstream state could be curtailed, while a junior water right in the downstream state receives its full share.

Interstate allocation can take various forms, outlined below.

Before going further, however, note that some of these measures are subject to restrictions under the dormant commerce clause as articulated in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.) (see discussion in section 44.B(5) at page 815), while others are not. In a nutshell, actions by Congress and the Supreme Court are not subject to the dormant commerce clause. Thus, equitable apportionment, compacts, and congressional allocations are immune from challenge under *Sporhase*. This does no more, however, than protect the provisions set out in the compact. Thus, even when two states are governed by a compact or other allocation, a state water export statute would still need to comply with *Sporhase* if it spelled out further criteria or other requirements not contained in the compact other allocation.

Macro-level approaches (applicable to states and only indirectly to individual water users)

- (1) *Equitable apportionment.* If two or more states cannot agree on the allocation of a shared water resource, one state may initiate litigation directly in the U.S. Supreme Court. This brute force approach to interstate allocation serves as the underlying threat motivating most of the other

approaches discussed below. These cases are tried first by a special master and ultimately decreed by the U.S. Supreme Court under the doctrine of "equitable apportionment."

- (2) *Compacts.* If states are able to reach an agreement regarding the allocation of a common water resource, they may enter into a "compact." Compacts must be approved by the U.S. Congress. Once approved, they are legally enforceable agreements. Typically, they are fairly rigid, mathematical allocations of water without a mechanism for consideration of new information or changed conditions. But they could contain more flexible terms.

- (3) *Congressional allocation.* The third approach is for Congress to unilaterally allocate the water resource among the states through legislation. These are very rare (having occurred only twice).

- (4) *Less formal agreements among the states.* More recently, states have begun to explore a less formal approach to water allocation based on memorandums of understanding and other mechanisms not entailing congressional approval. The advantage of this approach is that it is simpler, more flexible, more cooperative, more efficient, more incremental, and more adaptive. On the other hand, by and large, they are not enforceable. The goal of this approach may be the development of a better information base that will facilitate the cooperative development of creative management strategies in both states aimed at maximizing the efficient utilization of the resource while protecting other values. Because this approach often does not entail an explicit allocation of the water between the affected states, this is sometimes referred to as the "less is more" approach.[1393]

Micro-level approaches (directly applicable to individual water users)

- (5) *Export restrictions.* States sometimes attempt unilaterally to restrict the diversion of water in that state where it will be transported out-of-state to serve uses elsewhere. These restrictions may apply both to new appropriations and to transfers of exiting rights for use outside of the state. Such restrictions may expressly target out-of-state uses, or they may come in the form of restrictions on out-of-basin use. Across-the-board, unilateral bans on out-of-state uses are unconstitutional under the "dormant commerce clause" of the U.S. Constitution. Some limited restrictions on

[1393] James H. Davenport, *Less is More: A Limited Approach to Multi-State Management of Interstate Groundwater Basins*, ABA Water Law Conference (Feb. 21, 2008). Mr. Davenport is special counsel for the Colorado River Commission of Nevada.

export in the context of conservation efforts, however, are permissible. Export restrictions that would otherwise violate the Commerce Clause may be allowed by a compact or equitable apportionment. There may also be questions about whether a compact or equitable apportionment implicitly prohibits transfers across state lines.

- (6) *Interstate water markets and the administration of water rights transferred across state lines.* As a practical matter, it is rare for a water right acquired in one state to be transferred to a use in another state. With tightening supplies and an emerging interstate water market, however, this is likely to occur more frequently in the future. Of course, any such transfer would be subject to any applicable export restrictions imposed by the exporting state or by compact. Transfer of the place of use across a state line is fairly straightforward. In contrast, transfer of the point of diversion across a state line is problematical.

- (7) *Private enforcement of priority across state lines.* Interstate allocation litigation ordinarily involves actions by state governments. However, individual parties have been known to bring litigation to establish priority relationships across state lines. For example, a senior user in one state may sue to enjoin diversions by a junior in another state, as in *Bean v. Morris*, 221 U.S. 485 (1911). This approach has seldom been employed. Presumably, it would be available only in the absence of any other applicable interstate allocation. For instance, if a decree, compact, or congressional allocation were in place, individual water users would probably not be allowed to enforce priorities across state lines because doing so would upset the established allocation.

Each of these approaches is discussed below.

B. The law of interstate allocation

(1) Equitable apportionment

In the past, state-versus-state conflicts have focused on water supply for agricultural and other private consumptive water needs. In coming years, however, we may expect to see more and more interstate battles fought over water needed to meet new urban demands, to meet water quality and other instream needs, and to avoid jeopardy to endangered species.

For over a hundred years, the axiom "first in time is first in right" has reigned as the central governing principle of Western water law. One might think, then, that this principle would govern disputes between states as well as between people. It does not. One of the more curious incongruities in Western water law is that the rule of first in time

does not govern the allocation of water between western states. Priority of use between the states is a factor to be considered, but only one. As Justice Douglas noted, "But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible." *Nebraska v. Wyoming*, 325 U.S. 589, 599, 618 (1945).

The law of interstate allocation did not arise until the 20th century. In the 1800s, water resources were not sufficiently developed to generate significant cross-border conflicts. Beginning in the early 1900s, however, depletions in some interstate streams became so severe that states took each other to court. Curiously, some of the early interstate water conflicts developed not in the parched West, but on the East Coast as major cities tapped the rivers in neighboring states to satisfy their growing populations.[1394] Indeed, disputes over water in the Eastern United States are becoming increasingly common today.[1395]

The U.S. Supreme Court has the power to entertain and decide disputes on any subject (not just water) between two or more states pursuant to the Constitution's grant of original jurisdiction. U.S. Const. art. III, § 2, cl. 2. Such litigation is most unusual in that it is initiated directly in the U.S. Supreme Court, bypassing the lower federal district and appellate courts. As a practical matter, the Supreme Court is not equipped to conduct a trial of such matters. Consequently, it appoints a special master to conduct the trial. Trials before the special master are lengthy, complicated, and expensive—often lasting over a decade. The special master hears evidence, rules on motions, and proposes a

[1394] E.g., *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (This case contains Justice Holmes famous statement: "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it."); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931).

[1395] In *South Carolina v. North Carolina*, 552 U.S. 804 (2007) (per curium), the Court granted South Carolina leave to file an original action challenging an interbasin diversion of water by North Carolina from the Catawba River into the Yadkin-Pee Dee Basin. In an unusual move, the Court allowed Duke Energy and another water user to intervene. *South Carolina v. North Carolina*, 558 U.S. 256 (2010) (Alito, J.). Ultimately, the case was settled. *South Carolina v. North Carolina*, 562 U.S. 1126 (2010) (per curium).

In *Virginia v. Maryland*, 540 U.S. 56 (2003) (Rehnquist, C.J.), the Court ruled that Maryland may not prohibit a Virginia county from diverting water from the Potomac River. This was not, strictly speaking, an equitable apportionment case in that it did not allocate all the water in the river. Rather, it was a challenge to a particular water diversion. However, the Court invoked its authority to ensure that "water is equitably apportioned between the States." *Virginia v. Maryland*, 540 U.S. at 609.

recommended decree. The Court pays significant deference to the special master's recommendation, but reserves the right to render the final judgment.[1396]

The Supreme Court will not automatically take jurisdiction over any dispute between states. Rather, it has construed the Constitution and 28 U.S.C. § 1251(a)(1) as making original jurisdiction actions discretionary with the Court. The Court has said that the party initiating the suit must demonstrate "real or substantial injury or damage." *Colorado v. New Mexico*, 459 U.S. 176, 188 n.13 (1982), *appeal after remand*, 467 U.S. 310 (1984).

In theory, the dispute must be serious enough that it could cause the states to enter into war with each other, if they were sovereigns. *Missouri v. Illinois*, 200 U.S. 496, 519-21 (1906).

> When the Court exercises its original jurisdiction over a controversy between two States, it serves "as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force." *North Dakota v. Minnesota*, 263 U.S. 365, 372–373, 44 S.Ct. 138, 68 L.Ed. 342 (1923). That role significantly "differ[s] from" the one the Court undertakes "in suits between private parties." *Id*., at 372, 44 S.Ct. 138; see Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 705 (1925) (When a "controversy concerns two States we are at once in a world wholly different from that of a law-suit between John Doe and Richard Roe over the metes and bounds of Blackacre"). In this singular sphere, "the court may regulate and mould the process it uses in such a manner as in its judgment will best promote the purposes of justice." *Kentucky v. Dennison*, 24 How. 66, 98, 16 L. Ed. 717 (1861).

Kansas v. Nebraska, 574 U.S. 445, 453-54 (2015) (Kagan, J.).[1397]

[1396] William D. Olcott, Comment, *Equitable Apportionment: A Judicial Bridge Over Troubled Waters*, 66 Neb. L. Rev. 734, 736 (1987).

[1397] *Kansas v. Nebraska* was a compact enforcement case, not an equitable apportionment case. The Court recognized, however, the connection between the two. "This Court's authority to apportion interstate streams encourages States to enter into compacts with each other. . . . But in doing so, we remain aware that the States bargained for those rights in the shadow of our equitable apportionment power—that is, our capacity to prevent one State from taking advantage of another. Each State's 'right to invoke the original jurisdiction of this Court [is] an important part of the context' in which any compact is made." *Kansas v. Nebraska*, 135 S. Ct. at 1052 (quoting *Texas v. New Mexico*, 462 U.S. 554, 569 (1983)).

The Court's jurisdiction is equitable in nature. *Kansas v. Nebraska*, 135 S. Ct. at 1051. The Constitution provides no guidance on how to resolve these matters, so the Court has written on a blank slate in creating the body of federal common law of water allocation known as equitable apportionment.[1398] Presumably, Congress has the power to shape the rules of equitable apportionment through legislation. (See footnote 1405 at page 814 discussing Congress' power to unilaterally allocate interstate water.) In any event, it has never legislated on the subject.

The Court has made clear that whether the headwaters of a river arise in one state or another is "essentially irrelevant." *Colorado v. New Mexico*, 467 U.S. 310, 467 (1984). As a practical matter, equitable apportionment litigation is typically initiated by a downstream state seeking to curtail water diversions by an upstream state. In theory, however, an upstream state could initiate an equitable apportionment proceeding in order to resolve interstate rights in a predictable way before a downstream state sought to upset existing or planned uses in the upstream state.

Although all cases to date have originated in the context of disputes over rivers, the principles of equitable apportionment apply equally to the allocation of an interstate aquifer. For instance, in a 2001 decision, the Supreme Court awarded damages to Kansas because Colorado allowed ground water pumping that depleted surface flows in the Arkansas River to which Kansas was entitled under a 1949 compact. *Kansas v. Colorado*, 533 U.S. 1 (2001). Although this was a compact case, not an equitable apportionment case, it built on a long history of equitable apportionment of that river.[1399] Likewise, the case of *Kansas v. Nebraska*, 135 S. Ct. 1042 (2015) (Kagan, J.) involved the Republic River Compact in which ground water counted toward the water consumption allowed under the compact.

The first interstate equitable apportionment case was *Kansas v. Colorado*, 206 U.S. 46 (1907). Kansas sued Colorado charging that extensive irrigation in Colorado was drying up the Arkansas River and restricting the ability of Kansas farmers to launch new irrigation projects. Each state argued from the perspective of the water rights system with which it was familiar. Kansas, a largely riparian rights state, argued that Colorado's

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[1398] Of course, the principles of equitable apportionment assume that there has been no congressional apportionment of the waters through legislation (discussed below at section 44.B(3) at page 814). "Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress." *Arizona v. California*, 373 U.S. 546, 546 (1963) (Black, J.).

[1399] *Kansas v. Colorado*, 206 U.S. 46 (1907), *prior history*, 185 U.S. 125 (1902), *subsequent history*, *Colorado v. Kansas*, 320 U.S. 383 (1943), *and*, *Kansas v. Colorado*, 514 U.S. 673 (1995).

use of water was unreasonable. Colorado, a prior appropriation state, argued that, by its Constitution, it owned all the water and could allocate it on the basis of first in time.

In deciding the case, the Supreme Court had no precedent to go on; a case like this had never arisen before. The Court noted that the Constitution granted it the authority to resolve disputes between the states, and set out to write a new body of interstate allocation law now known as "equitable apportionment."

Had the case arisen today, it is likely that the parties would have documented the environmental consequences of a dried-up Arkansas River. But there was no mention of dead fish or the environment in this 1907 decision. Instead, the Court focused its attention on the benefits of irrigated farming. The Court determined that it would be inequitable to cut off the water already being used by Coloradans simply to provide more water to Kansas. But the Court did not rule in Colorado's favor simply because its uses were "senior" to uses in Kansas. Rather, the Court engaged in a balancing act to determine what allocation of water was "fair" to each of the disputants and concluded that the status quo was "fair." Thus, the Court allowed Colorado to continue its diversions for the time being, with the proviso that Kansas could institute a new suit if Colorado increased its depletions.

In the first case to arise between two prior appropriation states, *Wyoming v. Colorado*, 259 U.S. 419 (1922), the Court found it appropriate to apply the rule of priority in time to allocate water between the two states. However, in subsequent litigation between prior appropriation states (*Nebraska v. Wyoming* in 1945 and *Colorado v. New Mexico* in 1982[1400]) the Court has declared that the rule of priority is only one factor to be considered.

Over the years, the Supreme Court has heard just over a dozen cases in which decrees were sought allocating water on interstate streams.[1401] No hard and fast rules

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[1400] *Nebraska v. Wyoming*, 325 U.S. 589, 599, 617-18 (1945); *Colorado v. New Mexico*, 459 U.S. 17613 (1982), *appeal after remand*, 467 U.S. 310 (1984).

[1401] Arkansas River *Kansas v. Colorado*, 206 U.S. 46 (1907), *prior history*, 185 U.S. 125 (1902), *subsequent history*, *Colorado v. Kansas*, 320 U.S. 383 (1943), *and*, *Kansas v. Colorado*, 514 U.S. 673 (1995), 1949 *compact enforced in*, *Kansas v. Colorado*, 533 U.S. 1 (2001).

Bois de Sioux *North Dakota v. Minnesota*, 263 U.S. 365 (1923).

Catawba River *South Carolina v. North Carolina*, 558 U.S. 256 (2010) (Alito, J.) (allowing intervention); *Carolina v. North Carolina*, 562 U.S. 1126 (2010) (per curium) (dismissal following settlement).

Chicago River *Missouri v. Illinois*, 200 U.S. 496 (1906).

Colorado River *Arizona v. California*, 373 U.S. 546 (1963) (Black, J.), *decree entered*, 439 U.S. 419 (1979), *decree modified*, 460 U.S. 605 (1983).

Columbia & Snake Rivers *Idaho v. Oregon*, 462 U.S. 1017 (1983) (dealing with anadromous fish).

Connecticut River *Connecticut v. Massachusetts*, 282 U.S. 660 (1931).

have emerged from this history of litigation. To the contrary, the Supreme Court has ruled on an *ad hoc* basis, considering whatever evidence on the issue of equity it found appropriate at the time.

Justice Douglas, writing for the Court in *Nebraska v. Wyoming*, summed up the law this way:

> Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.

Nebraska v. Wyoming, 325 U.S. 589, 618 (1945) (Douglas, J.).[1402]

Delaware River *New Jersey v. New York*, 283 U.S. 336 (1931), *decree amended*, 347 U.S. 995 (1954).

Laramie River *Wyoming v. Colorado*, 259 U.S. 419 (1922), *decree modified*, 260 U.S. 1 (1922), *new decree entered*, 353 U.S. 953 (1957).

North Platte River *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *decree modified*, 345 U.S. 981 (1953), *settlement entered*, *Nebraska v. Wyoming and Colorado*, 534 U.S. 40 (2001).

Potomac River *Virginia v. Maryland*, 540 U.S. 56 (2003) (Rehnquist, C.J.). This was not, strictly speaking, an equitable apportionment case. Rather, it was a challenge to a particular water diversion.

Vermejo River *Colorado v. New Mexico*, 459 U.S. 176 (1982), *appeal after remand*, 467 U.S. 310 (1984).

Walla Walla River *Washington v. Oregon*, 297 U.S. 517 (1936).

[1402] *Nebraska v. Wyoming* concerned a dispute between Nebraska, Wyoming, Colorado and the United States regarding the waters of the North Platte River. The United States claimed it owned all of the unappropriated water in the river, and that its entitlement was derived not from appropriation but from its underlying ownership of the lands and waters—all acquired by cessions from foreign governments—which entitled it to an apportionment free from state control. The Court rejected the federal assertion, noting that the water rights in the North Platte Project all had been obtained in compliance with state law. *Nebraska v. Wyoming*, 325 U.S. at 614.

More recently, however, considerations of water conservation and efficiency have moved to the forefront. In the most recent case, Colorado sued New Mexico, charging that New Mexico was wasting water taken from the Vermejo River. *Colorado v. New Mexico*, 459 U.S. 176 (1982), *appeal after remand*, 467 U.S. 310 (1984). Although the water uses in New Mexico were longstanding and therefore "senior" to Colorado's potential uses of the river in the future, Colorado asked the Supreme Court to consider the inefficiency of New Mexico's irrigation system. The Special Master appointed by the Court to hear the facts found that "the heart of New Mexico's water problem is the Vermejo Conservancy District" which he considered a failed reclamation project that "quite possibly should never have been built." The Court nevertheless determined that Colorado should not be able to force New Mexico to improve the efficiency of the project to free up water for Colorado's use, because Colorado had not demonstrated any stronger water conservation program of its own.

This important case demonstrates the possibility that, in the future, water may be allocated between states based on each state's level of commitment to promoting water conservation and efficiency. The case should serve as a warning to all Western states to countenance wasteful water use practices at their peril.

(2) Compacts

An interstate compact is an agreement by two or more states that has been approved by Congress for the purpose of allocating the rights to the use of a natural resource such as water among the compacting states. The federal Constitution tacitly authorizes such agreements between states: "No State, shall without the Consent of Congress, . . . compact with another State, or with a foreign Power . . . ." U.S. Const. art. I, § 10, cl. 3.

Typically, Congress invites the states to initiate negotiations, with the expectation that whatever accommodation is achieved will receive subsequent congressional approval. Upon approval by Congress a compact becomes a law of the United States. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (White, J.). Thereafter, the compacting states act to incorporate the terms of the compact into their respective state laws. This dual codification aids in the enforcement of the compact's terms. The federal codification ensures that states cannot back out, and eliminates any potential for a dormant commerce clause attack on the allocation. State codification ensures that every affected individual water user will be subject to the benefits and burdens of the compact.

Compacts are typically implemented though the creation of administrative compact commissions. These compact commissions "create political institutions that help break down barriers that have prevented more effective water management" and

have been described as "the greatest contribution to interstate water resource management."[1403]

Violations of compact provisions carry heavy consequences. In 2001 the Supreme Court awarded monetary damages and pre-judgment interest to Kansas, based on Colorado's violation of its compact with the state. *Kansas v. Colorado*, 533 U.S. 1 (2001). The Court noted that "it is the State's prerogative either to deposit the proceeds of any judgment in the 'general coffers of the State' or to use them to 'benefit those who were hurt.'" *Kansas v. Colorado* at 10. See also, *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (White, J.) (Court not limited to prospective relief, may also award money damages for past breach of Compact). In *Kansas v. Nebraska*, 135 S. Ct. 1042, 1056 (2015) (Kagan, J.), the Court found that "Nebraska showed reckless indifference as to compliance" with the compact and ordered Nebraska to partially disgorge benefits it derived by failing to deliver sufficient water. It ordered payment of $1.8 million, saying that this "relatively small disgorgement award suffices here," because Nebraska had taken action to correct the problem after the 2006 breach. *Kansas v. Nebraska*, 135 S. Ct. at 1058.

The first interstate compact allocating water in the West was the Colorado River Compact of 1922. Since then, interstate compacts have been frequently employed by states sharing common water resources.

To date, about two dozen interstate compacts have been authorized to allocate the waters of interstate streams among the states. The allocations typically are based either on an agreement to share the waters of the interstate stream on a percentage basis, or upon the agreement of one or more upper basin states to deliver a fixed amount of water to one or more lower states.[1404]

Compacts are thought to be permanent and inflexible allocations of water. One commentator, however, has offered an interesting argument suggesting that under some circumstances a state might succeed in revoking its ratification of a compact where it finds itself "shackled" by outdated assumptions. Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. Colo. L. Rev. 105 (2003).

[1403] Karl Erhardt, *The Battle Over "The Hooch": The Federal-Interstate Water Compact and the Resolution of Rights in the Chattahoochee River*, 11 Stan. Envtl. L. J. 200, 216 (1992).

[1404] Two useful sources on the law of compacts are Frankfurter and Landix, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685 (1925); and Zimmerman and Wendell, *The Interstate Compact Since 1925* (Council of State Governments, 1951).

(3) Congressional apportionment (aka congressional allocation)

On rare occasions, two to be exact, the U.S. Congress has unilaterally allocated water among states. Unlike congressional approval of interstate compacts, this action may occur over the objection of affected states. Congress has the power to do so under its commerce power,[1405] and its actions override those of the states under the supremacy clause, which renders "congressional action the supreme law of the land, bind[ing] even unwilling states to the terms of congressional acts." Joseph L. Sax, *et al.*, *Legal Control of Water Resources* 731, 737 (2nd ed. 1991).

The most notable congressional apportionment (also known as congressional allocation) came in the form of the Boulder Canyon Project Act enacted by Congress in 1928.[1406] The Act established a comprehensive scheme for apportioning the waters of the Colorado River among Arizona, California, and Nevada. Although the Act did not contain an express allocation of water, the U.S. Supreme Court ruled in 1963 that the intent of Congress was to make such an allocation. *Arizona v. California*, 373 U.S. 546 (1963) (Black, J.).

The only other congressional apportionment to date involved a division of the waters of the Truckee and Carson Rivers and Lake Tahoe between Nevada and California. Although technically enacted as a congressional apportionment, Congress acted on an agreement worked out between the states which had originally taken the form of a compact.

(4) Informal agreements

As an alternative to formal interstate compacts, states may elect to enter into less formal, cooperative agreements or understandings. Just as with an interstate compact, these agreements could take all manner of approaches to allocation of the resource. They could allocate water according to a formula. The formula might or might not include variables that change over time. More likely, however, there might be mere targets or no allocation at all. Instead, the agreement might establish procedural mechanisms aimed at promoting cooperation and/or dispute resolution. Or it might simply approach the subject incrementally, for instance, requiring some steps by each side (such as data gathering, the

[1405] It had long been thought that Congress lacked the power to allocate water among states. Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. Colo. L. Rev. 105, 173-74 (2003). In 1963, however, a sharply divided Supreme Court held that Congress has this power and exercised it in the Boulder Canyon Project Act. *Arizona v. California*, 373 U.S. 546, 565-66 (1963) (Black, J.).

[1406] Boulder Canyon Project Act of 1928, ch. 42, 45 Stat. 1057 (1928) (codified at 43 U.S.C. §§ 617(a)-717(t)). The Act became effective after further state and federal actions in 1929, and is sometimes referred to as the Boulder Canyon Project Act of 1929.

adjudication of water rights, the promotion of conservation, and the development of cooperative solutions like aquifer recharge). The agreements might even provide for changes in state law governing water rights, for instance, to promote greater efficiency and conservation. They could also address issues outside of water law, such as zoning and land use policy.

The key difference between this approach and an interstate compact is that it is easier and more flexible. Notably, this informal approach does not require congressional ratification or any special form of approval by the states. Thus, depending on what it sought to accomplish, it might take the form of something as informal as a memorandum of understating between state agencies (or even a handshake of the governors). It also has the flexibility to incorporate other entities, such as local governments, tribes, water users, environmental groups, and other non-governmental organizations.

The downsides to this approach include the following:

- It lacks the strong enforcement mechanisms that come automatically with an interstate compact. This approach relies in large part on each state's commitment to making the process work. Of course, states may build in whatever enforcement mechanisms they wish in the form of a contract. But questions remain about their enforceability. The ability of states to wiggle out of such informal agreements is both a strength and a weakness. It gives states a chance to take their cooperation a step at a time, without making an ironclad commitment. And the fact that either state might walk away (and, perhaps seek an equitable apportionment instead) gives all parties an incentive to stay engaged.

- These agreements could be subject to challenge as a violation of the compact clause of the Constitution, which prohibits states from compacting without the approval of Congress. The more formal and substantive the agreement, the greater the risk of such a challenge.

- These agreements could also be challenged as a violation of the so-called dormant commerce clause, which precludes states from restricting interstate commerce. However, if the agreement was crafted in terms of promoting water conservation, it would probably survive the test established in *Sporhase v. Nebraska*. (See discussion below in section 44.B(5) at page 815).

(5) Unilateral restrictions on export: the dormant commerce clause

From time to time, states have sought to bar water rights that serve out-of-state water uses. Federal constitutional constraints severely constrain such "water hoarding."

The so-called dormant commerce clause of the U.S. Constitution has been interpreted to restrict the ability of states to regulate commerce. The leading case is *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.).[1407] The U.S. Supreme Court held that water was an article of interstate commerce, and that a state therefore may not unreasonably restrict its interstate use.[1408] The Court then struck down parts of Nebraska's water export statute which violated the "dormant commerce clause" of the U.S. Constitution. U.S. Const. art. I, § 8, cl. 3. Specifically, the Court voided Nebraska's absolute ban on water exports to "non-reciprocating" states, but upheld those provisions reasonably relating to the "conservation" of water. Thus, so long as restraints on exportation are expressed in terms of legitimate state concerns (which the Court found to include conservation), a limited preference for in-state use may not constitute an unconstitutional burden on commerce. In Nebraska's case, the Court commended the state's objective "to conserve and preserve diminishing sources of groundwater," ruling that "[t]he purpose is unquestionably legitimate and highly important" and that this purpose was "advanced" by the conservation requirements imposed on exporters of water. 458 U.S. at 954-55. Accordingly, for Idaho to make the restrictions on export stick, it was necessary to add the water conservation test to the requirements for all new and transferred water rights.

See discussion of Idaho's export restrictions in section 16 at page 302 and section 44.C(2) at page 820.

(6) Transfer of water rights across state lines

In theory, water may be moved across state lines either by appropriation of new rights in one state for use in another or by transfer of existing rights to a place of use in another state. Both are rare. They will be more common in the future, however, as supplies tighten and water markets become more sophisticated. If used properly, they could contribute to greater efficiency of use in the management of a common resource. There is not much track record and considerable uncertainty as to how such appropriations or transfers would be accomplished and administered.

Given the limited availability of unappropriated water and the benefit of a senior priority date, most interstate transfers will probably entail transfers of existing rights.

[1407] *See also, City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983); *City of El Paso v. Reynolds*, 597 F. Supp. 694 (D.N.M. 1984); and *Linsey v. McClure*, 136 F.2d 65 (1943); s*ee also, American Trucking Ass'ns v. Michigan Public Service Comm'n*, 545 U.S. 429 (2005).

