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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF RIVERSIDE'S PETITION FOR DECLARATORY RULING REGARDING NEED FOR A WATER RIGHT UNDER REUSE PERMIT NO. M-255-01	Docket No. P-DR-2020-01 **NAMPA'S RESPONSE BRIEF**

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INTRODUCTION

Shorthand definitions used by Nampa are collected in the footnote.[1]

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[1] This and other submissions by the Reuse Proponents employ the following shorthand definitions:

"AF".....acre-feet.
"AFA".....acre-feet per annum (year).
"AIC".....Association of Idaho Cities.
"Black Rock".....Black Rock Utilities, Inc.
"Boise-Kuna".....Boise-Kuna Irrigation District.
"Bureau".....U.S. Bureau of Reclamation.
"Department".....Idaho Department of Water Resources.
"DMR".....Discharge Monitoring Report.
"effluent".....treated sewage water that leaves a WWTP aka POTW.
"EPA".....U.S. Environmental Protection Agency.
"HARSB".....Hayden Area Regional Sewer Board.
"IDWR".....Idaho Department of Water Resources.
"IDEQ".....Idaho Department of Environmental Quality.
"Idaho Power".....Idaho Power Company.
"influent".....untreated sewage water that enters a WWTP aka POTW.
"McCall".....City of McCall.
"Municipal Intervenors"..The cities of Boise, Caldwell, Idaho Falls, Jerome, Meridian, Nampa, Pocatello, Post Falls, and Rupert, AIC and HARSB.
"Municipal Intervenors Response Brief".....Municipal Interveners' Response to Petitioner's Opening Brief, filed on October 30, 2020.
"Nampa" or "City".....City of Nampa.
"Nampa WWTP".....Nampa's wastewater treatment plant.
"NMID".....Nampa Meridian Irrigation District.
"Non-Potable System" (aka "PI System").....Nampa's non-potable pressurized irrigation water delivery system.
"NPDES Permit".....Nampa's National Pollution Discharge Elimination System Permit No. ID0022063.
"Opening Brief".....*Petitioner's Opening Brief* filed by Riverside in this proceeding on Oct. 2, 2020.
"Party" or "Parties".....Any or all of the Reuse Proponents and Reuse Opponents.
"Payette District".....Payette Lakes Recreational Water & Sewer District.
"Petition".....Riverside's *Petition for Declaratory Ruling Regarding Need for a Water Right to Divert Water Under Reuse Permit No. M-255-01.*
"PI System" (aka "Non-Potable System")....Nampa's non-potable pressurized irrigation water delivery system.
"Pioneer".....Pioneer Irrigation District.

This proceeding was initiated by the submission of Riverside's Petition on February 24, 2020. Nampa filed both an answer and a petition to intervene. Intervention in support of Nampa was sought by Pioneer and the Municipal Intervenors. Idaho Power also sought intervention, apparently in support of Riverside. All petitions to intervene were granted. All parties joined in the SOF filed on September 11, 2020.[2] Municipal Providers submitted Exhibits A through T, and all parties stipulated to their admission on September 11, 2020, subject to limitations set out in that stipulation. This brief is filed in response to Riverside's Opening Brief.

"Pioneer's Response Brief".....Intervenor Pioneer Irrigation District's Response to Petitioner's Opening Brief, filed on October 30, 2020.
"Potable System".....Nampa's potable water delivery system.
"POTW".....POTW stands for "publically owned treatment works." A POTW is a publicly owned WWTP.
"Project Participants".....Nampa and Pioneer.
"RAFN".....RAFN is an acronym for "reasonably anticipated future needs" as defined in Idaho Code § 42-202B(8).
"Reuse Agreement".....The agreement between Pioneer and Nampa known as *Recycled Water Discharge and Use Agreement* dated 3/7/2018.
"Reuse Opponents".....Riverside Irrigation District and Idaho Power Company.
"Reuse Permit".....Reuse Permit No. M-255-01 issued to Nampa by IDEQ.
"Reuse Project".....The project authorized by Nampa's *Reuse Permit* and to be undertaken pursuant to the *Reuse Agreement* with Pioneer.
"Reuse Proponents".....Municipal Intervenors and Pioneer.
"Riverside".....Riverside Irrigation District.
"SOF".....*Stipulation of Facts by All Parties* filed on Sept. 11, 2020 (not to be confused with the preliminary *Reuse Proponents' Stipulation of Facts* filed on June 30, 2020).
"Title 50 Agreement".....An agreement simply titled "Agreement" dated Sept. 9, 1974, a copy of which is set out as Exhibit L (In Submission of Exhibits K-T).
"waste water".....This term (with a space) is used in water law to describe water diverted under a water right but not consumed by the water user.
"wastewater".....This term (without a space) is used by municipalities, IDEQ, and EPA to refer to sewage or effluent.
"WWTP".....WWTP stands for "wastewater treatment plant." A WWTP is a POTW if it is publicly owned.

[2] Idaho Power did not stipulate to the accuracy of the facts, but stipulated that it does not currently intend to challenge them. SOF at 3.

Nampa, Pioneer, and the Municipal Intervenors have cooperated to minimize overlap in their briefs, which have different emphases and approaches but are intended to work together and make consistent arguments. Accordingly, Nampa adopts and incorporates the briefs of Pioneer and the Municipal Intervenors.

SUMMARY OF ARGUMENT

The Department is called upon to determine whether Pioneer is required to obtain a water right in order to accept delivery of wastewater[3] collected and treated by the Nampa and delivered to Pioneer in accordance with the Reuse Agreement and the Reuse Permit. Riverside does not contend that Nampa is required to obtain a new water right in connection with this undertaking. Riverside acknowledges that the water right requirement also could be satisfied by a transfer of Nampa's water rights. Nampa's position is that neither an appropriation nor a transfer is required.

If Riverside prevails and Pioneer is required to obtain a water right, it appears that Riverside will contend in such a proceeding that Pioneer must mitigate for the resulting reduction of wastewater currently discharged by Nampa to Indian Creek. (Riverside calls this injury and enlargement. Opening Brief at 23-25.) A requirement to provide a substitute supply of water to replace the entire irrigation-season flow of wastewater now wasted to Indian Creek would be

[3] Before turning to the substance, we offer this comment on terminology. The terms "waste water" and "wastewater" have different, but overlapping, meanings. The term "waste water" (with a space) is commonly employed in water law to describe water diverted under a water right but not consumed by the water user. (See definition of waste water quoted in *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 751, 118 P.3d 78, 83 (2005).) Waste water must be returned to the common supply as return flow, seepage, or drainage water unless it is lawfully recaptured by the original diverter. The term "wastewater" (without a space) is employed by municipalities, IDEQ, and EPA to mean treated municipal effluent. In this brief, the term "waste water" is employed in the context of water law, and the term "wastewater" is used in reference to effluent (which, of course, may also be waste water in the water law context).

impossible as a practical matter and would scuttle the Reuse Project, costing Nampa citizens tens of millions of dollars (SOF ¶¶ 38, 40-43), all to the benefit of Riverside.

Riverside pins its argument on its reading of Idaho Code § 42-201(2), which is a central component of Idaho's mandatory permitting statutes. Riverside contends, incorrectly, that the delivery of wastewater under Nampa's dominion and control for use within Pioneer's Irrigation District constitutes the "diversion" of water by Pioneer, and that application of any water to land (even water it obtained outside the public water supply) requires a permit. This is a misreading of subsection 2, which prohibits the diversion or application of water obtained from the public water supply. In allowing effluent to be added to its canal, Pioneer is neither diverting nor applying water it obtained from a public water supply.

Riverside's argument also ignores Nampa's right to use and reuse to extinction water diverted under its municipal water rights. Such reuse is lawful, does not constitute enlargement of the underlying municipal water rights, and consequently does not result in injury to others.

Last, but by no means least, subsection 8 of Idaho Code § 42-201 overrides subsection 2 and authorizes the Reuse Project without a water right. This is clear from the words of the statute (which make subsection 8 applicable "notwithstanding" subsection 2), from its legislative history (which makes clear that its purpose is to eliminate mandatory licensing, not shift the burden to farmers and irrigation districts), and from the presence of the IDWR notice requirement (which would be unnecessary if farmers and irrigation districts were required to obtain new water rights).

Indeed, subsection 8 alone is a complete and sufficient defense to Riverside's contentions. All of the other arguments amount to belts and suspenders.

In apparent recognition of the destructive force of subsection 8 to Riverside's argument under subsection 2, Riverside contends that subsection 8 is unconstitutional. That is quite a reach. If that argument were true, all statutory exemptions from permitting requirements—e.g., water for fighting fires[4]—would be unconstitutional.

Indeed, the subsection 8 exemption is in an even stronger position against constitutional attack than other exemptions. This is because it cannot seriously be contended that it results in legal injury. Injury occurs only if something is taken to which one has a legally protected right under the priority system. No water appropriator may be compelled to continue wasting its waste water back to the public water supply after an initial beneficial use if it is authorized, under its water right, to make further use of that water. Nor may an entity that lawfully obtains dominion and control of water outside of the appropriation system (e.g., sewer districts that collect effluent) be compelled to continue a particular practice for disposing of that collected water. Hence, allowing Nampa to replace its discharge of wastewater to Indian Creek with a delivery of that wastewater to Pioneer cannot constitute injury or an unconstitutional taking of property. In short, no property right is taken.

Indeed, Riverside's core assumption and its motivation for pursuing this declaratory ruling is based on this misunderstanding of injury. If Pioneer were allowed or required to obtain a new water right in Nampa's effluent, it could readily do so. It could seek a permit for a junior waste water right allowing it to use the effluent lawfully placed in the Phyllis Canal by Nampa

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[4] Subsection 42-201 contains several exemptions. Subsection 42-201(3)(a) (2000 Idaho Sess. Laws, ch. 291, § 1) makes it unnecessary to obtain a water right for diversions to fight existing fires. Subsection 42-201(3)(b) (2008 Idaho Sess. Laws, ch. 320, § 1) addresses forest practices and dust abatement. Subsection 42-201(3)(c) (2020 Idaho Sess. Laws, ch. 6.) addresses environmental cleanups. The only exemption that would survive constitutional challenge under Riverside's theory of injury is subsection 42-201(9) (2016 Idaho Sess. Laws, ch. 139, § 1), because the exemption from hydropower licensing is limited to incidental power generation.

pursuant to Idaho Code § 42-201(8), in accordance with the Reuse Permit and Reuse Agreement.[5] For the reasons just mentioned, Riverside would be in no position to demand mitigation or other tribute. The junior position of such a waste water right would be of no consequence, because the water is under the physical control of the parties and subject to rights created by contract. But a new junior water right would provide no more security or certainty to Pioneer than it already has under the Reuse Agreement.[6] And the existence of a water right held by Pioneer could confuse or complicate matters if Nampa ever elected to end its delivery of wastewater to Pioneer. A requirement to go through such a pointless water right exercise (with attendant costs, delays, and judicial reviews) would be a waste of resources, as the Legislature wisely recognized in enacting subsection 42-201(8).

ARGUMENT

I. IDAHO CODE § 42-201(8) AUTHORIZES MUNICIPALITIES TO COLLECT AND DISPOSE OF EFFLUENT WITHOUT OBTAINING A WATER RIGHT.

A. Subsection 8 is sufficient to resolve the question presented here.

The statutes primarily at issue in this proceeding are found within Idaho Code § 42-201. Subsections 1 and 2 of section 42-201 (together with Idaho Code §§ 42-103 and § 42-229) constitute Idaho's mandatory permitting law. The remaining subsections of 42-201 are exceptions to or clarifications of that mandate. The one pertinent here is subsection 8.

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[5] Pioneer explains in its brief that it cannot obtain and perfect a separate water right for effluent physically delivered to it by Nampa. Pioneer observes that Idaho water rights are based on diversion from a natural source. Nampa agrees with Pioneer that requiring it to obtain such a water right is unnecessary and improper. But if the Department ruled otherwise, i.e., if the Department ruled that Pioneer can "appropriate" the water delivered to it by Nampa, the best analogy would be to a waste water appropriation.

[6] See Pioneer's Response Brief for a thorough discussion of the Reuse Agreement.

The linchpin of Riverside's statutory argument is subsection 2. As Nampa explains in section II at page 25 below, that argument fails. Subsection 2 does not impose a water right requirement on Pioneer, because Pioneer is neither diverting nor applying water from a public water supply.

Nampa begins its discussion, however, with subsection 8, because it is sufficient to answer the question presented. Subsection 8 declares that no water right is required for a municipality, municipal provider, sewer district, or regional operator of a POTW that land applies or otherwise disposes of treated effluent pursuant to regulatory requirements. It reads in full:

> Notwithstanding the provisions of subsection (2) of this section, a municipality or municipal provider as defined in section 42-202B, Idaho Code, a sewer district as defined in section 42-3202, Idaho Code, or a regional public entity operating a publicly owned treatment works shall not be required to obtain a water right for the collection, treatment, storage or disposal of effluent from a publicly owned treatment works or other system for the collection of sewage or stormwater where such collection, treatment, storage or disposal, including land application, is employed in response to state or federal regulatory requirements. If land application is to take place on lands not identified as a place of use for an existing irrigation water right, the municipal provider or sewer district shall provide the department of water resources with notice describing the location of the land application, or any change therein, prior to land application taking place. The notice shall be upon forms furnished by the department of water resources and shall provide all required information.

Idaho Code § 201(8).[7]

[7] This statute was enacted in 2012. 2012 Idaho Sess. Laws, ch. 2018 (H.B. 608) (reproduced together with its legislative history at Addendum C at page 103). The legislation was prompted by concerns raised by the City of McCall over its disposal of effluent, which was land applied on farms outside the city. Official communications between McCall and the Department that led up to the legislation are set out in Addendum F at page 191.

B. The plain words of subsection 8 state that no water right is required for the disposal of Nampa's effluent.

Subsection 8 is a simple statute. By adding this subsection in 2012, the Legislature declared that no water right is required when a city or sewer district disposes of effluent in order to comply with environmental regulatory requirements.

Riverside implicitly concedes that the statute absolves Nampa of any requirement to obtain a water right in connection with its Reuse Permit. Opening Brief at 22-27. Its sole argument is that, unlike Nampa, Pioneer is not covered by subsection 42-201(8). In other words, according to Riverside, the legislation does not eliminate the burden of obtaining a water right in connection with water reuse. It merely shifts that burden to the farmers and irrigation districts who accept effluent from cities and sewer districts.

Riverside's niggardly reading of the legislation would negate the very purpose of subsection 8, which was to facilitate environmentally regulated reuse of wastewater by eliminating the uncertainty, delay, and expense attendant to new water right acquisition (not to mention eliminating an unnecessary use of scarce agency resources).

The statute says the city or sewer entity need not obtain a water right. But the statute also contains a sweeping declaration that when a city or sewer district takes action pursuant to subsection 8, the mandatory permitting requirements are set aside. The first nine words of subsection 8 state that this waiver operates "[n]otwithstanding the provisions of subsection (2)." The permitting requirements do not come back into play simply because a city employs an agent or contracting party to effectuate its disposal of effluent.

Riverside reads subsection 8 to say that mandatory permitting requirements are waived only if the city is able to accomplish its disposal without the involvement of any other party. But that is not what the statute stays. The statute does not concern itself with what contractual

relationships the city may employ to accomplish the disposal. Instead, the statute broadly declares the city does not need a water right, period, "notwithstanding" subsection 2. Riverside's suggestion that the subsection 2 survives the "notwithstanding" command and re-imposes water right requirements on anyone participating with the city is not a credible reading of the statute.

After all, the "notwithstanding" language employed in subsection 8 is identical to the "notwithstanding" language employed in all of the exemptions (subsections 3(a), 3(b), 3(c), 8, and 9). If Riverside is correct that subsection 8 exempts cities and sewer districts but not those applying the effluent to beneficial use, then the same problem would occur under subsection 9. That subsection exempts operators of irrigation canals that have made arrangements for the incidental generation of hydropower. Riverside's parsimonious reading of the "notwithstanding" language would lead to the result that Idaho Power must obtain a water right. That result is just as wrong. The plain and most logical reading of the "notwithstanding" reading is that any agent or contracting party acting in conjunction with the exempted party is also exempted from the mandatory permitting requirement in subsection 2.

C. The legislative history resolves any ambiguity.

The statute is clear enough. But if there is any ambiguity, the legislative history of H.B. 608 leaves no doubt that the statute's purpose was to eliminate the very argument that Riverside now raises.[8]

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[8] The Idaho Supreme Court has observed:

> If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Escobar*, 134 Idaho at 389, 3 P.3d at 67. [*State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000).] When this Court must engage in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. *Rhode*, 133 Idaho at 462, 988 P.2d at 688. [*State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999).] To ascertain the intent

The legislation was prompted by concerns over whether the City of McCall needed a water right to deliver effluent from its WWTP to farmers under contract with the city.[9] In formal communications between the City of McCall and IDWR, the Department concluded that no water right would be needed if McCall's WWTP treated only wastewater derived from the city's municipal water rights. Alas, that was not the situation. McCall's WWTP accepted substantial quantities of influent collected by the Payette Lakes Recreational Water & Sewer District from households outside the city. Because this was water originating in domestic wells, not traceable to the city's municipal water rights, the Department informed McCall that a water right likely would be needed for its land application.[10]

As a result, McCall worked with the Department, IWUA, IAC, HARSB, and other stakeholders to develop legislation to exempt McCall and all others in its situation from the obligation to obtain a water right. The result was H.B. 608 (Idaho Code § 42-201(8)).

> of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history. *Id.* It is "incumbent upon a court to give a statute an interpretation which will not render it a nullity." *State v. Nelson*, 119 Idaho 444, 447, 807 P.2d 1282, 1285 (Ct. App. 1991).

State v. Reyes, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003).

[9] The city's contractual arrangement with farmers is documented in the legislative history of H.B. 608. See, e.g., House State Affairs Committee (Feb. 28, 2012) (Statement of Rep. Stevenson) reproduced in Addendum C at page 117, and Senate Resources & Environment Committee (Mar. 16, 2012) reproduced in Addendum C at page 129 (Statements of Mr. Meyer). It is also documented in a letter in the files of IDWR from Christopher H. Meyer to Garrick L. Baxter dated September 16, 2011, reproduced in Addendum F at page 200.

[10] See letters in the files of IDWR from Garrick L. Baxter to Christopher H. Meyer dated September 7, 2011 and September 19, 2011, reproduced in Addendum F, items 2 and 4 at pages 198 and 202, respectively.

The legislation, approved unanimously by both Houses,[11] was clearly and unambiguously intended to eliminate altogether the need for new water rights when cities engage in programs to deliver effluent to those in a position to put it to beneficial use.

The following are four examples:

> The purpose of this legislation is to clarify that a separate water right is not required for the collection, treatment storage or disposal storage [sic], including land application, of the effluent from publicly owned treatment works. Effluent is water that has already been diverted under an existing right and has not been returned to the waters of the state. If the land application is to be on land for which there is not already identified a place of use for an existing water right, notice of the place of use will be provided to the department of water resources to allow the department to have complete records of where the water is being used.

Statement of Purpose (emphasis added) reproduced in Addendum C at page 113.

> Rep. Stevenson presented RS 21325, proposed legislation to clarify that a separate water right is not required for the collection, treatment storage or disposal storage, including land application, of the effluent from publicly owned treatment works. Rep. Stevenson stated this legislation was brought by the Association of Cities due to a situation that arose in McCall. They were combining wastewater from the city with a sewer district and realized each individual entity did not require a permit, but when combined, there was ambiguity. RS 21325 makes it clear that when you combine these two sources, if a land application is to take place, this will not require a permit.

House State Affairs Committee (Feb. 28, 2012) (Statement of Rep. Stevenson) (emphasis added) reproduced in Addendum C at page 117.

> The Association of Idaho Cities strongly supports House Bill 608, which would clarify that a separate water right is not required for the collection, treatment, storage, or disposal of effluent from publicly owned treatment works when wastewater is

[11] For unanimous passage, see 2012 Final Daily Data, reproduced in Addendum C at page 114.

> treated and disposed on behalf of entities that do not have a municipal water right.
>
> . . .
>
> House Bill 608 will benefit communities around the state that are working to provide wastewater treatment and disposal as efficiently and effectively as possible, while complying with a myriad of federal water quality requirements

Memorandum from Ken Harward, Association of Idaho Cities, to Senate Resources & Environment Committee (Mar. 14, 2012) (emphasis added) reproduced in Addendum C at page 128.

