



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Interim Director

July 27, 2007

Tom Courtney
City Manager
City of Twin Falls
321 Second Avenue East
Twin Falls, Idaho 83303-1907

Re: City of Twin Falls Municipal Water Rights

Dear Mr. Courtney:

This letter is in response to your correspondence of May 22, 2007, to the Idaho Department of Water Resources concerning alternatives being considered by the City of Twin Falls for future water supplies and management alternatives related to the City's Blue Lakes wells located at the head of Blue Lakes Springs in Jerome County. Your letter indicates that the City owns ground water rights 36-2603A and 36-2646, which are junior to or equal in priority to water rights for aquaculture on the spring system. Your letter further states that the City cannot pump its full 52.5 cfs water rights without encroaching on senior water rights from the spring system.

Your letter states that the amount of water needed from the Blue Lakes wells is not constant throughout the year, and that there are extended periods when the full supply available from the wells is not required to meet current demand. According to your letter, the City is contemplating the possibility of diverting excess water from the wells during extended periods of reduced seasonal demand in the winter and early spring to be stored in a reservoir for release when needed during peak use periods in late June and early July. You estimate a diversion to storage rate of 5 cfs for ninety (90) days and a reservoir system volume on the order of 500 to 1,000 acre-feet.

Before proceeding further with this planning effort, your letter states that the City seeks some assurance from the Department that this proposed storage alternative is allowable under the City's current water rights 36-2603A and 36-2646, which together authorize the diversion of up to 52.47 cfs of ground water for municipal purposes.

The Snake River Basin Adjudication District Court has decreed water rights 36-2603A and 36-2646 as diversionary ground water rights with no storage component. Under the prior appropriation doctrine governing the allocation and administration of rights to the use of water from public sources in Idaho, water rights are either direct flow rights or one designated as storage rights. I.C. §§ 42-202(3) and 42-1409(1). "It is a fundamental rule that the vested rights of other users or senior appropriators cannot be impaired by storage and delayed use." Robert E. Beck, 2 *Water and Water Rights* § 13.02, at p. 13-4 (1991 ed. 2000). It is well established under Idaho case law that the holder of a non-storage water right is limited to direct beneficial use under the right and does not have the right to store unused water in order to put it to beneficial use at a later time. The Idaho Supreme Court established this principle early on in the case of *Hutchinson v. Watson Slough Ditch Company*, 16 Idaho 484, 485, 101 P. 1059 (1909) in which the Court stated:

At such times as an appropriator is not using the water under his appropriation, and is not applying the water to a beneficial use, such water must be considered and treated as unappropriated public water of the state, and for such period of time is subject to appropriation and use by others.

The Idaho Supreme Court has consistently followed this basic principle of the prior appropriation doctrine that during the times a senior right holder is not beneficially applying water under a right, junior right holders have a right to use and apply the water to beneficial use. See e.g. *Knutson v. Huggins*, 62 Idaho 662, 668, 115 P.2d 421, 424 (1941) ("When an appropriator is not using water under his appropriation ... he must allow the water to flow down the bed of the natural channel."). The Idaho Supreme Court has further held with respect to actions that enlarge usage under a right that, "It is difficult, if not impossible, to perceive of a situation in which an enlargement would not injure an appropriator who had an established right if the enlargement receives priority." *Fremont Madison Irrigation District v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 461, 926 P.2d 1301, 1308 (1996).

Other prior appropriation doctrine states follow this same principle. In *Handy Ditch Co. v. Greeley & Loveland Irrigation Co.*, 280 P. 481 (Colo. 1929), the plaintiff had a direct flow water right junior to defendant's storage decree. The plaintiff sought injunctive relief that would allow it to divert the maximum amount authorized under its junior irrigation right so that it could "temporarily impound" the excess water for use later in the season. The Colorado Supreme Court rejected plaintiff's attempt to divert water in excess of its immediate irrigation needs under a direct flow water right so that it could use the water later in the season. *Id.* at 481-82.

In *Whitcomb v. Helena Water Works Co.*, 444 P.2d 301, 303 (Mont. 1968), the Montana Supreme Court considered the claimed right of the city to store water under its direct flow water right during times of shortage. The court denied the city's claim to a continuous right to store water during all seasons holding: "Persons who construct and maintain reservoirs to impound waters of an adjudicated stream have the burden of showing that they do not interfere with the rights of prior appropriation of water from the stream."

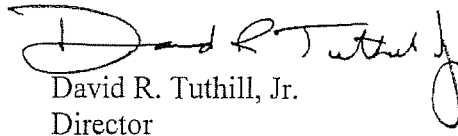
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The additional issue that needs to be addressed in response to your inquiry is whether municipalities in Idaho that hold direct flow water rights may be treated differently than other right holders and allowed to divert and store water in excess of winter seasonal demands so that the water can be available to satisfy higher use demands in the summer months. The question arises because municipalities are treated differently than other water users in some respects under Idaho law. For example, municipalities in Idaho are authorized by statute and case law to appropriate or otherwise obtain water rights in excess of current needs to meet the demands of future population growth. See I.C. § 42-202 (2) (municipal appropriations for reasonably anticipated future needs authorized); *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940) (right to acquire and hold irrigation water rights for future municipal needs); *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969) (right of municipality to acquire water rights in excess of current needs). The ability of municipalities to appropriate and hold water rights in excess of current demands in order to satisfy reasonably anticipated future needs does not give rise, however, to the ability to exercise a direct flow water right as though it were a storage right.

It is acknowledged that a municipality need not hold a "storage" water right to authorize the temporary storage typically associated with a municipal water delivery system and that may be necessary in order to satisfy peak delivery demands on a daily or multi-day basis. However, when extended storage is required to address seasonal changes in water delivery demand the need for a water right that specifically authorizes storage is evident in order to avoid causing injury to other direct flow right holders relying upon the same water source.

In conclusion, Idaho law does not give municipalities the ability to divert water under a direct flow water right in excess of current needs for the purpose of storing the water for use in a subsequent season when the water demands for the municipality may be greater. To allow such a practice would be contrary to principles of the prior appropriation doctrine because injury would be caused to the holders of other water rights having equal or junior dates of priority.

Sincerely,


David R. Tuthill, Jr.
Director

C: Charles E. Brockway, P.E.