[1408] For a fuller discussion see, Christopher H. Meyer, *Sporhase v. Nebraska: A Spur to Better Water Resource Management*, 1 The Environmental Forum 28, Environmental Law Institute (1983); Steven E. Clyde, *State Prohibitions on the Interstate Exportation of Scare Water Resources*, 53 U. Colo. L. Rev. 529 (1982); Frank J. Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. Colo. L. Rev. 347 (1985).

Most interstate transfers involve retaining the point of diversion in the original state and moving the water (via pipeline or other delivery system) to a place of use in a new state.

Suppose, for example, that an Idaho municipality sought to expand its service area into another state. Recently, for example, the City of Moscow explored delivering water pumped from its wells in Idaho to customers immediately across the state line in Washington. Presumably, as a matter of Idaho water law, the city would not need to seek a transfer of its municipal water rights to do this, assuming that the new service territory falls within the predictably expanding municipal service area. (See discussion of expanding service areas in section 23.D(6) at page 404.)[1409]

If, however, a transfer application were required for a new place of use outside of Idaho, the water right holder would need to address the factors set out in Idaho's water export statute (see discussion in section 44.C(2)(a) at page 820.) and, if applicable, Idaho's out-of-basin rules (see discussion in section 44.C(3) at page 824). That, presumably, would be the end of the matter. Unlike transfers involving a transfer of the point of diversion to outside of the state, relatively few administration issues would be presented. So long as the diversion remains in Idaho, IDWR would retain ample authority to monitor and administer the right. One issue that might arise would be ensuring that the use was not improperly enlarged or used for unauthorized purposes in the new out-of-state location. Presumably, IDWR could condition the right to require reporting of use in the neighboring state.

It is far more complex and problematical to move both the point of diversion and place of use from one state to another. Suppose, for example, that the developer of a new subdivision or commercial/industrial facility in Idaho purchased existing water rights used in Washington and sought to transfer those rights across the state line. If the water flowed from a stream in Washington into a river in or bordering Idaho (or if the water could be diverted from an aquifer common to both states), the developer might seek a new point of diversion in Idaho. Thus, the transfer might then seek to change the point of diversion to the other side of the Snake or to a well in Idaho.

Assuming the transfer survived any applicable water export rules in Washington and was approved by that state, how would such a right be administered in Idaho? This has never been attempted in these states. The authors are advised that IDWR is skeptical that such a transfer (involving moving an out-of-state point of diversion to a location in

[1409] On the other hand, there is a separate question as to whether Idaho cities have the authority—as a matter of municipal law—to serve customers outside of the state. A bill to clarify that they do have this authority was considered by the Legislature in 2009, but was not enacted. S.B. 1002 (2009).

Idaho) would be recognized in Idaho.[1410] One can only ponder how such a transfer might work. The discussion that follows illustrates the difficulties of administration.

Presumably, the holder of the transferred right could call upon Washington water authorities to curtail junior users in that state if those uses injured the right now diverted in Idaho. This, however, might trigger factually complex defenses from the Washington users in which they contend that the injury is caused not by them but others in Idaho.

Putting aside those evidentiary issues, it may be that the holder of the transferred right will have no motivation to seek such administration. Suppose, for example, the water was originally diverted from a tributary of the Snake River in Washington and is now diverted from the Idaho side of the Snake. Juniors in Washington might then begin to divert from the tributary in a manner that would have interfered with the water right where it was before the transfer. But the current user may not care, because there is plenty of water physically available in the Snake River. Essentially, the Washington juniors would be stealing water from downstream Snake River water users (including Idaho water rights for hydropower and instream flow). What remedies would the downstream Idaho water right holders have? Could they curtail the junior Washington pumpers? Should the right be conditioned to clarify how administration in Washington would occur?

Suppose that the holder of the transferred right diverts more water in Idaho than is allowed under the Washington right. If the point of diversion has moved to Idaho, Washington would have no jurisdiction to curtail the unlawful diversion. Plainly, Idaho could curtail the unlawful diversion, if it wished to. But suppose for some reason it did not. Could the State of Washington (or individual Washington or Idaho water users) initiate administrative or judicial proceedings in Idaho to curtail the illegal use? Presumably the answer is yes, but there is no precedent for this.

What if other water users in Idaho began to interfere with the new water right? For example, suppose the Washington right was transferred to a well on the Idaho side. Suppose further that the holder of the Washington right then complained to IDWR that other Idaho pumpers were interfering with their new well in Idaho. How would IDWR respond to such a call? Assuming that IDWR determined it had authority to protect the Washington right against Idaho juniors, would IDWR simply integrate the Washington priority date into the administration of priorities in Idaho? What if this "slotting in" resulted in Idaho rights now being curtailed? Should the right be subordinated to all Idaho rights existing at the time of the transfer into Idaho? Should the Washington right be allowed to limit further development of water rights in Idaho? This example

[1410] Telephone conference between Phillip J. Rassier, then Chief Counsel, IDWR and Christopher H. Meyer (Aug. 25, 2009).

illustrates the inherent difficulty in allowing one state to approve an out-of-state transfer of the point of diversion without administrative involvement by the other state.

These questions are offered simply to identify some of the issues that might be raised in such a point-of-diversion transfer. These examples also shed some light on why IDWR may be reluctant to allow this "can of worms" to be opened.

(7) Private curtailment of water rights in other states

In a handful of cases brought by private parties, federal courts have enforced priorities of water rights across state lines. The most notable is the decision by Justice Holmes in *Bean v. Morris*, 221 U.S. 485 (1911). In this case, the holder of a water right in Wyoming sued an upstream diverter with a more junior priority in Montana. The Court enforced the senior priority of the Wyoming water right holder, enjoining the Montana diverter from interfering with the senior diverter. In reaching its decision, the Court relied on the fact that both states applied the same prior appropriation doctrine and that neither state has adopted legislation suggesting that they would not honor priorities of neighboring states.

This decision is consistent with the result in *Wyoming v. Colorado*, 259 U.S. 419 (1922), in which the Court allocated water between two prior appropriation states on the basis of first in time. But it is inconsistent with the result in *Nebraska v. Wyoming*, 325 U.S. 589, 599, 617-18 (1945) and every equitable apportionment case since, all of which have recognized that priority of use is but one factor to consider, e.g., *Colorado v. New Mexico*, 459 U.S. 17613 (1982), *appeal after remand*, 467 U.S. 310 (1984).

It bears emphasis that this was not an equitable apportionment case brought by one sovereign against another. Rather, it was initiated by private parties. Had there been any sort of allocation in place (whether by compact, decree, or congressional allocation), that would have overridden the result here.

C. Interstate and inter-basin allocation and transfers in Idaho

(1) Idaho compacts

Idaho is a party to an interstate compact with the states of Utah and Wyoming on the Bear River located in the southeast corner of the state. The Amended Bear River Compact was ratified by the three states in 1979 and approved by Congress on February 8, 1980. Pub. L. 96-189, 94 Stat. 4; Idaho Code § 42-3402. The compact is actively administered by the Bear River Commission made up of representatives appointed by the governors of the three states and a Federal representative.

Idaho also is a party to the Snake River Compact with the State of Wyoming which allocates 96 percent of the waters of the Snake River for use by Idaho and 4

percent for use by Wyoming upon satisfying certain storage replacement provisions. Act of March 21, 1950, 64 Stat. 29; Idaho Code § 42-3401.

In 1963, Idaho ratified the Columbia River Interstate Compact among the states of Idaho, Montana, Oregon and Washington. 1963 Idaho Sess. Laws, ch. 818. Not all of the states ratified the compact. Idaho repealed its ratification of the compact in 1975. 1975 Idaho Sess. Laws, ch. 29. Some discussions have occurred in recent years concerning the prospects for renewing the interstate compact initiative as a way of addressing the numerous fish and water resource issues among the Columbia River states.

(2) Idaho's statutory water export restrictions

(a) Idaho Water Export Act

(i) Enactment in 1915 and amendments in 1951, 1990, 1992, and 2014

Idaho's Water Export Act may be traced to legislation enacted in 1915 that was directed solely to water exports to Oregon. 1915 Idaho Sess. Laws, ch. 111 (now codified at Idaho Code §§ 42-401 to 42-408).

Minor amendments were made in 1951. 1951 Idaho Sess. Laws, ch. 80.

In 1990, the Idaho Legislature enacted legislation that replaced all of the key substantive provisions of the Water Export Act. 1990 Idaho Sess. Laws, ch. 141 (codified primarily at Idaho Code § 42-401, but also §§ 42-203A(5)(f) and 42-222(1)). The 1990 amendment made the act applicable to all new appropriations or transfers of existing rights involving the use of Idaho water in any other state.

In 1992, out-of-state water bank rentals were made subject to the six factors set out in Idaho Code § 42-401(3). 1992 Idaho Sess. Laws, ch. 101, § 1 (codified at Idaho Code § 42-1763).

The Act was amended again in 2014 to remove the requirement of "transportation" of water across a state line in order make it applicable to recharge of an interstate aquifer in North Idaho.[1411] 2014 Idaho Sess. Laws, ch. 245.

[1411] Prior to the 2014 amendment, the Act was made applicable to the "transportation and use" of water out of state. At the time of the 1990 amendment, the Legislature was concerned that pipelines carrying Idaho water to Las Vegas or elsewhere might be constructed—hence the reference to "transportation" of water. The 2014 amendment removed these references, making the legislation applicable to any out-of-state use, even if no transportation of water was involved. The bill's Statement of Purpose explained that the amendment was intended to ensure that the act would apply to ground water recharge projects in the Rathdrum Prairie aquifer in North Idaho

(ii) Structure of Act

The 1990 amendment to the Water Export Act included two primary components: (1) water conservation requirements applicable to all water right applications and (2) six special requirements (or "factors") to be considered with respect to out-of-state water uses.

The 1990 amendment added a requirement applicable to all water right appropriation and transfer applications (not just those for out-of-state uses): The applicant must show that the proposed use is consistent with (or not contrary to) "the conservation of water resources within the state of Idaho." Idaho Code §§ 42-203A(5)(f), 42-222(1).

This water conservation requirement (and all other criteria set out in Idaho Code 42-203A(5)) were also made applicable to all out-of-state water use applications. Idaho Code § 42-401(3). Note that this has the effect of making both the 42-203(5) criteria (which are ordinarily applicable only to permit applications) applicable to out-of-state transfers as well.

The 1990 amendment to the Water Export Act repealed the 1915 measures aimed at water use in Oregon,[1412] replacing them with a set of rules applicable to all appropriations and transfers[1413] for use of water out-of-state.

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that would benefit out-of-state water users. In other words, the amendment clarified that it is not necessary to physically "transport" the water to out-of-state uses for the act to apply.

[1412] The 1990 amendment to the Water Export Act repealed former Idaho Code §§ 42-401, 42-408, 42-409, 42-410, and 42-411. 1990 Idaho Sess. Laws, ch. 145, § 2. These 1915-vintage requirements included a reciprocity requirement similar to the one struck down in *Sporhase v. Nebraska ex rel. Douglas*, *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.), discussed below, 1915 Idaho Sess. Laws, ch. 111, § 8 (later codified, before being repealed, at Idaho Code § 42-408).

[1413] The Water Export Act includes an oddly worded provision stating: "Any person, firm or corporation or any other entity intending to withdraw water from any surface or underground water source in the state of Idaho for use outside the state or to change the place or purpose of use of a water right from a place in Idaho to a place outside the state shall file with the department of water resources an application for a permit to do so, subject to the requirements of chapter 2, title 42, Idaho Code." Idaho Code § 42-401(2) (as amended) (emphasis added). The requirement to file an application for a "permit" makes sense for a new appropriation, but not for a transfer. Read literally, the language seems to require that a water user seeking a change in place or purpose of use should file an appropriation application rather than a transfer application. That would make no sense and is probably a drafting error. In any event, the Department has processed and approved transfer applications pursuant to the Water Export Act. See, e.g., James Cefalo, Memorandum at 1, *In the Matter of Transfer Application No. 81750* (Apr. 19, 2019).

Under the amended Act, applicants for out-of-state uses are required to follow special procedures and to satisfy six additional tests (or "factors"). 1990 Idaho Sess. Laws, ch. 141, § 3 (codified at Idaho Code § 42-401(3)).

This structure was designed to bring the State into compliance with *Sporhase v. Nebraska ex rel. Douglas*, *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.), which set constitutional standards under the federal commerce clause for the circumstances under which states may restrict water exports to other states. The basic idea is that restrictions on out-of-state exports are constitutional only if undertaken in the context of even-handed water conservation policies. This explains the addition to water conservation requirements for all new appropriations and transfers.[1414]

(iii) Six additional factors applicable to water exports

In addition, the Water Export Act sets out six additional "factors" for the IDWR Director to consider in the context of any water export application (permit or transfer). See the table set out in section 44.C(2)(a)(iv) at page 822.

These factors are aimed generally at evaluating the relative availability of water in the sending and receiving states—something that is inherently nebulous and subjective. It is unclear how they would be applied or what sort of evidence the applicant would be expected to provide. They appear to be intended to give the Director broad discretion. For the applicant, their nebulous nature translates to an increase uncertainty and transaction costs.

(iv) Summary of applicable criteria and factors

As noted above, the Water Export Act makes the "permit" criteria under section 42-203A(5) applicable to all out-of-state water exports, including transfers.

In addition, out-of-state exports are subject to the criteria set out in Idaho Code § 42-202(1) applicable to all transfers.[1415] These two sets of criteria overlap to a large extent, as summarized in the table below.

[1414] Compliance with *Sporhase* is also reflected in the Act's inclusion of a policy statement to the effect that Idaho is "dedicated to the conservation of its public waters" and "recognizes that under appropriate conditions the out-of-state use of its public waters is not in conflict with the public welfare of its citizens or the conservation of its waters." Idaho Code § 42-401(1).

[1415] This assumes it is correct to file a transfer application to change an existing right's place or purpose of use from a place in Idaho to a place outside the state. See footnote 1413 at page 821.

Application for appropriation criteria (Idaho Code § 42-203A(5))	Transfer application criteria (Idaho Code § 42-222(1))
(a) that it will reduce the quantity of water under existing water rights, or	[a] no other water rights are injured thereby, [b] the change does not constitute an enlargement in use of the original right,
(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 director 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 as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or	[c] the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code,
(g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates;	[d] the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and
	[e] the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

In addition to satisfying the criteria above, all applications for out-of-state uses are subject to the Director's consideration of the following six factors:

Out-of-state use factors (Idaho Code § 42-401(3))
(a) The supply of water available to the state of Idaho;
(b) The current and reasonably anticipated water demands of the state of Idaho;
(c) Whether there are current or reasonably anticipated water shortages within the state of Idaho;
(d) Whether the water that is the subject of the application could feasibly be used to alleviate current or reasonably anticipated water shortages within the state of Idaho;
(e) The supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
(f) The demands placed on the applicant's supply in the state where the applicant intends to use the water.

(3) Basin-of-origin protection (avoiding harm to local economy)

The Idaho Water Code contains two provisions providing basin-of-origin protection.

The first was enacted in 1980 and cosmetically amended in 1987. 1980 Idaho Sess. Laws, ch. 186; 1986 Idaho Sess. Laws, ch. 347 (S.B. 1353) (codified at Idaho Code § 42-226). It applies only to new, large appropriations of ground water for use outside the "immediate ground water basin as defined by the director." It applies only to applications seeking water for irrigation of 5,000 acres or more or for a total volume of 10,000 acre-feet per year. Such a permit application requires special approval by both IDWR and the Idaho Legislature, based on "due consideration to the local economic and ecological impact of the project or development."

The second basin-of-origin protection was added in 2003 as part of the "local public interest" legislation. H.B. 284, 2003 Idaho Sess. Laws, ch. 298. It is codified in multiple places: Idaho Code §§ 42-203A(5)(g) (appropriations), 42-222(1) (transfers), 42-240(5) (exchanges), 42-1763 (water bank). This protection, it appears, was aimed at protecting local areas from "Owens Valley" type water transfers that deprive a local community of its economic base.[1416] Thus, unlike the local public interest test, it does not call for a weighing and balancing of various harms and benefits. It focuses on one thing only: the avoidance of harm to the economy of the area in which the water is diverted.

In the case of an application for appropriation, the statute provides that when water is moved "outside of the watershed or local area where the source of water originates," the Director will consider whether it will adversely affect the local economy of the originating watershed or local area. If the Director finds such an effect, the Director may approve, deny, approve in part, or condition the permit. Idaho Code § 42-203A(5)(g).

In the case of a transfer, the language is phrased differently, stating that the Director "shall approve" the change so long as the Director finds "the change will not adversely affect the local economy of the watershed or local area within which the source

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[1416] Owens Valley was a once thriving agricultural area that was largely dewatered by the Los Angeles Canal completed in 1913. The plot of the movie *Chinatown* centers on this water grab.

"In 1963 the Los Angeles Department of Water and Power suggested that 2.4 million acre feet of water should be diverted every year from the Snake River near Twin Falls to the Colorado River system to increase the supply of water to southern California and Arizona. Idaho responded quickly, amending Article XV in 1964 for the purpose of creating an Idaho water plan. The goal was to put all of Idaho's water to work for Idaho so that none would be left for Los Angeles." Dennis C. Colson, *Water Rights in the Idaho Constitution*, 53 Advocate 20, 20 (Dec. 2010) (footnote omitted).

of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates." Idaho Code § 42-222(1).

Arguably, the language in the appropriation section is permissive while the language in the transfer section is mandatory. However, it is unlikely that the different structure of the two mandates was intended to distinguish the Director's responsibility or change the standard to be met. Rather, it appears that the different wording was simply a function of how the provision was grafted onto the existing language of the two sections.

(4) Interstate allocation in the Spokane – Coeur d'Alene area

(a) The Spokane River and the SVRP Aquifer

The Spokane Valley Rathdrum Prairie Aquifer underlies the Spokane River and areas north of Coeur d'Alene Lake in Washington and Idaho. The aquifer is known as the Spokane Valley Aquifer in Washington and the Rathdrum Prairie Aquifer in Idaho. It is referred to collectively as the Spokane Valley Rathdrum Prairie Aquifer or SVRP Aquifer.

In 1978, the SVRP Aquifer was designated as a "sole source aquifer" providing drinking water for over 400,000 people in this region, including the cities of Spokane, Spokane Valley, Liberty Lake, Post Falls, and Coeur d'Alene. The aquifer also feeds the Spokane River in Washington, which is experiencing difficulties in meeting minimum flow requirements during the summer months. These instream flows are needed to protect water quality, fisheries, and recreation.

A peculiar geologic feature of the aquifer is that the Spokane River is perched above the aquifer in Idaho, but not in Washington. Thus, ground water diversions from the SVRP Aquifer in Idaho have no impact on river flows within Idaho. But they are believed to reduce river flows where the aquifer is hydraulically connected to the river downstream in Washington.

(b) Allocation between Washington and Idaho

Unlike other interstate water conflicts, the tensions over water allocation on the Spokane River are not driven by unmet consumptive water rights in the downstream state. By and large, surface water rights on the Spokane River in Washington are being met. Rather, the conflict is driven by water quality and instream flow needs in Washington. This includes, notably, concerns over meeting the TMDL (total maximum daily load) requirements imposed under the Clean Water Act. It also includes concerns about maintaining fisheries and white water recreational opportunities.

There are four possible forums for resolving these disputes:

- Either Washington or Idaho could initiate an original jurisdiction lawsuit before the U.S. Supreme Court seeking an equitable apportionment of water. Such a lawsuit would be tried before a Special Master appointed by the Supreme Court. The U.S. Supreme Court, however, would have the last say. This is considered the most "brute force" approach. It typically results in a fairly arbitrary division of water between the states. Since there is little clear precedent (other than general equitable principles), outcomes are hard to predict and therefore dangerous from both sides' perspectives

- The two states could resolve their differences by entering into a formal interstate compact, pursuant to the U.S. Constitution. This would require the approval of the U.S. Congress. It appears that Idaho and Washington are not interested in pursuing this approach, because of a concern that Congress might widen the scope of the discussion to address issues beyond those contemplated by the states (such as endangered species). To date, state leaders have insisted that they prefer to resolve these water allocation issues without federal involvement (other than funding of studies).

- The states could seek a congressional allocation of water between the two states via federal legislation. However, this approach would entail the same federal involvement that appears to be problematical in the context of interstate compacts.

- The two states could enter into a less formal agreement (something short of a congressionally-approved compact). Such an agreement might take any form, from a contract to a memorandum of agreement. It would not necessarily set out a fixed formula for allocation. Instead, it might establish procedural mechanisms, set out broad criteria and goals, provide for additional fact-finding, and the like. To date, the two states have expressed a strong preference for this approach. This is reflected in the cooperative effort in the SVRP Study. Of course, were this approach to fail, either state could always fall back to the first option (equitable apportionment litigation). Thus, the first option remains a hammer driving the parties to make the cooperative approach work.

(c) The bi-state aquifer study

In the mid-1990s, the State of Washington imposed a de facto moratorium on new ground water appropriations in the Spokane Valley Aquifer.

In 2001, two applications were filed seeking huge ground water appropriations from the Rathdrum Prairie Aquifer in Idaho for proposed energy facilities.[1417] In 2002 IDWR denied the applications as being inconsistent with the "conservation of water" test. Idaho Code §§ 42 203A(5)(f), 42-222(1). Nevertheless, concern was aroused by these cases over the extent of water available.

In 2003, IDWR declined a request to impose a moratorium on new water appropriations in Idaho.

In the same year, the U.S. Geological Survey, IDWR, the Washington Department of Ecology, the University of Idaho, and Washington State University launched the Bi-State Aquifer Study to evaluate the SVRP Aquifer. The $3.5 million study resulted in the creation of a ground water model showing the hydrological connection between the SVRP Aquifer and the Spokane River. Thus, for the first time, questions about how the river and aquifer interact may be answered with a high degree of scientific certainty.

On May 8-9, 2007, the USGS and the other participants released reports on the Bi-State Aquifer Study in two days of meetings in Spokane Valley. One report (Scientific Investigation Report 2007-5044) described the ground water model. The other (Scientific Investigation Report 2007-5041) described the hydrogeologic conditions and water budget.

At the risk of oversimplification, the studies concluded that the SVRP Aquifer is very productive and is in hydrologic balance. In other words, withdrawals from the aquifer are in overall balance with natural inputs. In other words, ground water declines that are experienced from time to time are driven by short-term climatic conditions (e.g., drought), rather than ground water mining.

On the other hand, the study confirms that ground water pumping in both states reduces Spokane River flows in Washington. At this point, however, there appears to be reason for cautious optimism that the parties can build on the model and on cooperative efforts to date to find solutions to those problems. It is Idaho's position that there is not an overall water shortage in the basin. Rather, there are timing issues, notably in July and August, when the Spokane River drops below instream flow targets. This suggests that practical, on-the-ground solutions merit exploration.

Examples of possible strategies for improving instream flows in Washington might include the following:

- The City of Spokane could move its production wells further from the river. Today, they are located so close to the river that they are literally pumping

[1417] Application for Water Right No. 95-09086 by Kootenai Generation LLC; Application for Water Right No. 95-09069 by Cogentrix Energy, Inc.

river water and contributing to summer instream flow violations. Moving the diversion points, say, six or seven miles away might spread out the impact of diversion over time lessening the impact of peak diversion during this critical time.

- Additional water could be released from Lake Coeur d'Alene during the summer. This is a simple solution from a Spokane-oriented perspective. But it would have very significant downside impacts on interests around Lake Coeur d'Alene. There are also constraints related to lake level agreements and requirements and the interests of Avista in connection with its Post Falls Dam operation. Perhaps more significantly, the high summer temperature of the lake water can be a problem. Some research suggests that releases of high temperature water from the lake may do more harm than good to downstream fisheries.

- It may be that the SVRP Aquifer could be artificially recharged with river water during periods when flows exceed minimum flow levels. This could entail either direct diversion from the river or, conceivably, pumping from the City of Spokane's production wells (which, as a practical matter) pump river water. Thus, the SVRP Aquifer could be used as an underground reservoir, recharge of which would increase base flows into the river during the critical summer months.

At this point, ideas like these are only ideas. It is premature to suggest that they will work. And there are other reasons that they would be unacceptable. They are listed here solely to give a sense of the sort of things that might be explored. In any event, much work lies ahead to better understand which strategies could be practical and effective. Then there is the question of how to fund them, and how to mitigate adverse impacts and tradeoffs that may be entailed.

(d) Complicating factors

(i) Northern Idaho Adjudication

As a practical matter, this adjudication process is likely to force a number of skeletons out of the closet. Indeed, that is its purpose. Water rights that people have held (or claimed) for years may be disallowed. Others will be substantially cut back. At the end of the process, the State will have, for the first time, a comprehensive database of virtually all water uses in the region. This in turn should assist cooperative efforts to manage the water resource system.

Although having more data on the table can cut both ways, on balance it will probably strengthen Idaho's hand vis-à-vis Washington in the context of interstate disputes. One of the things that the Supreme Court looks at in equitable apportionment

decrees is the extent to which states have undertaken efforts to conserve and control water, and to prevent waste. The adjudication will count for something on that score. On the other hand, it will put data into the hands of everyone, and some of it could be used to support arguments by Washington against Idaho users.

A key question facing Idaho and Washington is how the pending adjudication of water rights in north Idaho (and the possible future adjudication of rights in Washington) could factor into equitable apportionment litigation between the states. Plainly, if interstate litigation were to be initiated, the Court would not simply tote up how much water Idaho has adjudicated to its users and award that to Idaho. On the other hand, the adjudication of rights would increase the state's ability to document its need for water. It could also be used to bolster the argument that the state is committed to weeding out paper water rights, enforcing limitations, conditions and mitigation requirements, and generally promoting water conservation. It would appear that these considerations are not lost on Washington, which, as of this writing, is gearing up toward an adjudication of rights on its side of the border. At this point it is in the "pre-adjudication" phase involving computer modeling, data collection, etc.

(ii) Avista

Avista Corp. is a private utility serving North Idaho. It holds senior water rights in connection with its Post Falls Dam hydropower plant. Its most senior rights on this project are two beneficial use claims with January 1, 1907 priority dates. Water Right No. 95-4518 is a hydropower right for 4,250 cfs. Water Right No. 95-9115 is storage right for 164,440 acre-feet per annum. These rights work in conjunction. The Company also holds two smaller rights for the project with less senior priority dates (Nos. 95-9119 and 95-8003).

These water rights will be adjudicated in the upcoming Northern Idaho Adjudication. Moreover, Avista's Post Falls Dam project is now being relicensed by the Federal Energy Regulatory Commission ("FERC") which has the power to impose conditions affecting water releases.