> . . . Mr. Meyer said the purpose of this legislation was to clarify that a separate water right was not required for the collection, treatment storage or disposal storage, including land application, of the effluent from publicly owned treatment works.
>
> . . .
>
> . . . The purpose of this legislation, he said, was to get the water lawyers out of this business and to allow municipalities to spend their dollars and focus their attention on the issue at hand, which was the water quality side of the equation. The Department of Water Resources was involved in drafting this legislation and added some provisions to it . . . .

Senate Resources & Environment Committee (Mar. 16, 2012) (Statement of Mr. Meyer) (emphasis added) reproduced in Addendum C at page 129.

These statements, and indeed everything in the legislative history,[12] make clear that the legislation was intended to eliminate the water right requirement across-the-board, not to shift the water right burden from the city to the farmer or irrigation district who accepts the effluent.

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[12] Riverside also cites the legislative history. Its cherry picking is ineffective. It quotes Lindley Kirkpatrick's statement to the House Resources & Conservation Committee (Mar. 5, 2012) reproduced in Addendum C at page 119. Mr. Kirkpatrick simply said that the legislation established that cities and sewer districts do not need to acquire a new water right. He said nothing to suggest that other entities instead would be required to obtain those new water rights. Riverside also notes Mr. Kirkpatrick said the bill is crafted narrowly. Riverside fails to explain that this was said in the context that the legislation does nothing to lighten environmental requirements. "He said this doesn't change anything about DEQ's reuse tools, it only allows cities to use wastewater on growing crops." *Id.* Perhaps most misleadingly, Riverside quoted

Indeed, if a complete elimination of the water right requirement was not accomplished by the "notwithstanding" language in section 8, H.B. 608 would not have solved the very problem faced by McCall. As noted above, McCall did not undertake the land application itself. It relied on farmers outside the city to apply the effluent to land. (See footnote 9 at page 17.) If Riverside's reading of section 8 is correct, those farmers would have been required to obtain water rights. The legislative history shows that the role of the farmers was understood by the Legislators and the Department, and no one intended that any new water right would be required. Those farmers and Pioneer stand in the same position. Both were engaged by a city in an undertaking falling within the ambit of subsection 8. The legislation intended that neither would be obligated to shoulder the very burden the statute was intended to eliminate.

In sum, if any corroboration or clarification of the statute's meaning is needed, the legislative history confirms the legislation's obvious goal. It shows that the only sensible reading of the "notwithstanding" language is to eliminate the water right requirement for the named entities as well as their agents and contractees. Riverside should not be allowed to exploit a perceived ambiguity in its language to achieve a result opposite that which was plainly intended.

D. Riverside's subsection 8 argument cannot be reconciled with the provision's notice requirement.

Subsection 8 includes only one affirmative requirement: notification of IDWR if effluent will be applied to lands not already identified as a place of use for an irrigation water right. The last two sentences of subsection 8 state:

Mr. Kirkpatrick's statement that IDWR "has assured the city they can reuse waste water when they have a municipal water right." Riverside fails to explain that this is the reason H.B. 608 was enacted—the City did not have a municipal water right for about half of its effluent. The whole point of the legislation was to make this a non-issue.

> If land application is to take place on lands not identified as a place of use for an existing irrigation water right, the municipal provider or sewer district shall provide the department of water resources with notice describing the location of the land application, or any change therein, prior to land application taking place. The notice shall be upon forms furnished by the department of water resources and shall provide all required information.

Idaho Code § 201(8).

The notification requirement was added, at the request of IDWR, to assure that the Department would have a record of authorized irrigation corresponding to irrigated lands depicted in aerial photography. This was a significant feature of the legislation, repeatedly mentioned in the legislative history.[13]

Obviously, there would be no need for the notification requirement if the farmer or irrigation entity receiving the effluent were required to obtain a new water right. The very basis of the notice requirement is that land may be irrigated with effluent for which the mandatory permit requirement is waived under subsection 8. If the Department saw "green" land in aerial photography and found no corresponding water right, notice that the land was covered by the

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[13] See Statement of Purpose reproduced in Addendum C at page 113 ("If the land application is to be on land for which there is not already identified a place of use for an existing water right, notice of the place of use will be provided to the department of water resources to allow the department to have complete records of where the water is being used."); Memorandum from Ken Harward, Association of Idaho Cities, to Senate Resources & Environment Committee (Mar. 14, 2012) reproduced in Addendum C at page 128 ("In the event that land application is to occur on land for which there is not already identified a place of use for an existing water right, notice of the place of use will be provided to the Department of Water Resources to ensure the department is informed about where water is being used."); Senate Resources & Environment Committee (Mar. 16, 2012) (Statement of Mr. Meyer) (emphasis added) reproduced in Addendum C at page 129 ("Mr. Meyer further pointed out, that if the land application was to be on land which was not already identified as a place of use for an existing water right, notice of the place of use would be provided to the Department of Water Resources. This would allow the Department to have complete records of where the water was to be used. He said this bill resolved this question.").

section 8 exemption would allow the Department to put the matter to rest without further investigation or action.

Plainly, the purpose of the notice requirement was not to allow IDWR to turn its enforcement attention to the entity receiving the effluent. If that had been the case, notice would have been required for all land application, not just land application "on lands not identified as a place of use for an existing irrigation water right."

Statutes are intended to be read together as a whole.[14] One cannot read the last two sentences of subsection 8 as anything but confirmation that subsection 8 lifts mandatory permitting not only for cities and sewer entities, but also those acting as their agents or contractees (i.e., farmers and irrigation districts accepting the effluent).

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[14] Idaho courts have observed:

> Statutes that are in *pari materia*, i.e., relating to the same subject, must be construed together to give effect to legislative intent. *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 construing a statute, this Court examines the language used, the reasonableness of the proposed interpretations, and the policy behind the statutes. *Webb v. Webb*, 143 Idaho 521, 525, 148 P.3d 1267, 1271 (2006).

Johnson v. McPhee, 147 Idaho 455, 561, 210 P.3d 563, 569 (Ct. App. 2009).

> "Language of a particular section need not be viewed in a vacuum. And all sections of applicable statutes must be construed together so as to determine the legislature's intent." *Lockhart v. Dept. of Fish and Game*, 121 Idaho 894, 897, 828 P.2d 1299, 1302 (1992) (quoting *Umphrey* [*v. Sprinkel*], 106 Idaho [700,] 706, 682 P.2d [1247,] 1253 [(1983)]; *see* also *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 853–54, 820 P.2d 1206, 1210–11 (1991)). Statutes and ordinances should be construed so that effect is given to their provisions, and no part is rendered superfluous or insignificant. *See Brown v. Caldwell Sch. Dist. No. 132*, 127 Idaho 112, 117, 898 P.2d 43, 48 (1995).

Friends of Farm to Market v. Valley Cty., 137 Idaho 192, 197, 46 P.3d 9, 14 (2002).

E. Subsection 8 is constitutional.

Riverside contends that subsection 42-201(8) is unconstitutional if it allows municipalities and sewer entities to move their effluent discharge to a new location without compensating downstream right holders.[15] Opening Brief at 29-33. If Riverside were right, its argument would invalidate far more than subsection 8; it would invalidate all statutory exemptions from mandatory permitting. (See footnote 4 at page 12 for other exemptions within section 42-201.) If Riverside's property is taken as a result of less water flowing in Indian Creek, then so too must water users be compensated for every bucket of water taken to fight a fire, for every ranch relying on instream stockwatering, and for every home with an exempt domestic well.

In fact, our Idaho Constitution does not mandate that every use of water be subject to a water right. Riverside pins its constitutional argument on these words: "The right to divert and appropriate the unappropriated waters of any natural stream shall never be denied . . . . Priority of appropriation shall give the better right as between those using the water. . . ." Idaho Const. art. XV, § 3. Those words establish that people have a right to obtain a water right under the appropriation system, and that among such appropriations, their relative priority shall govern. That is all. The Constitution does not prohibit uses of water that operate outside the appropriation system.[16]

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[15] Needless to say, an agency proceeding is not the proper forum to mount a constitutional challenge to a statute. IDAPA 37.01.01.415. Nampa briefly addresses Riverside's argument nonetheless, because it is baseless and should not be allowed to color the Department's analysis.

[16] Riverside cites to *In Re SRBA, Subcase No. 75-10117 (Lemhi Gold Trust LLC)*, Idaho Dist. Ct., Fifth Jud. Dist. (Memorandum Decision and Order on Challenge, Nov. 12, 2014) in support of its constitutionality argument. However, this SRBA decision is inapposite. Judge Wildman concluded that "since Idaho Code § 42-223(11) allows a party whose water right was

The fact that water uses may operate outside the priority system is evident in the fact that the 1986 legislation was needed at all. That legislation, for the first time in 100 years (except for ground water a few years earlier), made it unlawful to divert and use public waters without a water right (subject to exceptions). Perhaps the best known and most important statutory exemption from mandatory permitting is for domestic wells[17]—an exemption repeatedly recognized as proper by our courts. Riverside's sweeping constitutional argument would invalidate that exemption, too.

Plainly, the Legislature has the power to exempt water uses from mandatory permitting as it sees fit, without causing an uncompensated taking. This is because uncompensated takings occur only when one's property is taken. Riverside and others in its position have no legally protected interest in the discharge of effluent by cities or sewer districts.

This is particularly evident in the context of subsection 8. As previously discussed, cities that discharge effluent traceable to their municipal water rights may recapture and reuse that water. Doing so is not deemed an enlargement. And they have no duty to continue to waste

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previously subject to statutory forfeiture to resume use under that right to the injury of junior appropriators, the Court finds the statute violates Article XV, § 3 of the Idaho Constitution." *Id.* at 9. The *Lemhi Gold Trust* case addressed the as-applied constitutionality of a forfeiture exception contained in Idaho Code § 42-223(11) to resurrect a senior water right on Ditch Creek that was previously forfeited and disallowed. Both the *Lemhi Gold Trust* decision and the *Fremont-Madison* case (*Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996)) discussed in the *Lemhi Gold Trust* decision addressed situations where decreed water rights were proposed to be issued to water users (enlargement water rights in the *Fremont-Madison* case and a resurrected water right based exclusively on Idaho Code § 42-223(11) in the *Lemhi Gold Trust* case). The dispute before the Director initiated by Riverside does not involve issuance of a water right to Nampa or Pioneer. Rather, it is squarely centered on the rights of a municipality to treat and dispose of its wastewater without issuance of a water right.

[17] Idaho Code §§ 42-111, § 42-227 and IDAPA 37.03.08.035.01.b (exempting certain domestic wells). See also Idaho Code § 42-113 and IDAPA 37.03.08.035.01.c (exempting instream stockwatering).

water that was previously not reused. (See section III.B(2) at page 34.) A city's "reuse" may come in the form of a new beneficial use, such as irrigation of city parks. But it also includes any other disposal that is undertaken pursuant to environmental mandates.

Nor do sewer districts and others that discharge effluent not traceable to their municipal water rights have a duty to maintain an historical discharge to a public water body. For example, when a sewer district builds a sewer system, it does not first obtain a water right for the sewage it collects from homes and businesses. Sewage water generated by homes and businesses is not part of the public water supply unless and until it enters a public water body. Accordingly, and thankfully, the treatment and disposal of effluent by entities who have no prior water right in that wastewater operates outside the water right system. As a result, the law of "injury" does not apply, and no other water user who incidentally benefits from the discharge of treated effluent into the public water supply may demand that the treatment program never change.

Either way you look at it, water users like Riverside have no legally protected right to the continued discharge of effluent by either cities or sewer districts. Accordingly, the exemption found in subsection 8 cannot result in an uncompensated taking of property. It, and all other water right exemptions, pass constitutional muster.

II. SECTION 42-201(2) DOES NOT PROHIBIT PIONEER'S ACCEPTANCE OF TREATED EFFLUENT FROM NAMPA'S WWTP.

A. Nampa's delivery of wastewater to Pioneer is not a diversion of water from a natural watercourse.

Riverside's argument that Pioneer must obtain a water right rests on Idaho Code § 42-201(2). Opening Brief at 13-16. This subsection reads:

> No person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. No person shall divert any water from a natural watercourse or apply

> water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists.

Idaho Code § 42-201(2). In short, this subsection requires a water right when a person diverts water from a public supply, or applies such water to land. As will be shown below, Pioneer is doing neither.

(1) Effluent from a WWTP is not a public water supply.

Nampa's WWTP is not a natural watercourse, and the effluent it releases is not "public waters of the state of Idaho" unless and until it is released from Nampa's control into a pubic waterbody. Unlike water in a public supply, the effluent is lawfully possessed by Nampa and remains under its dominion and control until it is delivered to Pioneer.

(2) Pioneer's acceptance of effluent delivered to it by Nampa is not a diversion.

Riverside insists that Nampa's delivery of wastewater to Pioneer pursuant to contract is a "diversion" of water within the meaning of subsection 2. Opening Brief at 15. This defies the common understanding of the word "divert" in water law. Water is not "diverted" in the sense of an appropriation unless it is diverted from a public watercourse or other public supply such as ground water.

The inherent connection between diversion, appropriation, and public supply is evident even in our Constitution, which establishes that "[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial use, shall never be denied . . . ." Idaho Const. art. XV, § 3 (emphasis added).

This connection between appropriation and public supply is restated in the very first section of the Idaho Water Code:

> All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the

> boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose . . . .

Idaho Code § 42-101 (emphasis added).

The connection between appropriation and public supply appears also in the first of the two sections of the 1971 mandatory permitting statute.

> The right to the use of the unappropriated waters of rivers, streams, lakes, springs, and of subterranean waters for other sources within this state shall hereafter be acquired only by appropriation . . . .

Idaho Code § 42-103 (emphasis added) (as amended by 1971 Idaho Sess. Laws, ch. 177, § 2).

The connection appears again in the 1986 amendment to Idaho's mandatory permitting requirements:

> No person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so.

Idaho Code § 42-201(2) (emphasis added) (added by 1986 Idaho Sess. Laws, ch. 313, § 2).

The connection between public supply and appropriation is found once again in the section that describes the permit application process:

> For the purpose of regulating the use of the public waters and of establishing by direct means the priority right to such use, any person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho, shall, before commencing of the construction, enlargement or extension of the ditch, canal, well, or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of water resources for a permit to make such appropriation. . . .

Idaho Code § 42-202(1).

These statutory and constitutional provisions simply underscore what we all know. The diversion and appropriation of water occurs only when water is taken from a public water supply.

For instance, when Nampa discharges effluent into Indian Creek and Riverside removes that water downstream, that is a diversion. In contrast, Pioneer's acceptance of treated effluent physically delivered to it by Nampa is not a "diversion" of water under Idaho's mandatory permitting statutes.

B. The words "apply water to land" must be understood to refer to water that was diverted from a natural watercourse.

(1) This is clear from the textual context.

Apparently recognizing the weakness of its argument that Pioneer is "diverting" the water provided to it by Nampa, Riverside pivots to a semantic argument under subsection 42-201(2).

This is Riverside's "or" argument:

> Idaho § Code [sic] 42-201(2) is not limited only to water withdrawn from a "natural watercourse" as Nampa asserts. The disjunctive use of the word "or" in this code section extends this requirement to any application of water to land.

Opening Brief at 14.

There is no question that the statute employs the disjunctive word "or." The question is: What do the words "apply water to land" refer to? The sentence must be read as a whole. That textual context makes clear that the water one may not apply to land without a water right is water that was diverted from a natural watercourse.

This plain reading of the statute, if not plain enough on its face, is made perfectly clear by the context of its enactment and by its legislative history, discussed below.

(2) The conclusion is reinforced by the legislative context.

Subsection 2 was added in 1986 for a single and simple purpose. It plugged a loophole in Idaho's mandatory permitting statute enacted in 1971.[18] 1971 Idaho Sess. Laws, ch. 177 §§ 2 and 3 (codified as amended at Idaho Code §§ 42-103, 42-201(1)) (reproduced in Addendum A at page 57).[19]

Here is the loophole. The 1971 legislation established that the only way to obtain a water right is through the permitting process. But one could still divert and apply water from a public supply to a beneficial use without obtaining a water right. In other words, the 1971 legislation says that if you want to acquire an enforceable water right, you must go through the permitting process. That is, no post-1971 beneficial use rights could be created. But it did not explicitly prohibit people from simply diverting and using water without the protection and priority of a water right.

As Director Kenneth Dunn explained:

> The present law states that users must have a permit to appropriate water but it doesn't say it is against the law to appropriate water without the permit. This legislation makes it clear that no person shall divert water without having a permit to do so.

Minutes, House Resources and Conservation Committee (Jan. 9, 1986) (reproduced in Addendum B, item 6, at page 90).[20]

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[18] The permitting process became mandatory for ground water rights in 1963. 1963 Idaho Sess. Laws, ch. 216 (codified at Idaho Code § 42-229). The 1971 statute made permitting mandatory for all water rights.

[19] In 1971, what is now subsection 42-201(1) constituted the entirety of section 42-201. All the subsections to section 42-201 were added subsequently.

[20] The 1986 amendment adding subsection 42-201(2) was part of a larger piece of legislation aimed at strengthening IDWR enforcement tools with respect to violation of water

This context should remove any doubt as to the meaning and purpose of subsection 2. It plugged a loophole that, until then, allowed people to lawfully evade the priority system and the permitting process. That permitting system, and the prior appropriation doctrine itself, is concerned with the application to beneficial use of water diverted from a public supply. Subsection 2 was enacted for the simple purpose of ensuring that public waters not be taken or used outside the permitting system that enables the prior appropriation system to function—unless an exemption is provided.

Riverside's semantic argument about the word "or" would disconnect the mandatory permitting process from its inherent link to Idaho's public water supply. That construction should be rejected. As its legislative context makes clear, subsection 2 does not address water that is not part of Idaho's public waters. The statute does not require a person to obtain a water right to water one's garden with bottled spring water. Nor does it require Pioneer to obtain a water right in order to deliver treated effluent to lands within its boundary. Neither bottled water nor Nampa's effluent are part of the public water supply. Neither of these "applications to land" undermines the priority system. And protection of the priority system through the permitting process is the sole purpose of subsection 2.

III. EVEN UNDER THE COMMON LAW, NAMPA IS AUTHORIZED TO UNDERTAKE THE REUSE PROJECT UNDER OF ITS MUNICIPAL WATER RIGHTS.

A. Nampa does not need the 2012 amendment to the mandatory permitting statute.

As noted above in section I.C at page 16, the impetus behind H.B. 608 (which added subsection 8) was to cover the City of McCall's land application of effluent that it received from

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right conditions, cancellation of forfeited water rights, and preventing uses beyond the scope of a water right.

the Payette Lakes Recreational Water & Sewer District. IDWR determined that no legislation was required to cover McCall's delivery of its own effluent to farms outside the city or the farmers' application of that water to their land. (See footnote 10 at page 17.)

This is because under the common law, all water users may recapture and reuse water they lawfully divert, so long as they act within the bounds of the water right under which it was diverted. This principle, when applied to municipal water rights, allows cities like Nampa to use and reuse to extinction water diverted under its municipal water rights.

Unlike McCall, Nampa's WWTP accepts no influent from other sewer districts. Except for other *de minimis* components that are typical, if not inherent, in all municipal systems, Nampa's wastewater derives entirely from ground water it diverts under its municipal rights.[21] SOF ¶¶ 23, 25, 26. Accordingly, even if Idaho Code § 42-201(8) were unavailable, Nampa is authorized to undertake its Reuse Project, with the assistance of Pioneer, under the common law. This common law, and IDWR guidance on the subject, is explored below.

B. Water lawfully diverted and applied to beneficial use may be recaptured and reused under the original water right.

(1) All water right holders have a right to recapture and reuse water within the geographic bounds and other limits of the original water right.

It is a basic premise of the prior appropriation doctrine that water diverted and not consumed be returned to its source. This principle is at the core of Riverside's contention that the Reuse Project cannot be undertaken without Nampa or Pioneer obtaining a new water right.

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[21] If the ordinary and unavoidable quantities of other water entering Nampa's WWTP disqualify it from the law of recapture, the same would be true for all cities, and the entire body of law developed on the subject of reuse of municipal effluent would be academic.

But the obligation to return unused water to the public supply is counterbalanced by the equally important principle that an appropriator may recapture and reuse water previously diverted so long as the reuse occurs within the bounds of the original water right. This is not so much an exception to the obligation to return water to the common source as it is a clarification of what is "unused." Simply put, water that is lawfully recaptured and beneficially reused within the scope of the original water right is not "unused" water that must be returned to the common supply.[22]

The right to recapture has long been recognized Idaho law.

