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

In Re SRBA) Sub-case No.: 34-10030
)
Case No. 39576) IDWR'S BRIEF RE:
) ELEMENTS OF MUNICIPAL RIGHTS
)

DESCRIPTIVE SUMMARY

This document is IDWR's brief regarding the elements of municipal rights submitted in response to questions by the special master at the hearing on the Standard Form Five filed in this subcase.

A. Definition of Municipal

There is no definition enacted by statute or adopted by rule that defines the outer limits of a use that can be labelled as "municipal." A recommendation in the director's report of municipal use, however, generally indicates the following.

1. The claimant is a municipality incorporated pursuant to Idaho Code §§50-101, -102 (or its predecessor statutes), or a utility franchised by the city to provide water pursuant to Idaho Code §50-329.

2. The ultimate use of water appropriated for municipal purposes can include domestic, irrigation, stockwater, fire protection, recreation, commercial, industrial, and any other water use incidental to the functioning of a city. The uses can include not only the uses made by the city itself, such as for municipal offices, parks, etc., but also the uses by those consumers to whom the city or its franchisee is authorized by law to provide water.¹

As noted by the special master, IDWR did recommend one water right, no. 34-00780C, to the City of Mackay with a purpose of use for irrigation. This water right was originally decreed to an individual for irrigation use in *Utah Construction Company v. Abbott*, Equity No. 222 (S.E.Id 1923). The water right was subsequently acquired by the city, but continues to be used and was claimed for irrigation.

B. Quantity of Water

In the director's response to the United States' objection to this water right, IDWR noted an error in the director's recommendation of the water right. The water right as described in the director's report stated an annual diversion volume of 250 AFY. This number is in fact the annual volume of consumptive use. The Standard Form Five therefore moved the 250 AFY from the quantity element (no. 3) to the consumptive use element (no. 9). The diversion rate stated in the Standard Form 5 is the same diversion rate stated in the director's report.

Generally, IDWR quantifies a right appropriated for municipal purposes as the capacity of the diversion system by diversion rate in CFS, and does not limit annual diversion volume in AFY. IDWR follows this practice, both in the approval of new rights and the adjudication of existing rights, because the law allows municipalities greater

¹ In addition to supplying water to the city's inhabitants, a city can in some circumstances supply water to lands or consumers outside the city limits. See e.g. *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940); Idaho Code §50-220.

flexibility in the appropriation of water, allowing municipalities to appropriate water for reasonably anticipated future growth.²

A good discussion of this subject is found in the Memorandum of Points and Authorities Regarding the Appropriation of Water for Future Municipal Use in Support of Boise Water Corporation's Application for Permit to Appropriate Water, authored by Christopher H. Meyer. A true and accurate copy of the Memorandum, from IDWR's file for permit no. 63-12055, is attached to this brief.

C. Place of Use

Idaho Code §42-1411(2)(h) requires the director's report to include the legal description of the place of use. With respect to rights for municipal purposes, the place of use is generally described as the lands within the city limits.³ The description of the right in effect incorporates by reference the legal description of the city limits as set forth in the public records of both the city and the county in which the city is located.⁴

The purpose of describing the water right in this manner is precisely to avoid the need to process an application for change in use pursuant to Idaho Code §42-222 whenever the

² Exceptions to this general practice do exist. For example, a water right initially appropriated by a private individual for irrigation purposes, and later acquired by a city and used for municipal purposes, will generally include a limitation on annual diversion volume to prevent an expansion from the change in use. Although a city can appropriate a water right for future use, where a city acquires an existing water right for future use, the city obtains no greater right than the original owner appropriated.

³ As noted above, there are circumstances in which a city can acquire water rights for use outside city limits, but that is not an issue in these subcases.

⁴ The legal description of boundaries of the city is found in the proclamation creating the city, and subsequent ordinances annexing additional lands or disannexing previously incorporated lands, which are part of the public records of the city. See Idaho Code §50-102, 50-222, 50-225 to -234, 50-901 to -909. In addition, county assessors are required to maintain maps of city boundaries within their respective counties. Idaho Code §63-2215.

boundaries of the city change. Because cities may appropriate water for reasonably anticipated future needs, an increase in the boundaries of the city generally will not result in an expansion of the right so long as the diversion rate in cfs is not exceeded.⁵

D. Sufficiency of Standard Form 5 (SF5)

IDWR recognizes the authority and responsibility of the court to review Standard Form Fives to ensure the fair and accurate determination of water rights. IDWR is greatly concerned, however, that hearings are to be set for all Standard Form Fives with the expectation that the parties (and particularly IDWR) will "prove up" the water right as described in the SF5 to the extent necessary for the special master to enter findings of fact and conclusions of law as to the nature and extent of each water right. Such a procedure would be an expensive and unnecessary burden for IDWR, the court, and the parties.⁶

The law favors the avoidance or settlement of litigation, and compromises in good faith are ordinarily sustained as being upon a sufficient consideration without looking to the merits of controversy; otherwise compromises and settlements would be of little or no effect. *Moran v. Copeman*, 55 Idaho 785, 790, 47 P.2d 920 (1935). Stipulations for settlement of litigation are regarded with favor by the courts and will be enforced unless good cause to the contrary is shown. *Kershaw v. Pierce Cattle Co.*, 87 Idaho 323, 328, 393

⁵ As noted above, rights appropriated for municipal purposes are limited by diversion rate in cfs, but are generally not limited by diversion volume in AFY. In those exceptions where a municipal right is limited by diversion volume, such as where a right initially appropriated for irrigation purposes is changed to municipal purposes and diversion volume is limited to prevent injury from the change in use, the increase in the boundaries of the city generally would not be an expansion of the right so long as neither the diversion rate in cfs or diversion volume in AFY were exceeded.

⁶ Approximately 169,000 claims have been filed in the SRBA. It can be reasonably assumed that the average objection rate will be about 10%, with the result that there will be approximately 16,900 subcases in the SRBA. It can be reasonably assumed that at least 90% of these subcases will settle, with the result that approximately 15,210 Standard Form Fives will be filed in the SBRA.

P.2d 31 (1964). Because of the obvious public policy favoring amicable settlement of litigation, agreements accomplishing such result will be disregarded only for the strongest of reasons, which reasons must be shown by clear, satisfactory, and convincing evidence. *Lomas & Nettleton Co. v. Tiger Enterprises, Inc.*, 99 Idaho 539, 542, 585 P.2d 949 (1978).

In this subcase, the United States filed the only objection to this water right. In its response to the objection, IDWR noted an error in the description of the right in the director's report and included a revised description of the right. The U.S. sought and was granted leave to withdraw its objection, and was dismissed as a party from the subcase. The remaining parties agreed to the revised description of the right set forth in IDWR's response. Where the SF5 describes an element of the right differently than described in the director's report, the basis for that element is therefore correctly described as the stipulation of the parties.