These conditions (Avista's water rights and subsequent FERC-imposed license conditions) are a sleeping dog that could substantially complicate the water picture. The Post Falls Dam power facility frequently operates substantially below capacity, yet the company has never placed a "call" on upstream junior water rights and has never expressed any inclination to do so. Such a call could significantly disrupt existing and anticipated future development throughout the Coeur d'Alene area. It could also have significant effects on lake levels in Lake Coeur d'Alene—a highly sensitive subject.

On the other hand, Idaho Power Company was in the same position in the 1970s, holding senior water rights without making a call on juniors. The entire Snake River Basin Adjudication in the lower part of Idaho was driven by a lawsuit in the 1970s which

forced Idaho Power Company to assert its hydropower water rights. That litigation was brought by ratepayers who opposed Idaho Power Company's plan to build a new coal fired power plant. They complained that the company should fully exercise its existing hydropower rights before constructing new facilities. That litigation was ultimately resolved in the so-called Swan Falls settlement, which subordinated a portion of the company's water rights and mandated the initiating of the Snake River Basin Adjudication to adjudicate all water rights in the basin.

Could such a thing happen with Avista? In theory, it could. However, there are several reasons to think it will not.

- First, Avista has shown no interest in such an assertion. Indeed, doing so would create a public relations nightmare for the company. (Then again, Idaho Power was also forced into asserting its water rights.)

- Second, unlike Idaho Power's situation, the Post Falls hydropower project is a relatively small component of Avista's power production system. Thus, not as much is in play.

- Third, Avista's operations are constrained by long-established rules, policies, and statutes governing lake levels in Lake Coeur d'Alene.

- Fourth, and perhaps most importantly, Avista's senior rights are not licensed rights, but mere "beneficial use" claims. In other words, there is no piece of paper evidencing a determination of this water right; they are simply assertions by the company that they have always used these rights in this manner. It is entirely possible that when these rights are adjudicated in the Northern Idaho Adjudication, they will be deemed to have been subordinated to other water uses. If such a subordination occurred, however, presumably it would be a subordination to existing Idaho users, not to future Idaho development or to make new water available to solve problems in Washington.

(iii) Coeur d'Alene Tribe

The U.S. Supreme Court ruled in 2001 that the Coeur d'Alene Tribe owns the bed of the southern third of Lake Coeur d'Alene. *Idaho v. United States*, 533 U.S. 262 (2001).

The Tribe's claims were based on a complicated history of treaties and other agreements as well as unilateral reservations and other actions by the United States:

- On June 14, 1867, President Andrew Jackson issued an Executive Order establishing a reservation for the Coeur d'Alene Tribe in an area known as

Hangman Valley to the south of Lake Coeur d'Alene. The boundaries are disputed, but it included, at most, a tiny sliver of Lake Coeur d'Alene. The Tribe never accepted this reservation.

- In 1873, following further negotiations, the United States reached an agreement with the Tribe on a new reservation of 598,000. This included most of Lake Coeur d'Alene, the Coeur d'Alene River and the St. Joe River. The agreement also provided compensation to the Tribe. This agreement was reflected in a letter dated November 4, 1873 from the Commissioner of Indian Affairs to the Secretary of the Interior.

- In 1886, the Congress authorized the Secretary of the Interior to negotiate with the Tribe "for the cession of their lands outside the limits of the present Coeur d'Alene reservation."

- In 1887 the Tribe and the United States reached an agreement in which the Tribes ceded all claims outside the proposed reservation in the 1873 agreement. This was not binding on either party, however, until ratified by Congress.

- The Congress thereafter authorized the Secretary of the Interior "to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell."

- In 1889 the parties reached an agreement whereby the Tribe ceded the northern third of the 1873 reservation to the United States. This included roughly the northern two-thirds of the Lake. The agreement was not binding on either party until ratified by Congress.

- On March 3, 1891, Congress ratified the 1887 and 1889 agreements.

- In 1894, the Tribe agreed to cede to the United States a one-mile wide strip of the reservation running from the mouth of the Coeur d'Alene River to the reservation's eastern boundary (the "Harrison cession").

- In 1908, Congress authorized the conveyance to Idaho of land surrounding three small lakes adjacent to southern extreme of the Lake Coeur d'Alene. This later became Heyburn State Park.

The Supreme Court did not address water rights in the 2001 decision. However, the United States has now made federal reserved rights claims on behalf of the Tribe in the pending Coeur d'Alene Spokane River Basin Adjudication ("CSRBA"), presumably based on their ownership of the lake and other treaty rights.

The Nez Perce and other tribes have made similar federal reserved water right claims in Idaho, all of which have been settled. Speaking practically, one would reasonably expect the same to occur here, after a period of saber rattling by both sides. At the end of the day, the Tribe's interest in maintaining the status quo of lake operations in Lake Coeur d'Alene are not that different from other developers and property owners. While the Tribe's wild card will remain in play for some time, the end game, one might hope, may not result in substantial reallocation of rights or otherwise impair ongoing cooperative efforts between the two states to allocate water and manage the SVRP Aquifer cooperatively within existing legal structures.

(iv) Municipal water rights

In 2003 the State of Washington enacted H.B. 1338 validating what are known in Washington as "inchoate" water rights for municipalities. These rights allow municipalities to grow into larger uses over time. These rights are now being challenged in Washington courts. Thus, there is potential for significant new municipal demand in Washington, despite the de facto moratorium on new water rights.

Meanwhile, Idaho has long recognized the right of cities to hold water rights for reasonably anticipated future needs. See discussion in chapter 23 beginning on page 379.

45. NAVIGABILITY, TITLE, AND PUBLIC ACCESS TO STREAMS

Ownership of the bed and banks of rivers depends on whether the stream is navigable. If navigable, they are owned by the state; if not, the riparian landowner owns to the thread of the stream. This determination is made based on circumstances existing at the time of statehood.

> Upon the admission of a state to the Union, title to lands underlying navigable waters within the state passes from the United States to the state as incident to the transfer to the state of local sovereignty. Therefore, title to the submerged and submersible lands within the state vests in the state subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.

Oregon v. Riverfront Protective Ass'n, 672 F.2d 792, 794 (9th Cir. 1982).

The definition of navigability has changed over time. Under English common law, the Crown owned the bed and banks of all navigable waters affected by the ebb and flow of the tide. *Martin v. Waddell*, 41 U.S. 367 (1842). While that rule was followed briefly in the United States, it was soon recognized that the ebb and flow test was better suited to the English island than to the vast United States. Accordingly, the U.S. Supreme Court declared that "rivers must be regarded as public navigable rivers in which are navigable in fact" even if "many hundreds of miles" from the sea. *The Daniel Ball*, 77 U.S. 557, 563 (1870).[1418]

Over the years, different navigability tests have emerged for different purposes.

> The term "navigability" has many legally distinct applications. (1) It may determine title to river and lake beds. (2) It has been the touchstone of Congressional jurisdiction over waters via the Commerce Clause. (3) It embodies the navigation servitude, a modern declaration of the common law right of public access to the surface of waters. In addition, (4) admiralty jurisdiction in federal courts flows from the general concept of navigability. The use of the term "navigability" for these four purposes, however, does not necessarily mean that each is co-extensive with the other. Therefore any reliance upon judicial precedent must be

[1418] "*The Daniel Ball* sounded in admiralty, but the Supreme Court has adopted the same definition in 'navigability for title' cases." *Oregon v. Riverfront Protective Ass'n*, 672 F.2d 792, 794 (9th Cir. 1982).

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> predicated upon careful appraisal of the purpose for which the concept of "navigability" was invoked in a particular case.

United States v. Kaiser Aetna, 408 F. Supp. 42, 48-49 (1976), *aff'd*, 444 U.S. 164, 170-71 (1979) (the Supreme Court spoke approvingly of this passage) (footnotes and citations omitted). Thus, a river might be navigable for one purpose and not navigable for another.

Over time, tests for navigability have tended to become broader, particularly the test for commerce clause purposes.[1419] It has been observed, tongue in cheek, that "a navigable river is any river with enough water in it to float a Supreme Court opinion."[1420]

In contrast, the test of navigability for title purposes has remained relatively stable since adoption of the "navigable in fact" test. After a false start, Idaho's Supreme Court recognized that the state holds title to the bed and banks of navigable streams. *Callahan v. Price*, 26 Idaho 745, 146 P. 732 (1915) (reversing *Johnson v. Johnson*, 14 Idaho 561, 95 P. 499 (1908)).[1421] The Idaho Supreme Court has construed the "navigability in fact" test for title purposes to mean that streams are deemed navigable if they are "used either for transporting freight or passengers by boats, or for floating lumber, logs, wood, or any other product to market." *Johnson v. Johnson*, 14 Idaho 561, 95 P. 499 (1908) (other aspects of this case have been overruled, but this point remains good law).

[1419] E.g., *United States v. Appalachian Power Co*., 311 U.S. 377 (1940) (expanding the navigability test beyond the "navigable in fact" test). See also discussion of the broad definition of navigable waters under the Clean Water Act in section 41.A(2) at page 754.

[1420] Charles Meyers & Daniel Tarlock, *Water Resource Management* 240 (1971).

[1421] The Idaho Supreme Court declared this as a matter of state law. *Callahan*, 26 Idaho at ___, 146 P. at 734-35. This appears to be inconsistent with the U.S. Supreme Court's declaration that this is a question of federal law. *United States v. Oregon*, 295 U.S. 1, 14 (1935) ("Since the effect upon title to such lands is the result of federal action in admitting a state to the Union, the question, whether the waters within the state under which the lands lie are navigable, is a federal, not a local one.") *Callahan* notwithstanding, it is universally recognized that navigability for title is a federal test. "Determining whether waterways are 'navigable' for title under this test is a matter of federal rather than state law." Jas. Jeffrey Adams & Cody Winterton, Navigability in Oregon: Between a River Rock and a Hard Place, 41 Willamette L. Rev. 615, 623 (2005).

This test is now codified.[1422] The Legislature has also defined the term "navigable lake."[1423]

In addition to establishing title in the State, navigability carries with it the right of public access. This right of access is based on both federal law and state law.

While the State of Idaho owns the bed and banks of navigable rivers, it may dispose of them as it sees fit—but only subject to the right of the public to "the use navigable lakes, rivers, or streams as public highways over which every citizen has a natural right to carry commerce, whether by ships, boats, or the floating of lumber, having due consideration and reasonable care for the rights of individuals, as well as the public, in the common use of such public highways." *Callahan v. Price*, 26 Idaho 745, 146 P. 732, 735 (1915).

This right of public access was historically viewed in a commercial sense. However, the right of the public to access navigable streams for recreational purposes was confirmed in *Southern Idaho Fish and Game Ass'n v. Picabo Livestock, Inc.*, 96 Idaho 360, 528 P.2d 1295 (1974). The result was codified in 1976:[1424]

> (b) Recreational Use Authorized. Navigable rivers, sloughs or streams within the meander lines or, when not meandered, between the flow lines of ordinary high water thereof, and all rivers, sloughs and streams flowing through any public lands of the state shall be open to public use as a public highway for travel and passage, up or downstream, for business or pleasure, and to exercise the incidents of navigation – boating, swimming, fishing, hunting and all recreational purposes.
>
> (c) Access Limited to Navigable Stream. Nothing herein contained shall authorize the entering on or crossing over private land at any point other than within the high water lines of navigable stream except that where irrigation dams and other obstructions interfere with the navigability of a stream, members of the public may remove themselves and their boats, floats, canoes or other floating crafts from the

[1422] Idaho Code § 36-1601(a).

[1423] Idaho Code § 58-1302(a). This was amended in 2006 by H.B. 639 to clarify that privately owned, man-made reservoirs are not considered navigable lakes. 2006 Idaho Sess. Laws, ch. 111 (2006).

[1424] Idaho Code §§ 36-1601(b) and (c).

> stream immediately below such obstruction at the nearest point where it is safe to do so.

There is also a federal basis for the right of public access.[1425] This federal right is inherent in the "navigation servitude" which derives from the Commerce Clause of the federal Constitution. The "navigation servitude" exempts the federal government from the obligation to pay compensation for federal actions which would otherwise constitute compensable takings when the federal action is taken pursuant to the navigation power. *Arizona v. California*, 283 U.S. 423 (1931). However, the navigation servitude is more than a federal defense to a takings claim; it also carries with it an inherent public right of access to navigable waters.

In 1979, however, the U.S. Supreme Court made clear that the public right of access is not coextensive with the reach of the commerce power. *Kaiser Aetna* posed the question whether the owner of a formerly non-navigable lagoon must provide public access when the owner converted the lagoon into a marina by deepening it and opening it to a navigable bay.[1426] Here the Court concluded that the marina was navigable for commerce clause purposes (and thus within the reach of federal regulation), but not navigable for navigation servitude purposes (thus requiring the government to compensate the owner for the obligation to provide public access). Thus, the Court determined that the federal government had the power to provide public access, but would have to compensate the owner of the marina if it chose to exercise that power:

> In light of its extensive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a "taking," however, is an entirely separate question.[1427]

Here the Court examined a variety of factors and determined that a taking had occurred. In reaching this conclusion, the Court emphasized that prior to its dredging, the lagoon had been only two feet deep and was always deemed private property under Hawaiian law. The Court also noted that the owner had invested millions of dollars in the improvements and that public access would substantially devalue its investment.

[1425] E.g., *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 645 (1970) (holding navigable waterways "shall be and remain public highways . . . for the public purposes of commerce, navigation and fishery.")

[1426] *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

[1427] *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)

In sum, the Court in *Kaiser Aetna* restricted the application of the navigation servitude (and the right of free public access) to water bodies that were navigable prior to private investment. In a companion case, the Court determined that privately constructed canals in Louisiana are not subject to the navigation servitude, unless they replaced previously existing navigable waterways.[1428] Several cases have followed *Kaiser Aetna* and *Vaughn*.[1429]

Despite important exception carved out by *Kaiser Aetna*, the navigation servitude remains a vital tool for public access in the case of traditionally navigable streams.[1430]

[1428] *Vaughn v. Vermillion Corp*., 444 U.S. 206 (1979).

[1429] *Boone v. United States*, 944 F.2d 1489 (9th Cir. 1991) (navigation servitude does not reach man-made lagoon in Hawaii); *Loving v. Alexander*, 548 F. Supp. 1079 (W. D. Va. 1982) (navigation servitude does reach the Jackson River in Virginia, despite the fact that it is privately owned under state law, because it was capable of being used for commerce without private investment); *Dardar v. LaFourche Realty Co*., 55 F.3d 1082 (5th Cir. 1995) (navigation servitude does not apply to a series of canals in Louisiana that were capable of supporting commerce only after dredging).

[1430] E.g*., Atlanta Sch. Of Kayaking, Inc. v. Douglasville-Douglas Cnty. Water & Sewer Auth.*, 981 F. Supp. 1469 (N.D. Ga. 1997) (authorizing preliminary injunction to allow public access to a reservoir on the basis of the federal navigation servitude).

46. RIGHTS-OF-WAY AND EASEMENTS HELD BY IRRIGATION ENTITIES AND HIGHWAY DISTRICTS

In discussing this subject, it is important to have a basic understanding of the various types of legal interests involved and the entities that may hold them.

A. Types of ownership interests (fee, license, and easement)

(1) Fee ownership

A fee interest refers to full legal ownership of the real property (subject to any easements, leases, or other limitations imposed on the land).

(2) Licenses

A license is permission granted by the owner of real property (e.g., owner of a fee, leasehold, or right-of-way interest) given to a licensee allowing that person to use the land or the right-of-way for a specific purpose. A license may be oral or written. Licenses are generally revocable or for a stated period of time. A license is a contractual right, not a property interest.

(3) Easements and rights-of-way

Unlike a license, an easement is a real property interest. It is a non-possessory interest granted to a person allowing her to make a specified use of a property.

The term "easement" is broader than the term "right-of-way." A right-of-way is a particular type of easement. There are other kinds of easements, such as easements for light. Rights-of-way may be used for such things as roads and streets or for irrigation conduits. A right-of-way may be created by deed, dedication (e.g., on a plat), condemnation, prescription (adverse use over time). A right-of-way could also be created by operation of law if such a statute existed, but (as discussed below) none does. If one were enacted, it would give rise to a takings claim.[1431]

Most easements are affirmative easements, which allow the holder to make a particular use of another person's property, such as crossing it. An easement for light is an example of a negative easement in which the other landowner is prohibited to doing something, such as building a tall structure that would block the light or view of the easement holder.

[1431] Rights-of-way created by prescription do not give rise to takings claims, because they do not create rights-of-way by fiat. Instead, they operate by way of a statute of limitation, which has never been known to give rise to a takings claim.

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Easements may be exclusive or non-exclusive. If a servient estate owner grants an exclusive easement, she may not grant another easement in that area to another person. For example, if an exclusive right-of-way is granted, the servient estate owner may not subsequently grant an easement for an electric transmission line within that right-of-way. "An irrigation easement is not exclusive. *Morgan v. New Sweden Irr. Dist.*, 156 Idaho 247, 322 P.3d 980 (2014) (Burdick, C.J.) (citing *Pioneer Irr. Dist. v. City of Caldwell*, 153 Idaho 593, 601–02, 288 P.3d 810, 818–19 (2012)."

Easements may be appurtenant or in gross. An appurtenant easement benefits and is appurtenant to the land of the easement holder. An example of an appurtenant easement is an easement to cross a neighbor's property in order to reach the easement holder's property. An easement in gross is not associated with any particular property of the easement holder. For example, one might be granted an easement in gross giving the right to camp on another person's property. Easements in gross generally have lesser status and legal protection than appurtenant easements.

Specifically, it is a type of easement that creates a non-possessory right to cross another person's land. Rights-of-way may be used for such things as roads and streets or for irrigation conduits. A right-of-way may be created by deed, dedication (e.g., on a plat), condemnation, prescription (adverse use over time). A right-of-way could also be created by operation of law if a statute created a right-of-way by fiat. I have concluded that no such statute exists. If one did it would give rise to a takings claim.[1432]

B. Easements and rights-of-way held by ACHD

Ada County is unique in that it is the only Idaho county with a county-wide highway department. ACHD has regulatory jurisdiction over all public streets in Ada County. ACHD typically holds a right-of-way (a type of easement), not fee title. Idaho Code § 50-1312 says that a public dedication in a plat "is equivalent to a deed in fee simple."[1433] Most people (including most title companies) assume this language means what it says (that the dedication conveys a fee interest). Curiously, the Idaho Supreme Court has consistently held that only an easement is created.[1434] However, the easement

[1432] Rights-of-way created by prescription do not give rise to takings claims, because they do not create rights-of-way by fiat. Instead, they operate by way of a statute of limitation, which has never been known to give rise to a takings claim.

[1433] It is commonly believed that this language dates only to 1967, and that prior to 1967 only an easement was conveyed. This is because that is the extent of the history shown in the current codification dates to 1967. In fact, this "equivalent to a deed in fee simple" language has been on the books since 1893. 1893 Idaho Sess. Laws sec. 93, as discussed in *Shaw v. Johnston*, 17 Idaho 676, 682, 107 P. 399, 400 (1910) (Sullivan, C.J.).

[1434] The first case to address the nature of the interest conveyed by a public dedication under the 1893 statute (which is functionally the same as the version in effect today) was *Shaw v. Johnston*, 17 Idaho 676, 682, 107 P. 399, 399-400 (1910) (Sullivan, C.J.). The *Shaw* Court did

created by the dedication is an exclusive right-of-way. This conclusion follows from the Court's explanation that the main difference between a full fee and the "equivalent" of a fee is that the public entity may not convey away its interest for profit. This presumably means that ACHD would retain all other aspects of fee title including the right to exclusive use—i.e., the right to allow or not allow others to use the right-of-way. This puts ACHD largely in control with respect to what other easements can be placed within its easement—subject to the caveats set out in the footnote.[1435]

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not actually apply the statute because it was enacted nearly two months after the subject plat was filed. Nevertheless, the Court addressed the 1893 statute and ruled on its meaning (arguably in dictum). *Shaw* held that the same result would occur under the 1893 statute and the common law. Either way, only an easement is conveyed. In reference to the statute, the Court observed:

> While the acknowledgment and recording is equivalent to a deed in fee simple, it is not a deed in fee simple, and does not give the public the same right to sell or dispose of the same that a private party has to land for which he holds the title in fee simple. We do not think it would be contended that, if a private owner dedicates a street or a block in a city to public use, the public could convey it to a private party and have the property placed to some other use or purpose than that for which it was originally dedicated.

Shaw, 107 P. at 400-01.

See also *Mochel v. Cleveland*, 51 Idaho 468, 5 P.2d 539 (1930) (recording of plat vested only determinable fee for public use to surface of street in city); *Powell v. McKelvey*, 56 Idaho 291, 53 P.2d 626 (1935) (owners of property abutting on street which predecessor in title had dedicated to city or state for use as such, owned fee of land to center of street, while city or state had complete right to use of such land for street purposes).

Neider v. Shaw, 138 Idaho 503, 507, 65 P.3d 525, 529 (2003) (Kidwell, J.) involved a statutory dedication (not a common law dedication) in which the plat depicted roads dedicated to the public. Relying on *Shaw*, the *Neider* Court reiterated that the statute providing that a recorded plat dedication is the equivalent of a deed in fee simple (Idaho Code § 50-1312) actually conveys only an easement.

In *Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc.* ("*Ponderosa II*"), 143 Idaho 407, 410, 146 P.3d 673, 677 (2006) (Burdick, J.), a case involving a common law dedication, the Court again reiterated that "under Idaho law, a dedication, whether express or common law, creates an easement." The Court cited *Neider* in a footnote. *Ponderosa II*, 143 Idaho 410 n.3, 146 P. 676 n.3. Arguably, this too was dictum because the *Ponderosa II* case dealt with common law dedication not statutory dedication. Nevertheless, the Court has consistently adhered to its conclusion that section 50-1312 (and its 1893 predecessor) conveys an easement, not the full fee.

[1435] Caveats: (1) Some state and federal statutes provide that certain types of easements must be allowed within the road right-of-way, but none of these include irrigation easements. (2) ACHD's exclusive easement operates prospectively. It does not mean that another easement might have been granted prior to the dedication of the street.

C. Irrigation rights-of-way

(1) Prescription

Rights-of-way may be created by use of another person's land. See *Weaver v. Stafford*, 134 Idaho 691, 698, 8 P.3d 1234, 1241 (2000) (discussing the law of prescriptive rights in the context of an irrigation ditch).

This is called "adverse possession" in the case of land and "prescriptive use" in the case of rights-of-way and other easements. Adverse possession and prescriptive use are based on Idaho's statute of limitation on actions to recover realty. Idaho Code § 5-203. In short, if the original property owner suffers the use of the property by others without challenge for more than the statutory period, then the statute of limitation bars the original owner from litigating the matter thereafter. Although the statutory foundation is the statute of limitations, the courts have interpreted this as more than a restriction on that person's right to sue; the passage of time under the proper circumstances actually shifts title (for a right-of-way) to the new owner.

In 2006, the Idaho Legislature changed the prescriptive period from five to 20 years. 2006 Idaho Sess. Laws, ch. 158 (codified at Idaho Code § 5-203). However, the change does not apply retroactively.[1436] Thus, any right-of-way that already had vested by satisfying the five-year test as of 2006 would be unaffected by the amendment to the statute.

Thus, as a practical matter, irrigation conduits constructed after 2002 have not yet satisfied the prescriptive use period (though the clock is running).

In *Chester v. Wild Idaho Adventures RV Park, LLC*, 171 Idaho 212, 230-34, 519 P.3d 1152, 1170-74 (2022) (Zahn, J.), the Court held that an irrigator may establish an easement by prescription for overspray from a center pivot into a neighboring property.

[1436] *Capstar Radio Operating Co. v. Lawrence*, 153 Idaho 411, 420 n.2, 283 P.3d 728, 737 n.2 (2012) ("However, the twenty year time period does not apply to an easement by prescription acquired prior to the amendment.") (quoted in *Machado v. Ryan*, 153 Idaho 212, 222, 280 P.3d 715, 725 (2012).

(2) Title 42 irrigation rights-of-way statutes

Idaho's irrigation right-of-way statutes are among Idaho's oldest, dating to 1881.[1437] They create a specialized body of law, creating rights and obligations far different than those applicable to other rights-of-way. The special and highly deferential treatment accorded these rights-of-way was considered necessary to meet the unique needs of Idaho's most important industry—agriculture. They are discussed one-by-one below.

Note: The statutes discussed here were amended by S.B. 1339, 2024 Idaho Sess. Laws, ch. 93. The discussion below is in the process of being updated, and does not yet reflect fully these changes.

(a) Former Idaho Code § 42-1101 (repealed in 2021)

Section 42-1101 was the first section of Idaho's oldest statute dealing with irrigation rights-of-way.[1438]

Prior to its repeal in 2021, section 42-1101 read:

> All persons, companies and corporations owning or claiming any lands situated on the banks or in the vicinity of any stream, are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed.

Idaho Code § 42-1101 (repealed by H.B. 307, 2021 Idaho Sess. Laws, ch. 250).

The repealing bill's Statement of Purpose said it was repealed because it "appears to recognize riparian doctrine in Idaho." The repealed statute had been on the books (and essentially ignored) since 1881. Its reference to lands on the banks of streams was may be forgiven by the fact that in 1881 that is where irrigation took place. Thankfully, Idaho did not descent into riparianism during the decades that followed.[1439]

[1437] The first irrigation right-of-way statutes were enacted in 1881, 1881 Idaho Terr. Sess., pp. 269-73. They were codified in 1887 Idaho Revised Statutes §§ 3180 to 3190.

[1438] 1881 Idaho Terr. Sess., p. 271 (initially codified in 1887 Idaho Revised Statutes §§ 3180) (later codified in Idaho Code § 42-1101) (repealed by H.B. 307, 2021 Idaho Sess. Laws, ch. 250).

[1439] The only reference to the statute is the dissent in *Drake v. Earhart*, 2 Idaho 750, 23 P. 541, 546 (1890) (Berry, J., dissenting). The dissent noted that the statute recognized "what are the equivalent to common-law water-rights [i.e., riparian rights]." *Id.* (referring to an 1881 statute, "Section 3180, Rev. St.").

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The reason this repealed provision is of interest today is that it sheds light on the scope and meaning of the provisions that follow, most notably section 42-1102. Specifically, the repealed provision reinforces the conclusion that (until 2024) the other right-of-way statutes enacted in 1881 and codified in 1887 were limited to irrigation rights-of-way for riparian or closely adjacent lands. Section 42-1101 is expressly limited to the irrigation of "lands situated on the banks or in the vicinity of any stream." The following section (Idaho Code § 42-1102(1) which followed also in the original 1881/1887 legislation) begins with a reference to "such owners or claimants to lands." Thus, it, too, could be read to be limited to lands near rivers, not rights-of-way traveling great distances away from the river.

