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Jeffrey C. Fereday [ISB No. 2719]
Christopher H. Meyer [ISB No. 4461]
Michael P. Lawrence [ISB No. 7288]
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
www.givenspursley.com
Attorneys for M3 Eagle LLC

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DEPARTMENT OF
WATER RESOURCES

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION
FOR PERMIT NO. 63-32573 IN THE
NAME OF M3 EAGLE LLC

**M3 EAGLE'S BRIEF IN SUPPORT OF ITS
QUALIFICATION AS A MUNICIPAL
PROVIDER**

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INTRODUCTION

This is one of two post-hearing briefs of Applicant M3 Eagle LLC (“M3 Eagle”) before the Idaho Department of Water Resources (“Department,” “Director,” or “IDWR”). This brief responds to motions by Protestants North Ada County Ground Water Users Association (“NACGUA”), Eagle Pines Water Users Association, Alan Smith, and Norman Edwards (collectively “Protestants”) contending that M3 Eagle does not qualify as a municipal provider under the Municipal Water Rights Act of 1996¹ because it is not now providing water to customers under other municipal water rights. Protestants are wrong. In order to qualify as a municipal provider, it is necessary only that an applicant demonstrate that it is capable of providing water to customers through a public water supply once the permit is issued.

Protestants’ position is at odds with the purpose of the 1996 Act, which is to encourage full disclosure and up-front evaluation of long-term water needs for municipal purposes—known as “RAFN.”² Protestants’ view, if adopted, would be a sharp departure from a century of departmental policy toward the processing of permits, which has never required an applicant to have a similar beneficial use already in place at the time of permitting. The Protestants’

¹ Municipal Water Rights Act of 1996 (“1996 Act” or the “Act”), 1996 Idaho Sess. Laws, ch. 297 (codified as amended at Idaho Code §§ 42-202(2), 42-202(11), 42-202B, 42-217, 42-219(1), 42-219(2), 42-222(1), 42-223(2)). References to municipal providers are also found in Idaho Code §§ 43-335 and 43-338, dealing with the right of irrigation districts to lease water to municipal providers. These references were not part of the 1996 Act but came a year later.

² These long-term needs are called “reasonably anticipated future needs” in the Act and are referred to in this brief by the acronym RAFN. In contrast to RAFN rights, “current needs water rights” may be obtained by municipal providers who are prepared to prove current development and application of the water to beneficial use by the end of the five (or at most ten) year development period. RAFN rights also are proved up within the five to ten year development period, but the proof process is considerably more flexible than for current needs water rights. See Administrative Memorandum, Application Processing No. 63 (June 15, 1999) (Attachment J) and the draft guidance on municipal water rights recently posted on IDWR’s website (Attachment K). Department staff informally employ the term “short term water rights” for what we call “current needs water rights.” We prefer the latter, because non-RAFN rights are permanent water rights and the phrase “short term water rights” may be misunderstood to mean a temporary or interim right of some sort.

construction of the statute is inconsistent with the Department's issuance of an RAFN water right to Tamarack, another first-time developer. It would require a pointless two-step application process, thereby increasing the burden on the applicant, the public, and the Department. It would irrationally place some municipal providers (those who intend to provide service, but are not yet doing so) in a second-class position in violation of the Equal Protection Clause and, perhaps, in violation of the right to divert under Idaho's Constitution. Thus, in defiance of all logic, it would elevate the operator of a small community water system serving ten homes to preferred position vis a vis an applicant like M3 Eagle with extensive experience building large-scale developments in other states. It would invite first-time RAFN applicants to game the system by purchasing another municipal system for the sole purpose of qualifying as an existing municipal provider. It also would confound logic: to qualify as an appropriator for this type of water right, one already must be one. In sum, limiting the scope of the 1996 Act to municipal providers currently serving customers is not supported by precedent, policy, or common sense. Any ambiguity in the statute—and there is some—should be resolved in a way that advances sound public policy and meets the intent of the Legislature. This is best accomplished by construing the word “qualifies” to describe the applicant's ability—demonstrated by the thoroughness of its application and, if necessary, its proof at hearing—to meet the statutory requirements in due course, rather than a wooden requirement that the applicant currently be providing municipal water service elsewhere in Idaho under some other water right.

This issue was first raised, indirectly, on November 10, 2008 in *NACGUA's Motion for Stay and Limited Discovery for Purposes of Settlement* (“Stay Motion”). The Stay Motion did not seek a declaratory ruling or any other relief on the issue of M3 Eagle's status as a municipal provider. However, it did touch on the subject, asserting that NACGUA needed more time to

negotiate and that M3 Eagle's application was defective for a variety of reasons including an alleged failure to demonstrate that it was a municipal provider. Stay Motion at 3-4. M3 Eagle responded on November 13, 2008. On December 4, 2008, the Hearing Officer granted the Stay Motion, but for other reasons, without addressing the side issue of M3 Eagle's qualification as a municipal provider.

That was the last we heard of the matter until May 11, 2009. On that day, at the conclusion of M3 Eagle's case in chief, Protestants offered three functionally equivalent oral motions under Rule 413(c) of the Department's Rules of Procedures seeking to dismiss M3 Eagle's application on the basis that it had not shown that it met the definition of a municipality (Idaho Code § 42-202B(4)) or a municipal provider (Idaho Code § 42-202B(5)).³ The Hearing Officer denied each of these motions.⁴ He explained, first, that the relevant definition is Idaho Code § 42-202B(5)(c), defining the third category of municipal provider as a "corporation or association which supplies water for municipal purposes."⁵ Tr. pp. 1758-59. Second, he explained that, although the definition of municipal provider is phrased in the present tense, the definition first comes into play at the time of licensing under section 42-219. "And so, Mr. Smith, in my opinion, the definition that is in 42-202B, even though it's in the present tense, would apply at the time the Department examines the beneficial use . . . and that the status of that

³ The first motion was offered by Alan Smith, Tr., pp. 1749-53. The second motion, based on discovery responses, was offered by John Thornton, Tr. p. 1766, and joined in by Alan Smith, Tr. pp. 1764-66. The third motion, based on burden of proof, was offered by John Thornton, Tr. p. 1767.

⁴ Statement of Hearing Officer, Tr., pp. 1761, 1767, 1770.

⁵ The Hearing Officer is correct in focusing on section 42-202B(5)(c). M3 Eagle does not claim to be itself a municipality, as described in Idaho Code §§ 42-202B(4), 42-202B(5)(a). Nor does it claim to hold a franchise to supply water, as described in Idaho Code § 42-202B(5)(b). On the other hand, in Part IV of this brief, M3 Eagle argues, in the alternative, that it should be allowed to step into the shoes of the City of Eagle and assume the mantle of an existing, traditional municipal provider, based on its development agreement with the City.

entity at the time of that examining the licensing is when that present tense would apply.” Tr. p. 1761.⁶

On May 28, 2009, Protestants filed a *Motion for Reconsideration* seeking reconsideration of their oral motions. The next day, May 29, 2009, the Hearing Officer responded to the motion. First, he reiterated his conclusion that the definition of municipal provider, though phrased in the present tense, does not preclude a first-time municipal applicant from obtaining a municipal water right and proving it up at time of licensing.⁷ Tr. pp. 2174-77.⁸ This time, however, the Hearing Officer undertook his own review of the statutes and expressed uncertainty as to whether M3 Eagle might have a problem under a different section, Idaho Code § 42-202(2)—one not raised by the Protestants nor discussed during the argument on May 11, 2009. Tr. p. 2177-79. In sum, the Hearing Officer explained that a first-time developer may obtain a non-RAFN municipal water right—that is, a “current needs” right—even though it is not then providing municipal water. But he reserved judgment and called for briefing on the question of whether

⁶ The Hearing Officer also rejected the Protestants’ suggestion that section 42-222 is relevant, noting that this provision deals with transfers, not applications for permit. Tr. pp. 1761-62.

⁷ The Hearing Officer stated: “I don’t find it unusual that the definition describes—in 42-202B, describes what a municipal provider is without any perspective language. I guess I wouldn’t anticipate that the definition would say ‘want to be’ or ‘thinks it will be.’ And I think it’s consistent with the theme of the statutes and the appropriation process and I said that before in the initial ruling. And it’s my opinion that it doesn’t prevent an entity not yet a municipal provider from filing an application for municipal purposes. . . . And so, I see no prohibition and I see no problem with proceeding ahead with an application for municipal purposes by an entity or person not yet a municipal provider.” Tr. pp. 2176-77. The Hearing Officer reiterated this conclusion on July 21, 2009: “[I]t’s my belief, Mr. Smith, that the applicant qualifies to obtain—I shouldn’t use that word ‘qualify.’ They can apply and obtain a permit for municipal purposes.” Tr. p. 3325.

⁸ M3 Eagle agrees fully with the Hearing Officer’s conclusion that an applicant for a non-RAFN municipal right is not required to show that it is serving municipal customers, under other municipal rights, at the time of application. The statutes are clear, the Hearing Officer’s explanation is exactly correct, and there seems little need to say more on the subject. Accordingly, the balance of this opening brief will be devoted to the question posed by the Hearing Officer—whether a first-time municipal provider also may obtain an RAFN water right.

Moreover, it appears that Protestants do not dispute the Hearing Officer’s conclusion that first-time municipal providers are eligible for non-RAFN water rights that must be developed within the proof period. See statement by Mr. Smith that the Department should deny the RAFN right (which Mr. Smith describes as the municipal right) and instead “grant a small water right, 5 cfs, with five years to put that water right to beneficial use, and maybe ten years with an extension.” Tr. p. 3900.

such a first-time municipal applicant also may obtain an RAFN water right. Specifically, the Hearing Officer sought briefing on how to construe the phrase in section 42-202(2)—which applies only to applicants for RAFN rights—that “the applicant qualifies as a municipal provider.” In order to “qualify,” must the applicant already be serving other municipal customers under some other water right at the time of permit application? Or is it sufficient for the applicant for a RAFN right to show that it is qualified to serve the municipal customers contemplated under the permit once the permit issues?

M3 Eagle urges that the latter interpretation is the more sensible. The purpose of the qualification requirement is not to distinguish between providers serving municipal customers today from those who would serve tomorrow. That is a pointless (and constitutionally infirm) distinction. Instead, the qualification requirement was intended by the Legislature to enable IDWR to cull those who seek the benefits of municipal provider status but lack the intent or capacity to provide a municipal water supply. For example, applicants who do not “qualify” as municipal providers would include:

- applicants who have not submitted an application that seriously addresses the various planning, water usage, and other issues presented by their projects and explained in sufficient detail how their proposed public water supply system will be built and operated;
- speculators whose real goal is to obtain permits and entitlements in order to sell them to someone who has the wherewithal to build the project;
- applicants seeking water for industrial, commercial, or other purposes under a false cloak of municipal use;
- applicants whose anticipated service base is too small to qualify as a public water system;
- applicants who cannot meet environmental standards for a public water supply; and
- anyone else lacking the intent and capacity to become a true municipal provider.

In sum, the qualification requirement in section 42-202(2) serves an important purpose, but not the one urged by Protestants.⁹

ARGUMENT

I. THE MOST NATURAL READING OF THE 1996 ACT IS THAT, TO QUALIFY AS A MUNICIPAL PROVIDER FOR RAFN PURPOSES, IT IS SUFFICIENT TO DEMONSTRATE THAT THE APPLICANT INTENDS TO AND HAS THE WHEREWITHAL TO BE A MUNICIPAL PROVIDER.

A. The 1996 Act created a new class of non-traditional municipal providers.

Prior to the 1996 Act, the common law recognized only two types of municipal provider: (a) cities and (b) regulated public utilities serving cities and other specified service areas. These are sometimes referred to as “traditional” municipal providers.

The 1996 Act created a third category of municipal provider, defined as a “corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a ‘public water supply’ as described in section 39-103(12), Idaho Code.” Idaho Code §§ 42-202B(5)(c). M3 Eagle seeks recognition of its municipal provider status under this third, “non-traditional” category. Parts I through III of the brief address M3 Eagle’s qualification as a non-traditional municipal provider.

In the alternative, because it is acting on behalf of the City of Eagle pursuant to its pre-annexation and development agreement with the City, M3 Eagle qualifies as a traditional municipal provider (i.e., a city) under Idaho Code § 42-202B(5)(a). This is discussed in part IV of the brief.

⁹ If the Hearing Officer should disagree with M3 Eagle on the RAFN issue, he still should grant the water right permit for municipal purposes but without the RAFN element.

B. Whether M3 Eagle is entitled to an RAFN water right turns on the word “qualifies” in Idaho Code § 42-202(2).

M3 Eagle has acknowledged that it is a “first-time” applicant for a municipal water right in Idaho.¹⁰ Protestants have not contested that M3 Eagle will meet the definition of a municipal provider once its project is constructed. Thus, as the Hearing Officer has recognized,¹¹ M3 Eagle is entitled, at a minimum, to a “current needs” municipal water right.¹² The only question is whether a first-time municipal applicant also may obtain an RAFN water right.

This question turns on the meaning of the word “qualifies”:

An application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied by sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area, and the planning horizon are consistent with the definitions and requirements specified in this chapter.

Idaho Code § 42-202(2) (emphasis supplied).

The Hearing Officer has asked for briefing as to whether the verb “qualifies” in the first clause means that the applicant already must be providing municipal water to customers under other municipal rights at the time of application for a new RAFN water right. M3 Eagle suggests that greater weight should be given to the meaning of the word “qualifies” than to its tense. Likewise, as noted in the last clause of the provision, this language should be construed in light of the Legislature’s treatment of the entire subject of municipal water rights in this chapter of the Idaho Code. In short, the requirement that an applicant show that it “qualifies” as a municipal

¹⁰ Colloquy between Hearing Officer and Jeff Fereday, Tr., p. 2488; question and answer exchange between Alan Smith and Bill Brownlee, Tr., p. 2595. Although M3 Eagle is itself a first-time municipal provider, it has entered into an agreement to provide water at the behest of the City of Eagle, which is a current municipal provider. These unique facts give rise to an argument in the alternative, presented in Part IV, that M3 Eagle should be recognized as an existing municipal provider for purposes of section 42-202(2).

¹¹ See footnote 7 at page 10 and accompanying text.

¹² The phrase “current needs water rights” is explained in footnote 2 at page 7.

provider is best understood in the context of the broader goals of the 1996 Act. These goals are discussed below.

C. The 1996 Act did more than codify the growing communities doctrine; it created a new paradigm of benefits and burdens intended to encourage applicants for municipal water rights to seek RAFN water rights.

Courts throughout the West have long recognized that special treatment should be accorded providers of municipal water rights. This has come to be known as the growing communities doctrine.¹³ The fundamental premise of “use it or lose it” embodied in the short prove-up period for holders of water right permits is incompatible with the needs of municipal providers whose service obligations require them to plan ahead and acquire water rights that they will grow into over the long term. In an oft-quoted statement, the Colorado Supreme Court declared that “it is not speculation but the highest prudence on the part of the city to obtain appropriations of water that will satisfy the needs resulting from a normal increase in population within a reasonable period of time.” *City and County of Denver v. Sheriff*, 96 P.2d 836, 841 (Colo. 1939).

This principle has been recognized in three cases arising in Idaho. *City of Pocatello v. Murray*, 206 F. 72 (D. Idaho 1913) (aff’d, *Murray v. City of Pocatello*, 214 F. 214 (9th Cir. 1914) (in which the court found the rule applicable to a private developer of a municipal water system)¹⁴; *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940)¹⁵; *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969).¹⁶

¹³ We employ the phrase “growing communities doctrine” to capture the essential points of the case law. The label has been employed by the Washington Supreme Court, *State of Washington, Dept. of Ecology v. Theodoratus*, 135 Wash.2d 582, 957 P.2d 1241 (1998) (dissent), and by numerous commentators, e.g., Lora Lucero and A. Dan Tarlock, *Water Supply and Urban Growth in New Mexico: Same Old, Same Old or a New Era?*, 42 Nat. Resources J. 803 (2003).

¹⁴ 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

In enacting the 1996 Act, the Idaho Legislature acknowledged and embraced these common law principles as part of the prior appropriation doctrine.¹⁷ But it did more than confirm the common law. It created a new paradigm of limitations on future need water rights:

1. The Act required those seeking municipal water rights for the long term to submit to rigorous disclosure and proof requirements at the permit and licensing stages.
2. The Act eliminated the potential for speculation in municipal water rights by prohibiting the marketing of RAFN water rights.¹⁸

entire supply physically available in the creek. Applying Idaho law, the federal court found Murray indeed had failed to fulfill his contractual obligation. The court rejected Murray's argument that it was against public policy for the city to appropriate more water than was then needed. The court declared that the leeway accorded agricultural users "should and doubtless would, be applied with even greater liberality to the superior and more elastic needs of a growing municipality." *City of Pocatello*, 206 F. at 80.

¹⁵ In *Beus*, the Idaho Supreme Court upheld the city's right to purchase irrigation water rights and hold them for future municipal needs. The Court went on to hold that such water need not be applied to irrigation in the meantime to avoid forfeiture. "To require that would amount to nullifying the power granted to a municipality to acquire and hold water for future needs—an absolute necessity of life and existence for a municipality." *Beus*, 62 Idaho at 7, 107 P.2d at 154.

¹⁶ In *Village of Peck*, the Court upheld the right of the village to obtain an unquantified water right for "all the flow" from a particular source. The Court cited the water law scholar Wells A. Hutchins for the proposition that "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." *Village of Peck*, 92 Idaho at 751 n.4, 450 P.2d at 314 n.4 (citing Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 44 n.211 (1968)).

¹⁷ The bill's statement of purpose states: "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 statute does not address those licensed and decreed water rights now held by municipal providers, and the legislation intends no change in the common law with respect to such rights." Statement of Purpose, R.S. 06104, which became S.B. 1535, enacted as the Municipal Water Rights Act of 1996, 1996 Idaho Sess. Laws, ch. 297 (emphasis supplied) (Attachment D).

¹⁸ The Act contains two provisions prohibiting the transfer of RAFN water rights to a place of use outside the service area or to a new nature of use. The first appears in the context of licensing: "The director shall condition the license to prohibit any transfer of the place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use of amounts held for reasonably anticipated future needs together with such other conditions as the director may deem appropriate." Idaho Code § 42-219(1). The second appears in the context of transfers: "When a water right or a portion thereof to be changed is held by a municipal provider for municipal purposes, as defined in section 42-202B, Idaho Code, that portion of the right held for reasonably anticipated future needs at the time of the change shall not be changed to a place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use." Idaho Code § 42-222(1).

3. The Act discouraged water disputes between competing municipalities by making RAFN rights unavailable where they are inconsistent with comprehensive plans or serve areas overlapped by conflicting comprehensive plans.¹⁹ This applies equally to private, non-traditional municipal providers, thus giving every developer an incentive to support sound land use planning.²⁰

The essence of the 1996 Act is to encourage rigorous public disclosure coupled with express constraints on speculation in exchange for greater flexibility in meeting long-term municipal needs.²¹ This is the Act's basic trade-off. As the Legislature stated in the bill's statement of purpose, the "flexibility for municipal providers" should be "further described" and "appropriately controlled." Statement of Purpose, R.S. 06104 (Attachment D).

The 1996 Act does not expressly state whether the RAFN requirements are mandatory or optional for municipal providers. The Department, however, has concluded that the requirements are optional, allowing applicants for municipal water rights to elect either a current

¹⁹ Cities in other states have engaged in races to lock up huge stockpiles of water rights. Each city's goal is to ensure that it, rather than its neighbor, will be able to grow. The authors of the 1996 Act were acutely aware of this phenomenon—particularly on the Front Range of Colorado—and took steps to ensure that the special treatment accorded to municipal providers would not trigger similar water wars in Idaho. Accordingly, the 1996 Act requires that the asserted future 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." Idaho Code § 42-202B(8) (definition of "reasonably anticipated future needs"). This last requirement is a potentially draconian measure designed to provide an incentive to adjacent municipalities to cooperate in planning efforts. To the extent two or more municipalities assert planning authority over the same area and develop conflicting planning scenarios, none of them may obtain a "planning horizon" water right for its part of the overlapped area.

²⁰ Non-city municipal providers are equally prohibited from serving such "conflicted" areas. For example, several neighborhoods and commercial areas were left out of the "planning horizon" calculation in the first application for RAFN water rights in Idaho by United Water Idaho in its so-called Integrated Municipal Application Package or "IMAP."

²¹ The legislative history contains the following statement: "Karl Dreher then presented S 1535 to encourage long-term land use planning by municipalities—cities, counties, and State Universities." Minutes of the House Resources and Conservation Committee at 2 (Mar. 7, 1996).

needs municipal water right or an RAFN water right.²² In other words, municipal providers may opt out of the burdens of the RAFN provisions. But it would be an unwarranted step for the Department to construe the statute not just to allow municipal applicants to avoid the burdens of the 1996 Act but to actually prohibit some of them from taking on that burden.

Given that the basic premise of the 1996 Act was to encourage long-term planning, full disclosure, and protection against speculation, an intent to exclude first-time municipal providers from the basic goals of the 1996 Act should not readily be presumed. Nothing in the legislative history lends support to such a counter-intuitive construction.²³

In sum, the purposes of the 1996 Act are evident in the statute and its statement of purpose. The Act's basic trade-off of benefits and burdens is intended to discourage municipal providers from proceeding incrementally and disclosing only immediate requirements at each step. Rather, the RAFN planning requirements facilitate disclosure and evaluation of the full water needs that ultimately will be required for the development.