By virtue of the United States' withdrawal of its objection, this water right is uncontested. Except for the corrections to the description of the water right noted above, the basis for each element of the water right is described in the SF5 in the manner required in the instructions for the SF5, which is "as recommended in the director's report." The adjudication statute provides that uncontested portions of the director's report are "admitted as true facts."⁷ Since the nature and extent of the water right is the ultimate fact to be determined, these elements have been admitted as true facts.

⁷ Idaho Code §42-1412(9).

Under traditional rules of civil procedure, water right adjudications were extremely burdensome for the claimants and the court because the claimants were required to submit and the court was required to take evidence as necessary to determine each water right. The adjudication statute minimizes the burden on the claimant and the court by providing a report/objection procedure that identifies contested issues that merit the expenditure of resources on the part of IDWR, the parties, and the court to achieve a judicial resolution. In this case, IDWR has fully complied with its responsibilities to promote the accurate determination of water rights by 1) investigating and recommending the claim, 2) identifying and providing notice to the court and the parties upon its discovery of an error in its recommendation, and 3) preparing an SF5, and upon its execution by the parties, filing and providing notice of the filing of the SF5.⁸

As noted by the Idaho Supreme Court, IDWR's only interest is in the accurate determination of water rights;⁹ it does not share the claimants' interest in ensuring that the existence and extent of any particular right is judicially confirmed. If IDWR were further required to "prove up" these stipulations, it would unnecessarily divert the available resources away from IDWR's duties with regard to the investigation of unreported and

⁸ Generally, courts have expressed a policy of deference to the specialized expertise of an administrative agency which has concluded that the settlement is appropriate. See e.g. *Conservation Law Foundation of New England, Inc. v. Franklin*, 989 F.2d 54, 58 (1st Cir. 1990); *Securities and Exchange Commission v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984); *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689, 81 S.Ct. 1309 (1961). Courts in western states have also expressed a policy of deference to the findings of the state water resource agency in water right adjudications. E.g. *In re Bassett Creek and its Tributaries in White Pine County*, 62 Nev. 456, 155 P.2d 324, 325 (1945); *In re Waters of Tualatin River and its Tributaries*, 229 Or. 81, 366 P.2d 174, 179 (1961); *In re Adjudication of the Water Rights of the Upper Guadalupe River Segment of the Guadalupe River Basin*, 625 S.W.2d 353, 3663-364 (Tex.Civ.App. 1981), *aff'd* 642 S.W.2d 438 (Tex. 1982).

⁹ *Idaho Department of Water Resources v. United States*, 122 Idaho 116, 122, 832 P.2d 289 (1992), *rev'd on other grounds* ___ U.S. ___, 113 S.Ct. 1893 (1993).

reported but contested claims. Given IDWR's available resources, the burden to "prove up" a stipulation will ultimately fall to the claimants/objectors.

Compelling the parties to "prove up" the stipulation would in effect require the parties to litigate issues they have chosen not to litigate, either by not objecting to the recommendation of the right or by agreeing to the correction identified in IDWR's response to the United States' objection. It defeats the purpose of settlement agreements, which is to avoid the cost to all concerned of litigating the merits of the controversy, as well as defeating the judicial policy to encourage settlements.¹⁰ It defeats the economies the adjudication statute was intended to achieve through IDWR's investigation and reporting function.

Due to the interrelationship of the water rights to be determined in the SRBA, the determination of any one water right has the potential to affect others who are not parties to the subcase. The court therefore has a legitimate concern as to the effect that judgments based on stipulations could have on third parties. However, the potential for such effect is no greater with a judgment entered after stipulation than with a judgment entered after litigation. In either event, the adjudication statute and the court's SRBA Administrative Order No. 1 already provide procedures to protect the interest of third parties. First, the docket sheet provides notice to other claimants of both the objections and responses, allowing other claimants the opportunity to intervene; second, the docket sheet provides notice to other claimants of entry of a special master's report, at which point any claimant may file a notice of challenge to the report. The resources of IDWR, the parties, and the court might

¹⁰ Further, it could result in a judicial determination of an issue of general significance in a setting where there is insufficient adversity to ensure that the issue is thoroughly addressed.

be most efficiently spent by reserving a more detailed judicial review of stipulations to those instances in which a third party has identified a harmful and inappropriate effect from the stipulation through a challenge to the special master's report.

As previously noted, IDWR acknowledges the authority and responsibility of the court to review Standard Form Fives. But to avoid unnecessary cost to IDWR, the parties, and the court, the court's review of an SF5 should begin, and absent compelling reasons to the contrary should also end, with the presumption that the SF5 is valid and that the description of the water right contained therein is accurate. This presumption arises by virtue of 1) established judicial precedent, which favors entry of judgment upon stipulation of the parties absent a compelling reason to do otherwise, and 2) the adjudication statute, which provides for entry of judgment in accordance with the director's report absent objection. Such a presumption is reasonable, because the SF5 is based on 1) IDWR's investigation and review and 2) voluntary and good faith agreement of IDWR and the parties.

E. Conclusion

IDWR reaffirms its continuing commitment to the cooperative efforts of the court and the parties to resolve subcases through the settlement procedure established by the court's SRBA Administrative Order No. 9. IDWR hopes that the court will consider the thoughts and concerns expressed in this brief in the implementation of this procedure in the test basins. Where, as here, the stipulation is reasonable and was entered into voluntarily and in good faith, IDWR respectfully submits that the special master has sufficient basis upon which to issue its report recommending that this water right be decreed as described in the Standard Form Five.

DATED this 21st day of April, 1995.


A. LYNNE KROGH
Deputy Attorney General

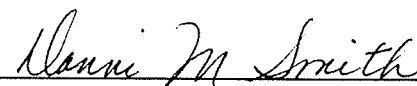
State of Idaho)
) ss.
County of ADA)

David B. Shaw, being first duly sworn, upon oath, deposes and says:

That I am the Adjudication Bureau Chief for IDWR, and that I have read the foregoing memorandum, know its contents, and that the statements contained therein are true to the best of my knowledge and belief.


DAVID B. SHAW
Adjudication Bureau Chief

Subscribed and sworn to before me this 21st day of April, 1995.


