

Handbook on Idaho Water Law

GIVENS PURSLEY ^{LLP}

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WATER RESOURCES
WESTERN REGION

Handbook on Idaho Water Law

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A. INTRODUCTION TO WATER LAW

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

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

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

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

These are changing times for water right holders. Yet the basic principles of allocation today are the same ones devised by the first settlers more than a century ago. The first rules to evolve were

simple understandings worked out (and sometimes enforced at the end of a gun) in the early mining camps. Today, the legislatures, courts, and regulatory bodies have taken over the task of writing the law. However, the basic premises remain unaltered. First, water is a public resource, owned by the public. Second, the right to use water in the West is allocated on the basis of who first puts it to beneficial use. When proper procedures are followed, the right to continue using water so “appropriated” ripens into a legally enforceable “water right.”

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

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

The market for water, however, is unlike others. Water is not a simple commodity like apples or coal. It flows; it is used and used again; it is lost, recycled and renewed. To the user, its real value lies in the physical and legal reliability of its source. This leads to the central principle of Western water law—priority. The most commonly described attribute of water rights in the West is the rule that “first in time is first in right.”¹ This is the essence of the prior appropriation doctrine—the governing law in the allocation of water throughout the West.² The basic principles of Idaho’s water law system are

¹ This principle is codified, literally, in Idaho Code § 42-106.

² The prior appropriation doctrine (to which Idaho subscribes) contrasts with the law of “riparian rights” prevalent in the Eastern United States where water is more plentiful. Riparian water rights are based on the principle of equal sharing of water among all riparian (streamside) landowners, without regard to who got there first. Nine of the Western states (California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington) mix together elements of prior appropriation and riparian water law. Even in these “dual system” states, however, the principles of prior appropriation dominate.

Idaho’s commitment to the prior appropriation doctrine is spelled out in its constitution: “The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes.” Idaho Const. art. XV, § 3. The prior appropriation doctrine was followed even prior to Idaho’s admission to the Union in 1890. *Malad Valley Irrigating Co. v. Campbell*, 2 Idaho 411, 18 P. 52 (1888). In *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 P. 1059 (1909), the court held that riparian rights are repugnant to the constitution and exist only to the extent they do not conflict with rights acquired through prior appropriation. Idaho rejected any remnants of the riparian rights doctrine

summarized below.

B. A BRIEF IDAHO HISTORY

Water resource development in Idaho has proceeded under four distinct phases. (See Jeffrey C. Fereday & Michael C. Creamer, *Swan Falls in 3-D: A New Look at the Historical, Legal and Practical Dimensions of Idaho's Biggest Water Rights Controversy*, 28 Idaho L. Rev. 573 (1992).) The first was the "easy" phase. It began with the earliest direct diversion of water from the Boise River in 1843. Other direct diversions of natural flow from the Snake River and its tributaries began in earnest in the 1860s, peaking in the 1880s and 1890s. By the turn of the last century, the direct flows, in large part, were fully appropriated.

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

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

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

Now, at the turn of the century, we are—perhaps—about to embark upon the fifth phase. Aquifer storage and recovery (or "ASR") takes the concept of water management, which has long been applied to surface streams, and applies it underground. Aquifers—long viewed as passive storage reservoirs filled by acts of nature (or as an incidental result of surface irrigation)—are now eyed as having the potential to capture vast quantities of new water through intentional artificial recharge.

in *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912) (rejecting the coexistence of riparian rights). See also *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973) (rejecting "correlative rights" in ground water).

C. THE FUNDAMENTALS OF WATER RIGHTS

1. A usufructuary right—a right to use

A water right is a property right, but the water right owners do not “own” the water itself. This is because Idaho’s rivers, streams, lakes and ground water all belong to the people of the state. A water right is a legally protected right to *use* the public’s water. Water rights are often described by lawyers as “usufructuary,” meaning a right to the use of a thing, not ownership of the thing itself. Usufructuary rights are nevertheless property rights—real estate—fully protected against unconstitutional takings.

2. Acquired through appropriation

One obtains a water right simply by “appropriating” it, that is, putting it to beneficial use. Idaho, like most Western states, requires that certain administrative procedures be followed to secure the appropriation. The appropriator pays nothing for the water itself (other than nominal administrative fees). Once obtained, the water right is valuable property which may be sold for whatever the market will bear.

3. Priority

Early water users are referred to as “senior,” while those who come later are called “junior.” A senior water right holder is entitled to have his right filled completely before any junior right holder is entitled to divert at all. This is the principle of “first in time is first in right.”³

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

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

The senior can obtain the state’s help in enforcing his priority. When the senior places a “call” on the water source, junior appropriators are obliged to reduce or cease their diversions to supply the senior. Administering water rights in this manner is typically carried out by a locally-elected state official

³ Idaho Code § 42-106.

known as a watermaster, but priorities also may be enforced by the courts.⁴ Idaho statutes require that the rights on a stream first must be adjudicated and a water district formed to elect such a watermaster.⁵

4. Beneficial use

The courts often recite that beneficial use is “the basis, the measure and the limit” of any water right.⁶ This same statement of the rule appears in federal reclamation statutes. The concept arises from the fact that a water right is not a right to the water itself, but rather is a right to *use* water owned by the people of the state.⁷ In legal parlance, a water right is a “usufructuary” right. Thus, regardless of what the right holder may believe his right to be, and regardless of what the right’s license, decree or other documentation proclaims, the extent of the right is limited to that amount which has actually been placed to beneficial use.⁸ Thus many “paper” water rights in Idaho actually may be subject to challenge on the basis that they are not being put to beneficial use.⁹

Idaho’s constitution, like those of most Western states, names only a few beneficial uses for which water may be appropriated: agriculture, domestic uses, manufacturing, mining and hydropower.¹⁰ However, the Idaho Supreme Court has ruled that this is not an exclusive list.

With the exception of those uses elevated to beneficial status by
Article 15, § 3, of the Constitution, the concept of what is or is not

⁴ See *Geertson v. Barrack*, 3 Idaho 344, 29 P.42 (1892); *Dunniway v. Lawson*, 6 Idaho 28, 51 P. 1032 (1898).

⁵ See Idaho Code, Title 42, Chapter 6.

⁶ See Wells A. Hutchins, *Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 39 (1968) (an appropriator is held to the quantity of water he is able to apply to a beneficial use at a particular time, within the limit of his appropriation); 3 *Kinney on Irrigation*, § 1579 (2d ed. 1912) (no one is entitled to have a priority adjudged for more water than he has actually appropriated, nor for more than he actually needs); 2 *Waters and Water Rights* § 17.03(b) (1991); Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 Wyo. L. J. 1 (1956) (actual beneficial use is the measure of the right, and the right is not protected from loss by wasteful over-application); Golze, *Reclamation in the United States* 95 (1961) (an essential part of the appropriation doctrine is the requirement that water be put to beneficial use, and if beneficial use lags, the right may be lost); Meyers, Tarlock, Corbridge & Getches, *Water Resource Management* 282 (3rd ed. 1988) (the concept that beneficial use is the basis, measure and limit of an appropriative right is recognized by state constitutions, statutes and judicial decisions throughout the Western states).

⁷ *Coulson v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320, 323-24, 227 P.29 (1924).

⁸ See e.g., *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1943); *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 231 P. 418 (1924) (decree is evidence of beneficial use of the right only as of the date of the decree).

⁹ See e.g., *Hillman v. Hardwick*, 3 Idaho 255, 28 P. 438 (1891).

¹⁰ Idaho Const. art. XV, § 3.

a beneficial use must necessarily change with conditions. ... The notion of beneficiality must include a requirement of reasonableness.¹¹

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.¹²

Recent Idaho statutes have defined a few specific uses as beneficial.¹³ However, it is still true that the "generic" term has never been statutorily defined.

The case law has filled in the constitutional and statutory gaps. For instance, it is well established that storage of water in a reservoir is beneficial, so long as the storage is related to an identifiable area and nature of use, such as irrigation, hydropower or municipal purposes.¹⁴ At the other end of the spectrum of uses, Idaho Supreme Court decisions and water right licenses issued by the Idaho Department of Water Resources ("Department") have approved fish and wildlife habitat, aesthetics, recreation and similar purposes as beneficial uses in Idaho. Today, the idea that only certain

¹¹ *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).

¹² *State of Idaho, Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 443, 530 P.2d 924, 927 (1974).

¹³ For instance, Idaho's Ground Water Recharge Act expressly states that "the appropriation and underground storage of water ... for purposes of ground water recharge shall constitute a beneficial use." Idaho Code §§ 42-4201(2), 42-4201A(2); *see also*, Idaho Code § 42-234(2). In a similar vein, in 1996, the Legislature addressed the issue in the context of municipal water rights. Municipal Water Rights Act of 1996, Idaho Code § 42-222 ("A water right held by municipal provider to meet reasonably anticipated future needs shall be deemed to constitute a beneficial use"). In a third example, the Legislature has declared certain instream uses to be beneficial. Idaho Code §§ 42-1501 to 42-1505.

¹⁴ In the irrigation context, storage is seen as protection against recurring drought and as a source of supplemental supply for appropriators whose natural flow rights may not provide them enough to complete the irrigation season.

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

Several Western states limit the amount of water which may be stored under the "one fill rule" which allows a reservoir to be filled only once per irrigation season. *City of Westminster v. Church*, 445 P.2d 52 (Colo. 1968); *Orchard City Irr. Dist. v. Whitten*, 361 P.2d 130 (1961).

types of use are “beneficial” is little more than an historic relic.¹⁵ The plain trend is toward recognition that, so long as the use serves some purpose and is not inherently wasteful, it probably qualifies as a beneficial use.

5. Duty of water

Closely related to the rule of beneficial use is the concept of “duty of water,” which is that amount of water reasonably necessary to achieve the purpose for which the water was appropriated. Each water right is limited by its “duty of water” even though the license, decree or other basis for the right does not specify such a duty.¹⁶ For instance, a person might hold a license for a right to divert 10 cubic feet per second (“cfs”) for use on a particular piece of land. Nevertheless, a competing user could argue that this rate of diversion is more than is required to serve the particular use. In making this argument, the other user would contend that the quantity stated in the first user’s licensed right exceeded the duty of water and should be cut back. Such a challenge would arise ordinarily in a change or transfer proceeding or in a general adjudication.

In Idaho, a statutory presumption regarding the duty of water has been codified. “[N]o one shall be authorized to divert for irrigation purposes more than one cubic foot of water per second of the normal flow for each fifty (50) acres of land to be so irrigated, or more than five (5) acre feet of stored water per annum for each acre of land to be so irrigated, unless it can be shown to the satisfaction of the department of water resources that a greater amount is necessary.”¹⁷ This amounts to one “miner’s inch” of water per acre.

The duty of water will include a reasonable amount of seepage, evaporation and carriage loss, and varies from place to place depending on conditions. In addition, the presumption can be overcome by evidence that more (or less) water is reasonably needed. For instance, a user could obtain a water right for 11 cfs if he could demonstrate that 10 cfs was required for application to his 500 acres and an

¹⁵ An example of such a “relic” is *Empire Water and Power Co. v. Cascade Town Co.*, 205 F. 123 (8th Cir. 1913). In this case, a federal court applying Colorado law denied an instream flow water right to a resort community build around a natural waterfall. “[W]e think complainant [the town] is not entitled to a continuance of the falls solely for their scenic beauty. The state laws proceed upon more material lines. . . . It may be that if the attention of the lawmakers had been directed to such natural objects of great beauty they would have sought to preserve them, but we think the dominant idea was utility, liberally and not narrowly regarded, and we are constrained to follow it.” *Id.* at 129.

¹⁶ The rather odd phrase “duty of water” is understood more easily in the context of the following quotation from an early Idaho case: “It is a cardinal principle established by law and the adjudications of this court that the highest and greatest duty of water be required. The law allows the appropriator only the amount actually necessary for the useful or beneficial purpose to which he applies it.” *Munn v. Twin Falls Canal Co.*, 43 Idaho 198, 207, 252 P. 865 (1926).

¹⁷ Idaho Code § 42-202; *see also* Idaho Code § 42-220 (repeating the requirement in the context of water right transfers).

additional 1 cfs was lost in transporting the water to the fields. (Note that the water right is measured at the point of diversion. Only a fraction of the water diverted under a user's water right, perhaps 50 percent, is actually consumed beneficially.)

The duty of water and beneficial use requirements both are central concepts in the corollary rule of Western water law that a water right does not include the right to waste water. In addition, the courts and legislatures of many Western states, Idaho among them to some extent, have announced that encouraging (or requiring) "maximum utilization" and efficiency also are legitimate subjects of state regulation.¹⁸

6. Quantification

All water rights must be quantified in some way. Very early irrigation water rights were quantified simply by reference to the lands which were irrigated. Just how much water this means is left for subsequent administrative or judicial determination.

Older water rights are often quantified simply in terms of a diversion rate. This is the rate of flow associated with the diversion of out its source. Even if this is the only "number" associated with the water right, however, it should be understood to be implicitly limited also in terms of annual volume, season of use, and consumptive use. More recently issued or decreed water rights are more fully defined in these other parameters.

Thus, for instance, a water right designed to irrigate 100 acres might be issued with a rate of diversion of 2 cfs (based on the standard "inch per acre" of flow). However, its annual volume might be capped at 400 acre-feet (based on 4 acre-feet per acre). Likewise, its consumptive use would likely be measured at 300 acre-feet (based on 3 acre-feet per acre).

In contrast, a municipal water right is quantified solely in terms of flow (rate of diversion). In other words, its annual volume equates to what would be produced if operated at that rate of flow 24 hours per day for 365 days. Thus, a municipal right quantified at 2 cfs would carry (either implicitly or explicitly) an annual volume cap of 1,448 acre-feet (in contrast to 400 acre-feet for a typical 2 cfs irrigation right). As a practical matter, a municipal provider will not pump the full allowable volume for a number of years. Eventually, however, the municipal provider with "grow into" the full annual volume permitted. See discussion of municipal rights and the "growing communities doctrine" in Chapter J at page 46.

¹⁸ The seminal case is *Fellhauer v. People*, 167 Colo. 320, 447 P.2d 986 (1968). Though extensively cited in Colorado and by commentators, the case has never been cited by an Idaho appellate court. However, the doctrine has also long been recognized in Idaho. *Poole v. Olaveson*, 82 Idaho 596, 502, 356 P.2d 61, 65 (1960) ("The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources"); *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 904, 792 P.2d 926, 929 (1990). The doctrine has now been codified in Idaho. Idaho Code § 42-226.

Domestic rights are quantified based on a statutory formula.¹⁹ Industrial and other water rights are tailor-made to the use, and quantified based on the specific needs of the appropriator.

7. Diversion requirement

The rule as traditionally stated is that a water right requires a “*diversion* to a beneficial use.”²⁰ That is, it is necessary to artificially remove (or impound) water in order to obtain a legally protected right to its use. However, Idaho’s Supreme Court has ruled that the state constitution does not require a diversion where none is necessary to accomplish the beneficial use. It is as yet unclear whether instream flow rights can be established in Idaho outside of Idaho’s rather restrictive minimum stream flow statute, Idaho Code §§ 42-1501 through 1505. (See discussion in section N.3 at page 74.)

8. Preferences

Like most Western states, Idaho’s constitution ranks various beneficial uses in terms of “preferences.”²¹ For instance, domestic uses have preference over all others. However, courts throughout the West have interpreted these provisions simply as conferring a right of condemnation on the preferred uses. Thus, while a city may condemn an agricultural water right for its own municipal use, it must pay the farmer the full market value for the water.

9. Water rights as property

Although a water right is described as “usufructuary” in nature—a right to use under certain conditions—it is a real property right nonetheless. It may be sold, donated, mortgaged, deeded, leased, devised or otherwise treated in most ways like any other real estate. In Idaho a water right will pass to the purchaser of land any time title to land is transferred (unless the right is specifically reserved).

Because they are property, water rights are subject to the U.S. Constitution’s prohibition

¹⁹ Idaho Code §§ 42-111.

²⁰ See discussion in footnote 211 at page 70.

²¹ “Priority of appropriations shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.” Idaho Const. art. XV, § 3.

against uncompensated takings.²² This does not mean that any government interference with a person's water right constitutes a compensable taking. However, the law of takings remains in flux.²³ Generally speaking, any physical invasion or a regulation that completely destroys the economic value of the water right probably constitutes a taking.²⁴

D. GROUND WATER

When compared with the development of a surface water appropriation and administration system in the West, the history of ground water development and administration has been relatively brief. The complex hydrogeology of ground water sources inhibited the growth of the general knowledge needed to exploit this abundant resource. Indeed, early understanding of ground water throughout the West often rested as much on superstition as scientific observation. Despite these initial hindrances, Idaho now ranks among the top five states in terms of the volume of ground water used.²⁵

Court decisions from the late 1800s and early 1900s reflect the limited understanding that people then had of the ground water resource. Like some other prior appropriation states, Idaho's constitution authorizes appropriations from "natural streams," but does not mention ground water.²⁶ In

²² The government is required to pay compensation if its action results in a "taking" of property under the Fifth Amendment. U.S. Const. amend. V (takings clause). The Fourteenth Amendment makes the takings clause applicable to actions by state government as well. U.S. Const. amend. XIV.

²³ Traditionally the courts have given wide latitude to regulatory bodies, but the rules for what constitutes a taking remain mushy. See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (land use regulation will be a taking only "if the ordinance does not substantially advance legitimate state interests ... or denies an owner economically viable use of his land.") No doubt, the courts will be called upon to provide further guidance on this issue. The lower courts do not appear to be applying the rules consistently. See, e.g., *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982) (denial of a section 404 permit did not constitute a compensable taking), *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987), on remand, 21 Cl. Ct. 161 (1990) (to determine whether there is a complete diminution in value the court must consider the value of the land as sold to speculators), *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990) (regulatory taking found in denial of section 404 permit).

²⁴ To further complicate matters, a doctrine known as the "navigation servitude" exempts the federal government from the obligation to pay compensation for federal actions which would otherwise constitute compensable takings when the federal action is taken pursuant to the navigation power. *Arizona v. California*, 283 U.S. 423 (1931). Recent U.S. Supreme Court decisions make clear, however, that even the navigation servitude is not a complete defense. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (proposed regulation to require public access to pond newly connected to a bay amounted to a taking); *Vaughn v. Vermillion Corp.*, 444 U.S. 206 (1979) (proposed regulation to require public access to waterbody amounted to a taking).

²⁵ The Idaho Groundwater Quality Council estimates that ninety percent of Idaho's drinking water comes from ground water sources and Idahoans divert approximately 6,500 million gallons of ground water per day. Irrigated agriculture accounts for the majority of ground water usage in the state. *Idaho Ground Water Quality Plan, Protecting Ground Water Quality in Idaho*, Idaho Ground Water Quality Council (1991).

²⁶ Idaho Const. art. XV, sec. 3.

1899, the Idaho Legislature passed an act that provided that appropriations could be made from subterranean waters as well as from rivers, streams, lakes and springs.²⁷ Despite this statute, disputes continued into the 1930's regarding whether ground water was subject to the prior appropriation doctrine. Several of the early reported court decisions involved contests where each party labored to prove or disprove that a particular diversion was from water that flowed in an underground channel with a defined bed and banks so as to be an appropriation of water from a "natural stream".²⁸ In 1931, Idaho's Supreme Court confirmed that ground waters are subject to appropriation under the priority doctrine either by the constitutional method of diversion and application to beneficial use, or by the statutory permit procedures.²⁹

The subsequent enactment of Idaho's Ground Water Act in 1951³⁰ established a comprehensive scheme of ground water appropriation, administration and protection, and validated pre-existing ground water appropriations. The Ground Water Act was amended in 1953 to provide, among other things, that the doctrine of first in time was recognized for ground water, but could not be exercised so as to block full economic development of the water resource. Prior ground water appropriations are to be protected through the maintenance of *reasonable* pumping levels. The 1953 amendments also granted the Department authority to protect ground water from depletion and to prohibit ground water withdrawal from existing wells when necessary to protect senior ground water appropriations.³¹

²⁷ 1899 Sess. Laws 380 (codified at Idaho Code § 42-103). Idaho's Territorial Statutes provided that "[t]he right to the use of the running water flowing in a river, or stream, or down a canyon or ravine, may be acquired by appropriation." Idaho Rev. Stat. § 3155 (1887).

²⁸ Occasionally, fact actually corresponded with the Stygian conception of ground water, in which subterranean watercourses were believed to flow in well-defined channels. An example is reported in *Medano Ditch Co. v. Adams*, 68 P. 431 (Colo. 1902). Medano Creek prehistorically had flowed west from the Sangre de Cristo Mountains in southern Colorado, and had served as the source of water for Big Springs Creek. Subsequent geologic events caused the formation of the Great Sand Dunes which covered the Medano Creek channel to a depth of several hundred feet. Although a majority of the surface flow of Medano Creek thereafter was deflected by the dunes to the southwest, significant subsurface flows continued to follow the original channel under the dunes to emerge at the head of Big Springs Creek seven miles to the west. In resolving a dispute between appropriators, the Colorado court held that the ground water flows were within a natural stream within a defined bed and banks and the junior's appropriation of water from Medano Creek was enjoined to protect senior appropriations from Big Springs Creek. Colorado continues to observe legal distinctions between appropriations of surface and ground waters.

Examples of water flowing in defined channels also exist in the Idaho's Snake Plain Aquifer where lava tubes carry large flows of water for considerable distances and where it has been hypothesized that the Big Lost River flows southwest in one or more ancient buried river channels to emerge from the canyon walls of the Snake River at Thousand Springs near Twin Falls, Idaho. However, for purposes of appropriation and administration, surface and ground waters are treated similarly under Idaho law.

²⁹ *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1931).

³⁰ 1951 Idaho Sess. Laws, ch. 200, p. 423 (codified at Idaho Code § 42-226 and elsewhere).

³¹ 1953 Idaho Sess. Laws, ch. 182, pp. 277-91 (codified at Idaho Code §§ 42-226, 42-231 to 42-237 and elsewhere).

1. Ground water appropriation

After 1963, the application, permit and license procedures became the exclusive means of acquiring ground water in Idaho.³² However, exceptions to the permit/licensing requirements still exist for domestic wells and drainage and recovery wells.³³ In addition to these exemptions, domestic wells drilled prior to March 29, 1978 may be absolutely protected from any significant drawdown by junior ground water diversions.³⁴

Indeed, this view of the law is reflected in a condition now typically added to new water rights:

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

Condition No. 5 from City of Eagle's Amended Permit No. 63-11413 (Issued by IDWR Nov. 20, 1998).

The same appropriation procedures set out for surface waters apply to ground water, including the requirement of public notice and an opportunity to protest.³⁵ In addition to the permit requirements for appropriation of ground water, a well drilling permit must be issued before a well may be drilled. All wells, including domestic, drainage and recovery wells, must be drilled by licensed well drillers.³⁶

³² 1963 Idaho Sess. Laws 623 (codified at Idaho Code § 42-229).

³³ Idaho Code § 42-227. A domestic well is a well that provides water for domestic uses, which under § 42-111 is limited to:

[t]he use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half acre of land, if the total use is not in excess of thirteen thousand gallons per day. . . or any other uses if the total use does not exceed a diversion rate of four one-hundredths cubic feet per second and diversion volume of twenty-five hundred gallons per day.

³⁴ See *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

³⁵ The protest must be filed within 10 days of last date of publication of notice of the application. Idaho Code § 42-203A(1). If the would-be protestant misses this deadline, he or she may petition to intervene in the proceeding.

³⁶ Idaho Code § 42-227. An exception to the well driller licensing requirement exists for persons who dig wells by hand on their own property. Idaho Code § 42-238 *et seq.* contains the licensing requirements for well drillers and well

2. Ground water transfers

Ground water transfers are subject to the same procedural requirements as transfers of surface waters, except that if an applicant proposes an out-of-basin transfer of ground water that will irrigate more than five-thousand acres, or that will involve a volume of more than 10,000 acre-feet per year, the transfer must be approved by both the Director and the Legislature.³⁷

3. Protection of reasonable pumping levels

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

The effects of neighboring wells upon each other have been the subject of numerous court decisions. The legal issues presented by these well interference cases include the right of a senior ground water appropriator to curtail junior ground water diversions to maintain the water level at the senior's well, and the authority of the Department to establish a pumping level from which both seniors and juniors may be required to pump. As the law has developed in the Western states, the answer generally has been that a senior appropriator is entitled to the maintenance of a reasonable pumping level. This principle is codified in Idaho's Ground Water Act, which states that

[t]he traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state... and while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water

drilling standards. Well drillers must demonstrate their knowledge of Idaho water law and well construction methods and standards before they may be licensed. They must prepare accurate well logs of all wells drilled. Well drillers also are required to obtain a surety bond, which under certain circumstances, can be charged by the Department for the cost of reconstructing or abandoning wells that have been improperly constructed. Well drillers are subject to civil penalties of up to \$10,000 for submitting fraudulent well logs.

³⁷ Idaho Code § 42-226.

pumping levels as may be established by the director....³⁸

The underlying basis for what at first appears to be a departure from a strict application of the priority doctrine is that no appropriator is entitled to maintain an unreasonable means of diversion that prevents the optimum use of the state's water resource. The seminal case of *Fellhauer v. People*³⁹ was decided in 1968 by the Colorado Supreme Court. It remains one of the most oft-quoted decisions concerning the tension between vested private rights and the maximum use of the state's water resources. In *Fellhauer*, the Colorado court noted that the concept of maximum use of water always has been implicit in Western water law. Remarking on the water appropriation provisions in Colorado's constitution, which were the model for Idaho's, the Court observed:

It is implicit in these constitutional provisions that, along with *vested rights*, there shall be *maximum utilization* of the water of this state. As administration of water approaches its second century the curtain is opening on the new drama of *maximum utilization* and how constitutionally that doctrine can be integrated into the law of *vested rights*. We have known for a long time that the doctrine was lurking in the backstage shadows as a result of the accepted though oft violated, principle that the right to water does not give the right to waste it.⁴⁰

There has been some disagreement in Idaho regarding whether Idaho Code § 42-226 imposes a reasonable means of diversion requirement only upon ground water uses. However, the better argument seems to be that all water rights are subject to the reasonable diversion requirement, and that the statute simply reiterates that requirement for wells in the context of the Ground Water Act of 1951.

Cases involving surface water have held consistently that an appropriator may not command the entire flow of a stream to effect an appropriation of only a portion. One way to read these cases is that the means of diversion does not attach as an absolutely protected element of the water right.⁴¹ This

³⁸ Idaho Code § 42-226.

³⁹ *Fellhauer v. People*, 447 P.2d 986 (Colo. 1968).

⁴⁰ *Fellhauer*, 447 P.2d at 994 (emphasis original).

⁴¹ See e.g., *Doherty v. Pratt*, 34 Nev. 343, 124 P. 574 (1912) (reasonable use requirement applies to methods of diversion); *Tudor v. Jaca*, 178 Or. 126, 164 P.2d 680 (1946) (wasteful methods of diversion common among early settlers do not establish a vested right to their continuance); *Hough v. Porter*, 51 Or. 318, 98 P. 1083 (1909) (old methods of diversion are not a right but a privilege permitted so long as they can be exercised without substantial injury to anyone); *Tulare Irrig. Dist. v. Lindsay Strathmore Irrig. Dist.*, 3 Cal. 2d 489, 45 P.2d 972 (1935) (appropriator may not be compelled to use most scientific diversion method, but it must be reasonable according to the custom of the locality); *Wayman v. Murray City Corp.*, 23 Utah 2d 97, 458 P.2d 861 (1969) (applying "rule of reasonableness" in refusing to protect ground water appropriator from diminution of pressure in existing well); *City of Colorado Springs*

was the case in *Van Camp v. Emery*, where the court held that an appropriator was not entitled to dam an entire stream merely to raise the water level sufficiently to subirrigate his land.⁴²

The same approach was taken by the U.S. Supreme Court in *Schodde v. Twin Falls Water Co.*, where a senior appropriator had used a waterwheel driven by the current of the Snake River to raise irrigation water to his lands. The Supreme Court held that there is “no right under the constitution and laws of the State of Idaho to appropriate the current of the river so as to render it impossible for others to apply the otherwise unappropriated waters of the river to beneficial uses.”⁴³ The Court concluded that a water right “must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.”

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

As courts have faced this issue in the context of ground water disputes, they have reached much the same result. An exception to this rule, based upon statute, has been recognized in Idaho in the case of *Parker v. Wallentine* where the Idaho Supreme Court held that Idaho Code § 42-227, which exempted domestic wells from the permit requirements of the Ground Water Act, also exempted them from the imposition of a reasonable pumping level requirement.⁴⁴ Also, the case of *Bower v. Moorman* can be read as protecting a prior appropriator in maintenance of historical artesian pressure.⁴⁵ However, the court’s discussion in *Bower* suggests that the junior ground water diversion was enjoined primarily because of the uncertainty about the effects it would have had on the senior’s right, rather than simply to protect historical artesian pressure:

No doubt, in many instances, it can be positively demonstrated that underground waters exist in large quantities, and where that can be done, a solution of the difficulties incident to the right to the use of percolating waters might be readily arrived at. However, where there exists great uncertainty as to the amount of underground water and the damage incident to the destruction and entire loss of

v. Bender, 148 Colo. 458, 366 P.2d 552 (1961) (at his own point of diversion, each diverter must establish some reasonable means of effectuating his diversion).

⁴² *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752 (1907).

⁴³ *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1911).

⁴⁴ *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

⁴⁵ *Bower v. Moorman*, 27 Idaho 162, 180 (1915).

the flow of the same—which is true in the case at bar—we are confronted with a problem that is not so easily solved.⁴⁶

Ultimately, resolution of well interference issues may devolve to the simple question of “who pays” to avoid or mitigate the adverse effects of a junior’s pumping on water levels or pressure in a senior’s well. In Idaho, it appears that the junior is required to provide compensation for expenses incurred by a senior, exempt domestic well owner to pump from lower levels,⁴⁷ or those incurred by a non-exempt senior to pump from below an established reasonable pumping level.⁴⁸ Decisions in other states such as Colorado have held that senior pumpers should not be required to improve their diversion facilities “beyond their economic reach”.⁴⁹

4. Protection of ground water supplies from depletion

The 1953 Amendments to Idaho’s Ground Water Act also provided the Department with the authority to regulate ground water withdrawals from aquifers which are subject to depletion. The primary mechanism for this regulation is the designation by the Department of Ground Water Management Areas and Critical Ground Water Areas.

A Critical Ground Water Area is any ground water basin without sufficient ground water to provide a reasonably safe supply for irrigation or other uses in the basin at the then current rates of withdrawal.⁵⁰ A Ground Water Management Area is an area identified by the Department as approaching the conditions of a Critical Ground Water Area.⁵¹

Upon designating a special ground water area under the Ground Water Act, the Department may require measurement and reporting of existing withdrawals, limit or prohibit new appropriations, or curtail or reduce diversions in order of priority to bring withdrawals into balance with the reasonably anticipated average rate of future natural recharge within the basin.⁵²

⁴⁶ *Bower*, 27 Idaho at 179-80.

⁴⁷ *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

⁴⁸ *Baker v. Ore-Idaho Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973).

⁴⁹ *City of Colorado Springs v. Bender*, 148 Colo. 458, 366 P.2d 552 (1961); *Alamosa-La Jara Water Users Protection Ass’n v. Gould*, 674 P.2d 914 (Colo. 1983).

⁵⁰ Idaho Code § 42-233a.

⁵¹ Idaho Code § 42-233b.

⁵² Idaho Code §§ 42-233a, 42-233b and 42-237a.

5. Conjunctive management of surface water and ground water

The integration of ground water and surface water management under the prior appropriation system is known as conjunctive management, and is perhaps the most complex management and policy issue in Idaho water administration today. Part of this complexity comes from the limited amount of knowledge about the ground water resource itself. Another factor contributing to this management complexity is the fact that even where interconnection of sources is well known, the *effect* of withdrawals from one source on the other can be exceedingly difficult to determine. The extent and timing of these effects often are delayed, masked or compounded by other factors, both known and unknown.

In most cases, ground water will be tributary to surface streams, and will contribute to — or receive water from — surface stream flows. Localized situations do exist where the ground water is confined in such a way that it will not reach a surface stream, or where its movement towards a stream is best measured in geologic time.

In Idaho, the Department of Water Resources has promulgated rules governing conjunctive management of ground and surface waters having a common source of supply.⁵³ The Department's rulemaking was spurred by the decision in the case of *Musser v. Higginson*.⁵⁴ In *Musser*, the Idaho Supreme Court held that the Department's Director was required by statute to "deliver" water to the holder of senior irrigation rights diverted from springs in the Thousand Springs area near Hagerman, Idaho. (See further discussion of *Musser* in section D.5 at page 21.)

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

The Conjunctive Management Rules are applicable statewide. So far, the Department has designated the Eastern Snake Plain Aquifer, as described in the United States Geological Survey Professional Paper 1408-F (1992), as an area having a common ground water supply. In the SRBA, it is anticipated that the Court will adopt a "general provision" dealing with conjunctive management that will put all water users on notice that the designation of a source for their water right does not immunize

⁵³ IDAPA 37.03.11 (Conjunctive Management of Surface and Ground Water).

⁵⁴ *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

them from a delivery call from a senior right holder in another, connected, source.

E. METHODS FOR APPROPRIATING AND CONFIRMING WATER RIGHTS

1. “Constitutional method” rights (aka “beneficial use” rights)

From the earliest days of the territory, an appropriation of water could be made simply by diverting water to beneficial use with the intent to create a water right. Idaho courts have long recognized that these three acts (intent, diversion and beneficial use) establish a valid water right with a priority date as of the date of application to beneficial use.⁵⁵

This do-it-yourself approach is commonly referred to as the “constitutional method” and claims thereunder are often called “beneficial use” rights. The reference to the constitution reflects the courts’ recognition that even without specific statutory authorization, appropriations are lawful under the Idaho Constitution.⁵⁶ The “constitutional method” terminology is potentially misleading, however.

The constitutional method is not constitutionally mandated, but merely constitutionally permissible. It is better understood as a creation of the common law, and, as such, is most certainly subject to legislative override (unlike a constitutional right). Consequently, it would be more accurately described as the “common law method.” Alas, the “constitutional method” terminology has come to stick.

Prior to the adoption of statutes governing the process of appropriation, the constitutional method was the only means of obtaining a water right. Even after legislation was adopted (which occurred as early as 1881⁵⁷), the constitutional method was deemed by the courts for many years to be an alternative to statutory requirements.⁵⁸ Finally, in 1963⁵⁹ (for ground water) and 1971 (for surface water),⁶⁰ the Idaho Legislature enacted legislation making clear that statutory methods were henceforth the only methods available for appropriating water. (See discussion below under “permit/license

⁵⁵ *Sand Point Water and Light Co. v. Panhandle Development Co.*, 11 Idaho 405, 413, 83 P. 347, 349 (1905); *Olson v. Bedke*, 97 Idaho 825, 829-30, 555 P.2d 156, 160-61 (1976); *State v. United States (In re SRBA Case No. 39576, Minidoka National Wildlife Refuges, SRBA Subcase No. 36-15452)*, 134 Idaho 106, 996 P.2d 806 (2000).

⁵⁶ “The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes.” Idaho Const. art. XV, § 3 (emphasis supplied).

⁵⁷ See the “posted notice” method discussed below.

⁵⁸ *R.T. Nahas Co. v. Hulet (“Nahas II”)*, 114 Idaho 23, 752 P.2d 625 (Idaho App. 1988).

⁵⁹ 1963 Idaho Sess. Laws ch. 216 (codified at Idaho Code § 42-229).

⁶⁰ 1977 Idaho Sess. Laws ch. 177 (codified at Idaho Code §§ 42-103, 42-201).

method.”)

Because there is no administrative or judicial process involved in obtaining a constitutional method water right—and thus nothing recorded—these rights remain a significant unknown in the administrative system. One of the major objectives of the Snake River Basin Adjudication (*see* discussion in Chapter U at page 146) is to review, define and quantify these beneficial use rights, and place them within the administrative system.

2. “Statutory claims”

Since 1967, the Idaho’s water code has authorized persons holding “constitutional method” water rights (aka “beneficial use” water rights) to file their claims with the Department.⁶¹ This option later became mandatory.⁶² However, a claim filed in the Snake River Basin Adjudication (or other general adjudication commenced prior to June 30, 1988) satisfies this requirement.

In yet another confusing choice of terminology, claims based on beneficial filed under this statute are referred to by the Department as “statutory claims.” This is confusing in that permits and licenses (discussed below) are statutory claims, as well.

3. Posted notice

A far less common method of appropriation was the “posted notice” approach. Under a statute enacted in 1881⁶³ and since repealed, an appropriator could physically post notice of his or her intent to appropriate water. The notice would be posed near the proposed diversion (and recorded like a mining claim). If he or she completed the project within a reasonable time, and applied the water to beneficial use, a water right, based on measured use, would be issued with a priority date going back to the original posting.

This method is no longer available. However, rights created under this method are still valid (assuming they have not been lost or forfeited for some other reason).

4. The permit/license method

The constitutional method has two primary shortcomings. First, it is not confirmed or quantified in any way, and thus always subject to challenge and uncertainty. Second, the priority date attaches to the date of first beneficial use, and does not relate back to the time the water project was first

⁶¹ Idaho Code §§ 42-243, 42-244.

⁶² Idaho Code § 42-245.

⁶³ 1881 Idaho Sess. Laws, at 267.

conceived or initiated.

In response to these problems, the Idaho Legislature has provided, a more formal, administrative alternative to the “do-it-yourself” approach under the constitutional method. Since the early days of statehood, a person seeking a water right could file an application seeking a water right with the state reclamation engineer (now the Director of the Department of Water Resources).

This is a two step approach, involving, first, a permit and, second, a license. Prior to initiating the water project, the appropriator first applies for a “permit.”⁶⁴ Other appropriators or members of the public are entitled to protest. If that happens, the Department will conduct a “prehearing conference” in an effort to resolve the protest. If that does not end the protest, a full-blown administrative hearing aimed in which all parties present argument, testimony and other evidence.⁶⁵ In deciding whether to grant a water right permit, the Department will determine, among other things, whether there is sufficient water to satisfy the water right sought under the permit, whether granting it would injure other rights, and whether granting the permit would violate the “local public interest.”⁶⁶

Once a permit is granted, the permittee has a specified number of years (up to five, with a possible extension) to place the water to beneficial use.⁶⁷ Once the project is completed and the water is put to beneficial use, the permittee must “prove up” his or her water right, that is, demonstrate to the Department’s satisfaction, that the water has been put to beneficial use according to the terms of the permit.⁶⁸

The proof is accomplished by submitting a *Proof of Beneficial Use* form to the Department accompanied by either (1) a license examination fee and request for the Department to perform the field exam, or (2) a completed field report prepared by a certified water right examiner retained by the water right holder.

If the proof is not timely submitted, the permit will “lapse” and a *Lapse Notice* will be mailed to the holder. If proper administrative steps are not promptly undertaken, the permit will be forfeited entirely.

Once the proof is satisfactorily completed, the permit holder is entitled to receive a license for that amount of water beneficially used with a priority date relating back to the date of the application for

⁶⁴ Idaho Code § 42-202.

⁶⁵ Idaho Code § 42-203A(4).

⁶⁶ Idaho Code § 42-203A(5).

⁶⁷ Idaho Code §§ 42-204; 42-218.

⁶⁸ Idaho Code § 42-217.

the permit.⁶⁹ In many cases, the quantity of water on the license will be adjusted downward from the permitted quantity to reflect actual beneficial use.

A permit is not a water right (though it does authorize the holder to divert and use the water under the terms of the permit). A water permit is often described as an inchoate right, which is not (yet) real property.⁷⁰ Thus, for instance, the Legislature may change the rules governing licensing and make the changes applicable to existing permit holders.⁷¹

The primary advantage of the permit/license process is that a potential water user may determine and secure his priority (or place in line) *before* undertaking a considerable investment in the construction of the water project. Today, every Western state, except Colorado, has adopted a permit system. Colorado achieves much the same result via what it calls a “conditional right” issued by a special water court.

A license, like a decree, is only a “paper” water right. It is legal evidence of the right, but that right may be lost through subsequent abandonment or forfeiture. And of course, there is no guarantee that water will be available to fill the water right.⁷²

5. Private and general adjudications of water

Water users also may bring lawsuits to establish their rights and settle disputes. A private water adjudication is analogous to a quiet title action for land. The result is a decree establishing each party’s water rights in a particular reach of stream or other water body.

In addition to such private adjudications, general adjudications are held from time to time for particular basins. A private adjudication is limited to named parties. In a general adjudication, in contrast, notice is published and every person claiming to hold a water right in the named basin must come forward and prove up his right.

Obviously, a general adjudication is necessary only when the general state of affairs is confused with respect to who holds what water rights. The purpose of the general adjudication is to bring all players into court, resolve all the controversies at once, settle the books, and allow future developments to proceed with greater certainty.

⁶⁹ Idaho Code § 42-219.

⁷⁰ *Hardy v. Higginson*, 123 Idaho 485, 490, 849 P.2d 946, 951 (1993).

⁷¹ *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927); *Hidden Springs Trout Ranch, Inc. v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981).

⁷² *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997).

The most notable general adjudication is the Snake River Basin Adjudication, discussed in Chapter U at page 146.

Water rights obtained through such private or general adjudications are referred to as “decreed” rights.

F. THE ADMINISTRATIVE SYSTEM

1. Overview of the IDWR

The Idaho Department of Water Resources (“IDWR”) has authority over water quantity related issues, including water rights, in Idaho.⁷³ IDWR’s authority primarily resides in title 42 of the Idaho Code. IDWR’s administrative rules are located at IDAPA 37. IDWR has other authorities, including jurisdiction over stream channel alterations⁷⁴ and injection wells.⁷⁵

The IDWR traces its roots to the Office of the State Engineer, established by the Idaho Legislature in 1895. In 1919 the agency’s name was changed to the Department of Reclamation, and its head became known as the Commissioner of Reclamation. In 1943 the agency’s head was changed to the State Reclamation Engineer. In 1965 the Legislature created the Idaho Water Resource Board (discussed in Part F.3 at page 27). In 1970, the agency’s name was changed to the Department of Water Administration. Four years later, in 1974, the Legislature merged the Idaho Water Resource Board into the Department of Water Administration, and changed its name to the Department of Water Resources, as it is known today. In 1981 the Office of Energy was merged into the Department of Water Resources, as an operational division known as the Division of Energy.

The water resource activities of IDWR are divided into two divisions: the water management division and the planning and policy division. (A third division deals with energy issues.) The water management division contains the water right permitting, transferring and enforcement functions. The planning and policy division supports the statewide water resource planning conducted by the Idaho Water Resource Board. It also provides the technical services for the entire Department. An IDWR organizational chart is set out in Appendix 3.

⁷³ The Department was originally known as the Idaho Department of Reclamation, and was headed by the State Reclamation Engineer. The agency’s name was changed to the Idaho Department of Water Administration in 1970, and its head was renamed the “Director.” 1970 Idaho Sess. Laws, ch. 12. In 1974, the agency’s name was changed again to the Idaho Department of Water Resources. 1974 Idaho Sess. Laws, ch. 20 (codified as amended at Idaho Code §§ 42-1801 to 42-18046).

⁷⁴ *Alterations of Channel of Streams*, Idaho Code §§ 42-3801 to 42-3813. Implementing regulations are found at IDAPA 37.03.07.

⁷⁵ *Waste Disposal and Injection Wells*, Idaho Code §§ 42-3901 to 42-3919.

The Department administers water rights on the basis of over fifty “administrative basins.” They are shown on the map set out in Appendix 5. Each permit or water right issued by the Department is assigned a number whose first two digits correspond to the administrative basin in which it is located.

The primary contact with IDWR for most practitioners will be at IDWR’s regional offices. Applications for water right permits, transfers, well permits and other administrative approvals can be obtained at these offices and are submitted there as well. A list of addresses and phone numbers for IDWR’s offices is provided in Appendix 3.

2. IDWR Hearing Procedures

Procedures specific to particular types of transactions before the Department are discussed in the sections that follow. If a matter is disputed, however, it will result in a contested hearing, with a possible appeal to district court, and from there directly to the Idaho Supreme Court (bypassing the court of appeals).

Post hearing procedures and deadlines are governed by the APA⁷⁶, and by the Department’s own rules.⁷⁷ The two dovetail. In a few cases, the Departmental rules provide specific deadlines left up to the discretion of the agency by the statute.

The deadlines for post-hearing actions are summarized in Appendix 2.

Note that the statute and the implementing rule contemplate use of both “recommended orders” and “preliminary orders.” The difference is that preliminary orders become final automatically after a certain amount of time (if there is no petition or appeal), while recommended orders require the agency head’s approval before becoming final orders.

3. The Idaho Water Resource Board

The Idaho Water Resource Board was created by the Idaho Legislature in 1965 following the passage of a constitutional amendment which established the Board. There are eight Board members, appointed by the governor, who serve four-year terms. The current members of the board are listed in Appendix 3.

The Board is the agency described in Idaho’s constitution to formulate and implement a state water plan. The Board initially was created as a separate agency with its own staff. In 1974, the Board and the existing Department of Water Administration were combined to form the present Idaho

⁷⁶ Idaho Code §§ 67-5243 to 67-5249.

⁷⁷ IDAPA 37.01.01.720 to 37.01.01.740.

Department of Water Resources.

There are specifically mandated Board functions and responsibilities within IDWR. The Department provides administration and staff support to the Board. The Board and IDWR are also interrelated in areas such as appeals, administrative rules adoption, water bank administration, and water right negotiations with the Federal government and Indian Tribes. Board programs are divided into three general categories: comprehensive state water planning, water management activities and financial programs.

4. The Comprehensive State Water Plan

In the 1960s, partly in response to concerns about proposals to divert Idaho rivers for use in the Southwest, Idahoans approved a constitutional amendment which established the Idaho Water Resource Board and empowered it to “formulate and implement a state water plan for optimum development of water resources in the public interest.” In adopting the Plan, the Board must follow criteria including, among other things, means to achieve conservation and optimum use; minimum stream flow for aquatic life, recreation and aesthetics; and maximizing supplies for beneficial uses.

The Plan is arranged into numerous short policy statements followed by a brief explanation. These policies have no direct legal effect, but may carry some weight with the Department in water allocation decisions. Policies adopted by the Board include recognition of the importance of non-consumptive uses and the need for protection of instream flows, particularly in connection with the state’s anadromous fishery resource, endorsement of the Water Supply Bank, closer review of federal water projects, establishment target flow levels for the Snake River (ranging from zero flow below the Milner gauge to 13,000 cfs at Lime Point).

G. ABANDONMENT AND FORFEITURE

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

Water rights may be lost under either of two methods: abandonment (a common law doctrine based on subjective intent) or forfeiture (a objective statutory rule). Both rules operate throughout the West.

Water rights lost through either abandonment or forfeiture revert to the state as unappropriated water and are either subject to further appropriation or serve to satisfy the rights of existing junior appropriators from the same water source. *Jenkins v. State, Dep’t of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). This of course does not mean that, say, a forfeited 1871-priority water

right can be picked up and diverted under that priority by another water user. Rather, by eliminating this right from the priority line, more junior rights effectively “move up the ladder” or become that much more reliable because they have fewer senior rights in front of them.

1. Abandonment

Western courts have long recognized the “abandonment” of a water right based on the voluntary relinquishment of the right by the owner. Abandonment of a water right requires (1) an intent to give up the right, and (2) an actual relinquishment of the right. The intent to abandon a water right must be shown by clear and unequivocal acts. Nonuse alone is not sufficient, but a substantial period of nonuse may give rise to a rebuttable presumption of intent to abandon.

Several Idaho Supreme Court decisions discuss abandonment and contrast it with statutory forfeiture and other ways of losing a water right. *Jenkins v. State, Dep’t of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982); *Sears v. Berryman*, 101 Idaho 843, 623 P.2d 455 (1981); and *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976).

The “abandonment” doctrine still applies in Idaho. However, it is not seen very often because the requisite proof of a mental state (i.e., the intent to abandon) is difficult to make.

2. Forfeiture

Idaho’s water code has long contained a provision declaring that if a water right is not placed to beneficial use for a period of five years, it is “forfeited”—regardless of the owner’s intent.⁷⁸

Numerous statutory defenses to forfeiture exist.⁷⁹ These include:

- ✓ an extension approved by IDWR
- ✓ involuntary nonuse due to unlawful acts of others
- ✓ rights placed in the Water Supply Bank
- ✓ lands placed in a federal cropland set aside program
- ✓ right held by municipal provider for “planning horizon” needs
- ✓ need for water replaced by land application of waste water
- ✓ resumption of use prior to intervening claim of right.⁸⁰

⁷⁸ Idaho Code § 42-222(2); *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992).

⁷⁹ Idaho Code § 42-223 (previously codified to section 42-222(2)); *Jenkins v. State, Dep’t of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982).

⁸⁰ This last point is not settled law. The resumption principle is recited in *Jenkins*, 103 Idaho at 389, 647 P.2d at 1261. However, a case involving whether a long unused water right may in fact be “resumed” without forfeiture is

In addition, although not expressly stated in the statutory list of exceptions, forfeiture plainly does not apply if there is no need for the water due to wet weather conditions. For instance, a storage right in a reservoir may be held for many years in anticipation of a drought.

3. Partial forfeiture

The Idaho Supreme Court has confirmed that the forfeiture statute applies to any portion of a water right that goes unused, without adequate excuse, for the statutory five-year period.⁸¹ This is referred to as a partial forfeiture.

For example, consider the situation where a farmer has a 4 cfs water right to irrigate 200 acres, but then takes 50 acres out of irrigation for use as a processing facility, a housing development, or some other non-irrigated use. The “forfeiture clock” would begin running as to a portion of the water right. After five years, one-fourth of the water right, or 1 cfs, would be subject to a ruling that it had been forfeited. Such a result is hardly surprising, given that the foundational principles of the prior appropriation doctrine are beneficial use, the avoidance of waste, and maximum use of the resource. Of course, the farmer could avoid forfeiting this portion of the right by transferring it to some other use or placing it in a “water bank” or “rental pool” established pursuant to state law.⁸²

Under the above example, one also might argue that the farmer also could be deemed to have abandoned that portion of his water right, because his intent clearly was to stop using it. Nonetheless, as a practical matter, the courts are most likely to allow the five years, as a kind of “grace period,” in which the right holder has the opportunity to seek to use the water right elsewhere or for a different use. Of course, in the transfer proceeding the agency will evaluate the amount of historical use under the right, including consumptive use, to determine what conditions must be imposed on the transfer to avoid causing injury to other water rights. Periods of nonuse may come into play in that analysis.

now pending before the Idaho Supreme Court.

⁸¹ *State v. Hagerman Water Right Owners*, 130 Idaho 727, 947 P.2d 400 (1997) (“*HWRO I*”). The case arose via “basin-wide issue No. 10” in the SRBA, in which the Hagerman Water Right Owners contended that Idaho Code 42-222(2) contemplates only a total forfeiture, not partial forfeiture. The Court found that the statute is ambiguous, but construed it to allow partial forfeiture, based on consistency with longstanding prior administrative practice and sound public policy. In particular, the Court found that partial forfeiture advanced the “goal of securing maximum use and benefit of our natural water resources.” 130 Idaho at 735, 947 P.2d at 408.

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

⁸² Idaho Code §§ 42-1761 to 42-1766

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

4. Water delivery entities

When it comes to water rights held by water delivery entities, the law of forfeiture has been muddled by the Supreme Court's recent decision in *Aberdeen-Springfield Canal Co. v. Peiper*, 982 P.2d 917 (Idaho 1999). See discussion in Part S.3 at page 139.

5. Procedure

Unlike the practice in other states, the Idaho Department of Water Resources does not actively evaluate water rights to ferret out potential forfeitures. The forfeiture question arises most often in disputes between right holders or in those cases where one seeks to transfer a water right. In a transfer proceeding, the Department will investigate whether there has been a forfeiture or abandonment of the right sought to be transferred; the state will not allow a forfeited water right to be brought "back to life" by transferring it to another user. To do so would result in "injury" to other users who benefitted from the non-use of the water right.⁸³

H. WATER RIGHT CHANGES AND TRANSFERS

In comparison with many other Western states, Idaho is a water rich state. The Snake River Basin contributes nearly thirty-seven million acre-feet of water to Columbia River flows each year⁸⁴, and the Snake Plain Aquifer, which underlies much of the approximately 15,600 square mile Snake River Plain, holds an additional 200 to 300 million acre-feet.⁸⁵ Despite this relative abundance of water, shortages do occur on both a regional and seasonal basis. Even during normal precipitation years in areas such as the Upper Snake River Basin, the Big Lost River Basin, and the Boise River Basin, the natural surface flows during the peak of the irrigation season typically are fully appropriated. In addition, most of the feasible water storage projects already have been constructed in Idaho, and the availability of federal or state funding for new water projects appears to be limited for the foreseeable

⁸³ *Jenkins v. Department of Water Resources*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982).

⁸⁴ Idaho Dept. of Water Resources, *Stream Flows in the Snake River Basin: 1989 Conditions of Use and Management*, Open File Report 27 (June 1989).

⁸⁵ U.S. Dept. of Energy, *Geohydrologic Story of the Eastern Snake River Plain and the Idaho National Engineering Laboratory 2* (Wash. D.C. 1982).

future.

Also, modern, large-scale development of ground water resources within the Snake Plain Aquifer and elsewhere have combined with periodic drought and changing irrigation practices to affect recharge to the aquifers and return flows to surface sources. As a result, opportunities to make new ground water appropriations have become severely limited in recent years as the Department has imposed administrative moratoria on the acceptance or processing of applications for permits.

For a more detailed treatment of this subject see A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249 (1990). At the time of the article, the author was a senior deputy attorney general assigned to the IDWR. She is now a district judge.

Where opportunities for new appropriations now are much more limited, changes of existing water rights to new uses and transfers to new owners, new places of use and new points of diversion represent a practical means of obtaining water for new beneficial uses. Under the prior appropriation doctrine, in areas where existing supplies are fully appropriated, transfers of existing rights may represent the only means of acquiring water to meet the new and growing demands for water for industry, municipalities and environmental protection. Consequently, water transfers are becoming increasingly common in Idaho, as they are throughout the West.

In addition to traditional agriculture-to-agriculture transfers involving changes in points of diversion and places of use, significant amounts of water are being transferred to new beneficial uses through Idaho's Water Supply Bank, and through the facilitation of the U.S. Bureau of Reclamation⁸⁶ and Army Corps of Engineers who operate many of Idaho's largest reservoirs. It is almost certain that these federal agencies will play a greater role in future water reallocations.

Like other Western states, Idaho has attempted to limit out-of-state water transfers to the extent possible. In *Sporhase v. Nebraska*⁸⁷, the U.S. Supreme Court held that water was an article of interstate commerce, and that a state therefore may not unreasonably restrict its interstate use. Idaho's statutes represent an attempt to satisfy the Supreme Court's prescription while retaining as much state

⁸⁶ The Bureau of Reclamation has developed a transfer policy and an administrative guidance document that govern the Bureau's role in water right transfers in the West. The underlying principle of the Bureau's transfer policy is that the Bureau will involve itself only as a facilitator of voluntary transfers affecting federal water projects and water rights with the goal of mitigating third party effects and preserving existing financial, operational and contractual commitments of the Bureau and its water users. See Department of Interior, *Principles Governing Voluntary Water Transactions that Involve or Affect Facilities Owned or Operated by the Department of Interior* (Dec. 16, 1988); U.S. Bureau of Reclamation, *Voluntary Water Transactions: Criteria and Guidance* (1989).

⁸⁷ *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982). See also, *City of El Paso v. Reynolds*, 563 F.Supp. 379 (D.N.M. 1983); *City of El Paso v. Reynolds*, 597 F. Supp. 694 (D.N.M. 1984); and *Linsey v. McClure*, 136 F.2d 65 (1943).

control as possible over water originating in Idaho.⁸⁸

1. Basic transfer principles

A change in a water right simply refers to a change in its use. Under Idaho law, a change or transfer⁸⁹ of a water right can involve a change in virtually any of the essential elements of a water right, including:

1. point of diversion,
2. place of use,
3. period of use, and
4. nature of use.⁹⁰

In Idaho, as in other prior appropriation states, a water right is valuable real property that may be conveyed together with, or apart from, the land to which it is appurtenant.⁹¹ Idaho's courts held early on that a water right holder also has the right to change its use provided that the rights of others are not injured as a result.⁹²

Idaho's water code now codifies the basic requirements for a change in water right.⁹³

⁸⁸ Idaho Code § 42-401 *et seq.*

⁸⁹ In Idaho, the term "transfer" is used to connote a change in the use of a water right, and such changes are accomplished by filing an "Application for Transfer of a Water Right." A change in the ownership of a water right is accomplished by filing a verified "Change of Ownership" form with the Department of Water Resources. However, the terms "change" and "transfer" tend to be used interchangeably.

⁹⁰ Idaho Code §§ 42-108, 42-222(1). In approving a change, the Department may alter other elements of a water right, too. For example, the rate or volume of diversion may be modified, and, in unusual circumstances, the priority date may be adjusted to prevent injury. Apparently as a matter of legislative oversight, prior to 1981, the Department had no authority under the transfer statutes to approve a change in a water right's period of use or nature of use. *Beker Industries, Inc. v. Georgetown Irrigation Dist.*, 101 Idaho 187, 610 P.2d 546 (1980). This omission has since been corrected by legislative amendments. 1981 Idaho Sess. Laws 253.

⁹¹ *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918); *In re: Robinson*, 61 Idaho 462, 103 P.2d 693 (1940); *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984); Idaho Code § 55-101.

⁹² *First Security Bank of Blackfoot v. State*, 49 Idaho 740, 291 P. 1064 (1930); *In re: Robinson*, 61 Idaho 462, 103 P.2d 693 (1940); *Noh v. Stoner*, 53 Idaho 651, 26 P. 2d 1112 (1933); A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Rights Transfers*, 27 Idaho L. Rev. 249, 251-52 (1990) ("It has been held that, absent injury, the right to make a change in use of a water right is inherent in the constitutional right of property ownership and that the statute setting forth the procedure and standards for change in use neither adds to nor detracts from existing rights. It therefore appears that the right to change is a constitutional right much like the constitutional 'right to appropriate,' although the right to change is not expressly stated in the Idaho constitution.").

⁹³ Idaho Code § 42-222(1). The Department has not promulgated any rules governing water transfers.

1. no injury,
2. no enlargement,
3. consistent with conservation of water,
4. in the local public interest, and
5. no significant effect on local agricultural base

Note that certain water right transfers exceeding 50 cfs or 5,000 acre-feet require approval of the Legislature.⁹⁴

2. Amendments to a permit

This discussion deals primarily with changes in final (that is, licensed, decreed or beneficial use) water rights. Similar principles govern the amendment of a permit before a license has been issued. In short, an amendment of the application must be filed, but the original priority is retained under proper circumstances. Permit amendments are governed by statute which set out a more limited set of criteria.⁹⁵ The Idaho Supreme Court has ruled, however, that the Department may apply the full range of public interest criteria just as in an initial permit application.⁹⁶

3. The “no injury” and “requantification” rules

The issue of injury to other water rights is crucial to any consideration of a transfer application. The injury analysis focuses on protection of junior right holders, who are entitled to have conditions in the source maintained as they found them when they first made their appropriation.⁹⁷ While senior right holders conceivably might be injured by a transfer, they typically are protected from injury by the fact that they may call out the junior transferor to satisfy their senior right.⁹⁸ Idaho Code § 42-222 protects

⁹⁴ Idaho Code § 42-108. The Department interprets the requirement as applicable to individual water rights exceeding these quantity limits, not to transfers of multiple water rights which, in sum, exceed these quantities. Oddly, this provision is triggered only if the period or nature of use is changed. Thus, it does not apply to changes in point of diversion or place of use, even on a very large scale. Also, the Department is allowed to approve temporary transfers of large water rights for less than three years without legislative approval. *Id.*

⁹⁵ Idaho Code § 42-211.

⁹⁶ *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993).

⁹⁷ *Crockett v. Jones*, 47 Idaho 497, 277 P. 550 (1929); *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912). The “no injury” rule has been codified at Idaho Code § 42-222.

⁹⁸ Examples where a senior right holder might object on the grounds that administration of transfer in priority would not provide adequate protection include situations where a transfer would change a point of diversion so as to overlap and interfere with a senior right holder’s point of diversion, or where a change in the location of a storage reservoir would inundate a senior’s water right or increase the rate of evaporation from the stream system. *See e.g., Lionelle v. Southeastern Colorado Water Conservancy Dist.*, 676 P.2d 1162 (Colo. 1984)(increased evaporation from enlargement of existing reservoir site).

all rights from injury, whether junior or senior. However, the injury must be “real and actual,” and not merely “fanciful.”⁹⁹

The classical way to protect a water right from injury from a proposed transfer is to limit the amount of water that can be transferred to a new use to the amount that historically had been consumed by the prior use. Limiting the amount of water that can be transferred to this historical consumptive use component of the water right is based on the fact that typically only a portion of the water diverted actually is consumed in accomplishing the beneficial use to which it is placed. Much of the balance often returns to the water source as subsurface return flows, which then become available once more to support additional appropriations and uses.¹⁰⁰ A junior appropriator is entitled to rely on these return flows being maintained to support his appropriation.

As an example, irrigated crops consume through evapotranspiration only a fraction of the water actually diverted and applied at the field. Some other fraction of the diversion is lost from the system through evaporation. The remainder either seeps from the irrigation ditches and laterals, passes below the plant root zone at the field or runs off the end of the field as waste water. The amount of water that actually has been applied to beneficial use on the field, but which returns to the source represents return flow, and junior appropriators are entitled to have it maintained, and in the case of a proposed transfer, to have an amount equal to the historic return flow left in the stream to satisfy their appropriations.

Because a review of the historical exercise of a water right often is essential in determining the quantity of water that may be transferred, those persons seeking to transfer a water right must be fully aware that their water right can be placed “under the microscope” and requantified by the Department.¹⁰¹ The principle of requantification based on historical use is well-stated by a Colorado court which held that:

[O]nce an appropriator exercises his or her privilege to change a water right... the appropriator runs the real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively

⁹⁹ *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 7, 154 P.2d 507, 509 (1944).

¹⁰⁰ Return flows allow the use and reuse of the same water within a stream system. It is not unusual for return flows from irrigated agriculture to support a total volume of diversions far in excess of the actual natural flow of the river. An example of this phenomenon is the Boise River where return flows support far more appropriations than could be accomplished using natural surface flows alone.

¹⁰¹ *See Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982).

limited actual historical use of the right.¹⁰²

Of course, “requantification” is not really what is happening in these instances. Rather, the process is one which evaluates what actually is being beneficially used. A better description of what happens in a transfer is that it evaluates the true size and nature of a water right, based on beneficial use.

An obvious question that arises in transfer proceedings is what period is to be used as the basis for determining historical use. Although Idaho case law has not directly addressed this issue, arguably a five-year period coinciding with Idaho’s forfeiture statute might be a proper period.¹⁰³ However, if the most recent five-year period also coincided with a prolonged period of drought, or included a year of extremely abnormal conditions of drought or precipitation, then some other period over which a representative diversion and use might be obtained seems appropriate. In practice, absent an objection or a clear case of nonuse, water rights have been presumed to have been exercised to the full extent of the license or decree. However, as demands for water and the resulting conflicts among users continue to grow, it should be expected that historical use of rights will receive greater scrutiny in transfer proceedings.¹⁰⁴

Not all transfer impacts are objectionable. An injury to a water right must be substantial.¹⁰⁵ Although Idaho cases have not focused on what degree of injury is “substantial,” arguably a substantial injury would occur whenever a transfer materially and adversely affected the quantity, timing, location or overall cost of exercising the water right. These effects ultimately impact the enjoyment of the right’s relative priority,¹⁰⁶ or the right holder’s ability to accomplish the intended beneficial use. It might be argued that there is no substantial injury to a water right where a senior right holder could still accomplish the beneficial use, despite a reduction caused by the transfer, by employing reasonable conservation measures.¹⁰⁷

¹⁰² *Pueblo West Metropolitan Dist. v. Southeastern Colorado Water Conservancy Dist.*, 717 P.2d 955, 959 (1986).

¹⁰³ The U.S. Bureau of Reclamation’s regulations for administration and transfer of Colorado River water would calculate historical consumptive use based upon the average beneficial consumptive use for the previous five years. 43 C.F.R. § 415.8(d)(2).

¹⁰⁴ Idaho Code § 42-220 provides that a water right license is prima facie evidence of the right as defined therein.

¹⁰⁵ *Beecher v. Cassia Creek Irrig. Co.*, 66 Idaho 1, 154 P.2d 507 (1954).

¹⁰⁶ The relative priority of a water right is a protectable interest. *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982).

¹⁰⁷ See e.g., Laitos, *What is a “Material Injury” to a Water Right?*, Colorado Lawyer 1333 (July 1990) (evaluating injury in terms of Colorado water transfer statutes which prohibit “material injury”).

4. The rule against enlargement

In addition to satisfying the no-injury requirement, water right transfers must not result in an “enlargement” of the water right. Enlargement is similar in concept to injury, but the issue is approached from the other side. Instead of focusing on impacts on other uses, the enlargement inquiry focuses on how the water right is used by its owner.

In short, any change in use which increases either the rate of diversion or the consumptive use constitutes an enlargement. Either would, presumably, cause injury to someone. The effect of the prohibition on enlargement is to turn these into a “per se” injury. In other words, if a user proposes to increase his or her diversion rate or consumptive use, it is not necessary to independently prove injury.

The classic example of an enlargement is the practice known as “water spreading.” Suppose an irrigator modifies his or her irrigation technique in a way which substantially increases its efficiency. For example, she might switch from flood irrigation to pressurized center pivots. The irrigator could then bring additional acreage under irrigation, without increasing the rate of diversion.

Indeed, many have done this, thinking that it was acceptable. However, as more acreage is brought under irrigation, the total consumptive use necessarily increases. In short, water is illegally taken from the system, even though the diversion rate stays the same.¹⁰⁸ Such water spreading is illegal in Idaho.¹⁰⁹

Thus, the only way to bring new acres under irrigation, is to dry up an equal number of previously irrigated acres. There are several reasons for the “dry up” requirement. First, the prior appropriation doctrine limits a water right to the amount that reasonably can be placed to beneficial use. If the original lands could continue to be irrigated after some portion of the appurtenant water right had been transferred to other lands, then the amount being transferred away presumably was never needed for the beneficial use in the first place. Second, any increase in the total acres irrigated under the right after the transfer would increase the right’s consumptive use and reduce return flows supplying other rights.