Such up-front disclosures would appear all the more appropriate in a case, such as this one, where the developer proposes a fixed number of units to serve within a set boundary, but where build-out will take two or three times longer than even the ten-year extended prove-up period. By entitling such a developer to apply for and obtain a RAFN water right, the Legislature is encouraging full disclosure of the project's entire water use at the outset. The Legislature is discouraging piecemeal development in which partially-completed projects argue their entitlement to the next increment of water regardless of availability because shutting them

²² Memorandum from L. Glen Saxton to Water Allocation Bureau re Water Rights for Municipal Use (Mar. 18, 1998) (Attachment H) (stating that applicants for new municipal permits may elect to obtain RAFN or non-RAFN water rights). This is discussed further in Part III.D at page 41.

²³ The legislative history is discussed in the text accompanying footnote 36 at page 29 and in Part I.I at page 29.

down mid-stream would hurt the community. The Legislature is extending, to those developers willing to put all the cards on the table up-front and prove full water sufficiency and financial ability, a measure of security that will allow it to attract the type of investment that is important to community stability.

These planning requirements benefit the public by putting potential water users on notice at the outset of the entire commitment of water supply required for the development. By encouraging these disclosures and discouraging speculation, the 1996 Act allows water markets to send the right signals and policy makers to make the best possible judgments about water management.

D. There is no logical basis for excluding new developments from the burdens and benefits of RAFN water rights.

Having so carefully crafted this balanced system of increased flexibility coupled with additional burdens and restrictions, and having expressly added a whole new class of non-traditional municipal providers to those who may seek RAFN water rights, it seems most unlikely that the Legislature then would have intended by subtle implication (based on no express language but only on a verb tense) to have excluded the bulk of that new class (new developments) from those benefits and burdens.

Perhaps, Protestants may suggest, the Legislature did so because new developments cannot be trusted to hold RAFN water rights. This argument does not withstand scrutiny. The brutal market conditions we are now experiencing demonstrate painfully and graphically that defaults and bankruptcies clobber established developments (and even counties, cities, and states) just as readily as they hit first-time developments. Even if it were true that new developments were more prone to unexpected changes in condition, then all the more reason

why they should be subjected to the disclosure and anti-speculation rules that attach only to RAFN water rights.

Excluding new developments from being “appropriately controlled”²⁴ by IDWR under the 1996 Act simply makes no sense. If anything, these developments should be required to obtain RAFN water rights, thereby ensuring that the water rights they obtain cannot be traded for speculative gain. Arbitrarily barring all new developments from these protections, thereby forcing them to an incremental water acquisition path with no public disclosure of their long-term plans, is the opposite of good policy. Whatever ambiguity there may be in the 1996 Act should be construed to avoid illogical results, not embrace them.

E. The Legislature established the time of licensing as the point at which an applicant’s “municipal provider” status would be evaluated.

There is another reason to conclude that the qualification requirement does not draw a line in the sand over whether the applicant is a municipal provider at the time of permitting. If the applicant had already established that it was serving municipal customers at the time of permitting, there would be no need to make another assessment of the matter at the time of licensing. Yet the Legislature—acting in a way that is consistent with all other categories of water rights described in Chapter 2—required the Director to evaluate the applicant’s qualifications at the time of licensing:

Upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use. . . . A license may be issued to a municipal provider . . . provided that the director determines that the amount is reasonably necessary to

²⁴ Statement of Purpose, R.S. 06104 (Attachment D).

provide for the existing uses and reasonably anticipated future needs within the service area and otherwise satisfies the definitions and requirements specified in this chapter for such use.

Idaho Code § 42-219(1) (*emphasis supplied*). “This chapter,” of course, includes both the definition section, Idaho Code § 42-202B, and the application provisions, Idaho Code § 42-202.

The Hearing Officer already has recognized that this language in the licensing provision—often referred to as the “proof” or “prove-up” provision—refutes Protestants’ original argument that first-time providers may not even obtain non-RAFN water rights.²⁵ The same language also undercuts the argument that the qualification language in section 42-202(2) is intended to restrict RAFN eligibility solely to already-existing municipal providers. Instead, the most logical interpretation of the statutory scheme is that the application must include sufficient information to allow the Department to proceed with the reasonable expectation that approval will result in the construction of a public water supply system and the delivery of actual municipal service. If a contested case ensues after the application is published, the likelihood of qualification can be further explored, as it has been in this case. In any event, once the permit is issued and the project underway, the fact of municipal service must be confirmed with proof at the time of licensing. There would be no need to examine at the time of proof whether the water user was a municipal provider if that fact had already been established at the time of application.

Nor is there any need for the Protestants’ narrow reading of the Act to protect against water rights being “locked up” by first-time municipal providers. After all, the Department is called upon at permitting and again at licensing to evaluate the legitimacy of the provider’s long-term needs. Moreover, licensed RAFN rights are subject to forfeiture even after licensing if the

²⁵ See footnote 7 at page 10 and accompanying text.

system capacity is not developed or if long-term needs do not materialize.²⁶ Finally, any concern about speculation—or “opening Pandora’s Box,” as Protestants say²⁷—is eliminated by the Act’s self-executing protections against speculation.²⁸ This is in contrast to holders of current needs municipal water rights; the holders of such rights are free to switch purposes and even to sell their rights to the highest bidder. In short, RAFN applicants are committing to an appropriation with more restrictive rules than ordinary municipal providers face, not one that opens any avenue whatsoever to speculation or abuse.

Unlike other municipal applications, by the way, M3 Eagle’s application presents yet another protection: an annual volume cap on diversions. This voluntary concession provides further assurance that the full scope of the project and its potential impacts are understood at the outset.

F. Absent a compelling reason for doing so, an ambiguous statute should not be construed at once to create a new class of beneficiaries and then to exclude most members of the class.

Protestants’ interpretation calls for another improbable conclusion. Protestants urge that the 1996 Act opened the door to non-traditional providers and then closed it for most of them. If this were the case, would there not have been some language in the Act, the statement of purpose, or the legislative history to explain why the Legislature was at once creating, and at the same time drastically restricting, the class of non-traditional municipal providers who could “qualify” under the statute?

²⁶ Administrative Memorandum, Application Processing No. 63, at 4-5 (June 15, 1999) (Attachment J). See discussion in footnote 43 at page 41.

²⁷ Statement of Alan Smith, Tr., p. 1756.

²⁸ Idaho Code §§ 42-219(1), 42-222(1) prohibit the speculative transfer of RAFN water rights. See footnote 18 at page 15.

It is difficult to fathom what policy goal would be advanced by drawing the distinction urged by Protestants. That distinction would limit RAFN water rights to those developers who were able to find lenders or investors willing to finance the most costly initial phase of their development with “current needs” water rights only. Why would the Legislature wish to reward this class of risk-takers to the detriment of developers and lenders who seek the assurance of longer term planning and water rights and are willing to meet the statute’s obligations, conditions, and proof requirements? Under Protestants’ theory, even experienced developers with a successful track record in other locations (such as M3 Eagle’s parent, M3 Companies²⁹) typically would not be able to qualify for RAFN rights, because most new projects are undertaken by different corporate entities that would not qualify as existing providers. This is the situation with M3 Eagle in this case; while its principals and parent company have experience providing municipal water elsewhere, it is a new, single-purpose entity to develop this specific property in north Eagle.

G. Disallowing RAFN water rights for new developments would lead to a pointless two-step application process or an equally pointless acquisition of residential properties.

If Protestants’ position were to prevail, new developments that cannot be completed (or stubbed out) in five or ten years would be forced to undergo a two-step process whereby they first acquire a current needs municipal water right. Then, once the project is partially constructed, the developer finally would “qualify” as a municipal provider. At that point the developer could return to the Department with a new application for an RAFN water right to

²⁹ M3 Eagle’s parent, M3 Companies, is an example of an experienced developer with solid track record of providing municipal water to municipal customers, including the Prescott Lakes, American Ranch, and Wickenburg Ranch projects. Testimony of Bill Brownlee, Tr. pp. 2596-97, 3771-72.

cover the rest of the build-out. This cumbersome, incremental scheme does not appear to comport with what the Legislature intended in enacting the forward-looking 1996 Act.

First, the public and the Department are deprived of the value of up-front disclosure of the project's long-term plans and water needs. As discussed in part I.C at page 14, this largely defeats the purpose of the 1996 Act.

Second, large-scale projects (which typically are the only ones that can afford substantial parks and open space, smart growth amenities, transportation planning and infrastructure, wastewater re-use, and other public facilities and benefits) cannot reasonably be built out in less than ten years, and require long-term financing. This is illustrated by a letter from the representative of the Dallas Police and Fire Pension System (one of M3 Eagle's financial partners): "In evaluating this investment, DPFPS finds it important that the Company has applied for a 'Reasonably Anticipated Future Needs' water right for the project and has made arrangements to convey the water systems to the city into which the project will be annexed." (Ex. 87, reproduced as Attachment G to this brief.)³⁰

Third, a reliable, efficient, centralized water system backed by adequate water rights for full build-out is an important marketing factor in the development of the project. For example, Mr. Brownlee testified:

[Not having a long-term supply] gives a lack of assurance to a major employer that may look at relocating in this community based upon the fact that they're looking for the viability of the buildout of that entire community to support their employment objectives.

It hinders our ability to construct educational facilities based upon the full buildout of the community. It also affects the fire and police positions. So, there's a number of facets of a community that are affected when you don't have the ability to

³⁰ The value of a long-term water right sufficient for full build-out of the M3 Eagle project is discussed further in the testimony of Bill Brownlee, Tr., pp. 95-96, 125, 153-54, 157-59.

plan for the full horizon of the community.

Tr. p. 158.

Fourth, the developer would suffer a loss in priority if it is forced to postpone its application for RAFN rights. This is unfair to developers who are willing to shoulder the burdens of long-term planning and full disclosure. And this again contradicts a key purpose of the 1996 Act.

Fifth, what could have been accomplished in one proceeding now requires two. Such a two-step process would be a waste of time for protestants, taxpayers, the Department, and other governmental entities (such as the Idaho Department of Environmental Quality).

An equally pointless alternative to this two-step process would be for an applicant for an RAFN water right first to acquire an existing municipal water right for a ten-home trailer park or subdivision and take over service to those customers. Under the Protestants' theory, such a developer then would qualify as a municipal provider based on this petty demonstration, and it could then apply for an RAFN water right for the larger project. If this is what the Department believes that M3 Eagle should do, the applicant can certainly do that. But we fail to see how that advances the goals of the 1996 Act.

H. The Protestants' suggestion that a beneficial use must be established prior to permitting departs from a century of water right permitting policy.

(1) Since 1903, the permitting process has looked forward to what the applicant will do with the water once the permit is issued.

As the Hearing Officer noted on May 11, 2009, the permitting process in Idaho has always been forward looking. "The Department receives applications for irrigation from people that are not yet irrigators, that are not yet domestic users, and that are not yet commercial or industrial users, and we receive them in anyway." Statement of Hearing Officer, Tr., p. 1761.

Of course this is the case. The permitting process contemplates that persons not yet appropriators may become so by meeting certain qualifications. That's what a permit is about. The prior appropriation doctrine from the very start was aimed at rewarding and protecting newcomers who are willing to put water to work. It would be a startling departure to reshape the appropriation process as an exclusive club that provides special advantages only to those with pre-existing water uses of the same type.

This forward-looking approach to permitting is reflected in the language used throughout section 42-202—the same section containing the “qualification” requirement at issue here.

Indeed, section 42-202(2) itself is constructed in this same prospective manner:

(2) An application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied by sufficient information and documentation to establish that the applicant qualifies³¹ as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made.

Idaho Code § 42-202(2) (emphasis supplied). Read in the context of the very paragraph in which it appears, the term “qualifies” means that the applicant must display a plan for the proposed use that is sufficient for the Department to conclude that the “intended use” reasonably can be expected to occur—that the water will “be used” for the purpose. This forward-looking approach is the same as is used throughout the application provisions of which section 202(2) is

³¹ The verb “qualifies” is the subject of this brief. Although this is a present tense verb, the meaning of the verb focuses on the future—whether the applicant is qualified, that is, or capable of being a municipal provider.

a part.³² It is not reasonable to assign the opposite construction to one ambiguous word in this paragraph and thereby compel this one type of applicant to show that it already supplies municipal customers under a previously acquired water right.

This forward-looking language reflects over a hundred years of legislative policy toward new appropriations.³³ The 1996 Act is part and parcel of section 42-202 and in any event must be read *in pari materia* with other statutory provisions dealing with water appropriation.³⁴

The word “qualifies” should be understood in that context. The idea that an applicant must already be applying water to a particular type of beneficial use—indeed, the very type being applied for—before he or she may obtain a permit for a new water right is antithetical to the permitting process we have known for so long. That approach would tend to create monopoly, not guard against it. As discussed below, Idaho’s Constitution and the permit system

³² Section 42-202(1) refers to the person or entity “intending to acquire the right to the beneficial use of the waters” of the State, and requires, “before” beginning the diversion for the “proposed appropriation” it “make an application” setting forth several details concerning the “proposed use,” the “proposed . . . work and the amount of water to be diverted” and the “time required for the completion of construction . . . and application of the water to the proposed use.”

Section 202(3) concerns the waters the applicant “intends to store” and limits irrigation storage to a certain amount “per acre of land to be irrigated.”

Section 202(4) requires “a plan and map of the proposed works” for the diversion and use of the water, including dimensions of “the proposed reservoirs” and other facilities “proposed to be used.”

Section 202(5) requires applicant to demonstrate financial resources “necessary to construct the proposed works.” If the application is for purposes other than irrigation or domestic, the applicant must describe “the purpose for which it is proposed to be used, the nature, location, character, capacity and estimated cost of the works, and whether the water used is to be and will be returned to the stream.” Note that this sentence says “water used,” not “water to be used.” Of course, this departure from future tense is of no consequence, because the forward-looking sense of the statement is clear. This illustrates that undue weight should not be placed on verb tense in the context of a statute that is plainly forward looking. The same goes for the verb “qualifies” in section 42-202(2).

Section 202 (6) contains the same type of language, using terms such as “the proposed right of use,” the land “proposed to be irrigated,” the acreage “to be reclaimed” or “proposed to be reclaimed.” (Emphasis supplied in each of the above quotations.)

³³ Idaho’s first permit system for water rights was established in 1903.

³⁴ “We will construe a statute as a whole Statutes that are *in pari materia*, i.e., relating to the same subject, must be construed together to give effect to legislative intent.” *Johnson v. McPhee*, 147 Idaho 455, 561, 210 P.3d 563, 569 (Ct. App. 2009) (citing *Paolini v. Albertson’s Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006); *Union Pacific R.R. Co. v. Bd. of Tax Appeals*, 103 Idaho 808, 811, 654 P.2d 901, 904 (1982)).

in our water code contradict Protestants' notion that the Legislature intended that only those who already provide municipal water need apply.

- (2) **In the absence of supporting legislative history, an ambiguous statute should not be construed to require an abrupt change in how permits are approached.**

Certainly, the Legislature has the power to change the rules. And it is true that the sentence requiring an applicant to show that it “qualifies” as a municipal provider could be construed as employing an anomalous present-tense wording for the purpose of restricting the applicant pool to those who already provide municipal water. But surely, if the Legislature had intended such a sharp departure from a century-old approach to forward-looking permitting, it would have employed language expressly calling for this result. If the Legislature cared so much about the current status of the applicant, would it not have required the applicant to be a municipal provider, rather than qualify as a municipal provider? If the Legislature desired to embrace the Protestants' result, would not the legislation have been changed to read as follows: “An application . . . shall be accompanied by sufficient information and documentation to establish that the applicant qualifies as is a municipal provider”

When interpreting a single verb with an ambiguous meaning in a substantial statute, meaning and context count for more than verb tense. The word “qualifies” usually connotes the idea that a person is capable of meeting applicable criteria, not necessarily that the person is doing the thing now. The dictionary says qualifies means: “to provide with proper or necessary skills, knowledge, credentials, etc.; make competent: *to qualify oneself for a job.*” *Random House Webster's Unabridged Dictionary, 2nd Ed.* (1998) (emphasis original). One does not qualify oneself for a job one already has. One qualifies for a job by showing that he or she is capable of doing it.

We are mindful of the Hearing Officer's comment, during the hearing, to the effect that "qualifies" might be considered to have a meaning such as it would in a track meet, where the winner of a heat thereby "qualifies" to move up to the main race. Tr. p. 3906-07. But "qualifies" in this sense does not block a less burdensome definition in the present case. The verb "qualify" addresses capacity to do a job. In the case of a race, winning a heat shows that one has the wherewithal to compete seriously in the main race. Likewise, M3 Eagle "qualifies" because it has taken every step it reasonably can at the application stage to show itself capable of the job of providing municipal water.

Likewise, one may "qualify" for admission to college by obtaining good grades and tests scores in high school. It is not necessary already to be a college student in order to "qualify" for college. Nor must M3 Eagle already be serving municipal customers to "qualify" as a municipal provider. The sole question is whether M3 Eagle has shown itself capable of serving municipal customers.

To analogize to a prominent current event, Senators recently debated whether Judge Sonia Sotomayor was "qualified" to serve as a U.S. Supreme Court Justice. The debate on her qualification, however, looked forward to what kind of a job she could be expected to do in the future on the high court. Although there was disagreement about how well qualified she was, no one said she was unqualified because she was not already a Supreme Court Justice. Again, being qualified does not mean that one is already doing a job. It means that one has the wherewithal to succeed in an undertaking that has not yet occurred.

The same goes in this case. The Legislature requires the Department to scrutinize the applicant's "information and documentation" on this subject to decide whether the applicant qualifies as a municipal provider. Idaho Code § 42-202(2). The Protestants' suggestion that this

boils down to a petty determination of whether the applicant already is providing municipal water elsewhere in Idaho trivializes the Department’s important responsibility to ascertain that the applicant has the wherewithal and intent to develop the water for municipal purposes.

M3 Eagle has provided information and documentation to show that it qualifies by showing that it is capable of serving municipal customers. At proof, M3 will show that it is in fact serving municipal customers. The statute should not be read to require more.

In any event, “qualifies” is an odd choice of word to convey the idea that the applicant is then and there serving municipal customers, rather than is capable of or qualified to do so. Since the meaning of the word “qualifies” does not get them very far, the Protestants rest their entire argument on the tense of the verb.³⁵ This is a slender reed to support such a fundamental shift in permitting policy, which has never before decided who is qualified for a permit based on what other water rights he or she holds. If the Legislature had intended to effect such a sea change, surely someone would have said something during the entire course of the legislative history to note this result. The legislative history is silent on the subject.³⁶

I. The legislative history supports the conclusion that applicants are not required to be serving customers already to be qualified as municipal providers for RAFN rights.

Although the committee reports and other commentary in the legislative history do not address the subject of what “qualifies” means, the evolution of the legislation sheds light on the subject. A completely plausible explanation of this word usage is that the Legislature was signaling the Department to ensure that the applicant’s testimony and other proof show that it has the capability—that is, it qualifies—to put in place a functioning municipal water system. To

³⁵ To be precise, Protestants addressed verb tense in sections 42-202B(5), 42-219, and 42-222. It was the Hearing Officer who drew attention to tense of the verb in section 42-202(2). See discussion in the Introduction.

³⁶ Committee Reports on the legislation are reproduced in Attachment E.

quote Webster's, it must make a showing necessary to "qualify itself for the job" of being a municipal provider through the permitting process.

Another explanation for why the Legislature used the word "qualifies" in the present tense is that it was not even thinking about section 42-202(2) when it amended section 42-202B(5)(c). The first municipal water rights bill considered by the Legislature was S.B. 1355 (attached as Attachment B). That version contained a more limited definition of municipal provider in section 42-202B(5). It recognized only the two traditional municipal providers, cities and public utilities.

S.B. 1355 also contained the language in section 42-202(2) requiring a permit applicant to show that it "qualifies as a municipal provider." While new cities and public utilities can be created, this happens rarely. Thus, speaking about cities and public utilities "qualifying" (in the present tense) as municipal providers was a natural choice of language. But even here there would be no reason to conclude that the Legislature intended to block future-formed utilities, or cities to be incorporated in the future, from qualifying to be municipal providers.

S.B. 1535 (attached as Attachment C) was introduced later in the session. This version, which ultimately was enacted as the 1996 Act, expanded the definition of municipal provider in section 42-202B(5) to allow permit applications by a third category of non-traditional municipal providers (which includes developers like M3 Eagle). When that change was made, it is easy to imagine that no one thought to look back at section 42-202(2) to ponder whether the tense of the verb "qualifies" should be changed to clarify that it encompassed providers that are not yet serving customers.

This reinforces the idea that not too much emphasis should be placed on verb tense. Instead, in order to divine legislative intent, it may be more productive to focus on what the Legislature was trying to accomplish.

We know this: The Legislature thought it important to amend the bill to add a new class of non-traditional municipal providers. That being the case, it is reasonable to conclude that if the Legislature intended to exclude some members of that class it would have taken pains to say so—rather than just rely on the tense of a verb in another section to accomplish that distinction. The far more logical assumption is that the Legislature intended to bring all non-traditional municipal providers within the Act's burdens and benefits, irrespective of whether they become municipal providers before or after they receive their permit.

Why, then, did it include a qualification requirement? The answer is simple. The Legislature instructed the Department to ensure that only bona fide municipal providers will hold RAFN water rights, and it wished to ensure that the permit process would inquire into the applicant's qualifications to do so. As noted at the end of the introduction, there are those who might apply for an RAFN water right but have insufficient engineering or build-out plans, no real intent to develop the project themselves, no concept of water availability, no likelihood of funding, or some other disqualifying characteristic. Thus, based on the evolution of the legislative language and the purposes of the Act, it is fair to conclude that the qualification requirement is not focused on the temporal issue of when the provider first begins to provide municipal water but on whether the applicant's case includes a showing that municipal water actually will be provided.