However, the 2024 amendments eliminated the reference in section 40-1102 to "such" owners. Section 40-1102 is now a stand-alone provision whose link to former section 40-1101 has been severed. After 2024, there is no argument that section 42-1102 is limited to ditches, etc. that are closely adjacent to a river. Prior to 2024, the language in 42-1102 making it applicable to ditches, etc. serving land "back from the banks of such stream" could be read as limited to land back "just a little" from the stream. The 2024 amendments make that argument difficult to make, because it was dependent on a link to section 42-1101 that no longer exists.

(b) Idaho Code § 42-1102

(i) Subsection 42-1102(1) (owners entitled to ROW)

Subsection 42-1102(1) states:

> Owners or claimants to land that do not have not sufficient length of frontage on a stream to afford the requisite fall for a ditch, canal, lateral, drain, or other conduit on their own premises for the proper irrigation or drainage thereof, or where the land proposed to be irrigated is back from the banks of such stream, and convenient facilities otherwise for the watering of said lands cannot be had, such owners or claimants are entitled to a right-of-way through the lands of others, for a ditch, canal, lateral, drain, or conduit to convey water to the place of use for the purposes of irrigation or to provide drainage of irrigated land.

Idaho Code § 42-1102(1) (as amended by S.B. 1339, 2024 Idaho Sess. Laws, ch. 93) (emphasis added).

The key question is to whether subsection 42-1102(1) actually creates rights of way where none existed before. The author would suggest that was not the intent of the

Legislature.[1440] However, two cases decided in 2022 found to the contrary. *Hood v. Poorman*, 171 Idaho 176, 519 P.3d 769 (2022) (Zahn, J.) and *Chester v. Wild Idaho Adventures RV Park, LLC*, 171 Idaho 212, 519 P.3d at 1152 (2022) (Zahn, J.). These cases are addressed in section 46.C(2)(f) on page 852.

In any event, it appears that the easements addressed by this subsection do not apply to all irrigation rights-of-way.

The key point is that the statute applies to "owners or claimants of land." In other words, it applies to farmers who own ditches or other irrigation conveyance facilities. Its language does not include irrigation districts that do not actually own the irrigated land. This limitation continues through all the subsections of section 42-1102.

Notably, this conclusion is not changed by the 2024 legislation.

Note that section 42-1102 does have some counterparts in chapter 12 of title 42 that are applicable irrigation districts, etc. For example, Idaho Code § 42-1204 sets out rights describing the scope of the easement that are very similar to subsection 42-1101(2).[1441] Likewise, Idaho Code § 42-1209 provides a virtually identical counterpart to subsection 42-1102(5) (dealing with encroachments).[1442] The fact that these provisions are repeated in chapter 12 reinforces the conclusion that section 42-1102 is limited to landowners who actually own their own the irrigation ditches. Most notably, there is no counterpart in chapter 12 (which applies to irrigation districts and similar entities) to the language in section 42-1102(1) saying that irrigation districts and other public entities "are entitled to a right-of-way." If that language creates rights-of-way (as was held in *Chester* and *Hood*), it does so only for privately owned ditches.

[1440] It contains no words to that effect, stating instead that landowners are "entitled to a right-of-way." Does the phrase "entitled to" constitute a legislative transfer of title from one owner to another? If so, that would raise a takings issue. Or does it mean that a landowner is entitled to create an easement through condemnation or otherwise? For reasons discussed in section 46.C(2)(f) on page 852 (dealing with section 42-1106), the author would contend that this subsection merely authorizes condemnation.

[1441] H.B. 634a, 2004 Idaho Sess. Laws, ch. 179 added the virtually identical encroachment language in Idaho § 42-1209 and what is now Idaho Code § 42-1102(5).

[1442] S.B. 1476, 1996 Idaho Sess. Laws, ch. 187 added a similar list of rights to Idaho Code § 42-1204 and what is now Idaho Code § 42-1102(2).

(ii) Subsection 42-1102(2) (list of rights)

Subsection (2) defines the scope of the right-of-way, in the form of a list of rights. This was added to the statute in 1996 by S.B. 1476, 1996 Idaho Sess. Laws, ch. 187, which added similar language to Idaho Code § 42-1204.

(iii) Subsection 42-1102(3) (notice of visible ditch)

Subsection 42-1102(3) was amended in 2024. (It was previously codified to Idaho Code § 42-1102(4). As amended in 2024, it reads:

> (3) Any servient estate owner shall be deemed to have notice that the owner of the ditch, canal, lateral, drain, or conduit has the right-of-way and all incidental rights confirmed or granted by this section if:
>
> (a) The servient estate owner has actual or constructive knowledge of the ditch, canal, lateral, drain, or conduit; or
>
> (b) The ditch, canal, lateral, drain, or conduit or any feature thereof is visible or reasonably discoverable.

Idaho Code § 42-1102(3).

This section eliminates the need to record a ditch easement if the conveyance is visible. "Idaho Code sections 55–606 and 55–812 provide that an unrecorded interest in land is void against subsequent purchasers who acquire title in good faith and for valuable consideration." *Tiller White, LLC v. Canyon Outdoor Media*, LLC, 160 Idaho 417, 420, 374 P.3d 580, 583 (2016) (Burdick, J.).[1443] Section 42-1102(4) overcomes this obstacle by declaring that subsequent purchasers have notice of unrecorded easements under the circumstances specified. Indeed, it goes beyond by applying to the existing owner even if there has been no sale.

This section does not actually create the easement, however. The last clause says that it applies to easements "confirmed or granted by this section." In other words, easement must arise by some other provision of section 42-1102.[1444]

[1443] *Tiller White* was not an irrigation case. It involved an easement for a billboard. The Court held that a bona fide purchaser without notice of a written but unrecorded easement for the billboard took the property not subject to the easement.

[1444] There is dictum to the contrary in *Zingiber, LLC v. Hagerman Highway Dist.*, 150 Idaho 675, 681, 249 P.3d 868, 874 (2011) (W. Jones, J.).

To the extent rights-of-way are created by section 42-1102(1), this subsection eliminates any argument that the easement is extinguished by failure to record.

Note that subsection (4) applies only to visible irrigation conduits. Buried pressurized irrigation pipe is not visible.

(iv) Subsections 42-1102(4) and (5) (encroachments & self-help)

Until 2024, subsections 42-1102(4) and (5) were codified together under subsection 42-1102(5).

Subsection 42-1102(5) was first enacted in 2004 as part of the same legislation that added Idaho Code § 42-1209.[1445] H.B. 634a, 2024 Idaho Sess. Laws, ch. 179. Both sections were amended extensively in 2024. S.B. 1339, 2024 Idaho Sess. Laws, ch. 93.

As amended in 2024, these encroachment provisions read:

> (4) Rights-of-way provided by this section are essential for the operations of the ditches, canals, laterals, drains, and conduits. No person or entity shall cause or permit any encroachments onto the right-of-way, including public or private roads, utilities, fences, gates, pipelines, structures, landscaping, trees, vegetation, or other construction or placement of objects, without the written permission of the owner or operator of the right-of-way, in order to ensure that any such encroachments will not unreasonably or materially interfere with the use and enjoyment of the right-of-way. Such written permission shall not be unreasonably withheld.

[1445] Interestingly, even before subsection 5 was enacted in 2004, the Idaho Supreme Court recognized the owners of irrigation rights-of-way have the right to prevent unreasonable encroachments. *NMID v. Washington Federal Savings* ("*Washington Federal*"), 135 Idaho 518 (2001) (Walters, J.). NMID sought to enjoin the bank from constructing a sidewalk and fence next to NMID's lateral. NMID held a written easement for the lateral, which it had obtained from the prior owner. But NMID did not like the narrow scope of the written easement, so it argued that Idaho Code § 42-1102(2) should be used instead to define (and broaden) the scope of the easement. The Court said it didn't matter. Both the statute and the written easement set out rights and obligations for the right-of-way owner. But neither impair the servient estate owner's right to make uses of the property that do not unreasonably interfere with the use of the easement. "The owner of the servient estate is entitled to make uses of the property that do not unreasonably interfere with the dominant estate owner's enjoyment of the easement." *Washington Federal* at 522. Thus, even before the explicit limitation in subsection (5) was added in 2004, encroachments of an irrigation right-of-way may be barred only if they actually impair use of the irrigation conduit.

> (5) Encroachments of any kind placed in such right-of-way without express written permission of the owner or operator of the right-of-way shall be removed at the expense of the person or entity causing or permitting such encroachment, upon the request of the owner or operator of the right-of-way, in the event that any such encroachments unreasonably or materially interfere with the use and enjoyment of the right-of-way.
>
> (a) The person or entity that caused or permitted the encroachment shall perform such removal, modification, repair, or restoration within a reasonable time after request from the owner or operator of the easement or right-of-way or immediately upon such request in the event of reduced delivery or drainage of water, property damage, safety risk, or other emergency. What constitutes a reasonable time to respond to the request depends on the circumstances affecting the use, operation, maintenance, and repair of the ditch, canal, lateral, drain, or conduit and associated easement or right-of-way.
>
> (b) If the person or entity that caused or permitted the encroachment fails to timely perform the requested actions, or in the event of reduced delivery or drainage of water, property damage, safety risk, or other emergency, the owner or operator of the easement or right-of-way may proceed to perform such actions at the expense of the person or entity causing or permitting the encroachment, as long as no work is performed on any municipal or public utility line.

Idaho Code §§ 42-1102(4) and 42-1102(5).

~NOTE YET REVISED:

The second and third sentences operate (somewhat redundantly) to require a person to obtain the permission of the irrigation right-of-way owner before encroaching thereon. This subsection provides that the permission is aimed at avoiding unreasonable or material interference with the irrigation works. Thus, an irrigation entity would have no right to deny permission if the encroachment did not cause such interference.

This conclusion is underscored by the legislative history. What is now subsection 42-1102(5) was added in 2004.[1446] The same bill added both subsection 42-1102(5) and section 42-1209. H.B. 634a, 2004 Idaho Sess. Laws, ch. 179. Section 42-1209, discussed below, contains language that is nearly identical to section 42-1102(5). When first introduced, H.B. 634 contained only the permission requirement. In order to gain Senate approval (which it did only on a tie vote), the bill was amended to add language to both subsections making clear that the permission requirement is targeted at preventing injury to the irrigation right-of-way. In other words, it does not give the irrigation entities carte blanche or veto power over any encroachment to the right-of-way.

Both section 42-1102(5) (which applies to private ditches) and its counterpart, section 42-1209 (which applies to irrigation district ditches), are silent as to whether they authorize self-help.[1447] Idaho Code § 42-1102(5) and its counterpart, section 42-1209, employ the ambiguous passive voice in stating that "Encroachments … shall be removed at the expense of the person or entity causing or permitting such encroachment[s] …." This leaves open who is authorized to remove the encroachment. The same sentence provides that the removal shall occur "upon the request of the owner or operator of the right-of-way," which implies that it is the landowner, not the ditch owner, that is required to undertake the removal. In *Pioneer Irrig. Dist. v. City of Caldwell*, 153 Idaho 593, 288 P.3d 810 (2012) (Horton, J.), the Court recognized the ambiguity in section 42-1209, noted that the common law allowed self-help, and construed the legislative intent to not overturn the common law.[1448] Presumably, the same result would apply to section 42-1102(5).

Note that the self-help recognized in *Pioneer* has two limitations. First, the owner of the ditch or conduit may engage in self-help only upon the refusal of the landowner who placed the encroachment to remove it. Second, although the ditch owner is vested with broad discretion to grant or deny a request to place an encroachment in a ditch or right-of-way, that exercise of discretion may be challenged, including in a self-help

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[1446] When the new language was added to section 42-1102 in 2004, the section was not divided into subsections. The new language became subsection 42-1102(5) when the section was amended again in 2021. H.B. 307, 2021 Idaho Sess. Laws, ch. 250.

[1447] Idaho Code § 42-1102(5) and its counterpart, section 42-1209, employ the ambiguous passive voice in stating that "Encroachments … shall be removed at the expense of the person or entity causing or permitting such encroachment[s] …." This leaves open who is authorized to remove the encroachment. The same sentence provides that the removal shall occur "upon the request of the owner or operator of the right-of-way," which implies that it is the landowner, not the ditch owner, that is required to undertake the removal.

[1448] "We hold that I.C. § 42–1209 does not modify the ditch owner's common law right to self-help. Rather, the statute codifies the ditch owner's right to recover the cost of removing unpermitted encroachments that unreasonably or materially interfere with the use and enjoyment or the easement or right-of-way." *Pioneer*, 153 Idaho at 600, 288 P.3d at 817.

situation. "We hold that a ditch owner's decision to request removal of encroachments constructed without permission or to thereafter remove offending encroachments shall be subject to review to determine whether a reasonable decision-making process was employed, and whether the decision was arbitrary and capricious or based upon clearly erroneous findings. We therefore affirm the decision of the district court as to this issue." *Pioneer* at 601.

In *Hood v. Poorman*, 171 Idaho 176, 519 P.3d 769 (2022) (Zahn, J.), the Court discussed section 42-1102(5) in a manner that assumed that it authorizes the ditch owner to engage in self-help with respect to a culvert installed by the servient landowner (as one would expect, given the ruling in *Pioneer* on the virtually identical provisions in section 42-1209). In *Hood*, a farmer owned an irrigation ditch that crossed a neighboring farm. The neighboring farmers placed a portion of the ditch in a culvert where it crossed their land. The ditch owner brought suit against the owners of the neighboring farmers (owners of the servient estate) alleging that the landowners were encroaching upon and otherwise interfering with the right-of-way. The landowners counterclaimed that Hood had engaged in unauthorized self-help. The Court weighed whether section 42-1102(5) or section 42-1207 governed the situation. The Court evidently assumed that self-help is authorized under section 42-1102(5).[1449] But the Court found that section 42-1207 is more specific to the situation of a culvert installed by the landowner and therefore applies. The Court then held that section 42-1207 does not authorize self-help. *Hood*, 171 Idaho at 198, 519 P.3d at 791. Thus, the only recourse for a ditch owner whose ditch is unlawfully converted to a buried culvert is to seek injunctive relief and damages under section 42-1207. (*Hood* did not mention it, but another option is criminal enforcement. See footnote 1454 on page 856.)

Note that *Hood* did not eliminate self-help for encroachments under section 42-1102(5) (or 42-1209, which was not addressed, because it deals rights-of-way owned by irrigation districts). The *Hood* decision was limited to situations that fit under section 42-1207—i.e., movement or burying of ditches etc. by the servient landowner. "[W]e hold that section 42-1207 governs the placement of a culvert in a ditch because it is the

[1449] Oddly, the *Hood* Court did not mention the holding in *Pioneer Irrig. Dist. v. City of Caldwell*, 153 Idaho 593 (2012) (Horton, J.) that self-help is available under the identical language of Idaho Code § 42-1209. Instead the Court said: "[Section 42-1102(5)] also provides for removal of encroachments placed in violation of the statute." *Hood*, 171 Idaho at 197, 519 P.3d at 790.. The Court then cited an earlier decision involving removal by the landowner. The Court never actually addressed whether section 42-1102(5) authorizes self-help, but seemingly assumed that self-help was available under that statute given the lengths to which the Court went to explain why section 42-1102(5) was not applicable. Moreover, the Court explained in detail (without any expression of disagreement) the district court's conclusion that section 42-1102(5) does authorize self-help. *Hood*, 171 Idaho at 197, 519 P.3d at 790.. The district court found that Idaho Code § 1102(5) (which was enacted in 2004) authorizes self-help, but only as to ditches installed after the date of enactment.

more specific statute. ” *Hood*, 171 Idaho at 198, 519 P.3d at 791. The *Hood* Court left intact self-help under sections 42-1102(5) and 42-1209 for virtually any other encroachment occurring after 2004 (the date of enactment).

Hood did not address Idaho Code § 42-1209. Nor did it mention the *Pioneer* case. Because *Pioneer* did not deal with the installation of a culvert to carry the irrigation water, it would seem that holding in *Hood* would also apply to the irrigation entities covered by section 42-1209. Thus, the state of the law today is that self-help is available under both 42-1102(5) and 42-1209 for every type of encroachment except those covered by section 42-1207.

(v) Subsection (8) (retroactive effect)

Subsection 42-1102(8) was amended in 2024. It was previously codified to subsection 42-1102(6). As amended in 2024, it reads:

> This section shall apply to ditches, canals, laterals, drains, conduits, and embankments existing on the effective date of this act, as well as to ditches, canals, laterals, drains, conduits, and embankments constructed or existing after such effective date.

Idaho Code § 42-1102(8).

Subsection (8) simply provides that section 42-1102 applies both retroactively (to facilities existing on the date of enactment—which date is ambiguous given the various amendments to this section) and prospectively (to facilities constructed after enactment). Subsection (6) itself has no substantive effect. It creates no rights-of-way.

By the way, this subsection was amended in 2021. H.B. 307, 2021 Idaho Sess. Laws, ch. 250. The amendment added the words “or existing” apparently (and according to the Statement of Purpose) to reinforce that subsection (8) (then subsection (6)) also applies prospectively.

(c) Idaho Code § 42-1103 (condemnation—irrigation, municipal, and factory use)

Section 42-1103 states:

> Where the owners of any spring, or the appropriators thereof, or of any stream, desire to conduct the waters thereof to any lands for the purposes of irrigation, or to any city or town for the use of the inhabitants thereof, or to any factory, or <u>to any distant place</u>, with the intent to apply the same to a beneficial use, and to accomplish such object it is necessary

> to cross with ditches, flumes or other conduit, the lands owned or occupied by others than the owners or appropriators of such spring or stream, the right of way over and across the lands of others for conducting said water may be acquired in the manner above provided.

Idaho Code § 42-1103.

Note that while section 42-1102 (discussed above) is limited to facilities serving riparian lands, section 42-1103 reaches lands in "any distant place."

Although the sweep of section 42-1103 is broad, it does not create any rights-of-way. The reason is the last clause: "may be acquired in the manner above provided." When enacted in 1881 (1881 Idaho Terr. Sess., p. 271) and codified in 1887 (1887 Idaho Revised Statutes §§ 3180 to 3190), the condemnation provisions were located "above" what is now section 42-1103.[1450]

Thus, section 42-1103 does no more than create a right to condemn and pay for a right-of-way. There is no language requiring other persons to seek the permission of the right-of-way owner before encroaching upon right-of-way. The requirement to seek permission set out in section 42-1102(5) does not apply to rights-of-way addressed by section 42-1103. As discussed above, section 42-1102(5) applies only to rights-of-way described in section 42-1102.

(d) Idaho Code § 42-1104 (condemnation of state lands)

Idaho Code § 42-1104, which dates to 1899, authorizes condemnation of rights-of-way across State lands for ditches and conveyances used to deliver water to any beneficial use.

(e) Idaho Code § 42-1105 (condemnation – riparian appropriators)

Section 42-1105, which dates to 1881, gives condemnation rights to owners of riparian land.

[1450] What is now Idaho Code § 42-1103 was codified at 1887 Idaho Rev. Stat. § 3185, while the associated condemnation provisions were codified immediately above that section in sections 3182 and 3183. In 1899 the condemnation provisions were replaced by what now appears in Idaho Code § 42-1106 (discussed below). Thus, the condemnation provision is now "below" section 42-1103, not "above." But the statute was never cleaned up to reflect that reorganization. Curiously, the reference to condemnation in Idaho Code § 42-1105 (which is not relevant here) was fixed, but the corresponding need to correct section 42-1103 was overlooked.

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(f) Idaho Code § 42-1106 (condemnation – ditch rights)

Section 42-1106 states:

> In case of the refusal of the owners or claimants of any lands, through which any ditch, canal or conduit is proposed to be made or constructed, to allow passage thereof, the person or persons desiring the right of way may proceed as in the law of eminent domain.

Idaho Code § 42-1106 (emphasis added).[1451]

Section 42-1106, which authorizes condemnation of irrigation rights-of-way, is critical to understanding how Title 11 of Section 42 operates. Adopted in 1889 (Idaho General Laws, p. 380, § 14), it replaced the more antiquated condemnation provisions in the 1887 codification (sections 3182 and 3183). Its existence suggests that the other sections of Title 11 (notably sections 42-1102 and 42-1103) do not actually create rights-of-way. Rather, they describe the right to obtain irrigation rights-of-way through condemnation and scope and operation of such rights-of-way, once they are created.

The statutory history suggests that section 42-1102 was not intended to create rights-of-way. Section 42-1102 was enacted in 1881 (1881 Idaho Terr. Sess. Laws, p. 269) and was codified in 1887 (1887 Idaho Revised Statutes § 3181) along with other statutes relating to irrigation ditch rights-of-way. The two sections that followed in the 1887 codification (sections 3182 and 3183) authorized the irrigator to condemn of a right-of-way across the lands of another in the event the other landowner refused to allow passage of the irrigation works. This suggests that section 3181 (now 42-1102) was not intended to create irrigation rights-of-way. Instead, it would appear that it authorizes their creation through condemnation (including payment of compensation to the underlying landowner). Understood this way, section 42-1102 defines the scope of irrigation easements that are created by condemnation and, presumably, by other means, such as prescriptive use.

[1451] Section 42-1106 provides the right to proceed under the laws of eminent domain. Those eminent domain statutes are codified at Idaho Code §§ 7-701 to 7-721. "To condemn such a right of way [under section 42-1106], the water right owners must proceed under Idaho's law of eminent domain, found in I.C. §§ 7–701 et seq." *Canyon View Irrig. Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 607 (1980) (Bakes, J.).

See discussion of the eminent domain statutes in the *Idaho Land Use Handbook*.

This conclusion is confirmed by the following statement in a 1975 Idaho Supreme Court decision, in which the Court explained that right-of-way described section 42-1102 may need to be acquired through the condemnation power in section 42-1106:

> Chapter 11 of Title 42, Idaho Code, deals with ditch rights of way for the irrigation of land. I.C. § 42-1102 gives to landowners a right to an easement or right of way across the lands of others to supply irrigation water. If the landowner of an adjacent parcel refuses to allow such access for irrigation water, the owner of land may condemn a right-of-way under the law of eminent domain. I.C. § 42-1106. The law of eminent domain is governed by I.C. § 7-701 et seq.

White v. Marty, 97 Idaho 85, 86, 540 P.2d 270, 271 (1975) (McQuade, C.J.) (emphasis added).

In 1980, the Court reiterated that section 42-1102 does not create easements itself, but may be used in conjunction with section 42-1106 to condemn an easement:

> In order to assist owners of water rights whose lands are remote from the water source, the state has partially delegated its powers of eminent domain to private individuals. I.C. §§ 42–1102 and-1106. See *White v. Marty*, 97 Idaho 85, 540 P.2d 270 (1975). These statutes permit landlocked individuals to condemn a right of way through the lands of others for purposes of irrigation.
>
> To condemn such a right of way, the water right owners must proceed under Idaho's law of eminent domain, found in I.C. §§ 7–701 *et seq*. Article 1, § 14, of the Idaho Constitution permits the power of eminent domain to be exercised only in furtherance of a "public use." The irrigation and reclamation of arid lands is a well-recognized public use, Idaho Const. art. 1, § 14, and art. 15, § 1; I.C. § 7–701(3), even if the irrigation project is ostensibly intended to benefit only private individuals.

Canyon View Irrig. Co. v. Twin Falls Canal Co., 101 Idaho 604, 607 (1980) (Bakes, J.) (emphasis added).

Without any discussion of *White* or *Canyon View* and without the benefit of briefing or analysis by the parties or the district court, the Court reached the opposite conclusion in *Hood v. Poorman*, 171 Idaho 176, 519 P.3d 769 (2022) (Zahn, J.) and *Chester v. Wild Idaho Adventures RV Park, LLC*, 171 Idaho 212, 519 P.3d at 1152 (2022) (Zahn, J.).

In *Hood*, the owners of an irrigation ditch right-of-way brought suit against the owners of servient estate alleging that the landowners were encroaching upon and otherwise interfering with the right-of-way. The parties to the litigation all agreed that the Hoods owned a right-of-way and had statutory rights with respect to the right-of-way under Idaho Code § 42-1102. The Court went further than what the parties said, however. The Court said, "All parties to this action agree that section 42-1102 creates an easement—referred to as a right-of-way—for a ditch user. … Thus, the plain language of section 42-1102 creates a right-of-way for a landowner to convey water over the land of another for irrigation purposes, through use of a ditch, canal, or conduit." *Hood*, 171 Idaho at 187, 519 P.3d at 780.[1452] One cannot call this a holding, because there was no dispute that an easement existed one way or the other (presumably through prescriptive use). But there seems little doubt that the Court assumes that section 42-1102 does not just define the scope of an easement but actually creates what it called a "statutory right-of-way." *Hood*, 171 Idaho at 187, 519 P.3d at 780.

This conclusion is confirmed by the Court's holding four days later in *Chester*. *Chester* also involved a dispute over a privately owned ditch and the owner of the servient estate. However, in *Chester* there was a deed creating the ditch right-of-way. One might think that the Court would have found that section 42-1102 would either be inapplicable in the face of an express deed or that it might serve to define the scope of the easement created by the deed. Instead, the *Chester* Court held that section 42-1102 creates a new and different easement in addition to the deed easement.

> Although both parties and the district court appear to have considered the ditch easement in this case through the lens of section 42-1102, in actuality there are two easements relating to the ditches running through Wild Idaho's property.
>
> First, there is the express easement set out in the Confirmation Deed, which reserves "the right to continue the use and maintenance of those certain ditches and ditch rights of way upon or running across the described property." Second, section 42-1102 entitles ditch owners "to a right-of-way through the lands of others, for a ditch, canal, or conduit to convey water to the place of use for the purposes of irrigation." I.C. § 42-1102(1). Further, section 42-1102(2)

[1452] The Court went on to explain: "An easement consists of two parts: the primary easement and the secondary easement. A primary easement encompasses the general definition of an easement—that is, the right to use another's land for some specific purpose. A secondary easement, in contrast, refers to the right to enter and repair and do those things necessary to the full enjoyment of the primary easement. The exercise of secondary easement rights must always be reasonable." *Hood*, 171 Idaho at 188, 519 P.3d at 781 (citations and quotation notation omitted).

> provides a nonexhaustive list of rights within the statutory right-of-way. …
>
> … Thus, the Chesters have two easements: (1) the express easement created by the Confirmation Deed and (2) a statutory right-of-way created by section 42-1102.

Chester, 171 Idaho at 222, 519 P.3d at 1162.

Thus, as of 2022, there appears to be no doubt that section 42-1102 actually creates rights-of-way where none existed before or in addition to one existing before.[1453] It bears emphasis, however, that, as discussed above, section 42-1102 is limited to privately owned ditches and conduits, not to those owned by irrigation districts and the like.

(g) Idaho Code § 42-1107 (condemnation – drains)

A separate statute, Idaho Code § 42-1107 (enacted in 1911), authorizes condemnation for purposes of drains.