Expansion of a water right also can occur where an appropriator seeks to transfer a point of diversion to a location farther from the original place of use, or vice versa. Often the increased distance

¹⁰⁸ The Legislature attempted to provide an “amnesty” to these widespread illegal diversions in 1994. The effort was only partly successful. The amnesty was challenged as unconstitutionally allowing illegal diverters to insert themselves into the priority system ahead of legal diverters. The Idaho Supreme Court agreed. It ruled, that the amnesty had the effect of making the diversions legal. However, the Court determined that these rights cannot be exercised to injure any other water rights. In practical effect, this means that they must be treated as being junior to all water rights existing in 1994. See discussion in Part U.8(viii) beginning on page 154.

¹⁰⁹ A special provision allows an expanded number of acres in transfers involving stored water, so long as injury is avoided. Idaho Code § 42-222.

between the point of diversion and place of use will increase conveyance or “carriage” losses of the water because of increased exposure to canal seepage and evaporation. If the diversion rate were to be increased to compensate for the increased loss, an expansion of the water right would occur. In Idaho, the burden of increased conveyance loss must be borne by the one seeking the transfer and not by other appropriators.¹¹⁰ This is consistent with the principle that a water right is measured for its sufficiency at the point of diversion and not the place of use.¹¹¹

Until recently, the concept of enlargement had never been applied in a non-irrigation context. Recent ruling from the Snake River Basin Adjudication (which have not been appealed) hold that an industrial user may enlarge the use made of a water right (e.g., by expanding a factory or adding more races to a fish hatchery), so long as he or she does not increase the diversion rate or consumptive use.

The only reason other water users might care is that the expansion in industrial operations will make the use more valuable and more costly to mitigate, should that be necessary. However, according to the SRBA court, the right to inexpensive mitigation is not an element of a water right.

5. Water right transfer procedures

(i) Application

The procedures for obtaining a transfer are contained in state statutes which require the submission of an application to the Department that describes the existing right and the way it will be exercised after the transfer.¹¹² If the transfer involves water that is represented by shares in a corporation or irrigation district, then consent to the transfer is required from the corporation or district.¹¹³ Applications for change in period of use or nature of use for a quantity exceeding fifty cfs or 5,000 acre feet of stored water requires the approval of the Legislature.¹¹⁴

After receiving a completed application, the Department must publish a notice of the proposed transfer at least once each week for two consecutive weeks in a newspaper in the county where the

¹¹⁰ *Glen Dale Ranches, Inc., v. Shaub*, 94 Idaho 585, 494 P.2d 1029 (1972).

¹¹¹ *Stickney v. Hanrahan*, 7 Idaho 424, 63 P. 189 (1900); *State v. Twin Falls Canal Co.*, 21 Idaho 410, 121 P. 1039 (1911); *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912). See also, *State of Idaho v. Dickson*, In Re: SRBA Case No. 39756, Memorandum Decision re: Petition for Preliminary Injunction, Docket No 91-07-009 (5th Dist. 1991) (recognizing that conveyance losses incurred by changing place of use are to be borne by transferor and do not justify increase in rate of diversion of the original right).

¹¹² Idaho Code § 42-222(1).

¹¹³ Idaho Code § 42-108. This restriction is discussed further beginning on page 127.

¹¹⁴ Idaho Code § 42-108.

point of diversion lies. Statewide publication is required if the transfer will involve a diversion greater than 10 cfs or 1,000 acre-feet.¹¹⁵

(ii) Protests

Anyone wishing to object to a proposed transfer may do so by filing a notice of protest with the Department within 10 days of the last date of publication of the notice.¹¹⁶ The statutes are liberal in terms of who may protest a transfer, and do not require a protestant to be a water right holder. However, a protestant initially should be prepared to prove to the Department that he or she would somehow be affected by the outcome of the transfer.¹¹⁷ It may be sufficient that a protestant show a concern and ability to speak for the local public interest.

(iii) Pre-hearing conference

After receiving a protest, the Director must investigate the issues raised. Typically, the first step in its investigation will be to hold an informal conference with the transfer applicant and any protestants. This conference allows the parties to identify or simplify the issues, to obtain documents and agree on undisputed facts in the case, to schedule any discovery or exchange of documents and exhibits, and, if possible, to resolve their differences short of a formal hearing. It is worthwhile for both parties to give considerable thought to each of these matters before appearing at a conference, and if possible to discuss them with each other beforehand.

(iv) Hearing

If the protest cannot be settled by the parties at the conference or in some other way, the matter will be set for a hearing in the county where the water right is located. The hearing is conducted by a Department employee who has been designated as the hearing officer, and is governed by the Idaho Administrative Procedures Act and the Department's published Rules of Practice and Procedure. The Department's rules contain important procedures for appearance, pleading and conduct at the hearing. Subpoenas may be issued by the Director commanding the appearance of witnesses from any place within Idaho. The hearing is tape-recorded, but anyone wanting a transcript of the hearing must request a court reporter at least five days before the hearing and arrange to pay for the reporter's presence.¹¹⁸ Unless otherwise agreed to by the parties, permission must be obtained from the Department before

¹¹⁵ Idaho Code § 42-203A(2).

¹¹⁶ Idaho Code § 42-203A(1).

¹¹⁷ The Department has held that a protestant must "demonstrate some nexus to the issue in controversy." *Hardy v. Higginson*, Case No. 92599 (4th Dist., July 25, 1990) (unpublished Memorandum Decision).

¹¹⁸ See IDAPA 37.01.01.651.

parties may engage in formal discovery by way of interrogatories, requests for production or depositions.¹¹⁹

(v) Burden of proof

Neither the Idaho Supreme Court nor the Department's regulations address the question of who bears the burden of proof¹²⁰ in water transfer proceedings. However, the Court has twice addressed the burden of proof issue in the context of a public interest challenge to a new water right appropriation,¹²¹ and the Department has codified that case law in its regulations governing applications for new water rights.¹²²

That regulation provides:

- b. The burden of coming forward with evidence is divided between the applicant and the protestant as follows:

¹¹⁹ IDAPA 37.01.01.521.

¹²⁰ The burden of proof, by the way, is really composed of two elements: the burden of production—that is, who has to go first—and the burden of persuasion—that is, who wins in an evidentiary “tie.” IDAPA 37.03.08.040.04.a.

¹²¹ In *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985), the Court quoted District Judge Schroeder, who now sits on the Idaho Supreme Court in this extended, but lucid, discussion of the burdens of production and persuasion:

As Judge Schroeder correctly noted below, this burden of production lies with the party that has knowledge peculiar to himself. For example, the designer of a fish facility has particularized knowledge of the safeguards or their lack concerning the numbers of fish that may escape and the amount of fecal material that will be discharged into the river. As to such information the applicant should have the burden of going forward and ultimately the burden of proof on the impact on the local public interest. On the other hand, a protestant who claims a harm peculiar to himself should have the burden of going forward to establish that harm.

However, the burden of proof [that is, the ultimate burden of persuasion] in all cases as to where the public interest lies, as Judge Schroeder also correctly noted, rests with the applicant:

[I]t is not [the] protestant's burden of proof to establish that the project is not in the local public interest. The burden of proof is upon the applicant to show that the project is either in the local public interest or that there are factors that outweigh the local public interest in favor of the project.

Shokal, 109 Idaho at 339, 707 P.2d at 450 (referring to District Judge Schroeder, now on the Supreme Court) (quoted again in *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 607, 759 P.2d 891, 898 (1988).

The only other Idaho case to address burden of proof in the context of the local public interest was *Collins Bros.* That case merely recited that “the applicants had not met their burden of proof” and quoted from the *Shokal* case regarding burden of proof.” *Collins Bros.*, 114 Idaho at 606, 759 P.2d at 897.

Note that different burden of proof rules apply to the special public interest tests applicable to appropriations of “trust water” pursuant to the Swan Falls Agreement. Idaho Code § 42-203C; IDAPA 37.03.08.040.04.

¹²² IDAPA 37.03.08.040.04.

- i. The applicant shall bear the initial burden of coming forward with evidence for the evaluation of criteria (a) through (d) of Section 42-203A(5), Idaho Code [injury, supply, speculation, and finance];
- ii. The applicant shall bear the initial burden of coming forward with evidence for the evaluation of criterion (e) of Section 42-203A(5), Idaho Code [local public interest], as to any factor affecting the local public interest of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant shall bear the initial burden of coming forward with evidence relevant to criterion (e) of Section 42-203A(5), Idaho Code [local public interest], of which the protestant can reasonably be expected to be more cognizant than the applicant.
- iii. [Deals with “trust water” appropriations.]
- c. The applicant has the ultimate burden of persuasion for the criteria of Section 203A, Idaho Code [all standard criteria, including local public interest], and the protestant has the ultimate burden of persuasion for the criteria of Section 42-203C [“for trust water”].

It is likely that the same analysis would apply to a transfer or change of a water right. The Department takes the position that it does, and issues guidance to this effect to all participants in protested transfer applications.¹²³ This is also consistent with the general law of burden of proof in civil litigation.¹²⁴

Even where the burden of proof rests with the applicant, however, it does not follow that protestants should be allowed to “put the applicant to its proof” for the sport of it.¹²⁵

¹²³ IDWR’s “Conference and Hearing Procedures.”

¹²⁴ A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 253 (1990).

¹²⁵ The Department should use the prehearing conference, and discovery if necessary, to determine whether the applicant is prepared to present a prima facie case and, if so, whether the protestant has any meaningful and relevant rebuttal. If the applicant is prepared to go forward, but the protestant has not shown that it will be capable of presenting a relevant rebuttal case, the protest should be dismissed prior to hearing. In such a case, the applicant should not be subjected to the costs of “fishing-expedition-type” discovery nor the costs of retaining experts and

(vi) Conditions on transfers

Numerous conditions can be placed on an approved transfer to prevent injury or to protect the public interest. Some common transfer conditions include:

1. Limit the amount transferred to the historical consumptive use;
2. Require measuring devices to document diversions and/or return flows;
3. Require water releases at specified times to guarantee water availability at a junior's point of diversion;
4. Require basin-of-origin protection such as construction of additional storage for out-of-basin transfers;
5. Retain administrative jurisdiction for a reasonable period to evaluate and fine-tune the transfer; and
6. Restrict the rate of diversion or period use to avoid expansion of the right and/or to guarantee the timing of return flows.

(vii) Final decision and judicial review

Following the hearing, a Memorandum Decision and Order signed by the Director will be issued that contains the Department's findings of fact and conclusions of law. In some instances, a proposed decision will be issued and the parties will be given an opportunity to file exceptions to it and present oral argument.

Any party who is not satisfied with the Department's decision is entitled to file a Petition for Rehearing within 20 days after service of the Order.¹²⁶ Judicial review of the Department's decision is available from the state district court in the county in which the hearing was held, or in Ada County which is where the Director's office is located.¹²⁷

presenting a formal case on the public interest.

If the protestant is allowed to proceed, the Department should specify with reasonable clarity the bounds of allowable issues and evidence, so that both protestant and applicant may effectively and efficiently prepare for hearing.

If the Department summarily denies a protest or excludes an issue area, the protestant should be allowed to make a brief record of the nature of the evidence which would have been sought or produced. But neither the protestant nor the applicant should be put to the expense of fully developing evidence on that issue unless and until a reviewing court overrules the Department and remands for further proceedings.

¹²⁶ See generally, IDAPA 37.01.01.720 to 791.

¹²⁷ Idaho Code §§ 42-1701A, 67-5215 and 67-5217.

Judicial review is governed by Idaho's Administrative Procedure Act, and is sharply limited.¹²⁸ Essentially, the party challenging the agency's decision must show that the Department (1) applied the law incorrectly, (2) made a factual determination which is clearly erroneous, or (3) abused its discretion.

6. Exchanges of surface water

Amendments to the water code in 1998 have codified and regularized the practice of informally "exchanging" surface water rights between users.¹²⁹ An exchange is essentially a "swap" of one water right (or portion thereof) for another (or portion thereof). Thus, an exchange is conceptually equivalent to rolling two transfers into one.

The 1998 amendments ensure that informal exchanges end, and that all further exchanges be subject to a level of departmental review functionally the same as for the ordinary transfers. This includes opportunity for protests and requires local public interest review.

The exchange concept is statutorily limited to surface rights. However, natural flow rights may be exchanged for storage rights.

I. THE WATER SUPPLY BANK

Although a water right is a "use right," it still is considered a type of real property. Like real property, it can be sold, mortgaged, or inherited. Moreover, a water right certainly can be leased. If the owner does not need the use of a water right during a given year—or perhaps a period of years—he or she has the option to lease the right to another water user. Indeed, leases have long been part of the water right transactional landscape. One reason for opting for a lease would be to keep the water right in use, and thereby avoid its forfeiture, while retaining the ability to resume one's use in the future.

The catch is that a lease typically involves changing the place of use, point of diversion, or even nature of use of the water under the water right. Generally speaking, none of these elements can be changed, even on a one-year, lease-only basis, without going through the statutory water right transfer (a/k/a change) process described in Idaho Code § 42-222. This is where Idaho's water bank statute comes in.

After Idaho's irrigation storage reservoirs began to come on line in the early part of the Twentieth Century, it became evident that in many years there was more storage available than the contract holders of the storage space would need for the upcoming irrigation season. (This is not surprising. A central purpose of storage is to provide for supplies in dry years, not necessarily all

¹²⁸ The standard of review is set out in Idaho Code § 67-5217(g). See, *Dovel v. Dobson*, 122 Idaho 59, 61-62, 831 P.2d 527, 529-30 (1992), and cases cited therein.

¹²⁹ Idaho Code §§ 42-105, 42-240.

years.) Consequently, there developed a market for at least a portion of the annually unneeded storage water. Beginning in the 1930s, informal annual leases began to occur, some perhaps without formal transfer proceedings, primarily within water delivery organizations in Eastern Idaho.¹³⁰

In 1979, the practice was formalized and approved by statutory provisions establishing a “water supply bank.”¹³¹ The Water Supply Bank is administered by the Idaho Water Resource Board through the Idaho Department of Water Resources. The Department operates under rules adopted by the Water Resource Board.¹³² The water bank handles both natural flow water rights (the definition of which includes ground water rights¹³³) and storage rights.¹³⁴ To be eligible, the water right must decreed, licensed or permitted.¹³⁵ The Board approves transactions which it determines to be “reasonable.”¹³⁶ Transactions involving non-storage water rights are handled directly by the Board; most storage right transactions occur through the local rental pools discussed below.

The Water Resource Board’s rules state that water right owners “lease” water rights to, and end users “rent” them from, the bank.¹³⁷ This lease/rental terminology is not fully descriptive of the nature of the transaction, because the owner/lessor obtains no payment for putting the water right in the bank unless the right (or a portion of it) actually is rented from the bank. Thus, the water supply bank is not so much a bank as it is a state-run clearinghouse for short term transactions in water rights.¹³⁸

In any event, the Water Resource Board can accept into the bank both storage and natural flow water rights from anywhere in the state. The Board requires a written application and will hold a hearing if necessary to determine the advisability of accepting the right and the terms of the arrangement, such as the duration of the placement.

¹³⁰ The first known rental occurred in 1932, when 14,700 acre-feet of water were rented for 17 cents per acre- foot.

¹³¹ Idaho Code §§ 42-1761 through 1766.

¹³² IDAPA 37.02.03 (Water Supply Bank Rules); IDAPA 37.02.04 (Shoshone-Bannock Tribal Water Supply Bank Rules).

¹³³ Natural flow rights are defined to include ground water rights. IDAPA 37.02.03.010.07.

¹³⁴ Storage rights are defined in terms of surface storage. IDAPA 37.02.03.010.10. It is not clear now an “aquifer storage and recovery” water right might be handled.

¹³⁵ IDAPA 37.02.03.025.02(a). Technically a water permit is not a water right, but they may be traded through the water bank nonetheless. Unadjudicated beneficial use claims (aka constitutional claims), however, are not eligible for water bank transactions.

¹³⁶ IDAPA 37.02.03.025.06(d).

¹³⁷ This terminology is found in IDAPA 37.02.03.010.05; 37.02.03.010.08; Idaho Code §§ 42-1762(2), 42-1763.

¹³⁸ However, the statute does authorize the Board to obtain water rights for placement in the bank by means of “purchase, lease, or otherwise.” Idaho Code § 42-1762(2). So the possibility certainly exists that the Board would see fit to buy a water right, or a portion of one, to hold in the bank and rent for specified terms to water users.

Once in the bank, the water right is protected from the running of the forfeiture clock, even if it is not rented from the bank.¹³⁹ Furthermore, a rental from the bank does not require an approved transfer from the Department.¹⁴⁰

Water right holders typically see the water bank procedures as providing two primary benefits. First, while a water right is in the water bank, it is protected against forfeiture. Second, the rental and use of water under a right that has been placed in the bank may proceed without going through the statutory transfer process. In addition, of course, the water right holder who places a right in the bank receives a lease payment if the right is rented. For those needing water on an annual basis (typically storage water), the bank provides a relatively easy way to acquire it.

The statute also authorizes the Board to appoint "local committees," as that term is used in the water distribution statute,¹⁴¹ to manage local rental pools for the banking and rental of storage water under the auspices of the water supply bank.¹⁴² As it has turned out, almost all of the activity pursuant to the Idaho water bank statute occurs through the local committees that the Board has authorized to manage storage water rental pools on the Boise River, the Payette River, and the Snake River above Milner Dam.¹⁴³ As the statute provides, the local committee meets yearly to set the amount of the administrative fee the committee will charge per acre-foot for rentals from the pool. Typically, the storage water spaceholder places a specified number of acre-feet of water with the bank in the spring when he or she is confident that the leased amount will not be needed that year.

No fixed price is set for non-storage water leased through Board-managed portion of the water bank. Rather, the lessor names a minimum rental price when the water right is offered to the Board. Renters then have the option to rent at that price. In contrast, the price of water leased through the local rental pools is set by each rental pool with the approval of the Water Resource Board. Prices vary from pool to pool and are based on conditions set for each pool. Rental prices for 1999 in the

¹³⁹ Idaho Code § 42-17649(2) and IDAPA 37.02.03.025.08(e).

¹⁴⁰ The statute provides that "[t]he approval of a rental from the water supply bank may be a substitute for the transfer proceeding requirement of section 42-222, Idaho Code." Idaho Code § 42-1764(1). In actual practice, rentals have not been required to undergo a transfer proceeding. In addition, the statute establishes no limit on the duration of a water bank transaction; however, the rules governing local rental pools typically restrict water bank leases and rentals to one year. While the District 01 rental pool allows longer term transactions, none have yet been consummated.

¹⁴¹ Idaho Code § 42-605(6)

¹⁴² Idaho Code § 42-1765.

¹⁴³ Pursuant to a settlement of its on-reservation reserved water rights, the Shoshone-Bannock Tribe also has authority to operate a rental pool. The Shoshone-Bannock Water Supply Bank is governed by a separate set of rules. IDAPA 37.02.04.

Upper Snake (Water District 01) were \$2.95 per acre foot for water use above Milner Dam and \$10.50 per acre foot for use below Milner Dam. The price in the Boise River basin (Water District 63) was \$6.50 per acre-foot for in-basin use and \$6.93 for out-of-basin use. In the Payette basin (Water District 65) is \$3.20 per acre foot in-basin and \$5.65 out-of-basin. The rental price of storage waters from federal reservoirs is subject to the approval of the Bureau of Reclamation which operates the facilities. When a water right is leased from the bank, the Water Board or local committee extracts a small transaction fee from the rental payment; the balance then goes to the owner/lessor.¹⁴⁴

All leases and rentals are subject to a local public interest determination by the Director and/or the Board.¹⁴⁵ (See discussion in Chapter P beginning on page 79.)

The water bank regulations make no special provision for public notice or hearing with respect to a lease to the water bank, however, leases are considered at public meetings of the Board.¹⁴⁶ As for rentals, public notice and hearing is optional at the discretion of the Director (unless for a rental period five years or more).¹⁴⁷ The local rental pools all have rules preferring rentals to irrigators over non-irrigators, and in-basin rentals over out-of-basin rentals. For example, the rental of one's irrigation storage right for a non-irrigation purpose results in the storage space involved being accounted the next year as the last to fill.¹⁴⁸

The water bank is currently being used, on an interim basis, as the mechanism for making substantial quantities of storage water—up to 427,000 acre-feet per year—available for rental by the federal government from a combination of the three local rental pools mentioned above in connection with salmon recovery efforts.¹⁴⁹

J. MUNICIPAL WATER RIGHTS

1. The line between beneficial use and speculation

All water users, from the family farmer to the industrial giant, have plans for the future, it seems. Water is often a part of those plans. The prior appropriation doctrine is well suited to the task of assisting the entrepreneur in expanding his or her panoply of water rights to serve a growing enterprise. It must be said, however, that these new uses are not accommodated under the prior appropriation doctrine without some tension.

¹⁴⁴ IDAPA 37.02.03.035.01.

¹⁴⁵ Idaho Code § 42-1763; IDAPA 37.02.03.025.06(f), IDAPA 37.02.03.030.01; IDAPA 37.02.03.040.01(i).

¹⁴⁶ IDAPA 37.02.03.025.05.

¹⁴⁷ IDAPA 37.02.03.030.02 ("The Director may give notice")

¹⁴⁸ IDAPA 37.02.03

¹⁴⁹ Idaho Code §§ 42-1763A, 42-1763B.

The reason is this. While the prior appropriation doctrine has long been an engine of growth in the West, it has just as long been the enemy of speculation.

Under the prior appropriation doctrine, one cannot claim a right to use water one in fact does not use. With limited exceptions, a person cannot tie up quantities of water for development or use at some future time, thus preventing appropriations by others who can and will develop today.

The basis for this anti-speculation feature of the doctrine is the same as the foundation of the doctrine itself: water rights are based on beneficial use of a public resource that remains the property of the public. Beneficial use is the basis, the measure, and the limit of the right.

This is not to say that no speculative scheme in the West ever involved water rights. However, the water right itself ultimately can be recognized only on the basis of bona fide use, and cannot be maintained indefinitely as a "paper" entitlement.

Hence, from the start, the prior appropriation doctrine has recognized the lawful rights of those who apply water to beneficial use, and has denied any legal protection to those who would hold water for speculative purposes. This distinction between need and speculation has remained viable over time, and rules have developed to define which is which.

In the early days, before permit systems were established in Idaho and virtually every other Western state, a water right did not come into existence until actual diversion to beneficial use occurred.¹⁵⁰ The statutory permit system provided some critical leeway to the developer of a new right. Rather than engage in a risky race to develop a water supply, the user could obtain in advance a water right permit which secured the quantity and priority of the water right sought. With permit in hand, the user then could obtain financing and proceed to construction of the diversion and delivery system with some confidence that water would be available. Once the project was completed and in use, a license would be awarded, serving as *prima facie* evidence of the actual diversion and application to beneficial use.¹⁵¹

In Idaho, the user might spend five years getting from permit to license, with another five year

¹⁵⁰ "The procedure for appropriating water contained in the act of 1881, providing that an intending appropriator should post a notice at the point of diversion and record the same, was replaced in 1903 by the present procedure which places the regulation of appropriation of waters under the jurisdiction of [what is now Idaho Department of Water Resources]." Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 21 (1968). Except for certain small domestic wells, the permit/license process is now mandatory in Idaho. Idaho Code §§ 42-103, 42-201 (for surface water diversions, effective May 19, 1971) and Idaho Code § 42-229 (for ground water diversions, effective March 25, 1963). Implementing regulations are found at IDAPA 37.03.08.035.01.a. (may not "commence the construction of any project works" until permit application has been approved).

¹⁵¹ Once the project is completed and the water is put to beneficial use, the permittee is entitled to receive a license for that amount of water with a priority date relating back to the date of the application for the permit. Idaho Code § 42-219.

extension upon showing of need; in specified circumstances, further extensions might be obtained.¹⁵² In most cases, that has proven sufficient time to design, fund and construct a water project, at least for the typical Idaho irrigation project. The system has not been entirely satisfactory, however, for municipal suppliers.

Municipal suppliers have argued that they shoulder an obligation unlike that of other water users. The municipal supplier (whether that be a city or a corporation supplying a city), is bound to serve all those customers who find it desirable to locate within the municipality. Cities point out that they cannot wait for the future to unfold. Although uncertainty is inherent in growth projections, practical necessity demands that cities lay the foundation today to meet the water needs of the coming decades. Surface and underground supplies must be identified and acquired. Diversion and storage systems must be put in place. Delivery systems must be expanded and treatment plants constructed.

The bottom line is that the planning horizon for these endeavors may be longer than five or ten years. It is economically, if not physically, impossible for most cities simply to add on additional supply as needed in five or ten year increments. When pipe is laid, wells are drilled, and treatment systems are engineered, cities contend, these systems sensibly must be sized for many years of future growth. But if that need is more than ten years out, what becomes of the water right?

The courts of Idaho and other Western states long ago have addressed this question. Their answer has been consistent. They have recognized the unique obligations of municipalities and have treated them differently than other water users. The seminal statement comes from the Colorado Supreme Court, writing in 1939:

The concern of the city is to assure an adequate supply to the public which it serves. In establishing a beneficial use of water under such circumstances the factors are not as simple and are more numerous than the application of water to 160 acres of land for agricultural purposes. A specified tract of land does not increase in size, but populations do, and in short periods of time. With that flexibility in mind, it is not speculation but the highest prudence on the part of the city to obtain appropriations of water that will satisfy the needs resulting from a normal increase in population within a reasonable period of time.¹⁵³

This quotation demonstrates that the core of the debate over the right of municipalities to hold water for future growth is whether or not this practice constitutes “beneficial use” on the one hand or “speculation” on the other. That is, does the acquisition of water rights beyond the usual five or ten

¹⁵² Idaho Code §§ 42-204, 42-218, 42-128(a).

¹⁵³ *City and County of Denver v. Sheriff*, 96 P.2d 836, 841 (Colo. 1939) (emphasis supplied).

year time frame constitute prudence or hoarding? The growing communities doctrine¹⁵⁴ recognizes that long term planning by municipalities, under proper circumstances, may be prudent, necessary and lawful.

In a sense, the growing communities doctrine is not that much of a departure from the norm. Indeed, one might argue that the idea of a city designing a delivery system sized to accommodate future growth is similar in concept to the idea of storing water in a reservoir for use during a future drought. That drought may not come for many years, but no one would deny the benefit derived today simply from knowing that water will be available in the event of drought. Thus, it is undisputed that the storage of water for use in time of future shortage constitutes a current “beneficial use.”¹⁵⁵ The growing communities doctrine is simply a recognition of the fact that Idaho’s cities derive a substantial and tangible benefit today from securing a water supply sufficient to satisfy reasonably foreseeable needs. Without such ability, cities argue, they would be hard pressed to attract desirable new industries and manage sensibly for growth.

2. Judicial recognition of the growing communities doctrine in Idaho

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.

The first case was *City of Pocatello v. Murray*.¹⁵⁶ In this case, the City of Pocatello granted a franchise to Murray and his associates to provide water to the city. The city complained that while Murray had delivered some water from Mink Creek, he had not obtained the entire supply physically available in the creek. The federal court (applying Idaho law) found that Murray had indeed failed to fulfil his obligation under the contract. The court rejected Murray’s argument that it was against public

¹⁵⁴ We employ the phrase “growing communities doctrine” to capture the essential points of the case law. The phrase has now been picked up by the Washington Supreme Court, *State of Washington, Dept. of Ecology v. Theodoratus*, 135 Wash.2d 582, 957 P.2d 1241 (1998). Although this shorthand description has not yet been employed by the Idaho Supreme Court, and differs somewhat from the “great and growing cities doctrine” which has taken hold in Colorado, we think it captures the idea. The doctrine plainly applies to all growing communities, large and small, not just to great cities. For instance, in *Village of Peck v. Denison*, 92 Idaho 747, 751, 450 P.2d 310, 314 (1969), the doctrine was applied to a community of 200 inhabitants.

¹⁵⁵ “The storage of water for future uses has long been held to be a beneficial use.” *Waters and Water Rights*, § 13.03 at 144 (Robert E. Beck ed., The Michie Company 1991) (citations omitted); “Initially, the system relented on this proposition [requiring immediate use] only with reference to the building of reservoirs to catch otherwise unusable seasonal flows and floodwaters. ... Now, of course, municipalities are allowed to acquire supplies for projected future use; indeed, in many instances are required to, for long-term growth.” *Waters and Water Rights*, § 12.03(c)(2) at 108 (Robert E. Beck ed., The Michie Company 1991) (citations omitted); Samuel C. Wiel, *Water Rights in the Western States* § 378 at p. 410 (1911); 45 Am. Jur. 2d *Irrigation* § 38 (1969).

¹⁵⁶ *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). The appeals court affirmed on the more narrow basis of the construction of the municipal ordinance. However, the appeals court noted that one of the purposes of the water supply agreement between the city and defendants was to provide “as well for their future use.” 214 F. at 220.

policy for the city to appropriate more water than was then needed. The court declared that the leeway afforded to agricultural users “should and doubtless would, be applied with even greater liberality to the superior and more elastic needs of a growing municipality.”¹⁵⁷

In *Beus v. City of Soda Springs*,¹⁵⁸ the court upheld the right of the City of Soda Springs to purchase water rights from agricultural users and hold them for future municipal needs. The court went on to hold that such water need not be applied to irrigation in the meantime in order to avoid forfeiture.¹⁵⁹ “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.”¹⁶⁰

In the more recent case of *Village of Peck v. Denison*,¹⁶¹ the court upheld the right of the village to obtain an unquantified water right for “all the flow” from a particular source. Whether the water was needed for current or future needs is somewhat unclear from the decision. However, the court noted in a footnote that:

[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).¹⁶²

The court in *Village of Peck v. Denison* cites an article published a year earlier by the

¹⁵⁷ *Pocatello*, 206 F. at 80.

¹⁵⁸ *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940).

¹⁵⁹ In support of its decision, the Idaho court quoted from a Wyoming case, *Holt v. Cheyenne*, 137 P. 876 (1914): [T]he Supreme Court of Wyoming had before it . . . the identical question presented in this case. The court held: “A city’s right to appropriate the waters of a stream is not limited to the needs of its citizens at the time of the adjudication of its rights, but is entitled to appropriate for the probable future demands of its population.”

The court then reviewed numerous authorities holding that property may be held by a municipality for its future growth and development without being subject to adverse claims of others, and then continues: “Such, we think, is the better reasoning, and is supported by the great weight of authority and to which many courts have in later cases acceded, although a contrary doctrine has been announced in earlier decisions.”

Beus, 62 Idaho at 6, 107 P.2d at 154 (this quotation, which *Beus* attributed to *Holt*, is actually from the headnote to *Holt*).

¹⁶⁰ *Beus*, 62 Idaho at 7, 107 P.2d at 154.

¹⁶¹ *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969).

¹⁶² *Village of Peck v. Denison*, 92 Idaho at 751, n.4, 450 P.2d at 314, n.4.

distinguished water law scholar, Wells A. Hutchins.¹⁶³ 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.¹⁶⁴

In sum, Idaho case law consistently has recognized and accommodated the special burdens on municipal providers of water—providing them a measure of protection from the statutory forfeiture laws and common law abandonment principles. As one commentator (now a judge) put it: “Therefore, when a municipal corporation acquires a water right, the city generally will not lose the water right due to nonuse.”¹⁶⁵ In the same vein, the Department’s chief legal counsel noted: “The general law regarding the quantity of a municipal water right appears to be that a city may acquire a preferred right to store or appropriate more water than is immediately needed, thus allowing for growth of the city.”¹⁶⁶

This body of Idaho law, by the way, is consistent with that of cases and statutes throughout the West.¹⁶⁷

¹⁶³ Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1 (1968).

¹⁶⁴ Hutchins at 44, n. 211.

¹⁶⁵ Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 294 (1990).

¹⁶⁶ Phil Rassier, Chief Counsel, *IDWR Memorandum: Municipal Water Rights – Statutory Background* at 1 (May 7, 1979) (reproduced in Appendix 8).

¹⁶⁷ Cases:

Holt v. Cheyenne, 137 P. 876 (1914); *City and County of Denver v. Sheriff*, 96 P.2d 836 (Colo. 1939); *City and County of Denver v. Northern Colorado Water Conservancy Dist.*, 276 P.2d 992 (1954); *Metropolitan Suburban Water Users Ass’n v. Colorado River Water Conservation Dist.*, 365 P.2d 273 (Colo. 1961), *rev’d on other grounds sub nom.*, *Denver v. Colorado River Water Conservation Dist.*, 696 P.2d 730 (Colo. 1985); *Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566 (Colo. 1979); *Rocky Mountain Power Co. v. Colorado River Water Conservation Dist.*, 646 P.2d 383 (Colo. 1982); *State v. Crider*, 431 P.2d 45 (N.M. 1967); *State ex rel. State Engineer v. Rio Rancho Estates, Inc.*, 624 P.2d 502 (N.M. 1981); *In re the Application of Plains Electric Generation and Transmission Coop., Inc.*, 750 P.2d 475 (N.M. App. 1988); *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981); *Weaver v. Eureka Lake Co.*, 15 Cal. 271 (1860); *City of Beaumont v. Beaumont Irrigation Dist.*, 42 Cal. Rptr. 859, 867 (Cal. App. 1965), *affirmed but opinion vacated by*, 63 Cal. 2d 291, 405 P.2d 377, 46 Cal. Rptr. 465 (1965).

Statutes:

Ariz. Rev. Stat. Ann. § 45-160; Cal. Water Code §§ 106.5, 1264 (Deering 1977); Nev. Rev. Stat. § 533.030(3); N.M. Stat. Ann. §§ 72-12-8, 72-1-9; Or. Rev. Stat. §§ 537.230(1), 537.410(2), 537.610(2)(a), 537.260(4); Utah Code Ann. § 73-1-4(3)(b)(iv); Utah Code Ann. § 73-3-12(1); Wash. Rev. Code § 90.03.260.

Commentary:

Frank J. Trelease, *Preferences to the Use of Water*, Rocky Mtn. L. Rev. 133, 138 (1955) (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.); *Waters and Water Rights*, § 14.03(a) at 170-71, § 48.03(c) (Robert E. Beck ed., The Michie Company

3. Idaho's 1996 codification of the doctrine

In 1996 the Idaho Legislature codified the growing communities doctrine and established specific procedures and limitations governing a municipality's ability to acquire water rights (by appropriation or transfer) for long term growth.¹⁶⁸ In short, the Legislature affirmed the doctrine's role in Idaho water law, but placed clear sideboards on how it is to be applied.

The Legislature recognized that it was not writing on a blank slate and specifically recognized and embraced the common law doctrine of special treatment for municipalities:

The appropriation doctrine as applied throughout the western states provides flexibility for municipal providers to obtain and hold water rights needed to assure an adequate water supply for reasonably anticipated future needs. While this concept is recognized in Idaho case law, it should be further described in statutes in order to guide the actions of the Department of Water Resources, water users and the courts, and to assure that the use of this concept is appropriately controlled. The legislation seeks to define and limit the authority of municipal water providers to develop and hold water rights for reasonably anticipated future needs and to allow water to be supplied to expanding service areas. This statute addresses future licensing of water rights for municipal purposes (including those currently permitted) as well as future changes in water rights to municipal purposes. The statute does not address those licensed and decreed water rights now held by municipal providers, and the legislation intends no change in the common law with respect to such rights. Municipalities would be required to provide information to describe their service area, to establish a reasonable planning horizon, and to show that the water rights are necessary for reasonably anticipated future needs.¹⁶⁹

However, the 1996 Act is more than a codification. It contains several new concepts, and reflects a much more precise, regulatory interpretation of the doctrine. The structure of the new approach is reflected in several newly defined terms of art. They are contained in the following one-sentence summary of the statute: "Municipal providers" may secure water rights for "municipal purposes" of sufficient quantity to serve all "reasonably anticipated future needs" within an expanding

1991); Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 44 (1968); Note, *Recent Developments in the El Paso/New Mexico Interstate Groundwater Controversy—The Constitutionality of New Mexico's Municipality Water Planning Statute*, 29 Nat. Resources J. 223, 229-30 (1989).

¹⁶⁸ Municipal Water Rights Act of 1996, 1996 Idaho Sess. Laws, ch. 297 (codified at Idaho Code §§ 42-202, 42-202B, 42-203, 42-217, 42-219, 42-222).

¹⁶⁹ Statement of Purpose, S.B. 1535 (1996 Municipal Water Rights Act, 1996 Idaho Sess. Laws, ch. 297).

“service area” during a specified “planning horizon.” We refer to water rights held for this purpose as “planning horizon” rights.

Although the statute speaks in terms of “reasonably anticipated future needs,” the authors employ the term “planning horizon needs” instead of “future needs.” The thrust of the Act (and the common law doctrine) is that communities need these rights in their portfolios now. Indeed, the Act expressly provides that these rights serve a beneficial use now (by allowing cities to plan their growth in an orderly fashion), despite the fact that they may not be physically pumped for decades. Calling them “future needs” may be misunderstood to suggest that they are simply being held for speculative future use, which is plainly contrary to the law.

We will address each of the terms of art under the statute, in turn. The first is “municipal provider.”¹⁷⁰ The term is defined to include more than just cities. It encompasses water supplied by any unit of municipal, county or state government.¹⁷¹ It also includes private corporations and associations holding a franchise (for example, from the Idaho Public Utilities Commission) to supply water for municipal purposes.¹⁷² The largest example of this is privately held United Water Idaho which serves parts of the Treasure Valley. Finally, the term includes corporations and associations supplying water for municipal purposes through a water supply system regulated as a “public water supply” under Idaho Code § 39-103(15).¹⁷³

The term “municipal purposes” is broadly defined to include “residential, commercial, industrial, irrigation of parks and open space, and related purposes.”¹⁷⁴ This list was broadly drawn and is intended to serve as a catch-all for virtually any use within a municipal service area which might be supplied by a municipal provider.¹⁷⁵

The only use expressly excluded from municipal purposes is “water from geothermal sources for heating.”¹⁷⁶ Thus, water rights for geothermal heating systems (which are common in Idaho) may be obtained only to meet current physical need. However, geothermal water used for non-heat purposes

¹⁷⁰ Idaho Code § 42-202B(3).

¹⁷¹ Idaho Code §§ 42-202B(2), 42-202B(3)(a). Thus, for instance, a water supply acquired for a state university or state prison would fall within the definition of “municipal provider”.

¹⁷² Idaho Code § 42-202B(3)(b).

¹⁷³ Idaho Code § 42-202B(3)(c).

¹⁷⁴ Idaho Code § 42-202B(4).

¹⁷⁵ A 1979 IDWR policy statement defined municipal use as including “domestic, irrigation, stockwater, fire protection, recreation, commercial, industrial, and any other water use incidental to the functioning of a city.” Norman Young, *Administrator’s Memorandum: Definition of “Municipal”* (Nov. 5, 1979) (reproduced in Appendix 9). This list, like the one in the 1996 Act, was intended to be comprehensive.

¹⁷⁶ Idaho Code § 42-202B(4).

(such as drinking) does fall within the Act.

Next, the statute addresses “reasonably anticipated future needs.” This, of course, is a concept derived from the common law growing communities doctrine. The statute attempts to put some sideboards on the concept by requiring that these needs be documented with “population and other planning data” provided by the municipal provider to the satisfaction of the Idaho Department of Water Resources (“IDWR” or the “Department”).¹⁷⁷ Experience to date demonstrates that the Department is being quite rigorous in its requirements for planning data. It has demanded sophisticated statistical analyses by well qualified economists before accepting a municipal provider’s claims for planning horizon needs. These analyses, for instance, have taken into account such factors as price elasticity, the availability of non-potable lawn irrigation, shifts in demographics and the composition of population, changes in lifestyle, conservation incentives, etc. Obviously, any effort to predict future demand more than ten years out is a guessing game. But the Department is insisting on rather sophisticated guessing.

An independent requirement is that the claimed needs must “not be inconsistent with comprehensive land use plans approved by each municipality” within the service area, and may not include “uses of water within areas overlapped by conflicting comprehensive land use plans.”¹⁷⁸ This last requirement is a potentially draconian measure designed to provide a stern incentive to adjacent municipalities to cooperate in planning efforts. To the extent two or more municipalities assert planning authority over the same area and develop fundamentally conflicting planning scenarios, no one may obtain a “planning horizon” water right for that overlapped area—even a private water provider that has no control over the municipal squabbling.¹⁷⁹ Of course, water rights may continue to be acquired to serve existing needs in such areas.

As a practical matter, Idaho’s Local Land Use Planning Act is a well-crafted planning statute aimed at resolving many of these disputes over the direction of future growth. Even so, it has not eliminated all conflicts. Consequently, entire communities have now been left out of the “planning horizon” calculation in applications now pending before the Department.

¹⁷⁷ Idaho Code § 42-202B(6).

¹⁷⁸ Idaho Code § 42-202B(6).

¹⁷⁹ The Act’s prohibition on conflicting plans is directed at comprehensive plans adopted by cities and counties. It is not concerned with the plans of private water companies which meet the definition of municipal providers. Thus two competing water companies could have conflicting plans in the sense that each hoped in the future to serve a particular area, reflected in overlapping future “service area” descriptions. This, in itself, however, would not prohibit either of them from obtaining a future need water right to serve the disputed area—so long as the cities and counties in the area did not have conflicting comprehensive plans describing their plans for growth. On the other hand, while the prohibition against overlapping comprehensive plans does serve as a *per se* barrier, the Department of Water Resources would have discretion to take such conflicts into account in making its determination of whether the entity did indeed have a “reasonably anticipated future need” for the water.

The Act contains no limit on the duration of the “planning horizon,”¹⁸⁰ but simply requires the IDWR to establish a reasonable period to fit the needs of the particular user. To date, the Department has shown a willingness to consider applications of substantial duration: fifty years out in the case of the state’s largest municipality.

The Act also provides for substantial flexibility in the establishment of a “service area.”¹⁸¹ One of the basic elements of every water right is its “place of use.” For most water rights, the place of use must be described with specificity, and any change in the place of use requires that the holder of the water right undergo a formal change proceeding with the Department.¹⁸² This presents a problem, in the case of municipal water rights, where the place of use is constantly changing as the city grows.

The Department has long recognized this special feature of a municipal water right, and allowed it to be described simply by reference to the “city limits” of the community.¹⁸³ But what if a municipal supplier serves customers outside the city limits?

This issue was clarified in the 1996 Act. A municipal provider’s place of use is not limited to a city’s corporate limits. Instead, it corresponds instead to the actual area served. The Act clarifies that a general description of the service area is sufficient. There is no need to identify a precise boundary.

More significantly, the service area is not fixed, but includes “changes therein after the permit or license is issued.”¹⁸⁴ In other words, there is no need to initiate a formal change proceeding each time the area served by a municipality is expanded. On the other hand, a municipality is well advised to update its service area description from time to time. This is not explicitly required under the statute. Doing so, however, will deprive potential protestants of any argument that they were not fairly put on notice of the scope of the provider’s water rights portfolio. An update once or twice a decade should suffice for this purpose.

Under the 1996 Act, a license for a planning horizon water right may be issued “for an amount up to the full capacity of the system constructed or used in accordance with the original permit”¹⁸⁵ In other words, at the time of license, the water right claimant actually must have constructed some

¹⁸⁰ “‘Planning horizon’ refers to the length of time that the department determines is reasonable for a municipal provider to hold water rights to meet reasonably anticipated future needs. The length of the planning horizon may vary according to the needs of the particular municipal provider.” Idaho Code § 42-202B(5).

¹⁸¹ Idaho Code § 42-202B(7).

¹⁸² In the case of irrigation rights, the water right must identify the place of use by “legal subdivisions”—that is, down to the 40 acre section. Idaho Code § 42-202(6).

¹⁸³ Norman Young, *Administrator’s Memorandum: Definition of “Municipal”* (Nov. 5, 1979) (reproduced in Appendix 9).

¹⁸⁴ Idaho Code § 42-202B(7).

¹⁸⁵ Idaho Code § 42-219(1).

“system” for diversion, storage and/or delivery of the water which is physically sized to meet the claimed needs.¹⁸⁶ Presumably a municipal provider need not have constructed the entire system. If that were required, then the Act’s central objective of allowing a city to gradually, economically, and efficiently develop its system would be entirely defeated. Instead, the statute appears to require that there be some tangible evidence of the provider’s commitment to meet the claimed planning horizon needs. The idea is that the willingness of the provider to invest today’s capital in infrastructure to meet planning horizon needs is a further guard against the purely speculative acquisition of water rights.

Informal guidance issued by the Department confirms this analysis and lays out seven criteria which the Department will evaluate in determining whether there is sufficient “planning, design, and investment in the unconstructed capacity of the complete system” to satisfy the statutory requirement.¹⁸⁷

It bears emphasis that the Act does not create any automatic entitlement on the part of municipal providers to obtain water rights for long term needs. Rather, the Act imposes on the Director of the IDWR the responsibility to determine the reasonableness of the applicant’s asserted future requirements. No doubt, a body of administrative and judicial law will emerge over time establishing how much need an applicant must have and how well the applicant must demonstrate it.

The Act applies at both the permit and license stage, as well as to transfers of water rights to municipal use. The determination of the scope of the planning horizon needs may be re-adjusted by the IDWR at the license stage where the user “proves up” the right.

When a municipal provider is granted a permit to appropriate water for “reasonably anticipated future needs” within the planning horizon for the municipality, the permit will be conditioned to require that the full capacity needed to provide water for the reasonably anticipated future needs be constructed by the end of the municipality’s planning horizon. The municipal provider will then be required to submit proof of beneficial use evidenced by construction of system capacity of the complete system by the end of the permit development period. If proof is not submitted and an extension to the permit development period has not been granted, as provided in Idaho Code § 42-204, the municipal provider shall be deemed to have lost all rights under the permit.¹⁸⁸

¹⁸⁶ L. Glen Saxton, Chief, Water Adjudication Bureau, *IDWR Memorandum to Water Allocation Bureau: Water Rights for Municipal Use* (Mar. 18, 1998) (reproduced in Appendix 12).

¹⁸⁷ Karl J. Dreher, Director, IDWR, Letter to Christopher H. Meyer, *Municipal Water Rights* at 3-4 (June 14, 1999) (reproduced in Appendix 13).

¹⁸⁸ Karl J. Dreher, Director, IDWR, Letter to Christopher H. Meyer, *Municipal Water Rights* at 5 (June 14, 1999) (reproduced in Appendix 13).

In contrast, transfers of water rights do not entail a two stage process (as for permits and licenses). This is not unique to the 1996 Act, but is the case for all water transfers in Idaho. Consequently, the scope of a water right transferred to a municipal provider for planning horizon purposes is established just once, at the time of transfer.

Once a water right is acquired under the 1996 Act, is it immune from forfeiture and abandonment? The Department takes that position that it is not immune, but will be addressed within the context of the 1996 Act:

If sufficient proof of beneficial use is submitted before the end of the permit development period and the municipal water right is licenced for an amount of water for “reasonably anticipated future needs,” the requirement that the full system capacity needed to provide water for the reasonably anticipated future needs be constructed by the end of the municipality’s planning horizon will continue as a condition of the license. If the municipal provider fails to construct the full system capacity needed to provide water for the reasonably anticipated future needs by the end of the planning horizon for the municipality, or the anticipated future needs do not materialize by the end of the planning horizon, the quantity of water under the license may be reduced to the capacity of the constructed system or the amount of water required to meet the needs that actually exist at the end of the planning horizon. Although a municipal provider can revise the planning horizon and amend its projections of reasonably anticipated future needs subsequent to the water right license being issued, provided the criteria in Idaho Code § 42-202B(5) are fully satisfied, the water right remains subject to being reduced or forfeited if actual use of the water does not occur.¹⁸⁹

The Act contains two strong anti-speculation provisions. The prohibition against “planning horizon” rights for areas with overlapping and conflicting comprehensive plans already has been mentioned.

In addition, the Act expressly prohibits the transfer of “planning horizon” water rights by a municipal provider to a place of use outside the service area or to a new nature of use.¹⁹⁰ In other words, the statute recognizes that while a municipality is accorded extra leeway in holding water rights to meet long term planning needs, the *quid pro quo* is that the municipal provider may not later decide

¹⁸⁹ Karl J. Dreher, Director, IDWR, Letter to Christopher H. Meyer, *Municipal Water Rights* at 5 (June 14, 1999) (reproduced in Appendix 13).

¹⁹⁰ This provision is stated twice in the Act. Idaho Code §§ 42-219(1), 42-222(1).

to accept a “better offer” and trade away its water rights for cash or other consideration. In a sense, the Legislature had determined to take away one stick from the property owner’s bundle of rights (free transferability) in recognition of the fact that municipal suppliers hold a stick which other water right holders do not (the right to acquire water rights for long term planning horizon needs).

These provisions were added, by the way, in order to avoid the spread of the “Colorado phenomenon” to Idaho. Colorado’s common law “great and growing cities doctrine” contains little if any protection against municipal speculation. Consequently, in Colorado, stockpiling and trading of municipal water rights is common, and cities have invested heavily, both in water rights and in water right lawyers. The anti-speculation provisions in the Idaho statute were intentionally designed to destroy the incentives which have led to this phenomenon. So far, it seems to have worked.

4. The transition from common law to statutory scheme

Even after the 1996 Act, the common law growing communities doctrine remains significant in Idaho. Existing municipal water rights are not affected by the 1996 Act.¹⁹¹ Most municipal providers have not taken the affirmative steps required to bring their water right portfolios within the statute. Consequently, the common law continues to apply to the vast majority of municipal water rights.

The principal effect of this is that the common law doctrine continues to provide defenses from forfeiture to municipal providers that have acquired water right portfolios exceeding their immediate physical needs. This conclusion is supported by recent guidance adopted by the IDWR to the effect that forfeiture and abandonment apply to municipal rights, but only when the municipal supplier has no current or future need for them. “Municipal water rights established prior to the 1996 Municipal Water Rights Act might also be subject to common law abandonment or forfeiture if the rights are not required to satisfy reasonable future needs of the municipality.”¹⁹²

This is no blank check, however. Under the common law, the municipal provider must demonstrate that it is a growing community and that its portfolio is reasonably necessary to serve its anticipated needs. A court could very well determine that a particular municipality is holding more water rights than it will ever be able to put to use, and declare the surplus forfeited. Given such uncertainty, municipal providers are well advised to bring their portfolios within the scope of the 1996 Act at their earliest opportunity.

¹⁹¹ One might argue that in adopting a codified municipal rights law for some water rights, the Legislature intended to repeal common law protections for other municipal water rights. This does not appear to be the intent of the Legislature, however. As noted on page 52, the Act’s *Statement of Purpose* expressly disclaims any intent to change the common law. Moreover, the Act contains a savings clause, Idaho Code § 42-202(11), which purports to preserve the common law’s protection for pre-1996 municipal rights. In the end, of course, the common law is whatever the Court says it is.

¹⁹² Karl J. Dreher, Director, IDWR, Letter to Christopher H. Meyer, *Municipal Water Rights* at 5 (June 14, 1999) (reproduced in Appendix 13).

How does a municipality bring its existing portfolio of water rights within the protection of the 1996 Act? The Act does not specifically address this. The Department has issued guidance concluding that a municipal water right *permit* issued prior to the 1996 Act may be treated as subject to the Act.¹⁹³ All other municipal water rights, however, must undergo a formal change process to bring them under the 1996 Act.

At the same time, the city may wish to change its points of diversion to more fully integrate its production and delivery system, particularly where it relies heavily on groundwater.¹⁹⁴ For instance, a municipality relying on a network of wells supported by a separate water right for each well may wish to make each point of diversion an alternative point of diversion for each other. This allows the city the flexibility to pump water anywhere from the system, so long as injury is avoided. The city's physical system may be operated more flexibly and efficiently.¹⁹⁵ And, of course, if the municipal water rights portfolio survives the scrutiny entailed in the transfer process, it will be accorded the more express protections available under the Act (e.g., expanding service areas). On the whole, such a portfolio stands a much better chance of surviving SRBA review intact.

¹⁹³ L. Glen Saxton, Chief, Adjudication Bureau, IDWR, Memo to Water Adjudication Bureau, *Water Rights for Municipal Use* (Mar. 18, 1996) (reproduced in Appendix 12).

¹⁹⁴ The Department has acknowledged the appropriateness of this sort of system-wide change for municipal water rights. Karl J. Dreher, Director, IDWR, Letter to Christopher H. Meyer, *Municipal Water Rights* at 1-2 (June 14, 1999) (reproduced in Appendix 13).

¹⁹⁵ Adding alternative points of diversion to a municipal system (or to any water right) raises interesting injury questions. The Department's position on this is quite clear. Let's take a simplified example. Suppose a city owns two wells, one with a 1950 priority for 1 cfs and one with a 1980 priority for 2 cfs. Suppose further that the city transfers the rights to bring them under the 1996 Act and makes them alternative points of diversion for each other. Next, suppose that the 1980 well becomes involved in a well interference dispute with a nearby 1970 irrigation well. May the city defend the interference claim by asserting that it is pumping 1950 water out of the 1980 well? The answer is clearly no. Despite each well being an alternative point of diversion for each other, the Department will continue to administer the wells on the basis of the pre-transfer priorities for purposes of well interference. But suppose instead that due to declining aquifer conditions, an aquifer-wide regulation of pre-1960 wells was imposed. (Such an aquifer-wide call might result from hydrological conditions, a mandate to protect endangered species, conjunctive administration rules, etc.) Note, this is not a well interference call, but an aquifer-wide regulation of wells. In this case, the city could continue to pump up to 1 cfs of "1950 water" out of either the 1950 well or the 1980 well, as it saw fit. In sum, going through the process of assigning alternative points of diversion will make no difference at all with respect to local well disputes, but can add a great deal of flexibility in the event of a regional regulation of groundwater supplies.

How is this implemented? The Department will maintain a record of the original priority date associated with each water right at each well. These would become relevant in the event of a call based on well interference. However, they would not be relevant (and the provider would have the advantage of additional flexibility) in the event of an aquifer-wide call on the reservoir. Karl J. Dreher, Director, IDWR, Letter to Christopher H. Meyer, *Municipal Water Rights* at 2 (June 14, 1999) (reproduced in Appendix 13).

5. Quantifying a municipal water right

Municipal water rights are also treated differently when it comes to how they are quantified. Most water rights are quantified in terms of both diversion rate and annual quantity. Thus, a typical water right could only be diverted at its full diversion capacity for a fraction of the year.

In contrast, however, it has long been the Department's policy to quantify municipal rights solely in terms of diversion rate with no annual cap.¹⁹⁶ In other words, a municipal water right is quantified in terms of its peak capacity. Initially, it might be pumped at or near that peak only during the hottest summer months. Over time, as demand grows, the municipality would then pump that right more and more days out of the year. Eventually a municipal provider will pump its older water rights at their full licensed capacity 365 days a year—thus constituted its “base load.” Meanwhile, new, junior water rights would be acquired, as needed, to serve the ever-growing summer peak. Eventually, however, they too will be used more and more, thus falling into the growing “base load.” In this way, a municipality is allowed to “grow into” its water right portfolio over time.

Moreover, the diversion rate is based on “the capacity of the system,” not the level of actual, physical diversions at the time of proof. This is a second way in which municipalities have historically been allowed to “grow into” their water rights.

The 1996 Act codified the “capacity of the system” feature (see discussion beginning on page 55), while leaving the diversion-based measurement feature intact.¹⁹⁷ In other words, the Department is implementing the 1996 Act with an eye toward allowing municipalities to hold quantities sufficient to meet their anticipated peak demand, without any annual volumetric limitation.

These long-standing administrative mechanisms, now codified by the Legislature, recognize the special circumstances faced by municipal suppliers.

K. LAND APPLICATION OF WASTE WATER

1. Background

In recent years “land application” of waste water has become increasingly common. This refers to the disposal of waste water from industrial processes by applying it to land to irrigate crops or grasses. Typically, the untreated waste water is untreated directly to crops, though it is often mixed

¹⁹⁶ A. Kenneth Dunn, IDWR, Administrator's Memorandum, *Licensing Procedures* (Apr. 7, 1975) (reproduced in Appendix 7).

¹⁹⁷ L. Glen Saxton, Chief, Adjudication Bureau, IDWR, Memo to Water Adjudication Bureau, *Water Rights for Municipal Use* (Mar. 18, 1996) (reproduced in Appendix 12).

with the clean water to dilute it.¹⁹⁸ The basic goal is to use natural processes to eliminate impurities in the waste water and, at the same time, consume the water. At the risk of oversimplification, the nutrients and/or impurities in the waste water are broken down and/or taken up by the plants and rendered harmless. In some cases, valuable crops are produced. In other cases, the application irrigates grasses or other plants of little or no economic value, which are mowed and discarded.

This raises the question: Must a change in water right be obtained for the application of the waste water to the land? In other words, should the land application be viewed simply as part of the original industrial water right? Or should the land application be viewed as a new beneficial use, requiring a change in the original industrial water right? Likewise, will a change in place of use be required? Will a new water right be required for the water used to dilute the wastewater?

This issue was addressed in guidance issued by the Department in 1996. Norm Young, *Administrator's Memorandum: Water Right Requirements for Industrial Waste Use and Treatment (Interim Policy)* (Sept. 27, 1996); Phil Rassier, Chief Counsel, *IDWR Memorandum: Land Application of Industrial Effluent* (Sept. 5, 1996). These are reproduced as Appendices 10 and 11.

The answers to the last two questions are no-brainers. If the land application falls outside the originally described place of use, then a change in place of use will be required. A water right for the any clean, make-up water will be required, just like any other. The original industrial water right could serve this purpose, if the land application is close enough to be physically supplied by it, and the additional quantity is available under the right. Or it might be obtained from another source (e.g., a new appropriation or a transfer of an irrigation right).

The only hard question is the first: must the original industrial water right be changed to allow include this new use? According to the Department's memorandum, the answer depends on whether the land application is "mandated" by environmental requirements, or is being undertaken for the independent purpose of producing crops.¹⁹⁹

¹⁹⁸ In one project (now proposed in Gooding County) waste water would be treated, before irrigation, to remove all pollutants. Biosolids removed from the treated waste water would be metered back in to the clean water before being applied to crops. This technologically sophisticated approach is very different from the typical land application project.

¹⁹⁹ This distinction is a blurry one. It is not always easy to draw a line between environmental programs which are "required" and those which are not. Are a company's actions "required" if the company is acting to anticipate future regulations and stay out in front of them? What if the company designed the system to remove more pollution than is strictly required under the regulation? The Department's guidance does answer these questions. However, we anticipate that the Department will not be unduly strict, so long as the project is generally designed to address environmental regulatory concerns.

2. Required land treatment

Let us suppose that an existing industrial facility with an existing industrial water right decides to switch its disposal strategy to land application. The Department has announced that land application of waste water by the industrial facility will be considered part of the industrial use (hence a beneficial use) if it is mandated by environmental requirements (and is consistent with best management practices established by the State).

This discussion assumes that the owner of the industrial water right is authorized to consume 100 percent of the water. If that is not the case (that is, if the owner is obligated to return a certain portion of the water diverted to a natural source as return flow), then none of the discussion below applies.

This discussion also assumes that the water user does not relinquish physical control over the water resource in accomplishing the land application. In other words, the waste water from the industrial use should be delivered directly (e.g., through a pipe) to the industrial use. If the waste water is allowed to reenter the public domain, there is a strong argument that it is no longer part of the original water use. In this case, it could be recaptured, via a separate water right with a junior priority.

However, saying that the land application If the land use application involves the cultivation of crops or any other new beneficial use, a change in nature of use (and presumably place of use) must be sought by the water right holder and approved by IDWR. If the land application does not entail the cultivation of crops or otherwise produce value, the land application will be deemed part of the original industrial purpose.²⁰⁰ Even so, the land application may require approval by the Department of a change in place of use, if the land application does not occur on the industrial site. Thus, the requirement of a change application may be avoided only where the new treatment method is within the original place of use and entails no new beneficial use.

The Department's guidance states that consumptive use can increase up to the amount determined to be consistent with the original water right, but diversion rate, annual volume diverted, and season of use cannot change. Thus, if the industrial user initially had the right to use and reuse the water to exhaustion, but was not actually doing so, the user may switch to land application. If, on the other hand, the original water right was expressly or implicitly restricted to its prior consumptive use, then it cannot be changed to expand the consumptive use; in this case a new water right must be obtained for the land application.

²⁰⁰ In many instances, even though there is income from the sale of crops, the overall farming operation may be unprofitable or negligibly profitable. In other words, the economic purpose of the operation is not to make money farming, but to dispose of the contaminants. The Department's guidance does not address whether such minimal, incidental economic benefit would be treated as creating a "new beneficial use." Until the situation is clarified, however, it is safer to assume that the Department will treat this as a change in use.

3. Optional land treatment.

The discussion above was premised on the assumption that land application (or some other form of treatment) is required to meet environmental regulations (and, therefore, is “part of” the industrial process). Suppose, on the other hand, that land application is not required in order to meet water quality requirements, but is merely convenient or economical. In this case, the Department has said it will view the cultivation as a separate use, requiring a separate appropriation of water.

Although the Administrator’s Memorandum does not address this, the new water right presumably could be obtained by filing for a junior “waste water” right at the point of discharge from the industrial facility. See discussion in Chapter O at page 79.

4. Mixing water

If additional fresh water is required to dilute the waste water, the fresh water must be obtained pursuant to a water right. If the existing industrial right allows additional pumping (without exceeding the right’s established rate and volume), it may be used for this purpose. Otherwise, the operator will have to obtain another water right by appropriation or transfer for this purpose.

5. Municipal water

The Administrator’s Memorandum is based on the assumption that the industrial user holds its own industrial water right. The Memorandum then addressed the issue of when the land application could be viewed as “part of” the original industrial right.

The Memorandum does not address the situation where the industrial user purchases water from a municipal provider. (In this case, the municipal provider is the water right holder.) In this circumstance, can the land application be viewed as “part of” the municipal right?

Municipal uses are broadly defined in Idaho.²⁰¹ On the other hand, municipal uses do not ordinarily include crop irrigation. Does that mean they cannot be part of a municipal right, where the economics allow municipal water to be used for crop irrigation?

A strong argument can be made that any beneficial use made by a customer of a legitimate municipal provider, with the approval of the provider, is a municipal use. Under this theory, it should not matter whether the land application were “required” or “optional.” Moreover, under this theory, there would be no need to obtain a change in place of use (assuming the new land application use physically occurred within the municipal provider’s broadly described service area).

On the other hand, the industrial user may choose to file for a new appropriation in its own

²⁰¹ Idaho Code § 42-202B(4). This statutory definition is consistent with case law across the West.

name.²⁰² This would eliminate any uncertainty regarding use of the right for irrigation purposes, and create a valuable property right and asset.

L. CONSERVED AND SALVAGED WATER

In recent years, attention has focused on efforts to squeeze more water out of the system through conservation measures.²⁰³ These measures can include lining ditches, increased use or maintenance of pipelines, tighter scheduling of irrigation applications to meet actual crop consumptive irrigation requirements, and the use of sprinkler application rather than flood irrigation. In the domestic or municipal water context, conservation measures may include water conservation education programs or restricting lawn watering to specific days or times of the day. Experience has demonstrated that these kinds of conservation methods can significantly reduce instantaneous and annual water demand.

Many, but not all conservation measures involve substantial capital investments to minimize seepage, evaporation or flow-through of waste water. Idaho law and policy already mandate that the right to use the waters of the state does not include the right to waste it. However, for water users who already employ reasonable diversion and application methods, such laws and policies likely are less important in their decision to employ water conserving methods than the simple need to reduce labor and maintenance costs, or to improve product quality and profit margins.

The costs of employing conservation measures, and the potential that they will allow more water to be available for actual beneficial use, raises the question of who is entitled to make use of the conserved water, and for what purposes. In Idaho, the law appears to be that the original appropriator may use the “additional” water for the original beneficial use, provided the water has not yet left his control, and provided the use does not result in an expansion of the original use. These, however, are significant conditions.

The issue of right to use additional water that becomes available through a water right holder’s employment of water conservation measures has not been fully resolved by statute or the courts in Idaho. One of the early Idaho cases to consider the question is *Reno v. Richards*.²⁰⁴ In *Reno*, the

²⁰² A waste water appropriation will not be allowed, if there is no release of control of the water back into the natural environment. However, the industrial user may obtain a new water right that piggy-backs the original municipal right and adds an additional use (but with a junior priority).

²⁰³ We use the term “conserved water” to describe water saved as a result of efficiency improvements or other changes made in the delivery or application of a water right. The term can also be used to describe efforts to reduce consumer demand in the context of municipal water rights.

“New” water can also be created through modifications of natural conditions aimed at reducing system losses to evaporation and the like. These rights are often referred to as “developed” water, or sometimes, “salvaged” water. Although there are some parallels between conserved water and developed water, judicial treatment of the two often differs.

²⁰⁴ *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918)

appropriator had removed brush and fall logs from the stream, and excavated channels through gravel bars in the streambed. In doing so, the appropriator increased the amount of water flowing through the channel and available for diversion. The Idaho Supreme Court held that

A person who, by removing obstructions from a stream and constructing artificial works, prevents the loss of water flowing therein through seepage and evaporation, and materially augments the amount of water available from the stream for a beneficial use, has the right to make use of the amount of water so conserved by his efforts in excess of the natural flow of the stream.²⁰⁵

Actually, the *Reno* case is more accurately treated as a “salvaged water” or “augmented supply” case rather than as one involving the right to conserved water. In *Reno*, the facts show that the actual supply of water at the source was increased by the appropriator’s efforts.²⁰⁶

In contrast, conserved water might best be defined as that water which results from making better use of the water once it has been diverted. Although there are no Idaho cases directly addressing the right to conserved water, Idaho cases dealing with the right to recapture and use waste water or seepage (discussed in the section above) may be instructional.

M. THE PRACTICAL PROBLEM OF FINDING CONSERVED WATER

As noted in the discussion above, Idaho has adopted a cautious approach to water conservation. Other states have been more enthusiastic about embracing incentives to water conservation. This Part explores the practical problems with this approach.

In recent years, water conservation has become a significant theme in the debate on water policy. Seeing enormous “waste” in water use, many policy makers have seized upon the idea that the gains achieved recently in energy conservation—such as improvements in electrical appliances, gas mileage, and insulation—should set the pattern for water conservation.

“Shouldn’t we encourage water users to become more efficient?” the thinking goes. More

²⁰⁵ 32 Idaho at 1, 178 P. at 82-83.