Indeed, it is the nature of water right permitting that the appropriator could not even begin to provide municipal supplies under the permission being applied for until the permit is

granted. It is granted (or denied) on the basis of water availability, the applicant's qualifications to do the job, and other familiar factors.

II. DENYING RAFN WATER RIGHTS TO NEW DEVELOPMENTS WOULD RAISE SERIOUS CONSTITUTIONAL ISSUES.

A. Statutes should be construed to avoid constitutional questions.

A canon of statutory construction requires that interpretations of statutes that raise constitutional questions should be avoided. "Our normal course is first to ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." *United States v. Grace*, 461 U.S. 171, 175-76 (1983) (internal quotes and brackets omitted). "We are mindful that whenever possible, a statute should be construed so as to avoid a conflict with the state or federal constitution." *State v. Holden*, 126 Idaho 755, 761 n.4, 890 P.2d 341, 347 n.4 (Ct. Ap. 1995). "Where a statute is capable of two interpretations, one of which would make it constitutional and the other unconstitutional, it is well established that a court should adopt that construction which upholds the validity of the act." *Cowles Publishing Co. v. Magistrate Court of the First Judicial Dist. of the State of Idaho*, 118 Idaho 753, 759, 800 P.2d 640, 646 (1990).

B. Denying RAFN water rights to new developments would violate the Equal Protection Clause.

Protestants' construction of the 1996 Act would favor one group of non-traditional municipal providers over another. Since there is no rational basis for favoring existing providers over new ones, the distinction violates the Equal Protection Clause of the federal and Idaho constitutions.³⁷

³⁷ The Fourteenth Amendment of the Constitution bars states from enacting legislation that denies any person equal protection under the law. U.S. Const., Amend XIV § 1. Similar protection is embodied in Idaho's Constitution. Idaho Const., art. I, § 2. These equal protection provisions apply to corporations as well as to natural persons. *In re Case*, 20 Idaho 128, 132-33, 116 P. 1037, 1038 (1911). In essence, the equal protection provisions

A good example of an unconstitutional differentiation is found in *Crom v. Frahm*, 33 Idaho 314, 193 P. 1013 (1920). In that case, the Idaho Supreme Court struck down a law that singled out Carey Act irrigation companies, allowing them to modify their boards more easily than other Idaho corporations. While one might conceive of reasons for distinguishing this type of water delivery entity from ordinary corporations, the Court declared that such special treatment of one type of water user “is not founded on a difference either natural, or intrinsic, or reasonable.” *Crom*, 33 Idaho at 319, 123 P. at 1014. The *Crom* decision indicates that our Supreme Court does not easily find a rational basis for distinctions of this type.

Our situation is similar to *Crom*. As shown in Part I.D at page 18, there is no natural, intrinsic, or reasonable basis for favoring existing non-traditional municipal providers over new ones. On what possible rational basis could the Legislature conclude that existing subdivisions and trailer parks serving as few as ten homes³⁸ should be allowed to plan for the future by

prohibit the government from singling out certain individuals or classes of persons for special treatment. While some classification is inherent in all legislation, the Equal Protection Clause prohibits laws that are in reality “a subterfuge to shield one class or unduly burden another.” 16B Am. Jur. 2d., *Constitutional Law* § 808 (1998). Thus, where legislation classifies persons without any rational basis, treating some better than others, it is unconstitutional.

Of course, some legislative classifications are appropriate. By way of example, it is reasonable and proper to implement different maximum fee schedules for ophthalmologists and optometrists. *Posner v. Rockefeller*, 31 A.D.2d 352 (N.Y. 1969). In that case the purpose of the legislation (to implement Medicare requirements) was rationally related to the distinction drawn between doctors and non-doctors. The situation would be entirely different if instead the Legislature declared that ophthalmologists are subject to a moratorium on new water rights, while optometrists are not. Plainly, such a classification would improperly single out a particular class of citizens, thus violating the Equal Protection Clause.

In sum, the Equal Protection Clause “does not preclude the states from enacting legislation that draws distinctions between different categories of people, but it does prohibit them from according different treatment to persons who have been placed by statute into different classes on the basis of criteria wholly unrelated to the purpose of the legislation.” 16B Am. Jur. 2d., *Constitutional Law* § 793 (1998).

Our Supreme Court has summed up the law concisely: “The discrimination must rest upon some reasonable ground of difference between the persons or things included and those excluded, having regard to the purpose of the legislation, and, within the sphere of its operation, the statute must affect all persons similarly situated.” *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 403-04, 263 P. 45, 53 (1927). In *Big Wood*, the Court upheld a statute providing special treatment of irrigation systems covering over 25,000 acres, noting that the classification was legitimate because it did not bear on the nature of the corporation, but instead “its classification relates solely to size.” *Big Wood*, 45 Idaho at 403, 263 P. at 53.

³⁸ This definition of public water supply applies to large and small developments alike. It includes systems “furnishing water for drinking or general domestic use in incorporated municipalities; or unincorporated

applying for RAFN water rights, but that a company laying out detailed plans for a new master planned community that will take decades to complete should be barred from applying for an RAFN water right? If either new or existing developments should be eligible to qualify to apply for RAFN rights, then both should be eligible.

The temporal distinction based on a verb tense urged by Protestants makes no sense and raises serious constitutional concerns. It should be rejected.

C. Protestants' construction would impair the constitutional right to divert.

Idaho's Constitution establishes the appropriation doctrine in Idaho and guarantees the right to divert:

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

...

Idaho Const. art. XV, § 3.

Although barring new developments from obtaining RAFN water rights would not be an absolute denial of a right to divert, it would substantially burden and impair this right. A court could well find that this treatment, including loss of priority, is unjustified and in violation of Idaho's Constitution.

III. THE TAMARACK PRECEDENT FOR AWARDED RAFN WATER RIGHTS TO FIRST-TIME DEVELOPERS IS *STARE DECISIS* AND SHOULD BE FOLLOWED HERE.

A. An RAFN water right was awarded to Tamarack.

Protestants' interpretation of the municipal qualification requirement would require the Department to override clear precedent. In a decision on all fours with the pending application,

communities where ten (10) or more premises or households are being served or intended to be served; or any other supply which serves water to the public and which the department declares to have potential health significance." Idaho Code § 39-103(12).

the Department granted an RAFN water right to first-time developer Tamarack Resort LLC. See Water Right No. 65-22357 (Attachment F). (Tamarack was then known as WestRock. For convenience, we refer to it herein by its current name, Tamarack)

The Department's records of the Tamarack contested case show that at the time Tamarack applied for its municipal water right permit, which included the RAFN element, it was serving no municipal customers. It owned no other municipal rights, and it had not even drilled its first production well.

Yet, this presented no obstacle whatsoever to a finding that Tamarack qualified as a municipal provider based on its plans to provide municipal water once the permit was issued.

The final order expressly found:

WestRock has shown that it is a municipal provider under I.C. § 42-202B(4)(c) and that it is applying for a water right for municipal purpose under I.C. § 42-202B(5). Further, WestRock, or its successor, will provide a "public water supply" under I.C. § 39-103(10). . . . However, WestRock's water system master plan indicates that its water system design documents will be submitted to the appropriate regulatory agencies for review and approval. Exhibit 31, p. 16. Thus, it is in the process of complying with this critical portion of the proposed water use.

In the Matter of Application for Permit No. 65-22357 in the Name of WestRock Associates, LLC

(IDWR, Final Order, Dec. 20, 2002) (Conclusion of Law No. 5) (emphasis supplied).

B. The Department's decision approving the Tamarack application is *stare decisis*.

Where the facts and the legal principles are the same, as they are here, the law of precedent (or, more formally, *stare decisis*) applies. 20 Am. Jur. 2d, *Courts*, § 135 at p. 517 (2005) (*stare decisis* applies when "the legal point on which the decision in both cases rests is the same").

This is true not only in the courtroom, but in administrative settings like this one. As one treatise notes:

The doctrine of *stare decisis* applies to administrative agencies acting in a quasi-judicial capacity, and it requires an agency to adhere to its own precedent when given similar facts. The same policy reasons for consistent results, given essentially similar facts, apply whether the proceeding is administrative or judicial; that is, to provide guidance for those governed by the determination, deal impartially with litigants, promote stability in the law, allow for efficient use of the adjudicatory process, and maintain the appearance of justice.

Decisions of Administrative Bodies, Carmody & Wait 2nd, New York Practice § 2:326 (2009).³⁹

Although intensively litigated, the protestants in the Tamarack case did not challenge the private developer's qualification as a municipal provider. But the Department's decision is a precedent nonetheless. A determination that the applicant is qualified as a municipal provider is an express prerequisite and thus an essential element in the award of an RAFN permit. Idaho Code § 42-202(2). The applicant recognized that it had an affirmative duty to meet its burden of proof on this subject, and presented evidence showing that it was qualified. The Department had an affirmative duty to make a determination as to qualification irrespective of whether the applicant's evidence was contested by a protestant.⁴⁰ The Department recognized this responsibility and made an express finding that Tamarack met the statutory test for a municipal provider (see quotation in Part III.A above).

Accordingly, we respectfully disagree with Hearing Officer Spackman's statement, in denying the offer of evidence concerning Tamarack's status at the time of its application, that "to

³⁹ Principles of *stare decisis* operate somewhat more flexibly where agencies are engaged in legislative action and policy-making. Even there, however, they are required to recognize and explain departures from prior policies. *McNeal v. Idaho Public Utilities Comm'n*, 142 Idaho 685, 132 P.3d 442 (2006).

⁴⁰ The implicit duty to determine whether there is "sufficient information" mandated by Idaho Code § 42-202(2) is analogous to the express duty stated in Idaho Code § 42-203A(5) that the Department shall make findings irrespective of "whether protested or not protested."

the extent [the Tamarack decision is] precedent, which I don't think it is, this particular issue was not raised, and I don't think the Department is bound by it in any way." Tr. p. 3327.

In fact, precedent is created and *stare decisis* applies whenever the issue was "necessary to be passed on to decide the case." 20 Am. Jur. 2d, *Courts*, § 134 at p. 517 (2005). All that is required is that the "issue must have been raised in the action, decided by the court [or administrative agency], and its decision made part of the opinion of the case." *Id.* It is not necessary that the evidence presented by the applicant be contested by other litigants.⁴¹

The issue of Tamarack's qualification as a municipal provider was squarely presented in its application, and it was necessarily and expressly decided by the Department. The Department's ruling on the subject (quoted above) amply demonstrates that the Department considered the issue and determined that, although Tamarack was not then delivering municipal water, it qualified because it was capable of and "in the process of" becoming a municipal provider.

This is not to say that precedents cannot be broken. But it is to say that agencies must do so with eyes open. They may not pretend that it is a matter of first impression if it is not. Rather, they must expressly acknowledge that they are deviating from precedent and consider the effects of such a departure. "[The] requirement that [the] administrative agency must provide a reasoned explanation for its action will ordinarily demand that, when agency action represents a change in administrative policy, then [the] agency will display an awareness that it is changing position and show that there are good reasons for the new policy." *Applicability of Stare Decisis*

⁴¹ The fact that the matter was "decided without argument" admittedly reduces the *stare decisis* effect, but it does not eliminate the precedent altogether. 20 Am. Jur. 2d, *Courts*, § 137 at p. 519 (2005). The same is true when, as here, there is only one precedent. *Id.* at 520. Here any diminution in the value of the precedent is offset by other factors discussed elsewhere in this part of the brief.

Doctrine to Decisions of Administrative Agencies, 79 A.L.R.2d 1126, § 6 (2009) (citing dozens of cases holding that prior standards may be set aside only if “deliberately changed”).

In short, precedent matters. To put it bluntly, “[s]tare decisis reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right.” 20 Am. Jur. 2d, *Courts*, § 129 at p. 510 (2005). Thus, while departures from precedent are allowed, they must be weighed against other factors.

Two factors that go hand in glove are reliance and hardship. “Another formulation of the grounds for deviation from precedent states that the court must consider . . . whether parties justifiably relied on the precedent so that reversing it would create an undue hardship.” 20 Am. Jur. 2d, *Courts*, § 132 at p. 514 (2005). The agency should be reluctant to overturn a precedent “where people have relied upon it to guide their conduct.” 20 Am. Jur. 2d, *Courts*, § 136 at p. 518 (2005). “In an inquiry into overruling a precedent, it must be determined whether the overruling would work an undue hardship because of reliance interests or expectations that have arisen; to have such reliance, the knowledge must be of the sort that causes a person or entity to attempt to conform his or her conduct to a certain norm before the triggering event.” *Id.* “Courts are generally reluctant to deviate from a rule established by precedent where rights of the public are concerned.” *Id.* at 519.

M3 Eagle has relied substantially and justifiably on the Tamarack precedent. On the basis of that precedent, it has invested some \$2,000,000 in aquifer studies in support of its RAFN application. Tr., p. 166 (testimony of Bill Brownlee). These studies, in turn, support M3 Eagle’s overall investment to date of another roughly \$62,000,000 in land acquisition, planning, design, and permitting. Ex. 87. It relied on the fact that the Department has never identified present municipal service as a requirement for RAFN in any rule, guidance, or draft guidance (see Part

III.D at page 41). M3 Eagle relied on the Department's determination that its application was complete and ready for processing; plainly, it could not have been complete if it was defective on its face in the way Protestants now urge. Finally, M3 Eagle relied on the Department in allowing this contested case to proceed past the prehearing conference to months of costly preparation, extensive discovery, and 16 days of hearing and as many volumes of transcript.⁴²

This substantial reliance should be weighed against the fact that the municipal qualification issue is nothing more than an afterthought, a verb tense technicality not raised until now in the 13 years since the enactment of the Municipal Water Rights Act in 1996 and not raised in this proceeding until the close of the applicant's case. Given how far the Department has committed itself—as reflected in the Tamarack precedent, its guidance and conduct with respect to municipal water rights matters over the years, and its processing of this application—it is inappropriate to allow a mere semantic argument with no basis in the legislative history and no underlying policy justification to overturn this precedent.

Stare decisis means something. If the Department believes that a fundamental change in eligibility for RAFN is required, it must face up to and justify the profound change it is making. As Congressman, Judge, White House counsel, and now Professor Abner Mikva observed, courts are particularly protective of agency precedent “when the agency [in departing from the precedent] seemed to be ignoring the underlying spirit of the statute and the will of Congress.”

Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and*

⁴² The Department's files in this matter will show that M3 Eagle submitted its application, had consultations with the Department about it, amended it twice, and made additional corrections before the Department began processing it with a published notice. The Department never suggested that there was an issue with the application's RAFN element. Given the Tamarack precedent and the Department's existing guidances, M3 Eagle was justified in concluding that the RAFN element is one for which it is qualified and about which it would be expected and entitled to submit proof. (Which it has done.) While M3 Eagle does not necessarily assert that the agency is estopped from ruling otherwise, in circumstances like these, where an applicant has proceeded in reliance upon the agency's decision in an identical case, such a prior decision should be deemed precedent and given appropriate deference.

the Rise of the Administrative Presidency, 73 Cornell L. Rev. 1101, 1183 (1989). As shown here, the Tamarack precedent is entirely consistent with the underlying spirit of the 1996 Municipal Water Rights Act. Departure from that precedent would undermine the will of the Idaho Legislature and must not be undertaken lightly.

C. Tamarack exemplifies how an RAFN right protects the public interest by reducing the likelihood of project failure and protecting the public in the event of project failure.

The Tamarack decision is not just precedent, it is a good policy. Tamarack's current financial difficulty illustrates the wisdom of the Legislature's vision and the Department's decision. At the time of permitting, no one could have predicted the economic events that have affected Tamarack. Yet the protections built into the Municipal Water Rights Act are working exactly as intended. As events unfold, it has become increasingly clear that the public interest is protected and served by the fact that this municipal provider holds an RAFN water right. This is evident in the following ways.

Tamarack or its successor will be far more likely to weather the economic storm and acquire new capital than it would be if it were facing the loss of much of its water right under a traditional, non-RAFN prove-up. Tamarack's proof due date is January 1, 2013, with its planning horizon set about five years after that (a 15-year planning horizon). The project, though troubled, is a functioning municipal provider relied upon by dozens of homes and businesses and a golf course, each of whom made investments based on the expectation of the long-term success of the project. Although reliably serving customers today, the Tamarack water right has not reached complete build-out. Even under the best of circumstances, there is no way the entire project would be stubbed-in by 2013. If it had to prove up as a non-RAFN right holder, it would face in less than four years a catastrophic downsizing of its water right. Tamarack is a good

project and is important to the economy of Valley County and the State of Idaho. Ultimately, we can expect it to be completed, if not by the current owner, then by someone else. Fortunately, because it holds an RAFN right it can focus its attention on obtaining new financing with its water supply secure through the planning horizon. This benefits not only investors but the entire community and the state.

RAFN rights also protect the public in the event of project failure. If Tamarack or its successor were not to survive or were to complete a smaller project within the planning horizon, the portion of its water right held for future needs would be forfeited. IDWR Administrative Memorandum, Application Processing No. 63 at 4-5 (June 15, 1999) (Attachment J).⁴³ Because it is an RAFN water right, the 1996 Act prohibits it from being conveyed to another entity for uses elsewhere. It is precisely the fact that the Tamarack right is held as an RAFN right that protects the public and other water users from that asset being sold for speculative benefit for another use outside the project.⁴⁴ The RAFN nature of the Tamarack water right provides the public, through IDWR, with a certain amount of control, and prevents that asset from being something the developer might sell off.

D. Department guidance is consistent with the Tamarack precedent.

The Department’s recognition that first-time developers may qualify as municipal providers also is reflected, at least by implication, in IDWR guidance.

⁴³ The referenced guidance speaks in terms of forfeiture at the end of the planning horizon. If deemed necessary to protect the public, the Department could condition the license to allow re-examination of the fundamental assumptions supporting the future need component of the right prior to the end of the planning horizon. Presumably, the municipal provider also could seek an extension. Mr. Brownlee acknowledged in his testimony that the M3 Eagle water right would be subject to forfeiture if it turned out that not all the water was needed for the project. Tr. p. 163.

⁴⁴ Condition 4 of Tamarack’s Amendment of Permit (reproduced in Attachment F) states: “The right holder shall not assign or sell the permit without first securing the written approval of the Department of Water Resources.” This condition is a direct result of the fact that the permit was issued for RAFN purposes. See footnote 18 at page 15.

Glen Saxton's March 18, 1998 memorandum (Attachment H) noted that the Department "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." Saxton Memorandum at 1. The memorandum concluded that these applicants may pursue either RAFN or non-RAFN permits at their option. Although it does not directly address the subject of first-time developers, the memorandum contains no suggestion that they would be treated any differently.

A subsequent August 15, 2003 memorandum from Shelley W. Keen (Attachment I) (initialed "OK" by Glen Saxton) makes clear that many if not most of these applicants, particularly in the Northern Region, are indeed first-time developers. Mr. Keen makes this evident by noting that they often are not even corporations or associations at the time of the application, and they have not obtained IDEQ approval of their water supply systems at the time of application. The Keen memorandum nonetheless expressly contemplates that these developers (under Idaho Code § 42-202B(5)(c)) are eligible for municipal provider status despite their first-time status. The Keen memorandum speaks only in terms of "municipal" water rights and does not draw a distinction between those municipal providers seeing RAFN and non-RAFN rights. But, like the Saxton memorandum, the Keen memorandum contains no hint that first-time developers would be eligible for part of the 1996 Act's provisions but not for RAFN rights.

Thus, the Keen memorandum dealt with first-time developers and the Saxton memorandum dealt with eligibility for RAFN. Admittedly, the two memoranda do not put the two issues together and say, in so many words, that first-time developers are eligible for RAFN permits. However, the Saxton and Keen memoranda are talking about the same influx of

municipal water right applications. It is logical to read them together. If the Department embraced the Protestants' position that first-time developers are not eligible for RAFN rights, surely that would have been mentioned somewhere. It seems inconceivable that, faced with an increasing number of municipal water right applications for land developments, Department officials would fail to advise staff that most of the applicants (the first-time developers) are not even eligible for RAFN.

The requirement that a municipal provider already be providing municipal water in order to qualify as a municipal provider is also strikingly absent from every other Departmental guidance. For example, section 5a(9) at p. 21 of the Department's guidance on *Transfer Processing Policies & Procedures*, Administrator's Memorandum, Transfer Processing No. 24 (Jan. 21, 2009) specifically addresses the municipal qualification requirement in the context of RAFN, but says nothing about any requirement that the applicant already be providing municipal water. Even in the context of a transfer application, it may be that the applicant would not yet be providing municipal water. For instance, a developer seeking to build a subdivision in an area with no unappropriated water would need to acquire and transfer other water rights to the new municipal use. Nothing in guidance suggests this could not occur.

The Department's earlier guidance on *Municipal Water Rights*, Administrative Memorandum, Application Processing No. 63 (June 15, 1999) (Attachment J) also failed to address the distinction urged here by Protestants.

Finally, the Department's new draft guidance on municipal water rights (Attachment K) although dealing comprehensively with the subject, contains no mention of the distinction urged by Protestants, and certainly has placed no one on notice of this issue. It is reasonable to assume that if the Department intended to directly override the Tamarack precedent and send a message

that seemingly is counter to the “forward-looking” nature of water right applications, this critical policy shift would deserve a mention somewhere in this comprehensive review of the implementation of the 1996 Act. M3 Eagle respectfully suggests that the reason the qualification requirement is not addressed in any of the Department’s guidance is that no one thought it necessary to state what had always seemed obvious—that an applicant capable of being a municipal provider “qualifies” as a municipal provider.