Notary Public for Idaho
Residing at: BOISE ID
My commission expires: 12/5/2000

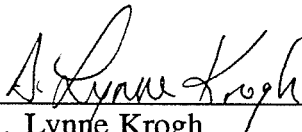
Certificate of Mailing

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Department of Water Resources
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BEFORE THE
DEPARTMENT OF WATER RESOURCES
STATE OF IDAHO

IN THE MATTER OF APPLICATION
NO. 63-12055 OF BOISE WATER
CORPORATION FOR A PERMIT TO
APPROPRIATE THE PUBLIC
WATERS OF THE STATE OF IDAHO

MEMORANDUM OF POINTS
AND AUTHORITIES
REGARDING THE
APPROPRIATION OF WATER
FOR FUTURE MUNICIPAL
USE IN SUPPORT OF BOISE
WATER CORPORATION'S
APPLICATION FOR PERMIT
TO APPROPRIATE WATER

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QUESTIONS PRESENTED

1. Can a permit for municipal water use include a component to meet reasonably anticipated future population growth?
2. Can a license for a municipal water use include a component to meet reasonably anticipated future population growth?
3. Must such a water right be limited geographically to the corporate limits of the municipality served or to the applicant's service area at the time the permit or license is issued?

INTRODUCTION

In evaluating Boise Water Corporation's pending application for water right, we understand that staff of the Idaho Department of Water Resources ("IDWR" or the "Department") has raised the question of whether a water right may be issued which encompasses future population growth and whether such a right must be limited to service within defined city limits or the applicant's current service area. Boise Water Corporation submits this Memorandum of Points and Authorities to assist the Department in evaluating these legal questions.

A review of the law in Idaho and elsewhere in the West demonstrates that a water right may be issued where a portion of the water is reserved to meet reasonably anticipated future growth. In other words, acquisition of a water right to meet the reasonable future needs of a growing community is permissible under the prior appropriation doctrine.

In this memorandum, we employ the phrase "growing communities doctrine" to capture the essential points of these cases. Although this shorthand description has not 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, not just to great cities.¹

Finally, such a water right need not be limited to an artificial geographic delimiter, such as a city's existing corporate limits or service area, so long as the water right describes a reasonably predictable area of growth.

ARGUMENT

- I. The Idaho courts consistently have recognized the "growing communities doctrine" by which water for municipal use may be appropriated to provide for reasonably anticipated future population growth.

Two Idaho cases and one federal case applying Idaho law have addressed the question of whether cities may obtain water rights of sufficient quantity to meet future population growth. In each case, the court squarely ruled that such water rights may be obtained.

A. City of Pocatello v. Murray

The first was *City of Pocatello v. Murray*, 206 F. 72, 80 (D. Idaho 1913), *aff'd*, *Murray v. City of Pocatello*, 214 F. 214 (9th Cir. 1914). In this case, the City of Pocatello granted a franchise to Murray and his associates to provide water to the city. The city experienced repeated shortages during the summer months, and the city sought to cancel the franchise because of Murray's failure to deliver

¹ 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.

sufficient water. The case turned on whether Murray fulfilled his franchise contract obligations with the city. Murray read the contract (reflected in a municipal ordinance) to mean that he was obligated to deliver some water from Mink Creek; the city read it to require him to capture and deliver all the water in the creek—which Murray had not done.

The court ruled in favor of Pocatello, noting that one of the objectives of the contract with the franchisee was to ensure that all the waters of Mink Creek were appropriated by the city. The court observed that this is permissible, even if some but not all the water was needed at the time:

The contention that it would have been against public policy for the defendant to have appropriated more of the public waters than was necessary to supply the immediate needs of the city, and that therefore the construction of a larger conduit would have been a vain thing, is without merit. Under the law of the state an appropriator has a reasonable time to apply the water which he has appropriated to a beneficial use, and if such rule may be invoked in the case of an appropriation for agricultural purposes, it should and doubtless would, be applied with even greater liberality to the superior and more elastic needs of a growing municipality.

206 F. at 80. Thus, *City of Pocatello v. Murray* stands for the proposition that municipalities may acquire water rights to meet expanding needs. Moreover, this conclusion was based on general principles of Idaho water law, not on any particular statute or contract provision.²

² The focus of the appeals court was more narrow. It affirmed on the basis of the municipal ordinance language, construing its language to require defendants to deliver all the water of Mink Creek, not just some of it. The appeals court did not elaborate on the future growth issue, but did expressly note that one of the purposes of the water supply agreement between the city and defendants was to provide "as well for their future use." 214 F. at 220. Thus, the appeals decision (continued...)

B. Beus v. City of Soda Springs

The next decision on the subject came from the Idaho Supreme Court in 1940. In *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940), the court evaluated the water rights of the City of Soda Springs. In 1920 the city bought two farms in order to obtain their water rights. Because the water rights thus obtained exceeded the city's current needs, it planned to use them for irrigation until needed for municipal use. In 1934 the city was joined in a lawsuit involving other users of the creek which had been brought to adjudicate claims to the waters of the creek. The Beus' contended that the city's indefinite and alternating use between irrigation and municipal use was improper, and that the city had thus abandoned that portion of its right in excess of eighty miner's inches (that apparently being the amount which the city consistently had applied to municipal use from the start).

The court upheld the city's water right in whole, concluding that a city is entitled to acquire water rights in excess of its current needs in order to satisfy future demand. In so ruling, the court relied on both a Wyoming common law precedent and an Idaho statute granting cities the right to acquire water supply systems.

The court quoted from a Wyoming case, *Holt v. Cheyenne*, 137 P. 876 (1914):

² (...continued)
can be seen as an affirmation of the trial court's discussion of the appropriateness of municipal water rights for future growth.

[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*).

Beus also relied on a then existing statute, Idaho Code Ann. 1932, § 49-1132, which provided that a municipal corporation has the power to "[a]cquire by purchase, or otherwise, waterworks systems or plants, . . . and construct, enlarge, extend, repair, alter and improve such plants or either of them, or any parts thereof, and to supply the municipality and the inhabitant thereof with water" The court declared:

The statute does not limit the power of a municipality to supply water to present inhabitants—the power granted is general—to *supply its inhabitants with water*. Hence, if, at the time of the acquisition of water for the purpose of supplying existing needs, it is necessary to also acquire and hold an additional supply to take care of future needs, a municipality undoubtedly has power to do so, in that "Whenever a power is given by statute, everything lawful and necessary to the effectual execution of the power is given by implication of law."

Beus, 62 Idaho at 6, 107 P.2d at 154 (emphasis original; citation omitted).

The court went on to hold expressly that water acquired by a municipality for future needs need not be applied to irrigation in the meantime in order to avoid forfeiture. "To require that would amount to nullifying the power granted to a municipality to acquire and hold water for future needs—an absolute necessity of life and existence for a municipality." *Beus*, 62 Idaho at 7, 107 P.2d at 154.

Although the statute upon which the court based part of its decision has been replaced with an entirely new codification,³ *Beus* remains good law. This is demonstrated in four ways.