²⁰⁶ See also *Basinger v. Taylor*, 36 Idaho 591, 211 P. 1085 (1922) (party who augments streamflow by 10 percent by constructing pipeline should be decreed prior right to the quantity saved). Compare the cases of *Southeastern Colorado Water Conservation District v. Shelton Farms, Inc.*, 529 P.2d 1321 (1975), and *R.J.A., Inc. v. Water Users Ass’n of Dist. No. 6*, 690 P.2d 823 (Colo. 1984), in which the Colorado Supreme Court held that there is no right to appropriate water made available by removing water consuming vegetation along a stream. The rationale in the Colorado cases is that such water already is a part of the stream, and when it becomes available, belongs to appropriators from the stream in the order of their priority. These Colorado cases also focus on the potential for severe environmental effects that would result from a policy that encouraged destruction of riparian vegetation to salvage additional water from the stream.

specifically, the suggestion is made that water right holders who adopt conservation measures should be entitled to retain the benefits of that conservation. That is, they should be allowed to use the “conserved” water for a new use, or sell it to someone else.

Other Western states, such as California and Oregon, have adopted precisely this approach, with statutes which expressly allow conserved water to be sold, leased, transferred or exchanged.²⁰⁷ Unfortunately, these state statutes fail to distinguish carefully between true conservation and recapture of return flows. Thus they overlook the most difficult issue: increases in consumptive use causing injury to others. As a result, they have proven largely ineffective in their policy goal. The discussion in the prior section outlines the law governing the use of conserved or salvaged water. In addition to those theoretical problems, practical problems are encountered by those seeking to apply or market such water.

A few states—Oregon comes to mind—have been quite direct about the issue. The Oregon Legislature has created a system aimed at encouraging water conservation through more efficient water uses.²⁰⁸ Under this Oregon statute, if changes are made which “save” surface water through greater efficiency, the bulk of the “salvaged” water is retained by the owner of the water right, while a fraction (25 percent) is automatically committed to instream flows.

Idaho does not follow this approach. While the law governing who owns this “salvaged” water has not been clearly defined in Idaho, this much is clear: Any increased use of a water right is likely to run headlong into the prohibition against “enlargement” of the water right. See discussion in Part H.4 at page 37.

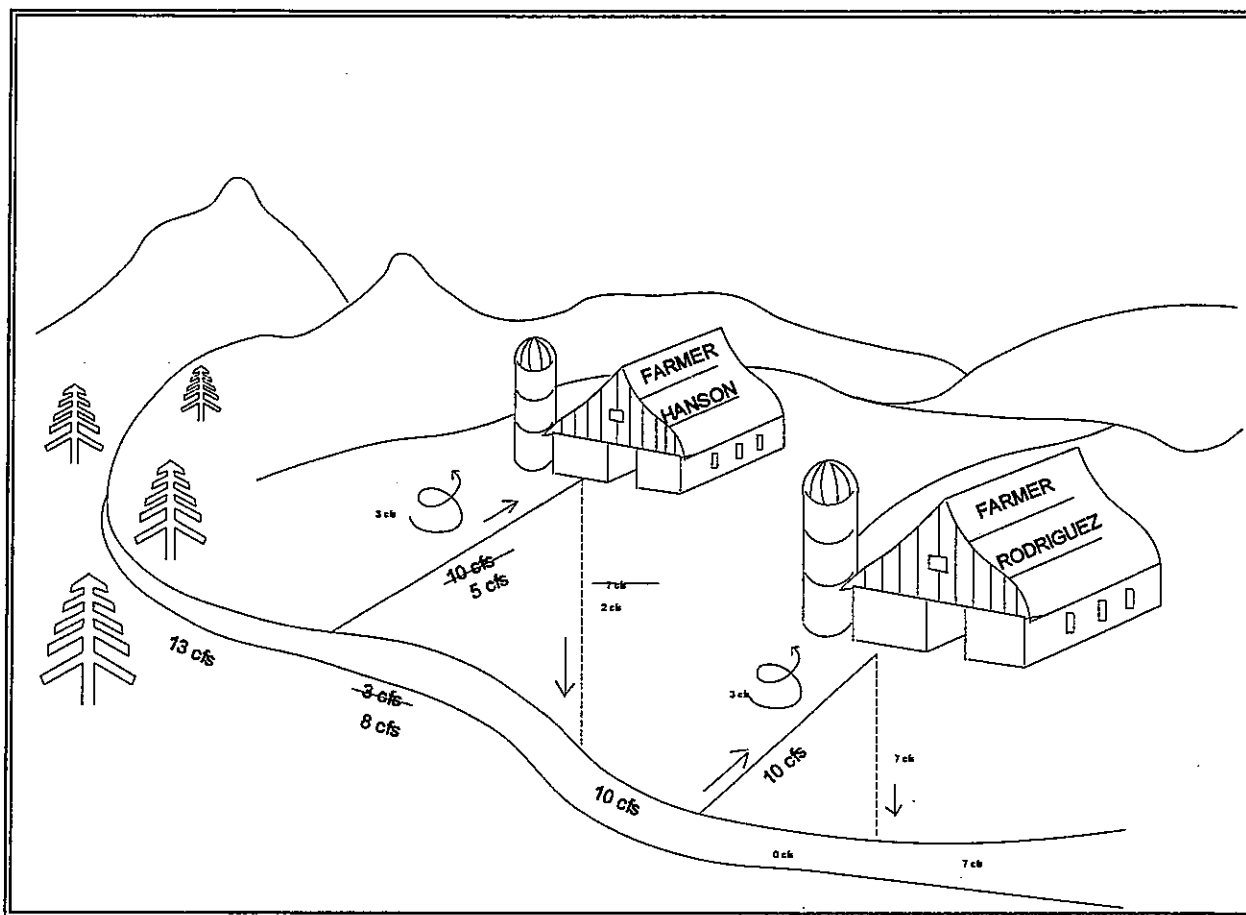
Even in places like Oregon which actively encourage salvaged water projects, there have been few actual, successful examples of salvaged water to date. One reason is it is hard to find cases where the expanded use made possible by the improved efficiency will not injure some other water users. In other words, water conservation often involves robbing Peter to pay Paul.²⁰⁹ In this way, water conservation is much more complicated than, say, energy conservation.

Water is used over and over by a series of people. A change in use by one user is likely to effect everyone else downstream. An example may help to illustrate the point.

²⁰⁷ Cal. Water Code § 1011(b); Or. Rev. Stat. §§ 537.455 to 537.500 and 540.510 (allowing a water right holder to retain up to 75 percent of conserved water, with the balance going to the State to maintain return flows).

²⁰⁸ Or. Rev. Stat. § 540.510.

²⁰⁹ an efficiency improvement saves a watt of energy, a watt of energy has been saved, and one less need to be created. Water, in contrast, is used and re-used by many people.



Consider the hypothetical above involving two rather inefficient irrigators. Suppose that Farmer Hanson and Farmer Rodriguez each own water rights to divert 10 cfs of water, and that each farm consumed only 3 cfs while returning 7 cfs to the stream through leaky ditches and so on. (The relative priorities of the farms are not relevant here.) Regardless of priority, neither farmer may make any change which injures the other.

As a result of these diversions, what would have been a natural flow of 13 cfs, is reduced to 3 cfs between points A and B, 10 cfs between points B and C, zero between points C and D, and 7 cfs downstream of D. Thus, the stream is “fully appropriated” in the sense that no new consumptive user can divert upstream of either farmer.

Now suppose that for one reason or another (for instance, a federal subsidy, a regulatory requirement, or a mitigation banking effort), Farmer Hanson decides to undertake an extensive irrigation efficiency improvement project. Let us suppose that by lining his ditches, converting to drip irrigation, or what have you, Farmer Hanson is able to significantly improve his efficiency and cut his diversions in half. Thus, after the efficiency improvements, Farmer Hanson only needs to divert 5 cfs to grow the same crop while consumptive use stays at 3 cfs. This would leave 8 cfs in the stretch between points A and B (compared to 3 cfs before the improvements).

Moving downstream, however, the water savings vanish. As Farmer Hanson reduced his diversion by 5 cfs, his return flow also was reduced by 5 cfs (from 7 to 2 cfs). Downstream of his return flow (between points B and C), the flow remains at 10 cfs, the same as it was before the costly efficiency measures were installed. And Farmer Rodriguez continues to divert all of it onto his crops.

Whether the efficiency improvements were a worthwhile investment depends upon whether the object was to improve flows within the depleted stretch upstream of the return flow (between points A and B) or downstream of the return flow. For instance, if an endangered snail lived between points A and B, the efficiency improvements could be of significant value in improving that habitat. If, on the other hand, the object of the improvements was to provide more water to flush endangered salmon through reservoirs somewhere downstream, the efficiency improvements may not have increased the total volume of downstream flow.

This example, of course, is highly simplified. It assumes (1) instantaneous return flows, (2) discrete, non-overlapping return flow points, (3) no conjunctive use of ground water, (4) no change in consumptive use, (5) no storage of water, (6) no inter-basin transfers, (7) no water quality effects, and (8) no cumulative effects. Changing any of these assumptions might change entirely the outcome of the analysis.

First, in the real world, return flow is not instantaneous. The component of return flow which returns water to a river at the end of the irrigation system is close to instantaneous, but the component which returns via ground water may involve considerable delays. To the extent that return flows are delayed, water conservation measures may result in temporary net inputs to the river until a new equilibrium is reached. This would occur as diversions are reduced, but recharge (from old diversions) continues for a period at the same rate. While the bonus is temporary, it might nevertheless be a critical component of a species recovery program.

Second, water which returns to the stream via the ground water return usually does not come in at a particular point and may not return for long distances. Consequently, the area of improved flow resulting from efficiency improvements may be both less discrete and much larger than in the example above. Thus, flows may be improved not just down to the next farm, but for hundreds of miles.

Third, the example above does not include a ground water component. A more realistic example may be that Farmer Hanson's excessive diversion is not only returning to the stream to be used by downstream diverters, but is recharging a large aquifer which also is supplying down-gradient ground water pumpers. If Farmer Hanson then implements irrigation improvements which reduce his diversions, there will be more water in the river and less water for the ground water pumpers. Assuming the ground water pumpers cannot prevent Farmer Hanson from reducing his diversion,²¹⁰

²¹⁰ This is probably the correct result. While ground water users are entitled in Idaho (and most Western states) to complain of injury just as is a downstream diverter, it is unlikely that a court would consider Farmer Hanson's efficiency improvements to constitute a "change" in use, because he has not changed his point of diversion, place

they are the loser, and the river is the winner.

Fourth, the example in the figure above assumes no change in consumptive use. That is probably a fair assumption in most cases. Lining a ditch, for example, has little impact on evaporative loss and does not change the quantity of water lost to evapotranspiration. On the other hand, some conservation measures may change consumptive use. Where that happens, “real” savings are realized. For instance, if water is lost from a leaky ditch to a contaminated aquifer whose waters cannot be used, lining the ditch puts “new” water back into the system. Switching from sprinkler to drip irrigation will reduce evaporation. And, of course, switching crops may produce huge changes in consumptive use.

Fifth, while the example above produced no change in the total *volume* of water below point B, the timing of flows may have changed due to a variety of real-world factors. In a particular situation, it may be that flows could be “shaped” to improve habitat or advance other goals. This ability to shape flows may be enhanced if the water not diverted may be put into storage (or may be left in storage).

Sixth, if the water savings occur on a trans-basin diversion (or involve crossing other hydrologic or legal barriers, such as state lines), the results may be substantially different from the example above. For instance, if Denver diverts water on the Western slope of the Rockies but provides return flows to the Platte River system on the other side of the Continental Divide, municipal water conservation (if it actually leads to reduced diversions) would increase flows on the Western Slope while reducing flows in the Platte.

Seventh, even if water quantity is not increased below Farmer Hanson’s return point, water quality may be improved. For instance, the addition of flow may improve the stream’s capacity to assimilate discharges within the reach.

Eighth, the example above focuses on conservation measures adopted only by a single farmer. Perhaps a more meaningful scenario would involve water conservation adopted throughout a basin. If that were the case, the incremental savings between points A and B could be replicated over a larger area.

In short, while water conservation is an important goal, it is not as simple as screwing in a lower watt bulb. A gallon saved is not necessarily a gallon earned. Whether habitat is improved as a result of efficiency improvements is highly situation specific, a fact sometimes not fully appreciated by advocates for efficiency improvements. By better understanding the dynamics of water conservation and water reuse, we can better target investments in conservation to ensure the biggest return for increasingly scarce dollars.

of use, or time of use. It must be said, however, that this is merely a prediction of a legal outcome. The authors are not aware of this situation having been tested in the courts.

N. INSTREAM FLOW RIGHTS

1. The traditional diversion requirement

Traditionally, Western states required a “diversion” to beneficial use before a water right could be recognized.²¹¹ Thus, a legally enforceable right to the use of water could only be obtained for water removed from a natural watercourse. A person seeking to protect natural (or, for that matter, artificial) stream flows from subsequent appropriation and diversion simply could not do so.

For a more detailed treatment of this subject see Christopher H. Meyer, *Instream Flows: Integrating New Uses and New Players into the Prior Appropriation System*, in *INSTREAM FLOW PROTECTION IN THE WEST* (Natural Resource Law Center, 1993).

In a classic early case, a federal court sitting in Colorado denied a water right to a resort town constructed around a cascading waterfall whose spray created an oasis of lush vegetation in the desert mountains near Colorado Springs. The waterfall, the court suggested, was an “inefficient” means of irrigation.²¹² The decision would have authorized a hydropower company to destroy the central attraction of a thriving town by diverting the falls. As it turns out, the project was never built.²¹³ In today’s thinking, the decision may seem strangely reasoned. While it is true that using a waterfall may be an inefficient means of irrigating flora, it is certainly an efficient way of supporting a resort community—a point seemingly lost on the court.

As recently as 2000, the Idaho Supreme Court confirmed that the diversion rule still applies in Idaho. In *State v. United States*,²¹⁴ rejected a “constitutional method” water right claimed by the

²¹¹ Although Idaho has no explicit statutory requirement for a diversion, the water code does speak of water rights in terms of diversion, Idaho Code §§ 42-101, 42-202, as does the state constitution, Idaho Const. art. XV, § 3 (see footnote 235 at page 77). Likewise, Idaho cases long have spoken of a diversion requirement (though, arguably in dictum). “In order to acquire a prior or superior right to the use of such water, it is essential that a riparian owner locate or appropriate the waters and *divert* the same as it is for any other user of water to do so.” *Hutchinson v. Watson Sough Ditch Co.*, 16 Idaho 484, 493, 101 P. 1059 (1909); “We deem it clear that until the time of the enactment of the statute in question herein [the 1971 Malad Canyon statute, discussed *infra* at page 76] Idaho’s statutory scheme regulating the appropriation of water has contemplated an actual physical diversion.” *State of Idaho, Dep’t of Parks v. Idaho Dep’t of Water Admin.*, 96 Idaho 440, 530 P.2d 924, 928 (1974).

²¹² *Empire Water and Power Co. v. Cascade Town Co.*, 205 F. 123 (8th Cir. 1913). Strictly speaking, this case was not decided on the diversion issue. Indeed, it recognized that a water right could be obtained for natural *irrigation* without a diversion, but not so for aesthetic purposes. *Id.* at 129.

²¹³ On remand the parties consented, for reasons not recorded, to a decree providing that the town had a senior right for all of the water of Cascade Creek except for one-half cfs. *Empire Water and Power Co. v. Cascade Town Co.*, Case No. 413, In Equity (U.S. District Court for the District of Colorado Decree issued Oct. 15, 1915).

²¹⁴ *State v. United States (In re SRBA Case No. 39576, Minidoka National Wildlife Refuges, SRBA Subcase No. 36-15452)*, 134 Idaho 106, 996 P.2d 806 (2000).

United States in the SRBA. The claim was for 1.16 cfs of water flowing from Smith Springs at the Minidoka Wildlife Refuge. The spring maintains wetlands and other habitat used by migratory birds.²¹⁵ However, it has never entailed any manmade diversion structure. The Idaho Supreme Court (reversing the district court) rejected the federal claim, noting that Idaho law has always required a diversion except in three circumstances: (1) stockwatering, (2) claims under the minimum stream flow statute (discussed in Part N.3 at page 74), and (3) specific legislative directives to appropriate water for instream purposes.

The diversion requirement may seem arbitrary—a sort of Catch-22 for instream uses. In fact, however, the diversion requirement is based on a sensible public policy—particularly in the pre-permit era. It protected against three types of abuse: First, it prevented speculators from obtaining water rights simply by asserting a claim to unappropriated water—and then selling the water to legitimate users arriving later. Second, it served an important notice function. In days prior to sophisticated record keeping and administration, about the only way a user could determine the state of water rights was to take a look at the stream. If people could hold rights for water left flowing in the stream, subsequent users could be misled into thinking that more water was available for appropriation than actually was the case. Third, the diversion requirement eliminated wasteful uses, for instance by users who sought to command the entire flow of a stream simply to run a waterwheel or irrigate adjacent lands by natural overflow.²¹⁶

In addition, the diversion requirement simply reflected the pragmatic view of the early settlers that eking out a living was more important than protecting the natural environment. Indeed, this clash of values has fueled decades of hostility between traditional consumptive water users and a growing cadre of river activists. Water users have charged that environmentalists simply fail to appreciate the economic benefits we all enjoy as a result of the sweat and determination of those who reclaimed the West. Some environmentalists, on the other hand, have charged that the prior appropriation doctrine callously ignores natural values. Others have come to recognize that the prior appropriation doctrine is well suited to accommodate both environmental and developmental interests.

²¹⁵ The United States might have claimed a federal reserved right in connection with the executive order creating the refuge. Instead, the claim was filed solely on the basis of state law.

²¹⁶ In *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1912), the U.S. Supreme Court, applying Idaho law, denied relief to a senior appropriator when a junior appropriator built a downstream reservoir which stilled the waters upstream and rendered the senior's waterwheels ineffective. This conclusion was based on the fact that to command the entire flow for a marginal benefit was unreasonable. Likewise, in *Walsh v. Wallace*, 26 Nev. 299, 67 P. 914, 917 (1902), early appropriators claimed a water right in the natural overflow of the Reese River upon which they relied to irrigate their adjoining land. The court rejected the right, declaring "[T]here must be an actual diversion of the same, with intent to apply it to a beneficial use" Cf., *Thomas v. Guiraud*, 6 Colo. 530, 533 (1883) (allowing an appropriation of bank overflow for irrigation). Clark, ed., *Waters and Water Rights*, vol. 1, § 19.5 (1967), contains an interesting discussion entitled "Judicial tolerance of wasteful practices." The thrust is that the courts tolerate waste until demand outstrips supply. A good example is that irrigation by bank overflow initially was viewed as beneficial, but eventually came to be regarded as wasteful.

Today most Western states have determined that these policy goals can be achieved without sacrificing instream values.²¹⁷ Recognizing that instream uses serve legitimate economic as well as environmental goals, sixteen of the nineteen Western states—including Idaho—have taken steps to accommodate them within the prior appropriation doctrine. Of these, however, not one puts instream flow water rights on a par with consumptive uses.

Typically, states which recognize instream flow rights have adopted special statutory restrictions. Many states allow only a single state agency—not private parties, municipalities, or others—to hold instream flow rights. Additional procedures, such as special tests or legislative approval, often are required to obtain instream rights. A variety of conditions may be attached. They may be sharply restricted in quantity (e.g., to the “minimum” needed to sustain fish life). Their duration may be limited, or they may be subject to subsequent re-evaluation. Some states limit their availability to specific geographic areas. Their transfer may be restricted. Even their priority date may be modified. In short, while most Western states, including Idaho, now have recognized instream water rights, they have been accorded by the Legislatures a “second class” status.

2. The mechanics of instream flows

Instream flow rights are no different in concept from ordinary water rights. They must be approved by the state just like any other right. They are then placed on the state’s books with a fixed priority date, a specified quantity, time and place of use, and are administered like any other water right. Thus, if the instream flow right is “in priority,” it can “call out” junior users upstream and force them to bypass water to support the instream flow. (To “call out” means to demand that upstream diverters forgo their uses so that water remains available for the downstream senior user). Of course, this does not guarantee that enough water will be in priority to meet the instream flow. In this sense, the term “minimum flow” used in the Idaho statute is misleading. Flows may well drop below the minimum. Whether the minimum flow will be met is a function of mother nature and senior rights.

The only difference in administration is that a consumptive water right has one or more discrete points of diversion, while an instream flow right applies throughout a specified reach of the stream (from one point to another). How one determines the endpoints of an instream flow is a matter of judgment. Theoretically, an instream flow could reach all the way from the headwaters to the state line. As a practical matter, they ordinarily are limited to some discrete reach, e.g., the location of an important fishery. If an existing consumptive use is transferred to an instream use, the protected reach might be anywhere downstream of the point of diversion. Arguably it could include the reach upstream of the point of diversion, too. The previous water right served as a sort of *de facto* instream right down to the point of diversion, in that it could call flows to that point. The new owner should be able to claim the

²¹⁷ “Most western water experts agree that the actual diversion requirement serves no function that cannot be served by other water law doctrines and statutory procedures. . . . For these reasons instream uses should be valid without the requirement of an actual diversion, and these uses should be presumed beneficial.” Tarlock, *Appropriation for Instream Flow Maintenance: A Progress Report on “New” Public Western Water Rights*, 1978 Utah L. Rev. 211, 221.

same right by stepping into the shoes of the previous owner.

Despite its name, an “instream” right does not have to be in a moving stream. It may also be obtained for a lake (or other standing body of water) or even a wetland. In such a case, the right would be for whatever quantity of water is needed to maintain a particular lake level or other condition.

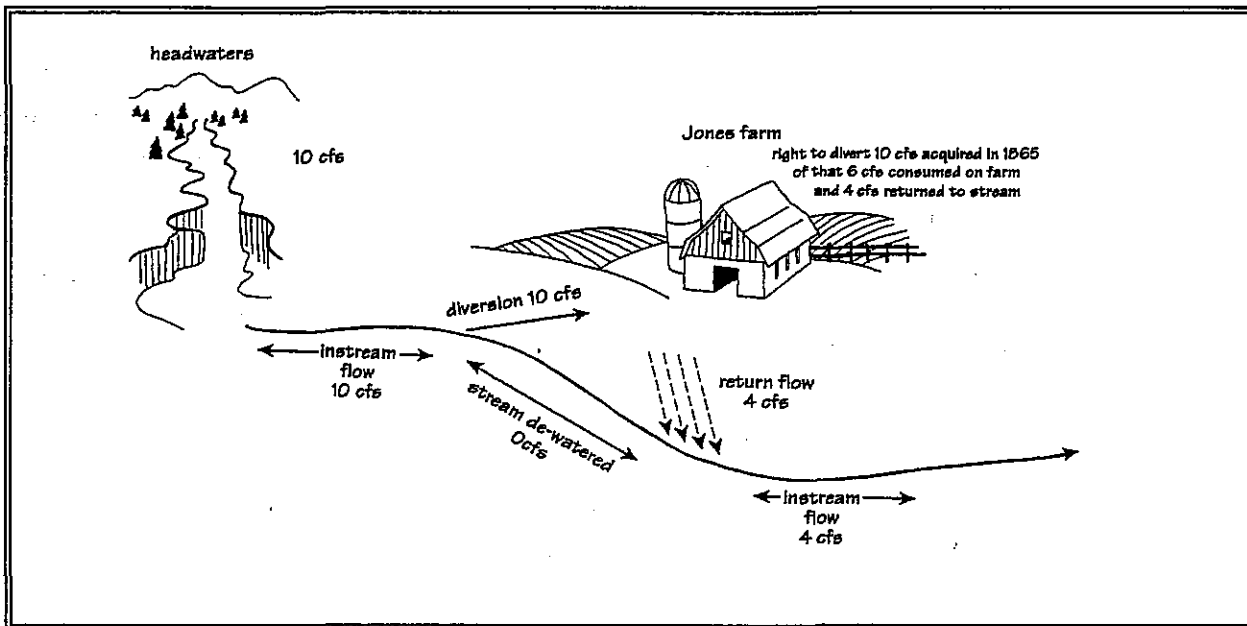


Figure 2 A junior instream appropriation cannot deprive Farmer Jones of his senior water right, but it could protect the *status quo* above and below his diversion.

There are many misconceptions about how instream flow water rights integrate with other water rights. Some people believe that a gallon of water committed to instream use is a gallon of water unavailable for other uses. Other people believe that because instream flow rights consume no water, they have no adverse effect on other users. While either conclusion might be right in a particular fact situation, neither statement is accurate across the board. The truth generally lies somewhere in between.

Consider the somewhat oversimplified example illustrated in **Figure 2**. Suppose that the stream flows at 10 cubic feet per second (“cfs”). And suppose that Farmer Jones has a senior water right to divert the entire 10 cfs of water from the stream, but that 4 cfs of that diversion finds its way back to the stream as return flow below the Jones Farm. Because instream rights must take their place in the priority system along with all other water rights, instream rights may only be obtained for what is left flowing in the stream. As a matter of law, Farmer Jones *cannot* be injured by a newly appropriated instream flow (or any other new appropriation, for that matter.) Thus, instream flow rights could be obtained today for up to 10 cfs for the reach between the headwaters and the point of diversion, for up to 4 cfs downstream of the Jones Farm return flow, and for none in between. (An instream right would

not necessarily be sought or approved for the entire remaining flow. It might claim considerably less if a lesser amount is all that is needed to achieve the beneficial use sought.)

Because instream rights are administered within the priority system, Farmer Jones will always be able to make his diversion first, even if it has the effect of reducing flows below his farm to less than 4 cfs. In short, the prior appropriation system guarantees that existing uses are not to be affected by junior instream rights.

If an instream flow right cannot take water away from existing uses, what is the point of securing an instream flow water right with a junior priority? The answer is that it preserves the *status quo*. It does this in two respects:

First, if there is any water left in the stream after the seniors satisfy their needs, that remaining flow may be protected from subsequent new appropriators. For instance, a new user could not build a hydroelectric diversion project upstream of the Jones Farm. (If it consumed no water and returned the water to the stream prior to the Jones diversion, the project would not injure Jones, but it would injure the instream flow right upstream of the Jones farm). Nor could a new user take additional water out of the protected stretch downstream of the Jones Farm.

Second, and this is important, the junior instream right prevents seniors (like Farmer Jones) from moving their points of diversion upstream into the protected reach. Suppose that in 1995 Farmer Jones decides to sell his water right to Big City, and Big City wants to take out the water farther upstream toward the headwaters (so that it will flow into town without pumping). Even though Big City steps into Farmer Jones' shoes and obtains a senior water right, it may *not* change the point of diversion if to do so would injure any other water right—including junior instream flow rights. In other words, it is possible to protect pristine mountain streams with very junior instream flow water rights.

The long and the short of it is that instream flow rights pose no threat to any existing use of water. On the other hand, they may block or complicate further development (in the form of changes, transfers and new users). But then again, so do all water rights. For example, a major hydroelectric dam or other project downstream on a river has the effect of preventing all new upstream consumptive use of that water. This is the way the prior appropriation doctrine always has operated.

3. Idaho's minimum stream flow statute

In 1978, in response to citizen pressure (including an initiative petition drive) the Idaho Legislature enacted the "Minimum Stream Flow" statute.²¹⁸ The provision expressly recognized that instream flows for "fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and

²¹⁸ 1978 Idaho Sess. Laws ch. 345, §§ 2, 11, amended by 1980 Idaho Sess. Laws ch. 238, § 14 (codified at Idaho Code §§ 42-1501 to 42-1505, 42-1736A).

navigation values, and water quality” are beneficial uses.²¹⁹ In so doing, the act implicitly did away with the diversion requirement.²²⁰ The act also requires the Department to take into account established minimum flows before granting any new appropriation.²²¹

The act provides that the Idaho Water Resource Board (a policy-making body) may apply to the Department of Water Resources for a permit and license establishing a minimum stream flow or lake level.²²² Any person may request the Board to file such an application.²²³ The statute expressly precludes judicial review of any denial by the Board of such a request.²²⁴

The statute specifies that the amount approved for this use must be found to be the “minimum flow or lake level and not the ideal or most desirable flow or lake level.”²²⁵ The requesting agency often uses the “Instream Flow Incremental Methodology” developed by the U.S. Fish and Wildlife Service to establish the flow upon which to base an application. The use of this methodology may help to ameliorate the otherwise harsh effect of the statute’s “not the most desirable” language. In one unusual case (Minnie Miller Springs), the Board and the Department agreed that the “minimum” was the entire amount of flow available.²²⁶ More typically, however, the minimum flow will be set by the State at or even below what is required for a healthy and diverse aquatic habitat.

²¹⁹ Idaho Code § 42-1501.

²²⁰ A similar statutory provision was so construed in Nevada. In 1969 the Nevada Legislature amended the state’s water code to recognize recreation as a beneficial use: “The use of water . . . for any recreational purpose, is hereby declared to be a beneficial use.” 1969 Nev. Stat. 141 (codified at Nev. Rev. Stat. § 533.030(2)). In 1988 the Nevada Supreme Court ruled unanimously that this action implicitly repealed Nevada’s statutory diversion requirement and allowed instream flow water rights to be protected under state law. *State v. Morros*, 766 P.2d 263 (Nev. 1988). The case involved an application for a water right by the U.S. Bureau of Land Management to protect a trout fishery at Blue Lake in northwestern Nevada. While the court did not squarely address the issue, its reasoning would support recognition of instream flow water rights by private parties as well.

²²¹ Idaho Code § 42-1736B.

²²² Idaho Code § 42-1503.

²²³ Idaho Code § 42-1504. As a practical matter, however, the Board follows a policy of looking to other *public* agencies, such as the Departments of Fish and Game, Parks and Recreation, and Health and Welfare, as well as county commissions and federal land management agencies for these recommendations.

²²⁴ Idaho Code § 42-1504.

²²⁵ Idaho Code § 42-1503.

²²⁶ In a recent Nebraska Supreme Court decision, *Nebraska Game and Parks Commission v. The 25 Corporation, Inc.*, 236 Neb. 671, 463 N.W.2d 591 (Neb. 1990) (aka *In re Application A-16642*), the court sidestepped the limitation in Nebraska’s statute to the “minimum necessary to maintain the instream use”, Neb. Rev. Stat. §§ 46-2,107 to 46-2,119. The court observed that the minimum necessary depended upon what the use was. If the use was to keep fish alive, that was not much water. But where, as in this case, the objective was to maintain a high quality trout fishery, the “minimum” flow was necessarily the “optimum” flow.

The statute also provides that the approved minimum stream flow permit must be submitted to the Legislature by the fifth legislative day of the session in order to give the body an opportunity to veto the permit.²²⁷ Although the state's Attorney General concluded that this provision is unconstitutional,²²⁸ a more recent Idaho Supreme Court decision appears to validate the procedure.²²⁹ In any event, the legislative veto provision has the effect of subjecting minimum stream flow applications to delays and legislative oversight not experienced by most other water right applicants.

As with all other water rights, the application must seek to appropriate only "unappropriated" waters. Keep in mind, however, that even streams which are "fully appropriated" in the traditional, consumptive-use sense, may be eligible for new appropriations of instream water rights. For instance, a stretch of stream might be fully appropriated because a downstream right diverts the entire flow. Thus, a new consumptive use upstream would flunk the "unappropriated water" test, and properly should be denied. But a new instream right should be allowed to protect the flows down to the point of diversion.

4. Other statutory mechanisms for protecting instream flows in Idaho

The 1978 minimum stream flow statute was not the Idaho Legislature's first recognition of instream flow rights. Actually, as early as the 1920s, the Legislature enacted statutes which protect lake levels in Idaho's large lakes for "scenic beauty, health, recreation, transportation and commercial purposes."²³⁰

Moreover, in the early 1970s, the Legislature adopted several more statutes which directed the State Parks and Recreation Board to appropriate "for scenic beauty and recreational purposes" the remaining unappropriated flows in certain scenic springs and streams.²³¹ These statutes have been interpreted by the Idaho Supreme Court as authorizing the recognition of instream flow water rights (prior to the minimum stream flow act).²³²

²²⁷ Idaho Code § 42-1503.

²²⁸ *Idaho Attorney General Opinions* 87-6

²²⁹ *Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410 (1990). *But see, Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (legislative veto violates the federal constitutional separation of powers requirement). The Idaho decision is criticized in Goble, *Through the Looking-Glass and What the Idaho Supreme Court Found There*, 27 Idaho L. Rev. 81 (1990-91).

²³⁰ Idaho Code §§ 67-4301, 67-4302, 67-4303 (Big Payette), 67-4304, 67-4305, 67-4306 (Priest, Pend d'Oreille and Coeur d'Alene).

²³¹ Idaho Code §§ 67-4307 (Malad Canyon), 67-4308 (Niagra Springs), 67-4309 (Big Springs), 67-4310 (Box Canyon), 67-4311 (Thousand Springs), 67-4312.

²³² *State of Idaho, Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974).

The Malad Canyon case²³³ arose when the Legislature specifically authorized the Department to "appropriate" water in Malad Canyon for recreational purposes. The court held that the concept of "beneficial use" encompasses "aesthetic and recreational values,"²³⁴ that Idaho's constitutional guarantee of a "right to divert"²³⁵ did not require an actual physical diversion, and that the Legislature must have intended to do away with the diversion requirement, at least for this particular appropriation.²³⁶

5. Transfers to instream uses

Another interesting question is whether a person holding a valid consumptive use right, such as an irrigation right, may change the nature of the right to an instream flow use. Although this is done routinely in other states,²³⁷ it has not yet been attempted in Idaho.

In the 1991 and 1992 sessions, the Idaho Legislature considered but rejected legislation drafted by the Department of Water Resources which would have established a procedure for transfers to instream uses.²³⁸ The legislation would have allowed a willing holder of a water right to assign or donate the right to the Water Resource Board, which, in turn, would seek approval to hold the right for instream purposes, without loss of priority.²³⁹ The proposed legislation failed to clarify whether "salvaged" water (e.g., water saved by lining ditches) may be transferred to an instream use.

As water rights become increasingly scarce, private willing seller transactions may become

²³³ Another Idaho decision holding that a diversion is not always required is *R.T. Nahas Co. v. Hulet* ("Nahas I"), 106 Idaho 37, 674 P.2d 1036 (Idaho App. 1983) (appropriation for stock watering does not require a physical diversion).

²³⁴ *Parks*, 530 P.2d at 928.

²³⁵ "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.

²³⁶ *Parks*, 530 P.2d at 929.

²³⁷ As enacted in 1973, Colorado's law also was silent on whether it authorized transfers to instream use. In 1986 the Legislature clarified that instream flow water rights could be obtained by transfer of existing rights as well as appropriation of unappropriated water. Senate Bill 91, 1986 Colo. Sess. Laws ch. 235 at 1095-96 (codified at Colo. Rev. Stat. § 37-92-102(3)).

²³⁸ The 1991 version was designated Senate Bill 1087. The 1992 version was not even printed by the committee.

²³⁹ Strangely, the legislation would have empowered the Department to adjust the priority date if necessary to "prevent injury." Such a concept is foreign to the prior appropriation doctrine, whose central premise is protection of priority of right. Only that portion of a water right which can be changed without injury should be eligible for transfer. Typically, this is the amount of water that is consumptively used. Because no injury results, the priority date should never be changed in a transfer proceeding. (If injury can be shown, and cannot be prevented by conditions or mitigation, the transfer should not be permitted, period.)

essential to an effective instream flow program. Indeed, they would benefit not only those interested in protecting habitat, but also farmers (who could gain income and forestall forfeiture actions), cities and industries (who could buy rights to protect investments in waste discharge permits, parks, and so on), and developers (who increasingly will be called upon to mitigate for habitat loss in order to obtain federal permits).

A sound instream flow transfer program would permit transfers of water rights to instream flows when such transfer avoided injury to all other existing or permitted users (junior as well as senior) and satisfied Idaho's public interest criteria.²⁴⁰ Artificial restrictions (such as the Idaho statute's limitation to a quantity of flow which is less than "ideal" or "desirable," *see* discussion at page 75 *supra*) should be eliminated. When transferred, either permanently or temporarily, the water right should retain its original priority date, just as other transferred water rights are entitled to, while being conditioned appropriately to prevent injury to other rights.

Just how much of the original water right could be committed to the new instream use would depend on the facts of the particular transaction. For instance, suppose Farmer Jones (in Figure 2 on page 73) sold his 10 cfs water right to the Nature Conservancy. If users downstream relied upon his return flow of 4 cfs, Farmer Jones could convey a water right only for the reach downstream of his return flow equal to his consumptive use (6 cfs). However, he should be able to convey an instream right for the full 10 cfs in the reach between his point of diversion and the return flow. This distinction was overlooked in the bill before the Legislature in 1992.

6. Water amenity rights

Water rights are routinely granted in Idaho for water amenity, wildlife habitat, and related purposes. These water rights are particularly common in new residential developments, where they support trout streams, ponds, fountains and the like. Although these look a lot like "instream rights," they are processed and approved like ordinary water rights.

The reason they are not instream rights is that they entail a diversion of some sort. For instance, water for the trout habitat in the River Run development in Boise is diverted out of the Boise river. Other water amenities, such as the ponds and water features in the new developments in Eagle, Idaho, are supported ground water pumped from wells.

Because these systems all entail a traditional diversion, they are not instream flow rights, and are not subject to any of the limitations imposed on instream rights. Most notably, they are owed by the private parties which developed them.

²⁴⁰ To be approved under the minimum stream flow statute, the instream flows must be found to be "in the public, as opposed to the private, interest." Idaho Code § 42-1503. Other water rights are subjected to a similar test in which they may be denied "where the proposed use . . . will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use." Idaho Code § 203A(5)(e).

This approach has been tested successfully in two cases in Colorado. The first was *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992). The City of Fort Collins sought an instream flow water right of 55 cfs along a segment of the Cache La Poudre river which runs through parks and open space areas within the city. The Colorado Water Conservation Board ("CWCB") objected because, as in Idaho, only the state agency can hold an instream right. The city agreed to amend its application.

The amended application characterized the water right as a traditional "diversion," rather than an instream right, making reference to "the Fort Collins Nature Center Diversion Dam" and "the Fort Collins Power Plant Diversion Dam" as the diversion points. The Nature Dam was then being build by the city in order to divert the river back into its historic channel and away from a channel cut during heavy rains in 1983 and 1984. Despite its name, the Power Dam does not supply hydropower, but is so-named after a nearby power plant. The court found that a kayak chute and fish ladder in the so-called Power Dam each constituted a sufficient "structure or device" to qualify as a diversion because they "concentrate the flow of water to serve their intended purposes."

Another case, decided later that year, went even further. In *Board of County Comm'rs. of the County of Arapahoe v. Upper Gunnison River Water Conservancy Dist.*, 838 P.2d 840 (Colo. 1992), the court approved a water right for reservoir storage which is used both for irrigation and to enhance a downstream fishery.

These cases offer dramatic evidence both of the ingenuity of western water lawyers and of the willingness of western courts to find ways to accommodate new uses of water which make sense. In short, instream use constitutes an idea whose time has come—even if one has to call it something else.

O. APPROPRIATION AND RECAPTURE OF WASTE WATER

Most uses of water entail some inefficiency, meaning that more water is diverted than is consumed. "Waste water" refers to water that is diverted for beneficial use, but is not consumed, and is released in a way whereby it may be physically captured before it reaches a natural aquifer or stream. This term includes the tail water left at the end of an irrigated field, the seepage water that leaks out of canals, the excess water applied to crops which percolates into the soil, and waste water generated by industrial processes or by a municipality. The term "return flow" is also used as a catch-all to describe any water that is diverted, but not consumed, and which eventually returns to the stream or aquifer from which it originated.

Many water uses, particularly irrigation uses, entail diversions which disrupt natural flow patterns and result in increased discharge of waste water in other areas. If this waste water reaches a stream or aquifer it is deemed return flow, and becomes subject to appropriation as part of that body of water. Thus, the return flow enhances the rights of every water right holder within its reach, by order of seniority.

On the other hand, there may be instances in which someone may be able to capture the waste water before it reaches a stream or aquifer. In analyzing waste water cases, it is important to distinguish who is the appropriator.

1. Recapture of waste water by the original diverter.

In one circumstance, the issue is whether the original appropriator (whose diversion created the waste water) may recapture and reuse his or her waste water as part of the original right. The original appropriator will contend that the recapture (even if undertaken years later) is allowed under his or her original right. Since the recapture would be allowed under the priority date of the original diversion, others who have had to rely on that waste water in the interim are simply out of luck.

In *Reynolds Irrig. Dist. v. Sproat*,²⁴¹ the focus was not on the new appropriator, but on the right of the original appropriator to maintain control of the waste water. The court held that “seepage and waste water belong to the original appropriator and, in the absence of abandonment or forfeiture, may be reclaimed by such appropriator as long as he is willing to put it to beneficial use.”

In the case of *United States v. Haga*,²⁴² the District Court suggested that the beneficial use of the recaptured waste or seepage must occur within the same lands for which the water originally was appropriated.²⁴³ This limitation—that recaptured waste or seepage water may be used only on the original lands—does not have any clear policy basis. In a primitive way, it reinforces Idaho’s anti-expansion policy. But trying to prevent expansion makes no sense here. Recapture is by its nature an expansion, albeit a permissible one.

2. Appropriation of waste water by third party

A distinct (and somewhat simpler) issue is presented where a person seeks a new appropriation of waste water generated by another appropriator. Since the new appropriation would carry a junior priority date, and would be allowed only in the absence of injury to other users, it does not present the same concerns over expansion. Indeed, such waste water appropriations are not uncommon, and are analyzed essentially like any other new appropriation.

An appropriation of waste water will be allowed following release of the waste water by the original appropriator back into the environment. Once the original appropriator has released control of the water, it becomes waste water and is subject to appropriation by others.

²⁴¹ *Reynolds Irrig. Dist. v. Sproat*, 70 Idaho 217, 214 P.2d 880 (1950).

²⁴² *United States v. Haga*, 276 F. 41 (Dist. Idaho 1921).

²⁴³ The court referred only to the beneficial uses on the “project” lands, which in that case included a federal irrigation project in the Boise River Basin.

The only caveat is that the new appropriator has no guarantee that the waste water will continue to be available. For instance, the senior appropriator who generates the waste water could cease diverting altogether so as to leave the new appropriator without a water source. Likewise, the senior appropriator may recapture the waste before it leaves his or her control.

In *Sebern v. Moore*,²⁴⁴ the court confirmed the basic right to appropriate waste and seepage water created, incidentally, by the diversions of other appropriators. (Prior to this decision, there was some thought that appropriations might be limited to water naturally occurring.) Indeed, in the *Sebern* case, the appropriator of waste water was allowed to re-establish his diversion of waste water after a waste ditch was relocated by another appropriator. The court added an important caveat, however. The appropriation of waste water is “subject to the right of the owner [that is, the person generating the waste water] to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use.”²⁴⁵ This is significant, because ordinarily the prior appropriator is not allowed to make any change in use (even in good faith) which would injure a downstream junior.

In *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*,²⁴⁶ 101 Idaho 677, 619 P.2d 1130 (1980), the Idaho Supreme Court unanimously reaffirmed the principle that a third-party appropriator of waste water may not compel the original diverter to continue the practices leading to the generation of the waste water. The court emphasized that it makes no difference whether the waste water arises before the use (from a leaky canal) or after the use (from post-irrigation tail water). The original appropriator may at any time cease the practice giving rise to the waste water, even to the detriment of those who hold valid water rights in that waste water.

P. AQUIFER RECHARGE, STORAGE AND RECOVERY

Since the 1900s, storage of water for future use has been a critical component of the western water picture. Until recently, however, that storage was typically in rivers and always above ground.

In the last three decades, however, water engineers have turned their attention downward. With most of the “do-able” above-ground sites already constructed, the concept of aquifer storage has come to the fore. After all, why not take advantage of the enormous natural capacity of these vast underground reservoirs? The idea is simple enough. Pump excess water down, store it in the aquifer, and pump it up as needed.²⁴⁷

²⁴⁴ *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927).

²⁴⁵ *Sebern*, 44 Idaho at 418.

²⁴⁶ *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980)

²⁴⁷ Obviously, there are water quality implications to such actions. The bottom line is that any water which will be introduced into the groundwater through an injection well must comply with State of Idaho ground water quality

Such a project might be undertaken in two very different circumstances: (1) “public benefit aquifer recharge” (“PBAR”) and private “aquifer storage and recovery” (“ASR”). It is essential to distinguish between the two, because their water rights implications are very different.

1. Public benefit aquifer recharge (“PBAR”) projects

The Idaho Legislature has addressed aquifer recharge solely in the context of what the authors call “public benefit aquifer recharge” projects or “PBAR.” These are projects undertaken by public agencies, typically ground water districts or aquifer recharge districts. The agencies obtain a water supply (typically surface natural flow or storage water) and cause it to recharge an aquifer (typically by running it through unlined canals during the non-irrigation season). The beneficiaries of the project are ground water users and others²⁴⁸ in general in the area—hence the term “*public benefit* aquifer recharge.”

Here is the key mark of a PBAR: No one obtains a new water right specifically to remove the water stored in the aquifer. Rather the new water reinforces the natural resource which supports all ground water rights in the area. It is as if Mother Nature added the water—for everyone’s benefit. At that point, anyone with a valid water right may take that water out, in priority, of course. This is why the authors refer to it as a “public” aquifer recharge project.

Legislative action on this subject dates back to 1978.²⁴⁹ The Ground Water Recharge District statute, Idaho Code §§ 42-4201 to 42-4231, expressly recognizes the legitimacy of public ground water recharge projects:

The legislature hereby acknowledges that certain water used and proposed projects to recharge water basins in the state by means of the storage of unappropriated waters of the public waters of the state in underground aquifers represents a unique and innovative

rules and, if it is a drinking water source, with the federal Safe Drinking Water Act. Consequently, if the water to be injected is surface water, it will have to be treated to meet drinking water standards before it can be injected.

These requirements, apparently, do not apply to water introduced to the ground water by way of incidental recharge through canals and the like. Arguably, they do not apply either to water intentionally introduced through aquifer recharge or storage and recovery efforts built around non-point sources like canals or settling ponds. But that is an open question.

²⁴⁸ Projects located above Thousand Springs may benefit not only ground water users, but springs in the Hagerman area and surface flows in the Snake River below the springs.

²⁴⁹ In 1978 the Legislature enacted two statutes on different aquifer recharge demonstration projects. In 1978 Idaho Sess. Laws ch. 293 (codified at Idaho Code § 42-4201 to 42-4231), the Legislature dealt with projects in Jerome, Lincoln, Gooding and Twin Falls Counties. Similarly, 1978 Idaho Sess. Laws ch. 366 (codified at Idaho Code § 42-234), dealt with a project in the vicinity of St. Anthony and Rexburg. This dual codification has been retained by subsequent amending statutes which have converted each statute into more generic aquifer recharge statutes, though still separate and largely redundant.

endeavor to further water conservation and increase the water available for beneficial use.²⁵⁰

The statute goes on to expressly declare that “[i]n view of the public betterment to be achieved” the “appropriation” of water “for purposes of ground water recharge shall constitute a beneficial use.”²⁵¹

A key question is, why is this statute necessary? Is this simply legislative cheerleading, or was this provision actually necessary to obtain water rights for PBAR projects? After all, virtually all uses of water are recognized as “beneficial uses” these days. (See discussion in Part C.4 at page 9.)

More to the point, isn’t storage of water recognized as a beneficial use? The answer is “not necessarily.” Storage of water for its own sake has never been considered a beneficial use. It is only when it is stored for some other specific beneficial use, for example, to irrigate identifiable lands, that the storage of water is deemed beneficial. See footnote 14 at page 10.

Moreover, a public benefit aquifer recharge project is unlike other reservoir projects. A typical reservoir holds water for the benefit of specific water right holders. Thus, the entity who captured the water (or shareholders therein or beneficiaries thereof) is entitled to take it out for its own benefit. In contrast, a PBAR project has no particular, identified beneficiaries, other than water right holders in the area generally. Instead, a public entity, such as a ground water district, puts the water in the aquifer—and then releases control.

For these reasons, PBAR projects are atypical in the West—where water is ordinarily appropriated for the benefit of the appropriator. Consequently, it was necessary for the Legislature to declare that it is a beneficial use when water is stored in an underground reservoir for no purpose other than to make more water available for other appropriators to take out.

In doing so, however, the Legislature added certain limitations on PBAR projects. These limitations, like PBAR projects themselves, are deviations from the ordinary application of the prior appropriation doctrine.

For instance, the Legislature expressly excepted water rights for PBARs from the Swan Falls subordination.²⁵² (See discussion in Part T.2 at page 145.) Thus, Idaho Power conceivably could call out a water right for a PBAR project which would have been immune from a call had the water been used for any other purpose.

²⁵⁰ Idaho Code § 42-4201A(1). Identical language appears with respect to a particular recharge project at Idaho Code § 42-4201. Similar language is found in the other ground water recharge statute, Idaho Code § 42-234.

²⁵¹ Idaho Code § 42-4201A(2).

²⁵² Idaho Code § 42-4201A(2); Idaho Code § 42-234(2).

Another statutory provision authorizes the Director of the IDWR to regulate (that is, to reduce) the amount water diverted for a PBAR project, even when the PBAR's water right is in priority.²⁵³ This sort of *carte blanche* regulatory authority to override a water right reflects a sharp departure from the fundamentals of the prior appropriation doctrine, and seriously undermines the value and integrity of PBAR projects.

Next, the Legislature apparently has restricted PBAR water rights to rights obtained through "appropriation"—in other words, water rights newly created for the project rather than existing water rights purchased and transferred to the project.²⁵⁴ This somewhat ambiguous restriction, however, is inconsistent with legislative funding of projects which have used water stored in surface reservoirs as the source of water for public benefit aquifer recharge projects.

Finally, the Legislature has prohibited water rights for aquifer recharge where the recharge is "incidental" to some other use.²⁵⁵ In large part, this was designed to ensure that high volume irrigators don't use the aquifer recharge statutes to circumvent the "duty of water" analysis. (See discussion in Part C.5 at page 11.)

Given the statutory restrictions and ambiguities, and the appurtenant regulatory uncertainties, perhaps it is not surprising that these projects really have not yet moved beyond the demonstration phase.

2. Private aquifer storage and recovery ("ASR") projects

The Legislature's various pronouncements about aquifer recharge have no bearing on private aquifer storage and recovery ("ASR") projects. Unlike PBARs, which require some special treatment under the prior appropriation doctrine, ASR projects are conceptually very familiar. They are nothing but ordinary storage projects which have been moved underground.

Consequently, no special legislative authorization is required, and, indeed, the Legislature has said nothing on the subject. More importantly, the unique legislative restrictions applicable to PBAR projects are inapplicable to ASR projects. What this means is that an entity seeking to undertake an ASR project should obtain a water right (through appropriation or transfer) allowing the entity to divert water from some source (surface water, ground water or storage) and place the water into the aquifer.

²⁵³ Idaho Code § 42-4201A(3). See also Idaho Code § 42-4201A(4) authorizing the Director to curtail water rights for PBARs under certain circumstances. Finally, see Idaho Code § 42-234(2) which provides that water rights obtained for PBARs are subject to "depletion [whatever that means] for surface storage or direct uses after a period of years sufficient to amortize the investment of the appropriator."

²⁵⁴ Idaho Code § 42-4201A(2); Idaho Code § 42-234(2).

²⁵⁵ Idaho Code § 42-234(3).

What about the other end? Is a separate water right required to take the water out again? The question is unsettled in Idaho. The authors would contend, however, that none is required or appropriate. Just as no separate water right is required to take the water out of an above-ground reservoir once it has been diverted in priority to storage, it would seem that no separate water right should be required to remove water from an aquifer where the water was properly stored pursuant to an in-priority water right and can be accounted for using an approved ground water model.²⁵⁶

In the event that the IDWR insists on there being a separate water right in place authorizing the withdrawal of water stored in the reservoir, it is essential that this right not be assigned a priority date. Imagine buying 1899 priority surface water, putting it into the ground, and then being required to take it out with a 1999 priority ground water right. Even assigning an 1889 priority to the removal from storage is an inappropriate restriction. Subjecting the water to any priority would defeat the entire purpose of an ASR project.

Rather, the “removal” water right should plainly state that stored water may be removed without regard to priority (in the same way that water may be released from a reservoir in a drought and conveyed past all other junior and senior appropriators). Thus, even if other ground water users were subject to curtailment during a period of extended ground water decline, an entity which affirmatively recharged the aquifer for its own benefit should be entitled to derive that benefit through an out-of-priority diversion, at will.

There is no magic here. Like any reservoir, this system does not create new water in the hydrologic system. This is a zero sum game. It is primarily a question of timing—making water available when needed. In some cases, ASR projects may be employed because they improve the quality of water. In others, the goal of the project may simply be to make the water physically available in a different place. No ASR project, however, increases the overall quantity of water in the system.

As with any reservoir, there must be a mechanism for determining what water within the reservoir belongs to the holder of the storage right. In the case of a surface reservoir, that calculation is relatively simple. In the case of an underground reservoir, the technical computations may be more complex. Once that model has been approved by the IDWR, however, the project owner ought to be able to rely on that model to justify removal of stored water which, according to the model, would not be there but for the project.

²⁵⁶ In Idaho, a storage right for a surface reservoir will note the priority of the right to divert water into storage (i.e., to capture water behind the dam), and will also identify the ultimate use(s) for which water may be released from the reservoir. However, those reservoir releases of captured water are not subject to any priority constraint. Once the water is captured, it belongs to the appropriator and may be released at will for the identified purpose. The authors contend that a water right for an aquifer storage and recovery project should work in exactly the same way.

Q. THE PUBLIC TRUST DOCTRINE AND THE LEGISLATIVE RESPONSE

1. The doctrine's origins

The public trust doctrine is a body of decisional law which provides that title to certain public resources are held in trust by the states for the benefit of the public. It operates, in effect, as a limitation on alienation, thus ensuring that no legislative or administrative entity may casually convey vital public resources to private use. Indeed, the doctrine may be traced through England to ancient Roman law, which provided that certain public resources, notably the seashore and riverbanks, were inherently "public" and therefore unalienable²⁵⁷

The seminal American case was *Illinois Central Railroad Co. v. Illinois*.²⁵⁸ That 1892 case dealt with the conveyance in 1869 by the Legislature of Illinois of the entire lake shore of the city of Chicago to the Illinois Central railroad. Four years later, the Legislature thought better of its stunning generosity, and repealed the grant.

The United States Supreme Court rejected the railroad company's contention that the Legislature could not just change its mind and take the property back. The Court found the Legislature, in effect, could do just that. Why? Because, the shoreline property was conveyed, from the start, subject to an unstated, but paramount public trust. In other words, the conveyance had a string attached to it, and the Legislature was free to pull that string and reclaim the property—without compensating the railroad.

This point bears emphasis. The key purpose of the public trust doctrine is to enable the government to avoid paying just compensation.²⁵⁹ The state always has the power to take (or to take

²⁵⁷ Here is the law as announced by Emperor Justinian:

In the preceding book we have expounded the law of Persons: now let us proceed to the law of Things. Of these, some admit of private ownership, while others, it is held, cannot belong to individuals: for some things are by natural law common to all, some are public, some belong to a society or corporation, and some belong to no one. But most things belong to individuals, being acquired by various titles, as will appear from what follows.

Thus, the following things are by natural law common to all--the air, running water, the sea, and consequently the sea-shore. No one is therefore forbidden access to the seashore, provided he abstains from injury to houses, monuments, and buildings generally; for these are not, like the sea itself, subject to the law of nations. On the other hand, all rivers and harbours are public, so that all persons have a right to fish therein.

The Institutes of Justinian (Translated into English) Book II, at D2 (J.B. Moyle trans. 5th ed. 1928) (Nov. 22, 533 A.D.).

²⁵⁸ *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892). See also, *Shively v. Bowlby*, 152 U.S. 1, 56 (1893), recognizing some limits on the alienability of lands under navigable waters which, under the equal footing doctrine, became the property of the state upon admission.

²⁵⁹ The Court said (apparently in dictum), "Undoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay . . ." 146 U.S. at 455. In other words, compensation is due for

back) property for public use under its condemnation power. The public trust doctrine is a way of declaring that the property belonged to the state in the first instance, and therefore no compensation need be paid.

2. How broad is the power?

The historic uses protected by the public trust were navigation, commerce and fishing. The list of public uses protected by the public trust has expanded in recent years to include aesthetic, environmental and recreational uses of the public resources. This has raised concern among users of public trust resources, because the public trust uses generally take priority over non-public uses when there is a conflict between them.

The Idaho Supreme Court has ruled that water rights in Idaho are held subject to the public trust.²⁶⁰ Just what this means in Idaho is a bit unclear.²⁶¹ Other states, however, have made it perfectly clear that the public trust doctrine has the power to take water rights out of the hands of those who hold them, and reassign them to public uses, without compensation.²⁶²

3. What is the basis for this power?

In *Illinois Central*, the Supreme Court seemed to say that the Legislature does not have the power to convey trust property free from the trust.²⁶³ But this concept of inherent inalienability is difficult to reconcile with modern jurisprudence. After all, unadorned pronouncements of “doctrines”

detrimental reliance only, not for the revocation itself.

²⁶⁰ *Idaho Conservation League v. State*, 128 Idaho 155, 911 P.2d 748 (1995) (overruled, in effect, by Idaho Code §§ 58-1201 to 58-1203, discussed below).

²⁶¹ Because Idaho also has an independent, statutory “local public interest” review process, the Idaho Supreme Court has not found it necessary to clearly explicate either the basis for the public trust doctrine, nor its practical effect. See footnote 340 at page 102.

²⁶² *National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983), cert. denied, 464 U.S. 977 (1983); see also, *Robinson v. Ariyoshi*, 65 Hawaii 641, 658 P.2d 287 (1982), reconsideration denied 66 Hawaii 528, 726 P.2d 1133 (1983); *United Plainsmen Assoc. v. North Dakota Water Conservation Comm’n*, 247 N.W.2d 457 (N.D. 1976) (with respect to new allocations).

²⁶³ “The trust with which they are held, therefore, is governmental, and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.” *Illinois Central* at 455-56. “A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.” *Id.* at 453. “[T]he State holds the title to the lands under the navigable waters of Lake Michigan, . . . [b]ut it is a title different in character from that which the State holds in lands intended for sale. . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.” *Id.* at 452.

are less willingly accepted by jurists today who fairly insist on knowing where the law comes from.

Where, then, does the public trust doctrine come from? The public trust doctrine “sounds” like constitutional law—an absolute statement of an inherent limitation. But it is doubtful that the doctrine can be justified on the basis of either the U.S. or the Idaho Constitutions, and no court has found it there. It is certainly not statutory law. We do not recognize divine law or natural law in our civil law system. That leaves common law, which, presumably, the public trust doctrine must be.²⁶⁴

If the public trust doctrine is common law, then the Legislature is free to change it. Rather than being a denial of the power of the Legislature to alienate trust property, it is better understood as something in the nature of a rule of construction. If, as in *Illinois Central*, the Legislature simply conveys trust property without saying more, the courts will interpret the conveyance as being subject to the public trust. If, on the other hand, the Legislature were to knowingly and expressly convey trust property not subject to the trust, then the courts would have no choice but to give full effect to the conveyance.

4. The Idaho Legislature’s response

In 1996 the Idaho Legislature expressly declared that the public trust doctrine does not apply to water rights.²⁶⁵ The Legislature expressly noted that the doctrine is merely common law, which can always be overridden by statute.²⁶⁶

So far, no court has ruled on the effect of this statute. Perhaps supporters of the public trust doctrine will challenge it, contending that the Legislature lacks the power to limit the doctrine. However, if the doctrine is really just common law, as suggested above, then the Legislature plainly does have the power to curtail or even eliminate the doctrine.

The effect of the statute is to limit the public trust doctrine to its early historical application under *Shively v. Bowlby*²⁶⁷ to conveyances or other actions by the state impairing public ownership in lands beneath navigable waters. The statute expressly disclaims any applicability of the doctrine to the appropriation or use of water (including the transfer of water rights).²⁶⁸ It also blocks application of the

²⁶⁴ Common law is simply judge-made law. That is, the collection of rules and principles which may be distilled from appellate decisions within a jurisdiction. The common law of England, as it existed in 1864, was adopted by the Idaho Legislature. Idaho Code § 73-116. This is known as the “reception.”

²⁶⁵ Idaho Code §§ 58-1201 to 58-1203.

²⁶⁶ Idaho Code § 58-1201(6).

²⁶⁷ See footnote 258 at page 86.

²⁶⁸ Idaho Code § 58-1203(2)(b).

doctrine in the context of the disposal of school lands.²⁶⁹ Finally, the act declares the public trust doctrine inapplicable with respect to the “protection or exercise of private property rights within the state of Idaho.”²⁷⁰

The upshot is that the Legislature has cleanly eliminated from Idaho law a major area of potential contention. As a result, the statutory law governing evaluation of the “local public interest” (discussed in Chapter R at page 89) will provide the primary legal forum for raising public interest issues in connection with water allocation and re-allocation in Idaho.

R. LOCAL PUBLIC INTEREST REVIEW

1. The origin of local public interest review

Prior to 1978, Idaho citizens had no standing to object to a water right appropriation or transfer on the basis that the diversion would harm the environment.²⁷¹ In 1978, the Idaho Legislature added a “local public interest” review requirement to the steps required for approval of appropriations of new water rights.²⁷² In 1979, when the water supply bank was created, the same local public interest test was made applicable to water bank rentals.²⁷³ In 1981 the Legislature made the test applicable to changes (also known as transfers) of existing water rights.²⁷⁴

This public interest provision states, simply, that the proposed use must not conflict with “the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use.”²⁷⁵ Standing alone, this spare language is hardly elucidating. The historical context of its adoption, however, sheds some light on its scope and intent.

²⁶⁹ Idaho Code § 58-1203(2)(a).

²⁷⁰ Idaho Code § 58-1203(2)(c). The meaning of this third point is unclear, but appears to be surplusage, given that the real intent of the legislation has already been accomplished.

²⁷¹ *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981) (in which the Idaho Department of Water Resources had ruled that water quality concerns were an “inappropriate consideration” prior to the adoption of the local public interest test).

By the way, there is a pre-1978 ancestor of sorts to the public interest test. An oblique reference to the “public interest” in the context of certain water right applications requiring approval by the Idaho Water Resource Board was made a part of the water code in 1967. 1967 Idaho Sess. Laws, ch. 374, § 2, p. 1086. It was repealed two years later. 1969 Idaho Sess. Laws, ch. 468, § 1, p. 1348. However, this short-lived provision did not provide a basis for a broad public interest review.

²⁷² 1978 Idaho Sess. Laws, ch. 306, § 1, p. 768 (codified at Idaho Code § 42-203A(5)(e)).

²⁷³ 1979 Idaho Sess. Laws, ch. 193, § 3, p. 561 (codified at Idaho Code § 42-1763).

²⁷⁴ 1981 Idaho Sess. Laws, ch. 147, § 3, p. 256 (codified at Idaho Code § 42-222(1)).

²⁷⁵ Idaho Code §§ 42-203A(5)(e), 42-222(1), 42-1763.

Historically, in Idaho and throughout the West, the allocation of water under the prior appropriation doctrine has involved little if any governmental direction or interference. So long as the applicant could demonstrate that the proposed use was beneficial, was feasible and not speculative, and involved no injury or enlargement, that was the end of the matter. It was not considered the government's job to critique the applicant's business plans or decide who, among competing applicants, could make the best use of the resource. Rather, the determination of which is the highest and best use of water is left to the competition of private initiatives in the marketplace.²⁷⁶

In the decades beginning in the 1960s, however, considerable attention has been directed to the question of whether the government ought to play a more active role in the allocation of water rights and the protection of the public's water resources. This was driven by two strong political factors.

First, first there was a growing perception that something must be done to stem environmental losses and protect remaining vital habitat. The objection was made that the playing field was not level, particularly with respect to the protection of instream flows. Throughout the West, the diversion requirement stood as a barrier to those who wished to obtain water rights to protect river flows and lake levels.²⁷⁷ Today, statutes and judicial decisions have corrected this imbalance to some extent at least. Idaho, like virtually all western states, has incorporated protection of instream flows into the prior appropriation system.²⁷⁸ Nevertheless, the perception that the prior appropriation doctrine is "anti-environmental" is difficult to shake.²⁷⁹

²⁷⁶ The Idaho Constitution does provide a "preference" for certain water uses. Idaho Constitution, Idaho Const. Art. XV, § 3. However, this so-called "preference" is a misnomer. Courts consistently have interpreted these provisions—which are common throughout the West—as conferring a right of condemnation on certain uses. Thus, a higher preference user can buy out a lower preference user (in a forced sale), but a higher preference user cannot simply demand that water be allocated or reallocated to it on the basis of preference.

²⁷⁷ The rule as traditionally stated is that a water right requires a "diversion to a beneficial use." That is, it is necessary to artificially remove (or impound) water in order to obtain a legally protected right to its use. The Idaho Supreme Court recently confirmed that the diversion requirement remains a part of Idaho water law (except as provided under the minimum flow statute). *State v. United States (In re SRBA Case No. 39576, Minidoka National Wildlife Refuges, SRBA Subcase No. 36-15452)*, 134 Idaho 106, 996 P.2d 806 (2000).

²⁷⁸ Idaho's minimum stream flow act was adopted in 1978. 1978 Idaho Sess. Laws ch. 345, §§ 2, 11, amended by 1980 Idaho Sess. Laws ch. 238 § 14 (codified at Idaho Code §§ 42-1501 to 42-1505, 42-1763B). This was not the first legislative recognition of the role of instream flows. As early as the 1920s, the Legislature enacted statutes which protect lake levels in Idaho's large lakes for "scenic beauty, health, recreation, transportation and commercial purposes." Idaho Code §§ 67-4301, 67-4302, 67-4303 (Big Payette), 67-4304, 67-4305, 67-4306 (Priest, Pend d'Oreille and Coeur d'Alene). Moreover, in the early 1970s, the Legislature adopted several more statutes which directed the State Parks and Recreation Board to appropriate "for scenic beauty and recreational purposes" the remaining unappropriated flows in certain scenic springs and streams. Idaho Code §§ 67-4307 (Malad Canyon), 67-4308 (Niagra Springs), 67-4309 (Big Springs), 67-4310 (Box Canyon), 67-4311 (Thousand Springs), 67-4312.