E. This precedent is entitled to deference.

The Department’s current policy is sound, and the law accords substantial deference to the Department’s judgment in these matters. The U.S. Supreme Court and the Idaho Supreme Court each has recognized that deference is owed to an agency’s interpretation of an ambiguous governing statute.

In *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court ruled that where a statute is ambiguous, the agency charged with administering that statute is entitled to deference in its interpretation of the statute. In *J.R. Simplot Company, Inc. v. Idaho State Tax Comm’n*, 120 Idaho 849, 820 P.2d 1206 (1991), the Idaho Supreme Court articulated a somewhat more complex four-part test to accomplish the same thing. Under *J.R. Simplot*, an agency’s interpretation is entitled to deference where:

- (1) the agency is entrusted with the responsibility to administer a statute,
- (2) the agency’s interpretation is reasonable,
- (3) the statute is ambiguous (in the sense that it “does not expressly treat the precise question at issue”), and
- (4) there is no cogent reason for the court to adopt a different interpretation (which would be the case if none of “the rationales underlying the rule of deference are present”).

J.R. Simplot, 120 Idaho at 862, 820 P.2d at 1219. IDWR’s interpretation of the 1996 Act, as reflected in its granting of an RAFN permit to Tamarack, is entitled to deference under both the *Chevron* and *J.R. Simplot* tests.

Both the *Chevron* and *J.R. Simplot* deference rules are premised on there being an underlying ambiguity in the statute. Here, the statutory definition of municipal provider in section 42-202B(5)(c) coupled with the requirement in section 42-202(2) that the applicant “qualifies” as a municipal provider is admittedly ambiguous. However, if the Department concludes here, as it did in Tamarack, that the longstanding, forward-looking nature of the application process applies and that an applicant is entitled to show that it “qualifies” as a municipal provider by showing that it has the plans, wherewithal, and competence to provide municipal water, then that interpretation will be entitled to substantial deference under *J.R. Simplot* and *Chevron*.⁴⁵

IV. M3 EAGLE SHOULD BE TREATED AS AN EXISTING MUNICIPAL PROVIDER BECAUSE IT IS BOUND BY CONTRACT TO CONVEY THE NEW RIGHT TO THE CITY OF EAGLE.

This argument regarding the agreement with City of Eagle is offered in the alternative to M3 Eagle’s basic premise that a first-time developers may “qualify” as municipal provider under Idaho Code § 42-202B(5)(c). If the Hearing Officer rejects that argument, this section provides an alternative basis for approving this permit application—namely, that M3 Eagle is acting on behalf of an existing municipal provider who qualifies under Idaho Code § 42-202B(5)(a).

⁴⁵ Failure to recognize the statute’s ambiguity, by the way, has tripped up other agencies. Where the agency declared that the statute is unambiguous, and the court later determines that it is ambiguous, the court will not then deferentially evaluate whether the agency’s interpretation is reasonable. “Because the Secretary did not recognize the ambiguities inherent in the statutory terms, we do not defer to her plain meaning interpretation but instead remand for her to treat the statutory language as ambiguous.” *Peter Pan Bus Lines, Inc. v. Federal Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006). “As the Final Rule is based on FWS’ erroneous conclusion that the ESA is unambiguous on this point, the Court may neither defer to the agency’s construction nor endorse [its] construction.” *The Humane Society of the U.S. v. Kempthorne*, 579 F. Supp.2d 7, 15 (2008).

A. M3 Eagle has entered into an agreement to acquire water rights and convey them to the City.

M3 Eagle's position is further strengthened by specific circumstances that put it in a different position than other developers. Even if the Department were to reject all of the above arguments and determine that first-time developers acting on their own behalf are not eligible for RAFN water rights, M3 Eagle is still entitled to an RAFN water right because it is acting on behalf of an existing municipal provider, the City of Eagle (the "City").

On December 27, 2007, M3 Eagle entered into a Pre-Annexation and Development Agreement ("Agreement") with the City.⁴⁶ The detailed Agreement, running 40 pages plus appendices, covers a variety of issues affecting the development. The Agreement places on M3 Eagle the obligation to seek a municipal water right for the entire development of over 7,000 homes, not just the first phase. Upon annexation and other approvals, and M3 Eagle's acquisition of a municipal water right, the Agreement requires M3 Eagle to convey portions of the water right to the City as each phase is completed, with the understanding that the City will then become the sole owner of the water right and the municipal provider serving the development.

The full text of this provision is set out in the footnote.⁴⁷ M3 Eagle continues to work in good faith towards implementing the Agreement's goals.⁴⁸

⁴⁶ The Agreement, Ex. 58, is discussed in testimony by Mr. Brownlee, Tr. pp. 141-43, 3766-68.

⁴⁷ Relevant portions of the Development Agreement read as follows:

(a) Water Provider. As provided in paragraph 2.2(c), an addition to City's Municipal Water System, hereinafter referred to as the Water System, shall be constructed by Developer sufficient to serve the Project. The Water System shall include all water rights necessary to serve the project as it is being developed. As provided further herein, City shall be responsible for the operation and maintenance of the Water System. City shall provide water service to the Property from the Water System on the same basis as City provides water to other residents and businesses in the City of Eagle under ordinances in place at the time of this Agreement.

...

In developing this water supply for the City, M3 Eagle may not be the City's agent in the strict legal sense of that word, but the Agreement leaves no doubt that M3 Eagle is acting pursuant to contract at the behest of the City and for the benefit of the City. The Agreement specifically provides that M3 Eagle will build not its own water system but will build "an addition to City's Municipal System" which will include "all water rights necessary." Agreement § 2.2(a) at p. 23 (Ex. 58). The Agreement is equally explicit that once the system is developed and water rights obtained, the City is to be the provider: "As set forth in this Agreement, it is City's and Developer's intent to have City be the water service provider and not have a PUC regulated provider serve the Property." Agreement § 2.2(e) at 24 (Ex. 58).

(e) Assured Water Supply. For each Planning Unit Master Water Plan, Developer shall submit evidence that Developer has secured adequate surface and/or ground water right(s) for the Water system, sufficient for all irrigation, aesthetic, amenity, potable and/or recreational use in connection with the development of each Planning Unit (unless Developer is entitled to a waiver as provided by City Code). As part of the construction of the Water System and conveyance to City, Developer shall transfer, convey or assign (on a phase by phase basis) ground water right(s) to City for inclusion in City's municipal water supply system; provided however, Developer shall not convey or assign more ground water right(s) than necessary to serve the Project as it is being developed and City shall not use any of the water transferred under such rights to serve any other properties unless City demonstrates to Developer that City has obtained adequate water rights to serve the Project and such other properties. City shall cooperate with Developer, at no cost to City, to assist Developer in Developer's obtaining all permit(s) and licenses for water rights sufficient to serve the Property as the Property is developed in accordance with this Agreement. If any transfer, amendment or other proceedings are required under Idaho Code or IDWR rule or policy for the water rights necessary to serve the Project, City shall cooperate with Developer in Developer's efforts to obtain all necessary permits and approvals from IDWR, including, without limitation, approvals in connection with Mitigation that may be required. Developer shall have the right to file for a municipal water right prior to the annexation. As set forth in this Agreement, it is City's and Developer's intent to have City be the water service provider and not have a PUC regulated provider serve the Property.

Agreement, ¶2.2 at pp. 23-24 (Ex. 58) (emphasis supplied; underlined portions correspond to quotations in main text).

⁴⁸ For example, it recently acquired property whose location will allow M3 Eagle's 6,000 acre parcel to become contiguous with the City, and has filed a petition with the City to annex this acquired property. Ex. 88; Tr. p. 3767 (testimony of Bill Brownlee). This makes M3 Eagle's parcel itself eligible for annexation, pending the City's proposed annexation of intervening BLM lands.

To achieve this, the Agreement expressly states: “Developer shall transfer, convey or assign (on a phase by phase basis) ground water right(s) to City for inclusion in City’s municipal water supply system” that the City then will use to serve the project. Agreement § 2.2(e) at 24 (Ex. 58). The Agreement further provides: “Developer shall have the right to file for a municipal water right prior to the annexation.” Agreement § 2.2(e) at 24 (Ex. 58).

The Agreement demonstrates that M3 Eagle was acting for the benefit of the City with the City’s blessing and encouragement. Under these special circumstances, if the Hearing Officer requires another rationale for deciding this issue in M3 Eagle’s favor, this applicant should be allowed to assert the benefit of the City’s existing municipal provider status. In other words, under these circumstances, M3 Eagle should be allowed to step into the City of Eagle’s shoes and be treated as an existing provider under section 42-202B(5)(a) for purposes of satisfying the qualification requirement under section 42-202(2).

This is consistent not only with the language and legislative policy of the 1996 Act. It is also consistent with the language of LLUPA⁴⁹ and legislative policy promoting effective local control through planning and zoning.

The Agreement is a binding commitment on behalf of M3 Eagle, effective upon annexation and zoning.⁵⁰ Agreements of this sort are recognized by the Idaho Legislature⁵¹ and

⁴⁹ The Local Land Use Planning Act (“LLUPA”), Idaho Code § 67-6511A, governs planning and zoning in Idaho.

⁵⁰ Agreements like this do not and cannot bind a city to annex and/or rezone the subject property. That is a legislative decision that will be made at the appropriate time. But the commitments made become binding (at least on the developer) upon annexation. “Such commitments . . . shall take effect upon the adoption of the amendment to the zoning ordinance. . . . By permitting or requiring commitments by ordinance the governing board does not obligate itself to recommend or adopt the proposed ordinance.” Idaho Code § 67-6511A.

⁵¹ LLUPA expressly contemplates development agreements in conjunction with zoning changes. Development agreements with respect to annexation are equally common, although not expressly addressed by LLUPA.

enforced by Idaho courts.⁵² The Legislature has good reason for encouraging such agreements. Annexation and zoning decisions by local governments entail a substantial commitment of resources by the people. Land use decisions affect the quality of life and the local economy for decades to come. Unenforceable projections or goals set by developers may not be enough to protect the public interest. Local governments should be allowed and encouraged to work out precise, enforceable terms under which these developments are allowed to move forward.

Increasingly, cities are insisting that developers—particularly developers of large projects—provide for a water supply and convey it to the city as part of the development process. That is exactly what occurred here. This way the developer, rather than the taxpayers and/or ratepayers, shoulders the financial burden of developing the water system.

In order to facilitate these cooperative efforts between city and developer and thus to further the goals and objectives of the 1996 Act, the Department should read section 42-202(2) to allow first-time developers who have entered into binding agreements to convey water rights to a city to step into the shoes of the city for purposes of qualifying as a municipal provider under section 42-202B(5)(a). In such cases, the Department may condition to the permit to ensure that the commitment to convey the water right to the city is met.

B. The Agreement between M3 Eagle and the City does not violate the 1996 Act's anti-speculation requirements.

We have noted already the anti-speculation provisions of the 1996 Act. (See discussion in footnote 18 at page 15.) M3 Eagle's contract to acquire a municipal water right and convey it to the City of Eagle does not violate these provisions.

⁵² Even before LLUPA, the Idaho Supreme Court recognized these agreements as valid and proper. *E.g.*, *Sprenger, Grubb & Associates v. Hailey* ("Sprenger Grubb I"), 127 Idaho 576, 903 P.2d 741 (1995) (the development agreement in this case predated LLUPA by two decades).

The anti-speculation provisions in Idaho Code §§ 42-219(1) and 42-222(1) prohibit the transfer of RAFN rights “to a place of use outside the service area” or to a “new nature of use.” Thus, M3 Eagle would be prohibited from selling its RAFN right to a different developer, industry, or city that did not continue to provide municipal water to the residents of the M3 Eagle planned community. The conveyance and transfer of these water rights to the City of Eagle, however, would not violate the prohibition, because the rights would continue to be used for the same purpose within the same area.⁵³

CONCLUSION

M3 Eagle has invested substantially in planning for and putting in place the agreements and approvals necessary to develop a reliable, centralized, efficient water supply and delivery system—a system that will serve the M3 Eagle planned community and that ultimately will be owned by the City of Eagle once the planned community is annexed into the City. M3 Eagle’s application is modeled directly on the precedent established in the Tamarack case. This sort of long-term planning, full disclosure, and resource protection should be rewarded, not penalized or discouraged.

We suggest that the statutory language at issue here is ambiguous on its face, and certainly so in the context of the rest of Idaho Code, chapter 2, in whose light it must be construed. If first-time developers are prohibited from obtaining RAFN water rights, this would mark a sharp departure from the longstanding practice of water right applications as outlined in

⁵³ Idaho Code § 42-219(1) would not come into play if the City simply continues to use the M3 Eagle water right within M3 Eagle’s separate water delivery system serving the M3 Eagle planned community. Obviously, there would be no change in place or nature of use. The same result should hold, however, even if, at some point in the future, the City integrated the M3 Eagle delivery system into the City’s delivery system. After all, municipal providers are free to expand their service areas. When a city expands its place of use, that is not a change in place of use. And, of course, there would be no change in nature of use. Accordingly, the statutory prohibition against changing the place of use “to a place of use outside the service area” would not be violated if and when the City integrates this water into its larger service area.

the statute. It also would substantially set back the important progress made to date toward sound municipal water planning, as embodied in the Department's new draft guidance on the subject (Attachment K). The Protestants' interpretation of this statute, if adopted, would eliminate protections against speculative transactions in municipal water rights. It would replace full disclosure and consideration of the impacts of development on our water supply with a blinders-on, incremental, short-term approach to water planning. Indeed, by depriving first-time or separate-entity applicants the protections and benefits of the 1996 Act, we can expect to see less long-term planning, fewer community water systems, and more individual domestic wells. That would be a shame. Fortunately, there is no reason to follow this path.

For all of the reasons stated above, the Department should adhere to the precedent established in the Tamarack decision and hold that first-time municipal developers are not barred from obtaining RAFN water right permits, so long as they establish that they can and will serve municipal customers once the permit is issued. That precedent is consistent with the most natural and logical interpretation of the statute. The 1996 Act does not require the applicant to be a municipal provider; it requires it to show that it "qualifies" as a municipal provider. "Qualifies" means that the applicant has shown, at the time of permitting, that it is capable of doing the job, of being a municipal provider.

This interpretation makes sense, flows naturally from the statutory language, reflects good policy, follows precedent, and is constitutional.

DATED this 11th day of September, 2009.

Respectfully submitted,

GIVENS PURSLEY LLP

By Jeffrey C. Fereday
Jeffrey C. Fereday

By Christopher H. Meyer
Christopher H. Meyer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th of September, 2009, the foregoing was filed, served, or copied as follows:

FILED

Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

SERVICE

North Ada County Groundwater Users Association
c/o David Head
855 Stillwell Drive
Eagle, ID 83616

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

North Ada County Groundwater Users Association
c/o John Thornton
5264 N. Sky High Lane
Eagle, ID 83616

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

Norman Edwards
884 W. Beacon Light Road
Eagle, ID 83616

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

Alan Smith
Eagle Pines Water Users Association
3135 N. Osprey Road
Eagle, ID 83616

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail


COURTESY COPIES

Gary L. Spackman
Administrator
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

John Westra
Manager, Western Regional Office
Idaho Department of Water Resources
2735 Airport Way
Boise, ID 83705-5082

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail


Jeffrey C. Fereday

Attachment A

TEXT OF THE MUNICIPAL WATER RIGHTS ACT OF 1996

The 1996 Act is codified as follows:

Idaho Code § 42-202(2)	An application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied by sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made.
Idaho Code § 42-202(11)	Provided further, that water rights held by municipal providers prior to July 1, 1996, shall not be limited thereby.
Idaho Code § 42-202B(4)	“Municipality” means a city incorporated under section 50-102, Idaho Code, a county, or the state of Idaho acting through a department or institution.
Idaho Code § 42-202B(5)	“Municipal provider” means: (a) A municipality that provides water for municipal purposes to its residents and other users within its service area; (b) Any corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area; or (c) A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a “public water supply” as described in section 39-103(12), Idaho Code.
Idaho Code § 42-202B(6)	“Municipal purposes” refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider.
Idaho Code § 42-202B(7)	“Planning horizon” refers to the length of time that the department determines is reasonable for a municipal provider to hold water rights to meet reasonably anticipated future needs. The length of the planning horizon may vary according to the needs of the particular municipal provider.
Idaho Code § 42-202B(8)	“Reasonably anticipated future needs” refers to future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality. Reasonably anticipated future needs shall not include uses of water within areas overlapped by conflicting comprehensive land use plans.

Idaho Code § 42-202B(9)	<p>“Service area” means that area within which a municipal provider is or becomes entitled or obligated to provide water for municipal purposes. For a municipality, the service area shall correspond to its corporate limits, or other recognized boundaries, including changes therein after the permit or license is issued. The service area for a municipality may also include areas outside its corporate limits, or other recognized boundaries, that are within the municipality’s established planning area if the constructed delivery system for the area shares a common water distribution system with lands located within the corporate limits. For a municipal provider that is not a municipality, the service area shall correspond to the area that it is authorized or obligated to serve, including changes therein after the permit or license is issued.</p>
Idaho Code § 42-217	<p>On or before the date set for the beneficial use of waters appropriated under the provisions of this chapter, the permit holder shall submit a statement that he has used such water for the beneficial purpose allowed by the permit. The statement shall include:</p> <p>...</p> <p>4. In the case of a municipal provider, a revised estimate of the reasonably anticipated future needs, a revised description of the service area, and a revised planning horizon, together with appropriate supporting documentation.</p>
Idaho Code § 42-219(1)	<p>Upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that <u>the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended</u>, the department shall issue to such user or users a license confirming such use. . . . A license may be issued to a municipal provider for an amount up to the full capacity of the system constructed or used in accordance with the original permit provided that the director determines that the amount is reasonably necessary to provide for the existing uses and reasonably anticipated future needs within the service area and otherwise satisfies the definitions and requirements specified in this chapter for such use. The director shall condition the license to prohibit any transfer of the place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use of amounts held for reasonably anticipated future needs together with such other conditions as the director may deem appropriate.</p>
Idaho Code § 42-219(2)	<p>If the use is for municipal purposes, the license shall describe the service area and shall state the planning horizon for that portion of the right, if any, to be used for reasonably anticipated future needs.</p>

Idaho Code § 42-222(1)	<p>When the nature of use of the water right is to be changed to municipal purposes and some or all of the right will be held by a municipal provider to serve reasonably anticipated future needs, the municipal provider shall provide to the department sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made.</p> <p>When a water right or a portion thereof to be changed is held by a municipal provider for municipal purposes, as defined in section 42-202B, Idaho Code, that portion of the right held for reasonably anticipated future needs at the time of the change shall not be changed to a place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use.</p> <p>The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.</p>
Idaho Code § 42-223(2)	<p>A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs.</p>

IN THE SENATE

SENATE BILL NO. 1355

BY RESOURCES AND ENVIRONMENT COMMITTEE

AN ACT

1 RELATING TO WATER MUNICIPAL RIGHTS; AMENDING SECTION 42-202, IDAHO CODE, TO
 2 PROVIDE ADDITIONAL FILING REQUIREMENTS FOR APPLICATIONS FOR PERMITS TO
 3 APPROPRIATE WATER FOR MUNICIPAL PURPOSES AND TO MAKE TECHNICAL CORREC-
 4 TIONS; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW
 5 SECTION 42-202B, IDAHO CODE, TO DEFINE TERMS RELATED TO MUNICIPAL USE;
 6 AMENDING SECTION 42-217, IDAHO CODE, TO REQUIRE THAT AN APPLICANT FOR A
 7 LICENSE FOR MUNICIPAL PURPOSES SHALL PROVIDE ADDITIONAL INFORMATION AND TO
 8 MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 42-219, IDAHO CODE, TO PRO-
 9 VIDE THAT LICENSES ISSUED FOR MUNICIPAL PURPOSES MAY RECOGNIZE THE SYSTEM
 10 CAPACITY AND LIST THE SERVICE AREA AS THE AUTHORIZED PLACE OF USE WHICH
 11 MAY INCLUDE AREAS OUTSIDE THE BOUNDARIES OF THE MUNICIPALITY AND TO MAKE
 12 TECHNICAL CORRECTIONS; AMENDING SECTION 42-222, IDAHO CODE, TO PROVIDE
 13 ADDITIONAL REQUIREMENTS TO CHANGE THE NATURE OF USE OF A WATER RIGHT TO
 14 MUNICIPAL PURPOSES AND TO DESCRIBE CIRCUMSTANCES UNDER WHICH FORFEITURE OF
 15 A MUNICIPAL WATER RIGHT MAY OCCUR.
 16

17 Be It Enacted by the Legislature of the State of Idaho:

18 SECTION 1. That Section 42-202, Idaho Code, be, and the same is hereby
 19 amended to read as follows:

20 42-202. APPLICATION TO APPROPRIATE WATER -- CONTENTS -- FILING FEES --
 21 DISPOSITION OF FEES -- RECORD OF RECEIPTS. (1) For the purpose of regulating
 22 the use of the public waters and of establishing by direct means the priority
 23 right to such use, any person, association or corporation hereafter intending
 24 to acquire the right to the beneficial use of the waters of any natural
 25 streams, springs or seepage waters, lakes or ground water, or other public
 26 waters in the state of Idaho, shall, before commencing of the construction,
 27 enlargement or extension of the ditch, canal, well, or other distributing
 28 works, or performing any work in connection with said construction or proposed
 29 appropriation or the diversion of any waters into a natural channel, make an
 30 application to the department of water resources for a permit to make such
 31 appropriation. Such application must set forth:

- 32 1-(a) The name and post-office address of the applicant.
- 33 2-(b) The source of the water supply.
- 34 3-(c) The nature of the proposed use or uses and the period of the year
- 35 during which water is to be used for such use or uses.
- 36 4-(d) The location of the point of diversion and description of the pro-
- 37 posed ditch, channel, well or other work and the amount of water to be
- 38 diverted and used.
- 39 5-(e) The time required for the completion of construction of such works
- 40 and application of the water to the proposed use.