First, the new statutory provisions applicable to municipalities are functionally equivalent to those in the 1911 statute, in that both provide broad, general grants of authority to municipalities to establish water supply systems.⁴

³ The statute upon which the court relied dates back to 1911. 1911 Idaho Sess. Laws ch. 81, § 1. It was amended in 1915 to expressly authorize cities to supply excess light and power to others outside the city. 1915 Idaho Sess. Laws, ch. 97, § 2. It was amended again in 1919 to add water to the list of things which may be supplied to persons outside of the city. 1919 Idaho Sess. Laws ch. 117, § 1. In 1951, the portion of the statute dealing with revenue bonds was repealed and replaced with a new Revenue Bond Act, which authorized cities to acquire "water systems," but did not deal expressly with the issue of water rights and their scope. 1951 Idaho Sess. Laws ch. 47. In so doing, the 1951 Act repealed Idaho Code § 49-1132 (which, by that time had been reclassified to section 50-1132). In 1967 the legislature undertook a comprehensive recodification and revision of the law of municipal corporations. 1967 Idaho Sess. Laws ch. 429, § 20, codified at Idaho Code § 50-323. The 1967 statute remains in effect today, modified only by a 1979 statute, 1979 Idaho Sess. Laws ch. 304, which extended its application to geothermal wells.

⁴ The 1932 statute, in effect at the time of *Beus*, provided authority for municipalities to:

[a]cquire by purchase, or otherwise, waterworks systems or plants, and also light and power plants, or any parts or portions thereof, and construct, enlarge, extend, repair, alter and improve such plants or either of them, or any parts thereof, and to supply the municipality and the inhabitant thereof with water

Idaho Code Ann. 1932, § 49-1132.

The 1967 version (in effect today) 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

(continued...)

The fact that the legislature again has authorized cities to "provide for domestic water from . . . any . . . source," and the fact that the legislature did so against the background of *Beus*, strongly suggests that the legislature intended for cities to do whatever was necessary (including the acquisition of water rights for future use) to fulfil the mandate "to provide for domestic water." As the court said in *Beus*, "Whenever a power is given by statute, everything lawful and necessary to the effectual execution of the power is given by implication of law." *Beus.*, 62 Idaho at 6, 107 P.2d at 154 (citation omitted). Thus the implication from the current statute runs in favor of assuming the grant of the power to provide for future growth, rather than in favor of overruling *Beus*.⁵

Second, while the current statute does not expressly codify the *Beus* decision, neither does it expressly reject it. It is a well established principle of statutory construction that repeals by implication are disfavored. *State v. Martinez*, 43 Idaho 180, 187, 250 P. 239, 240 (1926); *State ex rel. Good v. Boyle*, 67 Idaho 512, 186 P.2d 859 (1947); *Curtis v. Canyon Highway Dist. No. 4*, 122 Idaho 73, 78, 831 P.2d 541, 546 (1992). The principle extends to the situation at hand, where the legislature replaced one statute with a revised version:

⁴ (...continued)

of the city; and to do all things necessary to protect the source of water from contamination.

1967 Idaho Sess. Laws ch. 429, § 20, codified at Idaho Code 50-323.

⁵ Note, for instance, that the City of Boise is authorized to and does provide sewer service beyond the corporate limits of the city in anticipation of future development. This demonstrates that, despite the wording change in the statute, the legislature has never departed from the general principle of authorizing and encouraging municipalities to plan soundly for future growth. Indeed, the need for such planning is stronger today than it was at the time of *Beus*, and nothing in the legislative history suggests any retreat from this principle.

In the case of acts that are independent and original in form the presumption is against any change in legal rights. For, as a general rule, the common law will not be deemed changed, unless the language making the alleged change is clear and unambiguous, and statutes in derogation of the common law will be strictly construed. As far as changing statutory law, there is a presumption against the implied repeal or amendment of any existing statutory provision. In accord with this conservative attitude, an amendatory act is not to be construed to change the original act or section further than expressly declared or necessarily implied.

Norman J. Singer, *Sutherland Statutes and Statutory Construction*, § 22.30 at p. 267 (5th ed. 1993) (emphasis supplied).

Third, the court's reference in *Beus* to the Wyoming case (which in turn relied on a broad range of common law authority) and the court's observation that the acquisition of water rights for future municipal expansion is "an absolute necessity of life and existence for a municipality," demonstrate that the decision rests on a recognized exception incorporated into the common law of water rights, not just on the statutory provisions.

Fourth, the commentators consistently have read the case as standing for broader principle of water law. Dean Trelease summed it up thus:

In *Beus v. Soda Springs* the right of a city to acquire water in excess of its present needs was upheld. While the case involved an irrigation right that had been purchased by the city but that was not being used to capacity, it would seem to be good authority for the right to appropriate water for future municipal needs.

Frank J. Trelease, *Preferences to the Use of Water*, 27 Rocky Mtn. L. Rev. 133, 138 (1955) (footnote omitted). See also the discussion of the *Beus* case by Professor Hutchins, quoted on page 10 *infra*.

C. Village of Peck v. Denison

The conclusion that *Beus* remains good law is supported by the Idaho Supreme Court's more recent ruling in *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969). In this case, the Village of Peck obtained its water supply from three springs on land later purchased by Denison: Springs A, B, and C. The village brought this action to quiet title and secure its rights respecting the water supply. Denison acknowledged the village's right to Spring C, but challenged its right to Springs A and B. Denison's primary objection was that the village had not quantified its right in cfs, but rather claimed a right to "all" the flow.

The court found that there is no requirement to quantify the flow where all the flow has been appropriated. Apparently, there was no showing that the village's appropriation exceeded its needs. "In the present case, the Village has shown that it had used for beneficial purposes all of the water from springs A and B until appellants interfered with their right." *Village of Peck v. Denison*, 92 Idaho at 747, 751, 450 P.2d at 314. However, the court directly addressed the future use point 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 v. Denison, 92 Idaho at 751, n.4, 450 P.2d at 314, n.4.

Although this observation is arguably dictum, it is a strong indication that the court did not view the repeal of section 50-323 (previously 49-323) to have invalidated the broader conclusions reached in *Beus*.

Note as well that the court in *Village of Peck v. Denison* cites an article published a year earlier by the distinguished water law scholar, Wells A. Hutchins. Wells A. Hutchins, *The Idaho 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 at 44, n. 211. He summarized the cases discussed above in his article:

It was held in a Federal case to be not against public policy for a city to appropriate more water than necessary to supply its immediate needs. [Footnote citing *Pocatello*. The rule that allows an appropriator for agricultural purposes a reasonable time to apply the water to a beneficial use should be applied "with even greater liberality to the superior and more elastic needs of a growing municipality." The court stated further that if not required for immediate needs, the appropriation could have been consummated and the right held intact by a temporary application of any surplus to other beneficial uses.