(h) Idaho Code § 42-1108 (right to cross another ditch or conduit)

See discussion in section 49.G on page 899.

(i) Idaho Code § 42-1207 (change or burying of ditch)

What is now section 42-1207 was first enacted in 1907, some time after the first irrigation right-of-way statutes in 1881. 1907 Idaho Sess. Laws, p. 237, § 4. It provides that a landowner whose land is crossed by a ditch, canal, lateral or drain or buried irrigation conduit owned by someone else has a right to change the location of the conveyance to another place on his or her land or within a neighbor's easement, or to bury the conveyance, if this may be done without impairing the water flow. When the landowner decides to bury the water conveyance, the owner of the conveyance remains responsible for its maintenance. But there is a catch: "The right and responsibility for operation and maintenance shall remain with the owner of the ditch, canal, lateral or drain, but the landowner, his heirs, executors, administrators, successors and assigns, shall be responsible for any increased operation and maintenance costs, including rehabilitation and replacement, unless otherwise agreed in writing with the owner." Idaho Code § 42-1207.

[1453] The *Chester* Court reiterated its holding in *Hood* that "the statutory ditch right-of-way [created by section 42-1102] consists of two parts: the primary easement and the secondary easement. " *Chester*, 171 Idaho at 225, 519 P.3d at 1165.

The statute also authorizes the owner/operator of the ditch, etc. to change the facility under specified circumstances.

Note that there is no counterpart to section 42-1207 in chapter 11 of title 42. (This is in contrast to the encroachment provisions, which appear in both 42-1102(5) and 42-1209.) However, section 42-1207 does have a counterpart in the criminal code. Idaho Code § 18-4308 makes it a misdemeanor to unlawfully change an irrigation right-of-way.[1454]

In *Hood v. Poorman*, 171 Idaho 176, 519 P.3d 769 (2022) (Zahn, J.), the Court evaluated whether section 42-1102(5) or section 42-1207 applies to a ditch owner undertaking self-help to remove an encroachment. The Court found that section 42-1207 is more specific and therefore applies. The Court then held that, unlike section 42-1102(5), section 42-1207 does not authorize self-help. The ditch owner's only recourse is to seek injunctive relief and damages. *Hood* did not mention that criminal prosecution is also available under Idaho Code § 18-4308.

(j) Idaho Code § 42-1208 (no adverse possession)

Section 42-1208 states that rights-of-way owned by irrigation entities are not subject to adverse possession.

(k) Idaho Code § 42-1209 (encroachments & self-help—irrigation districts only)

Section 42-1209 was first enacted in 2004 as part of the same legislation that added Idaho Code § 42-1102(5). H.B. 634a, 2024 Idaho Sess. Laws, ch. 179, § 3. Section 42-1209 was amended in 2024. S.B. 1339, 2024 Idaho Sess. Laws, ch. 93. The prior language was unchanged, but extensive new provisions were added by the 2024 amendments.

It now reads:

> ENCROACHMENTS ON EASEMENTS AND RIGHTS-OF-WAY
>
> (1) Easements or rights-of-way operated, maintained, controlled or owned by irrigation districts, Carey act operating companies, nonprofit irrigation entities, lateral ditch associations, and drainage districts are essential for the operations of such irrigation and drainage entities.

[1454] "Idaho Code § 18–4308 is essentially identical to I.C. § 42–1207, except that I.C. § 18–4308 makes it a misdemeanor to relocate such an appurtenance in noncompliance with the statute." *Statewide Const., Inc. v. Pietri*, 150 Idaho 423, 428 n.3, 247 P.3d 650, 655 n.3 (2011) (Burdick, J.).

Accordingly, no person or entity shall cause or permit any encroachments onto the easements or rights-of-way, including any public or private roads, utilities, fences, gates, pipelines, structures, landscaping, trees, vegetation, or other construction or placement of objects, without the written permission of the irrigation district, Carey act operating company, nonprofit irrigation entity, lateral ditch association, or drainage district owning, operating, maintaining, or controlling the easement or right-of-way, in order to ensure that any such encroachments will not unreasonably or materially interfere with the use and enjoyment of the easement or right-of-way and the incidental rights and protections described in sections 42–1102 and 42–1207, Idaho Code. Such written permission shall not be unreasonably withheld.

(2) Encroachments of any kind placed in such easement or right-of-way, without such express written permission, shall be removed or modified, and the ditch, canal, lateral, drain, conduit, easement, or right-of-way shall be repaired or restored at the expense of the person or entity causing or permitting such encroachments, upon the request of the persons operating, maintaining, or controlling the easement or right-of-way or the owner of the easement or right-of-way, in the event that any such encroachments unreasonably or materially interfere with the use and enjoyment of the easement or right-of-way.

(a) The person or entity that caused or permitted the encroachment shall perform such removal, modification, repair, or restoration within a reasonable time after request from the owner or operator of the easement or right-of-way, or immediately upon such request in the event of reduced delivery or drainage of water, property damage, safety risk, or other emergency. What constitutes a reasonable time to respond to the request depends on circumstances affecting the use, operation, maintenance, and repair of the ditch, canal, lateral, drain, or buried irrigation conduit and associated easement or right-of-way.

(b) If the person or entity that caused or permitted the encroachment fails to timely perform the requested actions, or in the event of reduced delivery or drainage of water, property damage, safety risk, or other emergency, the owner or operator of the easement or right-of-way may proceed to perform such actions at the expense of

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the person or entity that caused or permitted the encroachment, as long as no work is performed on any municipal or public utility line.

(3) Any person or entity that causes or permits an encroachment shall be responsible for its use, operation, maintenance, repair, and replacement to prevent unreasonable or material interference with a ditch, canal, lateral, drain, or conduit and the associated easement or right-of-way and shall be liable for all damages that may accrue therefrom.

OLD:

Easements or rights-of-way operated, maintained, controlled or owned by irrigation districts, Carey act operating companies, nonprofit irrigation entities, lateral ditch associations, and drainage districts are essential for the operations of such irrigation and drainage entities. Accordingly, no person or entity shall cause or permit any encroachments onto the easements or rights-of-way, including any public or private roads, utilities, fences, gates, pipelines, structures, landscaping, trees, vegetation, or other construction or placement of objects, without the written permission of the irrigation district, Carey act operating company, nonprofit irrigation entity, lateral ditch association, or drainage district owning, operating, maintaining, or controlling the easement or right-of-way, in order to ensure that any such encroachments will not unreasonably or materially interfere with the use and enjoyment of the easement or right-of-way. Encroachments of any kind placed in such easement or right-of-way, without such express written permission, shall be removed at the expense of the person or entity causing or permitting such encroachments, upon the request of the persons operating, maintaining, or controlling the easement or right-of-way or the owner of the easement or right-of-way, in the event that any such encroachments unreasonably or materially interfere with the use and enjoyment of the easement or right-of-way. Nothing in this section shall in any way affect the exercise of the right of eminent domain for the public purposes set forth in section 7-701, Idaho Code.

Idaho Code § 42-1209 (emphasis added).

As noted above, this provision was enacted in 2004 along with virtually identical language in subsection 42-1102(5). H.B. 634a, 2004 Idaho Sess. Laws, ch. 179.

It appears that the 2024 amendments did nothing to alter the prior allocation between chapters 11 and 12.

The encroachment provision in section 42-1102(5) remains limited to the owners of irrigated land (e.g., farmers who have constructed their own ditches). Section 42-1209 continues to apply to irrigation districts and similar public entities. Just as before 2024, subsections 42-1102(5) and 42-1209 do not create rights-of-way.

The operative language of section 42-1209 is identical to that of subsection 42-1102(5). Accordingly, to the extent it creates a permission requirement for an encroachment, an irrigation entity may exercise that discretion only to the extent necessary to prevent unreasonable or material injury to its right-of-way.

Idaho Code § 42-1209 and its counterpart, section 1102(5), employ the ambiguous passive voice in stating that "Encroachments … shall be removed at the expense of the person or entity causing or permitting such encroachment[s] …." This leaves open who is authorized to remove the encroachment. In *Pioneer Irrig. Dist. v. City of Caldwell*, 153 Idaho 593, 288 P.3d 810 (2012) (Horton, J.), the Court held that identical language in section 1102(5) leaves in place the common law right to self-help.

47. THE "SURFACE WATER FFIRST" REQUIREMENT

Idaho's "surface water first" policy is reflected in

- a 2005 LLUPA requirement applicable to planning and zoning (Idaho Code § 67-6537(1)),
- a 2023 statute applicable to IDWR (Idaho Code § 42-204A), and
- a 2025 statute dealing with the approval of new subdivions (Idaho Code § 31-3805(3)).

These statutes, together with case law and IDWR's policy and practice, are discussed below.

A. LLUPA's "surface-water-first" requirement (Idaho Code § 67-6537(1))

In 2005, the Idaho Legislature enacted legislation applicable in the planning and zoning context that requires land developers to utilize available surface water for lawn irrigation systems if possible. H.B. 281a, 2005 Idaho Sess. Laws, ch. 338 (codified at Idaho Code § 67-6537) (sponsored by Rep. Mike Moyle).[1455]

The statute (as amended in 2005) reads in pertinent part:

> (1) All applicants proposing to make land use changes shall be required to use surface water, where reasonably available, as the primary water source for irrigation. Surface water shall be deemed reasonably available if:
>
> (a) A surface water right is, or reasonably can be made, appurtenant to the land;
>
> (b) The land is entitled to distribution of surface water from an irrigation district, canal company, ditch users association, or other irrigation delivery entity, and the entity's

[1455] Idaho Code § 67-6537 was first enacted as a part of the Ground Water Quality Protection Act of 1989, 1989 Idaho Sess. Laws, ch. 421, § 3. At that time, it contained only what is now codified, as amended, as Idaho Code § 67-6537(4). In 1989, it simply required local governments to "consider the effect the proposed amendment, repeal or adoption of the comprehensive plan would have on the quality of ground water in the area." It was not until 2005 that section 67-6537 was substantially amended to add the mandate in section 67-6537(1) that developers use surface water when available. H.B. 281, 2005 Idaho Sess. Laws, ch. 338. The 2005 amendment recodified the original section 67-6337 to 67-6537(4) and amended it to include consideration of the source and quantity (as well as quality) of ground water in the area.

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> distribution system is capable of delivering the water to the land; or
>
> (c) An irrigation district, canal company, or other irrigation delivery entity has sufficient available surface water rights to apportion or allocate to the land and has a distribution system capable of delivering the water to the land.

Idaho Code § 67-6537(1).[1456]

> This mandate is driven by the assumption that ground water (which typically does not require treatment to be used as drinking water) is more precious than surface water.

The legislation is not directed to IDWR. Instead, it amended LLUPA, which governs planning and zoning actions by cities and counties.

The 2005 act applies to any applicant "proposing to make land use changes." That is very broad, presumably including zoning changes, special use permits, planned unit developments, annexations, or any other application for a new land use.

Thus, if a developer of agricultural land served by surface water seeks a land use entitlement, he or she is arguably obligated to install a separate lawn irrigation system to utilize that water (rather than relying on municipal water that uses ground water). The unintended effect of this requirement is the proliferation of separate, unmetered lawn irrigation systems. Without the price signal of metering, effective water conservation is difficult to achieve. The City of Denver learned this the hard way, when it was forced to retrofit the entire city which was originally unmetered.

The requirement applies where surface water is "reasonably available." The act defines this as where surface water is appurtenant to the property, or reasonably could be made appurtenant, or where it could be obtained from an irrigation district or other entity. Idaho Code § 67-6537(1)(a). In other words, even if the land does not have surface water available today, the owner might be obligated to acquire surface water rights.

The requirement to use surface water where available raises a number of questions:

1. Does the act prohibit a municipal water provider (relying at least in part on ground water supplies) from serving homes that use the municipal

[1456] Idaho Code § 67-6537 was amended again by S.B. 1083, 2025 Idaho Sess. Laws, ch. 129, § 11. The 2025 amendment deleted the first sentence of the statute, which had read: "The intent of this section is to encourage the use of surface water for irrigation." The Statement of Purpose offers no clue as to why this sentence was deleted from the statute.

water for lawn irrigation? Answer: No. The act applies to developers appearing before zoning bodies, not to municipal providers whose water rights are administered by IDWR. Thus, it has no effect on what a municipal provider (or anyone else) does with its water rights. This is reinforced by subsection 3 of the act which states that nothing in the statute is intended to override or amend the Water Code. Idaho Code § 67-6537(3). Thus, the statute has no impact on IDWR's review of a water right application or any other administration of water rights.

2. Would the act require the developer of a shopping mall to install a separate surface-based irrigation system to irrigate the trees and shrubs in the parking lot? Answer: Arguably yes, if surface water is reasonably available. On the other hand, the mandate, though written in absolute terms, should be read in context, allowing the municipality to exercise some discretion. The first sentence of the act says that its purpose is to "encourage the use of surface water," not to mandate it. Moreover, the requirement is placed in a planning statute, LLUPA, which is built on the exercise of discretion. Thus, in determining whether surface water is reasonably available, one would think that the zoning board should be entitled to consider such things as the economic feasibility and efficiency.

3. Does this provision prohibit a municipal provider or subdivision developer from land applying treated municipal effluent from derived from ground water to parks, open space, golf courses, and common areas? Answer: No. IDWR takes the position that it does not, so long as the ground water was first used for in-house culinary purposes (as opposed to lawn irrigation). This also would seem logical from a physical standpoint: Once the water emerges from the treatment plant, it should be viewed as surface water.

4. If a proposed development is within an irrigation district that has surface water available for irrigation, can the municipality require that the development's irrigation be served instead by reuse water provided by the city?[1457] Answer: Probably yes. Assuming that the reuse is seen as surface water, the statute raises no impediment to such a city requirement.[1458] However, assuming the subdivision remains within the

[1457] For "Class A wastewater," which has been treated essentially to drinking water standards, the IDEQ guidance does not require any buffer zones between use areas and, for example, private dwellings. *Guidance for Reclamation and Reuse of Municipal and Industrial Wastewater*, Idaho Department of Environmental Quality at 6-17 (September 2007).

[1458] The "irrigate with surface water" statute, Idaho Code § 67-6537, raises no impediment, but it is possible an opponent of the city's plan might assert that Idaho Code

irrigation district, its landowners would be subject to irrigation district assessments whether they get water from the district or not.

5. Can a new development use ground water to irrigate lawns and landscaping during the "shoulder season" (when surface water is not available in the spring and fall)? Answer: Yes. The statute requires only that surface water serve as the primary source of water, and it must be reasonably available.

6. Can an applicant install an efficient irrigation system that uses a portion of the former surface right, and sell the balance to another user?[1459] Answer: Yes. The act does not limit the ability of a landowner to sell off the unused portion of surface rights associated with a developed parcel. In other words, the act says that if there is surface water on the property, it must be used.

7. Rather than directly applying the surface water, can the surface water be put to use indirectly as mitigation for a ground water right that serves the new development? Answer: Arguably yes. The statute requires the developer to "use the surface water . . . as the primary water source for irrigation." Arguably, use of the water in a mitigation plan would satisfy this requirement, but there has been no ruling or Departmental guidance on this point.

B. Idaho Code § 42-204A

For decades, IDWR has embraced what it perceives as a statewide policy of encouraging the use of natural flow surface water where it is available. Since the 1990s, the Department has usually conditioned new permits for ground water irrigation use (including domestic and municipal water rights that authorize lawn watering, etc.) to require use of appurtenant surface water rights as the primary source of irrigation water.

This is reflected in what has become a standard condition on new appropriations:

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§ 42-201(7), discussed below, would block the city from requiring that the reuse water be employed for subdivision irrigation. However, that provision addresses agency "authority over the appropriation of the public surface water and ground waters of the state." To the extent supplying reuse water for irrigation is not mandating an appropriation, it would appear this statute would not come into play.

[1459] Splitting a water right and selling a portion is relatively easy if the land is served by its own water right(s). It is far more difficult if the land is served by an irrigation district, whose consent (and possibly the consent of the federal water provider) will be required.

> The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping.

IDWR Standard Condition 102.

Similar language is used for new transfers (adding a further exception "where the use of surface water was replaced by the use of water diverted in connection with this right before the approval of this transfer").

However, in a 2022 decision, Judge Wildman overturned IDWR's denial in 2021 of ground water right applications where the applicant had stripped off underlying surface water entitlements (shares in an irrigation district). *Eden's Gate LLC v. IDWR*, Case No. CV14-21-10116, Memorandum Decision, Idaho Dist. Ct., Third Judicial Dist. (June 9, 2022) (Eric J. Wildman, D.J.). See discussion in section 27.D(4) on page 573. Judge Wildman found the LLUPA provision inapplicable to IDWR, and the local public interest provision was too narrow in scope to support the permit denial. He concluded: "The Court is unaware of any stated 'blanket' state-wide legislative policy setting forth a preference for the use of surface water over unappropriated ground water in the context of an application to appropriate water." *Eden's Gate* at pp. 6-7.

In response to *Eden's Gate*, the Department backed off this blanket policy. Instead, it temporarily changed its practice to only require the use of appurtenant surface water when the record demonstrated that using surface water was necessary to address the criteria of Idaho Code § 42-203A(5) or § 42-222(1). See memorandum by Shelley W. Keen entitled *"Surface Water First" Requirements for Water Right Approvals* dated September 6, 2022; this informal (unnumbered) guidance document has been superseded by c

In 2023, the Legislature enacted S.B. 1033, 2023 Idaho Sess. Laws, ch. 97 (codified at newly created Idaho Code § 42-204A). This statute provided the statewide legislative policy that the district court found lacking in *Eden's Gate*. Specifically, it requires that new permits for irrigation purposes "be conditioned to require use of available surface water as the primary irrigation supply and use of ground water as a supplemental water supply when surface water is not available." Idaho Code § 42-204A(1). However, the statute applies only to new appropriations of water "for irrigation purposes." Idaho Code § 42-204A(2). It does not apply to applications for municipal water. Nor does it apply to transfers of existing rights.

Accordingly, the Department enacted new guidance re-instituting the blanket application a "surface water first" policy in the context of appropriations. Shelley W. Keen, IDWR Guidance, *Application Processing No. 79* (*"Surface Water First" Requirements for New Ground Water Irrigation Appropriations*) (July 3, 2023). The narrow scope of section 42-204A is reflected in the new guidance, which applies only to "an application to appropriate ground water for irrigation purposes." *Application Processing No. 79*, p. 2.

The 2023 "surface water first" guidance implements the requirement in the context of new appropriations of irrigation water (including domestic rights that include an irrigation component).[1460] Thus, it is applicable to water rights for individual homes and residential subdivisions that are not served by municipal water rights but instead by water rights with "domestic" and "irrigation" purposes.

Appropriately, the 2023 guidance does not address municipal water rights (nor transfers of any rights), both of which fall outside the scope of Idaho Code § 42-204A(2).

The statute and the guidance provide flexibility to the Department to except certain new permits from the policy (1) based on the local public interest and water conservation criteria in the appropriation statute or (2) in connection with a mitigation plan or ground water management plan. See Idaho Code § 42-204A(4).

In sum, Judge Wildman concluded that the Department lacks authority to deny of an application (or to impose a surface water first condition) on the basis of a perceived statewide "surface water first" policy. That decision was overturned by the Legislature in 2023, but only with respect to new appropriations for irrigation purposes.

C. Idaho Code § 31-3805(3)

In 2025, the Legislature enacted S.B. 1083aa, 2025 Idaho Sess. Laws, ch. 129. The bill amended various water statutes including those dealing with exempt domestic water rights. The legislation also amended land use statutes dealing with the requirement to use surface water when available. It made a minor change to Idaho Code § 67-6537 (discussed above, see footnote 1456 on page 861).

More significantly, the 2025 legislation repealed and replaced Idaho Code § 31-3805. S.B. 1083aa, 2025 Idaho Sess. Laws, ch. 129, §§ 6 and 7. New subsection (2) is now a provision implementing a surface-water-first policy. Similar to Idaho Code

[1460] The guidance observes that the statute is limited "to applications for 'irrigation purposes.'" *Application Processing No. 79*, p. 3. It concludes "irrigation purposes" includes the irrigation component that is often associated with a domestic water right. The guidance states that this irrigation use shall be listed separately as a purposes of use, and shall be made subject to the surface water first condition. *Application Processing No. 79*, pp. 3-4.

§ 67-6537(1), it applies in the land use context, not to IDWR. Although it is codified to Title 31 (Counties and County Law), its language applies to the approval of new subdivision plats by both counties and cities.

The pertinent subsection requires that the landowner use available surface water in the irrigation of lots within the subdivision:

> If surface water for irrigation is reasonably available to all or any part of a subdivision, as provided in section 67-6537, Idaho Code, then no subdivision plat, amendment to a subdivision plat, or any other plat or map recognized by the city or county for the division of land will be accepted, approved, and recorded unless the owner or entity has provided for the irrigation of lots within the subdivision using the available surface water.

Idaho Code § 31-3805(3).

D. Municipal water rights

In the author's view, the "surface water first" policy as reflected in IDWR Standard Condition 102 (see above) is ill-suited to municipal rights. In concept, the policy could apply in either of two contexts, neither of which makes sense for municipal providers.

First, the policy could apply to appurtenant surface water that is not owned or controlled by the municipal provider but by the customer or the developer of the land. For example, a developer could peel off the appurtenant irrigation rights. Or a residential customer might be cut off or failure to pay irrigation district fees. Likewise, a homeowner could simply fail to turn on a separate non-potable lawn irrigation system and rely instead on potable municipal water. Or a commercial customer might find it more convenient to irrigate a few feet of ornamental landscaping with municipal water rather than maintain a separate surface water delivery system. In each of these instances, it is unlikely that the municipal provider would have any influence or control over those decisions. The only exception that comes to mind—and it is an unlikely hypothetical—would be if a municipal provider refused to undertake service to a new development unless the developer removed its surface water delivery system. The author is aware of no municipal provider who had engaged in such action.

The policy also could be employed would be in the context of the municipal provider's use of its own portfolio of ground and surface rights. In theory, a municipal provider could be required to use no ground water unless all available surface rights were fully employed. The difficulty with this is that municipal systems that employ both ground and surface water are typically extraordinarily complex physical systems

involving various water treatment facilities and programs, lift stations, above-ground storage, aquifer storage and recovery, and integrated delivery systems, making it difficult if not impossible to guarantee that every surface right is fully employed at all times. Enforcement of the policy in this context would place cumbersome burden on the Department.

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Printed 10/5/2026 10:07 AM

48. WATER RIGHTS AND LAND USE PLANNING

A. Overview

In Idaho and all western states, the law of water rights and land use planning developed along entirely different paths, which have intersected only recently.

Note: For a discussion of LLUPA's "surface water first" requirement, see section 47.A on page 860.

The quick (and somewhat over-simplified) distinction is that IDWR has control over the appropriation, transfer, and administration of water rights in Idaho, while cities and counties (collectively, municipalities) have control over land use (including planning, zoning, and subdivision). A third entity, the Idaho Department of Environmental Quality ("IDEQ"), has jurisdiction over water quality. Finally, the Idaho Public Utilities Commission ("IPUC") regulates public utilities including municipal providers of water, with particular attention to the rates they charge and the expenses they incur.[1461]

This discussion focuses primarily on the intersection of the authority of IDWR and municipalities. In particular, it explores the extent to which IDWR's exclusive authority over water rights administration limits the authority of municipalities to address or regulate water supply in the context of land use regulation.

[1461] The IPUC was created by the Legislature in 1913 (1913 Idaho Sess. Laws, chap. 61) 18 years after the establishment of IDWR. The IPUC regulates various types of utilities including water corporations, which are defined as companies "owning, controlling, operating or managing any water system for compensation." Idaho Code § 61-125.

Curiously, Chapter 10 of Idaho's Water Code (Idaho Code §§ 42-1001 to 42-1005) is entitled "Fixing Water Rates." The first of them authorizes Idaho counties to set rates for "parties interested in either furnishing or delivering for compensation … water for irrigation or other beneficial purpose." Idaho Code § 42-1001. These statutes were enacted in 1899 and have never been amended or repealed. 1899 Idaho Sess. Laws (aka Gen. Laws), pp. 380-87, § 26. One presumes that this statutory dinosaur was implicitly preempted by the establishment of IPUC authority in 1913 and is a dead letter today. The only reported cases addressing the statute (*Jackson v. Indian Creek Reservoir Ditch & Irrigation Co.*, 16 Idaho 430, 101 P. 814 (1909) and *Green v. Jones*, 22 Idaho 560, 126 P. 1051 (1912)) predate the IPUC. One may only wonder why this statute was not repealed after 1913.

Adding to the curiosity is the fact that yet another statute, this one dating to territorial times, authorized Idaho cities to set rates for water companies. 1887 Idaho Rev. Stat. § 2711 (municipal water rates to be set by a commission composed of city and water company representatives). Unlike the 1899 statute, the 1887 statute was repealed. The 1887 statute survived until at least 1908. (It appears in 1908 Idaho Rev. Codes § 2839.) It was repealed sometime before 1919. (It does not appear in the next recodification in 1919.) Thus, its repeal appears to coincide with the creation of the IPUC in 1913. However, from 1899 to at least 1908, two conflicting statutes gave both cities and counties control over water rates.

IDWR traces its authority over water rights back to its predecessor, the Office of State Engineer, created in 1895 (five years after statehood). (See footnote 321 on page 197 for history of IDWR.) This authority is grounded in the State Constitution and buttressed by statutes dating to territorial times.[1462]

Land use control and, in particular, the authority to zone, resides in Idaho cities and counties. Idaho is a Dillon's rule state (as opposed to a home rule state), meaning that cities and counties have no inherent authority to legislate.[1463] Rather, their law-making power derives from grants of authority found in or necessarily implied by the Idaho Constitution or statute.[1464]

Despite being a Dillon's rule state, no statutory authorization is necessary for zoning, because the authority to zone derives directly from a self-executing grant under the State Constitution.[1465] Specifically, the police power granted to municipalities (Idaho Const. art. XII, § 2) includes the power to zone.[1466] Thus, cities were authorized to engage in zoning even before the first planning and zoning statutes were enacted.[1467]

[1462] Idaho Const. art. XV, approved in 1890, governs water rights. See, Dennis C. Colson, *Water Rights in the Idaho Constitution*, 53 Idaho Advocate, 20 (Dec. 2010). The first Idaho statute addressing water rights was enacted by the Territorial Legislature in 1881. 1881 Idaho Sess. Laws 273-75. The earliest parts of what is now Idaho's water code (Title 42) date to 1899. 1889 Idaho Sess. Laws, pp. 380-87; 1901 Idaho Sess. Laws, pp. 191-201, in particular § 9b at p. 200-01 (codified to Idaho Code § 42-101).

[1463] Dillon's Rule is named after the Iowa Supreme Court Justice who authored the rule in 1868. *Merriam v. Moody's Executors*, 25 Iowa 163, 170 (1868) (Dillon, C.J.). He also authored 1 J. Dillon, *Commentaries on the Law of Municipal Corporations* § 237 (5th Ed. 1911).