> It is settled law that seepage and waste water belong to the original appropriator and, in the absence of abandonment or forfeiture, may be reclaimed by such appropriator as long as he is willing and able to put it to a beneficial use.

Reynolds Irrigation Dist. v. Sproat, 70 Idaho 217, 222, 214 P.2d 880, 883 (1950).

> In point of law the general principle upon which the plaintiff relies is scarcely open to controversy; one who by the expenditure of money and labor diverts appropriable water from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation, necessarily incident to practical irrigation. Considerations of both public policy and natural justice strongly support such a rule.

United States v. Haga, 276 F. 41, 43 (Dist. Idaho 1921).

The recapture and reuse may occur years after the initial water right was established. And, most importantly, it is true even if the change reduces the water available to other water

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[22] A good overview of the entire subject of water rights in waste water and reuse is James W. Johnson, et al., *Reuse of Water: Policy Conflicts and New Directions*, 38 Rocky Mtn. Min. L. Inst. § 23 (1992).

users downstream.[23] It is generally recognized that the recapture must occur before the appropriator relinquishes control (i.e., before the water reaches natural water bodies where it becomes available for appropriation by others).

For example, a farmer may capture tail water running off the low end of a field and pump it back to a portion of that field which, due to topography or other factors, was chronically under-irrigated. Others who may have come to rely on the waste water may not insist that the original appropriator maintain the artificial conditions from which they have benefited.

This is not to say that all seepage and waste water "belongs" to the original appropriator in the sense that they may do with it as they like. Notably, the right to recapture and reuse waste water does not override other principles of water law, such as the rule against enlargement. Thus, the farmer is not free to use recaptured water to bring new lands under cultivation.[24]

Although the earlier cases[25] authorizing an appropriator's recapture and reuse of waste water did not expressly address the enlargement issue, it now has been addressed, and in clear terms. If additional lands or other uses are to be added to a water right through the recapture of waste water, a new water right will be necessary.

This rule against enlargement was articulated by the Idaho Supreme Court in *Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d

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[23] One principle governing waste water is that an irrigator "is not bound to maintain conditions giving rise to the waste of water from any particular part of its system for the benefit of individuals who may have been making use of the waste." Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 100 (1968).

[24] See, e.g., *United States v. Haga*, 276 F. 41 (Dist. Idaho 1921) (limiting reuse to project lands).

[25] E.g., *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927); *In re Boyer,* 73 Idaho 152, 248 P.2d 540 (1952); *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980).

1301 (1996), and reinforced a few years later in *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P.3d 78 (2005). In the 2005 opinion, the Court ruled that "A&B may use the [recaptured waste] water on its original appropriated lots." *A&B*, 141 Idaho at 752, 118 P.3d at 84.

However, the no-enlargement limitation imposes little if any constraint on reuse of municipal rights, which may be used and reused to extinction within a flexible and expanding service area. (See section III.B(1) at page 31, section III.C at page 37, and section III.D at page 38.)

(2) The appropriator of waste water released by another may not compel the other user to continue to discharge waste water.

There are instances in which a third person may make a new appropriation of waste water generated by another or even by the same user.[26] However, waste water loses its characterization as such when released back to the public water supply. Thereafter, it is subject to appropriation (and available to satisfy prior appropriations) just like any other public water. It is in this context that Riverside has rights in Indian Creek, which benefits from waste water released to the creek by Nampa.

In either case, an important caveat is that the appropriator (whether of waste water or of water whose supply is enhanced by waste water) has no guarantee that the waste water will

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[26] In *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927), the Court confirmed the basic right to appropriate waste and seepage water made available as a by-product of the diversions of other appropriators. "We conclude that surface waste and seepage water may be appropriated under the provisions of C. S. § 5562, subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use." *Sebern*, 44 Idaho at 418, 258 P. at 178. (Prior to this decision, there was some thought that appropriations might be limited to water naturally occurring.) See also, *A&B*, 141 Idaho at 752, 118 P.3d at 84 (an appropriation of "recaptured drain and/or waste water" requires compliance with the mandatory permitting requirements).

continue to be available. An irrigator "is not bound to maintain conditions giving rise to the waste of water from any particular part of its system for the benefit of individuals who may have been making use of the waste." Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 100 (1968).[27]

For instance, the original appropriator who generates the waste water could cease diverting altogether so as to leave the waste water appropriator without that waste water supply. Likewise, the original appropriator might alter his or her operation to reduce the amount of waste water generated (e.g., by ditch lining). Finally, as noted, the original appropriator may recapture the waste water for use within the scope of his or her water right.

Indeed, in *Sebern*, the waste water appropriator was allowed to re-establish his diversion of waste water after a waste ditch was relocated by another appropriator. The Court added the now-familiar caveat, however, that the waste water appropriation is "subject to the right of the owner [that is, the person generating the waste water] to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use." *Sebern*, 44 Idaho at 418, 258 P. at 178. This is significant given that in a change or transfer application, the prior appropriator is <u>not</u> allowed to make any change (even in good faith) that would injure a junior.

In 1956, the Idaho Supreme Court held that a neighbor could not obtain a waste water appropriation that essentially compelled the original appropriator to continue to discharge waste water:

> It is a rule long recognized that a landowner cannot acquire a prescriptive right to the continued flow of waste or seepage water

[27] See also *In re Boyer,* 73 Idaho 152, 162-63, 248 P.2d 540, 546 (1952) and numerous other cases cited in Municipal Intervenors' Response Brief.

> from the land of another, that is, seepage water or waste water running from one's land to that of another need not be continued and it may be intercepted and taken by such owner at any time and used on the land to which it is appurtenant.

Thompson v. Bingham, 78 Idaho 305, 308, 302 P.2d 948, 949 (1956) (citing cases in Utah and Colorado).

In *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980), the Idaho Supreme Court unanimously reaffirmed the principle that an appropriator of waste water may not compel the original diverter to continue the practices leading to the generation of the waste water.

> No appropriator of waste water should be able to compel any other appropriator to continue the waste of water which benefits the former. *Crawford v. Inglin*, 44 Idaho 663, 258 P. 541 (1927). While the waste of the original appropriator is not to be encouraged, the recognition of a right in a third person to enforce the continuation of waste will not result in more efficient uses of water.

Hidden Springs, 101 Idaho at 681, 619 P.2d at 1134.

The *Hidden Springs* Court emphasized that it makes no difference whether the waste water arises before the use (from a leaky canal) or after the use (from post-irrigation tail water, for example). The original appropriator may at any time cease the practice giving rise to the waste water, even to the detriment of those who hold valid water rights in that waste water (subject, of course, to the limitations as to non-enlargement and beneficial use as described in *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 752, 118 P.3d 78, 84 (2005)).[28]

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[28] These legal principles pertaining to waste water have been followed in the Snake River Basin Adjudication ("SRBA"). Special Master Terry Dolan reiterated them in *Special Master's Report, In re SRBA,* Case No. 39576, Subcases 75-4471 and 75-10475 (Silver Creek Ranch Trust) at 4 and 6-7 (September 28, 2009). Similarly, in *In re: Janicek Properties, LLC,*

C. A water user may shift to more consumptive uses without seeking a transfer.

(1) Municipal rights are potentially 100 percent consumptive.

Water rights held for municipal purposes serve a grab bag of potential purposes, some of which may be entirely consumptive. Idaho Code § 42-202B(6) (definition of "municipal purposes"). In other words, the consumptive use of particular municipal uses vary, but municipal use is potentially 100 percent consumptive.

IDWR's Transfer Processing Memorandum No. 24 (*Transfer Processing Policies & Procedures*), ¶ 5d(9) at page 31 (revised Dec. 21, 2009) ("*Transfer Memo*") refers to municipal uses being "considered fully consumptive."[29]

In an informal guidance letter issued the year earlier, Mat Weaver confirmed, "IDWR recognizes municipal use as being fully consumptive." Letter from Mat Weaver to Christopher Meyer (Sept. 29, 2008) (reproduced within Addendum D, item 3, at page 162).

Memorandum Decision and Order on Motion for Summary Judgment, In re SRBA, District Court of the Fifth Jud. Dist. of the State of Idaho, Subcase No. 63-27475 (May 2, 2008), the Bureau of Reclamation and its contracting irrigation district argued that they constructed a drain and could trace most or even all of the water in it to seepage and return flows from the district's irrigated lands. They contended that the drain was not a natural watercourse and that they should be deemed the owner of the drain and the water in it. Based on this reasoning, they asked the adjudication court to invalidate a farmer's 1951-priority licensed water right pursuant to which he pumped water from the drain to irrigate his crops. The Special Master rejected this challenge to the farmer's drain water right, ruling that, regardless of who constructs a drain, the water in it is "public water of the state of Idaho and subject to appropriation and beneficial use." *Janicek Properties*, slip op. at 6. The SRBA Court found that whether the drain is a natural watercourse "is immaterial—what matters is that the water is water of the state" and is subject to appropriation. *Id.* at 8.

[29] The referenced section of the *Transfer Memo* deals primarily with transfers to facilitate disposal of wastewater from dairies and industries. It should not be read to mandate a change application for disposal of municipal wastewater where a transfer is not otherwise required.

(2) Shifts in use that are authorized under a water right do not require a transfer simply because they increase consumptive use.

It is black letter law that changes in consumptive use, in themselves, do not require a transfer application. "Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code." Idaho Code § 42-202B(1).

This principle is reiterated in the *Transfer Memo*, which notes that no transfer is required for "changes in water use under a water right for the authorized purpose of use that simply change the amount of consumptive use . . . provided that no element of the water right is changed." *Transfer Memo* §2, p. 4.

The *Transfer Memo* does not specifically address land application or other disposal of municipal wastewater. Given that municipal use is allowed to be 100 percent consumptive, it necessarily follows no transfer is required for reuse of municipal water so long as the reuse occurs within the broadly-defined bounds of the municipal water right.

D. A municipal provider may use and reuse to extinction water diverted under its municipal right.

(1) The right to reuse of water is broader in the context of municipal uses than elsewhere.

The principles of recapture and reuse that were developed in the context of irrigation apply as well in the context of municipal wastewater. In short, a city may recapture and reuse effluent from its sewage treatment plant before it is released to a public water body. Likewise, irrigators or others who had come to rely on the prior discharge of that wastewater cannot complain when the city recaptures and reuses it.

Although the same general principles apply to all water uses, there are important practical differences when it comes to municipal wastewater.

First, municipal water rights do not have a fixed place of use. Instead, a municipal service area may grow over time as service and uses are extended. Idaho Code § 42-202B(9). This moots the constraint applicable to irrigators and industrial users limiting the reuse to the original place of use.

While this is an important principle, it does not come into play here because Nampa will use the treated wastewater within its existing place of use. In other words, the Reuse Project is not driving expansion of Nampa's service area.

Second, municipal use encompasses a broad range of uses from low consumptive domestic uses to high consumptive uses by industries served by the municipal provider. This mix may change over time. Accordingly, the Department deems municipal water rights to be potentially 100 percent consumptive. (See discussion in section III.C(1) at page 37.) As a result, cities may recapture wastewater and reuse it for other municipal uses (such as watering parks, golf courses, or lawns) and such use is not deemed to be an enlargement.

These aspects of municipal rights work together to allow cities to use and reuse their wastewater without enlargement that might otherwise be deemed injury to others. "This rule [limiting reuse to the original irrigated land] was changed for municipalities, without an adjustment period for those who had relied on the return flow, when the courts allowed municipalities to start consuming their sewage effluent through disposal methods that no longer sent it back to the stream as return flow." Robert E. Beck, *Municipal Water Priorities/Preferences in Times of Scarcity: The Impact of Urban Demand on Natural Resource Industries*, 56 Rocky Mtn. Min. L. Inst. § 7.02[4] (2010).

(2) The principle of municipal reuse to extinction has been recognized and applied by the Department.

(a) Application Processing Memorandum No. 61

The Department has long recognized the principle of reuse of municipal rights to extinction. In guidance issued in 1996, the Department provided this detailed analysis of the case law:

> The case law addressing this issue appears to deal almost exclusively with the disposal of municipal effluent. In the case of municipalities, the majority view is that the proper disposal of effluent from waste treatment facilities comes within the parameters of the beneficial use of a municipal water right. One of the most frequently cited cases is *Arizona Public Service Co. v. Long*, 773 P .2d 988 (Ariz. 1989). In this case, the owners of downstream junior water rights that had historically used the effluent for irrigation following upstream discharge sued the City of Phoenix alleging that the city had no right to contract with a utility for the transport and use of the effluent in the cooling towers of a nuclear power plant. The court upheld the contract, holding that sewage effluent was neither surface water nor ground water, but was simply a noxious byproduct which the city must dispose of without endangering the public health and without violating any federal or state pollution laws. In reaching its decision, the Arizona Court quoted from a much earlier Wyoming decision which upheld the sale by a city of effluent discharged directly into the buyer's ditch, but also held that effluent discharged into a stream became public water subject to appropriation. *Wyoming Hereford Ranch v. Hammond Packing Co.*, 236 P.2d 764 (Wy. 1925). The Arizona Public Service case generally holds that cities may put their sewage effluent to any reasonable use that would allow them to maximize their use of the appropriated water and dispose of it in an economically feasible manner. Beck, *Waters and Water Rights*, § 16.04(c)(6) (1991).
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> In an even more recent Arizona case, the court upheld a city contract for the disposal of its effluent noting that the effluent from the city of Bisbee delivered to Phelps Dodge for copper leaching operations was not useable for drinking water, irrigation, or fire protection purposes and that it was only useful for the leaching operation. The city contract had been challenged by the local water utility that otherwise would have provided water for the leaching operation.

> Other cases reviewed have reached results similar to that in Arizona for municipal entities without as much emphasis on the distinct character of effluent. In a more recent Wyoming case, the court held that the City of Roswell could recapture its sewage effluent before it is discharged as waste or drainage and reuse it for municipal. purposes. *Reynolds v. City of Roswell*, 654 P.2d 537 (Wy. 1982). The court characterized sewage effluent as artificial water and therefore primarily private and subject to beneficial use by the owner and developer thereof because treated sewage effluent depends upon the acts of man.
>
> In the early Colorado case of *Pulaski Irrigation Ditch Co., et al v. City of Trinidad, et al*, 203 P. 681 (Colo. 1922), the court held that where a city had voluntarily chosen to treat its effluent in a manner that produced surplus water, it did not have the right to sell its purified water. The court went on to recognize, however, that where there is no other practicable method of disposing of the sewage, public policy might permit its disposal by the evaporation of the water. 203 P. at 683. A more recent Colorado case, *Metropolitan Denver Sewage Disposal District No. 1 v. Farmers Reservoir & Irrigation Co.*, 499 P.2d 1190 (Colo. 1972) merely holds that changes in the points of return of waste water to a stream are not governed by the same rules as changes of points of diversion and that there is no vested right in downstream appropriators to maintenance of the same point of return of irrigation waste water or effluent from a municipality or a sanitation district. In *Barrack v. City of Lafayette*, 829 P.2d 424 (Colo. App. 1992), the court held that impossibility of performance relieved the city from any obligation to deliver effluent to plaintiffs after state regulation made such delivery illegal. The court concluded that plaintiffs had no property right to the delivery of untreated water that could no longer be legally delivered.

Application Processing Memorandum No. 61 (Memorandum from Phil Rassier to Norm Young, pages 1-2 (Sept. 5, 1996)) (attached at Addendum G, item 2, at page 207.)[30]

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[30] In *Wyoming Hereford* and *Reynolds* (discussed in Phil Rassier's memorandum), municipal providers were allowed to reuse municipal waste water only if it were recaptured before entering a public water body. This principle was addressed again in *City of San Marcos v. Texas Comm'n on Envtl. Quality*, 128 S.W.3d (Texas Ct. App. 2004). The Texas Court of Appeals found that the City of San Marcos did not have the right to recapture its wastewater effluent in a river three miles downstream of the sewage treatment plant. The city sought to recapture the water, treat it, pipe it back to the city, and add it to its municipal supply. The purpose of leaving it in the river for so long was to allow the effluent to be diluted with cleaner river water, thus reducing the cost of treatment after recapture. In rejecting the plan, the Texas

Phil Rassier's summary of the law, though 24 years old, continues to provide an accurate summary of Idaho law and Departmental policy.[31]

(b) IDWR's guidance to Black Rock

Mat Weaver's 2008 *Review Memo* (Addendum D, item 2, at page 156) responded to an inquiry from counsel for Black Rock Utilities, Inc, a municipal water provider in North Idaho. Mr. Weaver confirmed Black Rock's authority to irrigate a golf course with municipal effluent without obtaining a new water right. The *Review Memo* began with this thorough analysis of prior guidance as it applies in a municipal context:

> The second issue deals with the enlargement of the historical consumptive use of the water diverted under the permit. The municipal use is recognized by IDWR as being completely consumptive, in actuality this may or may not be the case. Certainly the uses of water under the general heading of municipal use are varied enough that it is not unreasonable to assume that some of that water is in fact returned to the surrounding environment. Especially in the instance of the Black Rock project which is a stand alone community with water treatment, wastewater treatment, and irrigation all occurring and being contained within the development. By this reasoning land

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court concluded that the character of the water changed once the city released it to the river, whereupon it became public water. "By intentionally discharging its effluent into the river, where it eventually commingles with the State's water, the City effectively abandons its control over the identifying characteristics of its property. This physical reality suggests that the City is voluntarily and intentionally abandoning its ownership rights over the effluent." *San Marcos*, 128 S.W.3d at 277. By clear implication, however, the city would have been allowed to recapture and reuse its wastewater if it had done so before returning it to the river. Indeed, as the court noted, that was exactly what the city's opponents said: "If the City wants to reuse its wastewater, it should use it directly rather than unnecessarily mixing it with the pure river water." *San Marcos*, 128 S.W.3d at 267.

[31] Although the 2009 *Transfer Memo* revised some of the guidance in the 1996 *Application Memo No. 61* "concerning wastewater from industrial uses" (see *Transfer Memo*, n.1, p. 3), nothing in the *Transfer Memo* changes the guidance contained in Phil Rassier's memo concerning reuse of municipal water. Indeed, Mr. Rassier's analysis was included in the Department's recent website listing pursuant to the Governor's Executive Order No. 2020-02 requiring publication of "any agency guidance document that an agency intends to continue."

> application, a fully consumptive process, would represent some additional volume of consumption, or loss of water from this development, over and above the historical quantity of water lost from the development under the previous practices. So should this enlargement of consumptive use be allowed?
>
> If we consider the Administrator's Application Processing Memorandum No. 61 regarding industrial waste water and take forward the reasoning and direction put forth in that memo and apply it to municipal waste water, then the "consumptive use" associated with the use can increase (over the historical base line value) up to the amount determined to be consistent with the original water rights as reasonably necessary to meet treatment (land application) requirements. . . . For all these reasons it would seem that any enlargement of the consumptive component of the permit associated with the new practice of land application, can and should be allowed by IDWR.

Review Memo at p. 3 (emphasis added) (Addendum D, item 2, p. 156).

The *Review Memo* then repeated (in italics) the conclusion for which confirmation was sought, and then provided IDWR's confirmation:

> *The condition of Water Right No. 95-9055 prohibiting use of this ground water right for irrigation of land to which surface rights are available does not prohibit land application of treated municipal effluent on such land.*
>
> Mr. Meyer is correct in this regard. This condition is speaking to the primary or first use the diverted groundwater is put to. IDWR recognizes Municipal Use as being fully consumptive, as such, once the groundwater has served its initial purpose the Municipal Provider is free to use or reuse the reclaimed water at their discretion.

Review Memo at p. 5 (italics in original, emphasis added) (Addendum D, item 2, p. 156).

Mr. Weaver attached a footnote to that quoted statement noting the continued vitality of Phil Rassier's 1996 memorandum:

> This position does not seem to be explicitly articulated in any Idaho Statute or IDWR Administrator's Memorandum that I reviewed. However, this position does seem to have been regularly upheld in case law, although not completely without rulings in the opposite, and is well summarized by Mr. Phil Rassier

> in his Memo to Norm Young from September 5, 1996 titled "Land Application of Industrial Effluent."

Review Memo at p. 6, n. 2 (Addendum D, item 2, p. 156).

The *Review Memo* then concluded:

> Based upon my discussion in the BACKGROUND section of this memo it seems to me that not only is the land application of treated wastewater allowed for under the municipal use general heading, but should be encouraged as a valid and worthwhile conservation effort.