The Idaho Supreme Court also has held that a municipality, when acquiring water to supply its existing needs, may also acquire and hold rights to additional water for the purpose of supplying future needs. [Footnote citing *Beus*. Further, a municipality may purchase lands, if necessary, to acquire for its municipal needs, but is not required, after purchase, to irrigate the lands to which water rights had attached or to cause them to be irrigated in order to avoid the loss of the

water rights on a charge of abandonment. This is because the necessity of providing for future needs is vital to the life and existence of a municipality.

Hutchins, at 44.

The fact that the Idaho Supreme Court cited with approval Mr. Hutchins' 1968 article, two years after section 50-1132 (formerly 49-1132) had been replaced with the new code on municipal authorities, demonstrates that the court continues to view the general principles embodied in *Beus* as good law and not dependent upon the specific language in the former statute.

II. The common law "growing communities doctrine" is fully consistent with Idaho's statutory scheme for the appropriation of water.

The principal that communities may obtain water rights to meet future needs, though consistently recognized in Idaho case law, is not expressly articulated in Idaho's water code. Instead, the water code establishes fixed periods of time (five years, with a possible extension of up to five additional years) in which a permit for an approved application must be proved up. Idaho Code §§ 42-204, 42-217, 42-218. Specifically, the applicant must show the Department that the works of diversion have been constructed and the water has been applied to beneficial use.

The statute was written with irrigation primarily in mind. In that context, the means of proving up beneficial use is straightforward. Either the water has been applied to crop land, or it has not. The process is similarly direct in the case of industrial, mining, hydropower, or simple domestic use. The statute offers no

guidance, however, as to how a party proves up beneficial use in the case of a larger municipal right.

If the statute were applied rigidly, one might conclude that a municipality (or corporation serving a municipality) could never obtain a water right to meet future growth more than five or, at most, ten years out. This would follow if proof of "beneficial use" were understood to require that the city actually had experienced sufficient population growth within the proof period to fully utilize its entire water right.

This conclusion, however, is not compelled by the plain language of the statute. The more reasonable conclusion is that the concept of beneficial use in the context of municipal use encompasses acquisition of water to meet reasonably anticipated future growth. In other words, by actually constructing a water supply system today sized to accommodate both present needs and future growth, a community is putting that water to a full beneficial use today.

This is not reading the proof statute out of existence. The statute still requires that a municipal water right applicant actually construct a water supply system and be able to point to real future needs. In other words, Boise Water Corporation cannot make out proof sufficient for a water license simply by noting that some day it will need more water, and that some day it will need to build a larger delivery system. To the contrary, it must actually be prepared to construct the system with due diligence in order to obtain a permit, and must actually construct it in order to obtain a license.

This concept of building something today for use tomorrow is familiar to the law of prior appropriation. Indeed, the idea of a community planning and constructing a delivery system sized to accommodate future growth is no different than the idea of an entity storing water in a reservoir for use in a future drought. Where the water is held for drought protection, it may not actually be drawn out and applied to the land for many years. But no one would suggest that it does not satisfy today the requirement of application to a beneficial use, simply because it is being held for use in a future drought. *Waters and Water Rights*, § 12.03(c)(2) at 108 (Robert E. Beck ed., The Michie Company 1991); Samuel C. Wiel, *Water Rights in the Western States* § 378 at p. 410 (1911); 45 Am. Jur. 2d *Irrigation* § 38 (1969).

The New Mexico Supreme Court made precisely this point in a case approving a water right for the future needs of a coal fired generating plant was expected to expand over time:

The United States' brief focuses on the present needs of the generating station to which Plains Electric sought to move the water rights at issue. However, there was evidence below from which the trial court was entitled to find that these water rights would be put to use within a reasonable time as the needs of the generating station increased. This evidence was sufficient to support his finding on beneficial use. Cf. *State ex rel. State Engineer v. Crider*, 78 N.M. 312, 431 P.2d 45 (1967) (cities had right to appropriate water in artesian basin for future use subject to condition that water be applied to beneficial use within a reasonable time).

In re the Application of Plains Electric Generation and Transmission Coop., Inc., 750 P.2d 475, 477 (N.M. App. 1988) (emphasis supplied).

From the beginning, the concept of beneficial use has been aimed at promoting productive use of resource and avoiding speculation.

The roots can be traced to Mormon irrigation practices in Utah. From its earliest days wandering the frontier, the Church of Jesus Christ of Latter Day Saints conditioned the privilege of property ownership on the productive, non-speculative use of the property and policed the distribution of essential commodities.

. . . These functions remain important and are being expanded to incorporate new limitations on the use of water in light of changing competing demands.

A. Dan Tarlock, *Law of Water Rights and Resources* § 5.16[1] (1994).

Recognition of the acquisition of water rights for reasonable future use has been recognized from the start. "An appropriation can be made for a purpose contemplated in the future, such as the irrigation of land to be later acquired, if there will be no unreasonable delay, and speculation is not intended." Samuel C. Wiel, *Water Rights in the Western States* § 378 at p. 411 (1911).

In short, beneficial use is a flexible concept.⁶ It is not defined by Idaho

⁶ "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. *State of Idaho, Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 443, 530 P.2d 924, 927 (1974).

"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 changing conditions. . . . The notion of beneficiality must include a requirement of reasonableness." *State of Idaho, Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 447, 530 P.2d 924, 931 (1974) (Bakes, J. concurring).

"The term 'beneficial use' is not defined in the Constitution. What is beneficial use, after all, is a question of fact and depends upon the circumstances in each case. . . . All we now say is that the factors which enter into a determination of a beneficial use here, which is based upon a normal need, are more flexible than those relating to the use of water on agricultural land." *City and County of Denver v. Sheriff*, 96 P.2d 836, 842 (Colo. 1939).

"In light of the flexible approach taken in the case law toward application of the 'beneficial use' concept, and given the legislative expressions of concern for reclamation of mined land and abatement of dust pollution, we believe that land reclamation and dust control are beneficial uses." *State v. Southwestern Colorado Water Conservation Dist.*, 671 P.2d 1294, 1322 (Colo. 1983).

(continued...)

statute, and the courts are free to interpret it sensibly to accommodate the special and inherent needs of growing communities. As the Colorado Supreme Court said:

In agricultural pursuits the beneficial use is limited to the needs of the land. In the instant case the beneficial use is limited to the needs of 350,000 present customers, with a reasonable expectancy of an increase in the number of consumers as a normal condition. [*Id.* at 842.]

City and County of Denver v. Sheriff, 96 P.2d 836, 842 (Colo. 1939).