41 (2) An application proposing an appropriation of waters by a municipal
 42 provider for reasonably anticipated future needs shall be accompanied by
 43 sufficient information and documentation to establish that the applicant qual-

1 fies as a municipal provider and that the reasonably anticipated future needs,
 2 the service area and the planning horizon are consistent with the definitions
 3 and requirements specified in this chapter. The service area need not be
 4 described by legal description nor by description of every intended use in
 5 detail, but the area must be described with sufficient information to identify
 6 the general location where the water under the water right is to be used and
 7 the types and quantity of uses that generally will be made.

8 (3) Whenever it is desired to appropriate and store flood or winterflow
 9 waters, the applicant shall specify in acre feet the quantity of such flood or
 10 winterflow waters which he intends to store, but for irrigation purposes he
 11 shall not claim more than five (5) acre feet of stored water per acre of land
 12 to be irrigated, nor, in the event of the filing of an application claiming
 13 both normal flow and flood water and winterflow water, shall the total amount
 14 of water claimed exceed the equivalent of a continuous flow during the irriga-
 15 tion season of more than one (1) cubic foot per second for each fifty (50)
 16 acres of land to be irrigated, or more than five (5) acre feet of stored water
 17 for each acre of land to be irrigated.

18 (4) The application shall be accompanied by a plan and map of the pro-
 19 posed works for the diversion and application of the water to a beneficial
 20 use, showing the character, location and dimensions of the proposed reser-
 21 voirs, dams, canals, ditches, pipelines, wells and all other works proposed to
 22 be used by them in the diversion of the water, and the area and location of
 23 the lands proposed to be irrigated, or location of place of other use.

24 (5) If the application involves more than twenty-five (25) cubic feet per
 25 second feet of water or the development of more than five hundred (500) theo-
 26 retical horse-power horsepower, or impoundment of water in a reservoir with an
 27 active storage capacity in excess of ten thousand (10,000) acre feet, the
 28 applicant may be required by the director of the department of water resources
 29 to furnish a statement of the financial resources of the corporation, associa-
 30 tion, firm or person making the application, and the means by which the funds
 31 necessary to construct the proposed works are to be provided, and the esti-
 32 mated cost of construction; and if such application is made by a corporation,
 33 the amount of its capital stock, how much thereof has been actually paid in,
 34 and the names and places of residence of its directors; and if for the genera-
 35 tion of power or any other purpose than irrigation or domestic use, the pur-
 36 pose for which it is proposed to be used, the nature, location, character,
 37 capacity and estimated cost of the works, and whether the water used is to be
 38 and will be returned to the stream, and if so, at what point on the stream.

39 (6) In case the proposed right of use is for agricultural purposes, the
 40 application shall give the legal subdivisions of the land proposed to be irri-
 41 gated, with the total acreage to be reclaimed as near as may be; provided,
 42 that no one shall be authorized to divert for irrigation purposes more than
 43 one (1) cubic foot of water per second of the normal flow for each fifty (50)
 44 acres of land to be so irrigated, or more than five (5) acre feet of stored
 45 water per annum for each acre of land to be so irrigated, unless it can be
 46 shown to the satisfaction of the department of water resources that a greater
 47 amount is necessary. Provided further, that the plan of irrigation submitted
 48 shall provide for the distribution of water to within not more than one (1)
 49 mile of each legal subdivision of the land proposed to be reclaimed by the use
 50 of such water; provided also, that in the case of all ditches designed to have
 51 a capacity of ten (10) cubic feet per second or less, such map showing the
 52 location of such ditch, and the place of use of such water, or the location of
 53 the lands to be irrigated, may be upon blanks furnished by the department of
 54 water resources.

55 (7) No application shall be accepted and filed by the department of water

1 resources until the applicant shall have deposited with the department a fil-
2 ing fee as in this act chapter provided.

3 (8) All moneys received by the department of water resources under the
4 provisions of this chapter shall be deposited with the state treasurer, and
5 such sums as may be necessary shall be available for the payment of the
6 expenses of the department of water resources incurred in carrying out the
7 provisions of this chapter.

8 (9) Such expense shall be paid by the state controller in the manner pro-
9 vided by law, upon vouchers duly approved by the state board of examiners, for
10 the work performed under the direction of the department of water resources.
11 The department of water resources shall keep a record of all filing fees
12 received in connection with applications for permits to appropriate public
13 waters.

14 (10) Provided further, that rights initiated prior to the enactment of
15 this amendment, so far as it pertains to flood and winterflow waters, shall
16 not be affected thereby.

17 (11) Provided further, that water rights held by municipal providers prior
18 to July 1, 1996, shall not be limited thereby.

19 SECTION 2. That Chapter 2, Title 42, Idaho Code, be, and the same is
20 hereby amended by the addition thereto of a NEW SECTION, to be known and des-
21 ignated as Section 42-202B, Idaho Code, and to read as follows:

22 42-202B. DEFINITIONS. Whenever used in this chapter, the term:

23 (1) "Municipality" means a city incorporated under section 50-102, Idaho
24 Code, or a county of the state of Idaho acting through a department or insti-
25 tution.

26 (2) "Municipal provider" means either: (a) a municipality that provides
27 water for municipal purposes to its residents and other users within its ser-
28 vice area; or (b) any other corporation or association holding a franchise to
29 supply water, and which does supply water, for municipal purposes to users
30 within its service area.

31 (3) "Municipal purposes" refers to water which a municipal provider is
32 entitled or obligated to supply to all those users within a service area,
33 including those located outside the boundaries of a municipality served by a
34 municipal provider.

35 (4) "Planning horizon" refers to the length of time that the department
36 determines is reasonable for a municipal provider to hold water rights to meet
37 reasonably anticipated future needs. The length of the planning horizon may
38 vary according to the needs of the particular municipal provider.

39 (5) "Reasonably anticipated future needs" refers to future uses of water
40 by a municipal provider for municipal purposes within a service area which, on
41 the basis of population and other planning data, are reasonably expected to be
42 required within the planning horizon of the municipal provider and are consis-
43 tent with the comprehensive land use plans for each municipality within the
44 service area.

45 (6) "Service area" means that area within which a municipal provider is
46 or becomes entitled or obligated to provide water for municipal purposes. For
47 a municipality, the service area shall correspond to its corporate limits,
48 including changes therein after the permit or license is issued. The service
49 area for a municipality may also include areas outside its corporate limits
50 that are within the municipality's established planning area if the con-
51 structed delivery system for the area shares a common water distribution sys-
52 tem with lands located within the corporate limits. For a municipal provider
53 that is not a municipality, the service area shall correspond to the area that

1 it is authorized or obligated to serve, including changes therein after the
2 permit or license is issued.

3 SECTION 3. That Section 42-217, Idaho Code, be, and the same is hereby
4 amended to read as follows:

5 42-217. PROOF OF APPLICATION TO BENEFICIAL USE. On or before the date set
6 for the beneficial use of waters appropriated under the provisions of this
7 chapter, the permit holder shall submit a statement that he has used such
8 water for the beneficial purpose allowed by the permit. The statement shall
9 include:

- 10 1. The name and post-office address of the permit holder.
- 11 2. The permit number.
- 12 3. A description of the extent of the use.
- 13 4. In the case of a municipal provider, a revised estimate of the reason-
14 ably anticipated future needs, a revised description of the service area, and
15 a revised planning horizon, together with appropriate supporting documenta-
16 tion.
- 17 5. The source of the water used.
- 18 ~~56.~~ Such other information as shall be required by the blank form fur-
19 nished by the department.

20 Such written proof as may be required to be submitted by such user shall
21 be upon forms furnished by the department of water resources and shall include
22 fees as provided in subsection K. of section 42-221, Idaho Code, or a field
23 examination report prepared by a certified water right examiner.

24 Upon receipt of such proof and the fee as required in section 42-221,
25 Idaho Code, by the department of water resources the department shall examine,
26 or cause to be examined:

27 1. The place where such water is diverted and used, and, if the use is
28 for irrigation, he shall ascertain the area and location of the land irrigated
29 and the nature of all the improvements which have been made as a direct result
30 of such use.

31 2. The capacities of the ditches or canals or other means by which such
32 water is conducted to such place of use, and the quantity of water which has
33 been beneficially applied for irrigation or other purposes.

34 The department or the person making such examination under the direction
35 of the department shall prepare and file a report of the investigation; pro-
36 vided, that whenever irrigation systems cover more than twenty-five thousand
37 (25,000) acres, proof of beneficial use may be made by the persons, company or
38 corporation constructing the irrigation works on behalf of the project, and in
39 such cases, the lands upon which the water has been used need not be described
40 by legal subdivisions, but may be described generally as the lands under the
41 irrigation system, and it shall only be necessary to show in such cases that
42 the quantity of water beneficially applied for irrigation has been applied
43 within the limits of the project.

44 Holders of permits who have submitted proof of beneficial use but have not
45 had their project examined for beneficial use shall submit the fee required in
46 section 42-221, Idaho Code, within sixty (60) days of notification by the
47 director of the department of water resources that a license examination fee
48 is required. Failure to submit the fee in the time allowed shall be cause for
49 the director to advance the date of priority of the permit one (1) day for
50 each day that the fee is late; provided that if the fee is not fully paid
51 within one (1) year of the time it is due, the director of the department of
52 water resources may consider the proof of beneficial use for the permit to be
53 incomplete and lapse the permit, as provided in section 42-218a, Idaho Code.

1 SECTION 4. That Section 42-219, Idaho Code, be, and the same is hereby
2 amended to read as follows:

3 42-219. ISSUANCE OF LICENSE -- PRIORITY. (1) Upon receipt by the depart-
4 ment of water resources of all the evidence in relation to such final proof,
5 it shall be the duty of the department to carefully examine the same, and if
6 the department is satisfied that the law has been fully complied with and that
7 the water is being used at the place claimed and for the purpose for which it
8 was originally intended, the department shall issue to such user or users a
9 license confirming such use. Such license shall be issued under the seal of
10 the office of the department of water resources, and shall state the name and
11 post-office address of such user, the purpose for which such water is used,
12 the quantity of water which may be used, which in no case shall be an amount
13 in excess of the amount that has been beneficially applied. A license may be
14 issued to a municipal provider for an amount up to the full capacity of the
15 system constructed or used in accordance with the original permit provided
16 that the director determines that the amount is reasonably necessary to pro-
17 vide for the existing uses and reasonably anticipated future needs within the
18 service area and otherwise satisfies the definitions and requirements speci-
19 fied in this chapter for such use.

20 (2) If such use is for irrigation, such license shall give a description,
21 by legal subdivisions, of the land which is irrigated by such water. If the
22 use is for municipal purposes, the license shall describe the service area and
23 shall state the planning horizon for that portion of the right, if any, to be
24 used for reasonably anticipated future needs.

25 (3) Such license shall bear the date of the application for, and the num-
26 ber of, the permit under which the works from which such water is taken were
27 constructed; the capacity of such works; the date when proof of beneficial use
28 of such water was made, and also the date of the priority of the right con-
29 firmed by such license, which.

30 (4) The date of priority confirmed by the license shall be the date of
31 the application for the permit for the construction of the works from which
32 such the water is taken, and to which such the right relates, provided there
33 has been no loss of priority under the provisions of this chapter. ~~---provided,~~
34 that ~~---when~~ proof of the beneficial application of water shall be offered
35 subsequent to the date stated in the permit, or in any authorized extension
36 thereof, when such beneficial application shall be made, such the proof shall
37 be taken, if received by the department within the sixty (60) days prescribed
38 in the preceding section, ~~---and if~~ the proof taken is satisfactory to the
39 department of water resources, a license shall be issued by the department
40 the same as though such proof had been made before such the date fixed for
41 such beneficial application, ~~---but~~ the priority of the right established by
42 such the proof shall not date back to the date of the application for the per-
43 mit to which such the right would relate under the provisions of this chapter,
44 but shall bear a date which shall be subsequent to the date of such the appli-
45 cation, a time equal to the difference between the date set in such the per-
46 mit, or extension thereof, for such beneficial application of such water and
47 the date of such proof. ~~---provided, however, that upon~~

48 (5) For irrigation projects where the canals constructed cover an area of
49 twenty-five thousand (25,000) acres or more, or within irrigation districts
50 organized and existing as such under the laws of the state of Idaho, the
51 license issued shall be issued to the persons, associations, company or corpo-
52 ration or irrigation district owning the project; and final proof may be made
53 by such owners for the benefit of the entire project, and ~~it~~ shall not be
54 necessary to give a description of the land by legal subdivisions but a gen-

1 eral description of the entire area under the canal system shall be
 2 sufficient, ~~and~~ the water diverted and the water right acquired thereby
 3 shall relate to the entire project and the diversion of the water for the ben-
 4 efitial use under the project shall be sufficient proof of beneficial use
 5 without regard as to whether each and every acre under the project is irri-
 6 gated or not.

7 (6) In the event that the department shall find that the applicant has
 8 not fully complied with the law and the conditions of permit, it may issue a
 9 license for that portion of the use which is in accordance with the permit, or
 10 may refuse issuance of a license and void the permit. Notice of such action
 11 shall be forwarded to the permit holder by certified mail. The applicant may
 12 contest such action by the department pursuant to section 42-1701A(3), Idaho
 13 Code.

14 SECTION 5. That Section 42-222, Idaho Code, be, and the same is hereby
 15 amended to read as follows:

16 42-222. CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR
 17 NATURE OF USE OF WATER UNDER ESTABLISHED RIGHTS -- FORFEITURE AND EXTENSION --
 18 APPEALS. (1) Any person, entitled to the use of water whether represented by
 19 license issued by the department of water resources, by claims to water rights
 20 by reason of diversion and application to a beneficial use as filed under the
 21 provisions of this chapter, or by decree of the court, who shall desire to
 22 change the point of diversion, place of use, period of use or nature of use of
 23 all or part of the water, under the right shall first make application to the
 24 department of water resources for approval of such change. Such application
 25 shall be upon forms furnished by the department and shall describe the right
 26 licensed, claimed or decreed which is to be changed and the changes which are
 27 proposed, and shall be accompanied by the statutory filing fee as in this
 28 chapter provided. Upon receipt of such application it shall be the duty of the
 29 director of the department of water resources to examine same, obtain any con-
 30 sent required in section 42-108, Idaho Code, and if otherwise proper to pro-
 31 vide notice of the proposed change in the same manner as applications under
 32 section 42-203A, Idaho Code. Such notice shall advise that anyone who desires
 33 to protest the proposed change shall file notice of protests with the depart-
 34 ment within ten (10) days of the last date of publication. Upon the receipt of
 35 any protest, accompanied by the statutory filing fee as provided in section
 36 42-221, Idaho Code, it shall be the duty of the director of the department of
 37 water resources to investigate the same and to conduct a hearing thereon. He
 38 shall also advise the watermaster of the district in which such water is used
 39 of the proposed change and the watermaster shall notify the director of the
 40 department of water resources of his recommendation on the application, and
 41 the director of the department of water resources shall not finally determine
 42 the action on the application for change until he has received from such
 43 watermaster his recommendation thereof, which action of the watermaster shall
 44 be received and considered as other evidence.

45 When the nature of use of the water right is to be changed to municipal
 46 purposes and some or all of the right will be held by a municipal provider to
 47 serve reasonably anticipated future needs, the municipal provider shall pro-
 48 vide to the department sufficient information and documentation to establish
 49 that the applicant qualifies as a municipal provider and that the reasonably
 50 anticipated future needs, the service area and the planning horizon are con-
 51 sistent with the definitions and requirements specified in this chapter. The
 52 service area need not be described by legal description nor by description of
 53 every intended use in detail, but the area must be described with sufficient

1 information to identify the general location where the water under the water
 2 right is to be used and the types and quantity of uses that generally will be
 3 made.

4 The director of the department of water resources shall examine all the
 5 evidence and available information and shall approve the change in whole, or
 6 in part, or upon conditions, provided no other water rights are injured
 7 thereby, the change does not constitute an enlargement in use of the original
 8 right, and the change is consistent with the conservation of water resources
 9 within the state of Idaho and is in the local public interest as defined in
 10 section 42-203A(5), Idaho Code; ~~except the,~~ and the new use is a beneficial
 11 use, which in the case of a municipal provider shall be satisfied if the water
 12 right is necessary to serve reasonably anticipated future needs as provided in
 13 this chapter. The director shall not approve a change in the nature of use
 14 from agricultural use where such change would significantly affect the agri-
 15 cultural base of the local area. The transfer of the right to the use of
 16 stored water for irrigation purposes shall not constitute an enlargement in
 17 use of the original right even though more acres may be irrigated, if no other
 18 water rights are injured thereby. A copy of the approved application for
 19 change shall be returned to the applicant and he shall be authorized upon
 20 receipt thereof to make the change and the original water right shall be pre-
 21 sumed to have been amended by reason of such authorized change. In the event
 22 the director of the department of water resources determines that a proposed
 23 change shall not be approved as provided in this section, he shall deny the
 24 same and forward notice of such action to the applicant by certified mail,
 25 which decision shall be subject to judicial review as hereafter provided.

26 (2) All rights to the use of water acquired under this chapter or other-
 27 wise shall be lost and forfeited by a failure for the term of five (5) years
 28 to apply it to the beneficial use for which it was appropriated and when any
 29 right to the use of water shall be lost through nonuse or forfeiture such
 30 rights to such water shall revert to the state and be again subject to appro-
 31 priation under this chapter; except that all water rights appurtenant to land
 32 contracted in a federal cropland set-aside program, shall not be lost and for-
 33 feited for nonuse during the contracted period. The five (5) year period of
 34 nonuse for forfeiture of a water right shall begin to accrue upon termination
 35 of the contract if a period of nonuse did not occur prior to the effective
 36 date of the contract or shall continue to accrue if a period of nonuse
 37 occurred prior to the effective date of the contract. A water right held by a
 38 municipal provider to meet reasonably anticipated future needs shall be deemed
 39 to constitute a beneficial use, and such rights shall not be lost or forfeited
 40 for nonuse unless the planning horizon specified in the license has expired
 41 and the quantity of water authorized for use under the license is no longer
 42 needed to meet reasonably anticipated future needs. Upon proper showing before
 43 the director of the department of water resources of good and sufficient rea-
 44 son for nonapplication to beneficial use of such water for such term of five
 45 (5) years, the director of the department of water resources is hereby autho-
 46 rized to grant an extension of time extending the time for forfeiture of title
 47 for nonuse thereof, to such waters for a period of not to exceed five (5)
 48 additional years. Application for an extension shall be made before the end of
 49 the five (5) year period upon forms to be furnished by the department of water
 50 resources and shall fully describe the right on which an extension of time to
 51 resume the use is requested and the reasons for such nonuse and shall be
 52 accompanied by the statutory filing fee; provided that water rights appurte-
 53 nant to land contracted in a federal cropland set-aside program are exempt
 54 from this requirement. Upon the receipt of such application it shall be the
 55 duty of the director of the department of water resources to examine the same

1 and to provide notice of the application for an extension in the same manner
2 as applications under section 42-203A, Idaho Code. The notice shall fully
3 describe the right, the extension which is requested and the reason for such
4 nonuse and shall state that any person desiring to object to the requested
5 extension may submit a protest, accompanied by the statutory filing fee as
6 provided in section 42-221, Idaho Code, to the director of the department of
7 water resources within ten (10) days of the last date of publication. Upon
8 receipt of a protest it shall be the duty of the director of the department of
9 water resources to investigate and conduct a hearing thereon as in this chap-
10 ter provided. The director of the department of water resources shall find
11 from the evidence presented in any hearing, or from information available to
12 the department, the reasons for such nonuse of water and where it appears to
13 the satisfaction of the director of the department of water resources that
14 other rights will not be impaired by granting an extension of time within
15 which to resume the use of the water and good cause appearing for such nonuse,
16 he may grant one (1) extension of five (5) years within which to resume such
17 use. In his approval of the application for an extension of time under this
18 section the director of the department of water resources shall set the date
19 when the use of water is to be resumed. Sixty (60) days before such date the
20 director of the department of water resources shall forward to the applicant
21 at his address of record a notice by certified mail setting forth the date on
22 which the use of water is to be resumed and a form for reporting the resump-
23 tion of the use of the water right. If the use of the water has not been
24 resumed and report thereon made on or before the date set for resumption of
25 use such right shall revert to the state and again be subject to appropri-
26 ation, as provided in this section. In the event the director of the department
27 of water resources determines that a proposed extension of time within which
28 to resume use of a water right shall not be approved as provided in this sec-
29 tion, he shall deny same and forward notice of such action to the applicant by
30 certified mail, which decision shall be subject to judicial review as hereaf-
31 ter provided.

