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Department of Water Resources  
Adjudication Bureau

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

Case No. 39576

Subcase No. 34-10030

**BRIEF ON MUNICIPAL  
WATER RIGHT ISSUES**

**DESCRIPTIVE SUMMARY**

In this brief, United Water Idaho ("United Water") (formerly Boise Water Corporation) and the City of Rexburg ("Rexburg"), collectively, "Municipal Claimants," address several issues respecting the nature of municipal water rights.

**INTRODUCTION**

On April 5, 1995, Special Master Brigette Bilyeu held a Standard Form 5 hearing on the City of Arco's water rights in which the Special Master and the parties discussed five issues which we summarize below:

1. What is the appropriate definition of a municipal right?
2. May the place of use be specified by reference to "city limits," as opposed to a description by legal subdivision?
3. May the place of use for a municipal water right be stated so as to include city limits (or service area) as they change over time?
4. May the place of use for a municipal water right extend beyond the city limits (or service area)?
5. May a municipal water right be sized in such a way as to allow a city to grow into its full use over time?

On April 11, 1995, the Special Master established a briefing schedule on these and any other issues relating to the nature of municipal water rights in this subcase. This brief responds to that invitation.

## **ARGUMENT**

Throughout this discussion, references to municipalities or cities should be understood to include public utilities, such as United Water Idaho, which are franchised to provide water for municipal purposes under a sale, rental or distribution. There is no distinction under the law between municipal rights held by a city and municipal rights held by such a public utility.

### **I. What is the appropriate definition of a municipal right?**

Although the term "municipal water right" is not defined in the water code, it has a well understood meaning in water law. A municipal water right is simply a water right used either by a municipality for the benefit of the city's inhabitants

or by a utility franchised by a municipality and regulated by the state to provide water to persons within a defined service area.

Municipal water rights may be exercised for a variety of purposes, including among others, domestic, fire protection, recreation, industrial, commercial, and irrigation. Municipal water typically is delivered via an integrated delivery system in which water for these various purposes is provided to numerous end users. Thus, the municipality holding the right may not know, or be able to control, whether a particular customer is using the water for household purposes, lawn, park or garden irrigation, crop irrigation, any number of industrial or commercial purposes, or a combination thereof. The label "municipal use" encompasses the whole range of multiple and changing uses to which such water may be put once it is sold or distributed.

It also should be noted that in some cases municipal suppliers may acquire, through purchase or otherwise, existing water rights used for other purposes (typically irrigation). If the water is not immediately needed for municipal purposes, the supplier may continue the original use (typically through a contract with the original owner). In such a case, the right would properly be listed as an irrigation right even though held by a municipal supplier. Later the right might undergo a change proceeding to convert its use to municipal purposes.

Finally, if a city has acquired water rights in excess of its current needs, it is permitted, but not required, under Idaho case law to enter into contracts to supply water to entities outside the service area.

For case law and other authority on these points, please see  
*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*, 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 (Idaho Dept. of Water Resources Sept. 7, 1994) (hereinafter  
"Memorandum").<sup>1</sup>

**II. May the place of use be specified by reference to "city limits,"  
as opposed to a legal description?**

The requirement for inclusion of a "legal description, by subdivisions" found  
in Idaho Code § 42-219 is applicable only to irrigation rights, not municipal rights.  
The requirement in Idaho Code § 42-1411(2)(h) that water rights included in a  
Director's Report include a "legal description" specifically omits the words "by  
subdivision" except, again, in reference to irrigation rights. This is fully consistent  
with longstanding practice, and the common sense rule, that a general reference to  
a municipality's city limits (or a utility's service area) provides adequate notice of  
the place of use.

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<sup>1</sup> It is our understanding that a copy of this *Memorandum* will be supplied as an  
attachment to the brief to be submitted by the Idaho Department of Water Resources.  
Hence, we will not burden the record with another copy. If that is not the case, however,  
we would be pleased to supply an additional copy, as a supplement to this brief.

**III. May the place of use for a municipal water right be stated so as to include city limits (or service area) as they change over time?**

The description of the place of use for a municipal water right (city limits or service area) need not be fixed in time, but may encompass the ordinary changes in the those boundaries over time.<sup>2</sup> If this were otherwise, it would be necessary for every city in the State to go through a formal change of water right proceeding for every single water right they owned every time a boundary changed.

Requiring changes in water rights simply because of a modification of a city boundary or utility service area has not been the practice in the past. It would place a substantial burden on both municipalities and the regulatory system, all without any significant public benefit.