[1464] *Bradbury v. City of Idaho Falls*, 32 Idaho 28, 32, 177 P. 388, 389 (1918) (Morgan, J.) (quoting 1 *Dillon on Municipal Corporations* § 237 (5th ed.)); *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980) (Donaldson, C.J.).

[1465] In sharp contrast, the state constitutional taxing authority, Idaho Const. art. VII, § 6, is non-self-executing. Accordingly, impact fees, capitalization fees, service fees, and other "land use fees" all require statutory authority (except for those described as regulatory fees, which fall under the police power). This has given rise to a mountain of litigation in Idaho.

[1466] "The power of counties and municipalities to zone is a police power authorized by Art. 12, § 2 of the Idaho Constitution." *Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 617, 661 P.2d 1214, 1216 (1983), *overruled on other grounds by City of Boise City v. Keep the Commandments Coalition*, 143 Idaho 254, 257, 141 P.3d 1123, 1126 (2006). *See*, Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?*, 14 Idaho L. Rev. 143, 154 (1977).

[1467] Idaho's zoning statutes date to 1925. 1925 Idaho Sess. Laws, ch. 174; 1927 Idaho Sess. Laws, ch. 14 (previously codified at Idaho Code §§ 49-401 to 49-409 and later §§ 50-401

Today, local authority over land use is controlled and constrained by the comprehensive regime set out in the Local Land Use Planning Act ("LLUPA"), Idaho Code §§ 67-6501 to 67-6538. (See *Idaho Land Use Handbook* for a comprehensive discussion of LLUPA.)

These authorities over water and land use are largely distinct, but come into connection (and potential jurisdictional conflict) where IDWR seeks to guide land development through water rights administration or where municipalities seek to shape water policy. The discussion below explores a variety of statutory provisions that bear on these jurisdictional quandaries.

IDWR's exclusive control over water rights administration derives from two sources: (1) implied preemption analysis based on Idaho statutes assigning authority over water rights to IDWR, and (2) a 2006 statute expressly recognizing IDWR's exclusive authority over water rights (Idaho Code § 42-201(7)). The former is addressed in an Idaho Supreme Court decision, *Ralph Naylor Farms v. Latah Cnty.* ("*Naylor Farms*"), 144 Idaho 806, 810, 172 P.3d 1081, 1085 (2007) (Trout, J. Pro. Tem.). The latter is addressed in an unappealed district court decision, *Eagle Creek Partners, LLC v. Blaine Cnty.,* Case No. CR-2007-670, Idaho Dist. Ct., Fifth Judicial Dist. (May 6, 2008) (Robert J. Elgee, J.). Both concluded that IDWR's jurisdiction is exclusive.

A handful of statutes grant municipalities limited authority to address water supply and related issues in specific contexts. These statutes are addressed in section 48.E on page 878. Some but not all of them were addressed by *Naylor Farms* and *Eagle Creek*. Due to their limited scope, none of them provides a basis for municipalities to act in ways that infringe on IDWR's exclusive authority to regulate the use of the public water supply.

The bottom line is that, although there is some uncertainty about the extent and preemptive effect of IDWR's exclusive authority, it appears that the Department's responsibility over water rights substantially limits or precludes efforts by municipal governments to employ their land use authority to manage Idaho's water supply. A possible exception, however, may be Boise's Assured Water Supply requirements. This ordinance is arguably saved by the authority granted to cities under Idaho Code § 30-801. This is the requirement that municipal water providers obtain the permission of a city before providing water to the city.

B. Idaho is a Dillon's Rule state.

The authority granted to cities to govern varies from state to state. In "home rule" states, cities have broad authority to govern and need not rely on specific legislative authorization. Idaho is not a home rule state. It is what is known as a "Dillon's rule"

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to 50-409). The first planning statutes were enacted in 1935. 1935 (1st Emergency Session) Idaho Sess. Laws, ch. 51 (previously codified at Idaho Code §§ 50-2702 to 2708).

state.[1468] In Dillon's rule states, municipalities have only such authority as has been granted to them expressly or by necessary implication by the Idaho Constitution or statute.[1469]

C. Cities must exercise their planning and zoning authority so as not to conflict with other statutes.

Idaho's Constitution expressly requires legislative authorization for local taxation.[1470] Idaho Const. art. VII, § 6. In contrast, it grants the police power directly to cities and counties (without need for implementing legislation).

> Local police regulations authorized. — Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.

Idaho Const. art. XII, § 2 (emphasis added).

[1468] Dillon's Rule is named after the Iowa Supreme Court Justice who authored it. Justice Dillon stated:

> In determining the question now made, it must be taken for settled law, that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power.

Merriam v. Moody's Executors, 25 Iowa 163, 170 (1868) (Dillon, C.J.). In *Merriam*, the court invalidated the sale of a home for nonpayment of a special tax, noting that the Legislature authorized the tax, but did not expressly authorize the sale of property for nonpayment of the tax. The quoted passage is restated in nearly the same words in 1 J. Dillon, *Commentaries on the Law of Municipal Corporations* § 237 (5th Ed. 1911).

[1469] *Bradbury v. City of Idaho Falls*, 32 Idaho 28, 32, 177 P. 388, 389 (1918) (Morgan, J.) (quoting 1 *Dillon on Municipal Corporations* § 237 (5th ed.)); *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980) (Donaldson, C.J.).

[1470] As a result, impact fees, connection or capitalization fees, service fees, and other land use fees all require statutory authority (except for those described as regulatory fees, which fall under the police power). This has given rise to a mountain of litigation in Idaho all of which underscores the limited scope of regulatory authority held by Idaho cities.

The police power includes the power to zone.[1471] Thus, cities lawfully engaged in zoning even before the first comprehensive land use planning statute was enacted in 1975 (the Local Land Use Planning Act ("LLUPA"), Idaho Code §§ 67-6501 to 67-6538).[1472] Today, however, local authority over land use is controlled and constrained by the comprehensive regime set out in LLUPA—as well as other statutes.

The key words in the constitutional grant of police power state (quoted above) that local regulations adopted pursuant to the police power not be "in conflict with its charter or with the general laws." Idaho Const. art. XII, § 2.

Thus, the specific contours of LLUPA now constrain the authority of municipalities to engage in planning and zoning. And LLUPA is not the only constraint. In addition, and of particular note here, cities are constrained by other laws granting authority to other regulatory agencies, notably the Idaho Department of Water Resources ("IDWR"). Where the Legislature has seen fit to grant implicitly or explicitly exclusive authority over water rights and water supply to the IDWR, municipalities may not rely on their police power to justify their own regulation of water supply. Doing so runs afoul of the Constitution's requirement that local regulations not be "in conflict with . . . with the general laws." Idaho Const. art. XII, § 2. More simply put, the authority of municipalities over water supply is preempted by the delegation of authority to IDWR. This preemptive effect is discussed in section 48.D on page 873.

Hypothetically, any delegation of exclusive authority to IDWR could be overridden by clear legislative authority granted to municipalities over water rights and water supply. Accordingly, this memorandum evaluates all statutory provisions authorizing municipal involvement in matters relating to water. These authorities are discussed in section 48.E on page 878. That evaluation demonstrates that these authorities are sharply limited. None would justify a departure from the conclusion that IDWR has exclusive authority over water rights and water supply. Indeed, the expressly narrow range of municipal responsibilities described in these statutes reinforces the conclusion that municipal authority over water matters is not supported by an unbounded police power but is limited to those authorities set out in these statutes.

[1471] "The power of counties and municipalities to zone is a police power authorized by Art. 12, § 2 of the Idaho Constitution." *Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 617, 661 P.2d 1214, 1216 (1983), *overruled on other grounds by City of Boise City v. Keep the Commandments Coalition*, 143 Idaho 254, 257, 141 P.3d 1123, 1126 (2006). *See*, Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?*, 14 Idaho L. Rev. 143, 154 (1977).

[1472] For example, Boise's first zoning code was adopted in 1966, before the enactment of LLUPA in 1975.

D. IDWR's exclusive authority over water rights administration

IDWR's exclusive control over water rights and the management of water supply finds support in both (1) a traditional implied preemption analysis based on the implicit effect of laws delegating regulatory authority over water use to IDWR, and (2) explicit preemption in the form of a 2006 statute, Idaho Code § 42-201(7). These are discussed in turn below.

(1) Implied preemption analysis (*Naylor Farms*)

IDWR traces its authority over water rights back to its predecessor, the Office of State Engineer, created in 1895 (five years after statehood). The Department's authority is grounded in the State Constitution and buttressed by statutes dating to territorial times.[1473]

Since 1900, Idaho's water code has assigned to the State the authority to control the distribution and use of water. Idaho Code § 42-101.[1474] "I.C. § 42-101 provides that control over the appropriation of water is vested in the State . . . ." *Ralph Naylor Farms v. Latah Cnty.* ("*Naylor Farms*"), 144 Idaho 806, 810, 172 P.3d 1081, 1085 (2007) (Trout, J. Pro. Tem.).

[1473] Idaho Const. art. XV, approved in 1890, governs water rights. See, Dennis C. Colson, *Water Rights in the Idaho Constitution*, 53 Idaho Advocate, 20 (Dec. 2010). The first Idaho statute addressing water rights was enacted by the Territorial Legislature in 1881. 1881 Idaho Sess. Laws 273-75. The earliest parts of what is now Idaho's water code (Title 42) date to 1899. 1889 Idaho Sess. Laws (aka Gen. Laws), pp. 380-87; 1900 Idaho Sess. Laws, pp. 191-201, in particular § 9b at p. 200-01 (codified to Idaho Code § 42-101).

[1474] The very first section of Idaho's water code, codified in 1900 and unchanged since then, assigns to the State control over Idaho's water:

> 1. Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, <u>its control shall be in the state</u>, which, in providing for its use, shall equally guard all the various interests involved. <u>All the waters of the state</u>, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state <u>are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment</u> to those diverting the same therefrom for any beneficial purpose . . . .

Idaho Code § 42-101 (emphasis added).

On the other hand, as discussed in section 48.E on page 878, other statutes assign at least some responsibility for consideration of water quality and supply issues to other governmental entities.

Naylor Farms involved the interaction among three of these statutes (Idaho Code §§ 42-101, 67-6537(4), and 39-126(2)) and the county's Groundwater Management Overlay Zone. *Naylor Farms*, 144 Idaho at 810, 172 P.3d at 1085. The district court determined that the county's ordinance was preempted by section 42-101 and was not saved by the other two statutes.[1475]

The case involved an ordinance adopted by Latah County creating the "Moscow Sub-basin Groundwater Management Overlay Zone." The ordinance prohibited the county from accepting applications for specified new land uses that were found to consume large quantities of water (mineral extraction and processing, large CAFOs, and golf courses). *Naylor Farms*, 144 Idaho at 811, 172 P.3d at 1086. The ordinance was enacted as a direct response to the county's failed protest of Naylor Farms' application to IDWR for a ground water right for mineral extraction.

The district court applied the common law "implied preemption analysis" articulated in *Envirosafe Services of Idaho, Inc. v. Cnty. of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987) (Huntley, J.). *Naylor Farms*, 144 Idaho at 810, n.1, 172 P.3d at 1085, n.1. It concluded that the assignment of control over water allocation to IDWR occupied the field and preempted Latah County's ordinance. "The district court concluded that the effect of the Ordinance was to control access to water within the Groundwater Management Overlay Zone by controlling certain uses within that zone and therefore, there was an implicit conflict between the Ordinance and the general laws of the State." *Naylor Farms*, 144 Idaho at 810, 172 P.3d at 1085. Thus, "the County's actions were preempted by State law." *Naylor Farms*, 144 Idaho at 811, 172 P.3d at 1086.

As for section 67-6537(4), "the [district] court concluded that the Ordinance went beyond considering the effects on water and, in effect, was an attempt to manage water in Idaho." *Naylor Farms*, 144 Idaho at 810, 172 P.3d at 1085. In other words, the mandate to "consider" ground water in comprehensive planning is not authority to regulate or restrict the diversion of ground water. See discussion of this statute in section 48.E(1)(e) on page 881.

The Court also gave short shrift to section 39-126(2), which instructs all units of government, including local governments, to "take into account" the effect of an activity

[1475] The *Naylor Farms* decision did not address Idaho Code § 42-201(7) (then 42-201(4)), which was on the books at the time of the appeal but was not in effect during the relevant time. This statute is discussed below in section 48.D(2) on page 875.

on ground water quality when issuing a permit or license dealing with the environment.[1476] See discussion in section 48.E(2)(a) on page 882.

The county did not appeal, but Naylor Farms appealed the district court's denial of its request for attorney fees. Although the appeal was limited to the issue of attorney fees, the Idaho Supreme Court found it necessary to address the merits of the preemption issue in order to determine whether the county acted unreasonably. In so doing, the Idaho Supreme Court essentially upheld the district court's preemption analysis. "[W]e respect the district court's analysis of the Ordinance and preemption by State law . . . ." *Naylor Farms*, 144 Idaho at 811, 172 P.3d at 1086. The Idaho Supreme Court also upheld the district court's decision not to award attorney fees against the county because, prior to this litigation, "there was a legitimate question about the validity of the County's action in adopting the ordinance." *Id*.

(2) Idaho Code § 42-201(7) and *Eagle Creek Partners*

In 2006, the Idaho Legislature enacted a statute intended to further shore up IDWR's authority over water rights.[1477] 2006 Idaho Sess. Laws, ch. 256 (S.B. 1353) (now codified at Idaho Code § 42-201(7), originally codified as section 42-201(4)).

In a sense, Idaho Code § 42-201(7) may be seen as codifying the common law preemption analysis articulated a year later in *Naylor Farms* (that the statutory delegation of water right authority to IDWR occupies the field). In other words, any doubt about the strength of the *Naylor Farms* precedent is now resolved. The 2006 statute expressly delegates to IDWR "exclusive authority over the appropriation of the public surface water and ground waters of the state" and prohibits any other governmental entity from taking any "action to prohibit, restrict or regulate the appropriation" of water. It reads in full:

> This title [Title 42] delegates to the department of water resources exclusive authority over the appropriation of the public surface and ground waters of the state. No other agency, department, county, city, municipal corporation or

[1476] "While the Court is correct that counties may, pursuant to I.C. § 39–126, participate with regard to water "quality" management, there is no legislative or other authority for counties to manage water "quantity." Section 39–126 provides that counties and other political subdivisions of the State are "authorized and encouraged to implement ground water quality protection policies within their respective jurisdictions, provided that the implementation is consistent with and not preempted by the laws of the state ..." The code section repeatedly refers to water "quality", but the word "quantity" appears nowhere in the section." *Naylor Farms*, 144 Idaho at 813, 172 P.3d at 1088.

[1477] Idaho Code § 42-201(7) was not addressed in *Naylor Farms* because it was enacted after the events in 2005 giving rise to the litigation.

> other instrumentality or political subdivision of the state shall enact any rule or ordinance or take any other action to prohibit, restrict or regulate the appropriation of the public surface or ground waters of the state, and any such action shall be null and void.

2006 Idaho Sess. Laws, ch. 256 (S.B. 1353) (now codified at Idaho Code § 42-201(7), originally codified to Idaho Code § 42-201(4)) (emphasis added).

The legislation was a direct response to a draft ordinance contemplated by the City of Parma that would have required the City's approval of any new ground water well. The bill's sponsors viewed this as an attempt by the City to usurp IDWR's authority over water appropriation. Accordingly, the bill clarifies that local governments may not set up regulatory processes that mimic the responsibilities of IDWR regarding the appropriation of water.

The Statement of Purpose for the 2006 statute describes its goal as keeping IDWR and municipalities in their own lanes. While municipalities are forbidden from usurping IDWR's authority over water rights, the statute is not intended to deprive municipalities of their power to zone. "It will have no impact on the zoning authority or other powers inherent in political subdivisions."[1478]

As of this writing, no appellate case has addressed Idaho Code § 42-201(7). The only district court decision of which the authors are aware is *Eagle Creek Partners, LLC v. Blaine Cnty.,* Case No. CR-2007-670, Idaho Dist. Ct., Fifth Judicial Dist. (May 6,

[1478] The Statement of Purpose reads in full:

> Title 42 of the Idaho Code delegates comprehensive authority to the Idaho Department of Water Resources over the appropriation of the waters of the State. This delegation of authority preempts other agencies and political subdivisions from regulating the appropriation of the public waters of the State. This legislation further clarifies these principles to ensure that no other agency or political subdivision takes any action which impinges upon the Department of Water Resource's exclusive jurisdiction over the appropriation of the waters of the state. The legislation will not affect the right of an agency or political subdivision to file a protest in a water right proceeding. It will have no impact on the zoning authority or other powers inherent in political subdivisions. There would also be no impact on private contracts, covenants, or restrictions.

Statement of Purpose, R.S. 15889 (which became S.B. 1353, now codified at Idaho Code § 42-201(7)).

2008) (Robert J. Elgee, J.). In that case, the court invalidated a subdivision approval condition based on the 2006 statute.

Eagle Creek Partners sought to subdivide 37-plus acres of farm land in the Ketchum area into four large residential lots. The land was served by an irrigation company, which approved the development plan including the construction of five irrigation ponds intended to "gain a higher discharge for sprinkler irrigation systems." *Eagle Creek Partners* at 2. In the subdivision hearing, IDFG and others raised concerns about possible adverse effects of the ponds on fish and wildlife. The county approved the subdivision, subject to a condition requiring the developer fill in the ponds (which it had already built after receiving approval from the irrigation company) and devise a more efficient water distribution system.

The district court found this condition violated recently enacted Idaho Code § 42-201(4) (now 42-201(7)):

> Thus, the first question is whether the County's action, in requiring Condition 1, constitutes a restriction or regulation on Eagle Creek's appropriation. The Court concludes that it does. . . . . Making a determination that Eagle Creek could come up with a more efficient system is no different than telling Eagle Creek it has too much water, or does not need the water it has, or there are other beneficial uses that the water should be applied to. . . .
>
> The Court also concludes the County cannot measure or regulate <u>efficiency of water use</u>*;* . . . Regulating or managing efficiency is measuring or restricting or regulating beneficial use and the process of applying water to its beneficial use—<u>a uniquely state function.</u>

Eagle Creek Partners at 7-8 (emphasis original).

Blaine County pointed to Idaho Code § 31-3805(1)(b)(iii) as a way around the 2006 statute. (See discussion in section 48.E(3)(a) on page 883.) The county contended section 31-3805(1)(b)(iii) provides a specific grant of authority to evaluate and approve an applicant's water delivery system. The district court disagreed, holding that this statute only requires municipalities to evaluate the suitability of the delivery system to deliver water so that the buyer of property may be informed thereof. It does not authorize the county to require the developer to design and construct what the county perceives to be a better delivery system.

The district court did not address Idaho Code § 67-6537(4) (the statute requiring municipalities to "consider" the impact of its comprehensive plan on ground water, see

discussion in section 48.E(1)(e) on page 881)[1479] or to Idaho Code § 39-126 (requiring local governments to take ground water quality into account, see discussion in section 48.E(2)(a) on page 882). Presumably, that was because the proposed development used surface water. Nor did the court mention the recently-decided case of *Naylor Farms*.

E. Statutes authorizing municipalities to address water quantity and supply

Before turning to IDWR's authority, we begin by identifying statutes that contain provisions dealing with the authority of municipalities to address water quality and/or water supply.

(1) LLUPA

(a) Idaho Code § 67-6502(b): One of LLUPA's goals is to facilitate the provision of adequate public facilities and services.

The introductory section of LLUPA lists its goals. One is "To ensure that adequate public facilities and services are provided to the people at reasonable cost." Idaho Code § 67 6502(b). This objective is implemented through any number of requirements in LLUPA—from comprehensive planning to the establishment of areas of city impact—all of which are intended to foster the efficient provision of public services. It is an aspirational goal, not an extension of additional regulatory authority. Moreover, the goal emphasizes reasonable cost, which weighs against the imposition of unnecessary new burdens on those who provide municipal water.

(b) Idaho Code § 67-6508(h): Planning and zoning commissions are required to consider water supply in their comprehensive planning process.

Idaho Code § 67 6508(h) instructs planning and zoning commissions to conduct a comprehensive planning process that considers a long list of components, including "water supply." The statute does not provide any regulatory authority with respect to water supply in the comprehensive planning process.

[1479] The district court made a passing references to section 67-6537, but was in the context of the "surface water only" requirement in section 67-6537(1). *Eagle Creek Partners* at 6.

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(c) Idaho Code §§ 67-6511(2)(a), 67-6512(a), 67-6512(d)(6) and 67-6512(d)(8): Municipalities may consider services provided by political subdivisions.

Three provisions of LLUPA authorize municipalities to address impacts of development on public facilities or services provided by political subdivisions.

The rezone provision of LLUPA states:

> Particular consideration shall be given to the effects of any proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within the planning jurisdiction.

Idaho Code § 67-6511(2)(a) (emphasis added).

The section of LLUPA dealing with conditional use permits authorizes municipalities to take into account the public services that will be required by the development.

> A special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance . . ., subject to the ability of political subdivisions, including school districts, to provide services for the proposed use . . . .

Idaho Code § 67-6512(a) (emphasis added). This section then sets out a non-exclusive list of conditions that may be imposed on a CUP. The first allows conditions "[r]equiring the provision for on-site or off-site public facilities or services." Idaho Code § 67-6512(d)(6). The second authorizes conditions "[r]equiring mitigation of effects of the proposed development upon service delivery by any political subdivision, including school districts, providing services within the planning jurisdiction." Idaho Code § 67-6512(d)(8).

These sections are limited to addressing impacts on services provided by "political subdivisions."[1480] Thus, it appears that municipalities have authority to consider and to

[1480] LLUPA contains no definition of political subdivision. The term is defined in various contexts elsewhere in the Idaho Code. *E.g.*, Idaho Code §§ 6-902(2), 7-1303(6), 12-117(6)(b), 42-3207, 44-2013(2)(a), 42-3218C, 46-1002(4), 50-3002(12), 56-1402(5), 58-1102(c), 59-802(5); 63-3622O(2)(j), and 67-2809(2)(b)(i).

All the statutory definitions, and common usage, recognize that political subdivisions are limited to governmental entities with the power to tax. Some definitions are narrow. For example, the Idaho Video Service Act limits the term to cities and counties. Idaho Code

impose requirements aimed at mitigating the impacts of a rezone or conditional use permit on the ability of a water and sewer district (for example) to provide services to a proposed development. But this statutory authority is limited to political subdivisions

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§ 50-3002(12). At the other end of the spectrum is the Idaho Sales Tax Act which includes this broad definition:

> "Political subdivision" means:
> (i) A governmental organization that:
> 1. Embraces a certain territory,
> 2. Is organized for public advantage and not in the interest of private individuals or classes,
> 3. Has been delegated functions of government, and
> 4. Has the statutory power to levy taxes; or
> (ii) A public health district created by section 39-408, Idaho Code; or
> (iii) A soil conservation district as defined in section 22-2717, Idaho Code; or
> (iv) A drainage district created pursuant to chapter 29, title 42, Idaho Code; or
> (v) An irrigation district created pursuant to title 43, Idaho Code; or
> (vi) A state grazing board created by section 57-1204, Idaho Code; or
> (vii) A water measurement district created pursuant to section 42-705 or 42-706, Idaho Code; or
> (viii) A ground water management district created pursuant to chapter 51, title 42, Idaho Code.

Idaho Code § 63-3622O(2)(j).

There is no doubt that water and sewer districts are political subdivisions of the state. "The judges of election shall certify the returns of the election to the district court having jurisdiction. If a majority of the votes cast at said election are in favor of the organization, the district court shall declare the [water or sewer] district organized and give it a corporate name by which, in all proceedings, it shall thereafter be known, and designated the first board of directors elected, and thereupon the district shall be a governmental subdivision of the state of Idaho and a body corporate with all the powers of a public or quasi-municipal corporation." Idaho Code § 42-3207 (providing for the creation of water and sewer districts) (emphasis provided). See also, Idaho Code § 42-3218C ("Each water or sewer subdistrict created and established as provided in sections 42-3218A through 42-3218D, Idaho Code, shall be a political subdivision of the state of Idaho.").

The same is true for irrigation districts. *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, 329, 297 P.3d 1134, 1146 (2013) (holding that an irrigation district is a political subdivision within the meaning of section 12-117).

It is equally clear that public utilities, which have no governmental or taxing authority, are not political subdivisions.

and does not address the ability of non-governmental entities (such as municipal water providers) to provide water service.

(d) Idaho Code § 67-6537: LLUPA's "surface water first" requirement

This statute, first enacted in 1989, was amended and substantially enlarged in 2005 to add the "surface water first" provisions. See discussion in section 47 on page 860. However, the part pertinent here is the original 1989 component, which is now Idaho Code § 67-6537 (4) (the comprehensive plan provision) and the 2005 provision now codified at Idaho Code § 67-6537(3) (providing no override of IDWR authority).

This statute was addressed by the Court in *Ralph Naylor Farms v. Latah Cnty.* ("*Naylor Farms*"), 144 Idaho 806, 810, 172 P.3d 1081, 1085 (2007) (Trout, J. Pro. Tem.) (see section 48.D(1) on page 873).

The bottom line is that municipal governments are required to consider the effect of their comprehensive plans on ground water, but this does not authorize them to regulate ground water. This conclusion is underscored by Idaho Code § 67-6537(3) which provides: "Nothing in this section shall be construed to override or amend any provision of title 42 or 43, Idaho Code, or impair any rights acquired thereunder." (Titles 42 and 43 deal with water rights and irrigation.)

(e) Idaho Code § 67-6537(4): Municipalities are required to consider the effect of their comprehensive plans on the source, quantity, and quality of ground water.

In 1989, as part of larger legislation expanding IDEQ's role in ground water protection, the Idaho Legislature enacted a law requiring municipalities to address ground water impacts when updating their comprehensive plans. 1989 Idaho Sess. Laws, ch. 421 (now codified at Idaho Code § 67-6537(4)) (See footnote 1455 on page 860). The provision, as amended in 2005, reads:

> When considering amending, repealing or adopting a comprehensive plan, the local governing board shall consider the effect the proposed amendment, repeal or adoption of the comprehensive plan would have on the source, quantity and quality of ground water in the area.

Subsection 67-6537(4).

A comprehensive plan, as its name implies, articulates goals and objectives that will shape future growth within the geographic boundaries of the city or county. Idaho Code § 67-6508. These are broad, conceptual planning documents, not descriptions of

what is allowed under current zoning. "This Court has held that a comprehensive plan does not operate as legally controlling zoning law, but rather serves to guide and advise the governmental agencies responsible for making zoning decisions." *Urrutia v. Blaine Cnty.,* 134 Idaho 353, 357-58, 2 P.3d 738, 742-43 (2000) (Trout, C.J.)