The fact is, the Idaho Supreme Court already has done so, as shown in the cases discussed above in Part I. These very cases were handed down against the backdrop of a statutory scheme fundamentally the same as the one in place today. While the precise formulation of the "proving up" requirement has been amended from time to time, the principle has remained untouched since the water code was adopted in 1903. House Bill 146, 1903 Idaho Sess. Laws, p. 223.

If the requirement to prove up within a period of time fixed by statute were inconsistent with the growing communities doctrine, *City of Pocatello v. Murray* (1913), *Beus v. City of Soda Springs* (1940), and *Village of Peck v. Denison* (1969) could not have been decided as they were. Nor could Mr. Hutchins, one of the most celebrated water scholars of his day, have concluded:

[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.

⁶ (...continued)

"We have held that beneficial use is a broad concept and that characterization of a use as beneficial requires case by case factual analysis." *Zigan Sand and Gravel, Inc. v. Cache La Poudre Water Users Assn.*, 758 P.2d 175, 182 (Colo. 1988).

Hutchins at 44, n. 211.

In short, a community (or a corporation serving a community) may prove up its municipal water right through its real and substantial investments in a water supply system sized to meet reasonably anticipated future demand, and thus comply with the statutory proof requirements, even as to water not yet fully utilized.

This is no carte blanche for municipalities to hoard water rights. Like any other water right, an appropriation for future use is subject to scrutiny by the Department which must evaluate the reasonableness of the anticipated need. For example, a federal court applying New Mexico law (which recognizes municipal rights for future use as beneficial), denied a city's claimed appropriation of storage water where the evidence showed that the water would be stored for as long as forty years and 93 percent of it would be lost to evaporation. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

Nor are such water rights insulated from changing circumstances. If, for instance, unfolding events showed that a community had acquired more water than it needed in the reasonably foreseeable future, a water right can always be cut back. "Beneficial use is not a concept which is considered only at the time an appropriation is obtained. The concept represents a continuing obligation which must be satisfied in order for the appropriation to remain viable." *Basin Electric Power Cooperative v. State Board of Control*, 578 P.2d 557, 563 (Wyo. 1978). As the New Mexico 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. [Citation to *Denver v. Sheriff*.]

...
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.

Id. at 49.

In sum, so long as it appears that the water sought to be appropriated is needed to meet the reasonably anticipated future needs of a growing community, then a permit can issue. Then, upon a showing by the applicant that it has constructed a delivery system capable of serving those needs, and that those needs continue to be reasonably anticipated, then a license can issue at that time. In this way, the Idaho Water Code's proof requirements may be enforced in a manner consistent with full recognition of the growing communities doctrine.

III. Idaho's recognition of water rights for future growth tracks the conclusion consistently reached in other Western States.

Idaho is among several western states to recognize the growing communities doctrine. Some have done so by common law, others by statute. We have found no authority in any western state rejecting the doctrine.

The principles common to all these states were discussed in a seminal law review article by Dean Trelease:

APPROPRIATION FOR FUTURE GROWTH OF CITIES

Obviously a water supply for a city must keep a step ahead of the needs of its inhabitants; a city cannot obtain water from day to day as demand increases. A

city without some excess water or promise of water cannot grow, and typically municipal supplies are procured in large amounts that exceed present needs and permit expansion. This fact is recognized in the statutes of several states that allow municipalities to apply for permits to appropriate water for future requirements, and the courts in other states have permitted such appropriations to satisfy the needs resulting from population increases [citing, among others, *Beus v. Soda Springs* in Idaho].

Frank J. Trelease, *Preferences to the Use of Water*, Rocky Mtn. L. Rev. 133, 138 (1955) (footnotes omitted).

Authorities from individual states are discussed below.

A. Wyoming

We have already mentioned the Wyoming decision, *Holt v. Cheyenne*, 137 P. 876 (1914), which was cited by the Idaho Supreme Court in *Beus v. City of Soda Springs*. In *Holt*, a farmer brought suit against the City of Cheyenne for interference with the farmer's water right. Although Cheyenne held the most senior rights on the stream, the farmer complained that the city had improperly entered into contracts with the United States to supply water to a military reservation outside of the city limits. The additional diversions attributable to supplying the military reservation were adversely impacting the farmer's junior water right.

The court held that a city may acquire rights to water in excess of its current need:

At the time of the adjudication here complained of, the city was not limited by law to the appropriation of only the amount of water required or necessary for the

inhabitants of the city, but might appropriate and acquire more than sufficient for those purposes as they then existed, and this was done. If the right to change the point of diversion were denied, such appropriation might be insufficient for the city, as its needs and wants in that respect augmented by reason of increased population.

Holt, at 880-81.

The court held that a city may dispose of excess water by using it for other purposes. But the court made clear that a city is not required to do so in order to avoid abandonment. Rather, a city may acquire more water than is needed at the time.

B. Colorado

Wyoming's decision in *Holt*, in turn, helped lay the foundation for the doctrine in Colorado, where it is now firmly entrenched. In *City and County of Denver v. Sheriff*, 96 P.2d 836 (Colo 1939), the Colorado Supreme Court first articulated what has come to be known in that state as the "great and growing cities doctrine." In *Sheriff*, the city of Denver sought to confirm various water rights it held in connection with the Fraser River and Williams Fork Diversion Projects then under construction by the city. The water court confirmed the rights, but declared them to be supplemental to Denver's East Slope water rights, thus requiring Denver to fully utilize all of its East Slope water before bringing in any West Slope water. The water court stated that the purpose of the conditions was to ensure that Denver did not go into the business of selling water or disposing of its water rights. Denver appealed.

The Colorado Supreme Court sided with Denver, noting that the restriction would prohibit Denver from selling its East Slope water rights and relying instead on its West Slope water. "To so straight-jacket the city's Eastern Slope water rights, by the restrictions involved here, would be an arbitrary invasion of vested property rights in the city." *Sheriff*, at 840. The court found that such restrictions were inconsistent with the city's property right in the water. More importantly, the court articulated the public policy which requires that the needs of growing cities be accommodated within the prior appropriation doctrine:

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.

Sheriff, at 841 (emphasis supplied). The court continued:

[C]ities having a population of 200,000 and over may, for reasons already stated, have not only the right to appropriate a sufficient volume of water for immediate use, but by prudent management to acquire by appropriation an adequate supply for a reasonable time in the future. What such a reasonable time would be is not presented in this review.⁷

⁷ The court spoke here in reference to a Colorado statute specifically authorizing cities of over 200,000 to lease excess water without becoming obligated to continue those leases indefinitely. The context of the discussion makes clear that the court simply noted that the legislature as well as the courts have recognized the special needs of municipalities. In other words, the court's basic holding was buttressed by, but not premised upon, the Colorado statute.