Moreover, the practice, if required, would undermine the special, flexible nature of municipal water rights under the Prior Appropriation Doctrine, long recognized in Idaho and throughout the West. *See Memorandum.*

**IV. May the place of use for a municipal water right extend beyond the city limits (or service area)?**

Plainly, the place of use for a municipal water right may extend beyond the city's city limits. *See Memorandum.* The only issue is whether such use beyond the city limits must be described by a legal description including particular subdivisions. Municipal Claimants contend that a description of legal subdivisions is not required, at least when the extra-city use is not a purchased agricultural

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<sup>2</sup> This assumes, of course, no increase in the rate of diversion beyond that specified in the water right. Needless to say, any increase beyond the stated rate of diversion would require a new water right (assuming it is not eligible for some statutory amnesty).

right which continues to be used for irrigation purposes. However, this question need not be answered here. To our knowledge, the City of Arco is not claiming any water right whose place of use lies beyond its city limits.

The critical point from United Water's perspective is that no precedent be established suggesting that its place of use is limited to the Boise or Eagle city limits or that uses beyond those limits require a legal subdivision description. Such a requirement would be virtually impossible to satisfy. United Water is subject to a statutorily mandated regulatory procedure to establish its service area. That service area changes regularly (subject to regulation by the Public Utilities Commission), and includes substantial areas outside of the Boise or Eagle city limits. Consequently, as a practical matter, the place of use for United Water's water rights should be described by reference to United Water's certificated service area, and require more specific geographic description only for water supplied outside the service area.

**V. May a municipal water right be sized in such a way as to allow a city to grow into its full use over time?**

This, again, is a vital issue for Municipal Claimants. As a practical reality, it is impossible for a municipality simply to tack on infrastructure and water rights year by year as its needs grow. Instead, municipalities typically plan one or two decades ahead, or more. The infrastructure required to serve a city cannot gradually be sized up. Pipes, treatment facilities and other components must be sized at the time of design to meet growing needs over time. Likewise, in order to carry out its responsibility to its citizens, the city must acquire water rights of sufficient size to meet those growing demands. Waiting until the last minute to

acquire water rights for a growing community would be the height of irresponsibility.

Moreover, the obligation of municipal water suppliers is distinctly broad. A city must serve all its residents, including new arrivals. *See* Idaho Const. art. XV, § 1. Similarly, under Idaho law, a public utility must serve all those paying customers who come to reside within the certificated service area.

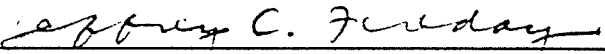
Fortunately, the special nature of municipal water rights has long been reflected in their treatment under the Prior Appropriation Doctrine. This is because the doctrine, as reflected in Idaho case law, recognizes that sound planning by a city to meet reasonable, foreseeable future need constitutes beneficial use today. This is analogous to the way water stored in a reservoir is deemed to satisfy the beneficial use test today, even though it may be years before a drought actually arrives and a particular block of water is used for irrigation.

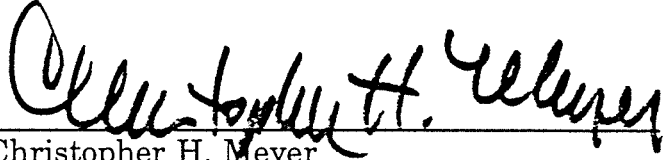
This is not to say that all water stored in reservoirs is beneficially used, any more than all water claimed by any municipality is necessarily beneficially used. In either case, the need must be real. *See Memorandum* at 16. The point is that the very nature of a storage right is to plan for predictable, future dry periods. Consequently, the ability to protect against reasonably foreseeable future drought satisfies the beneficial use requirement today. Similarly, the special obligation of municipal suppliers to meet reasonably foreseeable future growth means that designing a water supply system and acquiring water rights capable of serving that increased demand over a reasonable time horizon constitutes beneficial use of the water today.

The body of law on this subject is extensive. It is discussed at some length in the *Memorandum* referenced above. The bottom line is that sound planning for municipalities, which necessarily requires the acquisition of water rights into which the community grows over time, is fully consistent with the Prior Appropriation Doctrine and Idaho's water code.

Respectfully submitted this 21st day of April, 1995.

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## CERTIFICATE OF SERVICE

I hereby certify that on April 21, 1995 I caused to be served a true and correct copy of the foregoing to each of the persons named below by the method indicated below each of their names.

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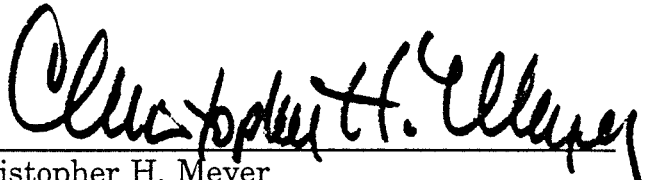
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