Review Memo at p. 6 (emphasis added) (Addendum D, item 2, p. 156).

(c) IDWR's guidance to Nampa

The quotations immediately above were made in reference to a municipal water right held by Black Rock Utilities in North Idaho. These principles were confirmed in more recent informal guidance provided to counsel for Nampa by the Department's counsel. This discussion took place not in the context of the current Reuse Project, but in the context of an earlier idea (never implemented) to dispose of Nampa's treated wastewater in infiltration basins outside of the city.

IDWR's counsel confirmed Nampa's authority to do so, without obtaining a new or changed water right. The quotation below shows the edits made by IDWR counsel (on May 26, 2011) to an earlier letter (dated May 24, 2011) from Nampa's counsel.

> You confirmed my understanding that a city may recapture and reuse its municipal effluent and apply it to other municipal uses within its growing service area, and that doing so does not cause legal injury to other water uses. You also confirmed that, if required to meet environmental regulations, treatment utilizing an infiltration basin would be viewed as being within the existing municipal use. You also confirmed that the uses could be modified over time. For example, as conditions change and demand grows, the City could put less water into ~~recharge~~ treatment of effluent by infiltration and use some or all of the effluent to serve new customers (e.g., for lawn or open space irrigation). Finally, you

> confirmed that these uses would not require a transfer—assuming that the reuse of the effluent was required in order to satisfy environmental requirements.

Letter from Christopher H. Meyer to Garrick L. Baxter and Jeff Peppersack (May 24, 2011) (redline edits reflect changes made by Garrick L. Baxter in his letter of May 26, 2011). These letters are reproduced in Addendum E, items 2 and 3, at pages 174 and 183, respectively. An interlineated version of the May 24, 2011 letter (matching the quotation above) was included as an attachment to a letter from Nampa's counsel dated June 2, 2011 (Addendum E, item 4, at page 188).

(d) IDWR's guidance to McCall

A few months later, another round of communication occurred between the same counsel in connection with the City of McCall. This is the discussion that led to the enactment of H.B. 608, discussed in section I.C at page 16.

Counsel for IDWR wrote:

> This responds to your letter of August 18, 2011 requesting confirmation that the City of McCall ("City") has authority to land apply its municipal effluent to lands located beyond the city limits but within the City's service area. I have reviewed your letter with the staff of the Idaho Department of Water Resources ("IDWR") and am able to confirm that on the issue of whether municipal reuse of waste water comes within the original use of the municipal right, your analysis is consistent with current IDWR policy. Waste water treatment necessary to meet adopted state water quality requirements is considered by IDWR as part of the use authorized under a municipal right so long as the treatment process complies with the best management practices required by the Idaho Department of Environmental Quality, the U.S. Environmental Protection Agency, or other state or federal agency having regulatory jurisdiction. For new uses of municipal wastewater that are not necessary to meet water quality requirements, an application for permit to appropriate water should be filed as required by Idaho Code § 42-202.

Letter from Garrick L. Baxter to Christopher H. Meyer (Sept. 7, 2011) (emphasis added).

The September 7, 2011 letter went on to say that, under the 1996 Municipal Water Rights Act, the land application could occur outside the boundaries of the city so long as "the constructed water delivery system for the area outside the city limits shares a common water distribution system with lands located within the corporate limits." The city limits issue was mooted by H.B. 608 (Idaho Code § 42-201(8)) enacted in 2012. In any event, Nampa will reuse water delivered to the Phyllis Canal within its service area. See discussion in section E below.

The informal guidance provided by IDWR to McCall gave rise to the enactment of H.B. 608, 2012 Idaho Sess. Laws, ch. 218 (codified at Idaho Code §§ 42-201(8), 42-221(P)) (set out in Addendum C at page 103). This legislation is discussed in section I.C at page 16.

In sum, the Department has long recognized and applied common law principles that allow municipalities like Nampa to recapture and reuse effluent traceable to their municipal water rights.

E. Nampa's Reuse Project fits within the common law right to reuse municipal water.

Nampa's Reuse Project may be seen as fitting within the common law principle of reuse of municipal water in either of two ways.

(1) Reuse within Nampa's current municipal service area

Nampa is reusing its own effluent within its Non-Potable System (aka PI System). This results from the fortuitous circumstance that Nampa will deliver effluent to the Phyllis Canal above the locations at which water is delivered by Pioneer for irrigation use by Nampa's customers. SOF ¶¶ 20, 27, 53, 54, 55. (This physical arrangement is described more fully in Pioneer's Response Brief.)

Of course, Nampa's effluent is mixed with other water in the Phyllis Canal. So there is no way of assuring which molecules (effluent or non-effluent) are delivered back to Nampa. But

in an accounting sense, Nampa can be seen to take all of its effluent back. Pursuant to the Title 50 Agreement[32] Pioneer currently delivers, at peak, more water to Nampa (21.64 cfs) than Nampa will contribute as effluent to the canal upstream of the delivery points (18.6 cfs).[33]

(2) Reuse is occurring within an expanded service area including all land within Pioneer's district boundary.

As an alternative to the accounting model, Nampa may be seen to reuse all of its effluent on lands served by Pioneer within an expanded municipal service area. Assuredly, the Reuse Project does not turn all of Pioneer's landowners into "customers" of Nampa, for the simple reason that they will not be receiving a water bill from Nampa (unless they are already residential or industrial customers). But that does not mean that Nampa is not making a beneficial use of the water delivered to Pioneer. As discussed above, the Department has recognized that environmental compliance is part of the beneficial use of municipal (and other) water rights.

That beneficial use is achieved through the agency of Pioneer, but it is a beneficial use to Nampa nonetheless. Indeed, it will save the good citizens and customers of Nampa many millions of dollars.

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[32] The Title 50 Agreement is an agreement pursuant to Title 50 (notably Idaho Code §§ 50-1801, 50-1805, 50-1805A) dated Sept. 9, 1974, a copy of which is set out as Exhibit L (In Submission of Exhibits K-T).

[33] Pioneer holds water rights and entitlements with an apportioned benefit under Idaho Code § 43-404 of an inch per acre, which it is obligated to provide to its district landowners, including Nampa. SOF ¶ 1. Nampa has the capacity to pump 33.3 cfs from the Phyllis Canal. SOF ¶ 17. During the irrigation season, Nampa currently pumps an average of 9.57 cfs and a peak of 21.64 cfs from the Phyllis Canal for use in its Non-Potable System. SOF ¶ 17. Nampa's current wastewater stream (effluent generated by its WWTP) is 18.6 cfs during the irrigation season. SOF ¶¶ 25, 29. Thus Nampa currently takes more Phyllis Canal water, at peak, than it generates as effluent, and it is entitled to and capable of taking much more. It is fair to assume that as Nampa grows, the ratio of wastewater generated to water pumped from the Phyllis Canal will remain roughly the same.

Accordingly, Nampa's municipal service area may be seen as expanding to include this new beneficial use. As the Department recognized in the McCall scenario, this occurs under the statutory definition of a flexible, expanding service area for municipal providers. Idaho Code § 42-202B(9). For administrative purposes, that flexible service area dovetails perfectly with the requirement under Idaho Code § 42-201(8) that Nampa report to the Department the location of the lands where effluent will be applied.

To reiterate, the Department may view the effluent as being applied to Nampa's own customer base, based on the accounting described in the previous subsection. Alternatively, if it chooses, the Department may view all of Pioneer's district lands as part of Nampa's expanded service area—at least for purposes of the Reuse Project.

Then again, none of this Jesuitical analysis of which molecules go where and which accounting system is best is necessary. The whole point of Idaho Code § 42-201(8) was to make this head-hurting debate (and all of section III of this brief) beside the point.

IV. RIVERSIDE'S DISCOURSE ON THE NATURE AND SCOPE OF NAMPA'S WATER RIGHTS IS IRRELEVANT.

A. The three relevant points are not mentioned by Riverside.

Riverside engages in a seven-page analysis of the nature and scope of Nampa's water rights. It says this is necessary to determine whether a new water right or transfer is required. Opening Brief at 17-23. Because subsection 42-201(8) is applicable and no water right is required for the Reuse Project, the nature and scope of Nampa's water rights are irrelevant. That is the whole point of subsection 8.

To the extent the nature and scope of Nampa's water rights is relevant (e.g., if Nampa had to rely on its common law right to recapture and reuse), the following three points are sufficient. Each has been addressed above.

First, the source of the effluent is potable water delivered by Nampa under its municipal water rights. (See footnote 21 at page 31 regarding *de minimis* quantities of other water.)

Second, municipal uses include a broad array of uses.[34] Even if "off-site" irrigation of farmland were deemed not to fall within the broad scope of municipal purposes, any use or disposal of the municipal water undertaken for environmental compliance falls within the permissible uses.

Third, Nampa's municipal service area is flexible and expanding, and may include all of Pioneer's district lands. Specifically, the municipal service area may include lands outside the city limits if connected by pipes or other discrete conveyances that keep the water out of the public water supply. Even if Nampa's service area could not expand to Pioneer's lands, Nampa's use of the effluent placed in the Phyllis Canal may be seen as occurring entirely within its existing service area within the city. This is because, pursuant to the Title 50 Agreement and Nampa's entitlement to an inch per acre, Pioneer is obligated to deliver more water to Nampa than Nampa contributes to the canal upstream of the delivery points.

B. The rest are red herrings.

(1) Nampa's water rights are not limited to its potable delivery system.

Riverside incorrectly states that Nampa's rights historically associated with its potable delivery system can only be used within that delivery system. Opening Brief at 17. There is no such limitation on its rights.

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[34] Idaho Code § 42-202B(6) defines "municipal purposes" to include "related purposes." The only use expressly excluded from "municipal purposes" is "water from geothermal sources for heating." Departmental policy informally but consistently recognizes that land application or other disposal of municipal effluent mandated by environmental regulations falls within the definition of municipal purposes.

The "purpose of use" listed for Nampa's water rights is "municipal" with no qualification or limitation. Many of the rights contain a statement under "point of diversion" to the effect: "This water right is part of the potable water delivery system for the City of Nampa." That is simply descriptive information regarding the location of the well or wells, which are indeed connected to (or "part of") the potable delivery system. That sentence does not limit where the water may be used. If there were any such a limitation, it would be found under the "place of use," which, instead, is broadly described.

As the Department is well aware, Nampa has physically connected its Potable System to its Non-Potable System. This was done for the express purpose, and with the blessing of the Department, to enable rights historically associated with the Potable System to be used for municipal irrigation purposes during times of shortage.

(2) It is of no consequence whether the Nampa's effluent is deemed ground water.

Riverside explains at length its theory that Nampa's effluent should be deemed ground water. Opening Brief at 19-22. Perhaps that is so, though it hardly matters given that no water right is required under Idaho Code § 42-201(8). Riverside says it matters because, if the effluent is ground water, "it is subject to the law of enlargements." That would be a problem if Nampa were not a city (as was the situation in the cases cited by Riverside). But, as explained above, Nampa's reuse is not deemed an enlargement. (See section III.B(1) at page 31, section III.C at page 37, and section III.D at page 38.)

(3) Nampa is not in violation of RAFN limitations.

Riverside thinks it is "worth noting" that the Reuse Agreement anticipates future growth and that Nampa and Pioneer may "apply that additional water land outside Nampa's service

area." Riverside contends this will violate a restriction on RAFN rights found in Idaho Code § 42-222. (See also Idaho Code § 42-219(1).) Opening Brief at 22. This is wrong.

Aside from the fact that Nampa has few RAFN rights and that Nampa's service area may expand to cover lands within Pioneer's district boundaries, the referenced statutory limitation on changing the place of use applies only to "that portion of the right held for reasonably anticipated future needs." By the time the water becomes effluent, it has been used. It is therefore evident that it is not the portion reserved for future needs. Likewise, if it is used again in Pioneer's district, it is not being held for future needs.

(4) The source of the water right is not being changed.

Finally, Riverside observes that a water right holder may not change the source of water described on the right. Opening Brief at 22. Even if there were no subsection 8 exemption, Nampa is not changing the source of its water right. The source is ground water. If the water is recaptured as effluent and thereafter reused, that is not a change of the original source. If that were the case, the entire body of law and Departmental guidance on municipal reuse would be wrong.

CONCLUSION

For the reasons stated, Nampa urges the Director issue a declaratory ruling stating that neither Nampa nor Pioneer is required to obtain a new water right in order to undertake the Reuse Project.

Should the Director disagree and find that a water right is required, Nampa urges the Director to include in his declaratory ruling a statement that if Pioneer were to seek an appropriation of the waste water delivered to it by Nampa, Pioneer would not be required, as a

matter of law, to mitigate or otherwise compensate Riverside for any corresponding reduction in Nampa's discharge of that wastewater to Indian Creek.

Respectfully submitted this 30th day of October, 2020.

GIVENS PURSLEY LLP

Christopher H. Meyer
Preston N. Carter
Attorneys for City of Nampa

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of October, 2020, the foregoing, together with exhibits or attachments, if any, was filed, served, and copied as shown below.

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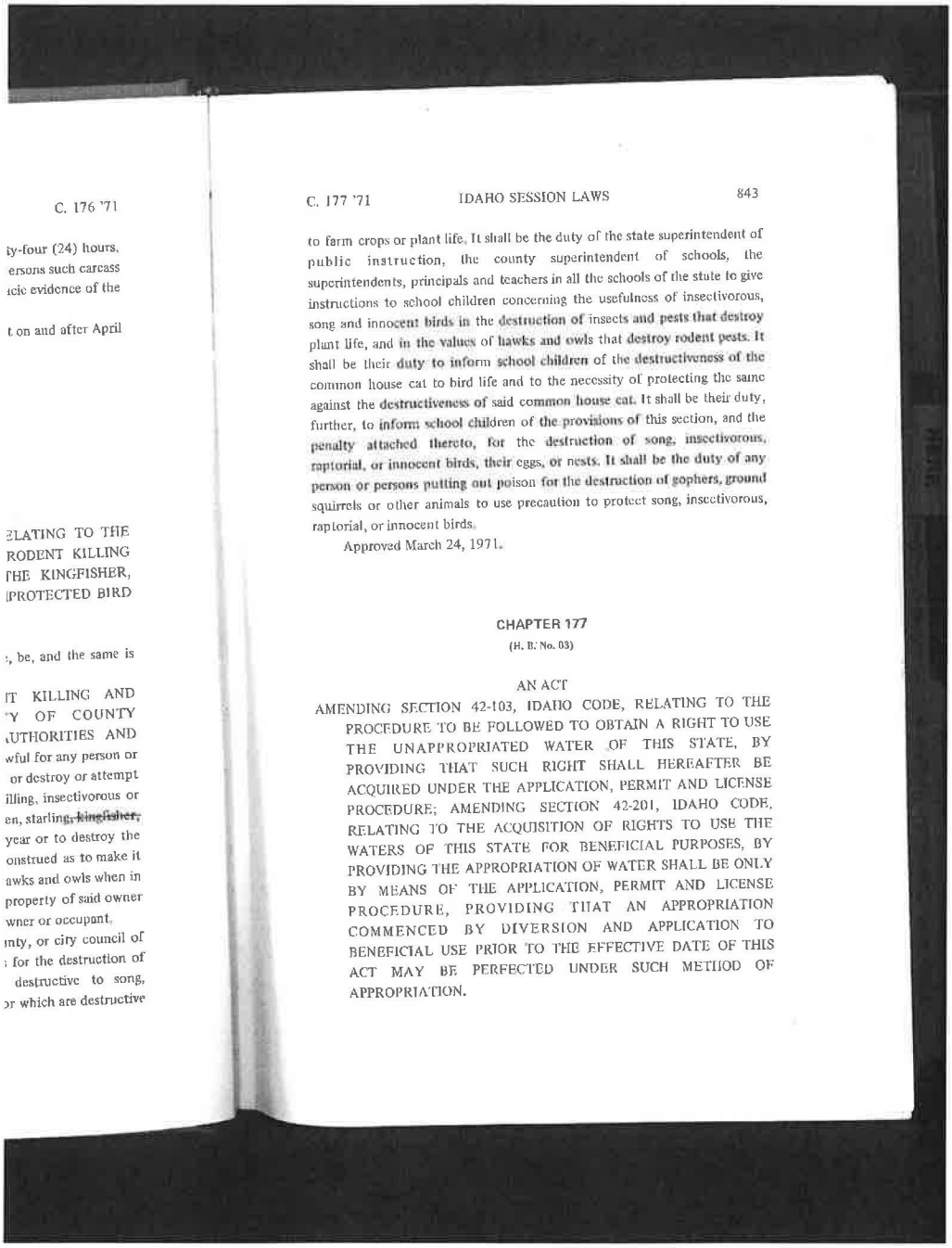
Christopher H. Meyer

Addendum A — H.B. 83, 1971 IDAHO SESS. LAWS, CH. 177 (CODIFIED AS AMENDED AT IDAHO CODE § 42-201(1)) AND ITS LEGISLATIVE HISTORY

1. 1971 Idaho Sess. Laws, ch. 177.
2. Final Daily Data 1971 (H.B. 83).
3. Minutes, House Printing & Legislative Expense Committee (Jan. 30, 1971).
4. Minutes, House Agricultural Affairs Committee (Feb. 5, 1971).
5. Minutes, House Agricultural Affairs Committee (Feb. 9, 1971).
6. Minutes, House Agricultural Affairs Committee (Feb. 11, 1971).



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to farm crops or plant life. It shall be the duty of the state superintendent of public instruction, the county superintendent of schools, the superintendents, principals and teachers in all the schools of the state to give instructions to school children concerning the usefulness of insectivorous, song and innocent birds in the destruction of insects and pests that destroy plant life, and in the values of hawks and owls that destroy rodent pests. It shall be their duty to inform school children of the destructiveness of the common house cat to bird life and to the necessity of protecting the same against the destructiveness of said common house cat. It shall be their duty, further, to inform school children of the provisions of this section, and the penalty attached thereto, for the destruction of song, insectivorous, raptorial, or innocent birds, their eggs, or nests. It shall be the duty of any person or persons putting out poison for the destruction of gophers, ground squirrels or other animals to use precaution to protect song, insectivorous, raptorial, or innocent birds.

Approved March 24, 1971.

CHAPTER 177

(H. B. No. 03)

AN ACT

AMENDING SECTION 42-103, IDAHO CODE, RELATING TO THE PROCEDURE TO BE FOLLOWED TO OBTAIN A RIGHT TO USE THE UNAPPROPRIATED WATER OF THIS STATE, BY PROVIDING THAT SUCH RIGHT SHALL HEREAFTER BE ACQUIRED UNDER THE APPLICATION, PERMIT AND LICENSE PROCEDURE; AMENDING SECTION 42-201, IDAHO CODE, RELATING TO THE ACQUISITION OF RIGHTS TO USE THE WATERS OF THIS STATE FOR BENEFICIAL PURPOSES, BY PROVIDING THE APPROPRIATION OF WATER SHALL BE ONLY BY MEANS OF THE APPLICATION, PERMIT AND LICENSE PROCEDURE, PROVIDING THAT AN APPROPRIATION COMMENCED BY DIVERSION AND APPLICATION TO BENEFICIAL USE PRIOR TO THE EFFECTIVE DATE OF THIS ACT MAY BE PERFECTED UNDER SUCH METHOD OF APPROPRIATION.

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

SECTION 1. That Section 42-103, Idaho Code, be, and the same is hereby amended to read as follows:

42-103. RIGHT ACQUIRED BY APPROPRIATION. – The right to the use of the **unappropriated** waters of rivers, streams, lakes, springs, and of subterranean waters, **or other sources within this state** ~~may~~ **shall hereafter** be acquired **only** by appropriation **under the application, permit and license procedure as provided for in this title, unless hereinafter in this title excepted.**

SECTION 2. That Section 42-201, Idaho Code, be, and the same is hereby amended to read as follows:

42-201. WATER RIGHTS ACQUIRED UNDER CHAPTER. – All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter **and not otherwise.** And after the passage of this title all the waters of this state shall be controlled and administered in the manner herein provided. **Such appropriation shall be perfected only by means of the application, permit and license procedure as provided in this title; provided, however, that in the event an appropriation has been commenced by diversion and application to beneficial use prior to the effective date of this act it may be perfected under such method of appropriation.**

Approved March 24, 1971.

CHAPTER 178

(H. B. No. 272)

AN ACT

AMENDING SECTION 31-4316, IDAHO CODE, RELATING TO RECREATION DISTRICTS, PROVIDING THAT YOUTH RECREATION CENTERS MAY BE OPERATED BY RECREATION DISTRICTS.

