



State of Idaho

**DEPARTMENT OF WATER RESOURCES**

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DIRK KEMPTHORNE  
GOVERNOR

KARL J. DREHER  
DIRECTOR

**ADMINISTRATIVE MEMORANDUM**

Application Processing No. 63

**To:** Distribution List

**From:** L. Glen Saxton, P.E. 

**RE:** MUNICIPAL WATER RIGHTS

**Date:** June 15, 1999

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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.



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Phone: (208) 327-7900 FAX: (208) 327-7866 [www.idwr.state.id.us/idwr/idwrhome.htm](http://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 6<sup>th</sup> 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

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alternate points of diversion some or most of the wells in United Water's system that are currently operated as production wells. The location of each well to be used as an alternate point of diversion would have to be specifically identified. Together with identifying each well location by quarter-quarter section, it would be helpful if the longitude-latitude or geographic coordinates for each well could be provided as well. Similarly, for those water rights wherein the place of use is defined differently than the service area of United Water, the application could also propose to change the place of use for those water rights to the service area.

If United Water chooses to file a system-wide change application, notice of the application would be provided and the application processed as set forth in Idaho Code § 42-222. If the application is approved, the approval would be conditioned to prevent enlargement of the water rights and injury to other water rights. Conditions of approval would likely include limiting the diversion rate from each well to the diversion rate authorized by the original water right established at each well and setting forth the priority date of the original water right at each well as the effective implementation date of the alternate point of diversion. The effective implementation dates would be used in resolving any future claims of well interference by other well owners, but would not be viewed as secondary priority dates. Another condition that would be considered would not allow wells in ground water management areas to be used as alternate points of diversion for water rights established outside of those areas.

#### System Capacity

As we have previously discussed and as noted in your January 25 letter, Idaho Code § 42-219(1) was modified by the 1996 Municipal Water Rights Act to allow the issuance of a water right license to a municipal provider for "an amount up to the full capacity of the system constructed or used in accordance with the original permit . . . ." Some might construe this limitation to require that a municipal provider fully construct the system used to divert or deliver water associated with a water right for an amount "reasonably necessary to provide for the existing uses and reasonably anticipated future needs within the service area . . . ." However, such interpretation would not be consistent with the intent of the 1996 Municipal Water Rights Act.

The purpose of the language in Idaho Code § 42-219(1) that refers to "an amount up to the full capacity of the system constructed or used in accordance with the original permit" is to define the beneficial use requirement for a municipal water right which includes "reasonably anticipated future needs." If a municipal provider is limited to the amount of water which is actually diverted and used under a permit, then there would never be any amount of water included under a water right for reasonably anticipated future needs. Similarly, if a municipal provider is required to fully construct the system used to divert or deliver water for reasonably anticipated future needs, the provider would not have any flexibility in its water supply/distribution system to make adjustments as the reasonably anticipated future needs become reality. Such inflexibility would likely result in system modifications that would be inefficient and increase consumer costs; a result that would be incompatible with the objective of encouraging municipal providers to implement well-planned, efficient water supply/distribution systems. Consequently, the beneficial use requirement of "the full capacity of the system constructed or used in accordance with the original permit" for a municipal water

right which includes an amount of water for "reasonably anticipated future needs" must lie between the one extreme of fully constructing the system used to divert or deliver water for reasonably anticipated future needs and the other extreme of simply intending to construct the system at some future date.

The appropriate criteria for determining whether "the full capacity of the system [has been] constructed or used in accordance with the original permit" are the degree to which the full capacity of the system has been constructed and the consistency of the constructed capacity with a definitive plan for fully constructing the system, both of which can only be evaluated on a case by case basis. To provide some guidance as to how these criteria should be applied, the following hypothetical examples are offered.

Consider the case of a municipal water provider with a permit to appropriate an amount of surface water for "reasonably anticipated future needs." If the municipal provider fully constructed the necessary water treatment plant and the distribution mains needed to deliver the full amount of water under the water right, the "full capacity of the system" requirement (termed herein as the "full beneficial use requirement") would clearly be satisfied, whether or not water lines for individual users were connected to the distribution mains. But less constructed capacity could also satisfy the full beneficial use requirement. For example, if the municipal provider constructed only a portion of the necessary water treatment plant and only a portion of the distribution mains, and those constructed portions of the system were shown to be significant, integral parts of a detailed plan or design to provide the full capacity of the system, the full beneficial use requirement could still be satisfied provided a substantial investment in the unconstructed capacity of the total system had been made. However, if the municipal water provider constructed a water treatment plant with limited potential for expansion which could treat only a small portion of the water authorized under the permit to appropriate water, constructed an isolated portion of the distribution mains needed to deliver the full amount of water, or otherwise made only a small investment in the unconstructed capacity of the planned system, the water right license might appropriately be issued for an amount of water less than the amount authorized by the permit or the planned full capacity of the system.

For a municipal provider with a permit to appropriate an amount of ground water for reasonably anticipated future needs, construction of the well or wells and the distribution mains needed to divert and deliver the full amount of ground water authorized under the permit should clearly satisfy the full beneficial use requirement. But like the hypothetical provider of treated surface water, less constructed capacity for a ground water system could also satisfy the requirement if the constructed portions of the system were shown to be significant, integral phases of implementing a detailed plan to provide the full capacity of the system and there was substantial planning, design, and investment in the unconstructed capacity of the complete system. Documentation that could be used to demonstrate substantial planning, design, and investment in the unconstructed capacity of the complete system includes the following:

- provision of an overall detailed design of the full capacity system for meeting reasonably anticipated future needs;
- financing plan demonstrating ability to fully pay the costs of constructing the full capacity system needed to meet reasonably anticipated needs;

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- 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

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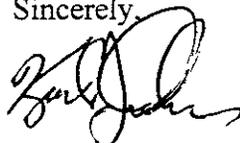
forfeiture. Although the basis for forfeiture is different for a municipal water right, just as the standard for beneficial use is different as discussed above, I would disagree with a conclusion that municipal water rights are immune from forfeiture.

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

If sufficient proof of beneficial use is submitted before the end of the permit development period and the municipal water right is licensed for an amount of water for "reasonably anticipated future needs," the requirement that the full system capacity needed to provide water for the reasonably anticipated future needs be constructed by the end of the municipality's planning horizon will continue as a condition of the license. If the municipal provider fails to construct the full system capacity needed to provide water for the reasonably anticipated future needs by the end of the planning horizon for the municipality, or the anticipated future needs do not materialize by the end of the planning horizon, the quantity of water under the license may be reduced to the capacity of the constructed system or the amount of water required to meet the needs that actually exist at the end of the planning horizon. Although a municipal provider can revise the planning horizon and amend its projections of reasonably anticipated future needs subsequent to the water right license being issued, provided the criteria in Idaho Code § 42-202B(5) are fully satisfied, the water right remains subject to being reduced or forfeited if actual use of the water does not occur. Municipal water rights established prior to the 1996 Municipal Water Rights Act might also be subject to common law abandonment or forfeiture if the rights are not required to satisfy reasonable future needs of the municipality.

I hope these thoughts on the issues you raised are helpful to you and your clients. I intend to have these concepts incorporated in a guidance memorandum for staff of the Department of Water Resources so that the 1996 Municipal Water Rights Act is implemented uniformly. If you have additional questions or would like to discuss these issues or others further, we can arrange to meet again.

Sincerely,



Karl J. Dreher  
Director

cc: IDWR Water Management Division  
Ed Squires / Scott Rhead - United Water