²⁷⁹ An abiding distrust of the prior appropriation doctrine is reflected, for example, in the writing of Professor Charles Wilkinson. Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* (1992) (in which Prof. Wilkinson describes the prior appropriation doctrine as one of five "Lords of Yesterday"); Charles F. Wilkinson, *In Memoriam: Prior Appropriation*, 21 *Env'tl L. v* (1991) (in which Prof. Wilkinson announces

Second, there was fear of “water raids.” During this time, water policy was strongly influenced by concern that Idaho (and other intermountain states) were vulnerable to massive water transfers to thirsty and powerful out-of-state interests. The late 70s and 80s were dominated by proposals and rumors of proposals for all manner of trans-basin diversions, from coal slurry pipelines, to water barges, to re-engineered rivers, to towing icebergs.

These seeming disparate political forces—for environmental protection, local control, and states rights—combined and gained momentum. Some might characterize the combination of political forces as improbable or coincidental, but the result was real. Water codes throughout the West were amended in the 1970s to give local citizens a stronger voice in water allocation decisions.

The result was often a three-pronged reform. The first prong was express legislative recognition of instream flow rights. The second prong was a requirement that water right applications be subjected to “public interest” scrutiny. The third prong was the provision of additional procedural and substantive protections specifically aimed at deterring harmful out-of-state or out-of-basin water transfers.

Idaho was no exception. Legislation on each of these subjects was enacted in the final decades of the last century.

In 1978, the Legislature responded to citizen pressure (in the form of a grassroots petition drive) by adopting the state’s minimum stream flow law.²⁸⁰ The provision expressly recognized that instream flows for “fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality” are beneficial uses.²⁸¹ In so doing, the act implicitly did away with the diversion requirement. By the way, Idaho’s minimum stream flow law contains its own “public interest” standard. To be approved, the proposed instream flow must be found to be “in the public, as opposed to the private, interest.”²⁸²

It the same year, the local public interest law was made applicable to all new appropriations.²⁸³ When the water supply bank was created in 1979, the local public interest test was made applicable to water bank rentals.²⁸⁴ In 1981, the local public interest test was extended to apply to transfers of

the “death” of the prior appropriation doctrine at age 152).

²⁸⁰ 1978 Idaho Sess. Laws ch. 345 §§ 2, 11 (codified at Idaho Code §§ 42-1501 to 42-1505, 42-1736B).

²⁸¹ Idaho Code § 42-1501.

²⁸² Idaho Code § 42-1503.

²⁸³ 1978 Idaho Sess. Laws ch. 306, § 1, pp. 767-69 (codified at Idaho Code § 42-203A(5)(e)).

²⁸⁴ 1979 Idaho Sess. Laws, ch.193, § 3, p. 561 (codified at Idaho Code § 42-1763).

existing water rights.²⁸⁵ Public interest considerations now arise also in the context of exchanges, emergency transfers, accomplished transfers, and trust water (see footnote 320 at page 96).

In 1980, the Legislature established special rules for “out-of basin” uses for ground water rights involving over 5,000 acres or 10,000 acre-feet per year. Such uses must meet special tests related to “the local economic and ecological impact” and must be specifically approved by the Legislature.²⁸⁶

In 1981, the Legislature enacted two more “anti-water-grab” protections. First, it prohibited any change in the nature of use of a water right (e.g., a change from agricultural to industrial or municipal) that “would significantly affect the agricultural base of the local area.”²⁸⁷ Second, it required affirmative legislative approval of any change in the nature or period of use of any water right involving over 50 cfs or 5,000 acre-feet of storage.²⁸⁸

In 1990, the Legislature enacted detailed legislation specifically dealing with any new out-of-state uses of water.²⁸⁹ The 1990 Act was intended to bring the state into compliance with *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), which set constitutional standards under the federal commerce clause for the circumstances under which states may restrict water exports to other states.²⁹⁰ The 1990 Act included two primary elements. First, it added a requirement applicable to *all* water right applications (not just those out-of-state): Every new water right appropriation or transfer must be

²⁸⁵ 1981 Idaho Sess. Laws, ch. 147, § 3, p. 256 (codified at Idaho Code § 42-222(1)).

²⁸⁶ 1980 Idaho Sess. Laws, ch. 186, § 1, p. 414 (codified at Idaho Code § 42-226).

²⁸⁷ 1981 Idaho Sess. Laws, ch. 147, § 3, p. 256 (codified at Idaho Code § 42-222(1)).

²⁸⁸ 1981 Idaho Sess. Laws, ch. 147, § 1, p. 354 (codified at Idaho Code § 42-108). This provision applies only to changes involving a change in period or change in nature of use. An “agriculture” to “agriculture” transfer of over 5,000 acre-feet would not require legislative approval. Thus, the Act appears to be aimed at transfers from agricultural use to new industrial or municipal uses. By its own terms, the provision applies equally to in-state and out-of-state transfers. This even-handed treatment is required to comply with the Commerce Clause of the U.S. Constitution. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982).

²⁸⁹ 1990 Idaho Sess. Laws, ch. 141 (codified at Idaho Code § § 42-222, 42-401 and elsewhere).

²⁹⁰ In *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), the Supreme Court struck down parts of Nebraska’s water export statute which violated the “dormant commerce clause” of the U.S. Constitution. U.S. Const. art. I, § 8, cl. 3. The Court voided Nebraska’s absolute ban on water exports to “non-reciprocating” states, but upheld those provisions reasonably relating to the “conservation” of water. Thus, so long as restraints on exportation are expressed in terms of legitimate state concerns (which the Court found to include conservation), a limited preference for in-state use may not constitute an unconstitutional burden on commerce. In Nebraska’s case, the Court commended the state’s objective “to conserve and preserve diminishing sources of groundwater,” ruling that “[t]he purpose is unquestionably legitimate and highly important” and that this purpose was “advanced” by the conservation requirements imposed on exporters of water. 458 U.S. at 954-55. Accordingly, in order for Idaho to make the restrictions on export stick, it was necessary to add the water conservation test to the requirements for all new and transferred water rights.

shown to be consistent with the “conservation of water resources within the state of Idaho.”²⁹¹ Second, the 1990 Act repealed earlier measures aimed particularly at water use in Oregon, and replaced them with a set of rules applicable to all out-of-state water transfers. Such out-of-state uses were required to follow special procedures and to satisfy five new tests (in addition to all others) aimed generally at evaluating the relative ability of water in the sending and receiving states.²⁹² Out-of-state water bank rentals were made subject to the same five tests in 1992.²⁹³

In sum, the local public interest test was part of a broad package of legislative measures responding to a series of perceived threats to Idaho’s water resources. The goal of each was to ensure that Idahoans remained in control of their public water resource.

2. Summary of other statutory tests.

The package of statutory measures discussed above (as well as others which have long been part of Idaho law) provide an arsenal of legislative protections against threats to Idaho’s water resources. The local public interest test is but one.

In this section, we summarize the other requirements, in order to underscore the breadth of protections available—outside the local public interest test—to harmful re-allocations of Idaho water which might be pursued by other states, corporations, or the federal government. Thus, even if the local public interest test were viewed more narrowly, as some suggest it should be, the Department retains considerable authority to evaluate and, when appropriate, reject proposals for water uses which threaten the health and integrity of the state.

These measures are summarized in detail in Appendix 6.

Each of the following twelve requirements—all of which are separate and distinct from the local public interest test—authorize the Department to scrutinize water right applications in the following circumstances:

- ✓ A water permit application may be rejected where “the water supply itself is insufficient for the purpose for which it is sought to be appropriated.”²⁹⁴ (Adopted in 1935.²⁹⁵)

²⁹¹ Idaho Code § § 42-203A(5)(f), 42-222(1).

²⁹² Idaho Code § § 42-401(3)(a) - (f).

²⁹³ 1992 Idaho Sess. Laws, ch. 101, § 1, pp. 319-20 (codified at Idaho Code § 42-1763).

²⁹⁴ Idaho Code § 42-203A(5)(b).

²⁹⁵ 1935 Idaho Sess. Laws, ch. 145, § 2, p. 358.

- ✓ Likewise, an application may be rejected “where it appears to the satisfaction of the director that such application is not made in good faith [or] is made for delay or speculative purposes.”²⁹⁶ (Adopted in 1935.²⁹⁷)
- ✓ An appropriation application may be denied where “the applicant has not sufficient financial resources with which to complete the work involved therein.”²⁹⁸ (Adopted in 1935.²⁹⁹)
- ✓ All appropriation and transfer applications must be denied where the applicant cannot demonstrate that the new use is consistent with the “conservation of water resources within the state of Idaho.”³⁰⁰ (Adopted in 1990.³⁰¹)
- ✓ The Department may reject a change application involving “a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area.”³⁰² (Adopted in 1981.³⁰³)
- ✓ An appropriation involving more than 25 cfs or more than 500 theoretical horsepower must meet a special set of criteria, in which the applicant is required to divulge detailed financial information.³⁰⁴ (Adopted in 1935.³⁰⁵) The same applies to appropriations for reservoirs with over 10,000 acre-feet in active storage.³⁰⁶ (Adopted in 1967.³⁰⁷)

²⁹⁶ Idaho Code § 42-023A(5)(c).

²⁹⁷ 1935 Idaho Sess. Laws, ch. 145, § 2, p. 358.

²⁹⁸ Idaho Code § 42-203A(5)(d).

²⁹⁹ 1935 Idaho Sess. Laws, ch. 145, § 2, p. 358-59.

³⁰⁰ Idaho Code § 42-203A(5)(f), 42-222(1).

³⁰¹ 1990 Idaho Sess. Laws, ch. 141, § 4, 5.

³⁰² Idaho Code § 42-222(1).

³⁰³ 1981 Idaho Sess. Laws, ch. 147, § 3, p. 256.

³⁰⁴ Idaho Code § 42-202.

³⁰⁵ 1935 Idaho Sess. Laws, ch. 145, § 1, p. 355.

³⁰⁶ Idaho Code § 42-202.

³⁰⁷ 1967 Idaho Sess. Laws, ch. 374, § 1, p. 1082.

- ✓ All instream flow appropriations must meet a set of statutory criteria, including a finding that it is in the “public, as opposed to the private, interest.”³⁰⁸ (Adopted in 1978.³⁰⁹)
- ✓ All new appropriations must respect all prior instream flow appropriations.³¹⁰ (Adopted in 1978.³¹¹)
- ✓ An appropriation for water outside the ground water basin for irrigation of over 5,000 acres or 10,000 acre-feet per year must meet special tests related to “the local economic and ecological impact” and must be specifically approved by the Legislature.³¹² (Adopted in 1980.³¹³)
- ✓ Specific legislative approval is required of any change in the nature or period of use of any water right involving over 50 cfs or 5,000 acre-feet of storage.³¹⁴ (Adopted in 1981.³¹⁵)
- ✓ Out-of-state water uses are required to follow special procedures to satisfy five special tests (in addition to all others) aimed generally at evaluating the relative availability of water in the sending and receiving states.³¹⁶ (Adopted in 1990.³¹⁷)
- ✓ Out-of-state water bank rentals are subject to the same five special tests.³¹⁸ (Adopted in 1992.³¹⁹)

³⁰⁸ Idaho code § 42-1503.

³⁰⁹ 1978 Idaho Sess. Laws, ch. 345, § 11, p. 893.

³¹⁰ Idaho Code § 42-1736B.

³¹¹ 1978 Idaho Sess. Laws, ch. 345, § 2, p. 886.

³¹² Idaho Code § 42-226.

³¹³ 1980 Idaho Sess. Laws, ch. 186, § 1, p. 414.

³¹⁴ Idaho § 42-108.

³¹⁵ 1981 Idaho Sess. Laws, ch. 1, p.254.

³¹⁶ Idaho Code § § 42-401(3)(a) - (f).

³¹⁷ 1990 Idaho Sess. Laws, ch. 141, § 3, pp. 316-17.

³¹⁸ Idaho Code § § 42-1763.

³¹⁹ 1992 Idaho Sess. Laws, ch. 42-1763.

If the “local public interest” test were broad enough to authorize the Department to engage in unbridled second-guessing of the investment decisions of applications, it would not have been necessary for the Legislature to separately authorize each of these considerations. Their very existence strongly suggests that the local public interest test was not intended to serve as a broad catch-all to allow the Department to substitute its judgment for that of the marketplace. Instead, it makes sense to think of the public interest test as a loosely defined, but nonetheless narrow safety net to allow consideration of externalities which would otherwise escape regulatory or marketplace evaluation.

3. Statutory provisions governing local public interest review

Before proceeding further, we pause for a detailed summary of the controlling statutory language. Idaho’s water code sets out separate criteria for agency review of water right applications in a variety of contexts.³²⁰ (A) applications for new permits, (B) amendment of pending permit applications, (C) applications for transfers of licensed, decreed and beneficial use rights, (D) applications for amendment of permits (not yet licensed rights), and (E) water bank leases and rentals. The criteria applicable in each circumstance are set out below. References to the local public interest are underscored.

(i) Applications for permits

The first step in the appropriation of a new water right is the submission of an application for a permit with the Department of Water Resources. Section 42-203A(5) of the water code sets out six criteria which the Department shall use to evaluate such applications:³²¹

... In all applications whether protested or not protested, where the proposed use is such

- (a) that it will reduce the quantity of water under existing water rights, or
- (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or
- (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or

³²⁰ In addition to those listed below, the water code addresses the local public interest test in two other contexts: emergency transfers during drought conditions, Idaho Code § 42-222A(5), and exchanges, Idaho Code § 42-240.

The local public interest also is mentioned (as a legislative finding) in connection with accomplished transfers. Idaho Code § 42-1425. However, there is no public interest test for accomplished transfers. *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 911 P.2d 748 (1995).

Finally, a special set of public interest tests (with their own burden of proof rules) apply when “trust water” is sought to be appropriated pursuant to the Swan Falls Agreement. Idaho Code § 42-203C; IDAPA 37.03.08.040.04.

³²¹ Idaho Code § 42-203A(5) (emphasis supplied).

(d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or

(e) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, or

(f) that it is contrary to the conservation of water resources within the state of Idaho;

the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

The reader should also review the Department's regulations setting out "evaluation criteria" for new permits.³²² The criteria specifically applicable to the local public interest test provide:³²³

- e. Criteria for determining whether the project conflicts with the local public interest. The director will consider the following, along with any other factors he finds to be appropriate, in determining whether the project will conflict with the local public interest:
 - i. The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both short and long term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains;
 - ii. The effect the project will have on recreation, fish and wildlife resources in the local area affected by the proposed project; and
 - iii. Compliance with applicable air, water and hazardous substance standards, and compliance with planning and zoning ordinances of local and state government jurisdictions.
 - iv. An application which the director determines will conflict with the local public interest will be denied unless the director determines that an over-riding state or national need exists for the project or that the

³²² IDAPA 37.03.08.045. There are no comparable rules for evaluating the local public interest in the context of water transfers. Indeed, the Department has not promulgated any rules governing water transfers. One might argue that these rules (applicable to new appropriations) should apply, at least by analogy, to public interest review in the context of water transfers. On the other hand, one might contend that the criteria should not be the same. Arguably a new appropriation (which, in effect, takes water out of the public domain) should be subject to more vigorous public review than the transfer of a water right from one private use to another. Because new appropriations are "free," the marketplace provides no reality check on the purported beneficial use. Water transfers, in contrast, are subject to severe marketplace constraints which, to some extent at least, ought to guard against unwarranted uses.

³²³ IDAPA 37.03.08.045.01.e

project can be approved with conditions to resolve the conflict with the local public interest.

(ii) Amendment of pending permit applications

Second, the water code addresses what happens when the applicant files an application for a permit, but then seeks to change the terms of the application before the application is acted upon.³²⁴ Section 42-211 (paragraph 2) provides that changes to applications for permits (where no permit has yet been issued) may be handled informally simply by modifying the application form. Republication is required, however. If there is any enlargement, the priority is advanced; otherwise the original priority is retained.

Because this is an informal process which essentially sends the applicant back to square one, no additional review criteria are spelled out. Rather, the applicant must pass muster, once again, under the criteria applicable to new permit applications (Idaho Code § 42-203A(5)).

(iii) Transfers of existing water rights

Third, section 42-222(1) of the water code sets out criteria applicable to the transfer (or change) of existing water rights—that is, licensed, decreed or beneficial use water rights. (Also see criteria set out in Idaho Code § 42-208, which are largely redundant, except for a special provision requiring legislative approval of certain large water transfers.)

The criteria for transfers are as follows:³²⁵

- ... The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided
 - [1] no other water rights are injured thereby,
 - [2] the change does not constitute an enlargement in use of the original right,
 - [3] the change is consistent with the conservation of water resources within the state of Idaho³²⁶ and

³²⁴ Idaho Code § 42-211 (paragraph 2). The first paragraph of section 42-211 deals with changes made after a permit has been issued (but before licensing). The second paragraph of section 42-211 deals with changes to an application for permit before the permit is issued.

³²⁵ Idaho Code § 42-222(1) (numbers in brackets are added to facilitate reading; they are not part of the statute) (emphasis supplied).

³²⁶ The “conservation” test was added in 1990. 1990 Idaho Sess. Laws, ch. 141. See discussion in footnote 290 at page 92.

[4] is in the local public interest as defined in section 42-203A(5), Idaho Code,³²⁷ and

[5] the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.³²⁸

[6] The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area.

(iv) Amendment of issued permits

Finally, where a change in a water permit is sought (prior to licensing), the applicant proceeds under section 42-211 (paragraph 1).³²⁹ This section provides only two criteria for review.³³⁰

[I]t shall be the duty of the department of water resources to examine the same [an application for amendment of a permit] and if

[1] approval thereof would not result in the diversion and use of more water than originally permitted and

[2] if the rights of others will not be adversely affected thereby,

the director of the department of water resources shall approve said application and return an approved copy to the permit

³²⁷ The "local public interest" test was added in 1981, along with the protection of the local agricultural base. This act also added a provision limiting water rights to one change; this was repealed in 1986. 1981 Idaho Sess. Laws, ch. 147.

³²⁸ In 1996, the Legislature added "beneficial use" as the fifth criterion, and declared that beneficial use was satisfied in the case of "future need" water rights for municipal providers. Municipal Water Rights Act of 1996, 1996 Idaho Sess. Laws, ch. 297.

³²⁹ In *Shokal*, the Department conditionally issued a permit, and required the applicant to revise its construction plan to accommodate effluent limitations. In response, the applicant made substantial changes to its proposed fish farm, and submitted a new plan to the Department. The Department approved the new plan, without holding a hearing on it. The Idaho Supreme Court found that this procedure violated the hearing requirement in section 42-211 (first paragraph). The Court apparently viewed the conditional grant of a permit as a permit. Thus, the changed plan was submitted after the permit had been issued, bringing the applicant into paragraph 1 of the section. The result would be the same, however, under paragraph 2 (if the applicant sought to amend an application for permit after hearing, but prior to permit issuance). In either case, the applicant must undergo a new hearing process.

³³⁰ Idaho Code § 42-211 (numbers in brackets are added to facilitate reading; they are not part of the statute).

holder.³³¹

These two criteria are the familiar “injury” and “enlargement” criteria which make up the first two tests applicable to a transfer of a licensed right. Why is it, one might ask, that the other criteria do not apply as well? Is there some reason that the transfer of a permitted water right should be subjected to less scrutiny than the transfer of a licensed right?

The Idaho Supreme Court pondered this very question in *Hardy v. Higginson*.³³² The Court concluded that there was no good reason for the distinction, and that the Department should apply the full set of public interest criteria just as in an initial permit application.

Consequently, despite the more limited statutory language, applicants seeking to transfer permits should be prepared to pass the same hurdles as those seeking to transfer licences.

(v) Water bank rentals

Since the establishment of the water supply bank in 1979, rentals from the bank have required consideration of the local public interest.³³³ Specifically, the following factors must be considered:³³⁴

- [1] that it will reduce the quantity of water available under existing water rights,
- [2] that the water supply involved is insufficient for the purpose for which it is sought,
- [3] the rental would cause the use of water to be enlarged beyond that authorized under the water right to be rented, or
- [4] it will conflict with the local public interest where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use.
- [5] The director shall consider in determining whether to approve a rental of water for use outside the state of Idaho those factors enumerated in subsection (3) of section 42-401, Idaho Code.

³³¹ Idaho Code § 42-211 also provides for changes to applications for permits (where no permit has yet issued). See Part R.3(ii) at page 98.

³³² *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993).

³³³ 1979 Idaho Sess. Laws, ch. 193, § 3, P.561 (codified at Idaho Code § 42-1763).

³³⁴ Idaho Code § 42-1763 (numbers in brackets are added to facilitate reading; they are not part of the statute) (emphasis supplied). The local public interest test also appears in the regulations, which make clear that it applies to leases as well as rentals. IDAPA 37.02.03.025.06.f; IDAPA 37.02.03.030.01; IDAPA 37.02.03.040.01.i.

4. The case law applying the local public interest test.

The statutes quoted above provide no real guidance as to what the local public interest means or how the Department should evaluate a water right's impact on public interest. Only a handful of cases have even touched on the question. This discussion will address each of the five Idaho cases which have addressed the subject.³³⁵

(i) *Hidden Springs Trout Ranch*

The first case to apply the local public interest test was *Hidden Springs Trout Ranch v. Allred*.³³⁶ The case addressed only the threshold issue of applicability of the statute to an ongoing proceeding.

A downstream appropriator challenged an application for a water permit by Hidden Springs on the basis that the company's proposed trout farm would impair water quality. The Department declined to take evidence on the subject, noting that water quality was an "inappropriate consideration."³³⁷ However, while the application was still pending, the Legislature amended the water code to add the local public interest criterion. In response, the Department allowed protestants to reopen the proceeding to raise water quality issues under this rubric. On appeal, the Idaho Supreme Court held that an applicant for a water permit has no vested right to the water at the time of the application (even though the permit application did reserve the priority date). Consequently, the Court determined that the legislation could properly be applied to an ongoing permit application proceeding.

The case did not directly address the scope of the local public interest evaluation. However, the Court apparently assumed that the local public interest included water quality impacts resulting from the diversion and return flow, because that was the sole issue raised by the protestants.

(ii) *Shokal v. Dunn*

The first case to explore substantively the application of the local public interest review was *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985). Trout Company (that is the actual name of the company) applied for a water right to divert 100 cfs from Billingsley Creek to supply a fish propagation facility and hydropower project it planned to build in the Thousand Springs area. Numerous protests were filed, but, after hearing, appeal and rehearing, the Department ultimately issued the permit.

The permit was issued conditionally, contingent upon the applicant submitting a new

³³⁵ Burden of proof issues are discussed in Part H.5(v) at page 40.

³³⁶ *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981).

³³⁷ *Hidden Springs*, 102 Idaho at 623, 636 P.2d at 745.

construction and operation plan showing compliance with prescribed effluent limitations. The company did so. Despite requests by protestants, the Department refused to hold a hearing on the new plan. The Court ruled that the changes proposed by Trout Company were so substantial as to require an amendment to its permit under Idaho Code § 42-211. The Idaho Supreme Court then remanded the matter for further hearings.

The rest of the Court's opinion addressed what should be considered by the Department at that upcoming rehearing. The Court focused on two items: the "financial resources" evaluation (under Idaho Code § 42-203A(5)(d)) and "local public interest" evaluation (under Idaho Code § 203A(5)(e)). This discussion will address only the latter.

Noting that this was a case of first impression, the Court took the first crack at what it described as the "difficult task" of defining the local public interest.³³⁸ Justice Bistline lead off with a footnote noting that the statutory local public interest review process is "related to" the common law public trust doctrine.³³⁹ The authors suggest that the resemblance is superficial at best.³⁴⁰ Although they both deal at some level with the public interest, they share few genetic traits. In any event, the public trust doctrine has been effectively eliminated from water rights considerations by legislative fiat in 1996.³⁴¹ The Legislature expressly noted that the doctrine is merely common law, which can always be overridden by statute.³⁴²

The Court then briefly surveyed decisions and statutes from other western states.³⁴³ Although the Court drew no clear conclusions from this exercise, it did offer some commentary which is difficult to reconcile with Idaho's water law history. Citing California's *East Bay Municipal Utility Dist. v.*

³³⁸ *Shokal*, 109 Idaho at 337.

³³⁹ *Shokal*, 109 Idaho at 336 n.2.

³⁴⁰ The local public interest requirement is a specific, codified, unqualified instruction from the Idaho Legislature to a particular state agency acting on particular matters. The public trust doctrine is a vague, gap-filling, judge-made rule with historical roots in England and ancient Rome whose modern function, in large part, is prodding legislative bodies to be more clear about what they intend to convey rights in submerged lands and certain other public resources, apparently including water.

³⁴¹ Idaho Code § 58-1201 to 58-1203.

³⁴² Idaho Code § 58-1201(6).

³⁴³ For instance, the Court referenced Alaska's public interest review statute—which contains a list of explicit factors—and seemed to suggest that it should serve as a model for interpreting Idaho's terser statute. The Court's wholesale embrace of a statute from a different state, as a guide to interpreting the state's own legislation, was sharply criticized by the Nevada Supreme Court in *Pyramid Lake Paiute Tribe v. Washoe County*, 918 P.2d 697, 700 (Nev. 1996).

Dept. of Public Works, 35 P.2d 1027 (Cal. 1934),³⁴⁴ *Utah's Tanner v. Bacon*, 136 P.2d 957 (Utah 1943),³⁴⁵ and *Young & Norton v. Hinderlider*, 110 P. 1045 (N.M., 1910),³⁴⁶ Justice Bistline seems to suggest that the Department of Water Resources may be authorized to force an applicant to subordinate its water right to some future use which the Department, in its wisdom, determines is of "greater importance." Whatever the merits of such a suggestion, it was plainly dictum. The facts of *Shokal* do not support such a holding.

Recognizing that public interest requirements in other statutes in the West are "explicated rarely," the Court turned its attention back to Idaho law, and found comfort in the fact that, "[f]ortunately, however, the Legislature did provide guidance in a related statute, Idaho Code § 42-1501."³⁴⁷

The Court was referring to Idaho's minimum flow law.³⁴⁸ Although the minimum flow law and the local public interest laws are different statutes, with different functions, the Court read them together. They both contain the phrase "public interest," said the Court, and they were passed on the same day. "Clearly," said the Court, "the legislature in § 42-203A must have intended the public interest on the local scale to include the public interest elements listed in § 42-1501." *Shokal*, 109 Idaho at 338.

³⁴⁴ In *East Bay* the California Supreme Court upheld the state's decision to subordinate a water right to future agricultural and municipal development.

³⁴⁵ Utah has long recognized the state engineer's authority to deny a water right application on the basis that it "will prove detrimental to the public welfare." Utah Code Ann. § 73-3-8 (1980). (A predecessor statute enacted in 1903 provided authority to reject an application which "threatens to prove detrimental to the public interest". 1903 Utah Laws ch. 100 § 40.) This provision was construed in *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943), a case involving a choice between two competing applications. *Tanner* filed the first application. Subsequently, another applicant sought a water right from the same source for a much larger multipurpose project to serve irrigation, municipal and industrial uses. The state engineer granted the first permit, but subordinated the water right to the filing for the subsequent larger project.

³⁴⁶ In *Young & Norton*, the Court determined that a statutory instruction to determine "the public interest" authorized the territorial engineer to choose between two competing applications for water projects (without reference to which was filed first). The determination is not a narrow one "limited to cases in which the project would be a menace to the public health or safety", but a broad one including the economic feasibility of the project and project cost. For instance, the engineer might choose the smaller of the two projects if the larger is likely to fail. *Young & Norton*, 110 P. at 1050. The Court then remanded for a determination of the facts. The Court recognized the need for an active determination of the public interest: "If it were a matter of private interest alone, a question simply between two rival applications for the right to use the waters in question, we should content ourselves with affirming the decision of the district court. But the question is much broader than that, and includes the public interest as well" *Young & Norton*, 110 P. at 1050.

³⁴⁷ *Shokal*, 109 Idaho at 337.

³⁴⁸ 1978 Idaho Sess. Laws ch. 345 §§ 2, 11, amended by 1980 Idaho Sess. Laws ch. 238 § 14 (codified at Idaho Code §§ 42-1501 to 42-1505, 42-1736B).

The Court quoted from the statute's statement of purpose:³⁴⁹

The legislature of the state of Idaho hereby declares that the public health, safety and welfare require that the streams of this state and their environments be protected against loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality.

Each of these items, said the Court, was an example of the sort of thing which should be weighed under the local public interest determination.³⁵⁰

Reading two statutes together merely because they were passed on the same day and contain common words may be stretching it a bit, as a form of statutory construction. As it turns out, however, the Court was probably justified in doing so in this case. As discussed above, the two statutes were each drafted in response to strong political pressure from the conservation community to do something about the destruction of stream habitat in the state. Moreover, as a matter of historical fact, instream flow protection measures and the creation of mechanisms for public interest review emerged simultaneously and out of the same political mix in this period in many states throughout the West. Thus, there is a sound basis for linking public interest review and instream flow protection. In terms of legal history, they are two sides of the same coin.

In the end, the Court ordered the Department to take evidence on three items: (1) the finality of design (whether the proposed diversion was clearly enough defined), (2) the effect of de-watering the source stream on fish, and (3) the health effects resulting from de-watering the source stream.

Plainly, these issues are all tied closely to the diversion and the return flow itself, not on perceived social effects resulting from an attenuated chain of causation not linked to the water right at all.

³⁴⁹ Idaho Code § 42-1501 (first sentence).

³⁵⁰ The Court also suggested that economic considerations might play a role in a public interest evaluation. *Shokal*, 109 Idaho at 339 (quoting District Judge Schroeder, now on the Supreme Court). "[I]f the Department gives weight to the economic benefits of the project, it should also give consideration to the economic detriments." However, the remark suggests that economic detriment to the public may be relevant only if the applicant "opens the door" to the subject by promoting the project's benefits. The authors suggest that this subject should be approached cautiously by the Department. Spotting the most egregious cases of ill-advised undertakings, is one thing. But the Department is not equipped to engage in fine-tuned cost-benefit analysis.

While the Court accorded the Department substantial latitude in evaluating the public interest,³⁵¹ it did set some bounds. For instance, the Court in *Shokal* drew a bright line limiting responsibility for review along agency lines. While the Department of Water Resources was authorized to consider “health” issues directly resulting from the diversion itself, it was not authorized to invent its own regulatory system.

The distinction is significant. The Court told the IDWR to determine whether or not the applicant for the water permit was in compliance with existing environmental laws. The Department was not told to take evidence on what those regulations ought to be, or to develop its own agenda of new environmental policies. Here is the critical language:³⁵²

We ... add a word of caution regarding the differing functions of Water Resources and the Department of Health and Welfare. Water Resources must oversee the water resources of the state, insuring that those who have permits and licenses to appropriate water use the water in accordance with the conditions of the permits and licenses and the limits of the law. It is not the primary job of Water Resources to protect the health and welfare of Idaho’s citizens and visitors—that role is vested in the Department of Health and Welfare, including compliance with the water quality regulations and monitoring effluent discharge in our state’s waterways. Nevertheless, although these agencies may have separate functions, Water Resources is precluded from issuing a permit for a water appropriation project which, when completed, would violate the water quality standards of the Department of Health and Welfare. It makes no sense whatsoever for Water Resources to blindly grant permit requests without regard to water quality regulations. Hence, Water Resources should condition the issuance of a permit on a showing by the applicant that a proposed facility will meet mandatory water quality standards.

Thus, IDWR may require an applicant for a water right to be in compliance with environmental standards set by other agencies. However, the quoted language suggests that the Department should not make up new regulatory standards, nor hear evidence on the need for new regulatory programs which the Legislature and other agencies with appropriate regulatory authority have not seen fit to create.

³⁵¹ “The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resources’ sound discretion.” *Shokal*, 109 Idaho at 339, 707 P.2d at 450.

³⁵² *Shokal*, 109 Idaho at 340-41.

(iii) *Collins Bros. Corp. v. Dunn*

Three years later, the Idaho Supreme Court addressed the issue again in *Collins Bros. Corp. v. Dunn*.³⁵³ Collins Brothers sought a water right for geothermal water. They intended to use it to heat 110 homes and for irrigation purposes. The Department issued the permit for heating use only, disallowing the proposed irrigation use. The restriction was based on the premise that it is not in the public interest to use geothermal water for irrigation.

On appeal the restriction was upheld. The Court said, quoting *Shokal*, that the determination of what elements are part of the local public interest is committed to the “sound discretion” of the agency.³⁵⁴

What does this case add to our understanding of the local public interest? Very little. While it contains the broad suggestion that determining the scope of the public interest is committed to agency discretion, the Court offers no guidance on the bounds of that discretion. In any event, the case certainly charted no new ground.

Indeed, denying a permit for geothermal water would readily have been justified even without reference to the public interest. In fact, this case could be approached more simply and directly under the more traditional rubric of “waste.”³⁵⁵

(iv) *Dovel v. Dobson*

In the case of *Dovel v. Dobson*,³⁵⁶ Dobson sought both a new water right and to change a decreed right he held. Another farmer, Dovel, challenged both applications on various grounds. Among them was his claim that both violated the “local public interest” because use of the ditch carrying the existing water right had on occasion caused flooding where the ditch crossed a road. The Department rejected the protest, and granted the applications. Dovel appealed.

³⁵³ *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 759 P.2d 891 (1988).

³⁵⁴ If the issue is one of agency discretion, one would think that the decision would be subject to review based on the “abuse of discretion” standard. That is, since there were no facts in dispute, the issue here was really one of policy, *i.e.*, discretion. Instead, however, the Court reviewed and upheld the agency’s action under the “clearly erroneous” standard. (The “clearly erroneous” standard was then codified at Idaho Code § 67-5215(g)(5). Its functional replacement is the “substantial evidence” standard found today at Idaho Code § 67-5215.)

³⁵⁵ In its classic form, the public interest test involves an effort to balance various goods and harms which the free market and other governmental programs fail to address. The waste concept is much simpler. It is a one-dimensional concept: Does this the proposed use yield a benefit which reasonably exploits (*i.e.*, does not waste) the resource’s potential? A simple rule rejecting any use of geothermal water for non-heating purposes fits squarely into the waste concept, because most of the value of the water (the heat) is not utilized at all.

³⁵⁶ *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992).

The Court easily disposed of the local public interest challenge saying that it “fail[ed] to see the logic” in the claim. The Court might have stopped there. Oddly, however, it went on to state that the conditions attached to the permit were sufficient to protect the public interest, the protection of which is “committed to the department’s sound discretion.” In fact, the conditions were all standard conditions which had nothing to do with the local public interest claim (flooding of the road). It would have been more accurate for the Court to say that the Department properly rejected the local public interest claim and declined to attach conditions addressing the issue. The broad language about agency discretion—essentially dictum—was attributed to *Shokal v. Dunn*.

Apparently the facts supporting Dovel’s claim about road flooding were weak, and were rejected for that reason, rather than because they fell entirely outside the scope of the public interest test. But the facts of the case—alleged flooding caused by the diversion—do not call for any broad extension of the local public interest test. The impact alleged was direct and immediately related to the diversion itself.

In any event, whether dictum or not, the teaching of the case is that the Court is likely to defer largely to the Department’s judgment when it comes to determining the scope and applicability of the local public interest test.

(v) *Hardy v. Higginson*

In 1993, the Idaho Supreme Court decided *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993), the “Box Canyon” case. Just like the applicants in *Hidden Springs* and *Shokal*, Hardy was seeking to develop a trout farm near Hagerman. (There is no connection between the three applicants or their projects.) Hardy sought to amend two water permits which had been issued in 1971 and 1975. The changes were sought in order to correspond to a new right of way granted by the BLM. (The amendment itself was probably environmentally beneficial.) Various protestants, who did not live in the area, opposed the amendment on the basis of impacts of the project on recreation, fishing and aesthetics. The Director granted the application, but imposed certain conditions (aimed at protecting a sculpin pool) based on protection of the “local public interest” to which Hardy objected.

The Court relied heavily on *Shokal v. Dunn* for its reasoning about the scope of the local public interest. The Court did not specifically delineate the bounds of the public interest concerns which may be considered, but noted that the Box Canyon area had been designated an Area of Critical Environmental Concern by the BLM, and that the area included four candidate threatened and endangered species. The Court concluded (without any real analysis): “Clearly, the protection of this habitat falls within the local public interest as defined in *Shokal*.” *Hardy*, 123 Idaho at 490, 849 P.2d. at 951.

This holding added little if anything to the understanding of the reach of the public interest review. The case is more important for its procedural rulings.

The case involved an application for amendment of permits under Idaho Code section 42-211. As discussed above, this statute does not mention the local public interest. The Court ruled that the Director nonetheless may consider the local public interest under section 42-211.

Thus, there is no practical difference in the public interest evaluation of:

- (1) applications for new permits,
- (2) amendment of pending permit applications,
- (3) applications for transfers of licensed, decreed and beneficial use rights, and
- (4) applications for amendment of permits (not yet licensed rights).

The Court also ruled that the Director may consider habitat issues raised by persons who do not live in Box Canyon, despite the language in the statute defining the local public interest as “the affairs of the people in the area directly affected by the proposed use.”

Finally, the Court found that the Department could impose new conditions on the permit, based on the public interest, despite the fact that the original permits had been obtained prior to the adoption of the local public interest statute in 1978.

In conclusion, each of the cases decided to date involve an application of the public interest test focused on the water itself—the direct effects of the diversion and return flow. Despite some broad language in *Shokal v. Dunn*, the local public interest test has not been employed to date by the Department of Water Resources to serve as a justification either for second-guessing other regulatory agencies or for overriding marketplace-driven economic allocation decisions.

5. Standing

Plainly, a principal effect of the local public interest test is to expand the grounds upon which one may protest a water right application.

If one’s protest is based on injury, for example, it is necessary to own a water right which will be injured. The law of standing will not permit one to protest a water right application on the basis that it might injure someone else’s water right.

When it comes to the local public interest, however, anyone who can legitimately demonstrate that he or she is affected by the alleged adverse impact on the local public interest has standing to raise the claim. Thus, the practical effect of the local public interest test is to broadly expand the number of potential protestants to a water right application.

This does not equate to a carte blanche, however, for anyone to protest any water right on any basis. The federal case law on this subject is becoming increasingly restrictive, requiring evidence of

actual impact on the person raising the protest.³⁵⁷ Idaho law may not be far behind. In the past, the Department of Water Resources has been quite lax in this area. In response to an increasing volume of public interest protests in recent years, however, there is some indication that the Department is beginning to more rigorously review a protestant's standing and basis for objection.

6. Making sense of the public interest test

In Idaho and throughout the West, water is recognized as a public resource. But what does this mean? Rights in water are distributed on a first-come, first-served basis to private parties, at no cost. Once acquired, water rights are valuable private property, which may be traded on the market and sold to the highest bidder.

Is this consistent with the "public" nature of the resource? Or, as some would suggest, is there an inherent conflict between public and private values in water?

The authors suggest this is no fundamental conflict. The simple answer is that the people of Idaho have determined that the public interest is best advanced by placing control of this public resource to a very large extent in private hands. A fundamental premise of the prior appropriation doctrine is that, by and large, the public benefits when water is put to use privately.

This is not a novel concept. As with so much of our nation's wealth, we trust the marketplace more than the government to allocate this natural resource to its highest and best use. Thus, in processing applications for appropriations, the Department of Water Resources asks whether the proposed use is a beneficial use. It does not inquire whether some other use of the water might be "more" beneficial.

On the other hand, however, the allocation of water rights is in one sense fundamentally different than other resources allocated within a free market system. That unique feature, of course, is the "use it or lose it" requirement.

The rules of abandonment and forfeiture do not ensure, nor are they intended to, that every use made of water will be its highest and best use. But these rules ensure that some beneficial use is made.

As virtually all uses these days are deemed "beneficial," the rule serves primarily to ensure that water remains "in play" somewhere in the economic system. The holder of a water right may not take that water right out of economic circulation, like a trunk load of coins stored in Grandma's attic. Water must work, one way or another, or its holder loses all rights therein. Except for limited, statutory exceptions, the prior appropriation doctrine requires that water be subjected to the rigors of the marketplace, day in and day out.

³⁵⁷ *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) ("Lujan I"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

The marketplace, not the government, lets Grandpa and Grandma decide, after a lifetime of farming, whether they would be better off trading in their farm and water for a condominium in Arizona and a nest egg for their children. If they decide to sell, the marketplace will select the next use for that water, whether that be washing dairy equipment, providing water amenities in a new residential community, cleaning microchips, or flushing salmon to the sea.

Those are hard choices. But few would rather have the government make those decisions for us. This is not to say that the government does not influence the allocation of resources. It does. Tax policies, trade rules, zoning regulations, environmental rules, subsidies, grants, outlays and a host of other regulations substantially influence what shows up in the marketplace and for what price. But despite all the regulatory prodding, the consumer still makes the choice in the end.

Yet, when it comes to water transactions, the guiding hand of the government is a little closer. The Legislature has expressly provided that in both new water appropriations and in transfers of existing rights, the Department of Water Resources shall insure that the outcome is in the "local public interest."

Just what this means, and how far this intrusion into the marketplace reaches, is the subject of this discussion. Is this a *carte blanche* for governmental second-guessing of the marketplace? Or is its goal more discrete? Is there a logical boundary which can be put on this analysis? Or is it a slippery slope with no real bounds?

The authors suggest that the meaning of the local public interest, though broad, is not unbounded. Most importantly, it does not undermine the prior appropriation doctrine's basic commitment to marketplace allocation. Rather, the primary goal of the public interest evaluation, in the view of the authors, should be to enable the Department to scrutinize the environmental and social impacts of the proposed diversion of water and return flows which are not addressed by the marketplace nor by other governmental programs.³⁵⁸

In short, Idaho citizens should continue to have standing to raise concerns over the impact of a proposed water use on the resource itself. They should continue to ask hard questions, for instance, about impacts of a proposed diversion on instream flow or the underlying aquifer. But it is not so clear that the Legislature intended to convert the Idaho Department of Water Resources into a debating forum for a host of other social and environmental concerns not directly related to the diversion involved. In the authors' view, limiting the local public interest test to impacts of the diversion (or return

³⁵⁸ Economists call these "externalities." For instance, if a company is allowed to pollute freely (at no cost to the company), the company will likely choose to pollute more and more, even if the cost borne by the public in the form of impaired health and environmental degradation outweighs the company's profit. This is a classic externality. The marketplace will not and cannot correct this error on its own: Because the cost of the pollution to the manufacturer is zero, the marketplace equation will necessarily be lopsided. The government must step in, in some form. It may add the public costs to the company's ledger. It may simply ban or restrict the pollution. Or it may mandate a technological fix.

flow) itself would be consistent with the original legislative intent. Moreover, this narrower view would not jeopardize the state's ability to protect itself against regional threats to its water resources.

S. WATER DELIVERY ENTITIES

1. The three basic types of water delivery organizations

A variety of institutions are involved in the development and distribution of water supplies. State government, municipalities, for profit corporations, non-profit corporations, quasi-municipal entities, individuals, and the federal government all have a hand in the water business. Much of the water in the West, however, is administered by "water districts," "irrigation districts," and "canal companies." This section briefly describes the special role played in Idaho by these entities.

This section provides an overview of the three basic forms of water delivery organization in the West: not-for-profit corporations, often referred to as mutual ditch corporations, which deliver irrigation water only to their own shareholders at cost; commercial or "carrier" ditch companies organized for profit and delivering to non-shareholder irrigators under a rental, sale or similar contract arrangement; and irrigation districts, water conservancy districts or similar "quasi-municipal" entities that provide irrigation water to irrigable lands in a prescribed area.³⁵⁹ In the course of evaluating these three forms, the outline digresses to consider the concept of "public use" in the irrigation water delivery concept; this concept helps to explain many of the case authorities in this area. The outline also looks briefly at: (1) the question of "who owns the water rights" delivered by various irrigation entities;³⁶⁰ (2) the question of restrictions, regardless of ownership, on transfers of water delivery entitlements out of the organization's service area; and (3) the authorities pertaining to deliveries from federal irrigation projects.

(i) Mutual ditch companies and Carey Act companies

A mutual ditch (or mutual canal, or mutual irrigation, or cooperative ditch) company is "formed expressly for the purpose of furnishing water to shareholders, not for profit or hire."³⁶¹ It is engaged in the business of storing and/or transporting irrigation water for use by its shareholders, in return for

³⁵⁹ There of course are many types of irrigation water delivery organizations in the West. One treatise reports that, as of 1978, there were at least 7,000 irrigation water delivery organizations in the 17 Western states, which together delivered about half of the irrigation water in the region. 3 *Waters and Water Rights* § 25.01 at 470 (Beck, ed. 1991), see also Meyers, Tarlock, Corbridge and Getches, *Water Resource Management* at 704 (1988).

³⁶⁰ For a discussion of the nature of "ownership" in the context of water resources, see Dean Trelease's amusing and insightful article, *Government Ownership and Trusteeship of Water*, 45 Cal. L. Rev. 638 (1957). While not dealing with the subject of water right ownership within irrigation delivery organizations, the article provides useful insights on this sometimes evasive concept.

³⁶¹ *Jacobucci v. District Court*, 541 P.2d 667, 671 (Colo. 1975).

payment of assessments levied to meet operating expenses of the company.³⁶²

Dean Trelease notes that “a mutual water company is a non-profit corporation that owns diversion or storage works and delivers water at cost to users who own its stock, and that derives its operating funds from assessments levied against the stockholders.”³⁶³ Trelease notes that mutuals come in a variety of forms; he considers Carey Act operating companies (see below) to be mutual irrigation companies.³⁶⁴ According to Trelease, the distinguishing feature of a mutual ditch company appears to be its direct control by its shareholders, and its lack of any purpose beyond supplying the shareholders with irrigation water (meaning, no profit motive, even though it may be organized under the state’s general corporation laws).

Hutchins’ view is to the same effect: “The distinctive feature of the mutual irrigation company is service rendered at cost to the lands of members only.”³⁶⁵

Wiel describes mutual ditch corporations as “a special kind of private service companies ... [which] are usually such that shares of stock represent rights to specific quantities of water, and the stockholder’s right to a supply rests upon his stock and not upon his status as a member of the public, the company being formed to supply water to its stockholders only.”³⁶⁶ Wiel’s treatise distinguishes mutuals from ordinary “public service” entities:

[I]t is very important to note that, being in private service only, [mutual irrigation companies] are not subject to the public control which obtains as to public service companies. Nor can a mutual company be forced to deliver water to others than its stockholders.³⁶⁷

As discussed below, companies engaged in public service are subject to special requirements.³⁶⁸

Kinney describes mutuals as

³⁶² *Nelson v. Lake Canal Co.*, 644 P.2d 55, 57 (Colo. App. 1982).

³⁶³ Trelease, *Water Law, Resource Use and Environmental Protection*, Ch. 6 at 612, n. 1.

³⁶⁴ Trelease, *Water Law, Resource Use and Environmental Protection*, Ch. 6 at 613.

³⁶⁵ Wells A. Hutchins, *Mutual Irrigation Companies*, USDA Tech. Bull. No. 82 at 3 (1929).

³⁶⁶ S. Wiel, 2 *Water Rights in the Western States* § 1266 at 1170-71 (3d ed. 1911).

³⁶⁷ S. Wiel, 2 *Water Rights in the Western States* § 1266 at 1171.

³⁶⁸ S. Wiel, 2 *Water Rights in the Western States* Ch. 54 at 1179.

private corporations which are organized for the express purpose of furnishing water only to the shareholders thereof, and not for profit, or hire.... Such corporations can not be deemed "public service" or "quasi-public" corporations, as they are not organized for the purpose of either furnishing, or carrying water to all whose lands are so situated that they may be irrigated from the system of works of the corporation.³⁶⁹

In some states, mutual ditch corporations were formed (or at least now operate) pursuant to specific statutory requirements.³⁷⁰

Many mutuals were formed by individual water right holders who pooled assets, incorporated the ditch company and conveyed their rights to it in return for stock.³⁷¹ This pattern was followed in establishing the "cooperative" ditch company—another term sometimes used to describe this form of company—which was the subject of *Fuller v. Azusa Irrigating Co.*³⁷² However, it is clear that mutuals were formed in a "variety of ways."³⁷³ There seems to be no reason, in law or logic, to distinguish between a mutual ditch corporation formed in such a way and one which was formed before any shareholder had acquired water rights. In either case, the resulting arrangement is the same.

A unique type of mutual ditch company is the Carey Act company. The federal Carey Act of 1894, as amended, 43 U.S.C. § 641, is a homestead law under which Congress guaranteed to make available for actual settlers in the seventeen Western states up to 1,000,000 acres of public domain if the state would carry out a water development and land settlement program. The state would contract with a for-profit "construction company" which would obtain water rights in its own name, build the irrigation project and sell to settlers stock in a successor "operating company"—a private water delivery corporation formed pursuant to state statutory procedures established to implement the Carey Act. In other words, the construction company was the promoter of the operating company; in the interim, the construction company operated the project. Once the project was completed and all (or nearly all) of the operating company stock sold to entrymen, the construction company departed (presumably with its profit), conveying to the operating company all of its remaining interest in the project facilities and water rights. The federal government issued land patents directly to the settlers, who proceeded with the non-profit stock company in place.³⁷⁴ Idaho, Wyoming, Montana, and

³⁶⁹ Kinney, 3 *Irrigation and Water Rights* § 1480 (2d ed. 1912).

³⁷⁰ See, e.g., Colo. Rev. Stat. §§ 7-42-101 *et seq.*

³⁷¹ See, e.g., historical discussion in *Jacobucci v. District Court*, 541 P.2d 667, 671 (Colo. 1975).

³⁷² *Fuller v. Azusa Irrigating Co.*, 71 P. 98 (Cal. 1902).

³⁷³ S. Wiel, 2 *Waters and Water Rights* § 26.02 at 477 (Beck, ed. 1991).

³⁷⁴ For a discussion of the Carey Act process, see 3 *Water and Water Rights* § 26.02(g) (Beck, ed. 1991).

Oregon saw the most lands patented under the Carey Act process, with 630,000, 200,000, 92,000 and 73,000 acres patented, respectively. The other Western states each patented less than 40,000 acres under the Act, and therefore today have relatively few Carey Act operating companies. In Idaho, water lawyers frequently encounter Carey Act operating companies; in Colorado, they rarely do.

The Carey Act operating company provides water deliveries on a per-share basis in return for an assessment. It operates not for profit, but merely in order to deliver irrigation water at cost to its shareholders. Shareholders/irrigators control the company. Thus, Carey Act operating companies are mutual irrigation companies. The Idaho Supreme Court also has referred to a Carey Act operating company as a “mutual irrigation company, not organized for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water for use upon their lands in proportion to their respective interests....”³⁷⁵ However, the statutory scheme under which they were formed entitles them to powers in dealing with their shareholders which other mutuals may not have absent a charter, article, or by-law provision (such as the right to impose liens against lands and water rights of shareholders for failure to pay assessments).

Interestingly, the Carey Act program was carried out using both a commercial, or carrier ditch corporation (the construction company which sold water entitlements to settlers), and a mutual ditch corporation (the operating company established to take over from the construction company and operate the project on behalf of the stockholders/entrymen). For a description of carrier corporations, see below.

(ii) Commercial (or “carrier”) ditch companies.

A commercial ditch corporation holds water right for its own profit. A commercial, or carrier, ditch company is an entity that holds a water right in its own name, for its own benefit, pursuant to which it rents or sells water to consumers for a profit.³⁷⁶ “The commercial irrigation company is an organization designed to construct and operate irrigation works for the profit of persons who build the works and retain temporary or permanent ownership. It thus differs essentially from the mutual irrigation company and the irrigation district, which are nonprofit community enterprises.”³⁷⁷ The commercial ditch company’s shareholders are not the persons making use of the water the company delivers. For a description of the difference between carrier ditch companies and mutual ditch companies as seen by the Colorado court, see *Denver v. Miller*.³⁷⁸

³⁷⁵ *Ireton v. Idaho Irrigation Co., Ltd.*, 30 Idaho 310 (1917).

³⁷⁶ S. Wiel, 2 *Waters and Water Rights* § 26.03 (Beck ed. 1991).

³⁷⁷ Wells A. Hutchins, *Commercial Irrigation Companies*, USDA Tech. Bull. 177 (1930) (“Bull. 177”).

³⁷⁸ *Denver v. Miller*, 368 P.2d 982 (Colo. 1962).

Commercial ditch corporations play a very minor role in Western irrigation today.³⁷⁹ “No known commercial companies are being organized now.”³⁸⁰ However, a description of them here helps explain the sometimes confusing court decisions in the area of water right ownership and control in delivery organizations.

The Colorado court has described a carrier ditch company as a “quasi-public entity with quasi-fiduciary duties to its contract consumers in setting rates and in permitting such consumers to exercise their rights to continue to put water to beneficial use on an annual basis.”³⁸¹

Commercial ditch companies generally were organized one of three ways.³⁸²

(1) The first form is a “construction or development company,” a carrier ditch company that would construct the canals and other facilities, then convey lands and water supply contracts to farmers. Once all lands had been irrigated and the canal’s capacity fully subscribed, the carrier ditch company would convey the water rights and facilities to the farmers—or, more likely, to a mutual irrigation company that the construction company would set up. At this point, the carrier ditch construction company would go out of business, presumably at a profit for its backers. This is precisely the formula used in implementing the Carey Act.

(2) The “private contract company” is one which would set up for perpetual service to farmers with whom it would contract; they would pay for the water delivery at established rates, whether they used the water or not. The users never acquire any interest in the water rights or facilities. At least historically, such a company was not subject to state control of rates.

(3) The “public utility company,” which holds itself out to serve all comers, so long as there is adequate water supply, on an annual rental basis. The deliberate entry into public service caused a dedication to public use and subjected these companies to public utility regulation (at least after public utility commissions came into being).³⁸³

³⁷⁹ See, e.g., Barton H. Thompson, *Institutional Perspectives on Water Policy and Markets*, publication pending in 81 Cal. L. Rev. 103, 118, Table 2 (1993) (indicating that the state with the greatest reliance on commercial ditch companies is Colorado, where they now supply only 1.6% of the irrigation water delivered in that state).

³⁸⁰ S. Wiel, 2 *Waters and Water Rights* § 26.03 at 496, n. 110 (Beck ed. 1991).

³⁸¹ *City of Westminster v. City of Broomfield*, 769 P.2d 490, 492 (Colo. 1989); see also *Wanamaker Ditch v. Crane*, 288 P.2d 339 (Colo. 1955) (carrier ditch company as a quasi-public servant is charged with a public duty or trust to annually deliver water to its contract holders so long as they comply with the rules and regulations of the carrier company and pay the fixed carrying charges).

³⁸² This description comes primarily from Wells A. Hutchins, *Commercial Irrigation Companies*, USDA Tech. Bull. 177 at 5-6 (1930).

³⁸³ For an early discussion of the nature and duties of commercial irrigation companies in California, see Kenneth L. Blanchard, *The Relation Between Irrigation Water Users and Distributing Companies With Special Reference to*

One of the most interesting developments relative to the commercial irrigation company concerns the “public use” concept. We discuss it here, because it provides useful background on the development of Idaho constitutional language pertaining to water rights and also bears on the questions of ownership of water rights in water delivery organizations. The delivery of water to an area, for irrigation or otherwise, in certain circumstances can be deemed a “public use,” pursuant to which the appropriation is found to be subject to some degree of public control. In these circumstances “all who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not.”³⁸⁴ In *Hildreth*, plaintiff water user’s complaint was held insufficient to support an injunction preventing a canal corporation from ceasing deliveries. The reason? Plaintiff had not alleged that the corporation was a carrier ditch corporation which owned the water right pursuant to which plaintiff’s deliveries had been made, thus plaintiff could not show that corporation had dedicated the rights to a public use to plaintiff’s benefit.

Wiel also points out that “[t]he common law of public service agencies is, since *Munn v. Illinois*, familiar, being, in general terms, that property devoted to the public service or use is affected with the public duty of performing reasonable service to all; that to secure this end, rates and terms of service must be reasonable, and service is compulsory upon tender of a reasonable rate; that there must be no discrimination; that the courts will enforce these things, and it needs no statute to give them the power.”³⁸⁵ *Munn v. Illinois*³⁸⁶ spelled the end of the era when “companies of capitalists” distributed water supplies according to contract, on a *laissez faire* basis. As Wiel noted, *Munn* was “to the effect that one who devoted his property to public use owes the public corresponding duties, even at common law”³⁸⁷ The Colorado court in *Wheeler v. Northern Colo. Irrigating Co.*,³⁸⁸ relied on *Munn* for the proposition that, by making water available for hire, a carrier ditch company “submitted itself to reasonable judicial control,” the court having the power to prevent “unreasonable and extortionate demands.” To be a public use at common law, it appears that the service must be “offered to the public generally” in the area to be served.³⁸⁹

Idaho’s constitution, which was adopted in 1889, contains four sections that relate to the public use or public dedication concept. Indeed, Idaho’s constitution declares certain types of irrigation water

Right Arising Out of Contract, 7 Cal. L. Rev. 295 (1919).

³⁸⁴ S. Wiel, 2 *Water Rights in the Western States* § 1261 at 1160 (3d Ed. 1911), quoting *Hildreth v. Montecito Water Co.*, 72 P. 395, 398 (Cal. 1903).

³⁸⁵ S. Wiel, 2 *Water Rights in Western States* § 1247 at 1145 (footnotes omitted).

³⁸⁶ *Munn v. Illinois*, 94 U.S. 113 (1876).

³⁸⁷ S. Wiel, 2 *Water Rights in Western States* § 1247 at 1146.

³⁸⁸ *Wheeler v. Northern Colo. Irrigating Co.*, 17 P. 487, 490 (Colo. 1888)

³⁸⁹ S. Wiel, 2 *Water Rights in the Western States* § 1261 at 1160.

deliveries to be a "public use." These provisions are similar to, although perhaps more elaborate than, those adopted in some other Western states, evidently because of problems that irrigators experienced in the early years of Western settlement with a plethora of private carrier ditch companies that either failed financially or were not scrupulously managed.³⁹⁰ The pertinent sections are Article 15, sections 1, 4, 5, and 6:

The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law.³⁹¹ Whenever any waters have been, or shall be, appropriated or used for agricultural purposes, under a sale, rental, or distribution thereof, such sale, rental, or distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have been once sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person ... shall not, without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and time of use, as may be prescribed by law.³⁹²

Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of this article provided, as among such persons, priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those

³⁹⁰ See S. Wiel, *2 Water Rights in the Western States* at §§ 1244-46.

³⁹¹ Idaho Const. art. XV, § 1.

³⁹² Idaho Const. art. XV, § 4.

subsequent in time of settlement or improvement, may by law prescribe.³⁹³

The Legislature shall provide by law, the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented, or distributed for any useful purpose.”³⁹⁴

The Idaho Supreme Court, in construing the “sale, rental, or distribution” language of art. XV, §§ 4, 5 and 6 of the Idaho Constitution, has ruled that “[c]ompanies or individuals may appropriate and take out the water of a stream for sale, rental or distribution, for any beneficial purpose. When so taken out, it becomes a public use, and the sale or rental of it for pay is a franchise.”³⁹⁵ A subtlety implicit in this statement is that, presumably, when water is appropriated only for distribution—and not for sale or rental for pay—it is still a public use. In other words, this case could be read as meaning that even a mutual ditch company’s diversion and its “naked title” to the water right would be impressed with the type of public trust described here, at least in Idaho.

Because the Idaho Constitution declares that appropriation of waters for sale, rental or distribution is a “public use,” the court found that deliveries under a commercial carrier ditch company gave rise to the “exclusive dedication” to the consumer’s use mentioned in Article 15, § 4:

The right to the *use* of such water after having “once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes,” becomes a perpetual right subject to defeat only by failure to pay annual water rents and comply with the lawful requirements as to the conditions of the use.³⁹⁶

Naturally, where the appropriator is a municipal water supply company, the same rules apply, at least in Idaho: the company owns the water right, but the consumers have a perpetual right of use upon payment of established rates. Thus, in *Murray v. Public Utilities Commission*³⁹⁷, the Idaho court reversed a public utilities commission ruling disallowing consideration of the municipal supply company’s water right as part of its rate base.

When the provisions of the constitution and statutes of this

³⁹³ Idaho Const. art. XV, § 5.

³⁹⁴ Idaho Const. art. XV, § 6.

³⁹⁵ *Wilterding v. Green*, 4 Idaho 773, 780 (1896).

³⁹⁶ *Id.* at 459.

³⁹⁷ *Murray v. Public Utilities Commission*, 150 P. 47, 58 (Idaho 1915).

state relating to water rights are carefully read together, it is apparent that if one appropriates water for a beneficial use, and then sells, rents or distributes it to others who apply it to such beneficial use, he has a valuable right which is entitled to protection as a property right.... To be sure, the person who takes water from the water company or carrier, also acquires a right to the use of it, dependent upon user and payment, but this does not alter the fact that the water company has a right.

Obviously, one of the semantic problems in this area is that the “right to the use of it” the consumer holds sounds a lot like a water right—the right to use water for beneficial purposes. However, it probably is more accurate, in those unusual cases where sorting out the ownership question is important (as it was for the public utility in *Murray*), to conclude that the consumer holds a right of service, enforceable against the supplier so long as the consumer pays the bill. But, despite the fact that this entitlement arises from constitutional mandate, it is not part of the consumer’s property holdings.

California’s constitution provided the basis for the above provisions in Idaho’s constitution. California’s constitution provides:

The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner prescribed by law.³⁹⁸

In *Glenn Colusa Irr. Dist. v. Paulson*,³⁹⁹ a carrier ditch company became insolvent and transferred its water rights and canals to an irrigation district. A customer of the carrier company argued that he held a perpetual easement—that is, a water right⁴⁰⁰ at the district was bound to honor under the original scheme. The court disagreed. Construing a California constitutional provision similar to Idaho’s, it concluded that a water delivery such as that being made by the carrier company constitutes a public use, and it is the company, not the landowner, who holds the water right, because “no private estate can be created in property devoted to a public use.” At least in such situations, the landowner in California holds only a “right of service.”

In *Thayer v. California Development Co.*,⁴⁰¹ the California Supreme Court found that a development company (a commercial or carrier ditch corporation), which had sold shares in subsidiary

³⁹⁸ Calif. Const., art. X, § 5.

³⁹⁹ *Glenn Colusa Irr. Dist. v. Paulson*, 242 P. 494, 499 (Cal. App. 1925).

⁴⁰⁰ For the notion of a water right being a “perpetual easement,” see *Ruhnke v. Aubert*, 113 P. 38, 40 (Or. 1911).

⁴⁰¹ *Thayer v. California Development Co.*, 128 P. 21, 25 (Cal. 1912).

mutual irrigation companies, was not supplying water for a “public use” because

the use of water for irrigation is not public unless the water is available, as of right, upon equal terms, to all landowners of the class and within the area to be benefitted who can get water from the ditches to their lands. If the dispenser of water has the right to say who shall have it, and upon what terms, selling to one and refusing to sell to another at will, it is not devoted to a public use....

It appears ... that the Development Company has always, either directly or through the auxiliary companies, selected the persons to whom it would sell and distribute the water and fixed its own prices. A use thus restricted, limited, and controlled by the owner is in no proper sense, according to the foregoing authorities, a public use.⁴⁰²

Thayer appears to reach a result that contradicts the Colorado approach as stated in *Wheeler* and *Combs*, which is essentially that a commercial ditch company cannot refuse to serve one who offers to pay the rate established by the county commissioners.

Idaho and California implemented the principle by explicit constitutional provisions. Colorado, whose jurisprudence also has influenced the development of the appropriation doctrine in Idaho, is an example of a state that did so by interpreting more general constitutional language.⁴⁰³ Both approaches reach essentially the same result in terms of the obligations placed on the commercial ditch company, if not on the “ownership” analysis.

Colorado’s constitution, art. XVI, § 8, authorizes the county commissioners to establish “rates to be charged for the use of water, whether furnished by individuals or corporations.” Section 5 declares that waters within the state are “the property of the public,” and is “dedicated to the use of the people of the state.”⁴⁰⁴

The Colorado Constitution does not contain the explicit “public use” language which the California and Idaho Constitutions apply to those entities appropriating water “for sale, rental, or distribution.” Nevertheless, the Colorado Supreme Court still has found these commercial entities to be subject to essentially the same duties as those imposed in these other states. In *Combs v. Agricultural*

⁴⁰² *Thayer*, 128 P. at 27.

⁴⁰³ *E.g. Wheeler v. Northern Colorado Irrigating Co.*, 17 P. 487 (1888).

⁴⁰⁴ *See also* Colo. Rev. Stat. § 37-85-110 (protecting a distributee’s entitlement to continue receiving water).

*Ditch Co.*⁴⁰⁵, the Colorado court ruled that the Colorado Constitution requires a carrier ditch company to supply water to anyone whose lands are susceptible of being supplied from the canal and who tenders the established rate for water delivery; the court forbade the commercial carrier from imposing additional costs or “unreasonable regulations or demands.”

The court in *Wheeler* stated that, given the “public interest” declarations of the Colorado Constitution, the commercial ditch company is a “quasi public servant or agent”; it has a monopoly, and therefore is impressed with “a public duty or trust.”⁴⁰⁶

In *City and County of Denver v. Miller*,⁴⁰⁷ the court observed that the commercial ditch corporation holds legal title to the appropriation and “has a duty to protect it for the benefit of the consumers under the ditch.”

The distinction between “private” and “public,” never crystal clear in the area of water rights, may have been unnecessarily confused, with respect to mutual ditch companies, by the Colorado Supreme Court in *Jacobucci v. District Court*.⁴⁰⁸ In *Jacobucci*, a mutual ditch company case, the court cited its 1896 decision in *Farmers Independent Ditch Co. v. Agricultural Ditch Co.*⁴⁰⁹ for the proposition that “[m]utual ditch companies in Colorado have been recognized as quasi-public carriers.” (The language in *Farmers* is: “Ditch corporations are quasi publici carriers.”) However, it appears that the *Jacobucci* court was mistaken on this point because the ditch corporation involved in *Farmers* was not a mutual ditch company. It was a commercial, for-profit carrier ditch corporation which, as explained below, is a form of organization that, from the early days, has been held to be subject to a public trust and certain special obligations of fair dealing with its consumers.⁴¹⁰ In any event, this public versus private distinction may be significant to some courts in evaluating the rights of water users in these distribution organizations.

⁴⁰⁵ *Combs v. Agricultural Ditch Co.*, 28 P. 966 (Colo. 1892), quoting *Wheeler v. Northern Colo. Irrigating Co.*, 17 P. 487 (Colo. 1888).

⁴⁰⁶ *Wheeler*, 17 P. at 490. See also *Farmers Independent Ditch Co. v. Agricultural Ditch Co.*, 45 P. 444, 447 (Colo. 1896).