32 (3) Any person or persons feeling themselves aggrieved by the determina-
33 tion of the department of water resources in approving or rejecting an appli-
34 cation to change the point of diversion, place, period of use or nature of use
35 of water under an established right or an application for an extension of time
36 within which to resume the use of water as provided in this section, may, if a
37 protest was filed and a hearing held thereon, seek judicial review pursuant to
38 section 42-1701A(4), Idaho Code. If no protest was filed and no hearing held,
39 the applicant may request a hearing pursuant to section 42-1701A(3), Idaho
40 Code, for the purpose of contesting the action of the director and may seek
41 judicial review of the final order of the director following the hearing pur-
42 suant to section 42-1701A(4), Idaho Code.

Attachment C

S.B. 1535

IN THE SENATE

SENATE BILL NO. 1535

BY STATE AFFAIRS COMMITTEE

AN ACT

1
2 RELATING TO WATER MUNICIPAL RIGHTS; AMENDING SECTION 42-202, IDAHO CODE, TO
3 PROVIDE ADDITIONAL FILING REQUIREMENTS FOR APPLICATIONS FOR PERMITS TO
4 APPROPRIATE WATER FOR MUNICIPAL PURPOSES AND TO MAKE TECHNICAL CORREC-
5 TIONS; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW
6 SECTION 42-202B, IDAHO CODE, TO DEFINE TERMS RELATED TO MUNICIPAL USE;
7 AMENDING SECTION 42-217, IDAHO CODE, TO REQUIRE THAT AN APPLICANT FOR A
8 LICENSE FOR MUNICIPAL PURPOSES SHALL PROVIDE ADDITIONAL INFORMATION AND TO
9 MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 42-219, IDAHO CODE, TO PRO-
10 VIDE THAT LICENSES ISSUED FOR MUNICIPAL PURPOSES MAY RECOGNIZE THE SYSTEM
11 CAPACITY AND LIST THE SERVICE AREA AS THE AUTHORIZED PLACE OF USE WHICH
12 MAY INCLUDE AREAS OUTSIDE THE BOUNDARIES OF THE MUNICIPALITY, TO PROVIDE
13 CONDITIONS AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 42-222,
14 IDAHO CODE, TO PROVIDE ADDITIONAL REQUIREMENTS TO CHANGE THE NATURE OF USE
15 OF A WATER RIGHT TO MUNICIPAL PURPOSES AND TO DESCRIBE CIRCUMSTANCES UNDER
16 WHICH FORFEITURE OF A MUNICIPAL WATER RIGHT MAY OCCUR.

17 Be It Enacted by the Legislature of the State of Idaho:

18 SECTION 1. That Section 42-202, Idaho Code, be, and the same is hereby
19 amended to read as follows:

20 42-202. APPLICATION TO APPROPRIATE WATER -- CONTENTS -- FILING FEES --
21 DISPOSITION OF FEES -- RECORD OF RECEIPTS. (1) For the purpose of regulating
22 the use of the public waters and of establishing by direct means the priority
23 right to such use, any person, association or corporation hereafter intending
24 to acquire the right to the beneficial use of the waters of any natural
25 streams, springs or seepage waters, lakes or ground water, or other public
26 waters in the state of Idaho, shall, before commencing of the construction,
27 enlargement or extension of the ditch, canal, well, or other distributing
28 works, or performing any work in connection with said construction or proposed
29 appropriation or the diversion of any waters into a natural channel, make an
30 application to the department of water resources for a permit to make such
31 appropriation. Such application must set forth:

- 32 1-(a) The name and post-office address of the applicant.
33 2-(b) The source of the water supply.
34 3-(c) The nature of the proposed use or uses and the period of the year
35 during which water is to be used for such use or uses.
36 4-(d) The location of the point of diversion and description of the pro-
37 posed ditch, channel, well or other work and the amount of water to be
38 diverted and used.
39 5-(e) The time required for the completion of construction of such works
40 and application of the water to the proposed use.

41 (2) An application proposing an appropriation of water by a municipal
42 provider for reasonably anticipated future needs shall be accompanied by suf-
43 ficient information and documentation to establish that the applicant quali-
44 fies as a municipal provider and that the reasonably anticipated future needs,

1 the service area and the planning horizon are consistent with the definitions
2 and requirements specified in this chapter. The service area need not be
3 described by legal description nor by description of every intended use in
4 detail, but the area must be described with sufficient information to identify
5 the general location where the water under the water right is to be used and
6 the types and quantity of uses that generally will be made.

7 (3) Whenever it is desired to appropriate and store flood or winterflow
8 waters, the applicant shall specify in acre feet the quantity of such flood or
9 winterflow waters which he intends to store, but for irrigation purposes he
10 shall not claim more than five (5) acre feet of stored water per acre of land
11 to be irrigated, nor, in the event of the filing of an application claiming
12 both normal flow and flood water and winterflow water, shall the total amount
13 of water claimed exceed the equivalent of a continuous flow during the irriga-
14 tion season of more than one (1) cubic foot per second for each fifty (50)
15 acres of land to be irrigated, or more than five (5) acre feet of stored water
16 for each acre of land to be irrigated.

17 (4) The application shall be accompanied by a plan and map of the pro-
18 posed works for the diversion and application of the water to a beneficial
19 use, showing the character, location and dimensions of the proposed reser-
20 voirs, dams, canals, ditches, pipelines, wells and all other works proposed to
21 be used by them in the diversion of the water, and the area and location of
22 the lands proposed to be irrigated, or location of place of other use.

23 (5) If the application involves more than twenty-five (25) cubic feet per
24 second feet of water or the development of more than five hundred (500) theo-
25 retical horse-power horsepower, or impoundment of water in a reservoir with an
26 active storage capacity in excess of ten thousand (10,000) acre feet, the
27 applicant may be required by the director of the department of water resources
28 to furnish a statement of the financial resources of the corporation, associa-
29 tion, firm or person making the application, and the means by which the funds
30 necessary to construct the proposed works are to be provided, and the esti-
31 mated cost of construction; and if such application is made by a corporation,
32 the amount of its capital stock, how much thereof has been actually paid in,
33 and the names and places of residence of its directors; and if for the genera-
34 tion of power or any other purpose than irrigation or domestic use, the pur-
35 pose for which it is proposed to be used, the nature, location, character,
36 capacity, and estimated cost of the works, and whether the water used is to be
37 and will be returned to the stream, and if so, at what point on the stream.

38 (6) In case the proposed right of use is for agricultural purposes, the
39 application shall give the legal subdivisions of the land proposed to be irri-
40 gated, with the total acreage to be reclaimed as near as may be; provided,
41 that no one shall be authorized to divert for irrigation purposes more than
42 one (1) cubic foot of water per second of the normal flow for each fifty (50)
43 acres of land to be so irrigated, or more than five (5) acre feet of stored
44 water per annum for each acre of land to be so irrigated, unless it can be
45 shown to the satisfaction of the department of water resources that a greater
46 amount is necessary. Provided further, that the plan of irrigation submitted
47 shall provide for the distribution of water to within not more than one (1)
48 mile of each legal subdivision of the land proposed to be reclaimed by the use
49 of such water; provided also, that in the case of all ditches designed to have
50 a capacity of ten (10) cubic feet per second or less, such map showing the
51 location of such ditch, and the place of use of such water, or the location of
52 the lands to be irrigated, may be upon blanks furnished by the department of
53 water resources.

54 (7) No application shall be accepted and filed by the department of water
55 resources until the applicant shall have deposited with the department a fil-
56 ing fee as in this act chapter provided.

1 (8) All moneys received by the department of water resources under the
 2 provisions of this chapter shall be deposited with the state treasurer, and
 3 such sums as may be necessary shall be available for the payment of the
 4 expenses of the department of water resources incurred in carrying out the
 5 provisions of this chapter.

6 (9) Such expense shall be paid by the state controller in the manner pro-
 7 vided by law, upon vouchers duly approved by the state board of examiners, for
 8 the work performed under the direction of the department of water resources.
 9 The department of water resources shall keep a record of all filing fees
 10 received in connection with applications for permits to appropriate public
 11 waters.

12 (10) Provided further, that rights initiated prior to the enactment of
 13 this amendment, so far as it pertains to flood and winterflow waters, shall
 14 not be affected thereby.

15 (11) Provided further, that water rights held by municipal providers prior
 16 to July 1, 1996, shall not be limited thereby.

17 SECTION 2. That Chapter 2, Title 42, Idaho Code, be, and the same is
 18 hereby amended by the addition thereto of a NEW SECTION, to be known and des-
 19 ignated as Section 42-202B, Idaho Code, and to read as follows:

20 42-202B. DEFINITIONS. Whenever used in this chapter, the term:

21 (1) "Municipality" means a city incorporated under section 50-102, Idaho
 22 Code, a county, or the state of Idaho acting through a department or institu-
 23 tion.

24 (2) "Municipal provider" means: (a) a municipality that provides water
 25 for municipal purposes to its residents and other users within its service
 26 area; (b) any corporation or association holding a franchise to supply water
 27 for municipal purposes, or a political subdivision of the state of Idaho
 28 authorized to supply water for municipal purposes, and which does supply
 29 water, for municipal purposes to users within its service area; or (c) a cor-
 30 poration or association which supplies water for municipal purposes through a
 31 water system regulated by the state of Idaho as a "public water supply" as
 32 described in section 39-103(15), Idaho Code.

33 (3) "Municipal purposes" refers to water for residential, commercial,
 34 industrial, irrigation of parks and open space, and related purposes, exclud-
 35 ing use of water from geothermal sources for heating, which a municipal pro-
 36 vider is entitled or obligated to supply to all those users within a service
 37 area, including those located outside the boundaries of a municipality served
 38 by a municipal provider.

39 (4) "Planning horizon" refers to the length of time that the department
 40 determines is reasonable for a municipal provider to hold water rights to meet
 41 reasonably anticipated future needs. The length of the planning horizon may
 42 vary according to the needs of the particular municipal provider.

43 (5) "Reasonably anticipated future needs" refers to future uses of water
 44 by a municipal provider for municipal purposes within a service area which, on
 45 the basis of population and other planning data, are reasonably expected to be
 46 required within the planning horizon of each municipality within the service
 47 area not inconsistent with comprehensive land use plans approved by each
 48 municipality. Reasonably anticipated future needs shall not include uses of
 49 water within areas overlapped by conflicting comprehensive land use plans.

50 (6) "Service area" means that area within which a municipal provider is
 51 or becomes entitled or obligated to provide water for municipal purposes. For
 52 a municipality, the service area shall correspond to its corporate limits, or
 53 other recognized boundaries, including changes therein after the permit or
 54 license is issued. The service area for a municipality may also include areas

1 outside its corporate limits, or other recognized boundaries, that are within
 2 the municipality's established planning area if the constructed delivery sys-
 3 tem for the area shares a common water distribution system with lands located
 4 within the corporate limits. For a municipal provider that is not a municipal-
 5 ity, the service area shall correspond to the area that it is authorized or
 6 obligated to serve, including changes therein after the permit or license is
 7 issued.

8 SECTION 3. That Section 42-217, Idaho Code, be, and the same is hereby
 9 amended to read as follows:

10 42-217. PROOF OF APPLICATION TO BENEFICIAL USE. On or before the date set
 11 for the beneficial use of waters appropriated under the provisions of this
 12 chapter, the permit holder shall submit a statement that he has used such
 13 water for the beneficial purpose allowed by the permit. The statement shall
 14 include:

15 1. The name and post-office address of the permit holder.
 16 2. The permit number.
 17 3. A description of the extent of the use.
 18 4. In the case of a municipal provider, a revised estimate of the reason-
 19 ably anticipated future needs, a revised description of the service area, and
 20 a revised planning horizon, together with appropriate supporting documenta-
 21 tion.

22 5. The source of the water used.

23 56. Such other information as shall be required by the blank form fur-
 24 nished by the department.

25 Such written proof as may be required to be submitted by such user shall
 26 be upon forms furnished by the department of water resources and shall include
 27 fees as provided in subsection K₂ of section 42-221, Idaho Code, or a field
 28 examination report prepared by a certified water right examiner.

29 Upon receipt of such proof and the fee as required in section 42-221,
 30 Idaho Code, by the department of water resources the department shall examine,
 31 or cause to be examined:

32 1. The place where such water is diverted and used, and, if the use is
 33 for irrigation, he shall ascertain the area and location of the land irrigated
 34 and the nature of all the improvements which have been made as a direct result
 35 of such use.

36 2. The capacities of the ditches or canals or other means by which such
 37 water is conducted to such place of use, and the quantity of water which has
 38 been beneficially applied for irrigation or other purposes.

39 The department or the person making such examination under the direction
 40 of the department shall prepare and file a report of the investigation: pro-
 41 vided, that whenever irrigation systems cover more than twenty-five thousand
 42 (25,000) acres, proof of beneficial use may be made by the persons, company or
 43 corporation constructing the irrigation works on behalf of the project, and in
 44 such cases, the lands upon which the water has been used need not be described
 45 by legal subdivisions, but may be described generally as the lands under the
 46 irrigation system, and it shall only be necessary to show in such cases that
 47 the quantity of water beneficially applied for irrigation has been applied
 48 within the limits of the project.

49 Holders of permits who have submitted proof of beneficial use but have not
 50 had their project examined for beneficial use shall submit the fee required in
 51 section 42-221, Idaho Code, within sixty (60) days of notification by the
 52 director of the department of water resources that a license examination fee
 53 is required. Failure to submit the fee in the time allowed shall be cause for
 54 the director to advance the date of priority of the permit one (1) day for

1 each day that the fee is late; provided that if the fee is not fully paid
 2 within one (1) year of the time it is due, the director of the department of
 3 water resources may consider the proof of beneficial use for the permit to be
 4 incomplete and lapse the permit, as provided in section 42-218a, Idaho Code.

5 SECTION 4. That Section 42-219, Idaho Code, be, and the same is hereby
 6 amended to read as follows:

7 42-219. ISSUANCE OF LICENSE -- PRIORITY. (1) Upon receipt by the depart-
 8 ment of water resources of all the evidence in relation to such final proof,
 9 it shall be the duty of the department to carefully examine the same, and if
 10 the department is satisfied that the law has been fully complied with and that
 11 the water is being used at the place claimed and for the purpose for which it
 12 was originally intended, the department shall issue to such user or users a
 13 license confirming such use. Such license shall be issued under the seal of
 14 the office of the department of water resources, and shall state the name and
 15 post-office address of such user, the purpose for which such water is used,
 16 the quantity of water which may be used, which in no case shall be an amount
 17 in excess of the amount that has been beneficially applied. A license may be
 18 issued to a municipal provider for an amount up to the full capacity of the
 19 system constructed or used in accordance with the original permit provided
 20 that the director determines that the amount is reasonably necessary to pro-
 21 vide for the existing uses and reasonably anticipated future needs within the
 22 service area and otherwise satisfies the definitions and requirements speci-
 23 fied in this chapter for such use. The director shall condition the license to
 24 prohibit any transfer of the place of use outside the service area, as defined
 25 in section 42-202B, Idaho Code, or to a new nature of use of amounts held for
 26 reasonably anticipated future needs together with such other conditions as the
 27 director may deem appropriate.

28 (2) If such use is for irrigation, such license shall give a description,
 29 by legal subdivisions, of the land which is irrigated by such water. If the
 30 use is for municipal purposes, the license shall describe the service area and
 31 shall state the planning horizon for that portion of the right, if any, to be
 32 used for reasonably anticipated future needs.

33 (3) Such license shall bear the date of the application for, and the num-
 34 ber of, the permit under which the works from which such water is taken were
 35 constructed; the capacity of such works; the date when proof of beneficial use
 36 of such water was made, and also the date of the priority of the right con-
 37 firmed by such license; ~~which.~~

38 (4) The date of priority confirmed by the license shall be the date of
 39 the application for the permit for the construction of the works from which
 40 such the water is taken, and to which such the right relates, provided there
 41 has been no loss of priority under the provisions of this chapter, ~~and~~ provided,
 42 that ~~when~~ proof of the beneficial application of water shall be offered
 43 subsequent to the date stated in the permit, or in any authorized extension
 44 thereof, when such beneficial application shall be made, such the proof shall
 45 be taken, if received by the department within the sixty (60) days prescribed
 46 in the preceding section, ~~and if~~ if the proof taken is satisfactory to the
 47 department of water resources, a license shall be issued by the department
 48 the same as though such proof had been made before such the date fixed for
 49 such beneficial application, ~~but~~ the priority of the right established by
 50 such the proof shall not date back to the date of the application for the per-
 51 mit to which such the right would relate under the provisions of this chapter,
 52 but shall bear a date which shall be subsequent to the date of such the appli-
 53 cation, a time equal to the difference between the date set in such the per-
 54 mit, or extension thereof, for such beneficial application of such water and

1 the date of such proof, ~~---provided, however, that upon~~

2 (5) For irrigation projects where the canals constructed cover an area of
3 twenty-five thousand (25,000) acres or more, or within irrigation districts
4 organized and existing as such under the laws of the state of Idaho, the
5 license issued shall be issued to the persons, association, company or corpo-
6 ration or irrigation district owning the project, and final proof may be made
7 by such owners for the benefit of the entire project, and ~~it~~ shall not be
8 necessary to give a description of the land by legal subdivisions but a gen-
9 eral description of the entire area under the canal system shall be
10 sufficient, ~~and~~ ~~the~~ water diverted and the water right acquired thereby
11 shall relate to the entire project and the diversion of the water for the ben-
12 efiticial use under the project shall be sufficient proof of beneficial use
13 without regard as to whether each and every acre under the project is irri-
14 gated or not.

15 (6) In the event that the department shall find that the applicant has
16 not fully complied with the law and the conditions of permit, it may issue a
17 license for that portion of the use which is in accordance with the permit, or
18 may refuse issuance of a license and void the permit. Notice of such action
19 shall be forwarded to the permit holder by certified mail. The applicant may
20 contest such action by the department pursuant to section 42-1701A(3), Idaho
21 Code.

22 SECTION 5. That Section 42-222, Idaho Code, be, and the same is hereby
23 amended to read as follows:

24 42-222. CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR
25 NATURE OF USE OF WATER UNDER ESTABLISHED RIGHTS -- FORFEITURE AND EXTENSION --
26 APPEALS. (1) Any person, entitled to the use of water whether represented by
27 license issued by the department of water resources, by claims to water rights
28 by reason of diversion and application to a beneficial use as filed under the
29 provisions of this chapter, or by decree of the court, who shall desire to
30 change the point of diversion, place of use, period of use or nature of use of
31 all or part of the water, under the right shall first make application to the
32 department of water resources for approval of such change. Such application
33 shall be upon forms furnished by the department and shall describe the right
34 licensed; claimed or decreed which is to be changed and the changes which are
35 proposed, and shall be accompanied by the statutory filing fee as in this
36 chapter provided. Upon receipt of such application it shall be the duty of the
37 director of the department of water resources to examine same, obtain any con-
38 sent required in section 42-108, Idaho Code, and if otherwise proper to pro-
39 vide notice of the proposed change in the same manner as applications under
40 section 42-203A, Idaho Code. Such notice shall advise that anyone who desires
41 to protest the proposed change shall file notice of protests with the depart-
42 ment within ten (10) days of the last date of publication. Upon the receipt of
43 any protest, accompanied by the statutory filing fee as provided in section
44 42-221, Idaho Code, it shall be the duty of the director of the department of
45 water resources to investigate the same and to conduct a hearing thereon. He
46 shall also advise the watermaster of the district in which such water is used
47 of the proposed change and the watermaster shall notify the director of the
48 department of water resources of his recommendation on the application, and
49 the director of the department of water resources shall not finally determine
50 the action on the application for change until he has received from such
51 watermaster his recommendation thereof, which action of the watermaster shall
52 be received and considered as other evidence.

53 When the nature of use of the water right is to be changed to municipal
54 purposes and some or all of the right will be held by a municipal provider to

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serve reasonably anticipated future needs, the municipal provider shall provide to the department sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made.

When a water right or a portion thereof to be changed is held by a municipal provider for municipal purposes, as defined in section 42-202B, Idaho Code, that portion of the right held for reasonably anticipated future needs at the time of the change shall not be changed to a place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use.

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code, ~~except the~~, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area. The transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement in use of the original right even though more acres may be irrigated, if no other water rights are injured thereby. A copy of the approved application for change shall be returned to the applicant and he shall be authorized upon receipt thereof to make the change and the original water right shall be presumed to have been amended by reason of such authorized change. In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter provided.