In *Naylor Farms* (discussed in section 48.D(1) on page 873), the Court agreed with the district court's finding that the mandate to "consider" ground water impacts in the context of a comprehensive plan does not overcome IDWR's exclusive authority and does not authorize municipalities "to manage water in Idaho." *Naylor Farms*, 144 Idaho at 810, 172 P.3d at 1085.

(2) EPHA

(a) Idaho Code § 39-126: The EPHA requires local governments to take ground water quality into account in their permitting decisions.

The Idaho Environmental Protection and Health Act ("EPHA"), Idaho Code § 39-101 to 39-130, established the Idaho Department of Environmental Quality ("IDEQ").[1481] A provision of this statute instructs local governments to take ground water effects into account in their permitting decisions. Idaho Code § 39-126(2). However, the next subsection cautions local governments not to second guess the decisions of other state agencies that already have addressed the ground water quality issue. Idaho Code § 39-126(3).

The regulatory authority granted by this statute is limited in several ways. First, it is limited to "a permit or license that deals with the environment." Arguably, that does not include permits and other entitlements issued under LLUPA or the subdivision statute. Second, the statute is limited to ground water quality; it does not extend to ground water supply or quantity issues. Third, as noted, subsection (3) prohibits local governments from acting where state agencies already have addressed the water quality issue. Fourth, subsection (4) expressly addresses preemption: "Nothing contained in this section shall be deemed to permit cities, counties or other political subdivisions of the state to regulate ground water quality with respect to any activity for which another statute or other statutes may have expressly or impliedly preempted such local ground water quality regulation."

Perhaps these limitations are the reason section 39-126 was given short shrift in *Naylor Farms* (see discussion in section 48.D(1) on page 873).

[1481] Section 39-126 was enacted by 1989 Idaho Sess. Laws, ch. 421, with non-substantive amendments in S.B. 1426, 2000 Idaho Sess. Laws, ch. 132.

(3) County and city laws

(a) Idaho Code § 31-3805: Municipalities are required to assess the suitability of certain irrigation delivery systems to serve proposed developments.

Idaho Code § 31-3805 sets out requirements for the subdivision of property within the boundaries of irrigation districts, canal companies, and the like.[1482] For cities, "the irrigation system must be approved by the city zoning authority or city council, as provided by ordinance, with the advice of the irrigation entity charged with delivery of water to said lands." Idaho Code § 31-3805(1)(b)(i). Similar provisions address subdivisions within the area of city impact (section 31-3805(1)(b)(ii)) and other unincorporated areas of the county (section 31-3805(1)(b)(iii)).

The functionally identical subsection applying to unincorporated areas (section 31-3805(1)(b)(iii)) was addressed in *Eagle Creek Partners* (see discussion in section 48.D(2) on page 875). The district court ruled that this provision did not overcome the exclusive authority granted to IDWR under Idaho Code § 42-201(7) (then codified at section 42-201(4)). The court said that section 31-3805 is essentially "a consumer protection statute, designed to insure a buyer of land in an irrigation district (under a proposed subdivision) either gets the water he is entitled to from the water provider, or receives notice that he is still liable for assessments for that water." *Eagle Creek Partners* at 9. The court continued: "The statute does not go on to provide the County the authority to approve or deny the subdivision on that basis, or to require modifications acceptable to the County . . . ." *Eagle Creek Partners* at 10.

In short, section 31-3805 calls for evaluation and notice to the purchaser of land regarding the adequacy of irrigation delivery systems operated by irrigation entities, but the statute includes no regulatory authority over those delivery systems.

(b) Idaho Code §§ 50-1326 through 50-1329 and 50-1334: Certifications are required on subdivision plats respecting water supply.

Sections 50-1326 through 50-1329 of the Municipal Code provide that all subdivision plats (except for agricultural land) are subject to a "sanitary restriction." The sanitary restriction may be satisfied by providing a certificate of approval issued by IDEQ with respect to water and sewer facilities.

[1482] Note that sections 31-3805 and 67-6537 are crossed referenced by LLUPA in Idaho Code § 67-6519(4).

Similarly, section 50-1334 requires persons filing subdivision plats to certify that the lots will be served by either (1) individual wells, (2) an existing water system, or (3) a new water system.[1483]

These provisions are directed to the county clerk and recorder and to IDEQ. They extend no authority to municipalities.

(c) Municipalities have authority to operate their own utilities providing water, sewer, and solid waste facilities, and flood control.

In addition to the specific authorities addressed above, municipalities have broad authority to construct and operate their own sewer systems, to require landowners to connect to them, to issue bonds and to impose ad valorem taxes, user fees, and hook-up or capitalization fees to pay for the systems, and/or to require developers to construct their own centralized sewer systems.

Other statutes authorize cities to establish and operate their own domestic water systems. Idaho Code §§ 50-323 and 50-324.

Cities are also authorized to operate their own sewer systems. In addition, Idaho cities have express authority to engage in activities relating to drainage and flood prevention and to impose the cost thereof on property owners.

[1483] More specifically, the act requires certification that at least one of the following is the case:

> (1) The individual lots described in the plat will not be served by any water system common to one (1) or more of the lots, but will be served by individual wells.
>
> (2) All of the lots in the plat will be eligible to receive water service from an existing water system, be the water system municipal, a water district, a public utility subject to the regulation of the Idaho public utilities commission, or a mutual or nonprofit water company, and the existing water distribution system has agreed in writing to serve all of the lots in the subdivision.
>
> (3) If a new water system will come into being to serve the subdivision, that it has or will have sufficient contributed capital to allow the water system's wells, springboxes, reservoirs and mains to be constructed to provide service without further connection charges or fees to the landowners of the lots, except for connection of laterals, meters or other plant exclusively for the lot owner's own use.

Idaho Code § 50-1334.

The voluminous body of law on this subject is addressed in the *Idaho Land Use Handbook*.

None of these constitute authority to regulate the public water supply.

(d) Idaho Code § 30-801: Consent is required to provide municipal water.

Idaho Code § 30-801, initially enacted in 1887, requires private municipal water providers to obtain some form of permission from the city before providing water to that city (and presumably to the city's inhabitants). This pre-statehood statute was originally intended to provide a primitive form of water utility regulation. That purpose has been supplanted by modern public utility statutes which give the IPUC, not cities, authority to decide which companies will provide service to city residents.[1484] Accordingly, sections 30-801 and 30-802, should be read together, subjecting water companies to "reasonable rules and directions" necessary to protect the city's interests, not to IPUC-like control over and supervision of service providers. This provision is discussed in detail in the *Idaho Land Use Handbook* in the sections dealing with franchise and non-franchise statutes.

F. Given IDWR's exclusive mandate to administer water rights, what authority do municipalities retain over water supply?

The Legislature has given municipalities express authority to address water quality and supply in the following areas. However, these statutory authorities are specific and limited in scope. A quick summary of the provisions discussed above follows:

- Municipalities are obligated to "consider" the source, quantity, and quality of ground water in developing their comprehensive plans. Idaho Code § 67-6537(4) (see section 48.E(1)(e) on page 881).
- Similarly, they must include a discussion of "water supply" when updating their comprehensive plans. Idaho Code § 67-6508(h) (see 48.E(1)(b) on page 878).
- Municipalities must take ground water quality into account in certain permitting decisions. Idaho Code § 39-126 (see section 48.E(2)(a)on page 882).

[1484] As for companies that provide services not regulated by the IPUC, cities retain broad authority to regulate them. Idaho Code § 50-330 (authorizes cities to regulate the rates and charges of a municipal franchisee, but only if the franchisee is not governed by the Idaho Public Utilities Commission).

- Municipalities must ensure that new developments seeking land use entitlements employ surface water when it is available. Idaho Code § 67-6537(1) (see section 48.E(1)(d) on page 881).
- At the time of subdivision, municipalities must assess the suitability of water delivery systems operated by certain irrigation entities. Idaho Code § 31-3805 (see section 48.E(3)(a) on page 883).
- LLUPA's rezone and conditional use permit provisions authorized municipalities to address impacts of development on public facilities or services that are provided by political subdivisions (*e.g.*, schools and water and sewer districts). Idaho Code §§ 67-6511(2)(a), 67-6512(d)(6), 67-6512(a), and 67-6512(d)(8) (see section 48.E(1)(c) on page 879).
- LLUPA's statement of goals, Idaho Code § 67-6502(b) (see discussion in section 48.E(1)(a) on page 878) speaks of facilitating the availability of adequate public facilities and services at reasonable cost. This is a goal, not a grant of regulatory authority.
- Sections 50-1326 through 50-1329 of the Municipal Code make subdivision plats subject to a "sanitary restriction" requiring the land owner to secure a certificate from IDEQ showing that private or public water and sewer have been provided. Similarly, section 50-1334 requires certification by persons filing plats that the new lots will be served by a private or public water supply. (See section 48.E(3)(b) on page 883.)
- Municipalities have broad authority to operate their own utilities providing water, sewer, solid waste, and flood control service to city residents. (See section 48.E(3)(c) on page 884).
- Idaho Code § 30-801 requires private municipal water providers to obtain some form of permission from the city before providing water to that city.

Municipal ordinances or actions that impair, override, second-guess, or otherwise implicate IDWR's water right administration or which limit the ability of water right holders to exercise their water rights are likely to be deemed "null and void" under Idaho Code § 42-201(7) and other statutes assigning water right authority to IDWR.

If the teaching of *Naylor Farms* and *Eagle Creek Partners* is followed, municipalities will find themselves on thin ice if their regulation of municipal water supply or delivery systems steps beyond the express authorities discussed above.

On the other hand, IDWR is not in the business of managing sewer systems or water quality in general. Accordingly, it would seem that Idaho Code § 42-201(7) should not be read to limit the authority of local governments to address water quality concerns via requirements for sewer connections or the construction of a central sewer system. Indeed, local governments routinely impose such requirements, often supported by bonds

and fees to cover the cost of sewer services. See discussion in section 48.E(3)(c)on page 884.

Whether municipalities have the authority to impose a requirement to construct or connect to a central water delivery system is perhaps a closer call. If such a requirement is framed as matter of water quality protection (to avoid aquifer contamination from multiple individual wells) it would seem to be justified for the same reasons as requiring a central sewer system.[1485] The argument that cities retain their long-standing authority to impose such requirements is strengthened by Idaho Code § 42-201(7)'s Statement of Purpose, which says that the 2006 bill is intended to "have no impact on the zoning authority or other powers inherent in political subdivisions." See footnote 1478 on page 876.

That said, it is reported that "some local governments do not require developers to install community wells because of concerns that they are prohibited from doing so under section 42-201(7) of the Idaho Code." Nathan Bracken, *Exempt Well Issues in the West*, 40 Envtl. L. 141, 216 (2010) (citing a 2009 email communication from Jeff Peppersack of IDWR).

The decision in *Eagle Creek Partners* (overturning Blaine County's requirement that a developer remove its irrigation ponds and design something more efficient) might be read to prohibit municipalities from requiring developers to employ efficient lawn and open space irrigation systems. The authors suggest that is going too far. *Eagle Creek Partners* should be limited to the circumstances of that case—namely, municipal regulation imposed directly on the holder of water rights or entitlements. (The developer, Eagle Creek Partners, was the beneficial owner of the water rights at issue.) Where water is supplied to a development by a third party (*e.g.*, a municipal provider), the concern raised by the court in *Eagle Creek Partners* does not arise. Thus, requiring a developer to install efficient irrigation equipment is no different than requiring the installation of low-flow toilets or xeriscaping. These reduce water demand without interfering with or second-guessing IDWR's determination of whether someone's water rights are rightly sized (as was the case in *Eagle Creek Partners*).

[1485] A requirement for central water and sewer was upheld in a case that pre-dated Idaho Code § 42-201(7). In *Sanders Orchard v. Gem Cnty.,* 137 Idaho 695, 702, 52 P.2d 840, 847 (2002), the Court vacated the county's denial of a subdivision plat on the basis of the developer's failure to provide for a central water and sewer system. The Court found that there was no evidence in the record to support the county's factual conclusion that sewer would soon be extended to the area. However, the Court made clear that the county had the authority to consider the feasibility of installing central water and sewer. Indeed, the Court strongly implied that the county could have simply mandated such a requirement without need for individual factual determinations. *Sanders*, 137 Idaho at 702-03, n.6, 52 P.3d at 847-48, n.6.

Some municipal jurisdictions require an applicant for development to provide a "will serve" letter from the water supplier. For example, Ada County requires such letters at the time of preliminary plat for planned communities. Ada County Code § 8-6-3(L)(3)(f). Curiously, the current Boise City Code contains no similar provision. Although there is no statute specifically authorizing municipalities to require "will serve" letters (confirming that water can and will be provided by a municipal water provider or other source), such authority may be found within the statutes discussed in section 48.E(1)(c)on page 879 to the extent the water service is provided by a political subdivision. Even in the absence of specific authorizing legislation, a requirement for a "will serve" letter probably falls within the municipal police power, which is not preempted because it entails no exercise of regulatory power by the municipality over the water supply.

Similarly, a municipality may require an applicant that is not served by a municipal provider (but is instead relying on wells or a private water system for the development) to provide documentation that it has secured or will secure water rights to support the use.

The law establishing that IDWR has exclusive authority to regulate use of the public water supply does not mean that local governments are obligated to grant every planning and zoning request simply because the applicant has obtained a water right for its project. But just where the line is between legitimate local regulation (*e.g.*, requirements for water service connections and "will serve" letters) and improper intrusions into IDWR's and the IPUC's authority remains to be worked out. In any event, it is evident that the Legislature and the courts have moved in the direction of limiting municipal authority over water supply to actions that are expressly authorized by statute or exercises of the police power (*e.g.*, water quality protection) that do not infringe on IDWR's authority over the public's use of state's water resources.

G. The "Assured Water Supply" provisions in Boise's 2023 zoning code.

(1) Background and jurisdiction

In June of 2023, the City of Boise adopted a completely revamped zoning code (which the City calls the Modern Zoning Code). *Boise City Code* §§ 11-01 to 11-08. It is aimed largely at promoting denser urban development. However, it also includes an entirely new section entitled Assured Water Supply, *Boise City Code* § 11-04-010. This is a subject not ordinarily found in zoning codes. This section requires both developers and municipal water providers to document that their developments or service areas will have a reliable water supply.[1486]

[1486] The Modern Zoning Code also includes more traditional landscaping requirements aimed at promoting water conservation. *Boise City Code* § 11-04-09.3.E. These requirements

> Boise City is committed to appropriate growth that does not exceed the supply of available water. The purpose of this Section is to confirm, prior to planning approval, the long-term adequacy of water supplies to serve the development or redevelopment of land.

Boise City Code § 11-04-010.1.

These provisions are modeled largely on requirements imposed by the Arizona Department of Water Resources, aimed at protecting Arizona's fragile ground water supply which is increasingly strained by exploding urban development. Arizona's program is overseen by the state agency with jurisdiction over water supply, while Boise's program is undertaken by a municipality. This raises the obvious question as to whether the City has authority to do so, in light of IDWR's exclusive authority over the administration of water rights (as discussed in section 48.D on page 873).

However, Boise's Assured Water Supply requirements may be saved by the authority granted to cities under Idaho Code § 30-801. This is the requirement that municipal water providers obtain the permission of a city before providing water to the city. This 1887 statute is discussed briefly in section 48.F on page 885 and more extensively in the *Idaho Land Use Handbook*.

The Modern Zoning Code recognizes this jurisdictional issue. Interestingly, it does not cite to section 30-801, and cites only LLUPA as its authority.

> The City recognizes that water supply is regulated by several state agencies and does not intend this regulation to duplicate or conflict with such jurisdiction. Pursuant to the Local Land Use Planning Act (LLUPA), however, the City will consider the impact of development on water supplies and water quality. … This Section is intended to supplement the roles and responsibilities of the State of Idaho's water supply regulators solely for planning and zoning purposes, to confirm that water resources will be available to serve continued growth in Boise.

Boise City Code § 11-04-010.1.

The author would suggest that LLUPA is the weaker of the authorities that might support the requirements applicable to municipal water providers. If the City has LLUPA-based jurisdiction over water supply, it would extend only to those seeking

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are applicable to developments seeking zoning approvals. They do not apply to municipal water providers.

zoning approvals (e.g., developers). Municipal water providers do not need zoning approval to provide water to their customers.

(2) The regulatory requirements

Boise's Assured Water Supply provisions (effective July 1, 2024) are aimed at two types of entities: applicants for land use entitlements and municipal water providers. The discussion here focuses primarily on the latter.

Developers and others seeking zoning approvals (aka land use entitlements) are subject to onerous requirements under the Assured Water Supply provisions (similar to those faced by municipal water providers), but only if they rely on their own water supply. Developers served by municipal water providers may comply with the ordinance by providing "will serve" letters from a municipal water provider.

As for municipal water providers, the ordinance requires that "[e]very provider of water for drinking or general domestic use as a public utility, with a service area within the City limits or the City Area of Impact … is required to be certified as a Designated Water Provider by demonstrating it has an Assured Water Supply … ." *Boise City Code* § 11-04-010.4. Veolia and Capital Water Corporation are the only regulated public utilities that provide municipal water within Boise.

To become certified as a "Designated Water Provider," the municipal provider must provide information with respect not only to the adequacy of its water rights but also the physical availability of water over a 50-year horizon. *Boise City Code* § 11-04-010.5.B.1.

Consistent with *Boise City Code* § 11-04-010.1 quoted above (explaining that the City is not seeking to invade the jurisdiction of IDWR over water management), the City has provided assurances to Veolia that a municipal provider may satisfy the Assured Water Supply requirements and be certified as a Designated Water Provider by providing information developed in other regulatory or non-regulatory contexts for similar time periods, and that documentation of an "assured" water supply does not require it to do the impossible—guarantee that water will be physically available under all circumstances. Instead, the municipal provider must show that it has responsibly evaluated long-term supply issues and contingency plans. Given that municipal water providers have no regulatory authority over their customers and are obligated to serve by the IPUC, those contingency plans (e.g., restrictions on lawn watering) are likely to depend on municipal action.

Once certified, the ordinance requires the Designated Water Provider to go through the process again and be recertified at least every ten years, or sooner if the provider seeks to enlarge its certificated area or a major drought occurs. *Boise City Code*

§ 11-04-010.7.A. A similar recertification requirement applies to developers (applicants for land use entitlements). *Boise City Code* § 11-04-010.7.B.

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49. OTHER TOPICS POTENTIALLY BEARING ON LAND USE OR MUNICIPAL WATER SUPPLY.

A. The "preference" for domestic use is really a right to condemn.

Like the constitutions of several western states, Idaho's Constitution ranks certain beneficial uses in terms of "preferences." Idaho's Constitution ranks domestic uses first, agricultural uses second, and manufacturing purposes third, except that in an "organized mining district" (an historical anachronism) mining uses have preference over all but domestic uses.[1487]

These preferences mean much less than might appear. They provide neither "super-priority" status in the priority system nor authority for IDWR to "prefer" certain water uses over others in the approval or administration of rights. Rather, this constitutional preference simply confers on the preferred water user the right to condemn the water rights of a less preferred user.[1488] Indeed, this is made explicit by the last sentence of section 3: "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."[1489]

Thus, for instance, a farmer may condemn the water rights of a manufacturing operation, but would be required to reimburse the manufacturer for the fair market value of the water right taken. That, of course, is not likely to pencil out. Likewise, a municipal provider (whose municipal water needs are deemed "domestic" for this purpose) could, in theory, condemn any other use. The authors are unaware of an instance in Idaho where this constitutional condemnation power has been exercised.

[1487] "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 appropriations 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 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, shall have preference over those using the same for manufacturing or agricultural 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." Idaho Const. art. XV, § 3.

[1488] *Montpelier Milling Co. v. City of Montpelier*, 19 Idaho 212, 113 P. 741 (1911).

[1489] This language was noted, in support of this proposition, in *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 880-81, 154 P.3d 433, 451-52 (2007).

B. IDWR's scaled back authority to evaluate the local public interest test.

Prior to 1978, applications for water right appropriations and transfers were evaluated by IDWR solely on the basis of the traditional issues, such as injury, enlargement, beneficial use, and speculation. The environmental or land use impacts of water development were not a relevant consideration.[1490] Indeed, in the early days of mining development, water uses often had horrific consequences on the local environment. At the time, that was considered the cost of progress.

In Idaho, this changed dramatically in 1978 when the Idaho Legislature added a "local public interest" review requirement to the criteria for approval of appropriations of new water rights.[1491] 1978 Idaho Sess. Laws, ch. 306, § 1 (codified as amended at Idaho Code §§ 42-202B(3), 42-203A(5)(e)).[1492]

As originally enacted, the public interest provision granted IDWR broad authority to consider anything bearing on "the affairs of the people in the area directly affected by the proposed use." 1978 Idaho Sess. Laws, ch. 306, § 1. This sweeping language opened the door for the Department to consider environmental and land use impacts associated with the project or development for which the water was needed.

The statute was hardly noticed for two decades. Then, in the late 1990s, it began to generate a substantial number of contested administrative cases. Opponents of unwelcome developments opposed water rights needed for the development. This tactic of challenging the water right, rather than the project itself, reflects the perceived inadequacy of other forums for citizen input. This coincided with the growth of the large-scale dairy industry in Idaho (whose economic power now exceeds that of Idaho's "Famous Potatoes"). Local public interest litigation, however, was not limited to dairy

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[1490] *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981) (in which the Idaho Department of Water Resources had ruled that water quality concerns were an "inappropriate consideration" prior to the adoption of the local public interest test).

[1491] There is a pre-1978 ancestor of sorts to the public interest test. An oblique reference to the "public interest" in the context of certain water right applications requiring approval by the Idaho Water Resource Board was made a part of the water code in 1967. 1967 Idaho Sess. Laws, ch. 374, § 2. It was repealed two years later. 1969 Idaho Sess. Laws, ch. 468, § 1. However, this short-lived provision did not provide a basis for a broad public interest review.

[1492] This test was soon applied in other settings. In 1979, when the water supply bank was created, the local public interest test was made applicable to water bank rentals. 1979 Idaho Sess. Laws, ch. 193, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-1763). In 1981 the Legislature made the test applicable to changes (also known as transfers) of existing water rights. 1981 Idaho Sess. Laws, ch. 147, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-222(1)).

conflicts. Public interest battles also were waged by those opposing such things as a ski development, power plants, fish production facilities, residential subdivisions, and competing municipal water supplies.

These contests set off a firestorm of debate over the proper scope of the local public interest test. The resulting hue and cry resulted in an amendment to the local public interest language in 2003, over the objection of environmental groups and IDWR itself.

In 2003, the Legislature redefined "local public interest," limiting its scope to "the effects of such use on the public water resource." 2003 Idaho Sess. Laws, ch. 298 (codified at Idaho Code § 42-202B(3)).

Under this new test, a protestant could still complain, for instance, that a water right would dewater a trout stream. Presumably, the new definition also embraces water quality impacts. For instance, if a diversion from a stream would reduce the quantity of water remaining, and, thereby, the assimilative capacity of the stream, this impact would appear to be a proper matter for the Department to evaluate.

But evidence about dairy odors, noise, traffic, and other adverse effects of the project (unrelated to the water resource) was off limits in IDWR's consideration of the water right application. These are land use matters that must be taken up with municipal and other regulatory authorities with proper jurisdiction.

The examples above involve impacts caused by the diversion of water. What about adverse impacts resulting from the use of the diverted water? For instance, suppose an applicant sought a water right for use in a facility that would contaminate the water with pollutants, and the resulting waste water would eventually reach a nearby aquifer raising the level of contaminants in it. The current language speaks in terms of impacts of "a proposed water use" (and not just the diversion). This suggests that the Department is authorized to consider impacts including contaminated return flow, seepage, or waste water.

C. IDWR's basin-of-origin protection

See discussion in section 44.C(3) (Basin-of-origin protection (avoiding harm to local economy)) at page 824.

D. IDWR's authority to evaluate out-of-state water transfers

In 1990, the Idaho Legislature enacted detailed legislation specifically dealing with out-of-state uses of water (by either appropriation or transfer of existing rights). 1990 Idaho Sess. Laws, ch. 141 (codified primarily at Idaho Code § 42-401, but also §§ 42-203A(5)(f) and 42-222(1)) ("Water Export Act").

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The Water Export Act was intended to bring the state into compliance with *Sporhase v. Nebraska ex rel. Douglas*, *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.), which set constitutional standards under the dormant commerce clause for when states may restrict water exports to other states. The Water Export Act included two primary elements.

First, it added a conservation requirement applicable to all water right applications (not just those out-of-state). See discussion in section 49.E at page 896. (This conservation requirement was added because states may not restrict the export of water unless they are conserving the resource within the state.)

Second, the Water Export Act repealed earlier measures aimed particularly at water use in Oregon, and replaced them with a set of rules applicable to all appropriations and transfers for use of water out-of-state. Such out-of-state uses were required to follow special procedures, and IDWR was required to address six additional "factors" addressing the availability of water in the sending and receiving states. Idaho Code § 42-401(3). The factors are:

> (1) The supply of water available to the state of Idaho;
> (2) The current and reasonably anticipated water demands of the state of Idaho;
> (c) Whether there are current or reasonably available anticipated water shortages within the state of Idaho;
> (d) Whether the water that is the subject of the application could feasibly be used to alleviate current or reasonably anticipated water shortages within the state of Idaho;
> (e) The supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
> (f) The demands placed on the applicant's supply in the state where the applicant intends to use the water.

Idaho Code § 42-401(3).

It is unclear how these factors would be applied or what sort of evidence the applicant would be expected to provide. They appear to be intended to give the Director very broad discretion. For the applicant, the result is to significantly increase uncertainty and transaction costs. Not surprisingly, out-of-state transfers are a rarity.

Out-of-state water bank rentals were made subject to the same five tests in 1992. 1992 Idaho Sess. Laws, ch. 101, § 1 (codified at Idaho Code § 42-1763).

E. IDWR's authority to evaluate water conservation

As noted above, the Water Export Act included a conservation requirement applicable to all water right applications. The applicant for any new water right appropriation or transfer must show that the proposed use is consistent with (or not contrary to) "the conservation of water resources within the state of Idaho." Idaho Code §§ 42-203A(5)(f) (appropriations), 42-222(1) (transfers) 42-401(3) (out-of-state water exports).

This provision was used in 2002 to deny two water right applications filed in connection with two proposed gas-fired power projects near Rathdrum, Idaho. *In the Matter of Application for Permit No. 95-09069 in the Name of North Idaho Power LLC*, Before the Idaho Dep't of Water Resources (Preliminary Order, July 18, 2002); *In the Matter of Application for Permit No. 95-09086 in the Name of Kootenai Generation LLC*, Before the Idaho Dep't of Water Resources (Preliminary Order, July 18, 2002). Both applications were denied because the proposed natural gas-fired power projects proposed to employ water-based cooling technologies where other technologies were available. The Department concluded that the inefficient use of water threatened the Rathdrum Prairie Aquifer. This decision was based on the "conservation of water" test (Idaho Code §§ 42-203A(5)(f), 42-222(1), not the local public interest test. There is no appellate case law interpreting this provision.