⁴⁰⁷ *City and County of Denver v. Miller*, 368 P.2d 982, 984 (Colo. 1962).

⁴⁰⁸ *Jacobucci v. District Court*, 541 P.2d 667, 671 (Colo. 1975).

⁴⁰⁹ *Farmers Independent Ditch Co. v. Agricultural Ditch Co.*, 45 P. 444, 447 (Colo. 1896).

⁴¹⁰ The court in *Farmers* did not state this expressly. But the description of the corporation that emerges from a close reading of the case clearly indicates that there is a distinction between its stockholders, on the one hand, and its “consumers,” on the other.

(iii) Irrigation districts.

Irrigation districts⁴¹¹ are water distribution organizations formed pursuant to state statutory procedures which vest them with quasi-municipal powers, the most important of which are the powers to issue bonds and to levy assessments, backed up by liens, on lands within the district. These lands typically are the irrigable lands within certain boundaries that could be served by the district's canal system. Irrigation districts are governed by boards elected by property owners within the district.⁴¹² Districts also often have authority to operate drainage or power facilities, or to carry out other water-related purposes. Irrigation district facilities are tax-exempt.

Each irrigation district was established through a petition process which designated specific irrigable lands which are to be served by the district. These lands are eligible for irrigation water deliveries from district facilities, which typically consist of a main canal, subsidiary canals and related facilities.

Irrigation districts may operate their own storage reservoirs. In Idaho, however, most have entered into long-term contracts with the Bureau of Reclamation which entitle them to receive storage water from federal reservoirs. In some cases, such as on the Boise River system and in the Upper Snake, several districts will form an operating board which contracts with the Bureau with regard to the operation of those federal projects which serve large areas encompassing several irrigation districts and other water delivery entities. In addition to providing irrigation water, districts often operate drainage facilities or carry out other drainage functions for lands within the district.

Many irrigation districts in Idaho, particularly those in the Boise area, have less irrigated land within their boundaries than in years past due to urbanization. Similarly, the widespread shift from flood to sprinkler irrigation techniques presumably has significantly reduced the amounts of diversions necessary to serve the same lands within many irrigation districts. It is uncertain how these changes will be treated in the Snake River Basin Adjudication (see discussion in Chapter U at page 146) or otherwise with respect to the water right forfeiture question. In Idaho, the majority of irrigation companies do not allow transfers of water either outside or within the district's boundaries. Where such transfers are permitted within district boundaries, the Department does not require state approval. This technique has been used to provide "supplemental" water to some district lands during droughts, for example. It might be argued that all water diverted into district facilities continues to be placed to

⁴¹¹ The term "irrigation district" here as a generic term to refer to any type of quasi-municipal entity that was formed to deliver water from an irrigation project to consumers. The term distinguishes this type of entity from mutual irrigation companies and includes water conservancy districts, reclamation districts and other similar forms of "special water districts" that are concerned with irrigation supply. This outline does not investigate any issues that may be peculiar to special districts concerned only with municipal water supply.

⁴¹² Because the Supreme Court has found irrigation districts to be special purpose entities which do not exercise normal governmental functions, it has affirmed their entitlement to restrict voting to landowners, despite the constitutionally-grounded "one-person, one-vote" rule. *Ball v. James*, 451 U.S. 355 (1981).

beneficial use, despite diminishing requirements, due in part to this flexible system of “moving water where it is needed.”

In general, legal authority for the formation of irrigation and other special water districts in the West (such as water conservancy districts) can be traced to the Wright Act⁴¹³, an 1887 California law, and to *Fallbrook Irr. Dist. v. Bradley*,⁴¹⁴ which upheld the act’s constitutionality.⁴¹⁵

2. Ownership of water rights provided by water delivery entities

(i) **Mutual ditch companies**

Kinney states that, in a mutual water corporation, “legal title to these rights is in the corporation, while the equitable title remains in the original owners, or their grantees. In other words, the company holds the legal title to the property in trust for its respective shareholders, the terms of the trust to be governed by the articles of incorporation, or the by-laws of the same.”⁴¹⁶

The judicial decision containing perhaps the clearest and most comprehensive statement about water right ownership in mutual ditch companies is that of the Colorado Supreme Court in the well-known case of *Jacobucci v. District Court*,⁴¹⁷ where the court ruled that

the shares of stock held by the consumers in a mutual ditch corporation represent a specific property interest in a water right. The interest of these shareholders cannot be “defeated or altered by any action of the ditch company or its other shareholders.” *United States v. 508.88 Acres of Land*, U.S. District Ct. (D. Colo. May 8, 1973, Unpublished); *Bent v. Second Extension Water Co.*, 51 Cal. App. 648, 197 P. 657 (1921). While the “naked title” may stand in the name of [the mutual ditch corporation], the ditch, reservoir, and water rights are actually

⁴¹³ Ch. 34, 1887 Cal. Stat. 29.

⁴¹⁴ *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112 (1896).

⁴¹⁵ For discussions of irrigation and other special water districts, see John Leshy, “Special Water Districts—The Historical Background,” in James Corbridge, Ed., “Special Water Districts: Challenge for the Future,” Natural Resources Law Center, Boulder, Colorado (1983); Wells A. Hutchins, “Irrigation Districts, Their Organization, Operation and Financing,” U.S. Dept. of Agriculture Technical Bulletin No. 254 (1931); Comment, “Desert Survival: The Evolving Western Irrigation District” 1982 Ariz. St. L. J. 377 (1982); and S. Wiel, 3 *Waters and Water Rights* § 27.02 (Beck, ed. 1991).

⁴¹⁶ Kinney, 3 *Irrigation and Water Rights* § 1481 at 2661-62.

⁴¹⁷ *Jacobucci v. District Court*, 541 P.2d 667, 672-73 (Colo. 1975).

owned by the farmers who are served thereby.

The dispute in *Jacobucci* was about whether the ditch company's shareholders were indispensable parties in a city's action seeking to condemn the ditch company's water rights. Because of the "ownership" principles described above, the court ruled that the shareholders should have been joined.⁴¹⁸

The court in *Jacobucci* also observed that there is some authority for the proposition that the ditch company holds the water right subject only to a trust in favor of the shareholders.⁴¹⁹ However, the court rejected the trust theory in favor of "actual ownership ... in the shareholder."⁴²⁰

While the *Jacobucci* court noted the existence of a Colorado statute setting forth certain obligations of mutual ditch companies,⁴²¹ it did not look to this statute as authority for its conclusions about water right ownership. (Incidentally, the statute does speak, in the context of the ditch company's lien for assessments, of the "shares of stock and the water rights represented by the same"⁴²²

In other states, such as Idaho, mutual corporations were formed under the general corporate code, and operate on a non-profit basis as a matter of practice. Carey Act corporations are subject to statutory provisions, but these do not contradict the conclusion that shareholders may hold beneficial title to the water rights.

The *Jacobucci* court further noted that "[t]he relationship between the mutual ditch corporation and its shareholders arises out of contract, implied in a subscription for stock and construed by the provisions of a charter or articles of incorporation."⁴²³ Kinney's perspective is that "[t]he relations between private incorporated water companies, whether organized as mutual corporations, or as corporations for profit or hire, is that of contract, and the rights and duties of both parties grow out of the contract implied in a subscription for stock, and construed by the provisions of their charters, or articles of incorporation."⁴²⁴ It follows that the exact dimensions of a shareholder's ownership, or what

⁴¹⁸ See also *May v. United States*, 753 P.2d 737 (Colo. 1988).

⁴¹⁹ *Jacobucci*, 541 P.2d at 673, quoting Kinney, *Irrigation and Water Rights* § 1482 (2d ed. 1912).

⁴²⁰ *Jacobucci*, 541 P.2d at 673.

⁴²¹ Colo. Rev. Stat. §§ 7-42-101 *et seq.*

⁴²² Colo. Rev. Stat. at § 7-42-104(3).

⁴²³ Citing *Supply Ditch Co. v. Elliot*, 10 Colo. 327, 15 P. 691 (1887); C. Kinney, *Irrigation & Water Rights* § 1482 (2d ed. 1912).

⁴²⁴ Kinney, *Irrigation and Water Rights* § 1482 at 2662 (footnotes omitted).

flexibility that ownership affords (such as the conditions that may limit transferring the right) may depend upon the terms of the corporation's "contract" with the water user.

The status of stock in a mutual ditch company often raises interesting questions among shareholders. In *Pacific Savings & Loan Corp. v. Schmitt*,⁴²⁵ the federal court held that if a landowner sells his land and water rights, his ditch company stock is included, even though not mentioned. The stock is a mere muniment of title to the water right. It has only nuisance value in the hands of one who has sold his water right. However, stock "certificates represent indicia of title and the essential right to participate in management" of the corporation.

In *Butte County v. Lovinger*,⁴²⁶ shares of ditch company stock were deemed to be personal property. Plaintiff obtained land in a mortgage foreclosure and contended that stock in the irrigation association represented certain water rights which were appurtenant to the land, and that he acquired these rights by virtue of his deed in foreclosure. The court disagreed, and held that water rights represented by shares of stock in a water company are personal property and may be sold and transferred independently of land and that they had not been intended to be included in the mortgage.⁴²⁷

In *Genola Town v. Santaquin City*,⁴²⁸ the Utah court observed that a certificate of stock in a mutual ditch company "is not like the stock certificate in a company operated for profit. It is really a certificate showing an undivided part ownership in a certain water supply." In other words, shareholders in a mutual ditch company might be seen as tenants in common in the water rights delivered by the company.

In *Vonburg v. Farmers Irrigation Dist.*,⁴²⁹ which, despite its caption, involved a mutual ditch company, the farmers were held to hold full title to the water rights when they conveyed away the other assets of the company.

The court in *Jacobucci* also emphasized that the shares of stock represent, in addition to "a definite and specific water right," "a corresponding interest in the ditch, canal, reservoir, and other works by which the water right is utilized."⁴³⁰ For a comment on this subject, see Jeffrey J. Kahn, "Who Owns Mutual Ditch Company Assets," publication available from Natural Resources Law Center, Boulder, Colorado.

⁴²⁵ *Pacific Savings & Loan Corp. v. Schmitt*, 103 F.2d 1002 (9th Cir. 1939).

⁴²⁶ *Butte County v. Lovinger*, 266 N.W. 127 (S.D. 1936).

⁴²⁷ *Butte County*, 226 N.W. at 132.

⁴²⁸ *Genola Town v. Santaquin City*, 80 P.2d 930, 936 (Utah 1938).

⁴²⁹ *Vonburg v. Farmers Irrigation Dist.*, 270 N.W. 835, 839-40 (Neb. 1937).

⁴³⁰ *Jacobucci*, 541 P.2d at 672.

As is well known by water lawyers dealing with water right sales and transfers that involve delivery organizations, the question of ownership of rights is an interesting one, but it often is not dispositive of anything. Other issues, such as traditional injury concerns or alleged limitations on transferability imposed by company bylaws, often define the debate, with the scope and meaning of ownership being a secondary discussion. For example, the courts on several occasions have dealt with the extent to which a mutual ditch company effectively can limit a shareholder's right to deal freely with his water right.

The mutual ditch company shareholder's right to change or transfer his water right may be limited, at least to reasonable degree, by corporate articles or bylaws. In *Wadsworth Ditch Co. v. Brown*,⁴³¹ both the mutual ditch company and other shareholders objected to a proposed change of point of diversion to another canal. The court found in favor of the stockholder despite the company's assertion that the change would violate a bylaw, and a customary practice in the company, to the effect that shareholders could use the water of another when he had no immediate need for it. The court clearly presumed that the shareholder, not the company, holds vested water rights, although this was not expressly stated.

In *Wadsworth Ditch Co.*, the Colorado court noted that "[t]he right to change [a point of diversion] is a property right" existing independently of a Colorado statute specifying the methods for making such a change. The court held that this right to change "always could be enforced so long as the rights of others are not thereby injuriously affected, and belongs to the stockholder (consumer) in a mutual ditch company as fully as to any other appropriator." *Wadsworth Ditch Co. v. Brown*, 88 P. at 1061.

In *Model v. Madsen*,⁴³² the Colorado court ruled that mutual ditch company bylaws constitute a contract between the shareholder and the corporation that will be enforced unless they violate public policy or are unreasonable. In *Model*, the company had refused to allow shareholder to change his place of use.⁴³³

*East Jordan Irrigation Company v. Morgan*⁴³⁴ held that a mutual ditch company shareholder may not change his right's point of diversion over the company's objection. However, in *Salt Lake*

⁴³¹ *Wadsworth Ditch Co. v. Brown*, 88 P. 1060 (Colo. 1907).

⁴³² *Model v. Madsen*, 285 P. 1100, 1101 (Colo. 1930).

⁴³³ See, also *Fort Lyon Canal Company v. Catlin Canal Company*, 762 P.2d 1375, 1379 (Colo. 1988), quoting *Fort Lyon Canal Co. v. Catlin Canal Co.*, 642 P.2d 501, 507 (Colo. 1982) (upholding mutual ditch company board decision, based on a bylaw "approval" provision and reasonable findings that the change would cause injury, to disapprove a shareholder's proposed transfer). See also *Riverside Land Co v. Jarvis*, 174 Cal. 316, 162 P. 54 (1917).

⁴³⁴ *East Jordan Irrigation Company v. Morgan*, 860 P.2d 310 (Utah 1993).

City Corp. v. Cahoon & Maxfield Irr. Co.,⁴³⁵ the Utah court appears to have abandoned this rule. In *Cahoon*, the court expressly concurred with its earlier holding in *Genola Town* that stock in a mutual ditch company evidences an undivided part ownership in the water right.

In some cases, statutory provisions provide the primary authority for imposing these limitations on ownership. Idaho Code § 42-108, which grants general authority for holders of water rights to change the place of use, nature or time of use, or point of diversion under a water right, contains the following proviso:

[I]f the right to the use of such water, or the use of the diversion works or irrigation system is represented by shares of stock in a corporation or if such works or system is owned and/or managed by an irrigation district, no change ... shall be made or allowed without the consent of such corporation or irrigation district.

In *Bishop v. Dixon*,⁴³⁶ this proviso was held inapplicable to a lateral ditch association because it was not a corporation. Therefore, the association's bylaw prohibiting any transfer was held to violate section 42-108's grant of authority to make such a change.

However, in *Johnson v. Pleasant Valley Irr. Co., Ltd.*,⁴³⁷ the proviso in section 42-108 was enforced in favor of the mutual ditch company which opposed shareholder's proposed change. Shareholder appealed, asserting primarily constitutional arguments. The Idaho Supreme Court ruled that section 42-108 does not violate the 14th amendment to the U.S. Constitution because the administrative procedure involved in considering the transfer afforded plaintiff a hearing. Furthermore, absent a statute to the contrary, a mutual irrigation corporation is not required to hold a hearing on a matter having to do with "the handling of its affairs and in dealing with its stockholders."⁴³⁸

Section 42-108 does not impermissibly delegate legislative power. The stockholder in *Johnson* had cited land use cases overturning legislation granting consent power to neighboring landowners. The court found the analogy inapt: "[T]here is no analogy between the relation of a property owner to his neighbors and the relation existing between a stockholder and his corporation. The refusal of a corporation to permit one of its shareholders to substantially withdraw from the corporation and change his relationship to the other stockholders without its consent, does not involve

⁴³⁵ *Salt Lake City Corp. v. Cahoon & Maxfield Irr. Co.*, 879 P.2d 248 (Utah 1994).

⁴³⁶ *Bishop v. Dixon*, 483 P.2d 1327, 1331 (Idaho 1971).

⁴³⁷ *Johnson v. Pleasant Valley Irr. Co., Ltd.*, 69 Idaho 139 (1949).

⁴³⁸ *Johnson*, 69 Idaho at 145.

legislative power but is concerned with the internal affairs of the corporation.”⁴³⁹ The court found no authority recognizing the right of “a shareholder in a water corporation to change his point of diversion and place of use *without the consent of the corporation*, to a place where he could not be served by the irrigation system of the corporation. The exercise of such a right would tend to disrupt the unity of the corporation, and to impair the very purpose for which the same was formed. Carried to excess, it would destroy the usefulness of the corporation.”⁴⁴⁰ The court did not cite any facts to support the argument that Johnson’s proposal would “disrupt the unity of the corporation.”

It would appear that, despite the language of *Johnson*, there would be solid legal and public policy arguments for the position that statutes like Idaho’s section 42-108 should be interpreted to mean that the company can withhold permission only for reasons of actual injury to the corporation or other shareholders.

Ownership of water rights in a Carey Act operating company essentially follows the rules for mutual ditch companies. Under the Carey Act land settlement scheme, the state entered a contract with the project construction company. The terms of this contract, to take one example described in *Leland v. Twin Falls Canal Co.*,⁴⁴¹ were that the construction company’s contracts with settlers would involve a “sale or contract of the water right to the [settler, which] shall be a dedication of the water to the land to which the same is applied and the water right so dedicated shall be a part of and relate to the water right belonging to the said system of canals.” In turn, the stock certificate issued to the settler entitled him or her “to proportionate interest in the dam, canal, water rights and all other rights and franchises of the [Carey Act operating company], based upon the number of shares finally sold” The Carey Act operating company received deeds from the construction company for both the water rights and the irrigation water delivery system; the local county records will reflect this “naked title.” However, the operating company is a mutual irrigation company, and beneficial title to the water rights and facilities rest with the shareholders.

In *Leland*, the court ruled that, pursuant to these contract arrangements, the settler “buys a water right dedicated to his land,” and that “the water right is an appurtenance to the land to which it was dedicated, and is part of that property.”⁴⁴² “It was clearly the intention of the Legislature, as well as the construction company, that the individual contract holder or settler should be the owner of the water right upon the completion of the construction works.”⁴⁴³

⁴³⁹ *Johnson*, 69 Idaho at 145-46.

⁴⁴⁰ *Johnson*, 69 Idaho at 145 (emphasis in original).

⁴⁴¹ *Leland v. Twin Falls Canal Co.*, 51 Idaho 204, 209, 3 P.2d 1105 (1931).

⁴⁴² *Leland*, 51 Idaho at 211.

⁴⁴³ *Leland*, 51 Idaho at 221.

In *Ireton v. Idaho Irrigation Co., Ltd.*,⁴⁴⁴ the court found that the foreclosure of mortgage on a Carey Act company stockholder's land included the shareholder's portion of the water right delivered by the company, as well as the debtor's stock in the company. While the stockholder had pledged his shares as security to another lienholder, this second lienholder could not assert an ownership in the water right because, at least once the right becomes appurtenant to land by delivery and beneficial use, the certificates are mere "muniments of title" to the water right, and "ownership of [the certificates] passes with the title which they evidence."⁴⁴⁵

Idaho statutes support the proposition that Carey Act corporation shareholders, as opposed to the corporation itself, own the water rights.⁴⁴⁶

Idaho Code § 42-2025 provides that "[t]he water rights to all lands acquired under [the state's Carey Act procedures] shall attach to and become appurtenant to the land as soon as title passes from the United States to the state."

The court in *Leland* also stated that, under the contract, the settler obtains "an interest in the remaining property of the corporation, to wit: the dam, franchises and other remaining property to be used in connection with the water right."⁴⁴⁷

(ii) Commercial ditch companies

Hutchins' equivocal comment about the ownership of the water right in commercial ditch corporations is a good indication of the difficulty encountered in trying to sort out this question: "Water rights vest in the consumers in some States, and in others may vest in either the company or consumers, depending upon the statutes and court decisions involved."⁴⁴⁸ It appears that the "general rule" would be that the water rights vest in the company, and the consumer has only a right of service.⁴⁴⁹

The Colorado approach is similar. The Colorado court in *Wheeler v. Northern Colorado*

⁴⁴⁴ *Ireton v. Idaho Irrigation Co., Ltd.*, 30 Idaho 310, 317 (1917).

⁴⁴⁵ *Ireton*, 30 Idaho at 317, citing *In re Thomas' Estate*, 81 P. 539 (Cal. 1905) and *Berg v. Yakima Valley Canal Co.*, 145 P. 619 (Wash. 1915).

⁴⁴⁶ See, e.g., Idaho Code §§ 42-2501 through 42-2509, which recognize a Carey Act corporation stockholder's right to transfer the "water right" appurtenant to his land to other lands within the same Carey Act system.

⁴⁴⁷ *Leland*, *supra*. But see, *Hobbs v. Twin Falls Canal Co.*, 24 Idaho 380, 394 (1913), where the court at first appears to presume that a Carey Act operating company is a commercial irrigation corporation whose duty to supply water arises from the constitutional "public use" provisions. However, the court ultimately concludes that the corporation "is nothing more than a holding company" for the interests of the irrigators.

⁴⁴⁸ Wells A. Hutchins, "Commercial Irrigation Companies," Tech. Bull. 177 at 16 (1930).

⁴⁴⁹ *Glenn Colusa Irr. Dist. v. Paulson*, 242 P. 494 (Cal. 1925).

Irrigating Co.,⁴⁵⁰ noted that by diverting the water, the carrier company acquires “certain peculiar rights,” but that “giving these rights all due significance, I cannot consent to the proposition that the carrier becomes a ‘proprietor’ of the water diverted.”⁴⁵¹ It is not completely clear whether the court is saying that the commercial ditch company holds no water right; the court certainly does state that the company has no property right in the “water” itself, which is obvious enough. The court’s reasoning makes much of the fact that it is the consumer who puts the water to beneficial use although it does not go so far as to say that only the consumer holds a water right. On the question of “ownership,” the case is confusing.

Kinney’s treatise identifies *Wheeler* as using “strained” reasoning, but concludes that it stands for the proposition that Colorado adheres to the rule that commercial ditch companies do not hold title to water rights.⁴⁵²

It appears that the Colorado court, even after finding the company to be a “quasi-public servant or agent,” felt that the consumer needed yet more protections.

The Idaho approach is strongly influenced by the “public use” and “dedication” language of the Idaho Constitution. The Idaho court appears to have had an easier time guaranteeing protection for irrigation water consumers without struggling to show that the commercial supplier holds no water right. In *Wilterding v. Green*,⁴⁵³ the court found that Idaho Const. art. XV §§ 1 and 4 mean that “all waters appropriated before or after the adoption of the constitution, for sale, rental or distribution, are declared to be a public use, and are exclusively dedicated to such use.”⁴⁵⁴ The court further observed that individuals “who are in a condition to use such waters ... have a constitutional right to the use of such waters, under such reasonable rules and regulations, and upon such payment, as may be prescribed, which payments and regulations must at all times be reasonable.”⁴⁵⁵ The court noted that art. XV § 4 also means that

a party, having once used the water upon his land, cannot be thereafter deprived of it without his consent, if needed, when he shall pay therefor, and shall comply with such equitable terms and conditions as the law prescribes. This section also gives the party using such water under the conditions a perpetual right to such

⁴⁵⁰ *Wheeler v. Northern Colorado Irrigating Co.*, 17 P. 487, 490 (Colo. 1888).

⁴⁵¹ *Wheeler*, 17 P. at 490.

⁴⁵² 3 Kinney, *Irrigation and Water Rights* § 1476 at 2653 (2d ed. 1912).

⁴⁵³ *Wilterding v. Green*, 4 Idaho 773 (1896).

⁴⁵⁴ *Wilterding*, 4 Idaho at 779-80.

⁴⁵⁵ *Wilterding*, 4 Idaho at 780.

use.⁴⁵⁶

The *Wilterding* court also concluded that the Idaho Constitution was intended “to deal only with the ‘use’ of water, and not with the property rights of appropriators therein The sale, renting, and distributing of the water is a dedication, and brings its use under the control of the state, but it in no sense destroys or abrogates the property rights of the appropriator therein.”⁴⁵⁷

Thus, the court in *Wilterding* indicates that the public use provisions in the Idaho Constitution do not address the question of water right ownership, but specifies only that the use by consumers or distributees is a dedication to their lands that cannot thereafter be interrupted so long as they pay reasonable assessments.

In *Hard v. Boise City Irr. and Land Co.*,⁴⁵⁸ the court ruled that, because of the Idaho constitutional provisions, a consumer supplied by a carrier ditch company obtained a perpetual right to use the water, upon payment of annual rentals, and thus was entitled to change its place of use to another location on the ditch. The opinion comes close to declaring that the consumer holds the water right.⁴⁵⁹

*Farmers Cooperative Ditch Co. v. Riverside Irr. Dist.*⁴⁶⁰ involved an appeal from a decree adjudicating rights on the Boise River. The Idaho Supreme Court had before it both kinds of ditch companies—mutuals and commercial canal corporations—as well as private ditch companies. Its opinion provides a straightforward description of the two types of ditch companies and the nature of their respective ownership of the water rights under which they divert.

The court first observed that there were several purely private ditch companies where “the appropriators were also the users of the water; they owned the water right and used the water on their own lands.”⁴⁶¹ But the court focused its attention on the two types of delivery corporations. First were the mutuals:

Others were co-operative ditch companies where a number of water users had joined together and constructed a ditch, each one owning a number of shares in the company which entitled him to a

⁴⁵⁶ *Wilterding*, 4 Idaho at 780.

⁴⁵⁷ *Wilterding*, 4 Idaho at 786.

⁴⁵⁸ *Hard v. Boise City Irr. and Land Co.*, 76 P. 331 (Idaho 1904).

⁴⁵⁹ See also *Slosser v. Salt River Valley Canal Co.*, 65 P. 332 (Ariz. 1901).

⁴⁶⁰ *Farmers Cooperative Ditch Co. v. Riverside Irr. Dist.*, 94 P. 761 (Idaho 1908).

⁴⁶¹ *Farmers*, 94 P. 761.

proportionate amount of the water of the canal ⁴⁶²

Second, the commercial ditch corporations: “By still other ditches the waters were appropriated and diverted not for the immediate use of the ditch owners, but for the purpose of sale, rental and distribution.”⁴⁶³ The court then described what it saw as the basic rule as to ownership of the “appropriation”—that is, the water right. In both cases, the “ditch owners” are the appropriators:

Whatever the differences may be in the facts with reference to the use and application of the water, *the ditch owners in every instance are necessarily the appropriators* of the water within the meaning of the constitution and statute.⁴⁶⁴

Because the ditch owners in a mutual company are the shareholders, each shareholder also is an owner of the appropriation—that is, an owner of the water right—according to the number of his or her respective shares. However, as to a commercial carrier ditch company, applying this same rule means that the irrigators/consumers are *not* vested with ownership of the water right because they are not also the company owners: “The appropriation of waters carried in the ditch operated for sale, rental and distribution of waters does not belong to the water users, but rather to the ditch company.”⁴⁶⁵

(iii) Irrigation districts

State statutes authorizing the creation of irrigation districts may shed light on the type of “ownership” the district is to obtain in various property interests. For example, Idaho Code § 43-316 provides:

The legal title to all property acquired under the provisions of this title shall immediately and by operation of law vest in such irrigation district, and shall be held by such district in trust for, and is hereby dedicated and set apart to, the uses and purposes set forth in this title. Said board is hereby authorized and empowered to hold, use, acquire, manage, occupy and possess said property as herein provided.

This section suggests that an irrigation district holds legal title to water rights it delivers. In

⁴⁶² *Farmers*, 94 P. 761

⁴⁶³ *Farmers*, 94 P. 761

⁴⁶⁴ *Farmers*, 94 P. at 457-58 (emphasis added).

⁴⁶⁵ *Farmers*, 94 P. at 458.

Jensen v. Boise-Kuna Irr. Dist.,⁴⁶⁶ the Idaho court took this position, although it did not attempt to make a distinction between “legal” and “equitable” title:

As held by this court, and as expressly provided by § 43-316, I.C., the title to all property acquired by an irrigation district, including its water rights, is vested in the district and held by the district in trust for, and dedicated and set apart to, the uses and purposes set forth in the law.

There is no definitive Idaho law on the question of the nature of the irrigator’s title to water rights received from the district. However, it is clear that a trust relationship exists between the irrigation district and the landowners which it serves.⁴⁶⁷ The irrigation district holds title to its property, including any water rights it may own, in trust for the purpose of irrigating lands within the district.⁴⁶⁸ One of the characteristics of a trust is the separation of legal and beneficial interests.⁴⁶⁹

Because the district has no shareholders, the ownership analysis presumably would reach results different from those reached in the case of mutual companies. Nonetheless, the public use doctrine, which effectively operates to vest the irrigator with the entitlement to continue receiving water, regardless of his or her “ownership,” will apply in the case of the district (and probably not in the case of a mutual). For example, given the language in the above-quoted Idaho constitutional provisions, it is not surprising that an irrigation district in Idaho would be seen as an entity involved in providing irrigation water under a “distribution” within the meaning of the constitution. Accordingly, not only is legal title to district water rights held in trust, the use of water in a district is a “public use,” subject to the regulation and control of the state.⁴⁷⁰

The defendant district, having acquired by purchase the rights of the original appropriator and having itself made subsequent appropriations and purchases of water, stands in the position of appropriator for distribution to the landowners within the district,

⁴⁶⁶ *Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 141, 269 P.2d 755, 760 (1954).

⁴⁶⁷ *Jensen*, 75 Idaho at 141, 269 P.2d at 760.

⁴⁶⁸ Chapter Eight of Title 43 provides that an irrigation district may retain title to or repossess a water right where the landowner is delinquent in payment of his assessments. To reconcile this section with Idaho Code § 43-316, one could conclude that its application is limited to the retaining or repossession of the title held by the irrigator, i.e. beneficial title. Or, where the landowner owns his water right independently of the irrigation district’s distribution, Chapter Eight could provide authority for the district’s ability to obtain title via the repossession process.

Bradshaw v. Milner Low Lift Irrigation District, 85 Idaho 528, 381 P.2d 440 (1963); *Lewiston Orchards Irrigation District v. Gilmore*, 53 Idaho 377, 23 P.2d 720 (1933).

⁴⁶⁹ *Pacific States Savings & Loan Co. v. Commercial State Bank*, 46 Idaho 481, 486, 269 P. 86, 87 (1928).

⁴⁷⁰ Idaho Const. art. XV, § 1; Idaho Code § 43-304 (1990).

within the meaning of Const., Art. 15, § 1.... The landowners, to whose lands the water has become dedicated by application thereon to a beneficial use, have acquired the status and rights of distributees under Const., Art. 15, §§ 4 and 5.⁴⁷¹

The framers of Idaho's Constitution clearly intended that whenever water is once appropriated by any person or corporation for use in agricultural purposes under a sale, rental or distribution, that it shall never be diverted from that use and purpose so long as there may be any demand for the water and to the extent of such demand for agricultural purposes.⁴⁷²

The right to continue to use the water delivered by the district, in Idaho at least, thus is a perpetual entitlement.

However, as to the narrow "ownership of the water right" issue itself, the same court has not been so solicitous of the irrigator in an irrigation district. In *Nampa & Meridian Irrigation District v. Barclay*,⁴⁷³ another of the cases where the issue was whether the irrigators are necessary parties to litigation concerning rights to water the district delivers, the Idaho court stated:

The consumers possess no water right which they can assert as against any other appropriator,—their rights are acquired from the district which is the appropriator and owner and it is the district's business to protect the appropriation and defend it in any litigation that arises. (*Yaden v. Gem Irr. Dist.* 37 Idaho 300, 216 Pac. 250.) One who acquires from an appropriator, whose right was initiated by appropriation under sec. 1, art. 15, for "sale, rental or distribution," is not the owner of the appropriation and does not acquire the rights of an appropriator but he simply acquires the rights of a *user and consumer*, as distributee of the water under secs. 4 and 5, art. 15, of the Constitution.

California's irrigation district law, upon which is based similar laws throughout the West,⁴⁷⁴ provides that legal title to district water rights is held by the irrigation district in trust for the landowners,

⁴⁷¹ *Bradshaw v. Milner Low Lift Irrigation District*, 85 Idaho 528, 545, 381 P.2d 440, 457 (1963). See also *Nampa & Meridian Irrigation Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916 (1935).

⁴⁷² *Mellen v. Great W. Beet Sugar Co.*, 21 Idaho 353, 359, 122 P. 30, 31 (1912).

⁴⁷³ *Nampa & Meridian Irrigation District v. Barclay*, 47 P.2d 916, 921 (Idaho 1935)

⁴⁷⁴ See, e.g., *Progressive Irr. Dist. v. Anderson*, 19 Idaho 504, 114 P. 16 (1911).

who are the equitable title holders.⁴⁷⁵ Equitable ownership of the water is held in common by all the irrigators within the district.⁴⁷⁶

The landowner's interest in the water right comes with restrictions, however, and, at least as the California court sees it, it a different interest than, say, the interest of a shareholder in a mutual company.

[T]o sustain the claim of plaintiff, it must be held that the effect of our statutes relative to irrigation districts, is to make each owner of land within a district the absolute owner of the proportionate share of the water of the district to which his land entitles him, to do with as he sees fit, even to the extent of diverting all thereof from the irrigation of lands within the district. It seems very clear that such a conclusion would be opposed to the whole plan or scheme of the legislation for irrigation districts The right of a landowner of the district to the use of the water acquired by the district is a right to be exercised in consonance with and in furtherance of such ultimate purpose, viz, for the improvement by irrigation of lands within the district, and in no other way. His right is always subordinate to the ultimate purpose of the trust. So far as he proposes to use the water for the irrigation of lands within the district, he is proposing to use it in furtherance of the purpose of the trust, and is entitled to have distributed to him for that purpose, such proportion as his assessment entitles him to. To this extent only can he be held to be the owner of any share or portion of the water ⁴⁷⁷

(iv) Federal reclamation project water

There is no definitive rule concerning the ownership of water rights in reclamation projects. However, the theory that landowners in federal reclamation projects are the beneficial owners, and that the federal government is the legal title holder of the water rights, seems to have gained the most support. Underpinning this view is that the United States, in carrying out the mandates of the Reclamation Act of 1902, must proceed pursuant to state water law, at least so long as such law does

⁴⁷⁵ *United States v. Imperial Irrigation Dist.*, 559 F.2d 509 (9th Cir. 1977), modified 595 F.2d 524 (9th Cir. 1977).

⁴⁷⁶ *Imperial*, 559 F.2d 509. See also *Merchants' Nat. Bank v. Escondido Irr. Dist.*, 144 C. 329, 334, 77 P. 937, 939 (1904) (property owner/irrigators are "the beneficiaries of the trust" who enjoy "the equitable ownership of [the district's] water rights, reservoirs, ditches, and property generally, as the means of supplying water").

⁴⁷⁷ *Jenison v. Redfield*, 87 P. 62, 63-64 (1906) (citations omitted). Accord, *State v. Birdwood Irrigation Dist.*, 46 N.W.2d 884 (Neb. 1951).

not frustrate the purposes of the federal act. Section 8 of the Reclamation Act⁴⁷⁸ provides:

The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right. Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or in any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such law, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or waters thereof.

The federal government has acquired water rights for federal reclamation projects in two ways: primarily, it has applied to state authorities and received a permit, license or decree, as the case may be, recognizing the right pursuant to state law. In addition, the federal government has obtained water rights by conveyance from entities or individuals (such as those who either failed to fully develop their own storage project or chose for other reasons to throw in with the federal project). In either case, the United States holds the water rights in its name. But, as is the case with all water delivery organizations, the United States (or its contracting irrigation district) itself is not the entity making beneficial use of it. The act thus sets up the same dual involvement in the water right—one diverts, the other applies to beneficial use—that exists with respect to private and quasi-public water distribution entities and their shareholders or distributees.

In *Ickes v. Fox*,⁴⁷⁹ the Bureau of Reclamation attempted to reduce water long-standing water deliveries to irrigators, who received their water under repayment contracts. The United States argued that it had acquired water rights in its own name under state law in compliance with section 8, and that its distribution of water under the rights gave the irrigators no property interest in the water rights, but only “contract rights against the distributor.” The Supreme Court disagreed:

Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights

⁴⁷⁸ 43 U.S.C. §§ 372 and 383.

⁴⁷⁹ *Ickes v. Fox*, 300 U.S. 82, 84 (1937)

became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. The government was and remained simply a carrier and distributor of the water with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefor, it was provided that the government should have a lien thereto—a provision which in itself imports that the water-rights belong to another than the lienor, that is to say, to the landowner.⁴⁸⁰

The rule in *Ickes* was reaffirmed in *Nebraska v. Wyoming*,⁴⁸¹ which concerned a dispute between Nebraska, Wyoming, Colorado and the United States regarding the waters of the North Platte River. The United States claimed it owned all of the unappropriated water in the river, and that its entitlement was derived not from appropriation but from its underlying ownership of the lands and waters—all acquired by cessions from foreign governments—which entitled it to an apportionment free from state control. The Court rejected the federal assertion, noting that the water rights in the North Platte Project all had been obtained in compliance with state law, and that “[t]he property right in the water rights is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator.”⁴⁸² The court found that the appropriators were the ones who put the water to beneficial use, thus perfecting the water right that had been issued in the name of the United States. In this way, the landowners had “become the appropriators of the water rights, the United States being the storer and the carrier.”⁴⁸³

In *Nevada v. United States*,⁴⁸⁴ in an attempt to obtain additional water rights for the Pyramid Lake Indian Reservation, the United States sought to undo the 1944 Orr Ditch decree for Truckee River waters. After reviewing *Ickes* and *Nebraska v. Wyoming*, the Court concluded that the landowners, not the government, receive the beneficial interest in the water rights, and therefore the government is not at liberty to reallocate project water rights as if it owned these rights in fee.⁴⁸⁵

⁴⁸⁰ *Ickes v. Fox*, 300 U.S. at 94-95 (citations omitted). According to Professor Sax, the irrigator relying on federal water project supplies has no more than “a right to fair treatment” by the federal government, which is “essentially the same as that to which he is entitled as a public utility user.” Joseph L. Sax, *Federal Reclamation Law*, in 2 *Waters and Water Rights* § 118.3 at 187 (R. Clark ed., 1967).

⁴⁸¹ *Nebraska v. Wyoming*, 235 U.S. 589 (1945).

⁴⁸² *Nebraska*, 235 U.S. at 614.

⁴⁸³ *Nebraska*, 325 U.S. at 615.

⁴⁸⁴ *Nevada v. United States*, 463 U.S. 110 (1983).

⁴⁸⁵ *Nevada*, 463 U.S. at 128.

[W]e conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the Orr Ditch decree in 1944 for use in the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, *the government's "ownership" of the water rights was most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land* within the Project to which these water rights became appurtenant upon the application of Project water to the land.⁴⁸⁶

However, the Court in *Nevada v. United States* noted that the federal government retains *legal title* to the water right.⁴⁸⁷

The Interior Department Solicitor has opined that, as to waters held in Bureau of Reclamation storage reservoirs, the state-granted water right—the “paper” entitlement—rests “exclusively with the distributor,” that is, with the United States.⁴⁸⁸ However, the opinion also notes that “it is [the individual irrigators] and not the distributor who actually put the water to a beneficial use as required by state law,” and concludes that *Nevada v. United States* “conclusively reaffirmed the concept that beneficial ownership of a reclamation project water right is in the water users who put the water to a beneficial use.”⁴⁸⁹

The Solicitor also concluded, based on the ruling in *Nevada v. United States*, that the legal title held by the Bureau carries with it an obligation “to preserve, maintain, protect, or have confirmed project water rights that are held in the name of the United States.”⁴⁹⁰ Thus, the Bureau has the obligation to file for and defend project water rights in any general stream adjudication in which the federal government might be joined.⁴⁹¹ The Solicitor noted that such a filing is the means by which the water user, the beneficial title holder, can effectively participate in the proceeding with actual proof of beneficial use to back up the agency’s filing.⁴⁹²

⁴⁸⁶ *Nevada*, 463 U.S. at 126 (emphasis added).

⁴⁸⁷ *Nevada*, 463 U.S. at 127.

⁴⁸⁸ Filing of Claims for Water Rights in General Stream Adjudications, M-36966, 97 I.D. 21, 23 (1989).

⁴⁸⁹ Filing of Claims for Water Rights in General Stream Adjudications, 97 I.D. at 27.

⁴⁹⁰ Filing of Claims for Water Rights in General Stream Adjudications, 97 I.D. at 28.

⁴⁹¹ Filing of Claims for Water Rights in General Stream Adjudications, 97 I.D. at 28.

⁴⁹² Filing of Claims for Water Rights in General Stream Adjudications, 97 I.D. at 28.

The Solicitor's opinion found that *Ickes* did not contradict the Supreme Court's earlier ruling in *Ide v. United States*,⁴⁹³ that primarily in order to protect project water entitlements and the project itself, the federal government retains some "control over the water" in federal reclamation projects, as well as those rights "incident to the appropriation" not placed in the hands of the appropriator. Likewise, the Solicitor cited *United States v. Humboldt Lovelock Irrigation Light & Power Co.*,⁴⁹⁴ *Hudspeth County Conservation & Reclamation Dist. v. Robbins*,⁴⁹⁵ and *United States v. Tilley*,⁴⁹⁶ for the proposition that the federal government retains some control over the water right and is entitled or obligated to protect it.

The Secretary of the Interior is empowered to transfer the operation and management of irrigation works in a reclamation project to project landowners once payments for a major portion of the project lands are made, but title to the reservoirs and works remains in the government, despite any transfer of operation and management responsibility.⁴⁹⁷ "The lack of mention of water right title in this section implies that title to the water right had already passed to the farmers with their land patents."⁴⁹⁸

In *Madera Irrigation Dist. v. Hancock*,⁴⁹⁹ the court ruled that the federal government may end subsidies to federal water project beneficiaries despite the fact that the beneficiaries hold "a vested property right to a permanent water supply."

For further comment on this issue, see Richard Roos Collins, *Voluntary Conveyance of the Right to Receive a Water Supply from the United States Bureau of Reclamation*, 13 Ecology L. Quarterly 773, 835 (1987).

3. Forfeiture of the water right by shareholder or consumer

This issue would appear clear cut. Regardless of who owns it, there is a complete dependence on the irrigator to place the right to beneficial use. Failure to place a water right to beneficial use violates the most basic rule of the appropriation doctrine and will subject the right to scrutiny, and potential cancellation, under doctrines of forfeiture and/or abandonment.

⁴⁹³ *Ide v. United States*, 263 U.S. 497.

⁴⁹⁴ *United States v. Humboldt Lovelock Irrigation Light & Power Co.*, 97 F.2d 38 (9th Cir. 1938).

⁴⁹⁵ *Hudspeth County Conservation & Reclamation Dist. v. Robbins*, 213 F.2d 425 (5th Cir. 1954).

⁴⁹⁶ *United States v. Tilley*, 124 F. 850 (8th Cir. 1942).

⁴⁹⁷ 43 U.S.C. § 498.

⁴⁹⁸ *United States v. Alpine Land & Reservoir Co.*, 503 F.Supp. 877, 879 (D. Nevada 1980). See also *U.S. v. Union Gap Irr. Co.*, 209 F. 274 (1913); *Westside Irr. Co. v. U.S.*, 246 F. 21 (D. Wash. 1916), both holding that the United States is the appropriator of water in reclamation projects and others have merely contract rights against the U.S.

⁴⁹⁹ *Madera Irrigation Dist. v. Hancock*, 982 F.2d 1397 (9th Cir. 1993).

[T]he appropriation and diversion of water by a ditch company that is not prepared to use the water itself is practically valueless without water consumers. In other words, it takes the water user, applying the water to a beneficial purpose, to enable a ditch company that has appropriated waters for sale, rental or distribution, to continue the diversion of the water. If it should cease to have water users or consumers, and cease to apply the water to a beneficial use, its right to divert the water would cease.⁵⁰⁰

Still, the fact that the water right is delivered through a canal corporation may provide defenses to a finding of forfeiture. For example, if the company's bylaws allow for internal transfers of rights, it might be argued that, even though Shareholder A has stopped using it, water under the right still was being diverted and used upon Shareholder B's lands.⁵⁰¹

Indeed, Idaho's high court ruled in a 1999 case that Carey Act canal companies are not subject to automatic abandonment upon the simple showing of non-use of by a shareholder. In *Aberdeen-Springfield Canal Co. v. Peiper*, 982 P.2d 917 (Idaho 1999), the court ruled that a stockholder's proportionate share of a water right issued in the name of a Carey Act operating company had not been forfeited despite the fact that the shareholder had not placed this portion to beneficial use for more than thirty years.

In *Peiper*, the shareholder stopped paying assessments to the canal company since the delivery ditch to his property had been obliterated for three decades and he had been irrigating instead under his own separate water right through a ground water well during this entire period. The Canal Company sued to collect past assessments. As one of several defenses—all of which were unsuccessful—Peiper asserted that the portion of the water right represented by his canal company shares had been forfeited by non-use, and that the canal company therefore could not levy or collect assessments based on it. Under Idaho law, a water right that is not placed to beneficial use for a period of five years is deemed forfeited. Idaho Code § 42-222(2).

The Idaho Supreme Court rejected the forfeiture defense. Although the basis of the decision is somewhat unclear, the court concluded that the canal company was the "appropriator" of the water right, and that the forfeiture statute applies only against the appropriator. The court found that "where the appropriator did nothing to cause the nonuse," a finding of forfeiture would have "troubling consequences for all Carey Act operating companies."⁵⁰² The court found that such a ruling "would

⁵⁰⁰ *Farmers' Co-Operative Ditch Co. v. Riverside Irrigation Dist., Ltd.*, 94 P. 761, 766 (Idaho 1908).

⁵⁰¹ See footnote 404 at page 133.

⁵⁰² This shielding of the "owner" from actions of the "user" is not a familiar concept in prior appropriation law. For instance, it is no defense for a farm owner to say that, although her lessee failed to use the farm's water right, there should be no forfeiture because the "the appropriator did nothing to cause the nonuser" and the lessee

give stockholders, who are not appropriators,” the power to determine the fate of [the Carey Act Company’s] water rights.” *Aberdeen-Springfield Canal Co. v. Peiper*, 982 P.2d at 922. Although citing the *Jacobucci* case on other points, the court did not discuss the nature of the property interest in the water right that is held by a Carey Act company shareholder.

The court also did not clarify whether the water previously used by Peiper was being used elsewhere in the canal company, an action which presumably would shield it from forfeiture in any event. An Idaho statute provides special flexibility to such companies to change the place of use of surface water “within a generally described place of use” without going through the formal transfer process.⁵⁰³

The opinion in *Peiper* also stressed that an Idaho statute entitles a Carey Act canal company to assess maintenance costs against shareholders, “regardless of whether such water is used or not”⁵⁰⁴ This could be seen as special authority for avoiding forfeiture where the only non-use is that occurring at the individual shareholder level, and not at the level of the Carey Act company itself. Similarly, the court gave a broad reading to the provision in the company’s articles of incorporation which entitle the company to assess for “benefits received.” Peiper argued that water is the only benefit that should be considered. The court disagreed, holding that an assessment will be upheld if it is “reasonably related to the overall benefit provided by [the canal company] as a whole,” even though the individual shareholder receives no benefit in the form of water deliveries. *Id.*

Since *Peiper* concerned only Carey Act operating companies, it is unclear how the court would evaluate forfeiture of water rights by a shareholder in a non-Carey Act mutual ditch company. Most importantly, the opinion does not deal with the situation where water has not been put to use anywhere in the company for the statutory period.

Other types of water delivery organizations also may enjoy special statutory defenses to forfeiture. In *City of Raton v. Vermejo Conservancy Dist.*,⁵⁰⁵ the court held that because of the

should not have “the power to determine the fate of water rights.”

⁵⁰³ Idaho Code § 42-219(6) provides that “[f]or an irrigation project developed under a permit held by an association, company, corporation or the United States to divert and deliver or distribute surface water under any annual charge or rental for beneficial use by more than five (5) water users in an area of less than twenty-five thousand acres” the place of use description in the water right license is sufficient if it “provide[s] a general description of the area within which the total number of acres developed under the permit are located and within which the location of the licensed acreage can be moved provided there is no injury to other water rights.” Idaho Code § 42-219(7) then provides that the canal company or association can change the place of use within these generally described boundaries “without approval under the provisions of section 42-222, Idaho Code,” provided that the change “shall not result in an increase in either the rate of flow diverted or in the total number of acres irrigated under the water right and shall cause no injury to other water rights.”

⁵⁰⁴ *Peiper* at 921 (quoting Idaho Code § 42-2201).

⁵⁰⁵ *City of Raton v. Vermejo Conservancy Dist.*, 678 P.2d 1170 (N.M. 1984).

provisions of N.M. Stat. Ann. § 73-17-21, conservancy district water rights could not be lost by prescription, adverse possession or for non-use. In the absence of such a statute, state law presumably will subject conservancy district water rights to scrutiny under a forfeiture or abandonment theory.

Section 8 of the Reclamation Act,⁵⁰⁶ recites the fundamental state law precept that beneficial use is the basis, the measure and the limit of a water right. It is fundamental to the appropriation doctrine, as reflected in statutes and common law, that failure to apply the resource to a beneficial use renders the water right vulnerable to statutory forfeiture and/or common law abandonment.⁵⁰⁷ Quite apart from what state law might require, section 8 bases acquisition of water rights upon the concept of beneficial use. Given this provision's mandate of federal conformance with state water law, it is evident that what constitutes a beneficial use must be determined by that state's law. Even if section 8 expressly allowed some question of whether the Bureau must comply with all elements of state water law, presumably the element expressly mandated in the reclamation laws, beneficial use, is the one that unquestionably must be observed.⁵⁰⁸

All of the above essentially comes down to some general conclusions, at least for the jurisdictions reviewed. The water users in irrigation water delivery organizations are likely to be found to hold beneficial title to the water rights under which the deliveries are made. In the case of mutual irrigation companies, this conclusion appears to be well established. Where Carey Act companies are involved the issue may be clouded in Idaho due to the *Peiper* decision.

Because of principles of "public use," which have been embodied in many state statutes and constitutions, and also are reflected in the common law, any entity supplying water to the public or to property owners in a particular area who are not shareholder/owners of the supplier, is likely to be deemed engaged, at least to some degree, in a public use activity and will be required to meet certain trust obligations analogous to the obligations placed on public utilities. An irrigator receiving water from a commercial or carrier ditch company presumably will not be seen as holding an ownership interest in the water right, but the irrigator will be entitled to a continued use of it, under fair terms, due to the public use doctrine and the various authorities implementing it.

There are important differences between the history and the legal structure of the two basic types of organizations that are most active today—mutuals and districts. The courts have not extensively explored the scope of these differences with reference to a water user's ability to act independently with his or her property, the water right. However, the authorities are in general agreement that a shareholder in a mutual company may sell or change his or her interest in the water

⁵⁰⁶ 43 U.S.C. §§ 372 and 383. For a discussion of federal reclamation law generally, see pages 139-44.

⁵⁰⁷ See, e.g., Idaho Code § 42-222(2).

⁵⁰⁸ At least one law review comment has concluded that the Bureau of Reclamation can lose its water rights by forfeiture for failure of its contracting entities to put it to beneficial use. Gregory Harwood, *Forfeiture of Rights to Federal Reclamation Project Waters: A Threat to the Bureau of Reclamation*, 29 Idaho L. Rev. 152 (1992).

right, including selling or changing it to a use outside the area served by the mutual canals. But this ability will be restrained somewhat by the needs, concerns and rules of the company. The restraint most likely will be imposed on a contract theory, although there are some state statutory controls as well.

The ownership analysis as applied to irrigation district irrigators probably differs from that applicable to mutual irrigation company shareholders. Nevertheless, if it were concluded that an irrigation district irrigator holds beneficial title to the water rights, the irrigator's ability to realize many of the attributes of "ownership" will be substantially constrained because of the quasi-municipal nature of the entity, its statutory roots, and the trust recognized in the district in favor of the lands within its boundaries.

Any analysis of the relationship between the delivery organization and the individual water user must recognize that it is the latter who makes the beneficial use, and thus supplies this critical element of the water right. No matter what the identity or structure of the supplier organization, water users can forfeit the water rights that are delivered by it, regardless of who, technically, might be seen as "owning" the water right.

4. Water districts

Unlike irrigation districts and canal companies, water districts do not hold water rights or operate water projects. Rather, in Idaho, a water district is a legal entity designated according to statute, established to administer water rights through a watermaster. A water district exists only on those streams where water rights have been adjudicated. Because only a few isolated ground water areas have been adjudicated, most water districts administer only surface water rights, not ground water.

The boundaries of each water district correspond to the particular adjudicated area of water rights and follow watershed lines.⁵⁰⁹ Most of the adjudications upon which water districts are based occurred early in the century, so most of the districts have been in existence for many years.

Like many of the Western states, the entire state of Idaho is now divided into non-overlapping water districts. Some of the state's numerous water districts are as small as the watershed of a moderately-sized creek system; others, such as Water District 1 (which is really a consolidation of several water districts on the Upper Snake), arose out of the adjudication of a portion of a major river and are extensive in area.

The statute controlling water districts provides that the holders of decreed water rights, licenses and permits within a district shall elect a watermaster and establish the watermaster's budget. Voting is

⁵⁰⁹ Water districts should not be confused with IDWR Administrative Basins, which also follow watershed lines. See discussion at page 27.

by these individuals or entities only, and the number of votes one has corresponds to the amount, in cubic feet per second, of one's water right. (Special rules apply for "non-consumptive" water rights.) Technically, the watermaster is an employee of the state and can be removed for cause by the Director of the Department of Water Resources. As a practical matter, watermasters are agents of the water users, primarily irrigators, within their districts.

Water districts are entitled to establish certain rules for water administration within the district. Business is conducted during an annual water users' meeting, usually held early in the year and prior to the irrigation season. The statute refers to "rules and regulations of the respective districts, adopted at the annual water users' meeting," but does not make clear the type of rules that the water users might adopt beyond those pertaining to the annual term during which the watermaster is to perform services.⁵¹⁰

T. THE SWAN FALLS AGREEMENT

1. History of the controversy

In the late 1970s, Idaho Power Company ("IPCo"), taking defensive action in response to a ratepayers' petition before the Public Utilities Commission, filed suit in district court to protect its senior water rights at its Swan Falls hydroelectric project on the Snake River. The dam is located well downstream on the river; its rights could call out or prevent licensing of potentially thousands of junior rights upstream. Although IPCo's Federal Power Commission licenses for its Hell's Canyon, Oxbow and Brownlee dams (the "Hell's Canyon complex") *had* required subordination of IPCo's water rights in favor of future upstream irrigation diversions, the 1982 Idaho Supreme Court decision in the Swan Falls matter found that IPCo's Swan Falls rights had not been subordinated to upstream junior depletions. This caused a furor. The Department imposed a moratorium on new water right approvals which only now is being lifted.

However, IPCo still faced a court trial on the question of whether it had waived, abandoned or would be estopped from asserting that portion of its rights that it had allowed upstream juniors to divert over many years of irrigation development in the upper Snake (particularly high-lift surface water pumpers below Milner Dam and well pumpers in the Snake Plain Aquifer, which is tributary to the Snake River above Swan Falls Dam). IPCo also had some exposure as to the question of whether it would be estopped from blocking future rights. Rather than litigate against thousands of upstream irrigators and the State of Idaho—which took the side of the irrigators and other upstream water users—IPCo settled by means of an agreement with Idaho's Governor and Attorney General. Pursuant to the settlement, the Idaho Legislature enacted a package of legislation which established a procedure by which a certain substantial amount of new irrigation development can proceed on the Snake River Plain despite the presence of the Swan Falls rights.

⁵¹⁰ Idaho Code § 42-608.

The statutory program ratified the agreement, pursuant to which IPCo pledged not to challenge the diminution of its ability to fill its Swan Falls rights that had been caused by stream or aquifer diverters who in the past had depleted flows reaching Swan Falls. The statutes also increased the minimum flow in the Swan Falls reach by 600 cfs (to 3,900 cfs) and established a non-irrigation season minimum flow of 5,600 cfs. These minimums provide

For a more detailed treatment of this subject see Jeffrey C. Fereday & Michael C. Creamer, *Swan Falls in 3-D: A New Look at The Historical, Legal and Practical Dimensions of Idaho's Biggest Water Rights Controversy*, 28 Idaho L. Rev. 573 (1991-92).

protection to IPCo by guaranteeing that future development cannot reduce flows below these amounts. On the other hand, IPCo agreed, and the statutes provide, that the portion of its Swan Falls rights in excess of these minimum flows would be subordinated to all past depletive rights and could be subordinated further to rights acquired by new upstream (or upgradient) diverters. This was carried out primarily by the statutory provision placing this portion of IPCo's Swan Falls water rights in trust for both IPCo and for the people of the State. The statutes establish a procedure by which proposed new rights that will have a significant effect on hydroelectric generation dependent upon Swan Falls flows must undergo a special "public interest" evaluation. The Department has developed regulations for processing new permit applications that would affect Swan Falls flows, and it is processing several thousand long-delayed applications pursuant to these rules.

2. Appropriating water pursuant to the Swan Falls statutes

The Swan Falls statutes require that each application in the area where Swan Falls flows could be affected (most seek ground water diversions from the Snake Plain Aquifer) first must be evaluated according to the standard considerations applicable to every proposed new right. But as indicated above, the Department also will evaluate whether its proposed diversions would result in a "significant reduction" in water available for hydropower production. In the context of the area upstream from Swan Falls, the department will evaluate whether IPCo's Swan Falls generation capacity will be significantly affected. If a significant reduction is predicted, then the application must undergo a *second* level of review to gauge how the proposal matches up against five criteria, including economic impact, impact on utility rates, "promotion of the family farming tradition," promotion of full economic development of Idaho's water, and whether the proposed development conforms to a "staged development policy of up to twenty thousand acres per year" of new agricultural development. The Department has adopted both formal rules and an informal "policy" concerning the processing of applications for new rights in the part of the state where diversions would affect Swan Falls flows. (However, due to a prohibition in the Swan Falls statutes, diversions that would affect river flows above Milner Dam are not to be considered in the evaluation of whether the proposed diversion would affect Swan Falls flows.)⁵¹¹

⁵¹¹ Idaho Code § 42-203B(2).

Because of the creation of a trust containing a portion of IPCo's water rights, and the use of the term in a portion of the Swan Falls statutes, the Department refers to those areas whose waters are tributary to the below-Milner, above-Swan Falls reach of the Snake River as the "trust water" area, and it takes the position that there was a block of water set aside in the Swan Falls statutes for future development. It refers to this as "trust water."

The Department has determined that the first 43,000 acres of irrigation development affecting this below-Milner reach would not have a significant effect on flows for hydropower. Consequently, the Department has not yet processed any of these permit applications under the more searching second level review. Despite the arguably favorable position agriculture enjoys in the Swan Falls statutes, it appears that IPCo will not soon experience significant depletions at its Swan Falls project and that water rights for new agricultural purposes will be denied, if at all, in the trust water area for reasons other than the application of the Swan Falls statutes.

For example, in 1992, the Department issued a moratorium order which ceased processing of pending and new applications to appropriate water in the trust water area and other areas of the state due to the extended drought. This moratorium, through subsequent amendments, remains in effect. In addition, the Department's Conjunctive Management Rules, which establish extensive criteria for determining injury issues and for mitigating impacts to senior surface rights by junior wells, may play a larger role in any future evaluation of the effects of trust water diversions on IPCo's rights at Swan Falls.

U. THE SNAKE RIVER BASIN ADJUDICATION ("SRBA")

1. A McCarran-type general stream adjudication.

Idaho's SRBA is the West's largest general stream adjudication. It was begun in 1987 when the Idaho Department of Water Resources ("Department"), as directed by the Legislature, petitioned the state district court in Twin Falls to commence a general water rights adjudication. The federal government was joined pursuant to the McCarran Amendment.⁵¹²

The action involves claims to some 175,000 water rights in the 53 separate sub-basins comprising Idaho's portion of the Snake River Basin, including over a thousand instream flow claims filed by Indian tribes and federal agencies on the basis of the federal reserved rights doctrine. The SRBA involves over 80% of all of Idaho's water sources. All ground water rights within the basin also are included, as are domestic and stockwater claims.

⁵¹² 43 U.S.C. § 666.

2. Who must participate.

In a general adjudication, such as the SRBA, all persons claiming water rights are required to come forward and prove up their rights. In the case of the SRBA, this applies to all those asserting an water right in existence at the time of the commencement of the adjudication (November 19, 1987).⁵¹³ Those holding licenses⁵¹⁴ with priority dates after that date may submit a claim for the water right to the SRBA court at their option. (The advantage and only reason for doing so is to obtain a judicial decree confirming the right, rather than just an administratively issued permit. The practical value of any *res judicata* effect of such a decree will vary with the circumstances and, in any event, is a matter of debate.⁵¹⁵)

3. Procedure.

The SRBA proceeds under Idaho's adjudication statute.⁵¹⁶ The SRBA Court (previously State District Judge Daniel Hurlbutt, now Judge Barry Wood, sitting in Twin Falls) has adopted special rules covering a variety of matters in the case, such as pleading requirements, forms for various motions, rules for reconsidering special masters' rulings, and the like. See SRBA Court Administrative Order No. 1 (Amended October 10, 1997).

The SRBA Court has consolidated the 53 subbasins into 22 "reporting areas" for which the Department, acting through its Director, will produce reports to submit to the court ("Director's Reports") detailing the facts the Department's investigation has shown as to current uses under each state-law-based water right claimed. As to claims arising under federal law—that is, federal and Indian reserved rights claims—the Director's Reports provide only an abstract of what is claimed.

The Director's Reports contain the foundational information about each water right; unless successful objections are received, these will form the basis for the decrees for each water right in each reporting area. Ultimately, all of these "partial decrees" will be consolidated into one enormous final

⁵¹³ Holders of water right permits, for which proof of beneficial use was not yet required to be filed as of the date of commencement, need not file a claim in the SRBA. Idaho Code §§ 42-1409(4); 42-1420(1)(c); 42-1420(1)(d). Likewise, holders of pending (unapproved) permit applications need not file SRBA claims. Idaho Code §§ 42-1409(4); 42-1420(1)(b). Although such claims are not required to be filed, the SRBA statute authorizes the Director of the Department to order such "post commencement" claims to be filed. To date, however, he has not done so, nor is any such order anticipated.

⁵¹⁴ Where the claim is still at the permit stage (no license has been issued), the situation is more problematical. How is the SRBA court to deal with a permit which has not yet been proved up? In any event, it is the practice of the Department to include and recommend such permit-based claims in the Department's report.

⁵¹⁵ See Idaho Code § 42-1420 regarding the "binding effect" of decrees entered in a general adjudication. See also, *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997) ("*HWRO P*") (dealing with the non-binding effect in the SRBA of certain prior decrees), discussed in Part U.8(ii) at page 151.

⁵¹⁶ Idaho Code §§ 42-1401 to 1428.

decree.

Claimants may object to the way their water right was recommended in a Director's Report, and they may file responses to objections filed by others. The litigation over objections and responses occurs in "subcases," individual cases involving discovery, motions and ordinary trial practice which usually are heard first by special masters appointed by the SRBA Court. (Currently there are three special masters.)

The SRBA Court posts large amounts of information about the case (including water right claims, rules, orders, and recent decisions) on the web at www.srba.state.id.us.

4. Post-commencement legislation affecting the SRBA.

In 1994, the Legislature amended several portions of Idaho's water adjudication statutes⁵¹⁷ to remedy several perceived problems with the SRBA. Among other things, the Legislature:

1. Removed the Department (and, thus, the Director) as a party to the adjudication, instead designating the Director an "independent expert and technical assistant to assure that claims to water rights ... are accurately reported"⁵¹⁸ Removing the Director as a party probably caused more problems than it solved (see discussion of "one party subcases," below.)
2. Declared that the Director's Reports no longer are pleadings in the case, but are to be received by the court as "prima facie evidence" of the nature and extent of the water rights they describe.⁵¹⁹ The statute still places the ultimate burden of persuasion on the claimant to establish each element of the claimed water right,⁵²⁰ and authorizes the Department to conduct fact-finding hearings as necessary "for a full and adequate disclosure of the facts."⁵²¹ To date, the Department has not yet conducted any such hearings, and the SRBA court has not indicated that it would welcome such hearings.
3. Enacted two "amnesty" provisions for those water right holders who, prior to 1987, changed or transferred a water right without going through the

⁵¹⁷ Idaho Code §§ 42-1401 to 1428.

⁵¹⁸ Idaho Code § 42-1401B.

⁵¹⁹ See Idaho Code § 42-1411(4).

⁵²⁰ Idaho Code § 42-1411(5).

⁵²¹ Idaho Code § 42-1410(1).

statutory procedure (Idaho Code § 42-1425) or who enlarged the use under their water right without increasing the rate of diversion (Idaho Code § 42-1426). Both of these provisions include conditions supposedly designed to prevent injury to any existing water rights—including those water rights existing on the date the statutes were enacted. The more controversial of these two provisions, section 42-1426 (amnesty for certain enlargements) was the subject of an Idaho Supreme Court ruling and is discussed below.

4. Enacted a provision stating that, where a prior decree is “ambiguous,” the Department is to look to conditions existing in 1987 (when the SRBA began) to determine the elements of a water right. This provision promises to generate more controversy in the case. It is being advanced by some water users to assert that the Department essentially is supposed to don blinders and ignore any other facts that come to light about a water use other than those occurring in 1987.⁵²² The Idaho Supreme Court also has spoken, if briefly, about this provision, indicating that the Department is not limited to those facts existing in 1987.

5. Progress to date

In 1992 and 1993, Director’s Reports were filed for the first three reporting areas (Subbasins 34, 36, and 57). The SRBA Court refers to these three subbasins as “test basins” because they were selected on the presumption that they would give rise to a wide variety of issues that should be resolved early in the process. That presumption proved correct. Lots of litigation has arisen from these three reports, including some so-called “Basin-Wide Issues,” discussed below. Some of this litigation is still continuing, primarily on the duty of water question. More on this below.

The Department is just now completing a fourth Director’s Report for an area that includes solely ground water rights in a portion of Eastern Idaho (Subbasin 35). Litigation has recently arisen here as well, involving objections filed by two large surface water diverters (North Side and Twin Falls Canal Companies) who assert that these ground water users have depleted the Snake River and reduced flows to the Companies’ headgates.

The Department also has produced Director’s Reports for certain categories of claims, such as federal and tribal instream flow claims and *de minimis* domestic and stockwater claims, that are handled outside of the reporting area structure. So far, about nearly half of the water right claims in the SRBA have been decreed, most of these small and unopposed domestic and stockwater claims. The federal and tribal claims, with the exception of the on-reservation water rights claims of the Shoshone-Bannock Tribe in eastern Idaho, are mostly all now in active litigation (also discussed further below).

⁵²² Idaho Code § 42-1427.