(2) All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that all water rights appurtenant to land contracted in a federal cropland set-aside program, shall not be lost and forfeited for nonuse during the contracted period. The five (5) year period of nonuse for forfeiture of a water right shall begin to accrue upon termination of the contract if a period of nonuse did not occur prior to the effective date of the contract or shall continue to accrue if a period of nonuse occurred prior to the effective date of the contract. A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute a beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs. Upon proper showing before the director of the department of water resources of good and sufficient rea-

1 son for nonapplication to beneficial use of such water for such term of five
 2 (5) years, the director of the department of water resources is hereby autho-
 3 rized to grant an extension of time extending the time for forfeiture of title
 4 for nonuse thereof, to such waters for a period of not to exceed five (5)
 5 additional years. Application for an extension shall be made before the end of
 6 the five (5) year period upon forms to be furnished by the department of water
 7 resources and shall fully describe the right on which an extension of time to
 8 resume the use is requested and the reasons for such nonuse and shall be
 9 accompanied by the statutory filing fee; provided that water rights appurte-
 10 nant to land contracted in a federal cropland set-aside program are exempt
 11 from this requirement. Upon the receipt of such application it shall be the
 12 duty of the director of the department of water resources to examine the same
 13 and to provide notice of the application for an extension in the same manner
 14 as applications under section 42-203A, Idaho Code. The notice shall fully
 15 describe the right, the extension which is requested and the reason for such
 16 nonuse and shall state that any person desiring to object to the requested
 17 extension may submit a protest, accompanied by the statutory filing fee as
 18 provided in section 42-221, Idaho Code, to the director of the department of
 19 water resources within ten (10) days of the last date of publication. Upon
 20 receipt of a protest it shall be the duty of the director of the department of
 21 water resources to investigate and conduct a hearing thereon as in this chap-
 22 ter provided. The director of the department of water resources shall find
 23 from the evidence presented in any hearing, or from information available to
 24 the department, the reasons for such nonuse of water and where it appears to
 25 the satisfaction of the director of the department of water resources that
 26 other rights will not be impaired by granting an extension of time within
 27 which to resume the use of the water and good cause appearing for such nonuse,
 28 he may grant one (1) extension of five (5) years within which to resume such
 29 use. In his approval of the application for an extension of time under this
 30 section the director of the department of water resources shall set the date
 31 when the use of water is to be resumed. Sixty (60) days before such date the
 32 director of the department of water resources shall forward to the applicant
 33 at his address of record a notice by certified mail setting forth the date on
 34 which the use of water is to be resumed and a form for reporting the resump-
 35 tion of the use of the water right. If the use of the water has not been
 36 resumed and report thereon made on or before the date set for resumption of
 37 use such right shall revert to the state and again be subject to appropri-
 38 ation, as provided in this section. In the event the director of the department
 39 of water resources determines that a proposed extension of time within which
 40 to resume use of a water right shall not be approved as provided in this sec-
 41 tion, he shall deny same and forward notice of such action to the applicant by
 42 certified mail, which decision shall be subject to judicial review as hereaf-
 43 ter provided.

44 (3) Any person or persons feeling themselves aggrieved by the determina-
 45 tion of the department of water resources in approving or rejecting an appli-
 46 cation to change the point of diversion, place, period of use or nature of use
 47 of water under an established right or an application for an extension of time
 48 within which to resume the use of water as provided in this section, may, if a
 49 protest was filed and a hearing held thereon, seek judicial review pursuant to
 50 section 42-1701A(4), Idaho Code. If no protest was filed and no hearing held,
 51 the applicant may request a hearing pursuant to section 42-1701A(3), Idaho
 52 Code, for the purpose of contesting the action of the director and may seek
 53 judicial review of the final order of the director following the hearing pur-
 54 suant to section 42-1701A(4), Idaho Code.

STATEMENT OF PURPOSE

RS 06104

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.

FISCAL IMPACT

This legislation will reduce costs to municipalities by reducing paperwork and the costs associated with additional findings. Costs to the state will be reduced by having fewer applications to change water rights and by the simplified recording and notice that will result from using the less complex descriptions for the authorized place of use. Most importantly, municipalities will be able to develop and retain at lower cost, water rights needed for expected growth.

Contact

Name: Norm Young

Agency: Department of Water Resources

Phone: 327-7900

Statement of Purpose/Fiscal Impact

51535

Attachment E LEGISLATIVE HISTORY OF 1996 ACT

SUGGESTED CHANGES IN MUNICIPAL WATER RIGHTS BILL

42-202B. DEFINITIONS. Whenever used in this chapter, the term:

(1) "Municipality" means a city incorporated under section 50-102, Idaho Code, or a county of the state of Idaho acting through a department or institution.

(2) "Municipal provider" means either: (a) a municipality that provides water for municipal purposes to its residents and other users within its service area; or (b) any other corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water for municipal purposes to users within its service area; or (c) a corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a public water supply as described in section 39-103(15), Idaho Code.

(3) "Municipal purposes" refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider.

(5) "Reasonably anticipated future needs" refers to future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of the municipal provider and are consistent with the comprehensive land use plans for each municipality within the service area, not inconsistent with comprehensive land use plans approved by each municipality. Reasonably anticipated future needs shall not include uses of water within areas overlapped by conflicting comprehensive land use plans.

(6) "Service area" means that area within which a municipal provider is or becomes entitled or obligated to provide water for municipal purposes. For a municipality, the service area shall correspond to its corporate limits, or other recognized boundaries, including changes therein after the permit or license is issued. The service area for a municipality may also include areas outside its corporate limits, or other recognized boundaries, that are within the municipality's established planning area if the constructed delivery system for the area shares a common water distribution system with lands located within the corporate limits. For a municipal provider that is not a municipality, the service area shall correspond to the area that it is authorized or obligated to serve, including changes therein after the permit or license is issued.

42-219. ISSUANCE OF LICENSE -- PRIORITY. (1) ...

A license may be issued to a municipal provider for an amount up to the full capacity of the system constructed or used in accordance with the original permit provided that the director determines that the amount is reasonably necessary to provide for the existing uses and reasonably anticipated future needs within the service area and otherwise satisfies the definitions and requirements specified in this chapter for such use. The director shall condition the license to prohibit any transfer of the place of use outside the service area (as defined in section 42-202B, Idaho Code) or to a new nature of use or amounts held for reasonably anticipated future needs together with such other conditions as the director may deem appropriate.

Insert this new paragraph in "change" section (42-222) at end of first underlined paragraph:

When a water right or a portion thereof to be changed is held by a municipal provider for municipal purposes (as defined in section 42-202B, Idaho Code), that portion of the right held for reasonably anticipated future needs at the time of the change shall not be changed to a place of use outside the service area (as defined in section 42-202B, Idaho Code) or to a new nature of use.

FAX COVER SHEET

DATE: February 12, 1996

TIME: 3:22 pm (Mountain Time)

PAGES (INCLUDING COVER): 1

ORIGINAL TO FOLLOW: () Yes (X) No

OUR FILE NUMBER: 4357-1

MATTER: Municipal Water Providers

TO:

	<u>Name</u>	<u>Organization</u>	<u>Fax Phone</u>
1.	Karl J. Dreher	IDWR	327-7866
2.	Phillip J. Rassier	IDWR	327-7866

From:
CHRISTOPHER H. MEYER
 GIVENS PURSLEY & HUNTLEY LLP
 Suite 200, Park Place
 277 North Sixth Street
 Post Office Box 2720
 Boise, Idaho 83701-2720
 Telephone: (208) 388-1200
 Direct Dial: (208) 388-1236
 Fax: (208) 388-1201

Chris

MESSAGE:

Here is the language I promised to produce on small community water systems. Substitute this subpart (c) for the one in your 42-202B(2):

(c) a corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a "public water supply" as described in section 39-103(15), Idaho Code.

Please let me know if this works.

-Chris Meyer *388-1236*

cc: Dave Mabe
Jeff Fereday
Ken McClure
Mike Creamer

If transmission is incomplete, call Barbara Feasel at (208) 388-1227.

***** CONFIDENTIALITY NOTICE *****

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(4357)\1\CMFAX\DRSNERA.P01

12. "Laboratory" means not only facilities for biological, serological, biophysical, cytological and pathological tests, but also facilities for the chemical or other examination of materials from water, air or other substances.

13. "Person" means any individual, association, partnership, firm, joint stock company, trust, estate, political subdivision, public or private corporation, state or federal governmental department, agency or instrumentality, or any other legal entity which is recognized by law as the subject of rights and duties.

14. "Public swimming pool" means an artificial structure, and its appurtenances, which contains water more than two (2) feet deep which is used or intended to be used for swimming or recreational bathing, and which is for the use of any segment of the public pursuant to a general invitation but not an invitation to a specific occasion or occasions.

15. "Public water supply" means all mains, pipes and structures through which water is obtained and distributed to the public, including wells and well structures, intakes and cribs, pumping stations, treatment plants, reservoirs, storage tanks and appurtenances, collectively or severally, actually used or intended for use for the purpose of furnishing water for drinking or general domestic use in incorporated municipalities; or unincorporated communities where ten (10) or more separate premises or households are being served or intended to be served; or any other supply which serves water to the public and which the department of health and welfare declares to have potential health significance.

16. "Substantive" means that which creates, defines or regulates the rights of any person or implements, interprets or prescribes law or policy, but does not include statements concerning only the internal management of the department and not affecting private rights or procedures available to the public.

17. "Nutrient" means any one (1) of the natural elements including, but not limited to, carbon, hydrogen, oxygen, nitrogen, potassium, phosphorus, magnesium, sulfur, calcium, sodium, iron, manganese, copper, zinc, molybdenum, vanadium, boron, chlorine, cobalt and silicon, that are essential to plant and animal growth.

18. "Medical waste combustor" means any device, incinerator, furnace, boiler or burner, and any and all appurtenances thereto, which burns or pyrolyzes medical waste consisting of human or animal tissues, medical cultures, human blood or blood products, materials contaminated with human blood or tissues, used or unused surgical wastes, used or unused sharps including hypodermic needles, suture needles, syringes and scalpel blades. [I.C., § 39-103 as added by S.L. 1992, ch. 305, § 4, p. 911; am. 1993, ch. 267, § 1, p. 899.]

Compiler's notes. This section was amended in 1992 by ch. 189, § 3, effective July 1, 1992 and by ch. 305, § 1, effective April 8, 1992. Section 6 of S.L. 1992, ch. 305 provided that such § 1 would become null and void and of no force and effect March 1, 1993 and that § 3 of ch. 305, which repealed

this section (1972, ch. 347, § 3, p. 1017; am. 1973, ch. 143, § 1, p. 279; am. 1974, ch. 23, § 47, p. 633; am. 1978, ch. 45, § 1, p. 80; am. 1989, ch. 308, § 2, p. 762; am. 1990, ch. 357, § 1, p. 966; am. 1992, ch. 305, § 1) and § 4 of ch. 305, which enacted a new § 39-103, would be in full force and effect on March 1, 1993.

Suggested Changes in Municipal Rights Bill

February 12, 1996

at 9:45 am

Substitute this definition of municipality (42-202B(1)):

(1) "Municipality" means a city incorporated under section 50-102, Idaho Code, or the state of Idaho acting through a department or institution, a political subdivision of the state of Idaho, or a community public water system regulated by the state of Idaho.

Substitute this definition of municipal purposes (42-202B(3)):

(3) "Municipal purposes" refers to water for any purpose appropriate to the functioning of a municipality, including residential, commercial, industrial, geothermal heat, irrigation of parks and open space, and like uses, which a municipal provider is entitled or obligated to supply to all those users within a service area.

Insert the following words after the phrase "shall correspond to its corporate limits" in definition of service area (42-202B(6)):

or other recognized boundary

Insert this new paragraph in "change" section (42-222) at end of first underlined paragraph:

^A *or portion thereof*
When the water right to be changed is held by a municipal provider for municipal purposes (as defined in section 42-202B, Idaho Code), that portion of the right held for reasonably anticipated future need at the time of the change may not be changed to a place of use outside the service area (as defined in section 42-202B, Idaho Code) or to a new nature of use, and such portion shall be lost and forfeited at the time of the change.

S:\CLIENTS\43571\LEGISLATION\SEPT.001

FAX COVER SHEET

From:

CHRISTOPHER H. MEYER

GIVENS PURSLEY & HUNTLEY LLP

Suite 200, Park Place

277 North Sixth Street

Post Office Box 2720

Boise, Idaho 83701-2720

Telephone: (208) 388-1200

Direct Dial: (208) 388-1236

Fax: (208) 388-1201

DATE: Monday, February 12, 1996

TIME: 9:45 am (Mountain Time)

PAGES (INCLUDING COVER): 2

ORIGINAL TO FOLLOW: () Yes (9 No)

OUR FILE NUMBER: 4357-1

MATTER: Municipal Water Providers

SEND TO FAX PHONE: 327-7866

TO:

Phillip J. Rassler, Esq.
Idaho Department of Water Resources
1301 North Orchard Street
Boise, ID 83706-2237
Office: 327-7905 (direct)
Main: 327-7920

MESSAGE:

Phil—

I've typed these suggestions out in anticipation of today's meeting at 10:30. Perhaps you and I will have a chance to chat before then. I would like to explain my thinking on these to you.

-Chris Meyer

If transmission is incomplete, call Barbara Feasel at (208) 388-1227.

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[4357\1\CHIMEYER\RASSLER.F01]

LAW OFFICES

GIVENS PURSLEY & HUNTLEY, LLP

A LIMITED LIABILITY PARTNERSHIP

277 No. 6th Street • Suite 200

P.O. Box 2720 • Boise, Idaho 83701

(208) 388-1200

FACSIMILE (208) 388-1201

February 1, 1996

L. EDWARD MILLER
PATRICK J. MILLER
JUDSON G. MONTGOMERY
TERRY L. MYERS
RAMONA S. NEAL
STEVEN L. OLSEN
W. HUGH O'RIGORDAN
ROBERT L. PHILLIPS
KENNETH L. PURSLEY
GREGORY J. VIETZ
CONLEY WARD
STEVEN H. WEEKS
STEPHANIE C. WESTERMEIER

RECEIVED

FEB 02 1996

JAMES A. MCCLURE
JUDITH K. HOLCOMBE
OF COUNSEL

Department of Water Resources

CHRISTOPHER H. MEYER
DIRECT DIAL
(208) 388-1236

GARY G. ALLEN
JOSEPH H. BAIRD
CHRISTOPHER J. BEESON
MICHAEL C. CREAMER
ROY L. EIGURCH
JEFFREY C. FEREADAY
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L. W. GRANT III
J. BART GREEN
ROBERT C. HUNTLEY, JR.
KARL T. KLEIN
DAVID R. LOMBARDI
KIMBERLY DAWN MALONEY
KENNETH R. MCCLURE
CHRISTOPHER H. MEYER

Mr. Norman C. Young
Administrator
Idaho Department of Water Resources
1301 North Orchard Street
Boise, ID 83706-2237

Phillip J. Rassier, Esq.
Idaho Department of Water Resources
1301 North Orchard Street
Boise, ID 83706-2237

Subject: Draft Municipal Water Rights Legislation
Our file: 4357-1

S.B. 1355

Dear Norm and Phil:

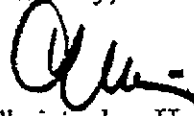
Enclosed please find a copy of a letter I received from Don Munkers, the Chief Executive Officer of the Idaho Rural Water Association (IRWA). This firm does not represent the IRWA; however, we have coordinated with Don and his organization in connection with the municipal rights legislation sponsored by the IDWR.

Don requests that the bill language be amended to include within the scope of its coverage small domestic water supply entities serving unincorporated communities. As I understand it, these entities are regulated by the DEQ but do not hold a PUC franchise. Although we have explored the matter preliminarily, my clients have taken no position on the proposal at this point. We like to have the benefit of your thoughts on whether this is an accommodation which makes sense in the legislation.

By copy of this letter, I will advise other key backers of the legislation, and invite their thoughts as well.

February 1, 1996
Page 2

Sincerely,



Christopher H. Meyer

Enclosure: Letter from Don Munkers

cc: Don Munkers, Idaho Rural Water Association
Municipal Providers Group

CHM:mac

S:\CLIENTS\43571\CHM\CORRYOUNG&L02

Idaho Rural Water Association



1314 'G' Street, Suite A • Lewiston, Idaho 83501
Phone: (208) 743-6142 • Fax: (208) 748-1024

January 15, 1996

Mr. Christopher H Meyer, Attorney
Givens, Pursley & Huntley, LLP
PO Box 2720
Boise, Idaho 83701

Dear Mr. Meyer:

Pursuant to our conversation on this date, I suggest that language be incorporated into the proposed municipal water rights legislation, to wit, R.S. No. 5488, to include those community public water systems that are non-incorporated and that are regulated by the Idaho Department of Environmental Quality.

These systems are small non-incorporated systems that are providing drinking water to their patrons in the same manner as the larger incorporated municipalities. These would include, but not be limited to, providers such as Owyhee Village Water Association, Kootenai County Water System #1, retirement mobile home parks, and others throughout the State. When added to the number of incorporated communities in the State, the total comes to approximately 750 systems. These systems would have any number of customers, ranging from 29 to 100 or more. They are DEQ regulated and must comply with all rules and regulations that govern the distribution of safe drinking water. For the most part, these are on ground water systems; however, some (as is the case with Kootenai County) are dealing with surface water supply.

The Idaho Rural Water Association feels strongly that these non-incorporated systems address the same programs and procedures as the larger, incorporated municipalities. It will support the proposed legislation, provided that small, non-incorporated systems are included in R.S. No. 5488 and in the bill when it is assigned a number.

Thank you Chris. If I can provide additional information, I will attempt to do so. Please keep me posted on this most worthwhile endeavor.

Sincerely,

Don Munkers, CEO
Idaho Rural Water Association

Attachment F TAMARACK'S AMENDMENT OF PERMIT (WATER RIGHT NO. 65-22357)

Page 1

State of Idaho
Department of Water Resources
Amendment of Permit

NO. 65-22357

Priority: March 16, 2001

Maximum Diversion Rate: 8.60 CFS

This is to certify, that TAMARACK RESORT LLC
960 BROADWAY AVE STE 100
BOISE ID 83706

has applied for an amendment of a permit and the amendment is APPROVED for development of water as follows:

Source: GROUND WATER

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>	<u>ANNUAL VOLUME</u>
MUNICIPAL STORAGE	01/01 to 12/31		520.0 AF
MUNICIPAL FROM STORAGE	01/01 to 12/31		520.0 AF
MUNICIPAL	01/01 to 12/31	8.60 CFS	
DIVERSION TO STORAGE	01/01 to 12/31	8.60 CFS	

LOCATION OF POINT(S) OF DIVERSION:

GROUND WATER	SE¼SE¼NE¼	Sec. 36, Twp 16N, Rge 02E, B.M., VALLEY County
GROUND WATER	SE¼NE¼	Sec. 8, Twp 15N, Rge 03E, B.M., VALLEY County
GROUND WATER	NE¼SW¼	Sec. 8, Twp 15N, Rge 03E, B.M., VALLEY County
GROUND WATER	SW¼SE¼	Sec. 8, Twp 15N, Rge 03E, B.M., VALLEY County
GROUND WATER	NE¼SW¼	Sec. 32, Twp 16N, Rge 03E, B.M., VALLEY County
GROUND WATER	L1 (NE¼NE¼)	Sec. 5, Twp 15N, Rge 03E, B.M., VALLEY County
GROUND WATER	SE¼NW¼	Sec. 5, Twp 15N, Rge 03E, B.M., VALLEY County
GROUND WATER	NE¼SW¼	Sec. 5, Twp 15N, Rge 03E, B.M., VALLEY County
GROUND WATER	NE¼SE¼	Sec. 5, Twp 15N, Rge 03E, B.M., VALLEY County
GROUND WATER	SE¼SE¼	Sec. 5, Twp 15N, Rge 03E, B.M., VALLEY County
GROUND WATER	L1 (NE¼NE¼)	Sec. 5, Twp 15N, Rge 03E, B.M., VALLEY County
GROUND WATER	SW¼SW¼	Sec. 5, Twp 15N, Rge 03E, B.M., VALLEY County
GROUND WATER	SW¼NE¼	Sec. 5, Twp 15N, Rge 03E, B.M., VALLEY County

CONDITIONS OF APPROVAL

1. Proof of application of water to beneficial use shall be submitted on or before **January 1, 2008**.
2. Subject to all prior water rights.
3. This right authorizes the diversion and use of 8.60 cfs to a maximum of 1248.0 acre feet per annum for reasonably anticipated future needs for municipal purposes within the service area for a 15-year planning horizon ending December 31, 2017, pursuant to Section 42-202(B), Idaho Code.
4. The right holder shall not assign or sell the permit without first securing the written approval of the Department of Water Resources.
5. The full system capacity necessary to provide water for the reasonably anticipated future needs authorized under this right must be constructed by the time proof of beneficial use is filed.
6. The place of use of this permit is the generally described service area depicted as a GIS shape file in IDWR's electronic file for Permit 65-22357.
7. A map depicting the place of use boundary for this water right at the time of this approval is attached to this document for illustration purposes.

State of Idaho
Department of Water Resources
Amendment of Permit

NO. 65-22357

CONDITIONS OF APPROVAL CONTINUED

8. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.
9. After specific notification by the Department, the right holder shall install suitable measuring devices or use other means acceptable to the Director to determine the amount of water diverted and shall annually report the information to the Department.
10. The volume of the storage reservoirs shall not exceed 135.0 acre feet. Operation of the reservoirs shall be in accordance with the operation plan submitted with the application for permit restricting diversions to and from storage to not exceed 520.0 acre feet per year.
11. The right holder shall comply with the requirements of the Idaho Department of Environmental Quality (IDEQ) as specified below:
 - a) the surface water pollution prevention plan, with any amendments approved or required by IDEQ;
 - b) the environmental monitoring agreement with IDEQ;
 - c) the IDEQ's Idaho Rules for Public Drinking Water Systems, IDAPA 58.01.08;
 - d) the water quality monitoring plan submitted to IDEQ;
 - e) the conditions in the Clean Water Act S401 certification for wetlands; and
 - f) the culvert sizing proposed by Tamarack.
12. The right holder shall comply with the requirements of the Wildlife Habitat Conservation Plan with any changes approved by the Idaho Department of Fish and Game, in particular as the Plan relates to the right holders agreement to retain its appurtenant surface water rights.
13. The right holder shall comply with the terms of the lease of state endowment land between the Idaho Department of Lands and Tamarack, including Article VII addressing water rights.
14. The right holder shall comply with the terms of the conservation easement from Tamarack to the Idaho Foundation for Parks and Lands.
15. The right holder shall complete the plans outlined in the letter of Intent to develop joint sewer facilities to serve the West Mountain area. Until the sewer facilities under that plan are in place, no water use under the terms of this permit that will result in a sewage discharge may occur without the express, written consent of the Director of IDWR.
16. The right holder shall comply with the Consent and Agreement for Construction of Well on Lease Premises between the Idaho Board of Land Commissioners and Tamarack Resort, L.L.C.