Sheriff, at 842. Thus *Sheriff* stated in clear and unmistakable terms the principle that municipalities are entitled, indeed, obligated as good managers, to acquire water rights to support future growth.

The next "growing cities" case was *City and County of Denver v. Northern Colorado Water Conservancy Dist.*, 276 P.2d 992 (1954). In this case, the court rejected claims by both Denver and Colorado Springs for back dating of appropriation dates on other grounds⁸. However, the court ruled that a decree may be awarded in excess of a city's current needs in order to provide for future growth. "[W]hen appropriations are made by a growing city, reasonable regard should be given to its reasonably anticipated requirements." *Id.*, at 997. "[T]here was substantial evidence to support a finding of future need for water from the Blue River within a reasonable time. This is amply demonstrated by the City's rapid growth." *Id.*⁹

⁸ The court found that Denver had repeatedly changed its plans, and should not be allowed to claim an earlier priority date for its abandoned projects. *Id.*, 276 P.2d at 1001, 1005. The court also rejected the claim of Colorado Springs which sought to back date its claim to the earlier efforts of a private developer which sold out to the city. "[M]ere speculators [cannot] by survey, plat, and token construction compel subsequent bona fide appropriators to pay them tribute by purchasing their claims in order to acquire a right guaranteed them by our Constitution." *Id.*, 276 P.2d at 1009.

⁹ It bears mentioning that the Colorado legislature sharply rejected a line of reasoning developed by the Colorado Supreme Court in a series of cases, most notably *Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566 (Colo. 1979), in which the court adopted a "wait and see" with respect to the availability of unappropriated water. In 1979, Colorado's General Assembly adopted Senate Bill 481, 1979 Colo. Sess. Laws ch. 346, codified at Colo. Rev. Stat. § 37-92-305(9)(b), which required a showing at the time of the granting of a conditional right (equivalent to Idaho's water permit) that water "can be and will be diverted." Thus, Colorado switched from a "wait and see" approach to a "can and will" approach in evaluating new water rights. This legislative pronouncement may have the effect of imposing a requirement that a city seeking a water right for future use need offer something more than a bald assertion of such a need. For example, the court's statement in *Metropolitan Suburban Water Users Ass'n v. Colorado River Water Conservation Dist.*, 365 P.2d 273, 289 (Colo. 1961), *rev'd on other grounds* (continued...)

C. New Mexico

The New Mexico supreme court followed the growing communities doctrine in a 1967 case. The case of *State v. Crider*, 431 P.2d 45 (N.M. 1967), involved a general adjudication of water rights within the Roswell Artesian Basin. The trial court granted water rights to two cities (Roswell and Artesia) based on the capacity of their wells without requiring proof that the water had actually been put to use, and based instead upon the assertion of future use. Irrigation users objected to the special treatment accorded the cities. The court upheld the cities' water rights "subject to the condition that the needed water be applied to beneficial use within a reasonable time." *Id.* at 49. The court observed:

The argument that the cities' rights should have been treated in the same manner as those of appellants overlooks certain fundamental differences. Appellants' use of water and the right decreed to them was for the irrigation of a specified tract of land. The right was a completed appropriation certain as to amount and place of use.

It appears to be undisputed that neither [the cities of] Roswell nor Artesia have made actual use of the full amount of water decreed to them. The claim however contemplated water for future use to meet requirements resulting from the increase in population. The right to appropriate water for future use is fully recognized by most authorities.

...

⁹ (...continued)
sub nom., Denver v. Colorado Water River Conservation Dist., 696 P.2d 730 (Colo. 1985), that "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" may no longer be good law. Nothing in this legislative change, however, undercuts the court's rulings with respect to the basic principle that, on a proper showing, a water right may be obtained to provide for a growing city's future needs.

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.

Id. at 48-49 (citing *Denver v. Sheriff*).

The New Mexico Supreme Court has repeated this conclusion on two occasions. In *State ex rel. State Engineer v. Rio Rancho Estates, Inc.*, 624 P.2d 502 (N.M. 1981), the court prohibited the State Engineer from limiting the size of water right sought by a housing developer to the size of an existing well. The court said:

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. [Citation to *State v. Crider*.] Thus, the amount of water a city is presently using from a well may not be the limit of its water right.

Id. at 505 (emphasis original).

In *In re the Application of Plains Electric Generation and Transmission Coop., Inc.*, 750 P.2d 475 (N.M. App. 1988), discussed above, an electric Cooperative applied for water rights in connection with the Escalante Generation and Transmission Project, a coal fired power plant. The water right sought exceeded the amount needed to operate the unit which already had been constructed, but evidence was offered showing that the additional water would be needed for planned future expansion. The court held that water can be appropriated for future use. See quotation from case above at page 13.

D. Statutory codifications of the growing communities doctrine

We have identified five states which have codified the growing communities doctrine: Nevada,¹⁰ California,¹¹ Washington,¹² Arizona,¹³ and Oregon.¹⁴

IV. The growing communities doctrine applies equally to municipalities and to private corporations serving them.

The growing communities doctrine draws no distinction between municipalities which provide their own water supplies and private corporations which serve municipalities. For example, *City of Pocatello v. Murray* (discussed *infra* at ?) recognized the doctrine in the case of a private, for-profit franchise.

¹⁰ The Nevada legislature did so by defining "beneficial use" to include:
[T]he appropriation of water . . . by a [city] or public utility . . . to serve the present or the reasonably anticipated future municipal, industrial or domestic needs of its customers for water . . . is a beneficial use.

Nev. Rev. Stat. § 533.030(3) (1993 Supp).

¹¹ In 1945, California also codified the doctrine:

It is hereby declared to be the established policy of this State that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and future uses

Cal. Water Code § 106.5 (Deering 1977) (emphasis supplied).

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 (Deering 1977).

¹² Washington's statute is based on California's:

If for municipal water supply, the application shall give the present population to be served, and, as near as may be, the future requirement of the municipality.

Wash. Rev. Code § 90.03.260.

¹³ Arizona provided a special exemption for municipalities from the proof requirement. Ariz. Rev. Stat. Ann. § 45-160 (1994).

¹⁴ As did Oregon. Or. Rev. Stat. § 537.230 (1993).

Similarly, the court stated in *Village of Peck v. Denison* (discussed *infra* at 9):

"[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. . . ." *Village of Peck v. Denison*, 92 Idaho at 751, 450 P.2d at 314. Similarly, in *City and County of Denver v. Sheriff* (discussed *infra* at 19), the growing communities doctrine was found to apply to Denver despite the fact that the city's water rights were obtained by the Denver Union Water Company, which the city later took over. *Id.* at 838.