One of the more significant single achievements in the SRBA to date is the final decree accepting the settlement between the Shoshone-Bannock Tribes, the State, and water users. This partial decree approved 27 federal water rights claims for these Tribes for on-reservation uses.

The SRBA is perceived by many, including some legislators and water users, as a protracted process with little to show for itself and no end in sight. It likely has given rise to far more litigation—including litigation of seemingly basic water law questions—than many observers or participants expected. With the appointment in 1996 of Karl Dreher as the Department's new Director, the working relationship between the SRBA Court and the Department improved. Certainly, a productive relationship between the Court and the Department is essential. Nonetheless, there are varying levels of frustration over the costs, to the state and to the parties, the perceived slow pace, and the concern that one-party subcases or other circumstances will lead to overstated water rights. Many water users are not convinced that the process will result in an accurate accounting of actual water rights based on beneficial use and a reasonable duty of water.

6. Basin-wide issues

The SRBA Court also has designated and decided several "Basin-Wide Issues"—questions of law seen to have overriding importance. All of those raised to date have been decided by the Idaho Supreme Court. As noted below, the high court also has decided other important legal questions outside of the Basin-Wide Issue format.

7. The "one-party subcase"—a uniquely Idaho experience.

Since the 1994 legislation the Department has not been a party to the SRBA. Consequently, many of the subcases proceed as "one-party subcases," where only the claimant objects to his or her water right (invariably arguing that the Director's report understated it) and no other claimants enter the case as respondents. The special masters generally have afforded little opportunity for testimony from the Department beyond the Director's Report itself, and often have allowed no real examination of the claimant's position in these one-party affairs.

However, as noted above, the Legislature designated the Department an "independent expert and technical assistant" in the SRBA and charged it with the duty to "assure that claims to water rights ... are accurately reported," and retained its authority to hold its own fact-finding hearings to produce "a full and adequate disclosure of the facts" supporting each water right. It would seem that this and similar statutory language would afford the court ample latitude to involve the Department in a meaningful way as it determines the facts about each objecting claimant's water right.

Most claimants outside the one-party subcase are unaware of the precedent the case might set, or are unable to afford getting in. Others may simply believe that somehow the process will end up with water decrees for reasonable, supportable amounts and uses of water, but this remains to be seen. Although the Idaho Supreme Court ruled that these one-party subcases are inappropriate for summary

judgment (because that presumes an adversarial process), many of these cases continue to proceed to a “trial” of sorts where the claimant faces little contrary factual evaluation.

8. Significant SRBA decisions

The SRBA has given rise to several important water law issues, and promises to produce more. Some of the more noteworthy are listed below:

(i) Can one forfeit a portion of a water right?

One of the central decisions so far in the case, designated by the SRBA Court as Basin-Wide Issue No. 10, is whether Idaho’s water right forfeiture law, Idaho Code § 42-222(2), allows the court to find forfeiture of only a part of a water right, or whether the use of any water under a right protects the entire right from forfeiture. The SRBA Court ruled that there is no such thing as “partial forfeiture” under Idaho law—in other words, the use of any portion of a water right maintained the validity of a long-unused (or even unusable) portion.

Obviously, there was a grave concern among many water right claimants—especially juniors—that a ruling upholding the SRBA Court would result in the decreeing of thousands of “paper” water rights in the SRBA and placing rights at risk. Not surprisingly, the Idaho Supreme Court found that a water right can be forfeited either in whole or in part and overturned the SRBA Court.

(ii) What is the effect of prior decrees in the SRBA?

Are decrees in prior private water rights adjudications, though affecting only those who were parties, nonetheless “conclusive” and “binding” on the Department and on all SRBA parties as it investigates actual beneficial uses under water rights today, absent a finding of forfeiture or abandonment. This was one of several questions in *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997) (“*HWRO I*”).

The Supreme Court, overturning the SRBA Court, ruled that such prior decrees are not binding on the Department or other parties. Also involved in the *HWRO I* case was the issue of whether the Director’s Report should be treated as a mere “presumption” in the adjudication which can be overcome by virtually any evidence offered by the claimant. The Idaho Supreme Court ruled that the report is actual evidence that must be weighed against any other evidence.

(iii) Inclusion of “general provisions” in the water rights decree.

Idaho’s general stream adjudication statute under which the SRBA proceeds states that the decree of water rights is to include, in addition to the basic elements of each water right, “such general provisions necessary for the definition of the rights or for the efficient administration of the water rights.” Idaho Code § 42-1412(6). In Basin-Wide Issues 5, 5A and 5B, the SRBA Court had taken an

essentially minimalist position on this issue, rejecting as unnecessary several proposed general provisions the Department had recommended. The SRBA Court also had suggested that a general provision should not be included unless it applied to all water rights in the basin equally. The general provisions rejected by the SRBA Court included guidances on the use of water for firefighting, the definition of "irrigation season" for particular areas, the practice of using "excess water" outside the irrigation season, the use of irrigation water for incidental stock watering, and language regarding the relationship between ground and surface waters.

In *A & B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d. 568 (1997), the Idaho Supreme Court rejected the SRBA Court's view that a general provision must apply to all rights or none, finding instead that such a provision could apply to less than all water rights in the basin.

The court upheld some of the Department's general provisions and rejected others: for example, a general provision authorizing the use of water for firefighting without a water right was held permissible because it was deemed necessary for the efficient administration of water rights. But a provision addressing the practice of diverting "excess water" was improper because such diversions could not be protected by a water right.

The court also held that, with respect to each irrigation water right, the decree must identify a "specific period of use setting forth a beginning date and an ending date." Consequently, the court rejected the SRBA Court's determination that the period of use should simply be generally described as "the irrigation season." *Id.* at 423. See also *State of Idaho v. Nelson*, 131 Idaho 12,951 P.2d 943 (1998) (pertaining to general provisions regarding rotation of diversions, treating a stream as two separate sources, and specially addressing storage water rights in a particular system).

(iv) **Conjunctive management of ground and surface water rights.**

An important part of the Court's decision on Basin-Wide Issue No. 5 was its ruling vacating the SRBA Court's order rejecting the Department's general provision addressing conjunctive management of ground and surface waters. *A & B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d. 568, 580 (1997). The Idaho Supreme Court stated that the Legislature, in launching the SRBA, intended ground and surface water rights to be decreed and managed together, and ordered the SRBA Court to conduct hearings to determine whether general provisions on this subject are necessary. These hearings have not yet been held.

Currently, litigation is getting underway in an SRBA subcase due to over 1,100 objections to ground water rights filed in Basin 35 in eastern Idaho by two senior surface water diverters: Twin Falls and Northside Canal Companies. This action may further develop the law of conjunctive management in Idaho.

The conjunctive management issue also arose, at least implicitly, earlier in the SRBA in

response to *Musser v. Higginson*.⁵²³ There, the Idaho court ruled on a narrow point: that the Director has a mandatory duty under Idaho's water distribution statute⁵²⁴ to deliver water upon demand to a holder of a decreed water right.

The court upheld the SRBA Court's writ of mandate requiring the Director to deliver water to serve Mr. Musser's decreed entitlement. The statute applies to adjudicated streams where there are watermasters to administer rights in priority. However, in this case the adjudicated stream was a canyon-wall spring which is fed by the vast Snake Plain Aquifer, and rights in the aquifer had not yet been adjudicated or placed under the management of a watermaster. While there were others who diverted from the spring, the presumed real targets of the action were the ground water pumpers upgradient.

The court's opinion in *Musser* does not address how the statute was to apply to the ground water right holders, who had not yet had an opportunity to have their rights adjudicated as against the spring diverters' surface water rights, or how the ground water pumpers would be provided some sort of due process in the matter.

The *Musser* decision was one of the factors leading to the Department's adoption of conjunctive management rules, which set forth the considerations that are to apply when a delivery call is imposed on ground water rights by senior surface rights. As the writ of mandate itself, the matter became moot when Mr. Musser received a supply of water from another source.

(v) Geographic scope of the SRBA.

Early on in the SRBA the Idaho Supreme Court ruled that the Idaho Legislature intended to include, in the adjudication, water rights on previously adjudicated tributaries. Part of the court's decision was based on the observation that the Legislature intended to leave no doubt that it would have McCarran jurisdiction. *In re Snake River Basin Water System*, 115 Idaho 1, 832 P.2d 289 (1992), *cert. denied* 490 U.S. 1005 (1989).

(vi) Can the United States be required to pay filing fees in the SRBA?

The Idaho Supreme Court thought so, but the U. S. Supreme Court gave this question a unanimous "no." *United States v. Idaho*, 113 S. Ct. 1893 (1993).

⁵²³ *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

⁵²⁴ Idaho Code § 42-602.

(vii) Is it constitutional for the Legislature to make changes in the SRBA after this court case has begun?

As noted above, in 1994, seven years after the SRBA had begun, the Legislature mandated certain procedural changes in the SRBA and removed the Director as a party. The Idaho Supreme Court upheld virtually all of the significant changes. *State of Idaho ex rel. Higginson v. United States*, 912 P.2d 614 (Idaho 1995) (Basin-Wide Issue Nos. 2 and 3).

(viii) Conditions on amnesty for illegal enlargements of water rights.

Beginning in 1971 for surface water diversions (1963 for ground water) Idaho Legislature prohibited the use of the "beneficial use" or "constitutional" method of appropriation. After these dates, all water rights could be acquired only by obtaining a permit and, ultimately, a license, from the Department. However, when it was writing the general adjudication statute to govern the SRBA, the Legislature became aware that many water users have enlarged their uses, often through the adoption of more efficient irrigation techniques, such as sprinklers and pipelines, that seemingly made more water available. This "conserved" water often was simply applied to newly developed land.

In response to concerns raised by these irrigators, the Legislature enacted an amnesty for these enlargements as part of the 1994 amendments to the adjudication statute, retroactively waiving the mandatory permit statute in their favor in certain circumstances.⁵²⁵

The question in Basin-Wide Issue No. 4 was whether the Legislature can retroactively validate illegal enlargements of water rights by such a waiver. *Fremont-Madison Irrigation District v. Idaho Ground Water Appropriators, Inc.*, 961 P.2d 1301 (Idaho 1996). The answer is "yes," but with a huge caveat that sharply limits the result. The Idaho Supreme Court cautioned that a waiver cannot operate so as to injure, such as by dilution of priority, any water right existing on the date the amnesty statute was enacted. The effect of this ruling is to require mitigation or a condition, such as a subordination, before an enlargement can be given a date-of-enlargement priority.

As a result of *Fremont-Madison*, these otherwise illegal water appropriations are legal, but they are treated as junior to all other rights as of the date of the amnesty statute. Nevertheless, holders of these rights have resisted this conclusion, and litigation over how they are to be administered has continued for years.

⁵²⁵ The current enlargement statute, Idaho Code § 42-1426, is part of a trilogy of amnesty statutes aimed shielding otherwise illegal water uses. Each of these also has a predecessor. The Legislature substituted the new versions when the older versions were challenged as being unconstitutional. They are:

- The "Accomplished Transfer Statute," Idaho Code § 42-1425 (formerly, Idaho Code §42-1416A).
- The "Enlargement Statute," Idaho Code § 42-1426 (replacing the second presumption in the presumption statute, formerly Idaho Code § 42-1416(2)).
- The "Ambiguous Decree Statute," Idaho Code § 42-1427 (replacing the first presumption in the presumption statute, formerly Idaho Code § 42-1416(1)).

(ix) Public trust doctrine's applicability to water rights: the Court says yes, the Legislature says no.

Conservation groups sought to intervene in the SRBA to assert public interest and public trust concerns. They argued that the SRBA Court is to consider and apply the public trust doctrine as a part of its evaluation of water right claims in the adjudication. The Idaho Supreme Court agreed with the SRBA Court that the public trust doctrine is not properly considered in the SRBA, and therefore upheld the denial of intervention. However, the high court stated that "the water rights adjudicated in the SRBA, as with all water rights, are impressed with a public trust." *Idaho Conservation League v. State of Idaho*, 911 P.2d 748, 750 (Idaho 1995). The Idaho Legislature responded to this ruling by abrogating the public trust doctrine's application to water in Idaho. See Idaho Code § 58-1201.

(x) Irrigators holding only a contract right to receive federal project storage water lack standing to file objections in the SRBA.

In *Fort Hall Water Users Ass'n. v. United States*, 129 Idaho 39, 921 P.2d 739 (1996), a water users association filed objections in the SRBA to the director's report of water rights that earlier had been agreed upon in a settlement between an Indian tribe, the State, and numerous other parties. The Idaho Supreme Court held that because the association was not itself a water right claimant, it lacked standing to file objections to the proposed water rights of others. See Idaho Code § 42-1401A(1). The court also noted that the association held only contract rights to receive storage water under rights held by the federal government, and the government had not asserted ownership rights in the SRBA on behalf of the association.

(xi) State common law instream water right for wildlife refuge.

In 1996, the SRBA Court concluded that the United States had obtained a "beneficial use" or "constitutional method" state water right in the instream flows of a stream and creek system by creating a wildlife refuge and managing wildlife there, despite the fact that it diverted no water. The State and several water user organizations appealed.

In the "Smith Springs" opinion issued March 9, 2000, the Idaho Supreme Court reversed the district court, thus denying the United States' claim to a water right under Idaho law for an instream wildlife use.⁵²⁶ Although the holding applies specifically to the federal claim involved, the decision presumably would apply to any party claiming a "private" instream flow water right under Idaho's "constitutional method." The *Smith Springs* decision lends weight to the argument that the Idaho minimum flow statute provides the only way to establish instream flows under Idaho law. (This case is discussed further in Chapter N at page 70.)

⁵²⁶ *State v. United States*, 134 Idaho 106, 996 P.2d 806 (2000) (the "Smith Springs" case).

(xii) Whether federal reserved water rights were created by Public Water Reserve No. 107.

President Coolidge's 1926 Executive Order withdrew and reserved thousands of tracts of public land containing water holes and other water sources used by the public for watering purposes. In Basin-Wide Issue No. 9, the SRBA Court concluded that the Executive Order did not create a federal reserved water right. The Idaho Supreme Court reversed, ruling that the Executive Order was an express statement showing an intent to reserve federal water rights in the waters on these lands. *United States v. State of Idaho (Basin-Wide Issue No. 9—PWR 107)*, 131 Idaho 468, 959 P.2d 449 (1998).

(xiii) Denial of federal reserved right for instream flow in Snake River to protect islands within wildlife refuge.

In 1937 President Franklin Roosevelt established the Deer Flat National Wildlife Refuge near the Snake River, and included within it numerous islands in the river itself. The U.S. Fish & Wildlife Service claimed that Roosevelt's executive order established federal reserved water rights to instream flows in the Snake River to preserve these lands as islands, including channel scouring flows and flows necessary to maintain patterns of land accretion on them. The SRBA Court ruled that there is no federal reserved water right for these purposes. *Memorandum Decision Granting State of Idaho's Motion for Summary Judgment*, In re SRBA, Deer Flat Wildlife Refuge Claims, Consolidated Subcase No. 02-10063, Idaho Fifth Judicial District Court (December 31, 1998). The U.S. Fish & Wildlife Service has appealed to the Idaho Supreme Court.

(xiv) Municipal water rights.

A special master's ruling in 1995 noted that there is substantial authority in Idaho that municipal water suppliers have flexibility, under the prior appropriation doctrine, to acquire water rights for future, reasonably projected growth even though they have not yet fully developed them. While the decision did not rule on this point, it did conclude that the city's water right at issue would not be restricted to specified boundaries as the place of use other than the general notation of the "city limits." *Special Master's Report, Findings of Fact and Conclusions of Law*, In re SRBA, Case No. 39576, Subcase No. 10030 (April 8, 1997). The decision was consistent with the position advanced in the case by United Water Idaho Inc., a municipal water supplier serving the Boise area. Subsequently, the Idaho Legislature passed a statute specifically recognizing, and placing limitations upon, water rights for municipal purposes.

(xv) Whether the United States has federal reserved water rights for wilderness areas and other special designations.

Wilderness areas. *Potlatch Corporation v. United States*, Idaho Supreme Court Docket Nos. 24545-48 and 24557-59 (appeal filed February 24, 1998). The Idaho Supreme Court ruled in

favor of the federal government finding, federal reserved rights for Idaho wilderness areas in an October 1, 1999 opinion. However, the Court reheard the matter in early 2000, and as of this writing it has not yet ruled on rehearing. Potlatch Corporation and the State of Idaho argued that the reserved water rights doctrine does not apply to modern statutes like the Wilderness Act. The SRBA Court's decision finding federal reserved water rights for wilderness can be found at *In re SRBA, Consolidated Subcase No. 75-13605 Order Granting in Part and Denying in Part United States' Motions for Summary Judgment*, Idaho Fifth Jud. Dist. Ct. (Dec. 17 1997). Also on appeal to the Idaho Supreme Court are the SRBA Court's decisions on similar grounds finding federal reserved water rights for the Hell's Canyon and Sawtooth National Recreation Areas. See SRBA Consolidated Subcase Nos. 79-123597 (Hell's Canyon) and 65-20766 (Sawtooth).

Wild and scenic rivers. *Potlatch Corporation v. United States, In Re SRBA (wild and Scenic Rivers Claims*, Nos. 25153 and 25154, (Idaho Supreme Court) (appeal filed November 25, 1998) (currently being briefed to the Idaho Supreme Court). The SRBA Court found that the language in the Wild and Scenic Rivers Act, 16 U.S.C. § 1284(c), expressly created a reserved water right, but denied the United States' motion for a ruling that the reservation was for all unappropriated flows—this second question will be left for trial. *Memorandum Decision Granting in Part and Denying in Part the United States' Motion for Summary Judgment*, Consolidated Subcase No. 75-13316, Idaho Fifth District Court (July 24, 1998).

Channel maintenance flows in National Forests under 1897 Organic Act. The SRBA Court denied the State of Idaho's motion for summary judgment seeking a ruling that the United States had no claim to channel maintenance flows under the Forest Organic Act of 1897. *Memorandum Decision Denying State of Idaho's Motion for Summary Judgment*, Idaho Fifth District Court, *In Re SRBA*, Case No. 39576, Organic Act Claims Consolidated Subcase 63-25243 (December 22, 1998). Accordingly, the United States is entitled to put on evidence at trial on the necessity for channel maintenance flows in streams in on National Forest reservations. The State and other parties have appealed this decision to the Idaho Supreme Court (appeal filed January 5, 1999).

Federal reserved water rights in National Forests under 1960 Multiple Use-Sustained Yield Act. The SRBA Court ruled that the Multiple Use-Sustained Yield Act ("MUSYA"), 16 U.S.C. §§ 528-531, did not establish any reserved water rights. The United States has appealed this decision to the Idaho Supreme Court. *United States v. City of Challis*, Idaho Supreme Court No. 24560 (appeal filed March 12, 1998).

(xvi) Whether the Nez Perce Tribe has Indian reserved water rights for substantial instream flows at off-reservation locations in the Snake River, the Clearwater River, the Salmon River, and most of their tributaries.

These claims raise the question whether the "Stevens Treaty" of 1855, particularly in light of subsequent treaties and agreements, reserved any instream flow water rights in favor of the Nez Perce

Tribe. The claims encompass vast portions of the Snake Basin in Idaho, including the Salmon River drainage, the Clearwater, and significant portions of the Snake. See discussion in Part W.3(viii) at page 178.

(xvii) Duty of water.

Several disputes have been fought, and many are ongoing, about the duty of water question. Probably the most notorious to date have been the disputes in the Hagerman Valley along the Snake River west of Twin Falls where many claimants assert a right to more than three miner's inches of water per acre. (A miner's inch in Idaho is .02 cfs; 3 inches per acre would account for diversions of about 18 acre-feet per acre in a 150-day irrigation season.) There are instances of claimants asserting the right to over 6 inches per acre. In other instances, claims have been filed on more water than a pipeline or other conveyance system can accommodate.

Other examples:

Decrees for aesthetic and fish propagation dating back to the original priority date based on an early-century decree that specified only domestic, irrigation and "other uses."

Decrees for more water than claimed, due to the theory that each water right on a ditch is entitled to have a decree for the entire amount of carriage water needed to deliver the water to the claimant's place of use, and should not be limited to a sharing of conveyance water with other rights. See, e.g., *Findings of Fact and Conclusions of Law, Subcase Nos. 36-0003A et al.*, SRBA District Court, Special Master Haemmerle (July 29, 1998).

(xviii) Jurisdiction of SRBA

In *Sagewillow, Inc. v. IDWR*, 2000 WL 1264661 (Sept. 6, 2000), the Idaho Supreme Court determined that appeals of contested cases involving water transfers within the Snake River Basin must be brought not in regular district court, but in the Snake River Basin Adjudication.

9. General Observations about Idaho's SRBA.

General water rights adjudications pose a simple question to the claimant: What is your water right? With the exception of the legal issues raised by some of the federal and Indian reserved water rights claims (or an occasional dispute between private claimants), the answer to this question usually is not difficult to answer, and is tied as much to physics as to law: how many acres actually have been irrigated? what is the capacity of your diversion facility? what is the actual annual volume of water used in your manufacturing plant? When did the use begin? Is it continuing today?

The question may be simple, but in the SRBA achieving the answer often has proved difficult to wrest from the process. With respect to the state-law-based claims, most of the problems, and most of

the costs to the parties, can be traced to one or more of the following:

The difficulty and contentiousness that arise when one claims a larger water right than one has, “mistakes paper for water,” disputes the usufructuary nature of water rights, or does not know (or neglects to tell) the truth about one’s water right and its use. Coupled with this is the fact that there is no incentive for claimants not to overstate their water rights.

- A failure of the fact-finder to cut through the hail of legal arguments and procedural wrangling that litigants marshal in defense of what they believe their water rights to be—in other words, a failure to zero in on the essential simplicity of the proceeding as to most disputes.
- The problems inherent in determining or implementing the judicial procedures for carrying out a general water rights adjudication. These actions are *sui generis* (one-of-a-kind); in large measure, they have to be invented especially for this purpose and often adjusted as they go along. And they are of such a large size that they are bound to be slow and unwieldy in the best of circumstances. There are strong arguments that an adjudication based on initial administrative fact-finding would be more efficient than the formal judicial model, and Idaho’s statute actually allows the Department to conduct hearings as necessary. Idaho Code § 42-1410(1) (in carrying out his investigation of a claimant’s use, the Director “may conduct any fact-finding hearing necessary for a full and adequate disclosure of the facts.”) However, so far there has been no attempt to use this power.
- The Legislature attempting to override or shade the appropriation doctrine in favor of certain groups, practices, or types of uses. Such efforts often lead to more litigation. An example in Idaho is the passage of the so-called “amnesty” statutes, whereby the Legislature retroactively waived the mandatory permit requirement for enlargements of use under existing water rights.⁵²⁷ It took a trip to the Idaho Supreme Court for junior water right holders to show that they could not have additional water rights created now with priorities ahead of them.

V. FEDERAL RECLAMATION LAW

By the turn of the century, settlers of the West already had demonstrated their remarkable resourcefulness and stamina. In the inhospitable mountains and plains, they scratched out mines, farms and towns. Despite the odds, these hardy folk survived, and many prospered. But their ability to transform the Western landscape was limited—by water. Monumental change required monumental water projects. And monumental water projects required monumental financing.

⁵²⁷ Idaho Code § 42-1426.

Enter the U.S. Congress. In 1902 it created the federal reclamation program,⁵²⁸ a plan of great vision and enormous proportion. The newly created Bureau of Reclamation⁵²⁹ quickly embarked on the construction of hundreds of reservoirs—many larger than anything ever before conceived—at every promising site across the desert. The plan to reclaim the desert has been achieved with such success that it would astonish the minds of Lewis, Clark, Powell, and Fremont, not to mention Captain Bonneville.

In undertaking this great enterprise, the federal government might have chosen to develop a *federal* law for the allocation of water. It certainly has the power.⁵³⁰ Instead the Congress stated from the outset that it would look primarily to state law to allocate water from the federal projects:

Nothing in . . . this title shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws

Reclamation Act of 1902, § 8, 43 U.S.C. § 383.

Of course, nothing is that simple. It was easy enough for Congress to say that it was deferring to state law. It was another matter to say what that meant. When push comes to shove, the courts have held that federal law overrides state water law which frustrates the purposes of the federal program.⁵³¹

Despite the ambiguity and uncertainty surrounding the interaction of federal reclamation law and state water law, however, the general premise still holds true. The federal government complies with state water law (at least the formalities of state law) when it builds reclamation projects: It files for and obtains water rights in the name of the federal government.

⁵²⁸ Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 372, 373, 381, 383, 391, 392, 411, 414, 419, 421, 431, 432, 434, 439, 461, 491, 498, 1457).

⁵²⁹ The Service has undergone several bureaucratic transmigrations. In July 1902, the Secretary of the Interior created the "Reclamation Service" under the Geological Survey. In March 1907, the Service was separated from the Survey. In June 1923 the name was changed to the "Bureau of Reclamation." The name was changed again to the "Water and Power Resources Service" in November 1979 (under the Carter Administration) by Secretarial Order No. 3042, and was changed back again to the "Bureau of Reclamation" by Secretary James Watt in May 1981 by Secretarial Order No. 3064. 52 Fed. Reg. 3354 (Feb. 3, 1987).

⁵³⁰ U.S. Const. art. I, § 8, cl. 3 (commerce clause); U.S. Const. art. IV, § 3, cl. 2 (property clause); U.S. Const. art. VI, cl. 2 (supremacy clause);

⁵³¹ *California v. United States*, 438 U.S. 645 (1978); with respect to hydropower licensing see, *California v. FERC*, 495 U.S. 490, *reh'g denied*, 110 S. Ct. 3304 (1990).

But who actually owns the water? In *Ickes v. Fox*,⁵³² the Supreme Court declared that reclamation water rights are held by the user, not by the federal government.

Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners The government remained simply a carrier and distributor of the water

....

In *Nebraska v. Wyoming*,⁵³³ the Court followed *Ickes* and declared, "Pursuant to that procedure individual landowners have become the appropriators of the water rights, the United States being the storer and the carrier." Similarly, in *Nevada v. United States*,⁵³⁴ the Court held that equitable title to water provided by the Bureau is held by individuals who put the water to beneficial use, not by the Bureau or the contractors.

This much appears plain. While the federal government holds paper title to Bureau water rights, the actual users of those rights have an equitable interest in those rights. The nature and contours of that interest is not so easy to determine.

Part of the difficulty is the sheer quantity of relevant law. The core federal legislation, the 1902 Act, is surrounded by an additional body of law and policy represented by statutes including reclamation related legislation⁵³⁵ and other

⁵³² *Ickes v. Fox*, 300 U.S. 82, 95 (1937)

⁵³³ *Nebraska v. Wyoming*, 325 U.S. 589, 615 (1945)

⁵³⁴ *Nevada v. United States*, 463 U.S. 110 (1983)

⁵³⁵ The following is a list of selected reclamation statutes:

- 1894: Federal Desert Lands Act (a/k/a the Carey Act), ch. 301 § 4, 28 Stat. 422 (codified at 43 U.S.C. § 641). N.B., This is not truly a federal reclamation statute. Rather, it provides for the transfer of federal lands to private ownership in order to assist states in developing arid lands.
- 1902: Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 372, 373, 381, 383, 391, 392, 411, 414, 419, 421, 431, 432, 434, 439, 461, 491, 498, 1457). [N.B., legislative history at 35 Cong. Rec. 6677 (1902).]
- 1906: Townsite Act of 1906, ch. 1631, 34 Stat. 116 (codified at 43 U.S.C. §§ 561-562, 566-567): Amended 1902 Act, which limited reclamation water to agricultural purposes, to authorizes DOI to furnish water to new towns in the immediate vicinity of irrigation projects).
- 1911: Act of Feb. 2, 1911, ch. 32, 36 Stat. 895 (codified at 43 U.S.C. § 374): Sale of lands acquired in connection with irrigation project.
- 1911: The Warren Act (Act of Feb. 21, 1911), Pub. L. No. 61-406, 36 Stat. 925 (codified at 43 U.S.C. §§ 523-525): Provides authority to sell surplus water to non-project lands.
- 1911: Act of Feb. 24, 1911, ch. 155, 36 Stat. 930 (codified as amended at 43 U.S.C. § 522): Lease of water power.
- 1914: Act of Aug. 13, 1914, ch. 247, 38 Stat. 686 (codified at 43 U.S.C. §§ 373 *et seq.*).
- 1920: Miscellaneous Purposes Act of 1920 (Surplus Water), 43 U.S.C. § 521 (Pub. L. No. 66-796, ch. 86, 41 Stat. 451): Allowed delivery of water to non-irrigators meeting three criteria: (1) approval by water users associations, (2) no other practicable source of water, and (3) no impairment of service to irrigators). The

environmental and planning acts,⁵³⁶ as well as project operations plans, contracts and contracting procedures, solicitor opinions, court opinions, and interstate compacts.

The bigger problem is that little of that law is dispositive. This is largely a function of the fact that few people worried much about it until quite recently. Projects were built with particular lands in mind. Users outside project lands (e.g., municipalities) frequently turned to the federal government seeking a share of *excess* supplies—requests which Congress often satisfied. (See footnote 535 at page 161.) Until recently, however, there has not been much interest in transferring rights in use for irrigation to other purposes. We are still at the cutting edge of determining how that can be accomplished.

act was construed in *El Paso County Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894 (W.D. Texas 1957), *aff'd* 243 F.2d 927 (5th Cir. 1957), *cert. denied* 355 U.S. 820 (1957), in which the court upheld the authority of BuRec to enter into contracts with El Paso to supply water under an agreement entailing the city's purchase of up to 2,000 acres of irrigated land.

- 1920: Act of May 20, 1920, ch. 192, 41 Stat. 605 (codified at 43 U.S.C. § 375): Provides for the sale of land improved at the expense of the reclamation fund.
- 1928: Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. § 617ff (enacted Dec. 21, 1928).
- 1926: Omnibus Adjustment Act of 1926: Ended the ability of the United States to contract with individuals for water rights in reclamation projects and required the United States to enter into contracts with irrigation districts.
- 1939: Reclamation Project Act of 1939, ch. 418, 53 Stat. 1187 (codified at 43 U.S.C. §§ 485-485k): First general reclamation statute to recognize multi-purpose projects. Authorizes DOI to furnish water "for municipal or miscellaneous purposes" from an irrigation project provided that "it will not impair the efficiency of the project for irrigation purposes". Requires municipal user to pay its appropriate share of costs and O&M.
- 1956: Colorado River Storage Project Act ("CRSPA"), ch. 203, 70 Stat. 105 (codified as amended at 43 U.S.C. §§ 620-620o).
- 1956: Small Reclamation Projects Act of 1956, ch. 972, 70 Stat. 1044 (codified at 43 U.S.C. §§ 422(a) *et seq.*).
- 1958: Water Supply Act of 1958, Pub. L. No. 85-500, title III, 72 Stat. 319 (codified at 43 U.S.C. § 390b): Allowed local interests to contract with Bureau and the Corps for the inclusion of excess storage capacity in dams to provide for domestic, municipal, industrial, and other purposes. This Act provides a "separate and distinct" procedure which the Secretary may employ for the letting of an M&I water contract. *Environmental Defense Fund v. Morton*, 420 F. Supp. 1037, 1044 (D. Mont. 1976), *modified on other grounds sub. nom. Environmental Defense Fund v. Andrus*, 596 F.2d 848 (9th Cir. 1979). Under the Water Supply Act the Secretary must apply for and receive congressional approval for modification of a pre-1958 project if the project requires "substantial modification". Act contemplates that municipal users will pay no more for the water than agricultural users.
- 1965: Federal Water Project Recreation Act of 1965, 79 Stat. 216, codified at 16 U.S.C. § 4601-18: Authorizes DOI to operate reclamation projects to provide for recreational, fish or wildlife benefits "in a manner coordinated with the other project purposes".
- 1968: The Colorado River Basin Project Act, Pub. L. No. 90-537, 82 Stat. 885 (codified throughout 43 U.S.C. including §§ 1521-1528, 1551-1556): authorized the Central Arizona Project and numerous others.
- 1982: Reclamation Reform Act of 1982, Pub. L. No. 97-293, title II, 96 Stat. 1263 (codified at 43 U.S.C. §§ 373a, 390aa to 390zz-1, 425b, 485h).
- 1987: Reclamation Reform Act, Pub. L. No. 100-203, Title V, § 5302(a) and (b), 101 Stat. 1330-268m 1330-269 (codified at 43 U.S.C. §§ 390uu, 390ww).

⁵³⁶ For example, the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667e, the Federal Power Act, ch. 285, 41 Stat. 1063 (codified at 16 U.S.C. §§ 791a-825r), and the Northwest Power Planning Act.

Generally speaking, transfers of water rights are governed by state statutes. In Idaho, that requires application to the Director of the Department of Water Resources, who must review and approve the application.⁵³⁷ Presumably, water rights acquired by the federal government pursuant to state law also are subject to the state transfer provisions. The Bureau of Reclamation recently sought approval of a transfer—actually a change—of some of its storage rights in Idaho to allow them to be released to enhance flows for Salmon migration. The application has been protested.

Contracts for reclamation water may inhibit the free transfer of project water. Typical contract language for water in Snake River reclamation projects states that “no assignment or transfer of this contract, or any part thereof, or interest therein, shall be valid until approved by the Secretary.” The Department of Interior has taken the position that this means the Secretary has discretion whether to approve a transfer or not. An opinion by the Department of Interior’s legal counsel suggests that where a transfer would result in a change in the project’s operating regime and would be controversial, without clear congressional authority, the change could be barred.

On December 16, 1988 the Department of Interior released its written policy to govern voluntary water transfers which affect Department of Interior facilities. This policy reiterates that primacy in water allocation and management decisions rests principally with the states. The policy also states that the Department of Interior will become involved in voluntary transfers of water only when the involvement will not affect other parties being served by the federal project and the transfer will affect federal project operations and only when requested to participate by a state or tribal authority. The Department of Interior’s goal is to facilitate transfers in accordance with state and federal law.

The policy of the Northwest Region of the Bureau of Reclamation is to allow local irrigation district committees (such as the Committee of Nine in the Upper Snake and the Boise Project Board of Control on the Boise River) to oversee temporary transfers of water through their respective water banks.

W. FEDERAL RESERVED WATER RIGHTS.

1. Introduction

The federal reserved rights doctrine has become deeply ingrained in lore of western water law. It is a favorite of law professors and law students, of Native Americans, of environmentalists, and, generally, of those who support bigger government. It is not so popular with just about everybody else.

Like the weather, people love it or cuss it, but no one ever does anything about it. Not until a series of recent cases in Idaho, that is.

⁵³⁷ Idaho Code § 42-222.

2. Background

(i) Federal Deference to State Water Law

The federal reserved rights doctrine is a curious example of the exercise of a federal power which is at once great and restrained.

It is great, in that the federal government has the authority to preempt state law when it acts under its delegated powers (e.g., the commerce and property powers of the Constitution) coupled with the Supremacy Clause of the Constitution.⁵³⁸ Given the breadth of the commerce power, in particular, there is little doubt that Congress has the power to override state water law where it chooses to do so.⁵³⁹ When it exercises that power, the

⁵³⁸ U.S. Const. art. VI, Cl. 2 (Supremacy Clause); U.S. Const. art. I, § 8, Cl. 3 (Commerce Clause); U.S. Const. art. IV, § 3, Cl. 2 (Property Clause).

⁵³⁹ For six decades, the U.S. Supreme Court upheld every federal statute challenged on the basis of exceeding the Congress' power under the Commerce Clause. U.S. Const. art. I, § 8, cl. 3 (Commerce Clause). E.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (Federal crop limitations applying to wheat grown and consumed on farm are a proper exercise of the commerce power because the wheat consumed may have displaced interstate wheat which the farmer otherwise would have had to purchase on the interstate market); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (Application of the Civil Rights Act as a proper exercise of the commerce power where the only effect on interstate commerce was purchase of interstate meat and serving of interstate customers by Ollie's Barbecue).

In 1995 the Supreme Court startled some in the legal community with its decision in *United States v. Lopez*, 514 U.S. 549 (1995). This 5-4 decision (with two concurrences and three dissents) struck down a federal law which made it a crime to possess a gun within 1,000 feet of a school. The Justice Department argued that guns near schools hinder students' ability to learn, which hinders their ability to compete in the global economy. This connection was so general and so broad that it would sustain federal regulation of virtually any activity, said the Court. If this sort of "but-for" logic was sufficient to sustain the connection to interstate commerce, it would "obliterate the distinction between what is national and what is local and create a completely centralized government." *Lopez*, 514 U.S. at 557.

The perception of a sea change in constitutional law was substantially diminished one week later, however, when the Supreme Court handed down its unanimous, two page long, per curiam decision in *United States v. Robertson*, 514 U.S. 669 (1995). *Robertson* (who happened to be a decorated Vietnam veteran, former prosecutor and former criminal defense lawyer) was a drug dealer who invested the proceeds of his illegal activity in an Alaska gold mine. The federal government charged him with RICO violations. The mine plainly was engaged in interstate commerce, the Court concluded. Despite the fact that the gold produced primarily was sold within the state, *Robertson* had hired miners and purchased equipment from outside the state.

Five years later, the Supreme Court took another, but somewhat more careful, swipe at the broad application of the Commerce Clause. In *United States v. Morrison*, 120 S. Ct. 1740 (2000), the Court struck down, again, by 5-4, the Violence Against Women Act. This law provided a new federal cause of action to victims of gender-based violence. The Court said the problem, though serious, is essentially local, that is, a matter of state concern and not a proper subject for federal legislation.

Interestingly, the *Morrison* Court did not question—much less overturn—*Wickard* and the other broad-application cases. Rather, it limited them to situations in which Congress was regulating commercial activity. *Morrison*, 120 S. Ct. at 1740 n.4. Thus, it appears that the Court will continue to allow federal regulation of commercial activity "based solely on that conduct's aggregate effect on interstate commerce." *Morrison*, 120 S. Ct. at 1754. But it will not employ this looser chain of causality where the activity to be regulated is not commercial activity at all, but activity which falls within areas of traditional state control, most notably criminal and family law.

result is to upset often settled expectations of property rights. Those on the losing end are left without recourse.⁵⁴⁰

On the other hand, the Congress has long hesitated to use this great power. Congress, particularly in earlier years, kept mostly to the sidelines when it came to western water disputes by deferring to state law.⁵⁴¹

When one considers the broad range of natural resource matters that Congress has subjected to national control—from mineral extraction to hydropower to air pollution—it is perhaps surprising that Congress has been so reluctant to do likewise with respect to water allocation. Indeed, while Congress has moved aggressively to preempt the field of water *quality* by enacting the Clean Water Act and other statutes, it has historically given the states relatively free rein with respect to water *quantity* (i.e., water allocation).

This dichotomy is founded not so much in logic or policy, as in history. The first settlers in the West were really squatters. The land and all of its resources, including water, were owned almost entirely by the federal government. Miners and farmers took what they needed from the federal land, and managed to scratch out an existence.

When Congress got around to actively managing the nation's vast Western estate,

Morrison pointedly omitted saying anything about federal regulation of the environment, so it remains to be argued whether that is ordinary commerce (federal) or general welfare (state). Opponents of federal regulation might use *Morrison* as a wedge. They might challenge certain environmental laws on the basis that, at their core, their objective is not to regulate commerce, but to protect human health and enjoyment (thus falling more within the States' traditional welfare power). However, absent a further shift in the Court, this appears to be a long shot.

On a separate constitutional track, the *Morrison* decision continues to prop up federal regulation resting on the more traditional regulation of the "instrumentalities" of interstate commerce (e.g., navigable waters) as well as "persons or things" in commerce. But the door remains open for challenges at the edge of navigability, e.g., the regulation of isolated wetlands.

Thus, despite the initial excitement (or panic) caused by the *Lopez* decision, it now appears that the Supreme Court intended a more modest correction with respect to what remains a broad application of the Commerce Clause. Consequently, it appears safe to assume that most federal environmental and natural resource statutes will continue to pass muster under the Commerce Clause—so long as they are perceived as regulating commercial activity.

⁵⁴⁰ The central, but unstated, purpose of the reserved rights doctrine is to allow government action without compensation under the Takings Clause.

⁵⁴¹ "When Congress has addressed expressly the subject of water rights, it generally has deferred to state law. See, e.g., Reclamation Act of 1902, 43 U.S.C. § 383 (1982); Forest Service Organic Act of 1897, 16 U.S.C. § 481 (1982); Desert Land Act of 1877, 43 U.S.C. § 321 (1982); Act of July 9, 1870, 43 U.S.C. § 661 (1982); Mining Act of 1866, *Id.* The leading judicial interpretations of these statutes are *California v. United States*, 438 U.S. 645 (1978); *United States v. New Mexico*, 438 U.S. 696 (1978); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); and *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899)." Brian E. Gray, *No Holier Temples: Protecting the National Parks through Wild and Scenic River Designations*, 58 U. Colo. L. Rev. 551 (1988).

resource use patterns already had been established by local custom. Although Congress quickly passed laws controlling (and encouraging) the exploitation of its land resources through such legislation as the Homestead Act of 1862⁵⁴² and the General Mining Law of 1872,⁵⁴³ when it came to water, Congress simply acquiesced in the pattern of development established by the settlers.⁵⁴⁴ In the language of the day, Congress “severed” the water flowing on public lands from the land itself. Thus, for instance, when Congress issued patents conveying land to homesteaders and miners, those conveyances did not include water rights. Water was “severed” from the land, so that it might remain a public resource, subject to appropriation on the basis of beneficial use by private parties under state law.

In so doing, the Congress washed its hands of any role in allocating water in the West—or at least so thought a lot of Western water lawyers. In fact, the federal government’s power over water on federal lands was merely dormant.

(ii) Origins of the reserved rights doctrine

Federal power over water was first articulated in a once obscure Indian case handed down by the U.S. Supreme Court in 1908 known as *Winters v. United States*.⁵⁴⁵ In 1888 the United States entered into a treaty with the Gros Ventre and Assiniboiné bands or tribes of Indians creating the Fort Belknap Indian Reservation along the Milk River in Montana. In the Court’s words, the purpose of the treaty was to convert “a nomadic and uncivilized people” into a “pastoral and civilized people.”⁵⁴⁶ The Court found that the Indians’ former means of subsistence was made impossible by their forfeiture of lands under treaty, and that their only opportunity for survival was irrigated agriculture. The Court then concluded that while the treaty failed to reserve explicitly any water rights for the Indians, such a reservation must have been implied in order for the Indians to sustain themselves. The Court construed the treaty to mean that water was intended.

For many decades, Westerners viewed the *Winters* case as an anomaly of Indian law,

⁵⁴² Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392 (previously codified in part at 43 U.S.C. §§ 161-163) (repealed by FLPMA).

⁵⁴³ General Mining Law of 1872, 30 U.S.C. § 22.

⁵⁴⁴ This acquiescence was articulated in three federal statutes governing the allocation of water on federal lands. The Act of July 26, 1866, ch. 262, § 9, 14 Stat. 253 (codified at 30 U.S.C. § 661) (“the Lode Law”); the Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218 (also codified at 43 U.S.C. § 661) (“the Placer Law”); and the Desert Land Act of Mar. 3, 1877, ch. 107, 19 Stat. 377 (codified at 43 U.S.C. § 321). Of course, other statutes reflected congressional deference to state water law in other contexts. See, e.g., Reclamation Act of 1902, quoted at page 160.

⁵⁴⁵ *Winters v. United States*, 207 U.S. 564 (1908)

⁵⁴⁶ *Winters*, 207 U.S. at 576.

and nothing more. The first clue that this might not be so came in 1955. In the Pelton Dam case,⁵⁴⁷ the Court first hinted that the reserved rights doctrine might extend to other federal reservations. It held that the Desert Land Act⁵⁴⁸ (which made water on public land subject to private appropriation) was inapplicable to reservations. While the case was not decided under the rubric of the reserved rights doctrine, and did not involve the direct use of water on a federal reservation by the United States, it implied that the private licensee was exercising a right of the United States which had been withheld from state control as a function of the reservation.

What Pelton Dam presaged was confirmed in 1963 by the Supreme Court's holding in *Arizona v. California*.⁵⁴⁹ The so-called Winters doctrine, said the Court, could be applied to all federal "reservations." Suddenly national parks, forests, and wildlife refuges—any federal land area "reserved" from settlement, sale, or entry under the mining and homestead laws—were seen as potentially carrying federal reserved water rights just like the Fort Belknap Indians won in 1908.

The federal reserved water rights doctrine now has been applied by the U.S. Supreme Court eight times⁵⁵⁰ and may be condensed to this simple principle quoted from a 1978 case:

This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.⁵⁵¹

Some may see this "doctrine" as a substantive rule of law, with the effect that whenever federal land is reserved, a federal reserved water right is created. But it clearly is not a substantive rule of law. Rather, it is a rule which guides a court's construction of a statute, treaty, or executive order that fails to address the water question. This rule of

⁵⁴⁷ *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955) (the "Pelton Dam" case).

⁵⁴⁸ See footnote 544 at page 166 for citations to Desert Land Act and related statutes.

⁵⁴⁹ *Arizona v. California*, 373 U.S. 546 (1963)

⁵⁵⁰ *Winters v. United States*, 207 U.S. 564 (1908); *United States v. Powers*, 305 U.S. 527 (1939); *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955); *Arizona v. California*, 373 U.S. 546 (1963); *United States v. District Court for Eagle County*, 401 U.S. 520 (1971); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. New Mexico*, 438 U.S. 696 (1978).

⁵⁵¹ *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

construction comes into play in those cases where Congress or the Executive, in creating a reservation, inadvertantly failed to address the question of water in the situation where water is necessary to carry out the primary purposes of the reservation.

Once established, these federal reserved water rights share many of the attributes of private appropriative rights under state law. First and foremost, they fit into the state priority system. They may be quantified in state court proceedings⁵⁵² to a specific flow at a particular place with a fixed priority date. In this respect, federal reserved rights operate very much like ordinary appropriative rights.

In other significant respects, however, federal water rights differ from appropriative rights acquired under state law. Most importantly, federal reserved rights arise by implication drawn from federal statute, not through compliance with state procedures. As a result, they may be “back dated” by the courts to the time of establishment of the federal reservation. This makes them “senior” to any private state water rights which may have arisen subsequent to the creation of the reservation. It is this point—the way the reserved rights doctrine evades the priority system through back-dating—which constitutes the most disruptive intrusion on the authority of states to allocate water.

Federal reserved rights differ also in that they need not conform to state substantive law. For instance, a federal reserved right may be obtained for instream flow rights even in a state which does not recognize instream rights or which recognizes them only when held by a state agency.⁵⁵³

(iii) How Much Water?

As to the question of how extensive a federal reserved right might be, the pivotal case was decided in 1978. In *United States v. New Mexico*,⁵⁵⁴ the U.S. Supreme Court was called upon to resolve a dispute over how much water the Forest Service could claim under the reserved rights doctrine for rivers in national forests. The Court concluded that reserved rights attached only to the primary, not to the secondary purposes of the

⁵⁵² In 1952 the Congress enacted the McCarran Amendment, 43 U.S.C. § 666, which waived sovereign immunity and allowed the United States to be joined in state court actions to quantify water rights. The act applies, however, only to general stream adjudications of an entire river basin, and not to administrative proceedings or lawsuits over individual water rights.

⁵⁵³ For instance, the Idaho Supreme Court recently rejected claims for instream rights asserted by the federal government under state law. *Idaho v. United States*, 134 Idaho 106, 996 P.2d 806 (2000) (the “Smith Springs” case). The Idaho court determined that the diversion requirement is alive and well, and is excused only for water right claims made pursuant to specific state instream flow statutes. Those statutes authorize only certain state agencies to hold these instream rights.

⁵⁵⁴ *United States v. New Mexico*, 438 U.S. 696 (1978)

reservation, and that only timber production and watershed management were primary purposes of national forests. Consequently the Court rejected the Forest Service's argument that it held reserved rights for instream flows to protect fish, wildlife, and recreation. It should be kept in mind, however, that the *New Mexico* case dealt only with the primary purposes of national forests.

From time to time, the federal government has sought to end run the "primary purpose" limitation by developing more primary purposes. For instance, claims have been asserted for federal reserved water rights under the Multiple Use Sustained Yield Act.⁵⁵⁵ MUSYA, adopted in 1960, was one of the first "modern" federal land statutes. It attempted to strike a balance between traditional uses of the forests (e.g., fiber production) and new environmental and recreational values. It did this by articulating a more expansive list of uses and purposes for the national forests. The question then arose, in so doing, did Congress intend to create a new set of water rights for this expanded set of purposes, dating to 1960?

MUSYA was first raised in *New Mexico*, discussed above. The United States sought to shore up its argument that the original organic act reflected a broad set of purposes by citing to confirmation of this in MUSYA. The ploy backfired. Not only did the Court reject the government's argument about the original intent of the National Forests, but took a vigorous swipe (albeit in dictum) at the idea that the MUSYA created any "new" reserved rights in 1960.

3. Federal Reserved Rights Litigation in Idaho

Idaho, long an important source for the development of new theories of water law,⁵⁵⁶ again finds itself on the front lines. In the last few years, more federal reserved rights jurisprudence has been produced by the Idaho Supreme Court than any other.

(i) **Stock Watering**

Three years ago, the Idaho Supreme Court ruled on Public Water Reserve No. 107 ("PRW 107") in *United States v. Idaho*.⁵⁵⁷ In that case, the United States asserted claims in the SRBA to federal reserved water rights under PRW 107, a federal executive order

⁵⁵⁵ Multiple Use Sustained Yield Act of June 12, 1960, Pub. L. No. 86-517, 74 Stat. 215 (codified at 16 U.S.C. §§ 528-531) ("MUSYA").

⁵⁵⁶ *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912) (reasonable means of diversion); *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973) (optimum development of water resources); *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985) (local public interest).

⁵⁵⁷ *United States v. Idaho*, 131 Idaho 468, 959 P.2d 449 (1998)

issued by President Calvin Coolidge in 1926. The executive order withdrew and reserved to the United States all springs and watering holes on unreserved federal land.

The government's claims were denied by the district court, but the Idaho Supreme Court reversed, holding that the 1926 executive order created federal reserved water rights. Whether the court viewed this as an express or an implied right is somewhat unclear. The state supreme court recited the law of implied reserved rights as the basis for the decision. Yet, the court declared: "After considering the plain and ordinary words of the enabling statutes and executive order underlying PRW 107, we conclude that PRW 107 evidences an express intention by Congress that reserves a water right in the United States." 959 P.2d at 452.

First, the language is oxymoronic. If it is merely an intention (something unstated), how can it be express? Moreover, if it were an express reservation, then what was the point of reciting all the law of implied federal reserved rights? The more sensible understanding of what the court said is that it meant that there was an "express intention by Congress to protect the water resource which gives rise to an *implied* reserved right." The unfortunate upshot of all this is that the Idaho Supreme Court's language did not clarify, but further confused the debate over the nature of the reserved rights doctrine.

(ii) MUSYA

Whether the Court's discussion of MUSYA in *New Mexico* was dictum or not, the Idaho Supreme Court caught the U.S. Supreme Court's drift, and rejected any notion of federal reserved rights under MUSYA in *United States v. Challis*.⁵⁵⁸ The Idaho Court ruled that the reserved rights doctrine only applies to "reservations" of land. Whatever MUSYA did, it did not reserve (or "re-reserve") land. Hence, no implication of reserved rights could follow.

Neither the PWR 107 nor the MUSYA cases offered any startling new insights into the reserved rights doctrine. These cases set the tone, however, for a more measured and skeptical application of the doctrine. This tone would more fully resonate in the cases which followed.

(iii) Wilderness Areas

No doubt, the highest visibility battles over water rights in Idaho have been fought over wilderness water rights. The issue has always inflamed passion, and Idaho proved no exception.

⁵⁵⁸ *United States v. Challis*, 133 Idaho 525, 988 P.2d 1199 (1999).

The Idaho courts were not writing on a blank slate. The question of whether wilderness areas carry implied reserved water rights was vigorously debated during the 1980s. First, in 1984 the Sierra Club brought suit in Colorado to force the federal government to claim reserved water rights on existing wilderness areas in that state. The district court issued an opinion finding that reserved rights indeed arise from wilderness reservations, and ordered the federal government to develop a plan to protect water flows in wilderness areas (which might or might not include adjudication of these rights).⁵⁵⁹ On appeal, however, the Tenth Circuit dismissed the case and vacated the opinion on the ground that the matter was not ripe for review (because Sierra Club had not pointed to any imminent harm).⁵⁶⁰ Consequently, this line of litigation left no clear judicial statement on the status of reserved rights for wilderness areas.

Meanwhile, a federal court in New Mexico reached the opposite conclusion with respect to both wilderness areas and wild and scenic rivers.⁵⁶¹

On yet another front, Democratic and Republican administrations issued predictable “pro” and “con” opinions on the subject. The latest in this line of flip-flops was issued in 1988 by then Attorney General Edwin Meese who joined with then Secretary of the Interior, Donald Hodel, in issuing a non-binding advisory opinion on the subject of wilderness water rights during Mr. Meese’s final week in office under the Reagan Administration.⁵⁶² Mr. Meese concluded that in enacting the Wilderness Act, the Congress

⁵⁵⁹ *Sierra Club v. Block*, 622 F. Supp. 842 (D. Colo. 1985).

⁵⁶⁰ *Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990).

⁵⁶¹ *New Mexico v. Molybdenum Corp. of America*, CV No. 9780 C (D. N.M., Order Approving and Affirming Report of Special Master, Feb. 2, 1988) (“Red River Adjudication”).

⁵⁶² Federal Reserved Water Rights in Wilderness Areas, Opinion M-36914, Supp. III (July 26, 1988) (by Solicitor Ralph W. Tarr). This opinion followed a series of opinions on the subject of federal water rights issued by the Interior Department. Much of the discussion in these opinions focused on the theory of “nonreserved water rights”—a theory conceived in the Carter Administration, but which has never gotten off the ground. The nonreserved rights theory argues that the federal government may appropriate water notwithstanding state law not only to achieve the primary purposes of federal reservation (under the reserved rights doctrine), but also for secondary purposes and for the purposes of nonreserved lands.

The first and the broadest articulation of the administrative authority to appropriate was that found in the *Krulitz Opinion* in 1979. *Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management* (Opinion M-36914), 86 Interior Dec. 553 (June 25, 1979) (by Solicitor Leo Krulitz) (“*Krulitz Opinion*”). Solicitor Krulitz determined that the federal government is empowered to preempt state law as necessary when four conditions are met: (1) the Congress assigns a land management function to a federal agency, (2) the Congress did not expressly prohibit the preemption, (3) unappropriated water is available, and (4) the water is in fact put to use.

This was followed, in the same year, by the *Martz Opinion*, which embraced the general reasoning of the *Krulitz Opinion*, but concluded that as applied to the Taylor Grazing Act and FLPMA, no authority to preempt state law was intended. This left the theory in tact but of vastly diminished applicability. *Supplement to Solicitor Opinion No. M-36914, on Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of*

intended to defer to Western water law and create no implied water rights.⁵⁶³

None of this, nor any of the thousands of pages of law review articles on the subject, bothered to explore the fundamental nature of the federal reserved rights doctrine. Instead, one partisan after another recited the mantra of the U.S. Supreme Court, hoping to put just the proper spin on it.

The Idaho litigation contrasts with the shadow boxing over wilderness rights in the *Sierra Club v. Block* line of cases. In that litigation, an environmental group sought to provoke a fight, but never managed to engage. It was, from start to finish, an academic dispute over access to water in headwaters wilderness areas. Because these wilderness areas were in the headwaters, the wilderness act itself prevented any real threat to the water. (Only the President, in a national emergency, could overcome that protection.) Tacking on a federal water right was, thus, a belt and suspenders operation.

Comparison of Practical Impact of Reserved Rights in Colorado and Idaho Wilderness			
Colorado Wilderness Litigation		Idaho Wilderness Litigation	
Level of threat to the environment (if reserved rights not recognized)	Level of threat to water users (if reserved rights are recognized)	Level of threat to the environment (if reserved rights not recognized)	Level of threat to water users (if reserved rights are recognized)
Purely academic	Purely academic	Purely academic	Very real

The situation in Idaho is far different. Three wilderness areas were at issue: the Frank Church

Reclamation and the Bureau of Land Management (Opinion M-36914, Supp.), 88 Interior Dec. 253 (Jan. 16, 1981) (by Solicitor Clyde O. Martz). (The first supplement is called "Supp." The second is called "Supp. I.")

Solicitor Coldiron did an about-face with his 1981 Opinion which flatly announced, "[T]here is no federal 'non-reserved' water right." *Nonreserved Water Rights—United States Compliance with State Law (Opinion M-36914, Supp. I)*, 88 Interior Dec. 1055, 1064 (Sept. 11, 1981) (by Solicitor William H. Coldiron). Even Solicitor Coldiron, however, did not doubt the Congress' power to preempt, but he concluded that Congress has not exercised it beyond the scope of reserved rights and the navigation servitude.

The next to be released—with great fanfare by the Department of Justice—was the *Olson Opinion*. *Legal Memorandum: Federal "Non-Reserved" Water Rights*, Office of Legal Counsel, U.S. Dep't of Justice (June 16, 1982) (by Assistant Attorney General Theodore B. Olson). The agency's press releases announced, "The nightmare is over." The Opinion itself, however, was a far cry from what the public posturing on both sides would have suggested. In fact, the Opinion is a thoughtfully reasoned rejection of the Coldiron Opinion; it articulates a theoretical basis for asserting preemptive federal appropriative water rights. After 80 pages of analysis, however, the Opinion stopped short of applying its reasoning to particular statutes, settling instead for the observation that "such rights probably cannot be asserted under the current statutory schemes."

See also a subsequent opinion by Solicitor Coldiron, *Purposes of Executive Order of April 17, 1926, Establishing Public Water Reserve No. 107 (Opinion M-36914, Supp. II)* (Feb. 16, 1983) (by Solicitor William H. Coldiron). (N.B., this opinion does not appear in the appropriate volume of Interior Decisions.)

⁵⁶³ A thoughtful rebuttal to the Meese/Hodel opinion was issued by the Congressional Research Service, *CRS Report for Congress: Wilderness Areas and Federal Water Rights* (Jan. 4, 1989) (by staff attorney Pamela Baldwin).

River of No Return, the Gospel-Hump, and the Selway-Bitterroot. The first two of these are anything but headwater areas. Significant resorts, industries, agricultural properties, and even whole towns, are located upstream of these areas. Indeed, a significant part of the debate over the boundaries of the Frank Church Wilderness was aimed at making sure that certain upstream mining properties were excluded through the time-honored "cherrystem" technique of gerrymandering.

Thus, federal reserved rights with priority dates reaching back to 1980 would have the power to curtail uses upstream that have come on line since that date, and to block all future development in these valleys and inholdings—despite the fact that they had been excluded from the wilderness specifically so that they could continue to grow. Indeed, the claims reached not only upstream surface users, but upgradient ground water users.

Needless to say, it came as quite a shock to many who had participated in this compromise when the federal government showed up some twenty years later in the Snake River Basin Adjudication claiming all the water.⁵⁶⁴

Perhaps the most curious thing about the federal claims in Idaho, is their flip side. On the one hand, they posed very real threats to upstream water users. Indeed, in response to the federal wilderness claims, the Director of the Idaho Department of Water Resources issued a moratorium on all new appropriations upstream and upgradient of the wilderness areas. On the other hand, however, the impact of the reserved rights (had they been recognized) on the environment was (as in Colorado) purely academic.

Even the United States conceded that there was no threat, current or foreseen, to wilderness values as a result of ground or surface water diversions in the area. Thus, while these federal water claims would have had immediate adverse economic effect on hundreds of users outside the wilderness, they would do nothing to improve the wilderness. They were sought by the government on a purely "just in case — you never know" basis.

When the issue reached the Idaho Supreme Court, it at first upheld the federal government's claims, in a 3 to 2 decision. *Potlatch Corp. v. United States*, 1999 WL 778325 (Oct. 1, 1999). A year later, following the grant of a motion for reconsideration, the court reversed itself, and rejected the federal claims, again by a 3 to 2 vote, one justice having changed her mind. *Potlatch Corp. v. United States*, 134 Idaho 916, 12 P.3d 1260 (2000) ("*Potlatch II*").⁵⁶⁵

⁵⁶⁴ After winning the first round before the Idaho Supreme Court, and facing a motion for reconsideration (and a mountain of bad publicity), the federal government backed off its claim for all the water, insisting that it never expected that much.

⁵⁶⁵ All this took place against the backdrop of intense political discussion. Justice Silak, who authored the original majority opinion, was challenged by then District Judge Eismann, who openly criticized the water rights decision and ultimately prevailed in the election. Following the election, on rehearing of the decision, Chief Justice Trout changed sides and became the author of the new majority opinion. The makeup of the Court had not changed

In the end, the court did what no other court or commentator had done before. It rejected the wooden application of the reserved rights doctrine, in favor of recognition that the “doctrine” is nothing more than means to divine congressional intent. In this case, no mechanical test based on the application of primary and secondary purposes was necessary.

The political reality is that Idaho’s Senators Frank Church and Jim McClure would never have promoted legislation containing a preemptive, federal water right capable of shutting down all new water-dependent activity upstream of our wilderness areas. On rehearing, the Idaho Supreme Court recognized as much:

... Congress could not and would not have passed a bill that implied a water right that would prevent the appropriation of water under state law beyond the boundaries of the wilderness areas. There was no more important person than Frank Church in the development of wilderness legislation. A review of the Frank Church papers brings home the reality that Senator Church would not have advocated or voted for the Wilderness Act but for his understanding that the Act would not cripple the economic growth of portions of Idaho outside the wilderness.

Potlatch II, 12 P.3d at 1268 (Justice Schroeder for the majority).

This “wake up and smell the coffee” analysis is a far cry from the wooden application of a law-review-based doctrine which has dominated the debate for the last thirty years or more. As Justice Schroeder said, “Little about the background and principles of *Winters* is applicable to this case.” *Potlatch II*, 12 P.3d at 1264.

The concurrence by Justice Trout (whose vote changed the result) was even more direct: “I have come to question the continued vitality of the doctrine.” *Potlatch II*, 12 P.3d at 1270 (Justice Trout, concurring). In the end, the “implication” at the center of the reserved rights doctrine was turned on his head (as it should be) by the Idaho court:

Because [at the turn of the century] Congress was not yet aware of the potential conflict between state and federal water rights, it was understandable that Congress could have remained silent about the existence of a water right, and yet still intended to reserve water for

at this point. Justice Silak was still on the Court at the time of the rehearing, and became the author of the new minority opinion.

Not surprisingly, a great deal has been made of this, perhaps more than is justified. We will not add to this debate, except to allow the author of this chapter to express his personal conviction that each of the justices voted his or her conscience, on both votes, despite considerable pressure to do otherwise. In the author’s view, each of the justices deserve commendation for their courage and integrity.

purposes of the reservation. Thus, through the holding in *Winters* and its progeny, the United States Supreme Court recognized a federal reserved water right where, had Congress thought about it, it would have believed water was necessary to accomplish the purposes of the reservation.

... Where, as in this case, Congress has chosen for whatever reason, not to create an express water right despite its knowledge of a potential conflict, I believe it can no longer be inferred that such a water right is necessary to fulfill the purposes of the reservation.

Potlatch II, 12 P.3d at 1270-71 (J. Trout, specially concurring).

The United States determined not to seek U.S. Supreme Court review of this decision.

(iv) Hells Canyon National Recreation Area

In the very same decision, *Potlatch II*, the Idaho Supreme Court ruled that in establishing the Hells Canyon National Recreation Area in 1975,⁵⁶⁶ Congress expressly reserved sufficient water to satisfy the purposes of the reservation. The court noted that the reservation was of both “land and water”⁵⁶⁷ and contained language exempting claims of water rights on certain rivers and tributaries.

The court remanded for a determination of quantity, the minimum necessary to fulfil the purpose of the reservation. Here the court cited *Cappaert*. The federal reserved rights doctrine, it seems, is being converted from a theory for implying new water rights into a mechanism for filling in the details of inartfully articulated but nonetheless express water rights. This is consistent with how the Idaho court handled the PWR 107 claims, discussed above.

(v) Wild and Scenic Rivers

In *Potlatch I*⁵⁶⁸ (a companion case to *Potlatch II*), the Idaho Supreme Court recognized federal reserved water rights for wild and scenic river designations.⁵⁶⁹ This, too, however, was done on

⁵⁶⁶ Hells Canyon National Recreation Act of 1975, Pub. L. No. 94-199, 89 Stat. 1117 (1975) (codified at 16 U.S.C. §§ 460gg(1)-(13)).

⁵⁶⁷ 16 U.S.C. § 460gg(b).

⁵⁶⁸ *Potlatch Corp. v. United States*, 134 Idaho 912, 12 P.3d 1256 (2000) (“*Potlatch I*”).

⁵⁶⁹ Wild and Scenic Rivers Act of Oct. 2, 1968, Pub. L. No. 90-542, 82 Stat. 906 (codified as amended at 16 U.S.C. §§ 1271-1287).

the basis of an express reservation, found in section 13(c) of the Act.⁵⁷⁰

Potlatch had urged that the odd, negative language employed by the statute reflected a common misunderstanding about how the doctrine worked, and was intended merely to set an upper limit on quantity—in the event that a court might someday impose reserved water rights on the reservation. The Idaho Supreme Court rejected this argument, concluding that while the language is awkward, it was clear enough to constitute an express, affirmative federal reserved right. (This, by the way, is consistent with what the majority of commentators have suggested over the years.⁵⁷¹)

(vi) Sawtooth National Recreation Area

In *Idaho v. United States*, 134 Idaho 940, 12 P.3d 1284 (2000) (“*Sawtooth*”), the court found no reserved water rights were created for the Sawtooth National Recreation Area.⁵⁷² No party asserted an express reserved right.⁵⁷³ The case turned on whether the establishment of these wilderness and recreation areas carried with it an implied reservation of water rights.

The court’s conclusion was consistent with its more radical analysis in the companion case, *Potlatch II*. In reaching its decision on the Sawtooth, however, the Court reverted to a much more traditional, wooden analysis under the reserved rights doctrine.

The Court began with a began with a recitation of the traditional reserved rights analysis (primary versus secondary purpose; entire defeat of primary purpose). It then divided the Sawtooth into its wilderness and non-wilderness components. (This national recreation area is unusual in that it contains both.) In each case, the Court identified a relatively limited primary purpose (e.g., “protect that area from the dangers of unregulated mining”) and then concluded that the purpose could be accomplished without a reserved water right.