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

SECTION 1. That Section 31-4316, Idaho Code, be, and the same is hereby amended to read as follows:

31-4316. PURPOSE OF DISTRICT. – Each district is organized for the uses and purposes of acquiring, providing, maintaining and operating ~~a~~

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1971 FINAL DAILY DATA

H78 UNEMPLOYMENT COMP., extended benefits
by State Affairs

(H) 1/29 Intro - 1st rdg - to Print
1/30 Rpt prt - hld at desk
Rls susp - PASSED 55-0-15
AYES—Allen Andersen Antone Brennan Brocke Cammack Carr Chatburn Claiborn Condie Copple Danielson Davidson Dean Dunn Edwards Elgin Farner Fogg Greenawalt Haaksenson Hale Hartvigsen Hedges Hedlund Hyde Jackson Johnson(35) Keithly Kendell Kennevick Koch(17) Koch(19) Kraus Litton Loveless Maynard McDermott McHan McKinney Merrill Murphy Onweiler Reardon Reid Rice Snow Sweeney Tibbitts Tregoning Wagner White Williams Worthen Mr Speaker
NAYS—None
ABSENT—Arnzen Crapo Hammond Jenkins Johnson(29) Larsen Lincoln Little Looney Molyneaux Palmer Ravenscroft Roberts Scoresby Sessions
Title apvd - to S

(S) 2/1 Rec'd fr H - 1st rdg - to Lab/Econ
2/2 Rpt out - rec d/p - to 10th ord
Rls susp - PASSED 33-2-0
AYES — Allen Barker Bilyeu Bivens Brown Budge Chase Cobbs Crookham Crutcher Egbert Ellsworth(20) Ellsworth(30) Evans Fredericksen High Kidwell Klein Manley Manning Miller Mitchell Mix Murphy Peavey Rigby Saxvik Solberg Steen Stoicheff Summers Swenson Williams
NAYS — Brassey Yarbrough
ABSENT — None
Title apvd - to H

(H) 2/3 Rec'd fr S - to Jud f/enrol
Rpt enrol - Sp signed - to S
(S) 2/3 Rec'd fr H - Pres signed - to H
(H) 2/3 To Governor
2/3 Governor signed
Session Law Chapter No. 4
Effective: Immediately

H79 EDUCATION, vocational high school districts
by Education

(H) 1/29 Intro - 1st rdg - to Print
1/30 Rpt prt - to Ed

[illegible] SCHOOLS, emergency fund level computation
by Education

(H) 1/29 Intro - 1st rdg - to Print
1/30 Rpt prt - to Ed
2/3 Rpt out - rec d/p - to 2nd rdg
2/4 2nd rdg - to 3rd rdg
2/5 3rd rdg - PASSED 56-2-12
AYES—Allen Andersen Antone Arnzen Brocke Cammack Carr Chatburn Claiborn Condie Danielson Davidson Dean Dunn Edwards Elgin Farner Fogg Greenawalt Haaksenson Hale Hammond Hartvigsen Hedges Hedlund Hyde Jackson Jenkins Johnson(29) Johnson(35) Keithly Kendall Kennevick Koch(19) Kraus Larsen Little Litton Looney Maynard McDermott McHan McKinney Merrill Molyneaux Murphy Onweiler Palmer Ravenscroft Reardon Reid Rice Roberts Scoresby Sessions Worthen
NAYS—Loveless Tregoning
ABSENT—Brennan Copple Crapo Koch(17) Lincoln Snow Sweeney Tibbitts Wagner White Williams Mr Speaker
Title apvd-to S

(S) 2/8 Rec'd fr H - 1st rdg - to HEW
2/13 Rpt out - rec d/p - to 2nd rdg
2/16 2nd rdg - to 3rd rdg

H80 continued

2/17 3rd rdg - PASSED 34-0-1
AYES—Allen Barker Bilyeu Bivens Brown Budge Chase Cobbs Crookham Crutcher Egbert Ellsworth(20) Ellsworth(30) Evans Fredericksen High Kidwell Klein Manley Manning Miller Mitchell Mix Murphy Peavey Rigby Saxvik Solberg Steen Stoicheff Summers Swenson Williams Yarbrough
NAYS—None
ABSENT—Brassey
Title apvd - to H

(H) 2/17 Rec'd fr S - to enrol
Rpt enrol - Sp signed - to S
(S) 2/18 Rec'd fr H - Pres signed - to H
(H) 2/19 To Governor
2/19 Governor signed
Session Law Chapter No. 30
Effective: May 19, 1971

H81 GARNISHMENT, wages, no reason to fire
by Judiciary and Rules

(H) 1/29 Intro - 1st rdg - to Print
1/30 Rpt prt - to Jud

H82 PERMANENT BLDG FUND, liquor fund to
by Onweiler

(H) 1/29 Intro - 1st rdg - to Print
1/30 Rpt prt - to Rev
3/11 Rpt out - to Gen Ord - to Comm of Whole
Rpt out amen w/o rec - to engros - amens ord prt
3/12 Amens rpt prt
3/15 Rpt engros - to 1st rdg as amen
1st rdg - to 2nd rdg as amen
3/16 2nd rdg - to 3rd rdg as amen
3/17 Held till 3/18
3/19 3rd rdg - PASSED 37-31-2
AYES—Allen Andersen Brennan Cammack Copple Crapo Dean Elgin Fogg Haaksenson Hammond Hedges Hedlund Hyde Jackson Jenkins Johnson(29) Johnson(35) Keithly Kennevick Koch(17) Koch(19) Looney Loveless Maynard McDermott Merrill Molyneaux Murphy Onweiler Ravenscroft Reardon Reid Rice Sweeney Wagner Worthen
NAYS—Antone Arnzen Brocke Carr Chatburn Claiborn Condie Danielson Dunn Edwards Farner Greenawalt Hale Hartvigsen Kendell Kraus Larsen Lincoln Little Litton McHan McKinney Palmer Scoresby Sessions Snow Tibbitts Tregoning White Williams Mr Speaker
ABSENT—Davidson Roberts
Title apvd - motion to recon FAILED 28-32-10
To S

(S) 3/19 Rec'd fr H - to 1st rdg - to Loc Gov

H83 WATER, water right permit system, mandatory
by Resources and Conservation

(H) 1/30 Intro - 1st rdg - to Print
2/2 Rpt prt - to Agric Aff
2/11 Rpt out - rec d/p - to 2nd rdg
2/12 2nd rdg - to 3rd rdg
2/13 3rd rdg - PASSED 45-11-14
AYES — Allen Andersen Cammack Carr Chatburn Claiborn Condie Copple Dunn Edwards Elgin Farner Fogg Greenawalt Hale Hedges Hyde Jackson Johnson(35) Keithly Kendell Kennevick Koch(19) Kraus Lincoln Little Looney Maynard McDermott McHan McKinney Onweiler Palmer Ravenscroft Reid Rice Roberts Snow Sweeney Tibbitts Tregoning Wagner White Worthen Mr Speaker

H83 continued

NAYS -- Brocke Crapo Danielson Davidson Haakenson Larsen Loveless Murphy Reardon Scoresby Sessions
ABSENT – Antone Arnzen Brennan Dean Hammond Hartvigsen Hedlund Jenkins Johnson(29) Koch(17) Litton Merrill Molyneaux Williams
Title apvd - to S

(S) 2/16 Rec'd fr H - 1st rdg - to Res
3/11 Rpt out - rec d/p - to 2nd rdg
3/12 2nd rdg - to 3rd rdg
3/13 Held
3/15 3rd rdg - PASSED 29-1-5
AYES–Allen Barker Bilyeu Bivens Brown Cobbs Crookham Crutcher Egbert Ellsworth(30) Evans Fredericksen High Kidwell Manley Manning Miller Mitchell Mix Murphy Peavey Rigby Saxvik Steen Stoicheff Summers Swenson Williams Yarbrough
NAYS–Budge
ABSENT–Brassey Chase Ellsworth(20) Klein Solberg
Title apvd - to H
(H) 3/16 Rec'd fr S - to enrol
3/17 Rpt enrol - Sp signed - to S
(S) 3/17 Rec'd fr H - Pres signed - to H
(H) 3/18 To Governor
3/24 Governor signed
Session Law Chapter No. 177
Effective: May 19, 1971

H84 FIREARMS, carrying loaded in vehicles
by Resources and Conservation

(H) 1/30 Intro - 1st rdg - to Print

H85 CATTLE, permit to drive across borders
by Agricultural Affairs

(H) 1/30 Intro - 1st rdg - to Print
2/1 Rpt prt - to Agric Aff
2/27 Rpt out - rec d/p - to 2nd rdg
3/1 2nd rdg - to 3rd rdg
3/2 3rd rdg PASSED 59-0-11
AYES–Allen, Andersen, Antone, Arnzen, Brennan, Brocke, Cammack, Carr, Chatburn, Claiborn, Condie, Crapo, Davidson, Dean, Dunn, Elgin, Farner, Fogg, Greenawalt, Haakenson, Hale, Hammond, Hartvigsen, Hedges, Hedlund, Hyde, Jackson, Jenkins, Johnson (29), Keithly, Kendell, Kennevick, Koch (17), Koch (19), Kraus, Larsen, Lincoln, Little, Litton, Maynard, McDermott, McHan, McKinney, Murphy, Onweiler, Palmer, Ravenscroft, Reid, Rice, Roberts, Scoresby, Sessions, Snow, Sweeney, Tibbitts, Tregoning, Wagner, White, Worthen. Total–59.
NAYS–None
Absent and excused–Copple, Danielson, Edwards, Johnson (35), Looney, Loveless, Merrill, Molyneaux, Reardon, Williams, Mr. Speaker. Total–11.
Title apvd - to S
(S) 3/3 Rec'd fr H - 1st rdg - to Ag Aff
3/5 Rpt out - rec d/p - to 2nd rdg
3/6 2nd rdg - to 3rd rdg
3/8 3rd rdg PASSED 22-5-8
AYES–Allen Barker Bilyeu Bivens Budge Chase Cobbs Ellsworth(20) Evans Klein Manning Mitchell Mix Murphy Peavey Rigby Saxvik Solberg Steen Stoicheff Summers Swenson
NAYS–Brown Crookham Crutcher Ellsworth(30) Kidwell
ABSENT–Brassey Egbert Fredericksen High Manley Miller Williams Yarbrough
Title apvd - to H
(H) 3/9 Rec'd fr S - to enrol
3/10 Rpt enrol - Sp signed - to S
(S) 3/11 Rec'd fr H - Pres signed - to H
(H) 3/12 To Governor
3/16 Governor signed
Session Law Chapter No. 120
Effective: Immediately

H86 HEALTH, dist., meeting of budget committee
by Edwards

(H) 1/30 Intro - 1st rdg - to Print
2/1 Rpt prt - to Health/Wel
2/2 Rpt out - rec d/p - to 2nd rdg
2/3 2nd rdg - to 3rd rdg
2/4 3rd rdg - PASSED 62-0-8
AYES–Andersen Antone Arnzen Brennan Brocke Cammack Chatburn Claiborn Condie Copple Crapo Danielson Davidson Dean Dunn Edwards Elgin Fogg Greenawalt Haakenson Hale Hammond Hedges Hedlund Hyde Jackson Jenkins Johnson(29) Johnson(35) Kendall Kennevick Koch(17) Koch(19) Kraus Larsen Lincoln Little Litton Looney Maynard McHan McKinney Merrill Molyneaux Murphy Onweiler Palmer Ravenscroft Reardon Reid Rice Roberts Scoresby Sessions Snow Sweeney Tibbitts Tregoning Wagner Williams Worthen Mr Speaker
NAYS–none
ABSENT–Allen Carr Farner Hartvigsen Keithly Loveless McDermott White
Title apvd to S
(S) 2/5 Rec'd fr H - 1st rdg - to HEW
2/9 Rpt out - rec d/p - to 2nd rdg
2/10 2nd rdg - to 3rd rdg
2/11 3rd rdg - PASSED 30-0-5
AYES–Allen Barker Bilyeu Bivens Brassey Brown Budge Cobbs Crookham Crutcher Ellsworth(30) Evans High Klein Manley Manning Miller Mitchell Mix Murphy Peavey Rigby Saxvik Solberg Steen Stoicheff Summers Swenson Williams Yarbrough
NAYS–None
ABSENT–Chase Egbert Ellsworth(20) Fredericksen Kidwell
Title apvd - to H
(H) 2/12 Rec'd fr S - to enrol
2/13 Rpt enrol - Sp signed - to S
(S) 2/16 Rec'd fr H - Pres signed - to H
(H) 2/16 To Governor
2/16 Governor signed
Session Law Chapter No. 27
Effective: May 19, 1971

H87 MINES, MINING, dredge, placer, permit
by Resources and Conservation

(H) 2/1 Intro - 1st rdg - to Print
2/2 Rpt prt - to Res
2/19 Rpt out - rec d/p - to 2nd rdg
2/20 2nd rdg - to 3rd rdg
2/22 Hld till 2/23/71
2/23 Hld till 2/24
2/24 3rd rdg PASSED 54-0-16
AYES–Allen Andersen Arnzen Brennan Brocke Cammack Carr Chatburn Condie Crapo Dean Dunn Elgin Farner Fogg Greenawalt Haakenson Hale Hartvigsen Hedges Hedlund Hyde Jenkins Johnson(29) Johnson(35) Keithly Kendell Kennevick Koch(17) Koch(19) Kraus Litton Looney Loveless Maynard McDermott McHan McKinney Merrill Molyneaux Murphy Onweiler Palmer Ravenscroft Reardon Rice Roberts Sweeney Tibbitts Tregoning White Williams Worthen Mr Speaker
NAYS–none
ABSENT–Antone Claiborn Copple Danielson Davidson Edwards Hammond Jackson Larsen Lincoln Little Reid Scoresby Sessions Snow Wagner
Title apvd - to S
(S) 2/25 Rec'd fr H - 1st rdg - to Res
3/15 Rpt out - rec d/p - to 2nd rdg
3/16 2nd rdg - to 3rd rdg
3/17 3rd rdg - PASSED 31-0-4

HOUSE PRINTING & LEGISLATIVE EXPENSE COMMITTEE

FORTY-FIRST LEGISLATURE - FIRST SESSION

January 30, 1971

The Printing Committee met in Room 311 at 10:30 AM.

PRESENT:	Hyde, Chairman	Koch (19)
	Little	McDermott
	Danielson	White
	Hedges	Williams
	Elgin	

ABSENT: None

H.B. No. 83 (Resources & Conservation) (To provide that the right to use appropriated water shall be only by application, permit and license procedure)

Mr. Williams presented H.B. 83. Mr. Hyde said this was from the Department of Water Administration and what it does, in effect, is eliminate the appropriation of water by building a diversion works and taking it. Mr. Williams moved that it be PRINTED. Seconded by Mr. Hedges. Motion carried unanimously.

H.B. No. 84 (Resources & Conservation) (Prohibit persons from carrying loaded guns in a vehicle)

Miss McDermott presented H.B. 84. She commented on the exemption to "any person hired to herd grazing animals or any person hired specifically for the purpose of controlling predatory animals....." and said that it should also say "in the course of his employment". There was also a question about whether a person duck hunting in a boat would be included in this since the bill states: "...or in any vehicle propelled by man...." Miss McDermott moved that H.B. 84 be HELD until Tuesday for clarification. Seconded by Mr. Hedges. Motion carried unanimously.

H.B. No. 85 (Agricultural Affairs) (To require a permit from the brand inspector to move horses, mules or cattle out of state by any means other than rail)

Mr. Koch presented H.B. 85 and Mr. Hedges moved that it be PRINTED. Seconded by Mr. Elgin. Motion carried unanimously.

H.B. No. 86 (Edwards) (To allow the budget committee of a Public Health District to meet on or before the first Monday of December -- presently they must meet on the first Monday of December)

Mr. White presented H.B. 86 and Mr. Williams moved that it be PRINTED. Seconded by Mr. White. Motion carried unanimously.

The committee discussed H.B. 49 (motor vehicle speed limits) which was being held.

Mr. Keithly appeared before the committee to explain this bill. He said he felt that anyone who had the money to get off of the speeding ticket could and those that didn't had to pay it. He said the bill had been checked by the Legislative Council and the House Attorney and they believed it was in order. He felt it would make the enforcement of the laws easier, and the bill does allow posting of higher or lower speed limits. Mr. Elgin moved that H.B. 49 be PRINTED. Seconded by Miss McDermott. Motion carried unanimously.

Meeting adjourned at 10:50 AM.

Aden Hyde

ADEN HYDE, Chairman

Jan Graff

Jan Graff, Secretary

(House)

AGRICULTURAL AFFAIRS COMMITTEE MEETING

FEBRUARY 5, 1971 9:00 A.M.

PRESENT: Jack Claiborn, Chairman; Walter Little, Vice-Chairman; Angus Condie; Carroll Dean; Virgil Farner; Albert Johnson; Kurt Johnson; Max Kendell; Allan Larsen; Harold Reid; Wayne Tibbitts

ABSENT: George Brocke; Lester Hartvigsen

GUESTS: Mr. Wilson Churchman, Jerome, President, Idaho Horse Racing Sponsoring Association
Mr. Dave Samuelson, Boise Attorney
Mr. Tom Sheldon, Chairman, Horse Racing Commission

Mr. Keith Higginson, Administrator, Water Administration Dept.
Mr. Bob Fleenor, Assistant Director, Water Administration Dept.

The meeting was called to order by Chairman, Jack Claiborn.

RS 2481: INCREASE IDAHO STATE HORSE RACING COMMISSION MEMBERS FROM 3 TO 5: Mr. Wilson Churchman was the first speaker. He said he represents the Idaho Race Horse Sponsoring Association. This consists of 12 groups which are listed on back of Resolution that was handed to Committee members. Half of the group are sponsored under the fair boards.

At the annual meeting November 7th, the resolution was drafted opposing any change in the three man board on the Horse Racing Commission. Mr. Churchman said there was a bill in the Legislature which would increase the take by the sponsor from 15% to 18% but he thought this had been killed. The first three resolutions pertain to that. The last three resolutions pertain to RS 2481. The Resolution was unanimously adopted by all sponsoring associations. Since the start of racing a three man board has handled the duties and this has worked very well. They only have twelve race tracks to supervise.

The Chairman said that a bill was introduced in the Senate and its number is SB 1065. This bill is the same as 1065 except it provides for per diem of $25 per day for members when they are on business of the Commission. The members draw no salary. RS 2481 was drafted by Rep. Williams and Mr. Joe Hansen brought it to Committee Chairman.

Mr. Sheldon gave a history of racing and passed out financial report. During the first year of racing (1963) the Commission handled $608,634. This past year they handled $4,115,511. (See previous remarks by Mr. Sheldon in minutes dated January 26th.)

→ HB 83: IDAHO MANDATORY PERMIT ACT: Mr. Higginson said that this bill would have no effect on any existing water rights whether they are established through permit procudure or through constitutional method of application. It simply would mean that from now on the procedure would be through permit system. Mr. Higginson said they believe there are in excess of 200,000 water rights unadjudicated. There are 10,000 water rights on record by decree and 15,000 permits or approximately 25,000 total. It would give a much more orderly process if water rights were recorded.

SB 1011: RELATING TO BENEFICIAL USES OF WATER: Mr. Higginson said this is not in effect a Water Administration Bill. It was introduced by Mr. Manley in the Senate. Two years ago the Water Administration Department did put in a similar bill. Mr. Higginson said he felt there would be an advantage to having the legislation which would recognize other beneficial uses of water other than the ones listed in the Constitution. They are now satisfied that the Constitution listing of those five uses is not a prohibition against the other uses.

RS 2440: DEFINITION OF "DOMESTIC PURPOSES": This legislation was discussed with Mr. Higginson. He stated that all this does is put back on the books what was passed last year. He also answered questions regarding critical ground water areas.

RS 2541: POTATO COMMISSION BILL: Mr. Larsen moved that this be introduced. Mr. Kurt Johnson seconded. Motion carried.

→ HB 83: This will be held for further study.

SB 1011: Mr. Larsen moved that this be held for further study. Mr. Little seconded. Motion carried.

Meeting adjourned at 10:30 A.M.

Jack D. Claiborn, Chairman

Nancy Gulles, Secretary

(House)

AGRICULTURAL AFFAIRS COMMITTEE MEETING

FEBRUARY 9, 1971 9:00 A.M.