V. There is no basis on which to restrict water rights for future municipal growth to existing city limits or to an existing service area.

The Department's practice, as we understand it, is to require the specification of particular forty acre tracts when municipal water service is provided outside of a city's corporate limits. See IDAPA 37.01.01 § 035.03.b.iii. Boise Water Corporation objects to this requirement. A requirement to specify individual quarter-quarters to be served in the future amounts to a requirement to say what cannot be known, and is fundamentally inconsistent with the growing communities doctrine.

The court in *Beus v. City of Soda Springs* (discussed *infra* at page 4) made clear that a water right may be for use outside the city limits:

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 (emphasis original). While the statute cited by the court has since been amended, the court's decision demonstrates that there is nothing inconsistent between the prior appropriation doctrine as applied in Idaho and the holding of water rights for municipal service outside the boundaries of a particular municipality.

Such a requirement also runs afoul of Idaho law governing the regulation of public utilities. Boise Water Corporation holds a franchise from the City of Boise to supply water. However, any agreement between a utility and a city purporting to limit service to the corporate limits of the city would be preempted by contrary action taken by the Idaho Public Utility Commission in setting the city's certificated area. Idaho Code § 61-527. In the case of Boise Water Corporation, the Commission has acted to expand the certificated area to encompass areas adjacent to but outside the Boise corporate limits. Consequently, Boise Water Corporation is obligated today to serve areas beyond the city limits.

Moreover, the legislature has expressly provided that in assessing the need for service and in determining the extent of the service area, the Public Utilities Commission shall consider future need:

No . . . water corporation, shall henceforth begin the construction of a . . . plant, or system, or any extension of such . . . plant, or system without having first obtained from the commission a certificate that the present and future public convenience and necessity require or will require such construction

Idaho Code § 61-526.

In addition, the statute expressly provides that regulated utilities, once they have obtained such a certificate of public convenience and necessity specifying their service area, may expand that service area from time to time without further approval from the Commission:

[P]rovided, that this section shall not be construed to require such corporation to secure such certificate for an extension within any city or county . . . or for an extension into territory whether within or without a city or county, contiguous to its . . . plant or system, and not heretofore served by a public utility of like character
....

Idaho Code § 61-526.

Thus, the service areas of regulated utilities may contain areas not yet served. However, they will not necessarily contain all areas planned to be served in the foreseeable future. Regulated utilities are hesitant to expand their certificated areas until they immediately are prepared to provide service hook-ups. This is so because, once an area is included within their certificated area, the utility is obligated to provide service to anyone within the area requesting it.¹⁵

In other words, the legislature has declared that service areas for water suppliers and other utilities are to be flexible. They are not limited to city or county boundaries, and they are designed to expand with population demands.

¹⁵ "The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders; and it may not choose to serve only the portion of the territory covered by its franchise which is presently profitable for it to serve." 64 Am. Jur. 2d *Public Utilities* § 16 at p. 562 (1972).

Nothing in water code suggests a contrary result. While it is undoubtedly true that the place of use of a water right must not be so vague and indefinite as to fail to put other water users on fair notice of the size and scope of the water right, there is no arbitrary rule restricting a municipal water right to a city's corporate limits or current certificated area. The water code provides, simply, that an application for non-irrigation water show the "location of other use". Idaho Code § 42-202. This non-specific requirement for non-irrigation uses is in sharp contrast to the statutory requirement for irrigation, in which case the application must provide "the legal subdivisions of the lands proposed to be irrigated." Idaho Code § 42-202.

This reading of the statute is confirmed by the following commentary:

If the proposed use is for irrigation, the application in Kansas must describe the land to be irrigated by designating the number of irrigable acres in each 40-acre tract. If the proposed use is for municipal water supply, the application must give the estimated population to be served. . . . Idaho requires essentially the same basic information.

Waters and Water Rights, § 14.03(a) at 170-71 (Robert E. Beck ed., The Michie Company 1991).

Consequently, Boise Water Corporation urges that its water permit application be approved without arbitrary geographic limitation and with sufficient flexibility to accommodate reasonably anticipated future growth.

VI. Idaho's Constitution mandates the recognition of water rights for future growth.

Idaho's Constitution provides:

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 legislature plainly has some discretion to set procedures on how water rights are obtained. "It is settled law in Idaho that the legislature, by proper legislation, may regulate the appropriation and use of public waters, and that it has done so in the enactment of the current statute."

Hutchins, at 21-22 n.90 (citing *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927)).

That regulation, however, must not impair the fundamental right to appropriate. Were Idaho's water code to be construed to prohibit the appropriation of water for future growth, even where that growth was reasonably contemplated and the actions of the appropriator were sound and prudent in seeking to provide for that future growth, a grave constitutional question would arise.

Idaho today faces unprecedented, sustained population and economic growth. The task of providing sufficient supplies of water to meet demand when people and jobs arrive, is growing increasingly complex. The acquisition of new water supplies, as well as the transfer of existing rights to municipal use, poses increasingly difficult hurdles under a host of new environmental and planning regulations. It is a matter of practical fact that the lead time for planning, water right acquisition, and construction of treatment and distribution facilities is ever expanding.

Thankfully, Idaho's water law can accommodate that practical necessity through continued recognition of the growing communities doctrine. Were it otherwise, the Constitution's promise would not be fulfilled.

CONCLUSION

The principle that water rights may be obtained for future growth is well established in Idaho and other western states. Three decisions applying Idaho law have endorsed it, and it is fully consistent with Idaho's water code. It is recognized as well by authorities we have identified in Wyoming, Colorado, New Mexico, Nevada, California, Arizona, and Oregon. Our research has found no western state which has rejected the concept.

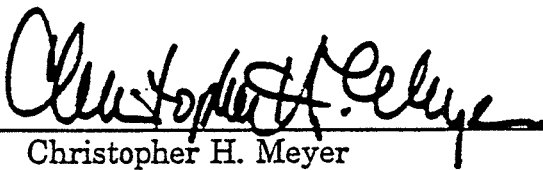
The Department may, therefore, grant a permit for municipal water use where the applicant shows that it will serve reasonably anticipated future need. Where the applicant proceeds to construct the planned project and completes its construction within the statutory proof period, the Department may issue a license for the water right, even if the project has some excess capacity at the time of the license, so long as the applicant continues to show that the project is designed to provide for reasonably anticipated future needs.

The service area for the water right, both at the time of permit and of license, should be reasonably well defined so as to put other users on fair notice of the scope and size of the right. However, the Department may not arbitrarily limit the service area to existing municipal boundaries or the existing service area

of the applicant, nor may the Department require the applicant to specify particular 40 acre tracts where the growth will occur.

Respectfully submitted this 7th day of September, 1994.

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