While this “primary-secondary-entire defeat” analysis seems, at first blush, logical, structured, and predictable, in fact it is little more than a blank check for courts to come down any way they want.

⁵⁷⁰ “Designation of any stream or portion thereof as a national wild, scenic or recreational river area shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this chapter, or in quantities greater than necessary to accomplish these purposes.” Section 13(c), 16 U.S.C. § 1284(c).

⁵⁷¹ E.g., Pamela Baldwin, *Water Rights and the Wild and Scenic Rives Act*, Congressional Research Service Report for Congress (Mar. 30, 1990).

⁵⁷² Act creating the Sawtooth National Recreation Area, Pub. L. No. 92-400, §§ 1-15, 86 Stat. 612 (codified at 16 U.S.C. §§ 460aa *et seq.*).

⁵⁷³ The State and Hecla Mining urged that the “no claim or denial” language contained in virtually all recent federal reservations constitutes an express denial of water rights. The court rejected this claim, essentially saying that the boilerplate (which commentators has debated for years) means nothing at all. *Idaho v. United States*, 12 P.3d at 1288.

For instance, the district court seized on references to fish and wildlife, took judicial notice of the fact that "fish need water," and then concluded that a reserved right was essential to prevent the entire defeat of a primary purpose. The Supreme Court rejected this analysis: "While we agree that fish require water, we do not agree judicial notice of this fact establishes that without such water the purposes of the non-wilderness portion of the Sawtooth NRA will be entirely defeated." 134 Idaho at 946, 12 P.3d at 1290. The fact that this game can be played back and forth so easily demonstrates the need to give up this doctrinal crutch altogether, at least when it comes to modern legislation.

While the Court seemed ready to do that in *Potlatch II*, it went back to square one in its analysis in *Sawtooth*. Indeed, it is difficult to believe that the same Court issued both decisions, much less the same day..

This may be explained in part by the fact that Potlatch Corp., whose briefing was reflected in the court's decision in *Potlatch II*, was not a party to the *Sawtooth* litigation. Meanwhile, the two parties to the *Sawtooth* case argued the case along the more traditional lines adopted by the court. Nevertheless, it is odd that decisions in such high visibility litigation would not be more thoughtfully integrated.

In any event, the court in *Sawtooth* stepped through a traditional Jesuitical analysis, beginning with a ritual separation of primary and secondary purposes, before reaching the ultimate question: did Congress intend to create reserved water rights?

What happened to Justice Schroeder's observation that *Winters* has little to do with these modern statutes? What happened to Justice Trout's questioning of the continued vitality of the reserved rights doctrine? (Justice Trout authored the *Sawtooth* decision.) If the doctrine has no continued vitality, why did the court apply it at all in the very next case, on the very next page in the reporter?

Perhaps the answer is that the reserved rights doctrine is deeply ingrained in the thinking of water lawyers. It is difficult to shake its inherent elegance. Like the recitation of Latin phrases, the doctrine has a certain appeal, and it surely provides some intellectual comfort. With respect to modern statutes, however, it is time to recognize that the doctrine is an empty one.

(vii) Deer Flat National Wildlife Refuge

The cases above suggest that the courts, at least those in Idaho, will no longer be as willing to indulge Congress when it fails to grapple with the issue of water rights in modern land legislation. But what of the "old" reservations? Are they just as sturdy as ever? Or is the growing skepticism with respect to modern statutes having a spillover effect in the treatment of more ancient reservations?

If the most recent Idaho cases on the subject are any clue, the answer is "yes, there is a spillover effect."

In *United States v. Idaho*, 135 Idaho 655, 23 P.3d 117 (2001), the Idaho Supreme Court rejected a claim for federal reserved water rights associated with the Deer Flat National Wildlife Refuge in the Snake River. The federal government asserted that the establishment of the refuge carried with it implied reserved water rights. The federal government relied heavily on references to the protection of “islands” in the authorizing order. Water is essential to the maintenance of an island, reasoned the United States.

In rejecting this argument, the Idaho court stepped through a traditional, rote analysis of the doctrine, identifying the primary purposes and then determining whether water was essential to their achievement. In clinging to this rigid outline, the court appears, at first glance, to be more concerned with the rituals of the doctrine than it does with the ultimate goal of divining congressional intent. But when we turn to the merits of what the court did, we find it back on the cutting edge of what we might call the new “reality therapy.”

Here is an example:

It is inconceivable that President Roosevelt in 1937, in the context of the dust bowl years, intended to give preference to waterfowl, or any other migratory bird over people. The reclamation projects themselves assure that water in the Snake River will be controlled for the benefit of agriculture. ... The presidents and other executives promulgating policy had the ability, and most likely the knowledge, that they could reserve a federal water right if that were essential. They did not do so expressly. And they did not do so by implication, considering the historical context in which they acted.

United States v. Idaho, 135 Idaho at 666-67, 23 P.3d at 128-29.

This type of “give-me-a-break” language makes clear that the Idaho court’s adherence to the rigid analysis of the reserved rights doctrine is more cosmetic than substantive. The court may continue to step through the minuet dictated by the doctrine. At the end of the dance, however, it is plainly more interested in the political reality of the congressional grant.

Thus, it appears that in Idaho both “old” and “new” reservations are being subjected to an increasingly vigorous reality check when it comes to the implication of federal reserved water rights. The knee-jerk “refuges need water” era is over.

(viii) Nez Perce Tribal Claims

This conclusion is accentuated by the district court's decision in the *Nez Perce* litigation.⁵⁷⁴ This decision by Judge Wood, who was then presiding judge in the Snake River Basin Adjudication, dismissed arguments by the Tribe that it was entitled to off-reservation reserved water rights under the *United States v. Winans*, 198 U.S. 371 (1905), a variant of the reserved rights doctrine.

Judge Wood's analysis is grounded in the same "give-me-a-break" reality checking as the Idaho Supreme Court's recent decisions:

It is inconceivable that the United States would have intended or otherwise agreed to allow the Nez Perce to reserve instream flow off-reservation water rights appurtenant to lands intended to be developed and irrigated by non-Indian settlers. ... However, it defies reason to imply the existence of a water right that was both never intended by the parties and inconsistent with the purpose of the Treaty. The Nez Perce submit that the issue pertaining to the quantity of water reserved is beyond the scope of these proceedings. However, for illustrative purposes it is helpful to point out that the Nez Perce's amended instream flow claim for the lowermost point on the Snake River is for 105% of the average annual flow of the Snake, Clearwater, and Salmon Rivers combined.⁵⁷⁵

(ix) Shoshone-Bannock Tribal Claims

The Shoshone-Bannock Tribes of the Fort Hall Indian Reservation reached an agreement with the State of Idaho and irrigators which is designed to settle their claims to water in the Upper Snake River. The Shoshone-Bannock claims to this water derive from the Second Treaty of Fort Bridger of July 3, 1868, and supplemental executive orders and agreements. The agreement involves over a million acre-feet per year of Tribal natural flow, storage and ground water rights.

(x) National Forest Reservations

The United States also filed reserved rights claims on various national forests throughout Idaho. These claims were ultimately withdrawn as part of an out-of-court settlement.

⁵⁷⁴ *In re Case No. 39576, Consolidated Subcase 03-10022 ("Nez Perce")*, Idaho Fifth Dist. Ct. (Order on Motions for Summary Judgment, Nov. 10, 1999).

⁵⁷⁵ *Id.* at 38.

4. Conclusion

There is no turning back the clock to the days of single-minded development of water resources. At both the state and federal level, we should expect to see environmental evaluation increasingly integrated into water allocation decisions.

On the other hand, courts are less willing to accomplish this goal by slight-of-hand. They are tiring of congressional failure to deal with the hard questions, and are increasingly reluctant to read meaning into legislative silence. Consequently, as we move forward, Congress will be expected to confront the water rights issue directly and to say what it means.

The reserved rights doctrine has seen its best days. It will grow increasingly obsolete as courts demand that legislative bodies do their job.

X. FEDERAL REGULATION OF WATER

Fifty or a hundred years ago, water rights were pretty much all that mattered when it came to figuring out where water would flow. Increasingly, however, the question of who owns the right to divert water is proving to be only a part of the water puzzle. Control of water today is a function not just of *ownership* of the water right, but also of the extent of government *regulation* of the activities involved.

Over the years, the federal government has enacted a host of environmental laws which significantly affect the allocation of water. While these laws do not create water "rights" as such,⁵⁷⁶ they clearly affect water allocation. For instance, ownership of the water becomes a moot point if the Corps of Engineers refuses to issue a permit for a proposed diversion project.

Three federal laws deserve special attention: section 404 of the Clean Water Act,⁵⁷⁷ the

⁵⁷⁶ One legal scholar has suggested that federal laws, such as the Clean Water Act's section 404 program, should be viewed as creating a new breed of "federal regulatory water rights." Tarlock, *The Endangered Species Act and Western Water Rights*, 20 Land & Water L. Rev. 1 (1985). If that argument were taken to its logical extreme, virtually any governmental regulation—from zoning restrictions to dumping regulations to the fire code—may as well be viewed as creating "property" rights in the government. (Could not they all be viewed as newfangled government "easements"?) These new labels really add nothing to our understanding. The sounder intellectual approach is to maintain the legal distinction between property rights and government regulation of property.

⁵⁷⁷ Clean Water Act, § 404, 33 U.S.C. § 1344. Section 404 is by no means the only legal authority for federal regulation of private activities affecting rivers. The Corps' section 404 authority parallels its authority under section 10 of the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 403. Indeed, the Corps typically issues a combined section 10/404 permit. Private hydropower projects are licensed by the Federal Energy Regulatory Commission. Federal Power Act, 16 U.S.C. §§ 791a-825r as amended by the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (1986). Moreover, any water project involving public lands is subject to a variety of controls by the federal land manager.

Federal Power Act⁵⁷⁸ and the Endangered Species Act.⁵⁷⁹

1. The Section 404 of the Clean Water Act

Decades ago the federal government took the lead, over the states, in regulating water quality. Of the many federal statutes dealing with water quality, the one which has the most potential to affect water rights and related activities is the Clean Water Act.⁵⁸⁰

The basic scope of the Act is quite broad: It flatly prohibits the “discharge of any pollutant” unless the discharge is permitted under section 402 or section 404 of the Act.⁵⁸¹ Moreover, in addition to the section 402 or 404 permit, the affected state must issue a “water quality certification” under section 401 of the Act confirming compliance with state water quality standards.⁵⁸²

Section 402 establishes the National Pollutant Discharge Elimination System (“NPDES”), requiring a permit for all point source discharges, other than those covered by Section 404. The NPDES program is implemented by the U.S. Environmental Protection Agency (“EPA”).

Section 404, in contrast, is implemented by the U.S. Army Corps of Engineers (“Corps”).⁵⁸³ Its scope is limited to the discharge of “dredged or fill material,” requiring that persons obtain a permit before any such discharge. Dredged material is anything which is lifted up out of the water (or a

⁵⁷⁸ Federal Power Act, 16 U.S.C. §§ 791a-825r. Originally the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063.

⁵⁷⁹ Endangered Species Act, 16 U.S.C. §§ 1531-1543. The Endangered Species Act applies both to private development requiring a federal permit (such as section 404) and to federal water projects (for example, those built by the Corps of Engineers or the Bureau of Reclamation).

⁵⁸⁰ The precursor to the Clean Water Act was enacted in 1948. Federal Water Pollution Control Act, ch. 458, 62 Stat. 1155 (1948). It emphasized state enforcement of water quality standards. The Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965), marked the first assertion of primary federal authority in national water pollution control efforts. Its approach allowed some pollution, up to ambient standards set by the states. When this approach proved ineffective, Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 (1972). This Act adopted direct restrictions on discharges and made it unlawful to discharge a pollutant without obtaining a permit. The 1972 Act also created federal minimum effluent standards. The Act established goals which have not been met (e.g., “fishable and swimmable” waters by the year 1983, and zero discharge by the year 1985). The Act was amended in 1977, Pub. L. 95-217, 91 Stat. 1567 (1977) (renaming it the Clean Water Act), and again in 1987, Pub. L. No. 100-4, 101 Stat. 60 (1987).

⁵⁸¹ CWA § 301, 33 U.S.C. § 1311.

⁵⁸² CWA § 401, 33 U.S.C. § 1341.

⁵⁸³ The EPA is the primary implementing agency of the Clean Water Act, and logically should have been assigned the role of administering section 404 of the Act as well. However, a political compromise resulted in the section 404 responsibility being handed to the Corps, while the EPA retains a veto power over all 404 permits. Clean Water Act, § 404(c), 33 U.S.C. § 1344; 40 C.F.R. part 231 (1987).

wetland).⁵⁸⁴ To put it simplistically, pretty much everything solid (including a dam) is deemed “fill.”⁵⁸⁵

Although the Act’s sweep is broad, it contains a list of important exceptions. For instance, various on-going farming, silvicultural, and ranching activities are exempted from sections 404 and 402. 33 U.S.C. § 1344(f)(1). Moreover, the Corps and EPA can expedite the permitting process by issuing what are called a “general permits.” See 33 C.F.R. § 325(e)(2) (1987) (regional 404 permits); 33 C.F.R. part 330 (1987) (nationwide 404 permits). If a general permit is applicable, the person need simply follow the provisions of the permit. Sometimes that calls for notification of the federal agency, and sometimes none is required.

Even if a general permit is available, the applicant must still obtain a Section 401 certification from the state. In some instances, the state will certify the general permit itself, so that no further action is required of the application. In other cases, the state has declined to certify the general permit, in which case the applicant must seek certification from the state on an individual basis.

The next significant jurisdictional question under the CWA is to what waters does it apply? As noted above, the Act prohibits any “discharge of a pollutant.” This phrase is defined, in turn, as the “addition of any pollutant to navigable waters from any point source.”⁵⁸⁶ The term “navigable water” is defined, in turn, as “waters of the United States.”⁵⁸⁷ The administrative and judicial interpretation of this phrase has evolved considerably over the years, and is still in a state of flux.

Initially, the Corps interpreted its jurisdiction narrowly—interpreting the word “navigable” as meaning, well, navigable. Gradually, as a result of numerous challenges, the courts began to extend that jurisdiction. Over the years, the limitation to physically navigable waters was eroded, and the meaning of the definition was expanded to include virtually anything reachable under the Commerce Clause of

⁵⁸⁴ Dredged material does not include what is known as “incidental fallback.” “The term *discharge of dredged material* does not include the following ... (iii) Incidental fallback.” 33 C.F.R. § 323.2(d)(3)(iii) (emphasis original). The term is defined as follows: “*Incidental fallback* is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.” 33 C.F.R. § 323.2(d)(2)(ii) (emphasis original).

This incidental fallback exception was dictated by the D.C. Circuit Court of Appeals. However, the Corps has implemented the exemption cautiously. The same regulation quoted above in this footnote also sets out the Corps’ presumption that “mechanized earth-moving activity” within waters of the United States typically involves the discharge of dredged material substantially away from the original source, and therefore generally is not incidental fallback. 33 C.F.R. § 323.2(2)(i).

⁵⁸⁵ In the words of the implementing regulation, fill is anything that “replac[es] an aquatic area with dry land or ... chang[es] the bottom elevation of a waterbody.” 33 C.F.R. § 323.2(e).

⁵⁸⁶ CWA § 502(12), 33 U.S.C. § 1362(12).

⁵⁸⁷ CWA § 502(7), 33 U.S.C. § 1362(7).

the U.S. Constitution.⁵⁸⁸ For a while, it seemed that anything which was “wet” was a “water of the United States” including virtually all wetlands.⁵⁸⁹

Then the pendulum began to swing back. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Supreme Court upheld the Corp’s jurisdiction over adjacent wetlands, but left hanging the authority of the Corps to regulate isolated wetlands. The Supreme Court took a much more aggressive swipe at the Corps’ jurisdiction in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“*SWANCC*”), 531 U.S. 159, (2001).

SWANCC held that, as a matter of statutory construction, Clean Water Act jurisdiction does not extend as far as the Commerce Clause permits. Consequently, the Supreme Court invalidated a rule (inspired by *Callaway* and its progeny) that claimed jurisdiction over every wetland used by migratory birds.⁵⁹⁰ Although *SWANCC* did not overrule *Bayview Homes*, it seems to have limited that decision to wetlands which are very closely connected, geographically and hydrologically, to navigable waters. In short, the Corps has no jurisdiction over isolated wetlands. By implication, the *SWANCC* decision also casts serious doubt on a handful of cases which have suggested that the Corps’ jurisdiction reaches to groundwater.

Just how the *SWANCC* decision plays out remains to be seen. Although it is a dramatic reversal of decades of thinking about the CWA’s jurisdictional limits, some courts are reacting to it quite cautiously. For example, In *Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169 (D. Idaho 2001), Judge Winnill acknowledges *SWANCC*, but goes on to rely on older precedents which are difficult to reconcile with *SWANCC*.

The bottom line is that anyone wishing to place a diversion structure in a river (or anything else which constitutes the discharge of dredged or fill material into waters of the United States) must first obtain a section 404 permit. This is so even if he or she already has obtained the necessary water rights under state law.

⁵⁸⁸ *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D. D.C. 1975). In a terse, one-page opinion, the court invalidated the Corp’s restrictive reading of its jurisdiction in its 1974 regulations, declaring “Congress by defining the term ‘navigable waters’ in [the CWA] to mean ‘waters of the United States, including the territorial seas,’ asserted federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution.” *Callaway*, 392 F. Supp. at 686.

⁵⁸⁹ Christopher H. Meyer, *Navigating the Wetlands Jurisdiction of the Army Corps of Engineers*, 9 Resource L. Notes 3 (Nat. Resources L. Center, 1986).

⁵⁹⁰ The Court stated: “Permitting respondents to claim federal jurisdiction over ponds and mudflats falling with the ‘Migratory Bird Rule’ would result in a significant impingement of the States’ traditional and primary power over land and water use. Rather than expressing a desire to readjust the federal-state balance in this matter, Congress chose to ‘recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources ...’” *SWANCC*, 121 S. Ct. at 684 (citations omitted).

Under the Clean Water Act, the Corps is obligated to consider the effect of proposed activities on the broad public interest in determining whether to issue or deny a section 404 permit. This means that the Corps may prohibit a dam project, the filling of wetlands, or any other activity requiring a 404 permit, if it determines that the project is not in the public interest. Of course, figuring out what is in the public interest is a rather subjective task. Consequently, courts tend to defer to the Corps' public interest determinations, making it difficult to challenge Corps decisions.

2. The Endangered Species Act

The discretion accorded government agencies under the Clean Water Act disappears when it comes to the Endangered Species Act, 16 U.S.C. §§ 1531-1543.⁵⁹¹ No federal environmental statute is as absolute as the Endangered Species Act.⁵⁹² It requires without exception that federal agencies not permit activities which are likely to jeopardize the survival of endangered or threatened species or will destroy or adversely modify their critical habitat. It is not a matter of balancing; the government may not consider whether the advantages of a particular project outweigh the potential loss of a species.⁵⁹³ Consequently, when endangered or threatened species are involved, the Endangered Species Act can combine with section 404 or other federal environmental statutes to frustrate or prohibit water development activities.

A case in point occurred in Colorado a few years ago when the Riverside Irrigation District proposed to build Wildcat Dam on a tributary of the South Platte River. The Corps refused to issue the district a section 404 permit because of the potential adverse impact of the dam on downstream whooping crane habitat.⁵⁹⁴ The district sued, claiming that the "Wallop Amendment" to the Clean Water Act⁵⁹⁵ prohibited the Corps from interfering with anyone's water rights, and that denying a

⁵⁹¹ The key provision of the Endangered Species Act is section 7(a)(2), 16 U.S.C. § 1536(a)(2).

⁵⁹² "One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies 'to insure that actions authorized, funded or carried out by them do not jeopardize the continued existence' of an endangered species or 'result in the destruction or modification of habitat of such species' *TVA v. Hill*, 437 U.S. 153, 173 (1978) (citation omitted, emphasis supplied by Court).

⁵⁹³ Following the celebrated snail darter case, *TVA v. Hill*, 437 U.S. 153 (1978), which blocked construction of the Tellico Dam in Tennessee, the Congress amended the Act 1978 to allow an "Endangered Species Committee" of top federal officials to approve projects despite jeopardy to endangered species. 16 U.S.C. § 1536(e); 50 C.F.R. Parts 450-453 (1988). Despite this authority, the committee (often referred to as the "God Squad" because of its power over the life or death of entire species), has never exempted a project. Most political analysts doubt the committee ever will.

⁵⁹⁴ *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985).

⁵⁹⁵ The "Wallop Amendment" provides: "It is the policy of Congress that the authority of each State to allocate water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Clean Water Act § 101(g), 33 U.S.C. § 1251(g) (enacted in 1977).

section 404 permit because the water was needed for some other purpose (e.g., protection of endangered species) was illegal. The court rejected the argument, declaring that the Wallop Amendment was merely a policy statement which did not override the Clean Water Act's clear and explicit mandate that the Corps regulate the disposal of material in water to maintain the ecological integrity of rivers. The case appears to have put to rest the argument that Western water rights are simply exempt from federal regulation.

3. Hydropower project licensing

Non-federal hydroelectric projects—that is, those owned by state and local governments and private parties—are regulated under the terms of the Federal Power Act (“FPA”). 16 U.S.C. §§ 791a - 825r. The act is administered by the Federal Energy Regulatory Commission (“FERC”).

Developers of hydropower projects must comply with an elaborate permit and licensing process which examines all aspects of a project's impacts, including on fish and wildlife, and which may involve formal evidentiary hearings. Some small-scale hydropower projects may be exempted from licensing, although they still are subjected to a “consultation” process. 16 U.S.C. §§ 2705 - 2708. In all cases, the hydropower projects must comply with applicable federal laws including the National Environmental Policy Act's environmental impact statement requirements, the Wild and Scenic Rivers Act, and the Clean Water Act.

Under the Electric Consumers Protection Act of 1986 (“ECPA”), FERC is required to take into consideration “comprehensive state plans” for the development and protection of its rivers and streams. Moreover, in considering projects for licensing (or relicensing), ECPA requires FERC to evaluate environmental matters much more thoroughly than was previously required.

There has been a long history of struggle between FERC (and its predecessor, the Federal Power Commission) and the states regarding the states' authority over hydropower development. Although the FPA includes language similar to that in the Reclamation Act that suggests that state water laws are not pre-empted by its provisions, the United States Supreme Court has ruled to the contrary. *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946). Apparently the only state laws that continue to bind FERC are law relating to proprietary water rights. *California v. FERC*, 495 U.S. 490 (1990).

State law can impact FERC's decisions, however. Section 10(a) of the FPA requires FERC to consider comprehensive waterway plans when making its licensing decisions. The comprehensive state water plan adopted by the Idaho Water Resource Board pursuant to Idaho Code § 42-1734A is such a plan. Further the ability to condition water quality certifications pursuant to section 401(d) of the Clean Water Act makes Idaho's water quality standards binding on FERC as a matter of Federal law. *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994). As a final note, hydropower projects in navigable rivers also must obtain State Land Board permission to utilize the State's lands underlying navigable waters.

FERC licenses have terms that extend from thirty to fifty years. Between 1997 and 2010, 20 large hydropower projects in Idaho are due for relicensing by FERC. The total annual energy produced at these projects is equivalent to more than half of the energy consumed by all customers in Idaho. The relicensing process involves a comprehensive review of each hydropower project and requires FERC to balance the competing uses of a waterway. These relicensing decisions in Idaho will represent the first time may Idaho projects have been reviewed under the new environmental laws and standards. Relicensing is a rigorous process that can affect both project operations and economics.

Y. INTERSTATE ALLOCATION

1. Equitable Apportionment

While most water conflicts pit individual users against each other, sometimes entire states jump into the fray. In the past, these state-versus-state conflicts have focused on water supply for agricultural development. In coming years, however, we may expect to see more and more interstate battles fought over water to meet new urban demands, to avoid jeopardy to endangered species, and to address other environmental concerns.

For over a hundred years, the axiom “first in time is first in right” has reigned unchallenged as the central governing principle of Western water law. Anyone who doubted the premise was liable to be charged with spreading “riparian socialism.” One might think, then, that this historic principle, so carefully enshrined in the prior appropriation doctrine, would govern disputes between states as well as between people.

It does not. One of the more curious incongruities in Western water law is the attitude of Western states toward dividing up the waters of a river that flows through several states. If one applied the prior appropriation doctrine, the water would go to which ever state put it to use first. In fact, water is allocated among states by court decrees or negotiated interstate compacts that often ignore which state uses the water first.

The law of interstate allocation did not arise until the 20th century. In the 1800s, water resources were not sufficiently developed in Western states sharing common rivers to generate any cross-border conflicts. Beginning in the early 1900s, however, depletions in some interstate streams became so severe that states took each other to court to fight over what was left.⁵⁹⁶

The first case, *Kansas v. Colorado*, 206 U.S. 46 (1907), was decided in 1907. Kansas sued Colorado charging that extensive irrigation in Colorado was drying up the Arkansas River and restricting the ability of Kansas farmers to launch new irrigation projects. In deciding the case, the Supreme Court had no precedent to go on; a case like this had never arisen before. The Court noted

⁵⁹⁶ Curiously, some of the early interstate water conflicts developed not in the parched West, but on the East Coast as major cities tapped the rivers in neighboring states to satisfy their growing populations.

that the Constitution granted it the authority to resolve disputes between the states, and set out with a clean slate to write a new body of interstate allocation law now known as "equitable apportionment."

Had the case arisen today, it is likely that the parties would have documented the environmental consequences of a dried-up Arkansas River. But there was no mention of the environment in 1907. Instead, the Court focused its attention on the benefits of irrigated farming. The Court determined that it would be inequitable to cut off the water already being used by Coloradans simply to provide more water to Kansas. But the Court did not rule in Colorado's favor simply because its uses were "senior" to uses in Kansas. Rather, the Court engaged in a balancing act to determine what allocation of water was "fair" to each of the disputants and concluded that the status quo was "fair." Thus, the Court allowed Colorado to continue its diversions for the time being, with the proviso that Kansas could institute a new suit if Colorado increased its depletions.

Over the years, the Supreme Court has heard eleven cases in which decrees were sought allocating water on interstate streams.⁵⁹⁷ No hard and fast rules have emerged from this history of litigation. To the contrary, the Supreme Court has ruled on an *ad hoc* basis, considering whatever evidence on the issue of equity it found appropriate at the time. Recently, however, considerations of water conservation and efficiency of use have become a part of the debate.

In the most recent case, Colorado sued New Mexico, charging that New Mexico was wasting water taken from the Vermejo River. *Colorado v. New Mexico*, 467 U.S. 310 (1984). Although the water uses in New Mexico were longstanding and therefore "senior" to Colorado's potential uses of the river in the future, Colorado asked the Supreme Court to consider the inefficiency of New Mexico's irrigation system. The Special Master appointed by the Court to hear the facts found that "the heart of New Mexico's water problem is the Vermejo Conservancy District" which he considered a failed reclamation project that "quite possibly should never have been built." The Court nevertheless determined that Colorado should not be able to force New Mexico to improve the efficiency of the project to free up water for Colorado's use, because Colorado had not demonstrated any stronger

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Arkansas River *Kansas v. Colorado*, 206 U.S. 46 (1907), *prior history*, 185 U.S. 125 (1902), *subsequent history*, *Colorado v. Kansas*, 320 U.S. 383 (1943).

Bois de Sioux *North Dakota v. Minnesota*, 263 U.S. 365 (1923).

Chicago River *Missouri v. Illinois*, 200 U.S. 496 (1906).

Colorado River *Arizona v. California*, 373 U.S. 546 (1963), *decree entered*, 439 U.S. 419 (1979), *decree modified*, 460 U.S. 605 (1983).

Columbia & Snake Rivers *Idaho v. Oregon*, 462 U.S. 1017 (1983) (dealing with anadromous fish).

Connecticut River *Connecticut v. Massachusetts*, 282 U.S. 660 (1931).

Delaware River *New Jersey v. New York*, 283 U.S. 336 (1931), *decree amended*, 347 U.S. 995 (1954).

Laramie River *Wyoming v. Colorado*, 259 U.S. 419 (1922), *decree modified*, 260 U.S. 1 (1922), *new decree entered*, 353 U.S. 953 (1957).

North Platte River *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *decree modified*, 345 U.S. 981 (1953), *petition to reopen*, *sub nom.*, *Nebraska v. Wyoming*, No. 108, Original (filed Oct. 6, 1986)

Vermejo River *Colorado v. New Mexico*, 467 U.S. 310 (1984).

Walla Walla River *Washington v. Oregon*, 297 U.S. 517 (1936).

water conservation program of its own.

This important case demonstrates the possibility that in the future, water may be shifted by the Supreme Court from one state to another on the basis of relative efficiency of use. The case should serve as a prod to all Western states to eliminate wasteful water use practices.

2. Compacts

An interstate compact is an agreement by two or more states that has been approved by Congress for the purpose of allocating the rights to the use of a natural resource such as water among the compacting states. Compacts are provided for under art. 1, Section 10 of the United States Constitution which provides that "No State, shall without the Consent of Congress, ... compact with another State, or with a foreign Power...." Upon approval by Congress a compact becomes a law of the United States. *Texas v. New Mexico*, 462 U.S. 554 (1983). Two useful sources on the law of compacts are Frankfurter and Landix, "The Compact Clause of the Constitution—A Study in Interstate Adjustments," 34 Yale L.J. 685 (1925); and Zimmerman and Wendell, *The Interstate Compact Since 1925* (Council of State Governments, 1951).

Interstate compacts have been frequently used throughout the West to allocate the waters of interstate streams among the states. The allocations are based either on an agreement to share the waters of the interstate stream on a percentage basis, or upon the agreement of one or more upper basin states to deliver a fixed amount of water to one or more lower states.

3. Idaho Compacts

Idaho is a party to an interstate compact with the states of Utah and Wyoming on the Bear River located in the southeast corner of the state. The Amended Bear River Compact was ratified by the three states in 1979 and approved by Congress on February 8, 1980. Pub. L. 96-189, 94 Stat. 4; Idaho Code § 42-3402. The compact is actively administered by the Bear River Commission made up of representatives appointed by the governors of the three states and a Federal representative.

Idaho also is a party to the Snake River Compact with the State of Wyoming which allocates 96 percent of the waters of the Snake River for use by Idaho and 4 percent for use by Wyoming upon satisfying certain storage replacement provisions. Act of March 21, 1950, 64 Stat. 29; Idaho Code § 42-3401.

In 1963, Idaho ratified the Columbia River Interstate Compact among the states of Idaho, Montana, Oregon and Washington. 1963 Sess. Laws 818. Not all of the states ratified the compact. Idaho repealed its ratification of the compact in 1975. 1975 Sess. Laws 29. Some discussions have occurred in recent years concerning the prospects for renewing the interstate compact initiative as a way of addressing the numerous fish and water resource issues among the Columbia River states.

Z. ETHICAL CONSIDERATIONS FOR THE WATER LAWYER

1. Conflicts of interest

An attorney representing clients in water right matters, as with all attorneys, must be cognizant of potential conflicts of interest. Because water is a flowing resource conflicts can exist that are not readily apparent. The upstream water user seeking a great amount of water may be taking that water directly from a downstream appropriator. An upstream polluter fighting the stringent requirements of an NPDES permit may be harming a downstream commercial fish hatchery on that stream. As the Idaho Supreme Court noted: "[U]nder the law of prior appropriation, all water users are interrelated. The amount of water one user consumes affects the amount of water available for other water users." *Idaho Dept. of Water Resources v. United States*, 122 Idaho 116 (1992) *rev'd on other grounds*, 508 U.S. 1 (1993).

Rules 1.7, 1.8 and 1.9 of the Idaho Rules of Professional Conduct ("I.R.P.C.") deal with conflicts of interest. Rule 1.8 directs an attorney's conduct when faced with ten specific conflict situations. For the most part these situations have little application to water lawyers, but they should be reviewed. For instance, I.R.P.C. 1.8(g) could be applicable when representing multiple clients making an aggregate settlement of claims in the SRBA.

If none of the conflict situations defined in I.R.P.C. 1.8 apply the attorney should then examine rules 1.7 and 1.9. Rule 1.9 deals with the situation where a former client is the source of the potential conflict, known as a "sequential" conflict situation. Rule 1.7 deals with the situation where current clients are the source of the potential conflict, known as a "concurrent" conflict situation. To determine which rule applies the attorney must determine whether the source of the conflict is a current or former client. Note that this determination is not easy, and it is likely that in most cases any doubt will be resolved against the attorney and in favor of the client.

When assessing conflicts of interest with former clients the attorney must determine (1) whether the new matter is the same or substantially related to the former client's matter, and (2) whether the interests of the new client are materially adverse to those of the former client. I.R.P.C. 1.9(a). Whether the matters are the same or substantially related generally refers to whether the matter involves the same disputed issues of fact. If the matters are the same or substantially related and are materially adverse to the former client, the attorney may represent the new client if the former client consents after consultation. I.R.P.C. 1.9(b) and (c) deal with the client of a former firm and using or revealing information obtained from a former client, respectively.

Rule 1.7(a) prohibits the representation of two clients whose interests are directly adverse. Both can be represented by a single attorney, however, if the attorney reasonably believes the representation will not adversely affect the relationship with the other client and each client consents after consultation. The lawyer should not ask for the client's consent if a disinterested lawyer would conclude that the client should not agree to the representation. This paragraph prohibits

representation of opposing parties in litigation.

Rule 1.7(b) prohibits the representation of two clients if the representation of one client may be materially limited by the lawyer's responsibilities to the other. Both can be represented by a single attorney if the lawyer reasonably believes the representation will not be adversely affected and each client consents after consultation. Again, the lawyer should not ask for the client's consent if a disinterested lawyer would conclude that the client should not agree to the representation.

For a client's consent to be valid in waiving a conflict, it must be based on a full and complete disclosure by the attorney. Both clients must consent to full disclosure to the other client or no valid consent may be obtained. The consent should be in writing and include provisions regarding disclosure of the nature of the conflict, the effect of either client's withdrawal of consent, and specifically what the client is waiving. Retention of separate counsel regarding the waiver should be advised and may be required. The client's consent must be completely voluntary--the client should not be pressured or induced by the press of circumstances.

2. Attorney fees

(i) Fees must be reasonable

Idaho Rule of Professional Conduct 1.5(a) requires that a lawyer's fee be reasonable. The rule includes a list of seven factors to consider in determining the reasonableness of a fee. None of them relate specially to water litigation or to the SRBA.

The fact of the matter, however, is that many of the claimants in the SRBA will find themselves in court for the first time, having had little experience with lawyers or their fees. Unlike Colorado, where all water transactions are conducted in water court, Idaho has a long tradition of a user-friendly administrative system which ordinarily requires little if any professional advocacy. The SRBA has provided a rude awakening for many farmers used to doing business in water with virtually zero transaction costs.

The key here is to focus on Rule 1.5(b) which provides:

When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

In short, avoid surprises. If your client is going to be startled at the cost of legal representation, that should be addressed at the outset. Both attorney and client will be better off.

Likewise, billing should be detailed and comprehensible. I.R.P.C.1.5(f). A client is less likely

to complain about a bill that he or she can understand.

(ii) Contingent fees

Historically, contingent fees were viewed as inherently unethical. In modern times, however, contingent fees have come to be viewed as appropriate funding mechanisms for civil cases not involving domestic relations. The matter is now governed by I.R.P.C. 1.5(c).

Ordinarily, contingent fees are charged only where the litigation will produce a judgment in the form of money damages from which to pay the fee. The classic example is a tort case. However, the rule is not so limited. Thus, in theory, a water lawyer could charge a fee which differed depending upon whether the client was decreed a particular water right. For a variety of practical reasons, this is not a common practice.

3. Acquiring a piece of the action

(i) Introduction

From time to time, lawyers are offered a share of a client's business venture in lieu of payment for a fee. This practice has accelerated dramatically in the last few years, with the emergence of the "dot.com" phenomenon. Indeed, in some circumstances, lawyers are insisting on receiving a share of the action.

Although nothing in the rules of ethics prohibits this practice (so long as fairness standards are met), some within the legal community have contended that such transactions are inherently suspect.⁵⁹⁸

This memorandum concludes that the practice is ethical, so long as appropriate caution is exercised.

(ii) The issue is governed primarily by two parts of Rule 1.8.

Idaho Rules of Professional Conduct 1.8 ("Rule 1.8") is entitled "Conflict of Interest: Prohibited Transactions." The two key provisions read as follows:

⁵⁹⁸ "There has been some lingering doubt, however, regarding whether this practice is ethical." Editorial, *Legal Fees: Take Stock of Your Options*, New Jersey Lawyer: The Weekly Paper (July 24, 2000).

For instance, I attended a video CLE on malpractice on October 10, 1992 (Home Group's video entitled *An Attorney's Approach to Avoid Malpractice* by Stein-McMurray) which directly contradicts the conclusions reached in this memorandum. The video included a staged interaction between an attorney and a potential client in which the client offered to compensate the attorney with an interest in the business venture in which he sought legal advice. The conclusion of the video was that the attorney must decline such an offer because it constitutes a "questionable practice" under the Model Rules and is "an inherent conflict" because the attorney's judgment will be clouded by his financial involvement.

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to the client unless:
 - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can reasonably be understood by the client;
 - (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
 - (3) the client consents in writing thereto.
- ...
- (j) A lawyer shall not acquire a proprietary interest in a cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
 - (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
 - (2) contract with a client for a reasonable contingent fee in a civil case.

Rules 1.8(a) and (j).⁵⁹⁹

Other applicable rules are:

Rule 1.5, requiring that fees be reasonable,

Rule 1.7(b), requiring the lawyer to avoid representation where the lawyer's ability to perform will be limited by responsibilities to others or himself, and

⁵⁹⁹ The predecessor to Rule 1.8(a) in Idaho is Idaho Disciplinary Rule 5-104. The predecessor to Rule 1.8(j) in Idaho is Idaho Disciplinary Rule 5-103(A). See *In Re May*, 96 Idaho 858, 538 P.2d 787 (1975), one of the few Idaho cases to discuss these rules.

Rule 2.1, requiring the exercise of independent professional judgment in advising a client.

(iii) Rule 1.8(a) authorizes business transactions with clients, so long as specific and rigorous fairness rules are followed.

Rule 1.8(a), which governs business transactions between lawyer and client, is directly applicable to this arrangement. The rule generally discourages business transactions with the client, but permits them where the terms are fair and reasonable, fully disclosed, and transmitted in writing in a manner understandable to the client, and where the client has access to independent counsel and gives his consent in writing.

There is really no room for debate here over the basic principle: The practice is permissible, so long as the fairly rigorous standards are met. The concern (and the potential for litigation) is over whether the lawyer has satisfied each of the criteria.

In 2000, the Standing Committee on Ethics and Professional Responsibility of the American Bar Association issued Formal Opinion 00-418 (July 7, 2000) on this subject. The opinion confirms the conclusions reached above regarding Rule 1.8(a). The ABA opinion has not been adopted or endorsed in Idaho. Nonetheless, it should carry some weight, particularly since there is no contrary authority.

(iv) Rule 1.8(j) does not apply in a non-litigation context.

Rule 1.8(j) prohibits a lawyer from acquiring an interest in a “cause of action” or the “subject matter” of a client’s litigation, unless an exception applies.⁶⁰⁰

This odd rule is a holdover from the rules against maintenance, champerty and barratry.⁶⁰¹

⁶⁰⁰ In practice, the two exceptions virtually swallow the rule. First, a lawyer may accept a lawful contingent fee. Second, a lawyer may acquire a lien to secure her fee or expenses. Consequently, Rule 1.8(j) applies very narrowly in the following contexts: (1) where a contingent fee is impermissible, such as a domestic or criminal case, (2) it is not a proper lien, or (3) the lawyer is engaged in the outright purchase of a cause of action. The one reported Idaho case involving a direct violation of the rule is *In Re May*, 96 Idaho 858, 538 P.2d 787 (1975). It dealt with an attorney who accepted an interest in a client’s property which was subject to a divorce proceeding (thus ineligible for a contingent fee).

⁶⁰¹ Maintenance is the impermissible financial assistance of a lawsuit. Champerty is a specialized form of maintenance in which the person providing the assistance obtains an interest in the recovery. Barratry is simply “adjudicatory cheerleading” in which persons are urged to quarrels and lawsuits. C.W. Wolfram, *Modern Legal Ethics* § 8.13 at 489-90 (West 1986). “Not so long ago, a considerable area of the law of legal ethics was given over to the mysteries of the Macbethian witches of the common law who stirred the cauldron of despised litigation—maintenance, champerty, and barratry.” Wolfram at 489. “Despite the general demise of the champerty-type prohibitions, decisions and rules still variously prohibit a lawyer’s purchase of causes of action on which a lawyer intends to file suit or a client’s interest in property that is the subject of litigation.” Wolfram at 491.

Fortunately, it is not necessary to dwell on the rule's arcane history and purpose,⁶⁰² due to its limited applicability.

By its own terms, Rule 1.8(j) applies only in a litigation context. Thus, a lawyer may accept an interest in the client's venture where his or her role is to assist in creating or advancing the venture through legal counseling.

This is confirmed by Timothy J. Dacey, III, *Fee Agreements* (in ETHICAL LAWYERING IN MASSACHUSETTS), Massachusetts Continuing Legal Education, Inc. (2000). "Rule 1.8(j) applies only to litigation. Thus, a lawyer may obtain an interest in the subject matter of a business transaction that he or she is conducting for a client, such as a stock issue or real estate development, provided that the attorney complies fully with Rule 1.8(a) concerning business transactions with clients." Dacey, § 5.7.

But what if the business later becomes involved in litigation requiring the lawyer's services? Or what if, from the outset, litigation was anticipated and was one of the lawyer's responsibilities? In my view, Rule 1.8(j) should not be implicated, even under these circumstances.⁶⁰³ As one scholar has noted, "Normally, those prohibitions are narrowly confined by a doctrine of 'primary purpose,' which permits lawyers and others to purchase causes of action if the primary purpose is investment or even speculation, so long as the purpose of suing is 'incidental.'" Wolfram at 491 n.56. In other words, so long as the lawyer's purpose in acquiring the interest in the business venture is not to "stir up litigation," it should not come within the purview of Rule 1.8(j), even if the venture is then or later the subject of litigation.

The sharply limited scope of Rule 1.8(j) is confirmed by the ABA's Formal Opinion mentioned above. The opinion focuses primarily on the applicability of Rule 1.8(a). It finds only one narrow circumstance in which Rule 1.8(j) might be applicable:

In our view, when the corporation has as its only substantial asset a claim or property right (such as a license), title to which is contested in a pending or impending lawsuit in which the lawyer represents the corporation, Rule 1.8(j) might be applicable to the acquisition of the corporation's stock in connection with the provision of legal services. If the acquisition of the stock constitutes a reasonable

⁶⁰² The rule was not a part of the draft model rules, but was inserted by floor amendment at the 1983 ABA meeting. Wolfram at 491. It is virtually identical to the older ABA Code provision: "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client . . ." DR 5-103(A). The code's predecessor, in turn, is Canon 10 of the ABA Canons of Professional Ethics adopted in 1908: "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

⁶⁰³ On the other hand, the fact that the business venture might someday lead to litigation (which, in turn might call for the lawyer's services), is an issue which should be taken into account under Rule 1.8(a) and the more generic Rule 1.7(b).

contingent fee, however, Rule 1.8(j) would not prohibit acquisition of the stock.

ABA Formal Opinion 00-418 at 9 (July 7, 2000).

(v) Although these transactions are permissible, caution is advised.

Although there is no direct authority in Idaho, all available authorities, and the plain language of the applicable rules, point to the conclusion that there is no ethical bar to acceptance of a business interest from a client in lieu of a fee.

It is appropriate to note that such transactions, though not inherently wrong, are inherently dangerous. For instance, if a lawyer becomes a significant owner of a client's company, the lawyer may lose her independence, and experience the same temptation as the client to cut legal corners. Likewise, a lawyer's demand for a percentage interest in a transaction raises questions about excessive fees under Rule 1.5(a). There are a host of other potential problems, which are discussed in an emerging literature on the subject.

In the end, I believe that these problems are all manageable. However, they will require considerable and ongoing ethical vigilance on the part of the firm, should it chose to accept such business interests.

4. Ex parte contacts in water right matters

Attorneys operating in an adversarial context should be cautious about any private, that is, *ex parte*, communication with the decision-maker. "'Ex parte' refers to a communication by one party to the Court without the knowledge of the other parties."⁶⁰⁴

Ex parte communications are generally understood to apply on to substantive communications and do not include, for instance, purely procedural inquiries. However, the conversation must not stray into any issue which has a bearing on the merits of the case.

The concern over *ex parte* communications has its roots in the state and federal constitutional promises of due process.⁶⁰⁵ However, they are also governed by various rules, statutes and cases discussed below.

⁶⁰⁴ *Hellar v. Cenarrusa*, 106 Idaho 568, 616, 682 P.2d 539, 569 (1984) (J. Huntley, responding to dissent).

⁶⁰⁵ "The right to procedural due process is secured by Article 1, Section 13, of the Idaho Constitution and by the Fourteenth Amendment to the United States Constitution." *Gay v. County Comm'rs of Bonneville County*, 103 Idaho 626, 628, 651 P.2d 560, 562 (Ct. App. 1982), *see also*, *Angstman v. City of Boise*, 128 Idaho 575 (App. 1996) (regarding the due process foundation of *ex parte* rules in a quasi-judicial context)..

The rules governing *ex parte* contacts change depending upon the type of proceeding. The varying rules in five such contexts are explored below.

(i) *Ex parte* contacts in the legislative arena

Ex parte rules do not apply at all in legislative branch.⁶⁰⁶ Indeed, elected representatives are expected and encouraged to communicate directly with their constituents and all others who may have relevant information about pending legislation. Thus, it is entirely permissible for a water lawyer to discuss a client's interest in pending legislation in private conversations with legislators.

The same goes for legislative acts at the local level. This includes, for instance, the adoption of ordinances by county or municipal authorities.

In the zoning context, our Supreme Court has also determined that the adoption of comprehensive plans and general zoning regulations constitutes "legislative" action, while the application of those ordinances to specific properties constitutes "quasi-judicial" action.⁶⁰⁷ *Ex parte* contacts in a quasi-judicial setting are discussed in Part Z.4(iv) below.

(ii) *Ex parte* contacts in a the judicial context

At the other extreme, *ex parte* contacts are strictly forbidden in a judicial (*i.e.*, litigation) setting, except for very specific exceptions. "A lawyer shall not ... communicate *ex parte* with such a person [a judge, juror, prospective juror or other official] except as permitted by law"⁶⁰⁸

In those rare circumstances (basically, emergencies) where *ex parte* communications are allowed, the lawyer is required to take off his or her adversarial hat, and tell both sides of the story to the judge.⁶⁰⁹

In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

⁶⁰⁶ *Bi-Metallic Investment Co. v. Bd. of Equalization*, 239 U.S. 441 (1915).

⁶⁰⁷ *Cooper v. Bd. of County Comm'rs of Ada County*, 101 Idaho 407, 409-10, 614 P.2d 947, 949-50 (1980); *see also* *Gay v. County Comm'rs of Bonneville County*, 103 Idaho 626, 628, 651 P.2d 560, 562 (Ct. App. 1982); Daniel R. Mandelker, *Quasi-Judicial vs. Legislative: What Does It Mean?*, SB06 ALI-ABA 749 (1996).

⁶⁰⁸ I.R.P.C. 3.5(b).

⁶⁰⁹ I.R.P.C. 3.3(d).

Similarly, judges are prohibited from initiating any *ex parte* communication concerning a pending proceeding, except as administrative responsibilities dictate.⁶¹⁰

(iii) *Ex parte* contacts in a contested case

Ex parte communications with the hearing officer are similarly barred in formal adjudicatory hearings before state agencies.⁶¹¹ IDWR's rules for contested cases address the matter with greater particularity.⁶¹²

Unless required for the disposition of a matter specifically authorized by statute to be done *ex parte*, a presiding officer serving in a contested case shall not communicate, directly or indirectly, regarding any substantive issue in the contested case with any party, except upon notice and opportunity for all parties to participate in the communication. The presiding officer may communicate *ex parte* with a party concerning procedural matters (e.g., scheduling). *Ex parte* communication from members of the general public not associated with any party are not required to be reported by this rule. However, when a presiding officer becomes aware of a written *ex parte* communication regarding any substantive issue from a party or representative of a party during a contested case, the presiding officer shall place a copy of the communication in the file for the case and order the party providing the written communication to serve a copy of the written communication upon all parties of record. Repeated violations of this rule shall be cause for the presiding officer to dismiss an action or to dismiss a party from an action. Written communications from a party showing service upon all other parties are not *ex parte* communications.

Note in particular the provision for dismissing an action or a party for violations of these rules.

(iv) *Ex parte* contacts in a "quasi-judicial" proceeding

⁶¹⁰ Idaho Code of Judicial Conduct, Canon 3.A.4.

⁶¹¹ Idaho Code § 67-5253. This section was formerly codified to section 67-5213. Consequently, many cases use the old citation.

⁶¹² IDAPA 37.01.01.417.

(a) Quasi-judicial decisions are in the middle between legislative and judicial decisions

As explained above, the rules are black and white at the two extremes (no restrictions in legislative settings versus strictly prohibited in judicial settings). However, local governments, particularly planning and zoning boards, sometimes operate in the middle. Their decisions are partly legislative and partly judicial in nature. This is referred to as “quasi-judicial” decision-making.

As noted in Part Z.4(i) above, when a planning and zoning board acts broadly (e.g., adoption of a zoning ordinance), it is acting legislatively. In such cases, *ex parte* communications are not prohibited. But where it acts on an individual application (e.g., on a variance or special use permit), the courts have ruled these actions to be quasi-judicial in nature. Thus, the same body may wear different hats at different times.

Although planning and zoning commissions do not administer water rights, water rights may be brought into issue. For example, conditions affecting water rights may be included in zoning approvals. Consequently, a water lawyer should be aware of the rules governing this quasi-judicial middle ground. In short, *ex parte* contacts are allowed, at least to some extent, but the rules are fuzzier.

The “organic” statute governing land use in Idaho, LLUPA,⁶¹³ says nothing, one way or the other, about *ex parte* contacts. Likewise, the caselaw, while laying the foundation for the current law, did not squarely address *ex parte* contacts rule until very recently.

(b) Prior to 2000, Idaho law did not address the issue of how to handle *ex parte* contacts in quasi-judicial proceedings.

A series of due process cases set the stage.⁶¹⁴ They established that due process requires that the parties be afforded a fair opportunity to build the record that will form the basis of the decision. None of these cases offer any direct guidance on how *ex parte* contacts in quasi-judicial proceedings should be handled.

However, their strong language about the importance of confining the decision to the record, might be understood as an absolute prohibition against *ex parte* contacts. On the other hand, it may be argued that so long as the *ex parte* contacts occur prior to the hearing, and are fully disclosed and made a part of the record, no problem arises. Until 2000, Idaho courts had never grappled with that

⁶¹³ Local Land Use Planning Act (“LLUPA”), Idaho Code §§ 67-6501 to 67-6537.

⁶¹⁴ *Cooper v. Bd. of County Comm’rs of Ada County*, 101 Idaho 407, 614 P.2d 947 (1980); *Van Orden v. State*, 102 Idaho 663, 665, 637 P.2d 1159, 1161 (1981); *Gay v. County Comm’rs of Bonneville County*, 103 Idaho 626, 651 P.2d 560 (Ct. App. 1982); *Chambers v. Kootenai County Bd. of Comm’rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994); *Comer v. County of Twin Falls*, 130 Idaho 433, 942 P.2d 557 (1997); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 928, 950 P.2d 1262, 1267 (1998)

question.

- (c) **The Supreme Court appears to have settled the question in the *IHPC* case, declaring that *ex parte* contacts are permissible if fully disclosed.**

The question was addressed in *Idaho Historic Preservation Council, Inc. v. City Council of Boise* ("*IHPC*"), 134 Idaho 651, 8 P.3d 646 (2000), the first and only appellate decision in Idaho to deal squarely set out the rules governing *ex parte* contacts in a local, quasi-judicial proceeding. The *IHPC* case involved a challenge to a decision by the City of Boise authorizing the demolition of the Foster Warehouse Building.⁶¹⁵ At the outset of the hearing by the city council, certain council members disclosed that they have received phone calls from concerned citizens who expressed views on the issue. While disclosing the existence of the calls, the council members failed to disclose who the calls were from or what arguments or facts were asserted.

The Supreme Court held that mere disclosure of the existence of such calls fell short of due process requirements.

The Court's reasoning was a bit unclear.⁶¹⁶ It went on, however, to expressly state that *ex parte* contacts are not prohibited *per se*, so long as meaningful disclosure is made.⁶¹⁷

This decision does not hold the City Council to a standard of judicial disinterestedness. As explained above, members of the City Council are free to take phone calls from concerned citizens and listen to their opinions and arguments prior to a quasi-judicial proceeding. In order to satisfy due process, however, the identity of the callers must be disclosed, as well as a general description of what each caller said."

This decision is the first and last word on the subject from our Supreme Court. The bottom line is that *ex parte* contacts which are properly put in the record (with identity and subject matter reasonably described) do not constitute a violation of due process in the context of a quasi-judicial proceeding.

⁶¹⁵ The city was acting in its appellate capacity over the *IHPC*, an entity charged under the Idaho Preservation of Historic Sites Act, Idaho Code §§ 67-4601 to 76-4619, with deciding whether historic buildings may be demolished. The decision is directly applicable here, because the proceeding was made by a local agency acting in a quasi-judicial function. Indeed, the Court relied exclusively on its prior zoning cases in reaching its decision.

⁶¹⁶ It discussed at some length three Oregon cases that applied a more relaxed standard with respect to *ex parte* contacts. The Court then found it unnecessary to say whether it was fully embracing them, or not: "Even if this Court were persuaded that Tierney and Neuberger express the better rule, the requirements of procedural due process ... were not met." *IHPC*, 134 Idaho at 655, 8 P.3d at 650.

⁶¹⁷ *IHPC*, 134 Idaho at 656, 8 P.3d at 651.

One could argue that *IHPC* should be limited to its facts. (For example, *IHPC* was an historic preservation case, not a zoning case.) But there is nothing in the decision, or in the consistent line of due process cases upon which it is built, which suggests any basis for doing so.

(v) ***Ex parte* contacts in the application process**

Ex parte contacts with agency staff are not prohibited at the water right application stage. In fact, attorneys typically make inquiries of staff (including potential decision makers) in the course of developing a water right application. Once an application is protested, however, the rules governing contested cases kick in. From that point forward, no further communications with any potential agency decision-maker should occur on an *ex parte* basis.

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APPENDIX 1: Units of Measure and Glossary

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

GLOSSARY	
Term	Explanation
Abandonment	This is a common law principle in most Western water law systems (but happens to be statutory in Idaho) whereby a person who stops using his or her water right with the intent to abandon it loses that right permanently. It is different from statutory forfeiture provisions in that intent to abandon must be shown, and no specific period of non-use is required. Abandonment is rarely found.
Adjudication	This refers to a judicial determination of the existence and scope of a water right. See general adjudication.

Term	Explanation
Application	Most Western state water rights systems (Colorado is an exception) require a person seeking a water right to file an application with the state engineer or other officer of the state. The state water authority (in Idaho, the Department of Water Resources) will then conduct studies and hold hearings where opponents may protest the application.
Appropriative right	This is a right to use water recognized in the Western system. It may be contrasted with riparian water rights recognized in the Eastern states.
Aquifer	This is an underground formation of rock, gravel or sand which stores water.
Aquifer storage and recovery ("ASR")	ASR refers to the process of intentionally placing water into an aquifer for purposes of storage so that it may be recovered and used later. The stored water may be either surface water or water from a different aquifer. Such projects may be undertaken on a private basis, in which case a private party stores water, retains ownership in it, and recovers it for its own benefit. Aquifer storage also may be undertaken by an irrigation district or other governmental entity for the benefit of water diverters generally. The authors employ the term "public benefit aquifer recharge" or "PBAR" to describe these projects, though others use the term ASR interchangeably for private and public efforts.
Augmentation plan	This concept first developed under Colorado water law and is now spreading to other states. The idea is that if a new user wishes to take more water from a stream where not enough is left to meet his or her needs as well as those of senior users, the new user may obtain a water right only if he or she submits an acceptable plan to "augment" the stream with a new supply of water. In a typical case, a group of junior tributary ground water pumpers who would otherwise face shutdown by senior direct flow users, might pool their resources in a joint augmentation plan to construct a new reservoir. The augmentation reservoir would satisfy the needs of senior users and enable junior ground water pumping to continue.
Beneficial use	This term refers to a set of uses of water which are deemed by law to provide legitimate bases for a water right. Historically, the only beneficial uses recognized were agricultural, industrial, domestic, and municipal. Many Western states, including Idaho, now recognize fish, wildlife, recreation and aesthetics as beneficial uses.
Board	The Idaho Water Resource Board.
Call	When the holder of a senior water right experiences a shortfall in water he or she is entitled to divert, that person may place a call on the river. This means that the state will force junior holders upstream to stop diverting in order to allow more water to reach the senior holder.

Term	Explanation
Carrey Act company	A canal or ditch company is referred to as a "Carey Act company" if it was created pursuant to the Carey Act, Federal Desert Lands Act (a/k/a the Carey Act), ch. 301 § 4, 28 Stat. 422 (codified at 43 U.S.C. § 641). This is a federal law which provides for the transfer of federal lands to private ownership in order to assist states in developing arid lands. The Carey Act predated federal reclamation statutes, and does not provide for any federal involvement in the project, other than conveyance of lands.
Carriage water	A certain volume of water is required to keep it moving through ditches. That amount which is kept in the ditch solely for purposes of transporting other water to the crops is referred to as "carriage water."
Certificated area	The "certificated area" of a municipal water supplier regulated by the PUC is that area which it is authorized and required to serve. Unlike the more loosely defined "service area" under the Municipal Water Rights Act, the certificated area is precisely defined, and must be amended (with the approval of the PUC) to bring in each new area.
Change / Transfer	The terms "change" and "transfer" are often used interchangeably to describe a change in point of diversion, period of use, nature of use, and/or place of use. The terms can also be used to describe the conveyance of title to a water right - that is, a change or transfer in <u>ownership</u> .
Common law	The "common law" refers to the body of law based on custom, court decisions, and precedent, rather than statutes enacted by the Legislature. Eastern riparian law is based on common law. The West's prior appropriation doctrine is based on a combination of common law and statute which varies from state to state. The common law of England, as it existed in 1864, was adopted by the Idaho Legislature. Idaho Code § 73-116. This is known as the "reception."
Compact	A compact is a voluntary agreement adopted by two or more states and approved by the U.S. Congress; in the context of water resources, it allocates water flowing by or through those states. Compacts typically guarantee to more slowly developing states in the headwaters a future right to a fraction of the water when it is needed. By reserving water to future uses, compacts refute the oft-cited argument that up river states must "use it or lose it."
Consumptive use	The amount of a diversion that actually is consumed during its application to beneficial use and is removed from the stream system. See "evapotranspiration."
DCMI	This acronym stands for "domestic, commercial, municipal and industrial" water. IDAPA 37.03.08.010.08.
Decree	A court decision confirming water rights.
Director	The Director of the Idaho Department of Water Resources.

Term	Explanation
Ditch company	A ditch company or canal is a private company which builds and operates a system which delivers irrigation water to farmers. There are various types of ditch companies: unincorporated ditches (in which a group of farmers own a ditch as co-tenants), carrier ditches (run as a for-profit business), and mutual ditches (non-profit carriers in which the shareholders are the recipients of the water).
Diversion	A diversion is a physical structure which removes water from a stream or controls its flow within a stream.
Doctrine	A "doctrine" is a rule, tenet or principle of law developed by the courts. Examples are the reserved rights doctrine and the public trust doctrine.
Duty of water	This is the amount of water customarily required to accomplish the purposes of the water right. One's water right is limited to this duty of water. For example, if people in an area ordinarily use three acre-feet of water per acre per year to irrigate corn, that amount will be declared to be the water duty, and, without specific proof no agricultural water user will be permitted to take more than that amount. The rather odd phrase "duty of water" is understood more easily in the context of the following quotation from an early Idaho case: "It is a cardinal principle established by law and the adjudications of this court that the highest and greatest duty of water be required. The law allows the appropriator only the amount actually necessary for the useful or beneficial purpose to which he applies it." <i>Munn v. Twin Falls Canal Co.</i> , 43 Idaho 198, 207, 252 P. 865 (1926).
Endangered Species Act ("ESA")	Section 7 of this federal statute, 16 U.S.C. § 1536, requires that the government take no action which may jeopardize the continued existence of any endangered or threatened species or adversely modify its critical habitat. Where the federal government is involved in a water project (either by building it or issuing a section 404 permit), the endangered species act may prohibit the government from proceeding if the loss of water will be harmful to such species. Some states have their own endangered species acts under state law, as well.
Equitable apportionment	When the Supreme Court is called upon to resolve disputes between states as to water, it employs a doctrine called equitable apportionment whereby it weighs the various equities favoring each state before issuing its decree.
Evapotranspiration	This refers to the combined effect of losing water to the air by evaporation and transpiration of plants. Such water is consumptively used in the process of irrigation and will not be returned to the stream as return flow.
Federal Energy Regulatory Commission ("FERC")	The Federal Energy Regulatory Commission, which issues permits and licenses in connection with non-federal hydropower development.
Federal Power Commission ("FPC")	Federal Power Commission, the predecessor to FERC.
Foreign water	Water which is conveyed into a new watershed is termed foreign water. This water is treated differently under the water law of most Western states in that an importer of foreign water is not required to allow the return flow to return to the stream, but may develop it for new uses.

Term	Explanation
Forfeiture	This is a statutory provision, Idaho Code § 42-222(2), whereby non-use of a water right for a five year period, regardless of intent, results in loss of the water right. <i>Dovel v. Dobson</i> , 122 Idaho 59, 831 P.2d 527 (1992).
Futile call	Where shutting down upstream users juniors would not result in more water reaching downstream seniors in time to satisfy their needs, the call is said to be futile, and it will not be enforced. This is the only instance in which a junior can receive water while a senior goes dry.
Future needs	The term "future needs" is sometimes employed in the context of municipal water rights to describe the water rights that make up the "Planning Horizon Component." This term is misleading because the Municipal Water Rights Act of 1996 expressly declares these rights to constitute beneficial use of water rights today.
Gaining or losing stream	Most streams are either feeding or being fed by ground water, depending on whether they are above or below the water table. A gaining stream will increase its flow as the river moves downstream even in the absence of rainfall or tributaries because it is being fed by ground water. Likewise, a losing stream will lose water to the ground as it moves downstream.
General adjudication	This is a special type of adjudication involving not just the relative rights of particular users who chose to litigate but of every person claiming a water right in a particular river or stream. Essentially, the state says, "Everyone who claims a water right—whether it has been determined before or not—must come into court and prove up that right." Anyone failing to do so, will suffer the loss of his or her water right (or, at least, loss of priority). General adjudications may involve hundred of litigants and take years to resolve. The Snake River Basin Adjudication in Idaho is an example. (See discussion under McCarran Amendment in this Glossary.)
Ground water	This is water in aquifers beneath the earth's surface. In Idaho, ground water is subject to the prior appropriation doctrine. Idaho has begun to recognize that ground water is hydrologically connected with surface water.
Ground water mining	This refers to the practice of taking ground water out of an aquifer at a rate faster than it is being replenished by all sources of recharge.
Growing communities doctrine	This is the common law doctrine which recognizes that water rights held by municipal providers for reasonably anticipated needs satisfy the requirement of <u>current</u> beneficial use under Idaho Water Law.
Headgates	These are the control devices at the head of an irrigation system. Turning off the headgates means that no irrigation water will be delivered.
Idaho Department of Water Resources ("IDWR" or the "Department")	This is the Idaho state agency which administers water rights.

Term	Explanation
Injury	It is possible that a change in use or point of diversion by one water user might result in diminished supplies of water to another. This result is called injury. The "no-injury" rule requires that proposed changes be denied where they will result in injury to any other water right holder—junior or senior.
Instream flow	This refers simply to water which is left in the stream to satisfy fish, wildlife, recreation, watershed management, and other purposes. Water rights for instream flows have begun to be recognized under various Western states' approaches to water law.
License	In Idaho, a license is issued to the holder of a water right permit once the project has been completed and water has been applied to beneficial use. (FERC also issues licenses in connection with hydropower projects.)
Local public interest	The Idaho Water Code requires the consideration of the "local public interest" in all water rights applications and water right transfers.
MAF	Million acre-feet
McCarran Amendment	The McCarran Amendment, 43 U.S.C. § 666, is a federal law which waives sovereign immunity and allows the federal government to be brought into state court where general adjudications of water rights are underway. The SRBA is one of these. If the federal government fails to assert water rights, including reserved rights, in the course of such a proceeding, such rights are lost.
Municipal Water Rights Act of 1996 ("1996 Act")	This is the legislative codification of the growing communities doctrine, which is the foundation of this CAP. The full citation is Municipal Water Rights Act of 1996, 1996 Idaho Sess. Laws, ch. 297 (codified at Idaho Code §§ 42-202, 42-202B, 42-217, 42-219, 42-222).
Natural flow right	The term "natural flow right" is used, particularly in the context of the water supply bank, to contrast with the term "storage right." It means any water right based the natural availability of water, as opposed to storage of water. This includes water derived from streams and springs as well as ground water. IDAPA 37.02.03.010.07.
Non-potable irrigation ("NPI")	This phrase refers to "non-potable irrigation" systems which deliver <i>untreated</i> water for lawn and park irrigation from a non-municipal source, such as an irrigation district. These are sometimes referred to a "pressurized irrigation facilities" or PIF. The term "PIF" is confusing, however, in that most domestic irrigation systems are pressurized, regardless of whether they obtain their water from municipal or untreated non-municipal sources. Consequently, we have employed the term "non-potable irrigation" to describe the systems providing untreated water from non-municipal sources—irrespective of whether it is provided in a pressurized or un-pressurized system.
Permit	This is a document, issued by the Idaho Department of Water Resources, which indicates that a user has satisfied all the requirements of state law to obtain a water right. (E.g., water is available, the public interest is satisfied, etc.) The permit secures the holder's priority as of that date, but typically requires completion of the project within five years.