PRESENT: Jack Claiborn, Chairman
Walter Little, Vice-Chairman
George Brocke
Angus Condie
Carroll Dean
Virgil Farner
Lester Hartvigsen
Albert Johnson
Kurt Johnson
Max Kendell
Allan Larsen
Harold Reid
Wayne Tibbitts

GUESTS: Mr. Keith Higginson, Director, Water Administration Dept.
Mr. Bob Fleenor, Assistant Director, Water Administration Dept.

Mr. Hugh Parks, Lewiston, Legislative Adviser, State Grange

Meeting was called to order by Chairman, Jack Claiborn. All members were present.

HB 83: IDAHO MANDATORY PERMIT ACT: Mr. Higginson said there has always been some concern over this proposal by people who feel it would upset the status quo and disrupt the water rights. Actually this legislation would offer protection to existing water rights. There will be a full disclosure before a permit is issued, and there will be records which they do not have now. In Utah they have had a permit procedure since 1906 and they have excellent records. A permit procedure has been on the books in Idaho but it has not been mandatory. Mr. Higginson gave out a letter dated February 10, 1970, regarding court decisions and also a paper entitled, "Justification for House Bill 83".

MOTION: HB 83: Mr. Little moved that this be held until the next meeting to give Members a chance to review literature from Mr. Higginson. Mr. Reid seconded.

AMENDED MOTION: Mr. Condie moved that bill be sent back to desk with "DO PASS" recommendation. Mr. Dean seconded. Motion failed to pass.

VOTE WAS TAKEN ON ORIGINAL MOTION. MOTION CARRIED. Bill will be held until Thursday meeting.

HB 107: DEFINITION OF DOMESTIC PURPOSES: The Chairman felt perhaps the bill should be amended to allow a permit for livestock as well as household use. Mr. Higginson suggested that this could be accomplished by changing the "and" to an "or" in sub-section (d). It would therefore read as follows: "Domestic purposes" is water for household use or livestock . . ."

MOTION: Mr. Little moved that HB 107 be amended by changing the "and" to "or". Mr. Al Johnson seconded. Motion carried. Bill will be placed on GENERAL ORDERS FOR AMENDMENT. Mr. Condie will sponsor.

RS 2398: MOTION: PUBLIC LIVESTOCK MARKET BOARD ACT: Mr. Brocke moved that this be introduced. Mr. Little seconded. Motion carried.

RS 2399: POULTRY GRADING: Mr. Condie moved that we introduce RS 2399. Mr. Farner seconded. Motion carried.

(House)

AGRICULTURAL AFFAIRS COMMITTEE MEETING

FEBRUARY 11, 1971 9:00 A.M.

PRESENT: Jack Claiborn, Chairman
Walter Little, Vice-Chairman
Angus Condie
Carroll Dean
Virgil Farner
Lester Hartvigsen
Albert Johnson
Kurt Johnson
Allan Larsen
Harold Reid
Wayne Tibbitts

ABSENT: George Brocke
Max Kendell

GUESTS: Mr. Bob Henderlider, Secretary, Idaho Cattlemen's Association
Mr. Tom Hovenden, Secretary, Idaho Cattle Feeder's Association

Meeting was called to order by the Chairman. Mr. Henderlider appeared before the Committee to give his views on several pieces of legislation.

RS 2586: BEEF COUNCIL LEGISLATION: Mr. Henderlider said there are areas where they are missing the dimes for beef promotion because of the loophole in the original act. The only time the collection is made is when there is a transfer of ownership. In one area they are actually selling cattle but are shipping to themselves across the State line. Also there are several large packing plants that are feeding cattle and are required to have a brand inspection at time of slaughter, but since no change of ownership is taking place, they are not contributing to the Beef Council even though they are deriving a good deal of the benefit from the promotion of beef. The other correction in the bill is the time period for asking for a refund. This has been changed from 30 days to 10 days. It is the same people who are asking for a refund time after time.

HB 141: PUBLIC LIVESTOCK MARKET BOARD: Mr. Henderlider said to make it fair they feel a corporation should be treated the same as an individual. This legislation does not require a hearing unless someone requests one. They must submit an application and financial statement. It gives the Board an opportunity to have a hearing for a market change. There are 21 livestock markets in the state.

HB 89: EXEMPTING EMPLOYEES OF COMMODITY COMMISSIONS FROM PERSONNEL COMMISSION: Mr. Henderlider said there is a real problem trying to work with the Personnel Commission. They have been opposed to the Commission from the beginning. Some of the examinations are "downright ridiculous". It would certainly facilitate the work of the Commissions if they did not have to hire through the Personnel Commission.

SB 1032: MEAT BILL: The Chairman asked someone to sponsor SB 1032. Mr. Little volunteered. Mr. Claiborn will make the motion to accept the amendment. Mr. Little will second the motion and explain the amendment.

HB 83: PERMIT & LICENSE PROCEDURE:

MOTION: Mr. Condie moved that this be sent to the desk with "DO PASS" recommendation. Mr. Dean seconded. Motion carried. Mr. Dean will act as sponsor.

AMENDED MOTION: Mr. Little moved that the motion just passed be amended to read that the bill be sent back to the desk "WITHOUT RECOMMENDATION", Mr. Farner seconded. MOTION WAS WITHDRAWN WITH CONSENT OF SECOND.

Addendum B — H.B. 369, 1986 IDAHO SESS. LAWS, CH. 313 (CODIFIED AS AMENDED AT IDAHO CODE § 42-201(2)) AND ITS LEGISLATIVE HISTORY

1. 1986 Idaho Sess. Laws, ch. 313.
2. H.B. 369.
3. Amendments to H.B. 369.
4. Statement of Purpose and Fiscal Note (RS 11737C1).
5. Final Daily Data 1986 (H.B. 369).
6. Minutes, House Resources & Conservation Committee (Jan. 9, 1986).
7. Minutes, House Resources & Conservation Committee (Jan. 21, 1986).
8. Minutes, Senate Resources & Environment Committee (Mar. 12, 1986).
9. Minutes, Senate Resources & Environment Committee (Mar. 14, 1986).
10. Minutes, Senate Resources & Environment Committee (Mar. 17, 1986).
11. Third Reading and Letter of Intent – H. 369 (1986 House Journal, p. 51) (Jan 27, 1986).

SECTION 1. That Chapter 18, Title 41, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 41-1841, Idaho Code, and to read as follows:

41-1841. BLOCK CANCELLATIONS AND BLOCK NONRENEWALS — NOTICE TO DIRECTOR REQUIRED. (1) Any insurer intending to implement block cancellations or block nonrenewals of insurance policies shall provide the director written notice of such intentions no later than one hundred twenty (120) days prior to such intended action. Such notice shall fully set forth reasons for such action and shall include additional information that the director may deem appropriate. Failure by any insurer to comply with the requirements of this section shall constitute a violation of the provisions of this section and shall render any policy cancellations or nonrenewals by the insurer null and void and without effect. The failure of any insurer to comply with the requirements of this section shall not affect the contract rights of insureds.

(2) At the end of sixty (60) days the intended insurer action shall be deemed approved unless prior thereto it has been affirmatively approved by order of the director.

(3) Block cancellations or block nonrenewals for the provisions of this section and the enforcement of this code, shall be defined to include any of the following: cancellation or nonrenewal of any class, line, type or subject of insurance, or the withdrawal from the business of insurance in Idaho.

(4) The requirements of this section are not a waiver or limitation of the provisions of this code, or other laws of this state, but are additional requirements.

(5) The director may issue reasonable regulations to establish requirements for reporting required herein.

Approved April 3, 1986.

CHAPTER 311
(H.B. No. 374)

AN ACT

RELATING TO PROBATION; AMENDING SECTION 20-222, IDAHO CODE, TO PROVIDE THAT A PERSON MAY BE PLACED ON PROBATION FOR A PERIOD OF TIME EQUAL TO THE PERIOD OF TIME HE MIGHT HAVE BEEN IMPRISONED.

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

SECTION 1. That Section 20-222, Idaho Code, be, and the same is hereby amended to read as follows:

20-222. INDETERMINED OR FIXED PERIOD OF PROBATION OR SUSPENSION OF SENTENCE — REARREST AND REVOCATION. The period of probation or suspension of sentence may be ~~indetermined~~ indeterminate or may be

1986

fixed by the court, and may at any time be extended or terminated by the court. Such period with any extension thereof shall not exceed ~~five years; except in cases in which the defendant is charged with failure to provide subsistance to his dependents~~ the maximum period for which the defendant might have been imprisoned.

At any time during probation or suspension of sentence, the court may issue a warrant for violating any of the conditions of probation or suspension of sentence and cause the defendant to be arrested. Thereupon the court, after summary hearing may revoke the probation and suspension of sentence and cause the sentence imposed to be executed, or may cause the defendant to be brought before it and may continue or revoke the probation, or may impose any sentence which originally might have been imposed at the time of conviction.

Approved April 3, 1986.

CHAPTER 312
(H.B. No. 373)

AN ACT

RELATING TO CRIMINAL PUNISHMENT; AMENDING CHAPTER 1, TITLE 18, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 18-112A, IDAHO CODE, TO PROVIDE A FINE FOR FELONY STATUTES WHEN A FINE IS NOT SPECIFICALLY PROVIDED.

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

SECTION 1. That Chapter 1, Title 18, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 18-112A, Idaho Code, and to read as follows:

18-112A. FINE AUTHORIZED. In addition to any other punishment prescribed for felonies in specific statutes of the Idaho Code, the court may also impose a fine of up to five thousand dollars ($5,000). This section shall not apply if the specific felony statute provides for the imposition of a fine.

Approved April 3, 1986.

CHAPTER 313
(H.B. No. 369, As Amended in the Senate)

AN ACT

RELATING TO ADMINISTRATION OF WATER RIGHTS; AMENDING SECTION 42-108, IDAHO CODE, TO PROVIDE THAT ANY PERMANENT CHANGE IN PERIOD OR NATURE OF USE FOR A QUANTITY OF WATER GREATER THAN FIFTY CFS OR FOR A STORAGE VOLUME GREATER THAN FIVE THOUSAND ACRE FEET SHALL

REQUIRE THE APPROVAL OF THE LEGISLATURE EXCEPT THAT ANY TEMPORARY CHANGE WITHIN THE STATE OF IDAHO FOR A PERIOD OF LESS THAN THREE YEARS MAY BE APPROVED BY THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES WITHOUT LEGISLATIVE APPROVAL; AMENDING SECTION 42-201, IDAHO CODE, TO PROHIBIT ILLEGAL APPLICATION AND USE OF PUBLIC WATERS; AMENDING SECTION 42-204, IDAHO CODE, TO PROVIDE FOR EXTENSIONS BY THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES FOR COMPLETION OF WORKS AND APPLICATION OF THE WATER TO FULL BENEFICIAL USE UNDER CERTAIN PERMITS AND TO DELETE ARCHAIC LANGUAGE; AMENDING SECTION 42-221, IDAHO CODE, TO PROVIDE A FEE FOR RECEIPT OF ALL NOTICES OF APPLICATION WITHIN A DESIGNATED AREA; AMENDING SECTION 42-222, IDAHO CODE, TO PROVIDE NOTICE OF A PROPOSED CHANGE IN WATER USE, TO PROVIDE CONDITIONS FOR TRANSFER OF THE RIGHT TO STORED WATER FOR IRRIGATION PURPOSES, TO DELETE LANGUAGE RELATING TO CHANGE OF NATURE OF USE OF A WATER RIGHT AND TO PROVIDE NOTICE OF AN APPLICATION FOR AN EXTENSION; REPEALING SECTIONS 42-240 AND 42-311, IDAHO CODE; AMENDING CHAPTER 3, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-311, IDAHO CODE, TO PROVIDE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES THE AUTHORITY TO ISSUE ORDERS PRIOR TO LICENSURE, TO PROVIDE GROUNDS FOR THE ORDER, TO PROVIDE THAT THE ORDER BE SERVED, TO PROVIDE FOR A HEARING, TO PROVIDE FOR JUDICIAL REVIEW AND TO DEFINE PERMITTEE; AMENDING CHAPTER 3, TITLE 42, IDAHO CODE, BY THE ADDITION OF NEW SECTIONS 42-350, 42-351 AND 42-352, IDAHO CODE, TO PROVIDE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES THE AUTHORITY TO ISSUE ORDERS AFTER LICENSURE, TO PROVIDE GROUNDS, TO PROVIDE THAT THE ORDER BE SERVED, TO PROVIDE FOR A HEARING, JUDICIAL REVIEW OR RIGHT OF ACTION IN DISTRICT COURT, TO DEFINE LICENSEE, TO PROVIDE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES AUTHORITY TO ISSUE ORDERS FOR ILLEGAL DIVERSION OR USE OF WATER, TO PROVIDE GROUNDS, TO PROVIDE THAT THE ORDER BE SERVED, TO PROVIDE FOR A HEARING AND JUDICIAL REVIEW AND TO PROVIDE CIVIL PENALTIES; AMENDING CHAPTER 17, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1778, IDAHO CODE, TO CREATE THE WATER RIGHTS ENFORCEMENT ACCOUNT IN THE AGENCY ASSET FUND; AND AMENDING SECTION 42-1805, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE POWER AND DUTY TO SEEK AN INJUNCTION OR RESTRAINING ORDER PERTAINING TO CERTAIN VIOLATIONS OR ATTEMPTED VIOLATIONS REGARDING WATER LAW.

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

SECTION 1. That Section 42-108, Idaho Code, be, and the same is hereby amended to read as follows:

42-108. CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR NATURE OF USE -- APPLICATION OF ACT. The person entitled to the use of water or owning any land to which water has been made appurtenant either by a decree of the court or under the provisions of the constitution and statutes of this state, may change the point of diversion, period of use, or nature of use, and/or may voluntarily abandon the use of such water in whole or in part on the land which is

receiving the benefit of the same and transfer the same to other lands, if the water rights of others are not injured by such change in point of diversion, place of use, period of use, or nature of use, provided; if the right to the use of such water, or the use of the diversion works or irrigation system is represented by shares of stock in a corporation or if such works or system is owned and/or managed by an irrigation district, no change in the point of diversion, place of use, period of use, or nature of use of such water shall be made or allowed without the consent of such corporation or irrigation district~~; provided, any~~. Any permanent or temporary change in period or nature of use in or out-of-state for a quantity greater than fifty (50) cfs or for a storage volume greater than five thousand (5,000) acre-feet shall require the approval of the legislature~~. Any lease~~, except that any temporary change within the state of Idaho for a term period of less than three (3) years may be approved by the director without legislative approval.

Any person desiring to make such change of point of diversion, place of use, period of use, or nature of use of water shall make application for change with the department of water resources under the provisions of section 42-222, Idaho Code. After the effective date of this act, no person shall be authorized to change the period of use or nature of use, point of diversion or place of use of water unless he has first applied for and received approval of the department of water resources under the provisions of section 42-222, Idaho Code.

SECTION 2. That Section 42-201, Idaho Code, be, and the same is hereby amended to read as follows:

42-201. WATER RIGHTS ACQUIRED UNDER CHAPTER -- ILLEGAL APPLICATION OF WATER. (1) All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise. And after the passage of this title all the waters of this state shall be controlled and administered in the manner herein provided. Such appropriation shall be perfected only by means of the application, permit and license procedure as provided in this title; provided, however, that in the event an appropriation has been commenced by diversion and application to beneficial use prior to the effective date of this act it may be perfected under such method of appropriation.

(2) No person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists.

SECTION 3. That Section 42-204, Idaho Code, be, and the same is hereby amended to read as follows:

42-204. EXAMINATION -- PERMIT -- COMMENCEMENT OF WORK -- EXTENSIONS -- APPEAL. On receipt of the application, which shall be of a form prescribed by the department of water resources, it shall be the duty of that department to make an indorsement thereon of the date of

its receipt, and to examine said application and ascertain if it sets forth all the facts necessary to show the location, nature and amount of the proposed use. If upon such examination the application is found defective, it shall be the duty of the department of water resources to return the same for correction or to correspond with the applicant to obtain the needed information or amendments. If the application is returned to the applicant or the department shall request additional information and the applicant fails to return the corrected application or to supply the needed information within thirty (30) days, the department may void the record of said application and notify the applicant of such action. If the corrected application is returned or the information is supplied after thirty (30) days, such corrected application shall be treated in all respects as a new application, and the priority of the right initiated shall be determined by the date of receipt, in the office of the department, of the corrected application or additional information; provided, that upon request, and good cause appearing therefor, the director of the department of water resources may grant an extension of time within which to return the corrected application or supply needed information. All applications which shall comply with the provisions of this chapter and with the regulations of the department of water resources shall be numbered in such manner as will aid in their identification, and it shall be the duty of the department to approve all applications, made in proper form, which contemplate the application of water to a beneficial use: provided, that the department may deny any such application, or may partially approve and grant permit for a lesser quantity of water than applied for, or may grant permit upon conditions as provided in the preceding section.

The approval of an application shall be indorsed thereon, and a record made of such indorsement in the department of water resources. The application so indorsed shall constitute a permit, and a copy thereof shall be returned to the applicant, and he shall be authorized, on receipt thereof, to proceed with the construction of the necessary works for the diversion of such water, and to take all steps required to apply the water to a beneficial use and perfect the proposed appropriation. In its indorsement of approval on any application the department shall require that actual construction work and application of the water to full beneficial use shall be complete within a period of five (5) years from the date of such approval, but may limit the application to a less period than is named in the application, and such indorsement shall give the date when beneficial application of the water to be diverted by such works shall be made. Sixty (60) days before the date set for the completion of the appropriation of water under any permit, the department shall forward a notice to the applicant by certified mail at his address of record of the date for such completion, which said notice shall advise the applicant of the necessity of submitting an affidavit of completion or a request for an extension of time on or before said date; Provided that:

1. In cases where the applicant is prevented from proceeding with his work by his failure to obtain necessary consent or final approval or rejection from the federal government because of the pendency of an application for right of way or other matter within the jurisdiction

of the United States, or by litigation of any nature which might bring his title to said water in question, the department of water resources upon proper showing of the existence of any such condition, and being convinced that said applicant is proceeding diligently and in good faith, shall extend the time so that the amount of time lost by such delays shall be added to the time given in the original permit for each and every action required.

2. The time for completion of works and application of the water to full beneficial use under any permit involving the ~~construction of a reservoir of more than two hundred thousand (200,000) acre feet capacity or for the appropriation of water to be impounded in such reservoir of more than two hundred thousand (200,000) acre feet capacity, or a~~ diversion of more than twenty-five thousand (25,000) acre feet in one (1) irrigation season for a project of no less than five thousand (5,000) acres, may upon application to the director of the department of water resources supported by a showing that additional time is needed on account of the time required for organizing, financing and constructing works of such large size, be extended by the director of the department of water resources for an additional period of seven (7) years, but not to exceed twelve (12) years in all from the date of permit: Provided, that no such extension shall be granted unless the applicant for such extension shall show that there has been actually expended toward the construction of said ~~reservoir or diversion~~ property in connection therewith) at least one hundred thousand dollars ($100,000).

3. The time for completion of works and application of the water to full beneficial use under any permit involving the construction of a reservoir of more than ten thousand (10,000) acre feet capacity or for the appropriation of water to be impounded in such reservoir of more than ten thousand (10,000) acre feet capacity, may be extended by the director of the department of water resources upon application to the director if the permittee establishes that the permittee has exercised reasonable diligence and that good cause exists for the requested extension.

4. In connection with permits held by the United States, or the Idaho water resource board, whether acquired as the original applicant, by assignment or otherwise, the director of the department of water resources may extend the time for completion of the works and application of the water to full beneficial use for such additional period or periods of time as he may deem necessary upon application supported by a showing that such additional time is required by reason of the status of plans, authorization, construction fund appropriations, construction, or any arrangements which are found to be requisite to completion of the construction of such works.

45. In all other situations not governed by these provisions the department may grant one (1) extension of time, not exceeding five (5) years beyond the date originally set for completion of works and application of the water to full beneficial use, upon request for extension received on or before the date set for completion, provided good cause appears therefor.

Any applicant feeling himself aggrieved by the indorsement made by

the department of water resources upon his application may request a hearing before the director in accordance with section 42-1701A(3), Idaho Code, for the purpose of contesting the indorsement and may seek judicial review pursuant to section 42-1701A(4), Idaho Code, of any final decision of the director following the hearing.

Every holder of a permit which shall be issued under the terms and conditions of an application filed hereafter appropriating twenty-five (25) cubic feet or less per second must, within one (1) year from the date upon which said permit issues from the office of the department of water resources, commence the excavation or construction of the works by which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted through no fault of the holder of such permit by circumstances, over which he has no control.