This amendment of permit is issued pursuant to the provisions of Section 42-211, Idaho Code. Witness the signature of the Director, affixed at Boise, this 13th day of May, 2006.


KARL J DREHER, Director

State of Idaho
Department of Water Resources
Amendment of Permit

NO. 65-22357

Municipal Service Area for Tamarack Resort LLC

May 11, 2006



White Outline -- Tamarack Resort LLC Place of Use
Yellow Grid -- Section Lines

Attachment G

**LETTER FROM CDK (JUNE 22, 2009) RE IMPORTANCE OF RAFN
TO PROJECT FINANCING**

CDK

COOLY-DONAHUE-KNOEHLER
REALTY ADVISORS

June 22, 2009

Mr. Bill Brownlee
The M3 Companies, L.L.C.
4222 E. Camelback Rd., Suite H100
Phoenix, AZ 85018

Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

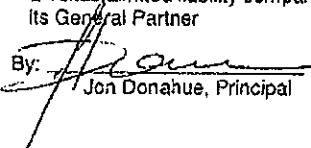
The Dallas Police and Fire Pension System "DPFPS" is a member of M3 Eagle, LLC (the "Company"), which is the developer of a proposed 6,005-acre master planned community known as M3 Eagle in Eagle, Idaho. To date, DPFPS has participated fully as a Company member and has invested \$79,000,000 in a combination of debt and equity in the Company. DPFPS is committed to continued involvement in the Company and to funding approved business plans for the development and construction of the infrastructure within the planned community. On no less than an annual basis, DPFPS and the Company review and approve the Company's business plans and funding requirements. Additional requirements for funding for the Company in accordance with an approved business plan will be funded as direct equity or debt investments from DPFPS or through institutional debt.

In evaluating this investment, DPFPS finds it important that the Company has applied for a "Reasonably Anticipated Future Needs" water right for the project and has made arrangements to convey the water systems to the city into which the project will be annexed. These factors, along with the developer's successful record developing planned communities, provide DPFPS with assurance that the Company has the ability to carry out a long term development plan that can provide recovery of DPFPS's investments within its return thresholds.

DALLAS POLICE AND FIRE PENSION SYSTEM, a
governmental pension plan created under the laws of the
State of Texas

By: CDK Realty Advisors, LP
a Texas Limited Partnership,
its authorized representative

By: CDK Advisors, LLC
a Texas Limited liability company,
its General Partner

By: 
Jon Donahue, Principal

4100 Harry Hines Blvd, Fourth Floor, Dallas, Texas 75219 P (214)253-2130 F (214)253-2131

Attachment H

IDWR MEMORANDUM FROM GLEN SAXTON (MARCH 18, 1998)

MEMORANDUM

To: Water Allocation Bureau
Adjudication Bureau
Regional Offices

From: L. Glen Saxton *LS*

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.

Memo - Pg 1

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

Memo - Pg 2

MEMORANDUM

DATE: August 15, 2003
TO: Jeff Peppersack and Glen Saxton
FROM: Shelley W. Keen
RE: Application for Municipal Water Use

Northern region has been receiving a considerable number of applications for permit for municipal use in multiple ownership subdivisions. Other regions have received a few similar applications. The applications are submitted as "municipal" use rather than "domestic" use because the applicant purports to be a municipal provider under §42-202B(5)(c), *Idaho Code*, which defines a municipal provider as:

A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a "public water supply" as described in section 39-103(10), *Idaho Code*.

Developers, homeowners, or other individuals, who do not meet the requirement that a municipal provider must be a corporation or association, have submitted a number of the applications. We have handled this issue by asking the applicants to assign the application to an association or corporation registered with the Secretary of State to do business in Idaho.

A slightly more complicated issue, however, is that Bob Haynes was told by IDEQ that it does not necessarily issue a public water supply number until after the project is built and is serving water to the users. Therefore, it is not always possible for the water right applicants to provide IDWR with a document stating that they are public water suppliers. Bob Haynes and I discussed the matter, and we propose that a copy of correspondence from IDEQ showing that it has been contacted about the proposed municipal water use and that it is asserting jurisdiction over the well site, engineering plans and specs, etc., should be sufficient to demonstrate that the applicant is being regulated as a public water supply. The permit could be issued with a condition that the permit holder must provide a document from IDEQ with the public water supply number when submitting proof of beneficial use. The only possible drawback that we can see is that if the proposed subdivision materializes in a smaller form than anticipated, resulting in IDEQ never issuing a public water supply number, then the permit may have to be amended to show domestic use instead of municipal use. Is this approach acceptable to you?

\\A006\Users\SKKeen\WRMEMOS\Municipal Provider Questions.doc

**Attachment J IDWR ADMINISTRATIVE MEMORANDUM, APPLICATION PROCESSING
No. 63 (JUNE 15, 1999)**



State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098
Phone: (208) 327-7900 FAX: (208) 327-7866

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

ADMINISTRATIVE MEMORANDUM

Application Processing No. 63

To: Distribution List
From: L. Glen Saxton, P.E. *LS*
RE: MUNICIPAL WATER RIGHTS
Date: June 15, 1999

Attached is the Director's June 14, 1999, letter to Christopher H. Meyer in connection with municipal water rights. This letter provides guidance how the department will treat system capacity and other aspects of municipal uses.

Please discard my prior memo dated March 18, 1998, in connection with municipal use.



State of Idaho
DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098
Phone: (208) 327-7900 FAX: (208) 327-7866 www.idwr.state.id.us/idwr/idwrhome.htm

DIRK KEMPTHORNE
Governor
KARL J. DREHER
Director

June 14, 1999

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

Mr. Christopher H. Meyer
June 14, 1999
Page 2 of 5

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

Mr. Christopher H. Meyer
June 14, 1999
Page 3 of 5

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;

Mr. Christopher H. Meyer
June 14, 1999
Page 4 of 5

- 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
Page 5 of 5

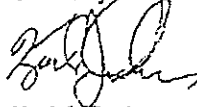
forfeiture. Although the basis for forfeiture is different for a municipal water right, just as the standard for beneficial use is different as discussed above, I would disagree with a conclusion that municipal water rights are immune from forfeiture.

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

Attachment K

**IDWR DRAFT GUIDANCE ON MUNICIPAL RIGHTS
(UNDATED, BUT POSTED TO IDWR WEBSITE ON APPROXIMATELY MAY 7, 2009)**

ADMINISTRATOR'S MEMORANDUM

To: Regional Offices
Water Allocation Bureau

App. Processing No. 18
Licensing No. 1

From: Gary Spackman

Re: **PROCESSING APPLICATIONS AND AMENDMENTS AND DETERMINING
BENEFICIAL USE FOR NON-RAFN MUNICIPAL WATER RIGHTS**

Date: Draft

This memorandum supersedes Application Processing Memo No. 18 dated November 5, 1979 and Licensing Memo No. 1 dated April 7, 1975.

The 1996 Municipal Water Rights Act recognized common law practices (case law) for growing communities to provide for a municipal water supply for reasonably anticipated future needs (RAFN). There are times when a municipal provider will choose to file an application to appropriate water solely for water needed in the short-term without the burden of demonstrating future needs over an established planning horizon. This memorandum provides guidance to Department staff when permitting and determining extent of beneficial use for licensing purposes for non-RAFN municipal water right permits.

The direction provided in this memorandum should be applied to the review and processing of permits to be issued after the date of this memorandum. Existing permits issued prior to the date of this memorandum should be handled on a case-by-case basis when determining beneficial use for licensing purposes. Determination of beneficial use for permits pre-dating this memorandum may depend on the date the permit was issued in relation to the 1996 Municipal Water Rights Act and/or the specific intent of the permit at the time it was issued.

PAST DEPARTMENT POLICY AND PRACTICE

Prior to the 1996 Municipal Water Rights Act, the Department acknowledged the need for some flexibility in licensing water rights due to the growth of municipalities and other small communities under two concepts as described below.

Installed Capacity for Municipalities

An incorporated city or a municipal provider serving an incorporated city could perfect a water right based on the maximum instantaneous diversion rate for the pumping system that was installed and operational during the development period of the permit (limited by the permitted amount), even if the city did not beneficially use the entire capacity during the development period of the permit. Note that even though a municipal system may have included multiple wells and pumps, the Department typically licensed a water right based on the diversion capacity of an individual well and pump listed as a single point of diversion on the water right. The Department typically did not review the overall

system capacity and evaluate the new well as an additional increment of diversion capacity or beneficial use under the entire system due to that point of diversion.

When licensing a municipal water right, the Department did not include an annual volume limit on the license. In addition, the place of use was described as the city limits and was allowed to change as the city limits expanded. A city's water use under a license could expand over time as demand for water increased by pumping the maximum rate over longer periods that may have included storage tanks to provide for higher peak demands.

Stub-in Practice for Subdivisions

For unincorporated cities and other small communities that did not qualify as municipalities, and therefore could not obtain a municipal water right, the Department could only license water rights for domestic and associated irrigation, commercial and other uses based on actual diversion and application of the water to beneficial use accomplished during the authorized development period of the permit. The Department provided some flexibility in determining beneficial use for domestic purposes in subdivision developments under the "stub-in" practice. Under the "stub-in" practice, the Department issued water right licenses for domestic purposes in subdivisions if the water diversion and distribution systems were in place, including a service line to each lot, even if water had not yet been put to beneficial use on all the buildable lots. The Department's stub-in practice recognized that the full build out of a subdivision can take longer than the number of years the Department could authorize for completion of a water appropriation project. By issuing a water right license for domestic uses that were yet to be completed, the Department avoided a parade of individual water right filings as each lot was sold. The stub-in practice also helped subdivision developers obtain financing by providing some assurance to lending institutions that a development project would not fail due to water right availability issues that may have arisen as the individual lots were built out over time. The Department's stub-in practice was applied to each home that would individually qualify as a domestic use as defined in Section 42-111(1)(a), Idaho Code.

The stub-in practice was not applied in all subdivision development situations. For example, suppose the Department issued a permit for development of 100 homes in a subdivision and proof was submitted for 100 homes based on the stub-in practice. Many years later, the Department completes an exam and finds only 20 homes were built and using water. The remaining lots remained vacant and undeveloped except for the stubbed-in service line. The Department would only issue a license based on the actual diversion and use of water because sufficient time would have passed to complete development of the subdivision.

1996 MUNICIPAL WATER RIGHTS ACT

The 1996 Municipal Water Rights Act allows municipal providers to obtain water rights for RAFN. Full completion of diversion works and beneficial use is not required during the development period of the permit, under specific conditions (see Application Processing Memo No. 63). The Municipal Water Rights Act also expanded the types of entities that can qualify for municipal water rights and defined expanding service areas for those entities. See Section 42-202B, Idaho Code for definitions.

To appropriate water for RAFN, the municipal provider carries an extra evidentiary burden to establish a planning horizon and to submit population and other planning data in support of the anticipated needs within the planning horizon. If a municipal provider seeks a water right for RAFN, the planning horizon and supporting data cannot be inconsistent with its comprehensive land use plans.

Furthermore, water rights for RAFN cannot be granted to a municipal provider in areas overlapped by conflicting comprehensive land use plans.

Municipal providers can receive the full benefit of the 1996 Municipal Water Rights Act if they file an application for RAFN and demonstrate future needs over an established planning horizon consistent with requirements in Chapter 2, Title 42, Idaho Code. The intent of a municipal provider to seek water for RAFN must be documented with the application for municipal use.

There are times when a municipal provider will choose to file an application to appropriate water solely for use to meet needs in the short-term (limited up to 5 years with possible extension up to an additional 5 years pursuant to Section 42-204, Idaho Code) without the burden of demonstrating future needs over an established planning horizon. The following sections provide guidance to Department staff when permitting and determining extent of beneficial use for licensing purposes for non-RAFN municipal water right permits. Note that some small community water systems (less than 10 homes) do not qualify as municipal providers and would still be subject to licensing under the past sub-in practices described above as a domestic use.

INCORPORATED CITIES AND MUNICIPAL PROVIDERS SERVING INCORPORATED CITIES

Incorporated cities, or municipal providers serving incorporated cities have historically benefited from common law practices allowing for appropriation of water and acquisition of water rights for long-term growth. Municipal providers in this category may include a city incorporated under Section 50-102, Idaho Code, an entity regulated by the Public Utilities Commission serving water to an incorporated city, or a Water District or Water and Sewer District established pursuant to Chapter 32, Title 42, Idaho Code serving an incorporated city. The 1996 Municipal Water Rights Act is interpreted by the Department to provide for increases to the capacity to divert and use water in accordance with an RAFN permit and license after the authorized development period, but within the established planning horizon (see Application Processing Memo No. 63). However, the act is not interpreted by the Department to fully limit the common law practice of developing the capacity to divert water to the full extent of a non-RAFN permit, without a volume limitation, as long as the beneficial use intended under the permit was developed within the authorized development period.

Application for Permit

An applicant for a non-RAFN municipal application must demonstrate short-term needs to justify the amount of water required for appropriation. This information should be requested pursuant to the additional information requirements provided under Water Appropriation Rule 40.05.d.i:

Information shall be submitted on the water requirements of the proposed project, including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that water is required, and the volume of water that will be consumptively used per year.

The applicant must also demonstrate that the new appropriation is not intended for RAFN by providing total system capacity and existing demand within the municipal service area and comparing to the entire municipal portfolio of water rights. If existing municipal water rights exceed existing demand and short-term needs, then an application for RAFN would be necessary for an additional

appropriation of water. If the applicant desires additional points of diversion without the need for a new appropriation of water, then an application for transfer to change existing rights would be appropriate.

An applicant for a permit not proposing municipal use for RAFN cannot later amend the application to gain the benefits of a RAFN permit without first demonstrating future needs over an established planning horizon consistent with requirements in Chapter 2, Title 42, Idaho Code. Pursuant to Section 42-211, Idaho Code, an amendment to an application to gain the benefits of a RAFN permit shall be republished and the priority date shall be changed to the date of the application for amendment.

Permit

The permit should not be limited by volume except under circumstances where a volume limitation is necessary to protect the water source or, in the case of an amendment of permit, when the original permit was issued or intended for a use other than municipal. The rate of flow must be reasonable when considered against the water flows available from the source (e.g., it may not be in the public interest to dewater a stream to satisfy the municipal needs). The place of use can be described generally for the service area as defined under Section 42-202B, Idaho Code.

A non-RAFN application for municipal use that includes additional rate justified for fire protection purposes should not be permitted for that additional rate under a municipal use, particularly where the applicant has not sought water for RAFN and offered no evidence to support the future appropriation and use of additional water. Doing so would allow the additional rate to be used for flows that may be required for future long-term growth of the municipality. Additional rate solely for fire protection should be listed as a separate use on the water right or permit to ensure that the rate, if approved, does not create a de facto water right for RAFN.¹

As an example, suppose an application for permit is submitted by a municipality for a non-RAFN municipal use and the application indicates that 3 cfs is required for the regular and continuous needs of the city and an additional 7 cfs is required to provide water for fire protection on an as-needed basis. The Department should not issue a permit for municipal use for 10 cfs, which would allow for additional rate to be used by the city in the future to meet the regular and continuous needs of the city. Instead, if the application is otherwise approvable, the Department should issue a permit for municipal use in the amount of 3 cfs and for fire protection in the amount of 7 cfs.

The complexity of some municipal systems makes it difficult to ascertain, at the time of a field exam, if an additional increment of beneficial use has been developed pursuant to a permit. To facilitate future licensing, the permit should include a condition requiring the permit holder to submit a report in connection with proof of beneficial use that describes how the water diverted under the permit provides an additional increment of capacity for the municipal water system as opposed to an alternate point of diversion for existing municipal water rights. In addition, the report should describe how the beneficial use intended under the permit (i.e. the reason used to justify the new appropriation of water) was accomplished.

¹ Permits and licenses issued for fire protection purposes to fight an existing fire do not require a volume limitation since the volume would be variable and unpredictable for firefighting purposes. A volume limitation is required for fire protection storage where water is stored to fight a future fire.

A permit issued to a municipal provider that does not provide for RAFN cannot be later amended to gain the benefits of an RAFN permit.

License

When licensing a permit for municipal use for an entity serving an incorporated city, the extent of beneficial use established under a non-RAFN permit should be determined based on the installed capacity developed and operational during the development period of the permit and cannot exceed the amount permitted. However, beneficial use may be further limited if the intended use described in the application as justification for the permit was not accomplished. The license should not be limited by volume except under circumstances where the permit was limited for reasons described above. The place of use listed on the license can be described generally for the service area as defined under Section 42-202B, Idaho Code.

When determining the installed capacity for licensing purposes, the entire municipal portfolio of water rights must be considered to determine the actual increase in installed capacity provided by the permit for the municipal use. Note that the installed capacity of the system is not necessarily the sum of the individual capacities for each pump or diversion into the system.

In situations where a new point of diversion authorized under the permit is developed, but an additional increment of capacity or beneficial use is not developed for the municipal system, a license may be issued limiting the diversion rate in combination with other rights in the municipal system to the existing capacity of the municipal system.

OTHER MUNICIPAL PROVIDERS

Municipal providers that do not serve incorporated cities can receive the full benefit of the 1996 Municipal Water Rights Act if they file an application for RAFN and demonstrate future needs over an established planning horizon consistent with requirements in Chapter 2, Title 42, Idaho Code. For such municipal providers, if they choose not to file an application for an RAFN permit, the ability of the municipal provider to acquire a water right for municipal purposes is limited to the amount that can be diverted and beneficially used based on development during the period authorized under a non-RAFN permit, as described below.

Application for Permit

For an application for permit seeking to divert water for domestic use or some combination of domestic and other uses for a subdivision or other multiple ownership service area, the use would be more properly described as municipal use within the service area if the uses fall under the definition of municipal purposes and the applicant would also qualify as a municipal provider pursuant to Section 42-202B, Idaho Code. An exception would be the use of water for fire protection. Additional rate for fire protection should be listed as a separate use to ensure that the rate, if approved, does not become part of the flows under the permit that may be required for future use of the municipal provider (see fire protection discussion above for permits under Incorporated Cities).

An applicant for a non-RAFN municipal application must demonstrate short-term needs to justify the amount of water required for appropriation. This information should be requested pursuant to the additional information requirements provided under Water Appropriation Rule 40.05.d.i:

Information shall be submitted on the water requirements of the proposed project, including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that water is required, and the volume of water that will be consumptively used per year.

The applicant must also demonstrate that the new appropriation is not intended for RAFN by providing total system capacity and existing demand within the municipal service area and comparing to the entire municipal portfolio of water rights. If existing municipal water rights exceed existing demand and short-term needs, then an application for RAFN would be necessary for an additional appropriation of water. If the applicant desires additional points of diversion without the need for a new appropriation of water, then an application for transfer to change existing rights would be appropriate.

An applicant for a permit not proposing municipal use for RAFN cannot later amend the application to gain the benefits of a RAFN permit without first demonstrating future needs over an established planning horizon consistent with requirements in Chapter 2, Title 42, Idaho Code. Pursuant to Section 42-211, Idaho Code, an amendment to an application to gain the benefits of a RAFN permit shall be republished and the priority date shall be changed to the date of the application for amendment.

Permit

The permit, if approved, shall include both a rate of flow and an annual volume limitation for the municipal use based on the amount justified. As described above, additional rate justified solely for fire protection should be listed as a separate use on the permit to ensure that the rate, if approved, does not create a de facto water right for RAFN.¹ The place of use can be described generally for the service area as defined under Section 42-202B, Idaho Code.

A permit issued to a municipal provider that does not provide for RAFN cannot be later amended to gain the benefits of a RAFN permit.

License

When licensing a permit for municipal use for a municipal provider that does not serve an incorporated city, the extent of beneficial use established under a non-RAFN permit should be described with both a rate of flow and a volume limitation.² Beneficial use shall be based on development within the service area during the authorized development period of the permit and shall include stubbed-in lots for domestic purposes (i.e. a service line is available for each lot to hook up to the municipal delivery system). The rate should be determined based on the installed capacity if reasonable to serve the needs

² Beneficial Use Rule 35.01.j indicates that "[t]he field examiner does not need to show total volume of water for municipal and fire protection uses on the field report unless the project works provide for storage of water." Although not required on the field exam, any license issued to a municipal provider that does not serve an incorporated city for a non-RAFN municipal use shall include an annual volume limitation based on the amount justified and approved under the permit and beneficially used as described in this memorandum.

within the established service area.³ The annual volume limitation should be determined based on the water requirements for the established service area (including stub-ins). The place of use listed on the license can be described generally for the service area as defined under Section 42-202B, Idaho Code.

As described above for municipal providers serving incorporated cities, when determining the installed capacity for licensing purposes, the entire municipal portfolio of water rights must be considered to determine the actual increase in installed capacity provided by the permit for the municipal use.

In situations where a new point of diversion authorized under the permit is developed, but an additional increment of capacity or beneficial use is not developed for the municipal system, a license may be issued limiting the diversion rate in combination with other rights in the municipal system to the existing capacity of the municipal system.

³ The installed capacity may not represent beneficial use if significantly greater than the diversion required to meet the needs of the developed service area (including stub-ins), even if it does not exceed the amount permitted. For example, if fewer lots are stubbed-in than permitted, the required diversion rate would likely be smaller than the permitted rate.