Term	Explanation
Phreatophytes	These are plants and trees whose roots reach below the water table and which consume a large amount of water through evapotranspiration. Removal of such vegetation along a river may significantly increase streamflow. Cottonwoods are an example.
Planning horizon component ("PHC")	This refers to the portion of a water right (or of a portfolio of water rights) which is held to meet reasonably anticipated needs within an approved planning horizon, as provided in the Municipal Water Rights Act. Idaho Code §§ 42-202B(5) and (6).
Planning area	A municipal provider's "planning area" is essentially its best guess as to what its service area will actually be at the end of its planning horizon. The planning area serves as the geographic basis for demand projections which, in turn, support a municipal provider's "planning horizon component" water rights.
Preemption	Laws of the federal government may preempt (or override) laws of the states where Congress so chooses. For example, federal reserved water rights preempt inconsistent state water law. Congress always has the power to preempt state law. The dispute usually revolves around whether Congress in taking a particular action intended to preempt state law.
Priority date	This is the date attached to all water rights in the Western system indicating when the water right was first obtained. The priority date determines how senior the water right is. The more senior the priority date, the more valuable the water right, because it is less likely to be called out in time of shortage.
Public Benefit Aquifer Recharge	The authors employ the term "public benefit aquifer recharge" or "PBAR" to describe projects undertaken by an irrigation district or other governmental entity for the benefit of water diverters generally. In these projects, ownership of the water is not retained by the recharger. Instead, the recharged water works generally to the benefit of all water right holders in the aquifer. The authors employ the term "aquifer storage and recovery" or "ASR" to describe similar projects undertaken by private parties. In ASR projects, a private party stores water, retains ownership in it, and recovers it for its own benefit. Others use the term ASR to describe both public and private recharge operations.
Public interest	See "Local public interest."
Public trust doctrine	This doctrine refers to the responsibility of the state to hold certain valuable property rights in trust for the benefit of the citizens of the state. In 1996 the Idaho Legislature expressly declared that the public trust doctrine does <u>not</u> apply to water rights.
Public Utilities Commission ("PUC")	The PUC has regulatory authority over UWID and all other private suppliers of water and power.
Quantification	This refers to the process of determining the exact size of a water right, and can include—usually in an adjudication—an evaluation of the extent to which the right actually has been put to beneficial use. Most federal reserved water rights, are unquantified.

Term	Explanation
Reserved water rights	These are water rights deemed by the courts to have been reserved to the federal government in conjunction with the reservation of land, even where Congress said nothing explicitly about water. Thus National Forests, National Monuments, and other federal reservations carry with them implicit rights to such water as is necessary to fulfil their primary purposes.
Return flow	"Return flow" is the component of water diverted for a beneficial use which is not consumed and which eventually returns to the stream or aquifer. It includes, for example, seepage water from leaky canals, tail water from irrigation systems, and the water which percolates down from irrigated fields. Once this water reaches the stream or aquifer, it supports (or becomes a part of) all appropriations therein. Ordinarily, one may not reduce or interfere with return flows, without injuring other water users. There are certain circumstances, however, where persons are allowed to do so, e.g., recapture of waste water and foreign water. Note that the definitions of return flow, waste water, seepage, tail water are not always consistently applied in cases and articles. A good rule is not to get too hung up on precise definitions, but focus instead on the meaning of the term within the context of the water law.
Riparian	The term "riparian" refers to land which adjoins a water body. The term also applies to the body of water law prevailing in the Eastern United States which premises the existence of water rights on the ownership of riparian land.
Salvaged water	This is water which is saved through water conservation practices or other techniques. Many Western states do not recognize water rights in salvaged water (without loss of priority date) and consequently provide no incentive to conserve. Most questions about salvaged water remain open in Idaho
Second-foot	This is a measure of flow equal to a cubic foot of water per second of water, or 448.8 gallons per minute. The labels "cfs" and "second-feet" are equivalent.
Section 404	Section 404 of the federal Clean Water Act, 33 U.S.C. § 1344, requires persons or agencies who wish to deposit dredged or fill material into rivers and wetlands to obtain a permit from the U.S. Army Corps of Engineers. Where issuance of the permit is not in the public interest (for example, if it would harm endangered species), the permit must be denied and the project cannot be built.
Seepage water	See discussion under "return flow" and "waste water."
Service area	The term "service area" is a term of art under the Municipal Water Rights Act. It refers to the evolving geographic area served by a particular municipal provider. Unlike other water users, municipal providers do not have fixed and precise places of use, but broadly defined service areas which grow and evolve over time. The term "service area" should not be confused with "planning area" or "certificated area" (see those definitions).
Snake River Basin Adjudication ("SRBA")	The Snake River Basin Adjudication, a general adjudication of water rights now underway in Idaho. Roughly two thirds of the state falls within this basin. (See discussion in Chapter U at page 146.)

Term	Explanation
Special district	Idaho has created special units of government with the authority to issue bonds, levy taxes, and use the money to build water projects. These include Drainage Districts, Groundwater Recharge Districts, and Flood Control Districts.
Special master	A special master is an expert appointed by a court to take evidence. When states bring suits in the Supreme Court seeking an equitable apportionment of interstate streams, the Court will appoint a special master to hear the evidence, summarize it, and recommend a ruling to the Court. Sometimes special masters are used in general stream adjudications.
Stored water	This term refers to any water derived from the storage of water in a reservoir. In some contexts, the term is limited to water from surface reservoirs. E.g., IDAPA 37.02.03.010.10 (water supply bank rules). In other contexts, the term probably ought to include water stored in underground aquifers pursuant to an ASR program.
Subordination	This refers to an agreement between water users that allows one user to step ahead of another's priority. Thus, if a senior user agreed (as part of a contract, settlement, or whatever) to subordinate his rights to a junior user, the senior would no longer have the right to call out that particular junior. Because subordinations are effective only between the parties entering into them, another senior would still be able to call out the junior. The Swan Falls settlement was built around a broad subordination program.
Surface water	This refers to that water which is found in rivers, lakes, streams, and wetlands. It is distinguished from ground water.
TAF	Thousand acre-feet.
Tail water	See discussion under "return flow."
Tributary	To the layperson, this is a noun describing a smaller stream or river which flows into a larger one. It is also used as an adjective to describe ground water which is similarly connected to a stream. In short, if there is a hydrological connection between ground water and a surface stream, the ground water is said to be "tributary" to the stream, and—at least theoretically—should be administered in priority just as if the user were diverting from the stream.
Trust water	This term is often used to refer to water subordinated to certain upstream uses as a result of the Swan Falls settlement. The term is confusing and misleading because it implies the existence of a separate, unappropriated block of water which is available to satisfy new uses. Indeed, it is often described as such. However, no such block of unappropriated water exists. Instead, the Swan Falls settlement resulted in the subordination of certain water rights of Idaho Power Company to users able to meet fixed criteria.
Unappropriated water	This is water flowing in a stream which has not been appropriated or claimed by any person.
Usufructuary right	This is a right to use something, such as water, despite the fact that one does not own the thing itself. All water rights are deemed usufructuary because no one (except the people of the State) owns the actual molecules of water, but only the right to use the water for a time before it is returned to the system.

Term	Explanation
Waste water	"Waste water" refers to water which is diverted for beneficial use, but is not consumed, and is released in a way whereby it may be physically captured before it reaches a natural aquifer or stream. This term includes the tail water left at the end of an irrigated field, the seepage water which leaks out of canals, the excess water applied to crops which percolates down into the soil, and waste water generated by an industrial processes or by a municipality. Under certain circumstances, the appropriator who creates waste water has a right to recapture it. Likewise third parties may acquire water rights in the waste water generated by another (but may not force the generator of that waste water to continue to produce it).
Water right	This is a right to use water. Water rights of different types are recognized under both the Eastern riparian system and the Western appropriation system. Under all systems, the water right is usufructuary in nature.
Watershed	This is an area that, because of topographic slope, contributes water to a specified surface water drainage system, such as a stream or river. Under Eastern riparian water law, water must be used within the watershed. Idaho water law allows use outside the watershed.
Weir	A device, usually made of concrete or steel, placed in a stream channel. Weirs are used for various purposes, such as to measure the flow rate or to divert water.

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APPENDIX 2: Time Lines for Contested Cases before IDWR

PRE-HEARING TIME LINE	
EVENT	TIMING
Application filed	Date determined by the applicant.
Prepare publication notice	The Department will prepare the notice of publication and submit it to the local newspaper.
Notice of application published	Notice of the application must be published once in each of two weeks. Idaho Code § 42-203A(2).
Deadline for protests	Protests must be filed within 10 days of the last day of publication. Idaho Code § 42-203A(1). However, a would-be protestant who misses the deadline may file a petition for intervention.
Prehearing conference	This is arranged through the Department by mutual agreement of the parties.
Discovery and motion practice	Discovery is not automatic, and must be initiated through petition. The Department will then set a discovery schedule (which will generally conform to the agreement of the parties).
Witness and exhibit disclosure	The Department will set a deadline for disclosure and identification of witnesses and exhibits.
Hearing	This is arranged through the Department by mutual agreement of the parties.

POST-HEARING TIME LINE			
ACTION	ACTOR	DEADLINE	AUTHORITY
<i>Hearing and Initial Decision</i>			
Hearing.	Conducted by hearing officer, with participation by all parties.	Date set by hearing officer.	Idaho Code § 42-1701A; ⁶¹⁸ Idaho Code § 67-5242; IDAPA 37.01.01.550.
Post-hearing briefs.	By the parties.	There is no provision in the rules for the filing of briefs. Parties should discuss this with the hearing officer.	
Recommended or preliminary order. ⁶¹⁹	Issued by hearing officer.	No deadline. ⁶²⁰ Once the recommended or preliminary order is issued, the clock begins to run simultaneously on petitions for reconsideration and administrative appeals.	Idaho Code § 67-5243(1)(a); IDAPA 37.01.01.720.01; IDAPA 37.01.01.730.01.

⁶¹⁸ The Water Code contains a separate “catch all” provision which provides a right to a hearing before the Director when no other opportunity for hearing was provided. Idaho Code § 42-1701A(3); IDAPA 37.01.01.730.02.e; IDAPA 37.01.01.740.02.b. This section does not apply in an ordinary contested case.

⁶¹⁹ Note that the APA and the implementing rule contemplate use of both “recommended orders” and “preliminary orders.” The difference is that preliminary orders become final automatically after a certain amount of time (if there is no petition or appeal), while recommended orders require the agency head’s approval before becoming final orders. The IDWR employs both, but preliminary orders are more common.

⁶²⁰ The hearing officer may take as long as needed following the conclusion of the hearing. However, IDWR orders usually come out within 60 days.

POST-HEARING TIME LINE			
ACTION	ACTOR	DEADLINE	AUTHORITY
<i>Preliminary Order</i>			
Optional: Petition for reconsideration of preliminary order. ⁶²¹	Filed by any party. Directed to hearing officer.	14 days after preliminary order. If neither petition for reconsideration or administrative appeal is filed within 14 days, the preliminary order automatically becomes final (and appealable).	Idaho Code § 67-5243(3); IDAPA 37.01.01.730.02.a.
Order "disposing of" petition for reconsideration. ⁶²²	Issued by hearing officer.	21 days after petition for reconsideration (or else deemed denied).	Idaho Code § 67-5243(3); IDAPA 37.01.01.730.02.a.
Appeal to agency head from preliminary order. ⁶²³	Any party may file. Directed to agency head.	14 days from order, or from denial of petition for reconsideration.	Idaho Code § 67-5245(3); IDAPA 37.01.01.730.02.b.
Opening brief.	Party filing appeal.	The opening brief is filed simultaneously with the administrative appeal.	Idaho Code § 67-5245(5); IDAPA 37.01.01.730.02.b.
Opposing brief.	Filed by opposing parties.	14 days from opening brief.	Idaho Code § 67-5245(5); IDAPA 37.01.01.730.02.c.
Oral argument (optional).	Agency head and all parties.	No deadline.	Idaho Code § 67-5245(5); IDAPA 37.01.01.730.02.d.

⁶²¹ A party may skip the "petition for reconsideration" and immediately file an administrative appeal. If a petition for reconsideration is filed, the parties will have another opportunity to file an administrative appeal after the petition is resolved. Filing a petition for reconsideration at this stage affords the hearing officer an opportunity to correct the alleged error before the matter is elevated to the agency head. Note that there is a separate provision for a "petition for clarification," IDAPA 37.01.01.770. This serves a similar, but less formal function. Most importantly, a petition for clarification does not suspend the time for appeal.

⁶²² The hearing officer is required to "dispose of" the petition within 21 days. Neither the statute nor the rule say what this means. It could mean that the hearing officer is required to address the merits of the petition within that time. But the Department does not read the rule that way. According to the Department, granting the petition simply means that the hearing officer has agreed to reconsider his or her decision. It does not indicate one way or the other whether the order will be changed in accordance with the request of the petitioner. Moreover, according to the Department, granting the petition essentially "stops the clock." Because the APA and the Department's implementing rule do not say what happens next, the Department takes the view that the hearing officer can take as long as he or she needs to reconsider the matter. Presumably, the end result is a new recommended order or preliminary order, which sends the parties back to step one. But this is not spelled out in the statute or rule. Thus, there is risk of substantial delay in filing a petition for reconsideration.

⁶²³ The terminology is inconsistent. The statute speaks in terms of "administrative review," "motion for review" and "petition for review." The regulation says a party may "appeal or take exceptions."

POST-HEARING TIME LINE			
ACTION	ACTOR	DEADLINE	AUTHORITY
Final order ⁶²⁴	Agency head	56 days after briefs and oral argument, if there is one. The agency may take longer, for good cause.	Idaho Code § 67-5245(6); IDAPA 37.01.01.730.02.d.

⁶²⁴ The agency head also has the option to conduct further hearings or remand the issue for further factual development of the record

POST-HEARING TIME LINE			
ACTION	ACTOR	DEADLINE	AUTHORITY
<i>Recommended Order</i>			
Optional: Petition for reconsideration of recommended order. ⁶²⁵	Filed by any party. Directed to hearing officer.	14 days after recommended order. If neither petition for reconsideration or administrative appeal is filed within 14 days, the recommended order goes to Director for further action.	Idaho Code § 67-5243(3); IDAPA 37.01.01.720.02.a.
Order "disposing of" petition for reconsideration. ⁶²⁶	Issued by hearing officer.	21 days after petition for reconsideration (or else deemed denied).	Idaho Code § 67-5243(3); IDAPA 37.01.01.720.02.a.
Appeal to agency head from recommended order. ⁶²⁷	Any party may file. Directed to agency head.	14 days from preliminary order, or from denial of petition for reconsideration.	Idaho Code § 67-5244(1); IDAPA 37.01.01.730.02.b.
Opening brief.	Party filing appeal.	The opening brief is filed simultaneously with the administrative appeal.	Idaho Code § 67-5244(1); IDAPA 37.01.01.720.02.b.
Opposing brief.	Opposing party.	14 days from opening brief.	Idaho Code § 67-5244(1); IDAPA 37.01.01.720.02.c.
Oral argument (optional).	Agency head and all parties.	No deadline.	Idaho Code § 67-5244(1); IDAPA 37.01.01.720.02.c.
Final order (or remand for further evidentiary hearings).	Issued by agency head.	56 days after briefs and oral argument, if there is one. The agency may take longer, for good cause.	Idaho Code § 67-5244(2)(a); IDAPA 37.01.01.720.02.c.

⁶²⁵ See footnote 621 at page 3 of this Appendix.

⁶²⁶ The hearing officer is required to "dispose of" the petition within 21 days. Neither the statute nor the rule say what this means. It could mean that the hearing officer is required to address the merits of the petition within that time. But the Department does not read the rule that way. According to the Department, granting the petition simply means that the hearing officer has agreed to reconsider his or her decision. It does not indicate one way or the other whether the order will be changed in accordance with the request of the petitioner. Moreover, according to the Department, granting the petition essentially "stops the clock." Because the APA and the Department's implementing rule do not say what happens next, the Department takes the view that the hearing officer can take as long as he or she needs to reconsider the matter. Presumably, the end result is a new recommended order or preliminary order, which sends the parties back to step one. But this is not spelled out in the statute or rule. Thus, there is risk of substantial delay in filing a petition for reconsideration.

⁶²⁷ The statute a party may "file exceptions." The regulation says a party may "support or take exceptions."

POST-HEARING TIME LINE			
ACTION	ACTOR	DEADLINE	AUTHORITY
<i>Final Order</i>			
Petition for reconsideration of final order by agency head. ⁶²⁸ (Not applicable to preliminary order which become final automatically). ⁶²⁹	Any party may file. Directed to agency head.	14 days from final order issued by agency head.	Idaho Code § 67-5246(4); IDAPA 37.01.01.740.02.a
Order disposing of petition for reconsideration.	Issued by agency head.	21 days from petition (or else deemed denied).	Idaho Code § 67-5246(4); IDAPA 37.01.01.740.02.a
Final order becomes "effective." Applies only to orders issued by agency head (not to preliminary order which become final automatically). ⁶³⁰	(automatic)	14 days after issuance of the order, if no petition for reconsideration. If a petition for reconsideration is filed with respect to a final order by an agency head, the final order becomes effective once the petition is disposed of.	Idaho Code § 67-5246(5).
Petition for judicial review to district court.	Filed by any aggrieved party in District Court. ⁶³¹	28 days from final order (that is, 28 days from order issued by the agency head or from date when preliminary order became automatically final). Note, if no petition for reconsideration is filed, the 28 days begins to run immediately from issuance of order.	Idaho Code §§ 67-5270 to 67-5279, in particular 67-5273(2); IDAPA 37.01.01.740.02.c

⁶²⁸ Called a "motion for reconsideration" in the statute. Idaho Code § 67-5246(4). Called a "petition for reconsideration" in the regulations. IDAPA 37.01.01.740.02.a.

⁶²⁹ Note that a petition for reconsideration may be filed at this stage only if the final order was issued by the agency head. If a preliminary order has become final automatically (because there was no appeal or petition), then no further administrative review is available.

⁶³⁰ The statute refers to "the order" which apparently relates back to "any final order issued by the agency head" in the previous subsection. This 14 day period runs simultaneously with the 28 day appeal period. Thus, the rule becomes effective halfway through the appeal period, if no petition is filed. Thus, this statutory provision is simply a mechanism to ensure that the parties have an opportunity to file a petition for reconsideration of orders issued by an agency head before the order goes into effect.

This rule has no applicability to preliminary orders which become final automatically because no administrative appeal is filed; they become "effective" as soon as they become final—because there is no further mechanism for administrative review. Note also that the Department's rules provide that the effectiveness of any order shall not be stayed automatically on the filing of an appeal.

⁶³¹ Venue is specified in IDAPA 37.01.01.740.02.c.

POST-HEARING TIME LINE			
ACTION	ACTOR	DEADLINE	AUTHORITY
Cross-petition for judicial review.	Filed by opposing parties in District Court.	14 days from petition for judicial review.	Idaho Code § 67-5273(2).

Hypothetical Post-Hearing Time Line: "Fast Scenario"			
<i>Deadline</i>	<i>Running Count</i>	<i>Event</i>	<i>Comment</i>
No rule	Day 0	Hearing	The date for the hearing is typically set by agreement of the parties and IDWR.
No rule	Day 0	No briefs filed	Assume the parties agree to file no post-hearing briefs, and so advise the hearing officer.
No rule (assume 30 days)	Day 30	Preliminary order	There is no deadline for issuance of the preliminary (or recommended) order. They are typically issued within 60 days. This period could be longer if the parties chose to submit post-hearing briefs. Here we will optimistically assume 30 days.
14 days	Day 44	Preliminary order automatically becomes final.	Assume that no petition for reconsideration of the preliminary order or administrative appeal is filed. In this case, no party may file a petition for reconsideration of the final rule, and the rule is "effective" at this point (unless stayed).
28 days	Day 72	Deadline for judicial review expires.	

Hypothetical example: "Slow Scenario"			
<i>Deadline</i>	<i>Running Count</i>	<i>Event</i>	<i>Comment</i>
No rule	Day 0	Hearing	The date for the hearing is typically set by agreement of the parties and IDWR.
No rule (assume 14 days)	Day 14	Opening brief	Briefing is not addressed in the rules. The schedule is negotiated.
No rule (assume 7 days)	Day 21	Response brief	
No rule (assume 60 days)	Day 81	Preliminary order	There is no deadline for issuance of the preliminary (or recommended) order. They are typically issued within 60 days. This period could be longer if the parties chose to submit post-hearing briefs.
14 days	Day 95	Petition for reconsideration	
21 days	Day 116	Petition for reconsideration denied, or granted and amended preliminary order issued	
14 days	Day 130	Administrative appeal to agency head filed, together with opening brief	
14 days	Day 144	Response brief filed	
no deadline (use 7 days)	Day 151	Oral argument (this could be waived by the parties)	We will optimistically assume that an oral argument is arranged for seven days after the filing of the response brief.
56 days	Day 207	Final order issued by agency head	
14 days	Day 221	Petition for reconsideration	
21 days	Day 242	Resolution of petition for reconsideration	
28 days	Day 270	Suit filed in district court	

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APPENDIX 3: IDWR Organizational Structure

The Idaho Department of Water Resources is headed by a director appointed by the governor. The agency is divided into three operating divisions, each headed by an administrator. Each division then has bureaus, sections or teams organized around specific areas of responsibility.

The email address for all IDWR employees consists of that person's first initial plus no more than the first seven letters of his or her last name followed by @idwr.state.id.us. For example, an email to someone named George Washington would be addressed to: gwashing@idwr.state.id.us.

Visit the Department's home page for up-to-date information on a broad range of information: www.idwr.state.id.us.

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Mr. Norman C. Young Administrator Water Management Division	Mr. Hal Anderson Administrator (Acting) Planning and Technical Services Division	Mr. Bob Hoppie Administrator Energy Division

Water Management Division	
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Mr. Bob Fleenor, Bureau Chief Resource Protection Bureau	Dam Safety Section
	Ground Water Protection Section
	Flood Plain Management Unit
	Stream Channel Protection
Mr. L. Glen Saxton, Bureau Chief Water Allocation Bureau	Water Rights Permit Section
	Water Distribution Section
Mr. David R. Tuthill, Jr., Bureau Chief Adjudication Bureau	Technical Support Section
	Eastern Adjudication Unit
	Southern Adjudication Unit
	Western Adjudication Unit

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Mr. D. Richard Wyatt, Secretary
Mr. Robert Graham, Member
Mr. Terry T. Uhling, Member
Mr. Claude Storer, Member
Mr. Leonard Beck, Member
Mr. Gary M. Chamberlain, Member

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APPENDIX 4: Water Flow Rate and Volume Conversion Charts

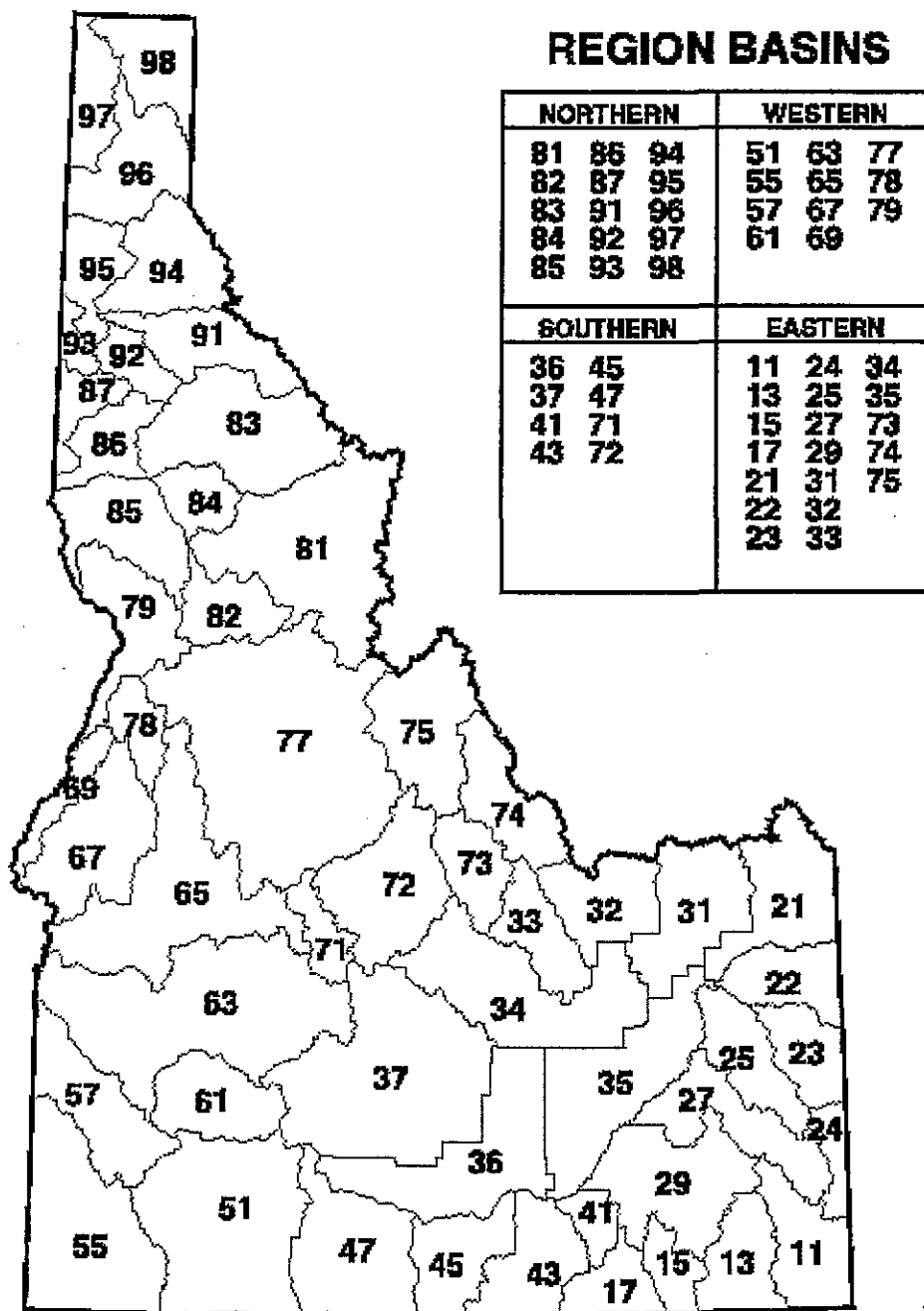
WATER UNIT CONVERSION TABLE (Approx.)				
A x B = C or C ÷ B = A				
A	x	B	=	C
acre-feet	x	43,560	=	cubic feet
acre-feet	x	435.6	=	ccf (100 cubic feet)
acre-feet	x	325,851.43	=	gallons
acre-feet	x	1,233.48	=	cubic meters
acre-feet/day	x	0.32585143	=	MGD
acre-feet/year	x	892.7436	=	gallons/day
cubic feet	x	7.480519	=	gallons
cubic feet	x	62.37	=	pounds of water
gallons	x	0.13368	=	cubic feet
gallons/minute	x	0.00222	=	cfs
cfs	x	448.83	=	gallons/minute
cfs	x	26,930	=	gallons/hour
cfs	x	646,315	=	gallons/day
cfs	x	1.9835	=	acre-feet/day
cfs	x	723.9775	=	acre-feet/year
cfs	x	59.505	=	acre-feet/month (30 days)
cfs	x	357.03	=	acre-feet/6 months
cfs	x	416.535	=	acre-feet/7 months
cfs	x	50	=	miner's inches (ID, NM, UT, NE)
cfs	x	38.4	=	miner's inches (CO)
cfs	x	40	=	miner's inches (AZ, CA, NV, OR)
miner's inch (ID)	x	8.9766	=	gallons/minute
gallons	x	0.001336805	=	ccf (100 cubic feet)
ccf (100 cubic ft)	x	0.002295684	=	acre-feet
ccf (100 cubic ft)	x	748.0519142	=	gallons
ccf/yr	x	0.001423234	=	gallons/minute
ccf/yr	x	0.000003170944	=	cfs
MGD	x	1.54726907	=	cfs
MGD	x	1,120.147	=	acre-feet/year
cfs	x	0.6463	=	MGD
gallons/minute	x	0.004418	=	acre-feet/day
gallons/minute	x	1.61	=	acre-feet/year
million gallons	x	3.0689	=	acre-feet
million gallons	x	133,681	=	cubic feet
AF/acre/day	x	25.214321	=	miner's inches (ID)
cubic meter per second	x	35.31	=	cfs
cubic meter per second	x	15,850	=	gallons/minute

Price conversion	
Price per gallon	Price per acre-foot
1 dollar per gallon	\$325,850.00 per acre-foot
1 penny per gallon	\$3,258.50 per acre-foot
10 cents per 1,000 gallons	\$32.59 per acre-foot

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IDWR ADMINISTRATIVE BASINS

IDWR has divided the state into more than 50 administrative basins that are used to help coordinate water management activities. Each basin area has been given its own unique number. The information in the box shows what basins are part of each of the four IDWR regions.



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APPENDIX 6: Summary of Public Interest and Other Tests

Public Interest and Related Tests

Date	Current Citation	Session Law	Applies to	Operative Language (as codified today)	Comment
1935	Idaho Code § 42-203A(5)(b).	1935 Idaho Sess. Laws, ch. 145, § 2, p. 358.	Appropriation	The director must find "that the water supply itself is insufficient for the purpose for which it is sought to be appropriated".	Requires a showing of sufficient hydrological availability to support the use.
1935	Idaho Code § 42-203A(5)(c).	1935 Idaho Sess. Laws, ch. 145, § 2, p. 358.	Appropriation	The director must deny an application upon finding "that such application is not made in good faith, is made for delay or speculative purposes".	Speculative applications may be rejected.
1935	Idaho Code § 42-203A(5)(d).	1935 Idaho Sess. Laws, ch. 145, § 2, pp. 358-59.	Appropriation	The director must deny an application upon finding "that the applicant has not sufficient financial resources with which to complete the work involved therein".	Authorizes evaluation of the applicant's ability to carry out the project.
1935	Idaho Code § 42-202.	1935 Idaho Sess. Laws, ch. 145, § 1, p. 355.	Appropriation	If the application involved more than twenty-five (25) cubic feet per second of water or the development of more than five hundred (500) theoretical horsepower	Establishes a set of special criteria for large appropriations. The applicant must provide detailed financial and corporate disclosure data, etc.
1978	Idaho Code § 42-203A(5)(e).	1978 Idaho Sess. Laws, ch. 306, § 1, pp. 767-69.	Appropriation	The director may reject an application where he finds "that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use".	This was the original "local public interest test". It was applied to water changes in 1981. The Department's implementing criteria are found at IDAPA 37.03.08.045.01.e.
1978	Idaho Code § 42-1503.	1978 Idaho Sess. Laws, ch. 345, § 11, p. 893.	Appropriation	To be approved, the director must find that a proposed instream flow "is in the public, as opposed to private, interest".	Section 11 of chapter 345 (1978) created the minimum flow law. It contained its own public interest determination provision (quoted here).
1978	Idaho Code § 42-1736B.	1978 Idaho Sess. Laws, ch. 345, § 2, p. 886.	Appropriation	"All future filings, permits and decrees on the unappropriated waters of this state shall be determined with respect to the effect such filings, permits and decrees will have on the minimum daily flow of the affected stream or river, or on the daily maintenance level of the affected lake or reservoir."	Section 2 of chapter 345 (1978) (quoted here) requires future appropriations to protect prior established instream flows.
1979	Idaho Code § 42-1763.	1979 Idaho Sess. Laws, ch. 193, § 3, p. 561.	Water bank	Rental of water from water supply bank must not "conflict with the local public interest where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use."	This is the same language as section 42-203A(5)(e), but there is no cross-reference to this section. It was made part of the original water supply bank legislation in 1979, and has not been changed since then.

Public Interest and Related Tests

Date	Current Citation	Session Law	Applies to	Operative Language (as codified today)	Comment
1980	Idaho Code § 42-226.	1980 Idaho Sess. Laws, ch. 186, § 1, p. 414.	Appropriation	"Any application for a water permit that seeks to transfer of ground water outside the immediate ground water basin as defined by the director of the department of water resources for the purpose of irrigating five thousand (5,000) or more acres on a continuing basis or a total volume in excess of ten thousand (10,000) acre feet per year, the application must first be approved by the director of the department of water resources and then by the Idaho Legislature. Each shall give due consideration to the local economic and ecological impact of the project or development so proposed."	Sets up a special public interest review for large agricultural transfers outside the basin of origin. Also requires legislative approval.
1981	Idaho Code § 42-222(1).	1981 Idaho Sess. Laws, ch. 147, § 3, p. 256.	Change	The director must find that an application for change of water right "is in the local public interest as defined in section 42-203A(5), Idaho Code".	This 1981 act extended 1978 local public interest test to changes in water rights.
1981	Idaho Code § 42-222(1).	1981 Idaho Sess. Laws, ch. 147, § 3, p. 256.	Change	"[T]he director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area."	The same 1981 act contained a provision to protect the local agricultural base from changes in the nature of use of water rights.
1981	Idaho Code § 42-108	1981 Idaho Sess. Laws, ch. 147, § 1, p. 254.	Change	"[A]ny permanent or temporary change in period or nature of use in or out-of-state for a quantity greater than fifty (50) cfs or for a storage volume greater than five thousand (5,000) acre-feet shall require the approval of the Legislature, except that any temporary change within the state of Idaho for a period of less than three (3) years may be approved by the director without legislative approval."	Note that this provision applies only to changes involving a change in period or change in nature of use. Thus, it appears that the Act is aimed at transfers from agricultural use to new industrial, municipal or other uses. The provision applies equally to in-state and out-of-state transfers.
1990	Idaho Code § 42-401.	1990 Idaho Sess. Laws, ch. 141, § 3, pp. 316-17.	Appropriation and change	"Applications for use of public waters outside the State. . . . The director shall consider the following factors: (a) The supply of water available to the state of Idaho; (b) . . ."	Repealed former statute specifically providing for use of Idaho water rights in Oregon. Added new section 42-401 requiring all out-of-state users to meet five additional criteria relating to the relative availability of water in Idaho and the receiving state.
1990	Idaho Code §§ 42-203A(5)(f), 42-222.	1990 Idaho Sess. Laws, ch. 141, § 4, 5.	Appropriation and change	Requires that applications be consistent with (or not contrary to) "conservation of water resources within the state of Idaho".	The same act (ch. 141) also amended the appropriation and change provisions affecting <u>all</u> water rights, to include this new criterion.
1992	Idaho Code § 42-1763.	1992 Idaho Sess. Laws, ch. 101, § 1, pp. 319-20.	Water bank	"The director shall consider in determining whether to approve a rental of water for use outside of the state of Idaho those factors enumerated in subsection (3) of section 42-401, Idaho Code."	Out-of-state rentals from the water bank were previously prohibited. This act allows out-of-state uses, but subjects them to the test set out in section 42-401 for permanent out-of-state uses.

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April 7, 1975

MUNICIPAL

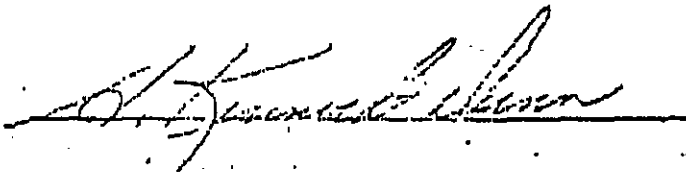
OPERATIONS DIVISION
ADMINISTRATOR'S MEMORANDUM

TO: District Engineers
FROM: A. Kenneth Dunn
SUBJECT: Licensing Procedures

The following policy should be followed in preparing the licenses for the municipal use of water. The growth of a city should be recognized in recommending the rate of diversion for which a license is issued. Therefore, normally the rate of diversion recommended should be that of the capacity of the system unless it exceeds the permitted amount. The annual use in "acre foot per year" should also be omitted from the license for municipal use.

Permits for fire protection will also be licensed without an "acre foot per year" limitation since the volume used for this purpose varies and it is meaningless to simply multiply rate x 1.98 x days per year to determine an annual volume.

Please advise personnel in your office of this policy and change any license drafts you may have before sending them to us. If you have any questions or suggestion, please let us know.



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State of Idaho

DEPARTMENT OF WATER RESOURCES

STATE OFFICE, 373 W. Franklin Street, Boise, Idaho

RECEIVED

JUL 05 1994

Givens, Pursley & Huntley

JOHN V. EVANS

Governor

C. STEPHEN ALLRED

Director

Mailing address:

Statehouse

Boise, Idaho 83720

(208) 384-2215

MEMORANDUM

TO: Dave Tuthill

FROM: Phil Rassier

PJR

DATE: May 7, 1979

RE: Municipal Water Rights - Statutory Background

The general law regarding the quantity of a municipal water right appears to be that a city may acquire a preferred right to store or appropriate more water than is immediately needed, thus allowing for growth of the city.

This position was adopted by the Idaho court in the case of Beus v. City of Soda Springs 62 Idaho 1, 107 P.2d 154 (1940). However, in that case the court relied principally upon the provisions of Idaho Code Ann § 49-1132 (1932) which was repealed by 1951 Sess. Laws. Ch. 47, § 17, P. 57. The text of former I.C.A. 49-1132 stated:

"49-1132. Water, light, and power plants--Acquisition and operation--Charges for service.--Acquire by purchase, or otherwise, waterworks systems or plants, and also light and power plants, or any parts or portions thereof, and construct, enlarge, extend, repair, alter and improve such plants or either of them, or any parts thereof, and to supply the municipality and the inhabitants thereof with water, light and power, or either, and to charge private persons and corporations therefor; to supply any excess water, light and power, or either, to persons (including municipal and private corporations) without the limits of the municipality, and to charge therefor; but all such charges, rates or revenues shall be reasonable and shall be uniform and equal to all alike and based upon the service supply and proportionately, without discrimination in favor or against any person or persons whatsoever.

"In fixing said charges, rates or revenues, said municipal corporation shall have the right to take into consideration and include, in addition to all of its other expenses and costs incurred in the operation of said plants, any or all of the following items; any interest on any bonded or other indebtedness created in order

May 7, 1979

to acquire, construct, enlarge, extend, repair, alter and improve such plants, or any of them; a sinking fund to meet said indebtedness; and a fund to meet and provide for any depreciation on said plants, and to provide for extensions or equipment necessary to meet the needs of the community served."

The closest comparable provision presently existing in the Idaho Code is §50-323 (1967) which is as follows:

"50-323. Domestic water systems.--Cities are hereby empowered to: establish, create, develop, maintain and operate domestic water systems; provide for domestic water from wells, streams, water sheds or any other source; provide for storage, treatment and transmission of the same to the inhabitants of the city; and to do all things necessary to protect the source of water from contamination. [1967, ch. 429, §20, p. 1249.]"

Because I.C.A. 49-1132 was repealed subsequent to the decision in Beus v. City of Soda Springs a question naturally arises as to whether the holding of the case is still good law. The answer may appear in the case of Village of Peck v. Denison 92 Idaho 747, 450 P.2d 340 (1969). In that case the court indicated by way of dictum at footnote 4, page 751, that Idaho will probably continue to follow the preferred right theory for municipal water rights. The dictum states:

"[A]lthough the Village of Peck became a municipality only after the events giving rise to this litigation, we would have found it difficult not to allow the appropriation of some excess water (had there been any in fact) under I.C. §50-323 and its predecessors and Beus v. City of Soda Springs, 62 Idaho 1, 107 P.2d 151 (1940)."

While there is no longer hard authority recognizing preferred municipal water rights in Idaho it appears safe, in light of Village of Peck, to assume that the court is prepared to rule that municipals can obtain and hold such rights.

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State of Idaho

DEPARTMENT OF WATER RESOURCES

STATE OFFICE, 373 W. Franklin Street, Boise, Idaho

JOHN V. EVANS

Governor

C. STEPHEN ALLRED

Director

Mailing address:

Storehouse

Boise, Idaho 83720

(208) 384-2215

ADMINISTRATOR'S MEMORANDUM

TO: Regional Offices and Water Allocation Section

FROM: Norman Young NCT

DATE: November 5, 1979

RE: Definition of "Municipal"

"Municipal" as defined relative to beneficial use for the establishment of a water right includes domestic, irrigation, stockwater, fire protection, recreation, commercial, industrial, and any other water use incidental to the functioning of a city. The term identifies a "preferred" right in three ways:

- 1) A municipal right should not be quantified by rate of flow beneficially used at the time of examination, but rather by the capacity of the diversion works.*
- 2) A municipal right should not be limited by volume.
- 3) A sufficient description of place of use is:
"Place of use within city limits of CITY NAME." Note that as city limits are changed, the place of use of the municipal right would change, requiring no water right transactions.

These three preferences allow the city to increase water use under an existing right. A city need apply for an additional right only when the diversion rate capacity is increased above the existing right.

Due to the preferred nature of a municipal right, its use is restricted to the corporate limits of the municipality. This limitation is derived from the statutory basis of the preferred right concept. Only the city or its delivery agent, for example Boise Water Corporation, can obtain a municipal water right. Unincorporated cities, subdivisions outside of city limits and other users of common water systems must identify the separate uses of domestic, irrigation, commercial, etc., and identify the specific place of use.

*This quantification must be limited to a "reasonable" extent. For example, the diversion of an entire stream when only a small portion is beneficially used may not be reasonable.

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MEMORANDUM

TO: Norm Young

FROM: Phil Rassier *PJR*

RE: Land Application of Industrial Effluent

DATE: September 5, 1996

You have asked for legal guidance regarding the water right implications created when a private industrial water user elects to land apply its industrial effluent because the company is required by environmental constraints to prohibit its waste water effluent from continuing to reach a public water source. The water rights issue created when an industrial water user adopts a land-application method of disposing of its effluent is whether the change results in an impermissible enlargement of its underlying water right by increasing the amount of water consumptively used. Previously, some percent of the water in the effluent was returned to a public stream or allowed to percolate into the ground water. The goal of land application of the effluent is that it all will be absorbed by the growing crops or evaporated to the atmosphere. The use of water under the industrial water right thus becomes 100 percent consumptive where before it was not.

The case law addressing this issue appears to deal almost exclusively with the disposal of municipal effluent. In the case of municipalities, the majority view is that the proper disposal of effluent from waste treatment facilities comes within the parameters of the beneficial use of a municipal water right. One of the most frequently cited cases is *Arizona Public Service Co. v. Long*, 773 P.2d 988 (Ariz. 1989). In this case, the owners of downstream junior water rights that had historically used the effluent for irrigation following upstream discharge sued the City of Phoenix alleging that the city had no right to contract with a utility for the transport and use of the effluent in the cooling towers of a nuclear power plant. The court upheld the contract, holding that sewage effluent was neither surface water nor ground water, but was simply a noxious by-product which the city must dispose of without endangering the public health and without violating any federal or state pollution laws. In reaching its decision, the Arizona Court quoted from a much earlier Wyoming decision which upheld the sale by a city of effluent discharged directly into the buyer's ditch, but also held that effluent discharged into a stream became public water subject to appropriation. *Wyoming Hereford Ranch v. Hammond Packing Co.*, 236 P.2d 764 (Wy. 1925). The *Arizona Public Service* case generally holds that cities may put their sewage effluent to any reasonable use that would allow them to maximize their use of the appropriated water and dispose of it in an economically feasible manner. Beck, *Waters and Water Rights*, § 16.04(c)(6) (1991).

In an even more recent Arizona case, the court upheld a city contract for the disposal of its effluent noting that the effluent from the city of Bisbee delivered to Phelps Dodge for copper leaching operations was not useable for drinking water, irrigation, or fire protection purposes and

that it was only useful for the leaching operation. The city contract had been challenged by the local water utility that otherwise would have provided water for the leaching operation.

Other cases reviewed have reached results similar to that in Arizona for municipal entities without as much emphasis on the distinct character of effluent. In a more recent Wyoming case, the court held that the City of Roswell could recapture its sewage effluent before it is discharged as waste or drainage and reuse it for municipal purposes. *Reynolds v. City of Roswell*, 654 P.2d 537 (Wy. 1982). The court characterized sewage effluent as artificial water and therefore primarily private and subject to beneficial use by the owner and developer thereof because treated sewage effluent depends upon the acts of man.

In the early Colorado case of *Pulaski Irrigation Ditch Co., et al v. City of Trinidad, et al*, 203 P. 681 (Colo. 1922), the court held that where a city had voluntarily chosen to treat its effluent in a manner that produced surplus water, it did not have the right to sell its purified water. The court went on to recognize, however, that where there is no other practicable method of disposing of the sewage, public policy might permit its disposal by the evaporation of the water. 203 P. at 683. A more recent Colorado case, *Metropolitan Denver Sewage Disposal District No. 1 v. Farmers Reservoir & Irrigation Co.*, 499 P.2d 1190 (Colo. 1972) merely holds that changes in the points of return of waste water to a stream are not governed by the same rules as changes of points of diversion and that there is no vested right in downstream appropriators to maintenance of the same point of return of irrigation waste water or effluent from a municipality or a sanitation district. In *Barrack v. City of Lafayette*, 829 P.2d 424 (Colo. App. 1992), the court held that impossibility of performance relieved the city from any obligation to deliver effluent to plaintiffs after state regulation made such delivery illegal. The court concluded that plaintiffs had no property right to the delivery of untreated water that could no longer be legally delivered.

In 1991, Nevada and Oregon each enacted legislation addressing the reuse of effluent or reclaimed water. The Oregon statute defines "reclaimed water" as "water that has been used for municipal purposes and after such use has been treated in a sewage treatment system and that, as a result of treatment, is suitable for a direct beneficial purpose or a controlled use that could not otherwise occur. OR. REV. STAT. § 537.131. The new legislation requires any person who is using or intends to use reclaimed water to file a Reclaimed Water Registration form with the Oregon Water Resources Department. The statute provides the circumstances under which potentially affected water users must be notified of the proposal and of their rights of preference to the use of the water under certain circumstances. The Nevada statute, by contrast, merely provides a statement of legislature policy encouraging and promoting the use of effluent, where that use is not contrary to the public health, safety or welfare, and where that use does not interfere with federal obligations to deliver water of the Colorado River. N.R.S. § 533.024.

The review of existing case law provides significant guidance with respect to the handling

Memorandum
September 5, 1996
Page 3

of municipal effluent. None of the reported cases I have reviewed, however, address whether the same or some different analysis should be applied when the effluent is produced by a private industrial user rather than by a municipality. This issue was raised but not addressed in *Wyoming, et al v. Husky Oil Company*, 575 P.2d 262 (Wy. 1978). The case arose as an action for declaratory relief by Husky Oil seeking a determination that its plan to impound and evaporate effluent water rather than continue to discharge it to a natural stream was not subject to the jurisdiction of the State Engineer and did not infringe upon any rights of downstream water appropriators. The majority of the Court voted to remand the case to the trial court for a full factual trial and to join other indispensable parties to the action. A lengthy dissent, however, proceeded to analyze the merits of the case. The dissent characterized the proposed change as an expansion of the original industrial water right for the refining process to now include the additional use of pollution abatement. The dissent concluded that Husky should be required to apply to the State Engineer for a permit for the additional use.

Before the Department, we have the precedence of issuing waste water permit nos. 29-7437 and 29-7431 to the J.R. Simplot Company and to the City of Pocatello respectively in 1978. The two permits were for the use of waste water from the city's sewage treatment plant and from the Simplot Fertilizer Plant at Pocatello. The waste water from both facilities was previously discharged to the Portneuf River. The applications specified 3,124 acres of land on which the water would be used for irrigation. Some 1,613 of these acres were not owned by the city or the J.R. Simplot Company but were covered by user agreements with the owners of the land. The decision does not address any concern that may have existed about discontinuing the practice of discharging the effluent to the river. The concerns with the project revolved more around the health and safety implications of the project.

Existing law in Idaho does not provide strong guidance as to whether the land application of industrial effluent initiated to comply with water quality requirements should be considered to come within the original purpose of use of the industrial water right, or should be treated as an added beneficial use of the water requiring a new water right to be obtained or established. If the Department determines that a new separate water right should be required, the option of allowing the user to appropriate the industrial waste water for the new purpose of pollution abatement through land application of the effluent should be considered. This approach is consistent with that taken by the Department in 1978 with the City of Pocatello and J. R. Simplot filings.

Please let me know if you desire further review or discussion of these issues.

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State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

ADMINISTRATOR'S MEMORANDUM

APPLICATION PROCESSING MEMORANDUM NO. 61

TO: WATER ALLOCATION BUREAU, ADJUDICATION BUREAU
AND REGIONAL OFFICES

FROM: NORM YOUNG

SUBJECT: WATER RIGHT FILING REQUIREMENTS FOR INDUSTRIAL
WASTE WATER USE AND TREATMENT (INTERIM POLICY)

DATE: September 27, 1996

PURPOSE OF MEMORANDUM

Because much of southern Idaho is included within areas covered by moratoriums or other designations that prevent or limit approval of new applications to appropriate water, water users are seeking innovative ways of using water for new and expanded projects. The waste water from industrial processes is one source of water for such uses. In addition, more restrictive water quality requirements are causing industrial water users to implement land disposal methods, create wetlands, capture and reuse waste water, and to provide for on-site containment of waste water.

The administrative requirements addressing the use of industrial waste water have not been clearly set forth. Direction is needed to guide staff and water users concerning the types of applications, if any, that need to be made, the criteria for considering such applications, and conditions that may be appropriate for approved applications. This memorandum addresses the water right filing requirements for the treatment of waste water and the reuse of waste water from industrial processes.

This memorandum provides interim guidance pending additional determination of policy and requirements through changes to law, adoption of rules or court rulings. Because a basic premise of this memorandum is that the consumptive use authorized by a water right for industrial purposes can be 100% of the amount diverted, depending on particular factual issues, this memorandum does not apply to waste water from uses which could not be 100% consumptive.

Application Processing Memorandum, Page 2

For purposes of this memorandum "waste water" is effluent, treated or untreated, from authorized beneficial uses under an industrial or other potentially 100% consumptive water right, prior to its being returned to a public water source. Waste water may contain solid waste and other contaminants, but for purposes of this memorandum it is a liquid, fluid enough to flow in an open channel or unpressurized pipeline.

AN EXAMPLE OF A TYPICAL SITUATION

An industrial user has for many years disposed of waste water diverted from the aquifer under a licensed right through a series of ponds which evaporate part of the water with the remainder seeping to the regional aquifer. In this instance, DEQ is requiring that water not be allowed to seep to the aquifer and has suggested land application. The land available for disposing of the waste is in sagebrush and does not have an irrigation water right. Each gallon of waste water land applied will have to be diluted with 3 to 4 gallons of fresh water. The net depletion from the aquifer will be increased 400 af/yr by the new water treatment requirements. Are water right related approvals required from IDWR to authorize surface disposal of the waste water?

LEGAL PRINCIPLES

The continuum of options for considering this matter is bounded by two principles. At one end of the continuum, the treatment necessary to comply with water quality requirements may be a part of the diversion and beneficial use authorized under the industrial water right. If the industrial right is a fully consumptive right, then as water quality requirements require a change in treatment, the amount of the water consumed can be increased. However, the diversion rate, annual volume diverted, and season of use established under the right cannot be increased. Any fresh water needed to dilute the waste water must be within the quantity elements of the industrial right or be covered by another water right.

At the other end of the continuum, the industrial right may be construed to authorize only the beneficial use established and historically used under the industrial right. Any increase in consumptive use (or other element of the right) would require a new water right. Depending upon the availability of water for appropriation, this may require the holder of the industrial right to mitigate injury to other users or obtain an existing right to cover the expanded consumption.

A brief review of the legal and administrative precedents (see Phil Rassier's attached memorandum) indicates that the existing law in Idaho does not provide strong guidance as to whether the land application of industrial waste water initiated to comply with water quality requirements should be considered to come within the original purpose of use of the industrial right, whether it should be treated as an added beneficial use of the water requiring a new water right, or whether some intermediate consideration should be used.

APPLICATION OF PRINCIPLES

IDWR will apply the following policies until or unless further guidance is provided:

1. Waste water treatment necessary to meet adopted state water quality requirements will be considered to be a part of the use authorized under the industrial right. The method of treatment must be "reasonable." IDWR will consider a treatment method to be reasonable if it is in accordance with best management practices recognized by Idaho Division of Environmental Quality, the U.S. Environmental Protection Agency, or other responsible state or federal agency.

2. Consumptive use can increase up to the amount determined to be consistent with the original water right as reasonably necessary to meet treatment requirements. Diversion rate, annual volume diverted, and season of use cannot exceed the permitted, licensed or decreed amounts for these parameters.

3. If the treatment method for industrial waste water is changed to land application on cultivated fields or any other method that beneficially uses the water, the industrial right must be changed to include the new use. This will require a transfer application to be filed, processed and approved in accordance with Section 42-222, Idaho Code, to include a new location for a waste treatment practice, such as land application, and other conditions of approval that may be necessary to prevent injury to other valid water rights.

4. For new uses of industrial waste water that are not necessary to meet water quality requirements, an application for permit to appropriate water should be filed as required by Section 42-107, Idaho Code.

5. Fresh water required to dilute the waste water for treatments such as land application must be diverted in accordance with a water right. This can be the industrial right if adequate rate and volume are available under the right. If not, another right must be provided. In areas where new allocations are limited or prevented by moratorium orders or other designations, establishment of a new right will require appropriate provisions to mitigate the depletion from the source.

Attachment: P. Rassier's Memorandum

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MEMORANDUM

To: Water Allocation Bureau
Adjudication Bureau
Regional Offices

From: L. Glen Saxton 

RE: WATER RIGHTS FOR MUNICIPAL USE

Date: March 18, 1998

Amendments enacted in 1996 provided for entities meeting the definition of a municipal provider to obtain and hold water rights for reasonable anticipated future needs (RAFN) for a planning horizon (PH). Changes relative to municipal use appear in several code sections including 42-202, 42-202B, 42-217, 42-219 and 42-222, Idaho Code. The purpose of this memo is to provide general guidance for processing municipal use applications and permits and to address two questions concerning the application of these concepts to existing permits.

In the past, municipal water right holders generally have already utilized the benefits offered by the amended code sections, since the department has issued municipal water rights which provide for future development up to the volume of water capable of being produced by the installed diverting works. An effect of the amendments is to include additional entities under the term municipal provider who have not previously been included.

The state office has received applications which propose municipal use but do not describe whether the applicant proposes development which will be accommodated during the permit development period or whether the applicant intends to include RAFN/PH in the application. In order to clarify the intent of an applicant, the regional office should determine the following:

- a) That the applicant qualifies as a municipal provider. Any questionable application for municipal use needs to be accompanied by appropriate supporting information.
- b) The intent of the applicant prior to advertisement of an application. If the application is filed to accommodate RAFN, the applicant needs to describe the service area, the planning horizon, the type and quantity of use in connection with future needs. The length of the planning horizon may vary according to specific needs of a given municipal provider. If the extent of proposed development will be completed during the permit development period, the applicant does not need to provide the additional information relative to RAFN/PH.

Two specific questions have been raised concerning the 1996 amendments as follows:

Question 1. Can a municipal provider apply the concepts to an existing permit?

An existing permit, held by an entity that qualifies as a municipal provider under Section 42-202B(3), Idaho Code, can be amended to provide for RAFN over a PH if the permit was issued prior to the effective date of the municipal provider amendments and proof of beneficial use of water has not been submitted for the permit. Permits issued after the effective date of the amendments may not be amended because the permit holder had the opportunity to use the provisions when the permit was obtained.

Question 2. Will the department issue a license for a diversion rate larger than has actually been installed if the permit was issued or subsequently amended to provide for RAFN/PH.

No. Section 42-219(1), Idaho Code provides in pertinent part as follows:

A license may be issued to a municipal provider for an amount up to the full capacity of the system constructed or used in accordance with the original permit provided that the director determines that the amount is reasonably necessary to provide for the existing uses and reasonably anticipated future uses within the service area and otherwise satisfies the definitions and requirements specified in this chapter for such use. (Emphasis added).

This section should not be interpreted to mean that the director will issue a license for a diversion rate larger than the installed capacity of the diversion works as determined during the license examination.

c: Norman C. Young



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State of Idaho

DEPARTMENT OF WATER RESOURCES

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DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

June 14, 1999

RECEIVED

JUN 16 1999

Givens Pursley, LLP

Mr. Christopher H. Meyer
Givens Pursley LLP
Suite 200
277 North 6th Street
P. O. Box 2720
Boise, ID 83701

Re: Municipal Water Rights

Dear Chris:

I have finally been able to focus on the issues you framed in your various letters dating back to January 25, 1999, regarding municipal water rights under the 1996 Municipal Water Rights Act (Idaho Code §§ 42-202, 42-202B, 42-217, 42-219, and 42-222). I very much appreciate your patience in waiting for me to have sufficient time to respond to these issues, even though this matter is of some urgency for one of your clients, United Water Idaho ("United Water"). My response is divided into three general topics: (1) System-Wide Change Application; (2) System Capacity; and (3) Forfeiture of Municipal Water Rights.

System-Wide Change Application.

It is my understanding that when an existing well in United Water's system suffered reduced production over a period of time or when a well was damaged, United Water obtained new water rights to divert ground water from new wells. As a result, United Water holds water rights that authorize the diversion of more ground water than the current system of wells has the capacity to produce. As I suggested in our meeting on October 21, 1998, the difference between the total quantity of ground water authorized for diversion and use by all of the water rights held by United Water, versus the total capacity of the current system of wells, could be considered a portion of the amount of water necessary for United Water to provide for "reasonably anticipated future needs" within its service area. This could require meeting all of the conditions set forth in Idaho Code § 42-202B as well as the "capacity of the system" limitation in § 42-219(1).

To initiate the process through which a determination can be made whether a portion of the water rights held by United Water could be considered necessary to provide for reasonably anticipated future needs, United Water could file an application under Idaho Code § 42-222 to change the point of diversion authorized under each water right for ground water to include as

alternate points of diversion some or most of the wells in United Water's system that are currently operated as production wells. The location of each well to be used as an alternate point of diversion would have to be specifically identified. Together with identifying each well location by quarter-quarter section, it would be helpful if the longitude-latitude or geographic coordinates for each well could be provided as well. Similarly, for those water rights wherein the place of use is defined differently than the service area of United Water, the application could also propose to change the place of use for those water rights to the service area.

If United Water chooses to file a system-wide change application, notice of the application would be provided and the application processed as set forth in Idaho Code § 42-222. If the application is approved, the approval would be conditioned to prevent enlargement of the water rights and injury to other water rights. Conditions of approval would likely include limiting the diversion rate from each well to the diversion rate authorized by the original water right established at each well and setting forth the priority date of the original water right at each well as the effective implementation date of the alternate point of diversion. The effective implementation dates would be used in resolving any future claims of well interference by other well owners, but would not be viewed as secondary priority dates. Another condition that would be considered would not allow wells in ground water management areas to be used as alternate points of diversion for water rights established outside of those areas.

System Capacity

As we have previously discussed and as noted in your January 25 letter, Idaho Code § 42-219(1) was modified by the 1996 Municipal Water Rights Act to allow the issuance of a water right license to a municipal provider for "an amount up to the full capacity of the system constructed or used in accordance with the original permit" Some might construe this limitation to require that a municipal provider fully construct the system used to divert or deliver water associated with a water right for an amount "reasonably necessary to provide for the existing uses and reasonably anticipated future needs within the service area" However, such interpretation would not be consistent with the intent of the 1996 Municipal Water Rights Act.

The purpose of the language in Idaho Code § 42-219(1) that refers to "an amount up to the full capacity of the system constructed or used in accordance with the original permit" is to define the beneficial use requirement for a municipal water right which includes "reasonably anticipated future needs." If a municipal provider is limited to the amount of water which is actually diverted and used under a permit, then there would never be any amount of water included under a water right for reasonably anticipated future needs. Similarly, if a municipal provider is required to fully construct the system used to divert or deliver water for reasonably anticipated future needs, the provider would not have any flexibility in its water supply/distribution system to make adjustments as the reasonably anticipated future needs become reality. Such inflexibility would likely result in system modifications that would be inefficient and increase consumer costs; a result that would be incompatible with the objective of encouraging municipal providers to implement well-planned, efficient water supply/distribution systems. Consequently, the beneficial use requirement of "the full capacity of the system constructed or used in accordance with the original permit" for a municipal water

right which includes an amount of water for "reasonably anticipated future needs" must lie between the one extreme of fully constructing the system used to divert or deliver water for reasonably anticipated future needs and the other extreme of simply intending to construct the system at some future date.

The appropriate criteria for determining whether "the full capacity of the system [has been] constructed or used in accordance with the original permit" are the degree to which the full capacity of the system has been constructed and the consistency of the constructed capacity with a definitive plan for fully constructing the system, both of which can only be evaluated on a case by case basis. To provide some guidance as to how these criteria should be applied, the following hypothetical examples are offered.

Consider the case of a municipal water provider with a permit to appropriate an amount of surface water for "reasonably anticipated future needs." If the municipal provider fully constructed the necessary water treatment plant and the distribution mains needed to deliver the full amount of water under the water right, the "full capacity of the system" requirement (termed herein as the "full beneficial use requirement") would clearly be satisfied, whether or not water lines for individual users were connected to the distribution mains. But less constructed capacity could also satisfy the full beneficial use requirement. For example, if the municipal provider constructed only a portion of the necessary water treatment plant and only a portion of the distribution mains, and those constructed portions of the system were shown to be significant, integral parts of a detailed plan or design to provide the full capacity of the system, the full beneficial use requirement could still be satisfied provided a substantial investment in the unconstructed capacity of the total system had been made. However, if the municipal water provider constructed a water treatment plant with limited potential for expansion which could treat only a small portion of the water authorized under the permit to appropriate water, constructed an isolated portion of the distribution mains needed to deliver the full amount of water, or otherwise made only a small investment in the unconstructed capacity of the planned system, the water right license might appropriately be issued for an amount of water less than the amount authorized by the permit or the planned full capacity of the system.

For a municipal provider with a permit to appropriate an amount of ground water for reasonably anticipated future needs, construction of the well or wells and the distribution mains needed to divert and deliver the full amount of ground water authorized under the permit should clearly satisfy the full beneficial use requirement. But like the hypothetical provider of treated surface water, less constructed capacity for a ground water system could also satisfy the requirement if the constructed portions of the system were shown to be significant, integral phases of implementing a detailed plan to provide the full capacity of the system and there was substantial planning, design, and investment in the unconstructed capacity of the complete system. Documentation that could be used to demonstrate substantial planning, design, and investment in the unconstructed capacity of the complete system includes the following:

- provision of an overall detailed design of the full capacity system for meeting reasonably anticipated future needs;
- financing plan demonstrating ability to fully pay the costs of constructing the full capacity system needed to meet reasonably anticipated needs;

- completed environmental studies needed to satisfy legal or permitting requirements for some unconstructed portion or for all of the full capacity system;
- acquisition of lands needed for future wells, pumping stations, and other facilities consistent with the overall design for the full capacity system;
- substantial construction of distribution mains shown to be essential and integral portions of the full capacity system through water distribution network analysis;
- construction of distribution system or regulatory storage consistent with the overall design of the full capacity system; and
- development of operations protocol and infrastructure needed to operate the full capacity system consistent with the overall system design.

There may be other information that a municipal water provider could also provide to demonstrate that constructed portions of the system were significant phases of implementing a detailed plan to construct the full capacity of the system and that substantial investment had been made in the unconstructed capacity of the complete system. However, any single factor alone probably would not be sufficient to demonstrate that the full beneficial use requirement for a municipal water right had been satisfied. Rather, constructed capacity and all of the information used to demonstrate substantial planning, design, and investment in unconstructed capacity of the complete system would be weighed as a whole in determining whether the beneficial use requirement had been met.

The type of information outlined above that could be used to satisfy the full beneficial use requirement for a municipal water right is similar to the information required in Colorado to establish and maintain a conditional water right. In fact, under the 1996 Municipal Water Rights Act, that portion of a municipal water right in Idaho that includes an amount of water for reasonably anticipated future needs could be viewed as somewhat analogous to a conditional water right in Colorado.

Please note that I have not attempted to outline the type of information that should be considered in supporting the "reasonably anticipated future needs" that a municipal water provider might claim. However, Idaho Code § 42-202B(5) describes in general the information that would be required to support an appropriation of water for "reasonably anticipated future needs."

Forfeiture of Municipal Water Rights

In your recent letter dated June 3, 1999, you provided some information that could be interpreted to suggest that a water right held by a municipal corporation, or another municipal provider as defined by the 1996 Municipal Water Rights Act, may not generally be subject to

Mr. Christopher H. Meyer

June 14, 1999

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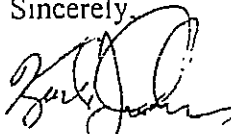
forfeiture. Although the basis for forfeiture is different for a municipal water right, just as the standard for beneficial use is different as discussed above, I would disagree with a conclusion that municipal water rights are immune from forfeiture.

When a municipal provider is granted a permit to appropriate water for "reasonably anticipated future needs" within the planning horizon for the municipality, the permit will be conditioned to require that the full system capacity needed to provide water for the reasonably anticipated future needs be constructed by the end of the municipality's planning horizon. The municipal provider will then be required to submit proof of beneficial use evidenced by construction of system capacity and substantial planning, design, and investment in the unconstructed capacity of the complete system by the end of the permit development period. If proof is not submitted and an extension to the permit development period has not been granted, as provided under Idaho Code § 42-204, the municipal provider shall be deemed to have lost all rights under its permit.

If sufficient proof of beneficial use is submitted before the end of the permit development period and the municipal water right is licensed for an amount of water for "reasonably anticipated future needs," the requirement that the full system capacity needed to provide water for the reasonably anticipated future needs be constructed by the end of the municipality's planning horizon will continue as a condition of the license. If the municipal provider fails to construct the full system capacity needed to provide water for the reasonably anticipated future needs by the end of the planning horizon for the municipality, or the anticipated future needs do not materialize by the end of the planning horizon, the quantity of water under the license may be reduced to the capacity of the constructed system or the amount of water required to meet the needs that actually exist at the end of the planning horizon. Although a municipal provider can revise the planning horizon and amend its projections of reasonably anticipated future needs subsequent to the water right license being issued, provided the criteria in Idaho Code § 42-202B(5) are fully satisfied, the water right remains subject to being reduced or forfeited if actual use of the water does not occur. Municipal water rights established prior to the 1996 Municipal Water Rights Act might also be subject to common law abandonment or forfeiture if the rights are not required to satisfy reasonable future needs of the municipality.

I hope these thoughts on the issues you raised are helpful to you and your clients. I intend to have these concepts incorporated in a guidance memorandum for staff of the Department of Water Resources so that the 1996 Municipal Water Rights Act is implemented uniformly. If you have additional questions or would like to discuss these issues or others further, we can arrange to meet again.

Sincerely,



Karl J. Dreher
Director

cc: IDWR Water Management Division
Ed Squires / Scott Rhead - United Water