~~The director shall, prior to July 1, 1982, notify holders of permits existing on the effective date of the act of the provisions of this act. Notice shall be by mail to the permit holder's last known address. Existing permit holders shall have one (1) year from the date of mailing to meet the provisions of this section.~~

The holder of any permit who shall fail to comply with the provisions of this section within the time or times specified shall be deemed to have abandoned all rights under his permit.

SECTION 4. That Section 42-221, Idaho Code, be, and the same is hereby amended to read as follows:

42-221. FEES OF DEPARTMENT. The department of water resources shall collect the following fees which shall constitute a fund to pay for legal advertising, the publication of public notices and for investigations required of the department in connection with the issuance of permits and licenses as provided in this chapter:

A. For filing an application for a permit to appropriate the public waters of this state:

1. For a quantity of 0.2 c.f.s. or less or for a storage volume of 20 acre feet or less $30.00
2. For a quantity greater than 0.2 c.f.s. but not exceeding 1.0 c.f.s. or for a storage volume greater than 20 acre feet but not exceeding 100 acre feet $45.00
3. For a quantity greater than 1.0 c.f.s. but not exceeding 20 c.f.s., or for a storage volume greater than 100 acre feet but not exceeding 2,000 acre feet ..... $45.00 plus $20.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 1.0 c.f.s. or 100 acre feet.
4. For a quantity greater than 20.0 c.f.s. but not exceeding 100 c.f.s. or for a storage volume greater than 2,000 acre feet but not exceeding 10,000 acre feet ..... $425.00 plus $10.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 20.0 c.f.s. or 2,000 acre feet.
5. For a quantity greater than 100.0 c.f.s. but not exceeding 500.0 c.f.s., or for a storage volume greater than 10,000 acre feet but not exceeding 50,000 acre feet $1,225.00

plus $5.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 100 c.f.s. or 10,000 acre feet.

6. For a quantity greater than 500 c.f.s., or for a storage volume greater than 50,000 acre feet ..... $3,225.00 plus $1.00 for each additional 1.0 c.f.s. or part thereof or 100 acre feet or part thereof over the first 500.0 c.f.s. or 50,000 acre feet.

B. For filing application for change of point of diversion, place, period, or nature of use of water of established rights; ~~for exchange of water;~~ or for an extension of time within which to resume the use of water under a vested right:

1. For a quantity of 0.2 c.f.s. or less or for a storage volume of 20 acre feet or less $30.00
2. For all other amounts $50.00

C. For filing application for amendment of permit $20.00

D. For filing claim to use right under section 42-243, Idaho Code $30.00

E. For filing a late claim to use a right under section 42-243, Idaho Code, where the date filed with the department of water resources, or if mailed to the department of water resources the postmark is:

1. After June 30, 1983, but not later than June 30, 1984..$100.00
2. After June 30, 1984, but not later than June 30, 1988..$200.00

F. For readvertising application for permit, change, exchange, or extension to resume use $20.00

G. For certification, each document $1.00

H. For making photo copies of office records, maps and documents for public use .... A reasonable charge as determined by the department.

I. For filing request for extension of time within which to submit proof of beneficial use on a water right permit $15.00

J. For tasks requiring in excess of one (1) hour research or for computerized data provided for public use .... A reasonable charge as determined by the department.

K. For receipt of all notices of application within a designated area, a reasonable annual charge as determined by the department.

All fees received by the department of water resources under the provisions of this chapter shall be transmitted to the state treasurer for deposit in the water administration account.

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

42-222. CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR NATURE OF USE OF WATER UNDER ESTABLISHED RIGHTS -- FORFEITURE AND EXTENSION -- APPEALS. (1) Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of

all or part of the water, under the right shall first make application to the department of water resources for approval of such change. Such application shall be upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be changed and the changes which are proposed, and shall be accompanied by the statutory filing fee as in this chapter provided. Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required by section 42-108, Idaho Code, and if otherwise proper to cause provide notice of the proposed change ~~to be published once a week for two (2) consecutive weeks in a newspaper published and of general circulation within the county where the water is diverted, if there is such paper, otherwise in a newspaper of general circulation within the county~~ in the same manner as applications under section 42-203A, Idaho Code. Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the receipt of any protest it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon. He shall also advise the watermaster of the district in which such water is used of the proposed change and the watermaster shall notify the director of the department of water resources of his recommendation on the application, and the director of the department of water resources shall not finally determine the action on the application for change until he has received from such watermaster his recommendation thereof, which action of the watermaster shall be received and considered as other evidence.

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 in the local public interest as defined in section 42-203, Idaho Code; except 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 director shall not approve such a change in nature of use of a water right if a change has previously been allowed except where the change is back to the original use.~~ 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. Provided, further, that upon proper showing before the director of the department of water resources of good and sufficient reason for nonapplication to beneficial use of such water for such term of five (5) years, the director of the department of water resources is hereby authorized to grant an extension of time extending the time for forfeiture of title for nonuse thereof, to such waters for a period of not to exceed five (5) additional years. Application for an extension shall be made before the end of the five (5) year period upon forms to be furnished by the department of water resources and shall fully describe the right on which an extension of time to resume the use is requested and the reasons for such nonuse and shall be accompanied by the statutory filing fee. Upon the receipt of such application it shall be the duty of the director of the department of water resources to examine the same and to ~~cause notice to be published once a week for two (2) consecutive weeks in a newspaper published and of general circulation within the county where the water has been diverted if there is such a paper, otherwise in a newspaper of general circulation within the county~~ provide notice of the application for an extension in the same manner as applications under section 42-203A, Idaho Code. The notice shall fully describe the right, the extension for which is requested and the reason for such nonuse and shall state that any person desiring to object to the requested extension may submit a protest to the director of the department of water resources within ten (10) days of the last date of publication. Upon receipt of a protest it shall be the duty of the director of the department of water resources to investigate and conduct hearing thereon as in this chapter provided. The director of the department of water resources shall find from the evidence presented in any hearing, or from information available to the department, the reasons for such nonuse of water and where it appears to the satisfaction of the director of the department of water resources that other rights will not be impaired by granting an extension of time within which to resume the use of the water and good cause appearing for such nonuse, he may grant one (1) extension of five (5) years within which to resume such use. In his approval of the application for an extension of time under this section the director of the department of water resources shall set the date when the use of water is to be resumed. Sixty (60) days before such date the director of the department of water resources shall forward to the applicant at his address of record a notice by certified mail setting forth the date on which the use of water is to be resumed and a form for reporting the resumption of the use of the water right. If the use of the water has not been resumed and report thereon made on or before the date set for resumption of use such right shall revert to the state and again be subject to appropriation, as provided in this section. In the event the director of the department of water resources determines that a proposed extension of time within which to resume use of a water right shall not be approved as provided in this section he shall deny same and forward notice of such

action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter provided.

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

SECTION 6. That Sections 42-240 and 42-311, Idaho Code, be, and the same are hereby repealed.

SECTION 7. That Chapter 3, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-311, Idaho Code, and to read as follows:

42-311. CANCELLATION OF PERMIT — GROUNDS -- HEARING -- PERMITTEE DEFINED. (1) If the director of the department of water resources finds, on the basis of available information at any time after a permit is issued but prior to license, that the permittee has wilfully and intentionally failed to comply with any of the conditions in the permit, then the director of the department of water resources may issue (a) an order to show cause before the director of the department or the director's designee on or before a date therein set, which shall be not less than thirty (30) days from the date of service, why the director of the department should not cancel said permit and declare the water subject to appropriation; or (b) an order directing the permittee to cease and desist the activity or activities alleged to be in violation of the conditions of the permit. A cease and desist order may direct compliance with the permit forthwith or may provide for a time schedule to bring the permittee into compliance with the conditions of the permit.

(2) Any order to show cause or order to cease and desist shall contain a statement of findings of fact and of conclusions of law that provide a factual and legal basis for the order of the director of the department of water resources.

(3) The director of the department of water resources shall serve forthwith, in accordance with the rules for service of a summons and complaint in the Idaho rules of civil procedure, a certified copy of any such order on the permittee.

(4) The permittee shall have a right to an administrative hearing before the department and to judicial review, all as provided in section 42-1701A, Idaho Code.

(5) The term "permittee," as used in this chapter, includes the heirs, successors, or assigns of the person to whom the department

issued a water right permit.

SECTION 8. That Chapter 3, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of NEW SECTIONS, to be known and designated as Sections 42-350, 42-351 and 42-352, Idaho Code, and to read as follows:

42-350. REVOCATION OF LICENSE -- GROUNDS -- HEARING -- LICENSEE DEFINED. (1) If the director of the department of water resources finds, on the basis of available information at any time after a license is issued, that the licensee has ceased to put the water to a beneficial use for a period of five (5) continuous years or that the licensee has wilfully and intentionally failed to comply with any of the conditions in the license, then the director of the department of water resources may issue (a) an order to show cause before the director of the department or the director's designee on or before a date therein set, which shall be not less than thirty (30) days from the date of service, why the director of the department should not revoke said license and declare the water subject to appropriation; or (b) an order directing the licensee to cease and desist the activity or activities alleged to be in violation of the conditions of the license. A cease and desist order may direct compliance with the license forthwith or may provide for a time schedule to bring the licensee into compliance with the conditions of the license.

(2) Any order to show cause or order to cease and desist shall contain a statement of findings of fact and of conclusions of law that provide a factual and legal basis for the order of the director of the department of water resources.

(3) The director of the department of water resources shall serve forthwith, in accordance with the rules for service of a summons and complaint in the Idaho rules of civil procedure, a certified copy of any such order on the licensee.

(4) The licensee shall have a right to an administrative hearing before the department and to judicial review, all as provided in section 42-1701A, Idaho Code.

(5) If the director of the department of water resources has issued an order to show cause why the director should not revoke a license, the licensee may, within twenty-one (21) days from the date of service of the order, notify the director in writing of the intent of the licensee to waive the right to an administrative hearing before the department and to file a complaint in the district court for a determination of the validity of the license. The complaint shall name the director of the department of water resources as a defendant and shall be filed either in the county where the point of diversion or the place of use under the license is located, or in the county where the director issued the order to show cause. The complaint shall be filed within forty-two (42) days of the date of service of the order to show cause by the director.

(6) The term "licensee," as used in this chapter, includes the heirs, successors, or assigns of the person to whom the department issued a water right license.

42-351. ILLEGAL DIVERSION OR USE OF WATER -- CEASE AND DESIST ORDERS. (1) If the director of the department of water resources finds, on the basis of available information, that a person is diverting water from a natural watercourse or from a ground water source without having obtained a valid water right to do so or is applying water not in conformance with the conditions of a valid water right, then the director of the department of water resources may issue an order directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or of any existing water right. A cease and desist order may direct compliance with applicable law and with any existing water right or may provide a time schedule to bring the person's actions into compliance with applicable law and with any existing water right.

(2) Any order to cease and desist shall contain a statement of findings of fact and of conclusions of law that provide a factual and legal basis for the order or the director of the department of water resources.

(3) The director of the department of water resources shall serve forthwith, in accordance with the rules for service of a summons and complaint in the Idaho rules of civil procedure, a certified copy of any such order on the person the subject of the cease and desist order.

(4) The person who is the subject of the cease and desist order shall have a right to an administrative hearing before the department and to judicial review, all as provided in section 42-1701A, Idaho Code.

42-352. CIVIL PENALTIES. (1) Any person who wilfully violates any cease and desist order issued under chapter 3, title 42, Idaho Code, after the same has been served on that person shall be subject to a civil penalty not to exceed one hundred dollars ($100) for each day following service of the cease and desist order in which the illegal diversion or use of water occurs. The director of the department of water resources shall have the authority to file an action in the appropriate district court to impose, assess and recover said civil penalties.

(2) All civil penalties collected by the director of the department of water resources under this section shall be deposited in the state water rights enforcement account established by section 42-1778, Idaho Code.

SECTION 9. That Chapter 17, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-1778, Idaho Code, and to read as follows:

42-1778. WATER RIGHTS ENFORCEMENT ACCOUNT. (1) The water rights enforcement account is hereby created and established in the agency asset fund.

(2) All moneys in the water rights enforcement account are reserved, set aside, appropriated and made available until expended as may be directed by the director of the department of water resources

in carrying out a water rights enforcement program.

SECTION 10. That Section 42-1805, Idaho Code, be, and the same is hereby amended to read as follows:

42-1805. ADDITIONAL DUTIES. In addition to other duties prescribed by law, the director of the department of water resources shall have the following powers and duties:

(1) To represent the state in all matters pertaining to interstate and international water rights affecting Idaho water resources; and to cooperate with all agencies, now existing or hereafter to be formed, within the state or within other jurisdictions, in matters affecting the development of the water resources of this state.

(2) To prepare a present and continuing inventory of the water resources of this state, ascertain means and methods of conserving and augmenting these and determine as accurately as possible the most effective means by which these water resources may be applied for the benefit of the people of this state.

(3) To conduct surveys, tests, investigations, research, examinations, studies, and estimates of cost relating to availability of unappropriated water, effective use of existing supply, conservation, storage, distribution and use of water.

(4) To prepare and compile information and data obtained and to make the same available to interested individuals or agencies.

(5) To cooperate with and coordinate activities with the administrator of the division of environmental protection of the department of health and welfare as such activities relate to the functions of either or both departments concerning water quality. Such cooperation and coordination shall specifically require that:

(a) The director meet at least quarterly with the administrator and his staff to discuss water quality programs. A copy of the minutes of such meeting shall be transmitted to the governor.

(b) The director transmit to the administrator, reports and information prepared by him pertaining to water quality programs, and proposed rules and regulations pertaining to water quality programs.

(c) The director shall make available to the administrator and the administrator shall make available to the director all notices of hearings relating to the promulgation of rules and regulations relating to water quality, waste discharge permits, and stream channel alteration, as such directly affect water quality, and notices of any other hearings and meetings which relate to water quality.

(6) To perform administrative duties and such other functions as the board may from time to time assign to the director to enable the board to carry out its powers and duties.

(7) After notice, to suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of minimum flow provisions of the state water plan.

(8) To promulgate, adopt, modify, repeal and enforce rules and

regulations implementing or effectuating the powers and duties of the department.

(9) To seek a preliminary or permanent injunction, or both, or a temporary restraining order restraining any person from violating or attempting to violate (a) those provisions of law relating to all aspects of the appropriation of water, distribution of water, headgates and measuring devices; or (b) the administrative or judicial orders entered in accordance with the provisions of law.

Approved April 3, 1986.

CHAPTER 314
(H.B. No. 569, As Amended)

AN ACT

RELATING TO SANITARY REGULATIONS FOR PUBLIC EATING PLACES; AMENDING SECTION 39-1611, IDAHO CODE, TO STRIKE REFERENCES TO INDIVIDUAL CLEAN TOWELS AND TO AUTHORIZE OTHER SANITARY DRYING DEVICES; AND AMENDING SECTION 39-1612, IDAHO CODE, TO STRIKE REFERENCES TO CUSPIDORS AND REQUIREMENTS FOR POSTING OF NOTICES.

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

SECTION 1. That Section 39-1611, Idaho Code, be, and the same is hereby amended to read as follows:

39-1611. SLEEPING IN COOK ROOM PROHIBITED -- WASHING FACILITIES AND REQUIREMENTS -- COMMON TOWEL PROHIBITED. No person shall sleep in any room where food is prepared, or cooked. No person in any way connected with the handling, cooking, preparing or serving of food in any kitchen or eating place, shall engage at work following a visit to a toilet room without first thoroughly cleansing his or her hands. Conveniently located washing facilities, including hot and cold running water, soap and ~~individual~~ clean towels or other sanitary drying devices, shall be provided in all such eating places. The use of a common towel is prohibited.

SECTION 2. That Section 39-1612, Idaho Code, be, and the same is hereby amended to read as follows:

39-1612. ~~CUSPIDORS---SMOKING~~, CHEWING, AND SPITTING ~~----NOTICES. Cuspidors of impervious material shall be provided for the use of employees and the public, and these shall be cleaned daily. No~~ employee or other person shall spit or discharge any substance from the mouth or nose on the floor or walls of the kitchen or any other room of an eating place. The smoking, snuffing or chewing of tobacco is prohibited in any part of any eating place, except that smoking will be permitted in ~~the toilet room or rest room, and in the dining room by the public only~~ designated smoking areas. ~~Plain notices shall be posted in every eating place forbidding any person to spit on the~~

~~floor or walls, or to use tobacco except as herein permitted.~~

Approved April 3, 1986.

CHAPTER 315
(H.B. No. 568)

AN ACT

RELATING TO MOTOR FUELS TAXES; AMENDING SECTION 63-2401, IDAHO CODE, TO PROVIDE A DEFINITION OF MOTOR FUELS; AMENDING CHAPTER 24, TITLE 63, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 63-2442A, IDAHO CODE, TO PROVIDE TAX COMMISSION AUTHORITY TO ENTER INTO INTERSTATE AGREEMENTS FOR THE ENFORCEMENT AND ADMINISTRATION OF MOTOR FUELS TAXES.

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

SECTION 1. That Section 63-2401, Idaho Code, be, and the same is hereby amended to read as follows:

63-2401. DEFINITIONS. ~~As used in~~ In this chapter:

(1) "Aircraft engine fuel" means any substance, the primary use of which is fuel for the propulsion of aircraft.

(2) "Bond" means:

(a) A surety bond, in an amount required by this chapter, duly executed by a surety company licensed and authorized to do business in this state conditioned upon faithful performance of all requirements of this chapter, including the payment of all taxes, penalties and other obligations arising out of the provisions of this chapter; or

(b) A deposit with the commission by any person required to be licensed pursuant to this chapter under terms and conditions as the commission may prescribe, of a like amount of lawful money of the United States or bonds or other obligations of the United States, the state of Idaho, or any county of the state.

(3) "Bulk storage tank" means a tank with a capacity of fifty-five (55) gallons capacity or more which meets any of the following criteria:

(a) It is physically attached to the real property of a purchaser of special fuels which are delivered into the tank.

(b) It is primarily used to store special fuels which are used by the purchaser of the special fuels for purposes other than propelling a motor vehicle on a highway.

(4) "Commercial motor boat" means any boat, equipped with a motor, which is wholly or partly used in a profit-making enterprise or in an enterprise conducted with the intent of making a profit.

(5) "Commission" means the state tax commission of the state of Idaho.

(6) "Distributor" means any person who receives gasoline and/or aircraft fuel in this state.

1986

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature — Second Regular Session — 1986

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 369

BY RESOURCES AND CONSERVATION COMMITTEE

AN ACT

RELATING TO ADMINISTRATION OF WATER RIGHTS; AMENDING SECTION 42-108, IDAHO CODE, TO PROVIDE THAT ANY PERMANENT CHANGE IN PERIOD OR NATURE OF USE FOR A QUANTITY OF WATER GREATER THAN FIFTY CFS OR FOR A STORAGE VOLUME GREATER THAN FIVE THOUSAND ACRE FEET SHALL REQUIRE THE APPROVAL OF THE LEGISLATURE EXCEPT THAT ANY TEMPORARY CHANGE WITHIN THE STATE OF IDAHO FOR A PERIOD OF LESS THAN THREE YEARS MAY BE APPROVED BY THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES WITHOUT LEGISLATIVE APPROVAL; AMENDING SECTION 42-201, IDAHO CODE, TO PROHIBIT ILLEGAL APPLICATION AND USE OF PUBLIC WATERS; AMENDING SECTION 42-204, IDAHO CODE, TO PROVIDE FOR EXTENSIONS BY THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES FOR COMPLETION OF WORKS AND APPLICATION OF THE WATER TO FULL BENEFICIAL USE UNDER CERTAIN PERMITS AND TO DELETE ARCHAIC LANGUAGE; AMENDING SECTION 42-221, IDAHO CODE, TO PROVIDE A FEE FOR RECEIPT OF ALL NOTICES OF APPLICATION WITHIN A DESIGNATED AREA; AMENDING SECTION 42-222, IDAHO CODE, TO PROVIDE NOTICE OF A PROPOSED CHANGE IN WATER USE, TO PROVIDE CONDITIONS FOR TRANSFER OF THE RIGHT TO STORED WATER FOR IRRIGATION PURPOSES, TO DELETE LANGUAGE RELATING TO CHANGE OF NATURE OF USE OF A WATER RIGHT AND TO PROVIDE NOTICE OF AN APPLICATION FOR AN EXTENSION; REPEALING SECTIONS 42-240 AND 42-311, IDAHO CODE; AMENDING CHAPTER 3, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-311, IDAHO CODE, TO PROVIDE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES THE AUTHORITY TO ISSUE ORDERS PRIOR TO LICENSURE, TO PROVIDE GROUNDS FOR THE ORDER, TO PROVIDE THAT THE ORDER BE SERVED, TO PROVIDE FOR A HEARING, TO PROVIDE FOR JUDICIAL REVIEW AND TO DEFINE PERMITTEE; AMENDING CHAPTER 3, TITLE 42, IDAHO CODE, BY THE ADDITION OF NEW SECTIONS 42-350, 42-351 AND 42-352, IDAHO CODE, TO PROVIDE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES THE AUTHORITY TO ISSUE ORDERS AFTER LICENSURE, TO PROVIDE GROUNDS, TO PROVIDE THAT THE ORDER BE SERVED, TO PROVIDE FOR A HEARING AND JUDICIAL REVIEW, TO DEFINE LICENSEE, TO PROVIDE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES AUTHORITY TO ISSUE ORDERS FOR ILLEGAL DIVERSION OR USE OF WATER, TO PROVIDE GROUNDS, TO PROVIDE THAT THE ORDER BE SERVED, TO PROVIDE FOR A HEARING AND JUDICIAL REVIEW AND TO PROVIDE CIVIL PENALTIES; AMENDING CHAPTER 17, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1778, IDAHO CODE, TO CREATE THE WATER RIGHTS ENFORCEMENT ACCOUNT IN THE AGENCY ASSET FUND; AND AMENDING SECTION 42-1805, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE POWER AND DUTY TO SEEK AN INJUNCTION OR RESTRAINING ORDER PERTAINING TO CERTAIN VIOLATIONS OR ATTEMPTED VIOLATIONS REGARDING WATER LAW.