It would seem that this provision could be used by IDWR, if it chose, to widen its role in the evaluation of the efficiency of all manner of water uses—from agricultural irrigation to housing developments. To date, however, IDWR has been guarded in its use of this conservation provision.

F. IDWR's responsibility to consider comprehensive planning in the context of RAFN rights

The courts of Idaho and other Western states have long recognized the unique obligations of municipalities to establish a long term water supply sufficient to meet all comers. Most water users are required to put water to use promptly in order to obtain and retain a water right. Idaho was the first state to recognize the need for special treatment for municipal providers, allowing them to secure water rights for future needs. *City of Pocatello v. Murray*, 206 F. 72 (D. Idaho 1913), *aff'd, Murray v. City of Pocatello*, 214 F. 214 (9th Cir. 1914); *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940) (Holden, J.); *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969) (McQuade, J.). Colorado was quick to follow, and the doctrine has been most thoroughly discussed by the courts of that state. The seminal exposition comes from the Colorado Supreme Court, writing in 1939. *City & Cnty. of Denver v. Sheriff*, 96 P.2d 836, 841 (Colo. 1939).

What is known in Colorado as the "great and growing cities doctrine," is known in Idaho and elsewhere as the "growing communities doctrine"—underscoring that it applies to all municipalities.

In 1996, the Idaho Legislature codified the growing communities doctrine and established specific procedures and limitations governing a municipality's ability to acquire water rights (by appropriation or transfer) for "reasonably anticipated future needs ("RAFN").[1493]

In the 1996 RAFN statute, the Legislature affirmed the growing community doctrine's role in Idaho water law, while placing clear sideboards on how it is applied. By requiring careful planning and full disclosure by municipal providers who seek future needs water rights, the statute establishes a cautious approach that is both sensitive to speculation and consistent with the Idaho's longstanding doctrine mandating the maximum use of this public resource.

The 1996 RAFN statute may be boiled down to one sentence (with defined terms underlined): "Municipal providers" may secure water rights for "municipal purposes" of sufficient quantity to serve all "reasonably anticipated future needs" (aka "RAFN") within an expanding future "service area" during a specified "planning horizon."

On occasion, growing cities in other western states have engaged in costly races to lock up huge stockpiles of water rights. Each city's goal is to ensure that it, rather than its neighbor, will be able to grow. The primary authors of the 1996 RAFN statute were acutely aware of this phenomenon—particularly on the Front Range of Colorado—and took steps to limit the possibility that the special treatment accorded municipal providers would trigger similar "water wars" in Idaho.

In order to avoid these problems, the 1996 RAFN statute imposes three anti-speculation requirements. First, the Act requires that the claimed future needs must not be "inconsistent with comprehensive land use plans approved by each municipality." Second, the quantification of RAFN may not include "uses of water within areas overlapped by conflicting comprehensive land use plans." Idaho Code § 42-202B(8) (definition of "reasonably anticipated future needs"). Third, RAFN rights may not be sold. Idaho Code §§ 42-219(1), 42-222(1).

[1493] Municipal Water Rights Act of 1996 ("1996 RAFN statute"), 1996 Idaho Sess. Laws, ch. 297 (codified as amended at Idaho Code §§ 42-202(2), 42-202(11), 42-202B, 42-217, 42-219(1), 42-219(2), 42-222(1), 42-223(2)). This list of codified sections excludes some minor "clean up" to other sections of the Water Code that were included in the 1996 RAFN statute. References to municipal providers are also found in Idaho Code §§ 43-335 and 43-338, dealing with the right of irrigation districts to lease water to municipal providers. These references were not part of the 1996 RAFN statute, but came a year later.

The first two of these speak directly to land use planning, and will be discussed further below. In a nutshell, the 1996 RAFN statute draws a clear jurisdictional boundary. It recognizes that municipalities have the duty to engage in comprehensive planning. IDWR is obligated to respect those planning documents, not to second guess them.

The first requirement—that projected future needs be consistent with comprehensive plans—is straightforward and not overly rigorous. Comprehensive plans are broad, conceptual planning documents, not specific descriptions of what is permitted where.[1494] Comprehensive plans do not ordinarily contain detailed population or economic projections. Thus, not too much should be read into this consistency requirement. On the other hand, the consistency requirement means something. It requires that future needs projections take into account the local government's vision of the future, at least on a macro scale. For example, if the comprehensive plan (or its associated future land use map) described an area as dedicated open space or preserved agricultural use, that, presumably, would be inconsistent with a quantification of RAFN based on high density development in the area.

The second requirement is a potentially draconian measure designed to provide an incentive to adjacent municipalities to cooperate in planning efforts. To the extent two or more municipalities assert planning authority over the same area and develop conflicting planning scenarios, future needs within that area may not be included in the quantification of any RAFN right. In other words, such areas must be excluded from what is informally known as the "planning area" for RAFN quantification. IDWR's *2021 RAFN Handbook*, pp. 6-8, 28, uses the term "RAFN service area" instead of "planning area."

As a practical matter, however, such conflicts are rare in Idaho. LLUPA does a good job of resolving disputes between cities over the direction of future growth. Each city is required to establish an "area of city impact" that defines the area beyond its current city limits where a city anticipates growing and, more specifically, extending city services and annexing. LLUPA provides a mechanism for cities and counties to resolve disputes over the boundaries of areas of city impact (to ensure that they do not overlap) and to determine whether the city's or the county's comprehensive plan and zoning ordinances will apply within the area of city impact. Idaho Code § 67-6526. The Act provides mechanisms for negotiation and, if necessary, judicial or political resolution. Even so, LLUPA has not eliminated all such conflicts.

The 1996 RAFN statute's prohibition against serving "conflicting plans" areas applies equally to municipalities and to private utilities providing municipal water. Thus,

[1494] Virtually all state zoning laws require local governments to adopt comprehensive plans. Idaho's requirement is found in the Local Land Use Planning Act ("LLUPA"), Idaho Code § 67-6508. *See Idaho Land Use Handbook* for a detailed discussion of this subject.

a water utility cannot base its RAFN quantification on service to lands where two municipalities have an unresolved area of city impact dispute.

It bears emphasis that the "conflicting plans" areas probation applies only to water rights (or the portion thereof) held for RAFN. Municipal providers may acquire and hold water rights to serve existing or short-term needs within such "conflicted" areas.

G. Cities' and developers' rights to cross, use, or discharge into irrigation canals and drains

Many Idaho cities contain within their boundaries substantial networks of irrigation canals, ditches, laterals, and drains, and the associated easements along these waterways necessary for their management and repair. The easements for these irrigation facilities, usually acquired by prescription (and recognized by statute[1495]) typically are owned by the irrigation district, canal company, lateral water users association, or individual that owns or claims the ditch or drain. As cities have grown, more and more public and private facilities need to cross over, under, or along these irrigation conduits or their associated easement areas. These facilities include such things as water and sewer pipelines, electrical utility lines, sidewalks, bridges, public pathways, landscaping, and storm water conveyance systems. Similarly, municipal water providers sometimes need to discharge water from wells as part of the well completion or maintenance process; canals or drains are a logical place to do so. Storm water historically has been discharged to irrigation canals or drains in many cases, and new land uses change flow patterns and lead to additional, or changed, stormwater discharges.

Idaho Code §§ 42-1209, 42-1102, and 42-1108 are the principal statutes addressing the question of how, or whether, entities may place such facilities—"encroachments" as they are termed in section 42-1209—within irrigation entity easements.

Idaho Code § 42-1204 expressly obligates the operators of ditches and canals to maintain their systems so as to avoid injury to others.

Section 42-1108 states that a ditch, flume, or other conduit shall not be used to block the development of other conduits that may be constructed over or under them without damage. This provision prohibits the owner of a ditch, flume or conduit from denying another the "right to cross their right of way with another ditch, flume or

[1495] Idaho Code § 42-1102 ("The existence of a visible ditch, canal or conduit shall constitute notice to the owner . . . of the underlying servient estate, that the owner of the ditch . . . has the right-of-way and incidental rights confirmed or granted by this section.") and Idaho Code § 42-1204 (ditch or canal owners "have the right to enter the land across which the right-of-way extends, for the purposes of cleaning, repairing and maintaining" the ditch "and to occupy such width of the land along the banks of the ditch . . . as is necessary to properly do the work").

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conduit," provided that "the same can be done in a convenient and safe manner" and the person building the crossing facility remains liable for any damages to the existing ditch. The term "other conduit" is not defined, but could be read broadly to include all manner of conduit (e.g., a city water main, or conceivably a conduit for gas or electricity). Thus, this language may provide a city or other entity an entitlement to place an encroachment—or at least a "ditch, flume or conduit"—in an irrigation easement, while remaining obligated to protect the irrigation entity from damage. Is this an exception to the encroachment provisions in sections 42-1102 and 42-1209? This would seem to be the case. But there is no case law discussing the interplay among these statutes.

Idaho Code sections 42-1102 and 42-1209 each require those seeking to build an encroachment to obtain the "written permission of the owner of the right-of-way in order to ensure that any such encroachments will not unreasonably or materially interfere with the use or enjoyment of the right-of-way."[1496] They also confirm the common law rule that the person making the encroachment will remain liable to the irrigation entity for damages caused by any encroachment, and expressly preserve the right of eminent domain under Idaho Code § 7-701.

In *Pioneer Irr. Dist. v. City of Caldwell,* 288 P.3d 810 (Idaho 2012) (Horton, J.), the Idaho Supreme Court considered whether a city could discharge stormwater into an irrigation district's canals and maintain urban stormwater discharge conduits within the district's canal easement. The irrigation district, claiming the conduits and discharges are trespasses on an exclusive canal easement, sought an injunction requiring their removal at the city's expense.

The Idaho Supreme Court considered the matter in light of Idaho Code § 42-1209. The Court held that "the ditch owner is vested with the discretion to determine whether

[1496] Idaho Code § 42-1209 provides in full: "Easements or rights-of-way of irrigation districts, Carey act operating companies, nonprofit irrigation entities, lateral ditch associations, and drainage districts are essential for the operations of such irrigation and drainage entities. Accordingly, no person or entity shall cause or permit any encroachments onto the easements or rights-of-way, including any public or private roads, utilities, fences, gates, pipelines, structures or other construction or placement of objects, without the written permission of the irrigation district, Carey act operating company, nonprofit irrigation entity, lateral ditch association, or drainage district owning the easement or right-of-way, in order to ensure that any such encroachments will not unreasonably or materially interfere with the use and enjoyment of the easement or right-of-way. Encroachments of any kind placed in such easement or right-of-way, without such express written permission shall be removed at the expense of the person or entity causing or permitting such encroachments, upon the request of the owner of the easement or right-of-way, in the event that any such encroachments unreasonably or materially interfere with the use and enjoyment of the easement or right-of-way. Nothing in this section shall in any way affect the exercise of the right of eminent domain for the public purposes set forth in section 7-701, Idaho Code."

an encroachment would result in unreasonable or material interference with the easement or right-of-way." *Pioneer* at 815. But that determination is subject to limited judicial review. The Court then remanded the matter to the district court "to determine whether a reasonable decision-making process was employed, and whether the decision was arbitrary and capricious or based upon clearly erroneous findings." *Pioneer* at 818.[1497]

As to the question about removing the encroachment, the Court found that the irrigation entity could engage in "self-help" and remove the encroachment itself at the encroacher's expense if four conditions are met: (1) the encroachment was built after 2004 (when section 42-1209 was enacted); (2) the encroachment was constructed without permission; (3) "the encroachment must unreasonably or materially interfere with the use and enjoyment of the easement"; and (4) the irrigation entity first must request that the party responsible for the encroachment remove it.

The Court disagreed with the irrigation district that its easements are exclusive. The Court noted that, under the common law, irrigation canal easements are not exclusive, citing, *inter alia, Pioneer Irr. Dist. v. Mussell,* 72 P.3d 868, 873 (Idaho 2003) and *Nampa & Meridian Irr. Dist. v. Washington Federal Savings,* 20 P.3d 702 (Idaho 2001). It found no indication that, in enacting section 42-1209, the Legislature sought to abrogate the common law. *Pioneer* at 818. On this point all five justices agreed.

H. Responsibility for maintaining canals, ditches, laterals, and buried water conduits

It is the duty of the owner of a canal, ditch, or other water conduit to maintain it:

> The owners or constructors of ditches, canals, works or other aqueducts, and their successors in interest, using and employing the same to convey the waters of any stream or spring, whether the said ditches, canals, works or aqueducts be upon the lands owned or claimed by them, or upon other lands, must carefully keep and maintain the same, and the embankments, flumes or other conduits, by which such waters are or may be conducted, in good repair and condition,

[1497] Such a review standard is familiar in the context of actions by state agencies or municipalities that engage in a meaningful fact-finding and hearing procedure, produce a record, and issue a final order that then will be subject to judicial review under Idaho's Administrative Procedure Act ("IAPA"), Idaho Code §§ 67-5201 *et seq.* The IAPA contains essentially the same deferential "arbitrary and capricious" standard the *Caldwell* Court concluded should be applied to an irrigation entity's decision regarding permission for an encroachment. While irrigation districts do not ordinarily hold hearings, employ procedures that ensure due process, or develop a record of decision, the Court concluded that section 42-1209 requires courts to extend "judicial deference" to the irrigation entity's decision to grant or withhold permission.

> so as not to damage or in any way injure the property or premises of others.

Idaho Code § 42-1204.

Similarly (or redundantly), the owner of any ditch, canal, or conduit is responsible to "carefully keep and maintain the embankments thereof in good repair." Idaho Code § 42-1203.

Another statute says the same thing in the context of laterals: "The improvement, repair and maintenance of any such lateral or distributing ditch shall be under the direction of the directors of the association." Idaho Code § 42-1303.[1498]

While the irrigation entity has the maintenance duty, the extent of liability for breach of that duty was limited by the Legislature in 2012:

> The duties referenced in this section, whether statutory or common law, require reasonable care only, and shall not be construed to impose strict liability or to otherwise enlarge the liability of the owner or owners of any irrigating ditch, canal or conduit. The owners or constructors of such ditches, canals, works or other aqueducts, while responsible for their own acts or omissions, shall not be liable for damage or injury caused by: (1) The diversion or discharge of water into a ditch, canal or conduit by a third party without the permission of the owner or owners of the ditch, canal or conduit; (2) Any other act or omission of a third party, other than an employee or agent of the owner or owners of the ditch, canal or conduit; or (3) An act of God, including fire, earthquake, storm or similar natural phenomenon.

Idaho Code § 42-1203. Functionally identical language was added in 2012 to Idaho Code § 42-1204.

[1498] "Where a ditch is common property, or there is a common right to the use of the water of a ditch without payment therefor, and any labor or materials are necessary for the repair or cleaning of the ditch, or any gate or flume thereon or thereunto belonging, the watermaster of the district may make a fair pro rata assessment of labor or materials against the inhabitants of the district claiming the use of such water, according to the benefits received by each; and if any person so assessed neglects or refuses, for the period of three (3) days after notice so to do from the watermaster or his deputy, to furnish his just proportion of the necessary labor or materials, according to such assessment, he must pay his pro rata in cash, to be recovered, with costs, in an action by the watermaster in his own name." Idaho Code § 42-1206.

A landowner whose land is crossed by a ditch, canal, lateral or drain or buried irrigation conduit has a right to change the location of the conveyance to another place on his or her land or within a neighbor's easement, or to bury the conveyance, if this may be done without impairing the water flow. See discussion in section 46.C(2)(i) on page 855.

There is even a criminal statute on the subject. "The right and responsibility for operation and maintenance shall remain with the owner of the ditch, canal, lateral or drain, but the landowner shall be responsible for any increased operation and maintenance costs, including rehabilitation and replacement, unless otherwise agreed in writing with the owner." Idaho Code § 18-4308.

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Appendix A: ABOUT THE AUTHOR

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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, road and public access law, land use law, natural resources law, and constitutional law—particularly impact fees and taxation. He has extensive litigation experience at the administrative, district court and appellate levels (including 22 Idaho Supreme Court cases).

Best Lawyers in America has named him "Lawyer of the Year" 14 times in the fields of water, land use, natural resources, and environmental law. 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, land owners, land developers, energy companies, food producers, and mining companies.

Before joining Givens Pursley in 1991, Chris practiced natural resources law with the National Wildlife Federation in Washington, D.C. He later taught water law and negotiation at the University of Colorado Law School's environmental law clinic.

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
- Honors program in economics, class honors
- Osterweil Prize in Economics

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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" 14 times since 2011:

- 2026 – top natural resources lawyer in Idaho
- 2025 – top land use and zoning lawyer in Idaho
- 2025 – top environmental lawyer in Idaho
- 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 in Idaho

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.

Global Law Experts (www.globallawexperts.com)

2024 – Named lawyer of the year in Idaho for land use and zoning 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.

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LITIGATION

Jutila v. Cnty. of Shoshone, ___ Idaho ___, 571 P.3d 399, (2025) (Zahn, J.) (successfully defended County's decision not to validate public road).

City of Middleton v. City of Star, Case No. CV14-21-10560 (Idaho Dist. Ct.) (Mar. 7, 2022) (Brent L. Whiting, J.) (successful defense of motion to dismiss in case involving annexation into another city's area of city impact; case settled).

Riverside Irr. Dist. v. IDWR, Case No. CV14-21-05008 (Idaho Dist. Ct.) (Dec. 28, 2021) (Eric J. Wildman, D.J.) (successful defense of City of Nampa's wastewater reuse program).

Nemeth v. Shoshone Cnty., 165 Idaho 851, 453 P.3d 844 (2019) (Moeller, J.) (represented county in road case involving authority of Idaho counties to validate roads on federal lands).

N. Idaho Bldg. Contractors Ass'n v. City of Hayden, 164 Idaho 530, 432 P.3d 976 (2018) (Bevan, J.) (Cynthis K.C. Meyer, D.J.) (represented city in challenge to sewer capitalization fees).

Black Canyon Irrigation Dist. v. State, 163 Idaho 144, 408 P.3d 899 (2018) (Burdick, C.J.) (Eric J. Wildman, D.J.) (successfully defended district court's rejection of late claims for refill water).

United States v. Black Canyon Irrigation Dist., 163 Idaho 54, 408 P.3d 52 (2017) (Burdick, C.J.) (Eric J. Wildman, D.J.) (successfully defended district court's rejection of late claims for refill water).

Greater Boise Auditorium Dist. v. Frazier, 159 Idaho 266, 360 P.3d 275 (2015) (W. Jones, J.; Eismann, J., concurring) (successfully defended auditorium 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) (successfully defended IDWR's accounting system for storage rights).

N. Idaho Bldg. Contractors Ass'n v. City of Hayden, 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J.; J. Jones, J., concurring) (Benjamin R. Simpson, D.J.) (represented city in challenge to sewer capitalization fees).

Washington Cnty. v. Bilbao, Case No. CV-2014-1854 (Idaho, Third Judicial Dist., Dec. 8, 2014) (Susan E. Wiebe, D.J.) (successfully represented Washington County in public access litigation).

Cnty. of Shoshone v. United States, 589 Fed. Appx. 834 (9th Cir. 2014) (per curium) (represented county in road case involving federal sovereign immunity).

A&B Irrigation Dist. v. State, 157 Idaho 385, 336 P.3d 792 (2014) (Burdick, C.J.) (Eric J. Wildman, D.J.) (successfully defended challenge to IDWR's single fill rule—Basin-Wide Issue No. 17).

In the Matter of Certified Question of Law – White Cloud v. Valley Cnty., 156 Idaho 77, 320 P.3d 1236 (2014) (J. Jones, J.) (represented county in certified question involving the statute of limitations for challenges to allegedly illegal road development fees).

Hehr v. City of McCall, 155 Idaho 92, 305 P.3d 536 (2013) (Burdick, C.J.) (Michael R. McLaughlin, D.J.) (successfully defended city in action involving impact fees – the Greystone Village case).

Alpine Village Co. v. City of McCall, 155 Idaho 92, 303 P.3d 617 (2013) (Burdick, C.J.) (Michael R. McLaughlin, D.J.) (successfully defended city in challenge to impact fees).

Buckskin Properties, Inc. v. Valley Cnty., 154 Idaho 486, 300 P.3d 18 (2013) (J. Jones, J.) (Michael R. McLaughlin, D.J.) (successfully 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.) (represented mining company in NEPA and forest management litigation).

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Sopatyk v. Lemhi Cnty., 151 Idaho 809, 264 P.3d 916 (2011) (W. Jones, J.) (Joel E. Tingey, D.J.) (successfully defended county's validation of Anderson Creek Road as a public road).

White Cloud v. Valley Cnty., 2011 WL 4583846 (D. Idaho Sept. 30, 2011) (Lodge, J.); *White Cloud v. Valley Cnty.*, 2012 WL 13018504 (D. Idaho Aug. 8, 2012) (Lodge, J.) (successfully 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 Cnty.*, 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.) (successfully 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) (Robert J. Elgee, D.J.) (successfully represented landowner in case upholding right to develop an "accessory dwelling unit").

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) (John M. Melanson, D.J.) (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) (John M. Melanson, D.J.) and (Idaho, Fifth Judicial Dist., April 12, 2010) (Eric J. Wildman, D.J.), *aff'd, City of Pocatello v. State*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) (successfully represented *amicus curiae* municipal water provider in case regarding alternate points of diversion for water rights).

Galli v. Idaho Cnty., 146 Idaho 155, 191 P.3d 233 (2008) (W. Jones, J.; J. Jones, J., concurring) (*amicus curiae* brief in public access case).

Cove Springs Development, Inc. v. Blaine Cnty., Case No. CV2008-22 (Idaho, Fifth Judicial Dist., June 3, 2008) (Robert J. Elgee, D.J.) (successfully represented developer in action 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.) (secured ruling declaring Sun Valley's affordable housing fee to be unconstitutional).

American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources, 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.) (R. Barry Wood, D.J.) (successfully represented ground water appropriators in litigation over conjunctive management of ground and surface water).

Chisholm v. Idaho Department of Water Resources, 142 Idaho 159, 125 P.3d 515 (2005) (Burdick, J.) (John K. Butler, D.J.) (successfully represented dairy in challenge to water rights involving the local public interest).

Davisco Foods Int'l, Inc. v. Gooding Cnty., 141 Idaho 784, 118 P.3d 116 (2005) (Schroeder, J.; J. Jones, dissenting) (Monte B. Carlson, D.J.) (represented dairy in land use challenge).

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 Cnty. Comm'rs of Lemhi Cnty., 138 Idaho 378, 64 P.3d 304 (2002) (Schroeder, J.) (James C. Herndon, D.J.) (successfully represented county in public road access case—the Indian Creek Road case).

Potlatch Corp. v. United States, 134 Idaho 916, 12 P.3d 1260 (2000) (Schroeder, J.) (Daniel C. Hurlbutt, D.J.; Silak and Walters, JJ, dissenting) (successfully represented timber company in case rejecting federal reserved water rights for wilderness).

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State v. Hagerman Water Right Owners, Inc., 130 Idaho 727, 947 P.2d 400 (1997) (Schroeder, J.) (Daniel C. Hurlbutt, D.J.) (successfully represented ground water appropriators in establishing partial forfeiture rule for water rights).

Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J.) (Daniel C. Hurlbutt, D.J.) (successfully represented ground water appropriators in interpretation of water right amnesty statute).

The Klamath Tribes, 135 I.B.L.A. 192, 1996 WL 518742 (Apr. 12, 1996) (Mullen, J.) (successfully represented mining company in defending challenge by Indian tribe to cultural resource use permit).

State, ex rel. Higginson v. United States, 128 Idaho 246, 912 P.2d 614 (1995) (McDevitt, C.J.) (successfully represented ground water appropriators in defense of constitutional challenge to Snake River Basin Adjudication amendments).

Nebraska v. Rural Electrification Admin., 23 F.3d 1336 (8th Cir. 1994) (Heaney, J.), aff'g, 1993 WL 662353 (D. Neb 1993) (Urbom, J.) (successfully represented Platte River Whooping Crane Trust in challenge to its authority to litigate).

Sierra Club v. Yeutter, 911 F.2d 1405 (10th Cir. 1990) (Tacha, J.) (filed *amicus curiae* brief on behalf of National Wildlife Federation in case seeking to establish federal reserved water rights).

State v. Morros, 766 P.2d 263 (Nev. 1988) (per curiam) (successfully represented National Wildlife Federation in case 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.) (successfully represented National Wildlife Federation in water rights case involving 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.) (successfully represented National Wildlife Federation in challenge to water project).

Tulalip Tribes of Washington v. FERC, 732 F.2d 1451 (9th Cir. 1985) (East, J.) (successfully represented National Wildlife Federation in challenge to hydropower licensing regulation).

Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984) (filed *amicus curiae* brief in case involving mitigation for hydroelectric developments on public lands) (White, J.).

National Wildlife Fed'n v. Marsh, 568 F. Supp. 985 (D.D.C. 1983) (Parker, J.) (successfully represented National Wildlife Federation in challenge to oil refinery on Chesapeake Bay in case involving administrative law and NEPA).

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) (Stevens, J.) (filed *amicus curiae* brief whose position was adopted by the Supreme Court in case involving water law and the dormant commerce clause) (*amicus curiae* brief available at 1982 WL 608572).

LEGISLATION

RAFN Amendments (addressing geothermal water), H.B. 676 (2026 Idaho Sess. Laws ch. ____).

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.

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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.

Idaho Administrative Procedure Act (logical outgrowth rule), 1992 Idaho Sess. Laws ch. 263, codified at Idaho Code § 67-5227.

PUBLICATIONS

Meyer, Nelson & Lee, *Idaho Land Use Planning Handbook*, Givens Pursley (2025).

Meyer, *Water Law Handbook: The Acquisition, Use, Transfer, Administration, and Management of Water Rights in Idaho*, Givens Pursley (2026).

Meyer, *Road Law Handbook: Road Creation and Abandonment Law in Idaho*, Givens Pursley (2026).

Meyer, *Ethics Handbook: Ethical Considerations for the Client and Lawyer in Idaho*, Givens Pursley (2026).

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).

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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).

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 (active) and Colorado and the District of Columbia (inactive).

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Admitted to practice in federal courts in the District of Columbia, Eighth, Ninth, and Tenth Circuits.

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 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 34 years.

CONTACT INFORMATION

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Appendix B: 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: ($50.00)***
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: ($50.00)***
Road Creation and Abandonment Law in Idaho

❑ ***Ethics Handbook: ($25.00)***
Ethical Considerations for the Client and Lawyer in Idaho

❑ ***CD Containing All Four Handbooks: ($5.00)***

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