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

SECTION 1. That Section 42-108, Idaho Code, be, and the same is hereby amended to read as follows:

42-108. CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR NATURE OF USE -- APPLICATION OF ACT. The person entitled to the use of water

or owning any land to which water has been made appurtenant either by a decree of the court or under the provisions of the constitution and statutes of this state, may change the point of diversion, period of use, or nature of use, and/or may voluntarily abandon the use of such water in whole or in part on the land which is receiving the benefit of the same and transfer the same to other lands, if the water rights of others are not injured by such change in point of diversion, place of use, period of use, or nature of use, provided; if the right to the use of such water, or the use of the diversion works or irrigation system is represented by shares of stock in a corporation or if such works or system is owned and/or managed by an irrigation district, no change in the point of diversion, place of use, period of use, or nature of use of such water shall be made or allowed without the consent of such corporation or irrigation district~~;--provided;--any~~. Any permanent or temporary change in period or nature of use in or out-of-state for a quantity greater than fifty (50) cfs or for a storage volume greater than five thousand (5,000) acre-feet shall require the approval of the legislature~~;--Any lease~~, except that any temporary change within the state of Idaho for a ~~term~~ period of less than three (3) years may be approved by the director without legislative approval.

Any person desiring to make such change of point of diversion, place of use, period of use, or nature of use of water shall make application for change with the department of water resources under the provisions of section 42-222, Idaho Code. After the effective date of this act, no person shall be authorized to change the period of use or nature of use, point of diversion or place of use of water unless he has first applied for and received approval of the department of water resources under the provisions of section 42-222, Idaho Code.

SECTION 2. That Section 42-201, Idaho Code, be, and the same is hereby amended to read as follows:

42-201. WATER RIGHTS ACQUIRED UNDER CHAPTER -- ILLEGAL APPLICATION OF WATER. (1) All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise. And after the passage of this title all the waters of this state shall be controlled and administered in the manner herein provided. Such appropriation shall be perfected only by means of the application, permit and license procedure as provided in this title; provided, however, that in the event an appropriation has been commenced by diversion and application to beneficial use prior to the effective date of this act it may be perfected under such method of appropriation.

(2) No person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists.

SECTION 3. That Section 42-204, Idaho Code, be, and the same is hereby amended to read as follows:

42-204. EXAMINATION -- PERMIT -- COMMENCEMENT OF WORK -- EXTENSIONS -- APPEAL. On receipt of the application, which shall be of a form prescribed by the department of water resources, it shall be the duty of that department to make an indorsement thereon of the date of its receipt, and to examine said application and ascertain if it sets forth all the facts necessary to show the

location, nature and amount of the proposed use. If upon such examination the application is found defective, it shall be the duty of the department of water resources to return the same for correction or to correspond with the applicant to obtain the needed information or amendments. If the application is returned to the applicant or the department shall request additional information and the applicant fails to return the corrected application or to supply the needed information within thirty (30) days, the department may void the record of said application and notify the applicant of such action. If the corrected application is returned or the information is supplied after thirty (30) days, such corrected application shall be treated in all respects as a new application, and the priority of the right initiated shall be determined by the date of receipt, in the office of the department, of the corrected application or additional information; provided, that upon request, and good cause appearing therefor, the director of the department of water resources may grant an extension of time within which to return the corrected application or supply needed information. All applications which shall comply with the provisions of this chapter and with the regulations of the department of water resources shall be numbered in such manner as will aid in their identification, and it shall be the duty of the department to approve all applications, made in proper form, which contemplate the application of water to a beneficial use: provided, that the department may deny any such application, or may partially approve and grant permit for a lesser quantity of water than applied for, or may grant permit upon conditions as provided in the preceding section.

The approval of an application shall be indorsed thereon, and a record made of such indorsement in the department of water resources. The application so indorsed shall constitute a permit, and a copy thereof shall be returned to the applicant, and he shall be authorized, on receipt thereof, to proceed with the construction of the necessary works for the diversion of such water, and to take all steps required to apply the water to a beneficial use and perfect the proposed appropriation. In its indorsement of approval on any application the department shall require that actual construction work and application of the water to full beneficial use shall be complete within a period of five (5) years from the date of such approval, but may limit the application to a less period than is named in the application, and such indorsement shall give the date when beneficial application of the water to be diverted by such works shall be made. Sixty (60) days before the date set for the completion of the appropriation of water under any permit, the department shall forward a notice to the applicant by certified mail at his address of record of the date for such completion, which said notice shall advise the applicant of the necessity of submitting an affidavit of completion or a request for an extension of time on or before said date; Provided that:

1. In cases where the applicant is prevented from proceeding with his work by his failure to obtain necessary consent or final approval or rejection from the federal government because of the pendency of an application for right of way or other matter within the jurisdiction of the United States, or by litigation of any nature which might bring his title to said water in question, the department of water resources upon proper showing of the existence of any such condition, and being convinced that said applicant is proceeding diligently and in good faith, shall extend the time so that the amount of time lost by such delays shall be added to the time given in the original permit for each and every action required.

2. The time for completion of works and application of the water to full beneficial use under any permit involving the ~~construction-of-a-reservoir-of-more-than-two-hundred-thousand-(200,000)-acre-feet-capacity-or-for-the--appro-~~

priation--of--water-to-be-impounded-in-such-reservoir-of-more-than-two-hundred thousand-(200,000)-acre-feet-capacity,-or-a diversion of more than twenty-five thousand (25,000) acre feet in one (1) irrigation season for a project of no less than five thousand (5,000) acres, may upon application to the director of the department of water resources supported by a showing that additional time is needed on account of the time required for organizing, financing and constructing works of such large size, be extended by the director of the department of water resources for an additional period of seven (7) years, but not to exceed twelve (12) years in all from the date of permit: Provided, that no such extension shall be granted unless the applicant for such extension shall show that there has been actually expended toward the construction of said reservoir--or diversion (including expenditures for the purchase of rights of way and property in connection therewith) at least one hundred thousand dollars ($100,000).

3. The time for completion of works and application of the water to full beneficial use under any permit involving the construction of a reservoir of more than ten thousand (10,000) acre feet capacity or for the appropriation of water to be impounded in such reservoir of more than ten thousand (10,000) acre feet capacity, may be extended by the director of the department of water resources upon application to the director if the permittee establishes that the permittee has exercised reasonable diligence and that good cause exists for the requested extension.

4. In connection with permits held by the United States, or the Idaho water resource board, whether acquired as the original applicant, by assignment or otherwise, the director of the department of water resources may extend the time for completion of the works and application of the water to full beneficial use for such additional period or periods of time as he may deem necessary upon application supported by a showing that such additional time is required by reason of the status of plans, authorization, construction fund appropriations, construction, or any arrangements which are found to be requisite to completion of the construction of such works.

45. In all other situations not governed by these provisions the department may grant one (1) extension of time, not exceeding five (5) years beyond the date originally set for completion of works and application of the water to full beneficial use, upon request for extension received on or before the date set for completion, provided good cause appears therefor.

Any applicant feeling himself aggrieved by the indorsement made by the department of water resources upon his application may request a hearing before the director in accordance with section 42-1701A(3), Idaho Code, for the purpose of contesting the indorsement and may seek judicial review pursuant to section 42-1701A(4), Idaho Code, of any final decision of the director following the hearing.

Every holder of a permit which shall be issued under the terms and conditions of an application filed hereafter appropriating twenty-five (25) cubic feet or less per second must, within one (1) year from the date upon which said permit issues from the office of the department of water resources, commence the excavation or construction of the works by which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted through no fault of the holder of such permit by circumstances, over which he has no control.

~~The--director--shall,--prior--to--July--1,-1982,-notify-holders-of-permits existing-on-the-effective-date-of-the-act--of--the--provisions--of--this--act. Notice--shall--be--by-mail-to-the-permit-holder's-last-known-address. Existing permit-holders-shall-have-one-(1)-year-from-the-date-of-mailing--to--meet--the provisions-of-this-section.~~

The holder of any permit who shall fail to comply with the provisions of this section within the time or times specified shall be deemed to have abandoned all rights under his permit.

SECTION 4. That Section 42-221, Idaho Code, be, and the same is hereby amended to read as follows:

42-221. FEES OF DEPARTMENT. The department of water resources shall collect the following fees which shall constitute a fund to pay for legal advertising, the publication of public notices and for investigations required of the department in connection with the issuance of permits and licenses as provided in this chapter:

A. For filing an application for a permit to appropriate the public waters of this state:

1. For a quantity of 0.2 c.f.s. or less or for a storage volume of 20 acre feet or less $30.00

2. For a quantity greater than 0.2 c.f.s. but not exceeding 1.0 c.f.s. or for a storage volume greater than 20 acre feet but not exceeding 100 acre feet $45.00

3. For a quantity greater than 1.0 c.f.s. but not exceeding 20 c.f.s., or for a storage volume greater than 100 acre feet but not exceeding 2,000 acre feet $45.00
plus $20.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 1.0 c.f.s. or 100 acre feet.

4. For a quantity greater than 20.0 c.f.s. but not exceeding 100 c.f.s. or for a storage volume greater than 2,000 acre feet but not exceeding 10,000 acre feet $425.00
plus $10.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 20.0 c.f.s. or 2,000 acre feet.

5. For a quantity greater than 100.0 c.f.s. but not exceeding 500.0 c.f.s., or for a storage volume greater than 10,000 acre feet but not exceeding 50,000 acre feet $1,225.00
plus $5.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 100 c.f.s. or 10,000 acre feet.

6. For a quantity greater than 500 c.f.s., or for a storage volume greater than 50,000 acre feet $3,225.00
plus $1.00 for each additional 1.0 c.f.s. or part thereof or 100 acre feet or part thereof over the first 500.0 c.f.s. or 50,000 acre feet.

B. For filing application for change of point of diversion, place, period, or nature of use of water of established rights; ~~for--exchange--of water~~; or for an extension of time within which to resume the use of water under a vested right:

1. For a quantity of 0.2 c.f.s. or less or for a storage volume of 20 acre feet or less $30.00

2. For all other amounts $50.00

C. For filing application for amendment of permit $20.00

D. For filing claim to use right under section 42-243, Idaho Code $30.00

E. For filing a late claim to use a right under section 42-243, Idaho Code, where the date filed with the department of water resources, or if mailed to the department of water resources the postmark is:

1. After June 30, 1983, but not later than June 30, 1984.....$100.00

2. After June 30, 1984, but not later than June 30, 1988.....$200.00

F. For readvertising application for permit, change, exchange, or extension to resume use $20.00

G. For certification, each document $1.00

H. For making photo copies of office records, maps and documents for public use .... A reasonable charge as determined by the department.

I. For filing request for extension of time within which to submit proof of beneficial use on a water right permit $15.00

J. For tasks requiring in excess of one (1) hour research or for computerized data provided for public use .... A reasonable charge as determined by the department.

K. For receipt of all notices of application within a designated area, a reasonable annual charge as determined by the department.

All fees received by the department of water resources under the provisions of this chapter shall be transmitted to the state treasurer for deposit in the water administration account.

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

42-222. CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR NATURE OF USE OF WATER UNDER ESTABLISHED RIGHTS -- FORFEITURE AND EXTENSION -- APPEALS. (1) Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change. Such application shall be upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be changed and the changes which are proposed, and shall be accompanied by the statutory filing fee as in this chapter provided. Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required by section 42-108, Idaho Code, and if otherwise proper to cause provide notice of the proposed change ~~to be published once a week for two (2) consecutive weeks in a newspaper published and of general circulation within the county where the water is diverted, if there is such paper, otherwise in a newspaper of general circulation within the county~~ in the same manner as applications under section 42-203A, Idaho Code. Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the receipt of any protest it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon. He shall also advise the watermaster of the district in which such water is used of the proposed change and the watermaster shall notify the director of the department of water resources of his recommendation on the application, and the director of the department of water resources shall not finally determine the action on the application for change until he has received from such watermaster his recommendation thereof, which action of the watermaster shall be received and considered as other evidence.

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 in the local public interest as defined in section 42-203, Idaho Code; except 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 director shall not approve~~

~~such a change in nature of use of a water right if a change has previously been allowed except where the change is back to the original use.~~ 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. Provided, further, that upon proper showing before the director of the department of water resources of good and sufficient reason for nonapplication to beneficial use of such water for such term of five (5) years, the director of the department of water resources is hereby authorized to grant an extension of time extending the time for forfeiture of title for nonuse thereof, to such waters for a period of not to exceed five (5) additional years. Application for an extension shall be made before the end of the five (5) year period upon forms to be furnished by the department of water resources and shall fully describe the right on which an extension of time to resume the use is requested and the reasons for such nonuse and shall be accompanied by the statutory filing fee. Upon the receipt of such application it shall be the duty of the director of the department of water resources to examine the same and to ~~cause notice to be published once a week for two (2) consecutive weeks in a newspaper published and of general circulation within the county where the water has been diverted if there is such a paper; otherwise in a newspaper of general circulation within the county~~ provide notice of the application for an extension in the same manner as applications under section 42-203A, Idaho Code. The notice shall fully describe the right, the extension for which is requested and the reason for such nonuse and shall state that any person desiring to object to the requested extension may submit a protest to the director of the department of water resources within ten (10) days of the last date of publication. Upon receipt of a protest it shall be the duty of the director of the department of water resources to investigate and conduct hearing thereon as in this chapter provided. The director of the department of water resources shall find from the evidence presented in any hearing, or from information available to the department, the reasons for such nonuse of water and where it appears to the satisfaction of the director of the department of water resources that other rights will not be impaired by granting an extension of time within which to resume the use of the water and good cause appearing for such nonuse, he may grant one (1) extension of five (5) years within which to resume such use. In his approval of the application for an extension of time under this section the director of the department of water resources shall set the date when the use of water is to be resumed. Sixty (60) days before such date the director of the department of water resources shall forward to the applicant at his address of record a notice by certified mail setting forth the date on which the use of water is to be resumed and a form for reporting the resumption of the use of the water right.

If the use of the water has not been resumed and report thereon made on or before the date set for resumption of use such right shall revert to the state and again be subject to appropriation, as provided in this section. In the event the director of the department of water resources determines that a proposed extension of time within which to resume use of a water right shall not be approved as provided in this section he shall deny same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter provided.

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

SECTION 6. That Sections 42-240 and 42-311, Idaho Code, be, and the same are hereby repealed.

SECTION 7. That Chapter 3, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-311, Idaho Code, and to read as follows:

42-311. CANCELLATION OF PERMIT -- GROUNDS -- HEARING -- PERMITTEE DEFINED. (1) If the director of the department of water resources finds, on the basis of available information at any time after a permit is issued but prior to license, that the permittee has wilfully and intentionally failed to comply with any of the conditions in the permit, then the director of the department of water resources may issue (a) an order to show cause before the director of the department or the director's designee on or before a date therein set, which shall be not less than thirty (30) days from the date of service, why the director of the department should not cancel said permit and declare the water subject to appropriation; or (b) an order directing the permittee to cease and desist the activity or activities alleged to be in violation of the conditions of the permit. A cease and desist order may direct compliance with the permit forthwith or may provide for a time schedule to bring the permittee into compliance with the conditions of the permit.

(2) Any order to show cause or order to cease and desist shall contain a statement of findings of fact and of conclusions of law that provide a factual and legal basis for the order of the director of the department of water resources.

(3) The director of the department of water resources shall serve forthwith, in accordance with the rules for service of a summons and complaint in the Idaho rules of civil procedure, a certified copy of any such order on the permittee.

(4) The permittee shall have a right to an administrative hearing before the department and to judicial review, all as provided in section 42-1701A, Idaho Code.

(5) The term "permittee," as used in this chapter, includes the heirs, successors, or assigns of the person to whom the department issued a water right permit.

SECTION 8. That Chapter 3, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of NEW SECTIONS, to be known and designated as Sections 42-350, 42-351 and 42-352, Idaho Code, and to read as follows:

42-350. REVOCATION OF LICENSE -- GROUNDS -- HEARING -- LICENSEE DEFINED. (1) If the director of the department of water resources finds, on the basis of available information at any time after a license is issued, that the licensee has ceased to put the water to a beneficial use for a period of five (5) continuous years or that the licensee has wilfully and intentionally failed to comply with any of the conditions in the license, then the director of the department of water resources may issue (a) an order to show cause before the director of the department or the director's designee on or before a date therein set, which shall be not less than thirty (30) days from the date of service, why the director of the department should not revoke said license and declare the water subject to appropriation; or (b) an order directing the licensee to cease and desist the activity or activities alleged to be in violation of the conditions of the license. A cease and desist order may direct compliance with the license forthwith or may provide for a time schedule to bring the licensee into compliance with the conditions of the license.

(2) Any order to show cause or order to cease and desist shall contain a statement of findings of fact and of conclusions of law that provide a factual and legal basis for the order of the director of the department of water resources.

(3) The director of the department of water resources shall serve forthwith, in accordance with the rules for service of a summons and complaint in the Idaho rules of civil procedure, a certified copy of any such order on the licensee.

(4) The licensee shall have a right to an administrative hearing before the department and to judicial review, all as provided in section 42-1701A, Idaho Code.

(5) The term "licensee," as used in this chapter, includes the heirs, successors, or assigns of the person to whom the department issued a water right license.

42-351. ILLEGAL DIVERSION OR USE OF WATER -- CEASE AND DESIST ORDERS. (1) If the director of the department of water resources finds, on the basis of available information, that a person is diverting water from a natural watercourse or from a ground water source without having obtained a valid water right to do so or is applying water not in conformance with the conditions of a valid water right, then the director of the department of water resources may issue an order directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or of any existing water right. A cease and desist order may direct compliance with applicable law and with any existing water right or may provide a time schedule to bring the person's actions into compliance with applicable law and with any existing water right.

(2) Any order to cease and desist shall contain a statement of findings of fact and of conclusions of law that provide a factual and legal basis for the order or the director of the department of water resources.

(3) The director of the department of water resources shall serve forthwith, in accordance with the rules for service of a summons and complaint in the Idaho rules of civil procedure, a certified copy of any such order on the person the subject of the cease and desist order.

(4) The person who is the subject of the cease and desist order shall have a right to an administrative hearing before the department and to judicial review, all as provided in section 42-1701A, Idaho Code.

42-352. CIVIL PENALTIES. (1) Any person who wilfully violates any cease and desist order issued under chapter 3, title 42, Idaho Code, after the same has been served on that person shall be subject to a civil penalty not to exceed one hundred dollars ($100) for each day following service of the cease and desist order in which the illegal diversion or use of water occurs. The director of the department of water resources shall have the authority to file an action in the appropriate district court to impose, assess and recover said civil penalties.

(2) All civil penalties collected by the director of the department of water resources under this section shall be deposited in the state water rights enforcement account established by section 42-1778, Idaho Code.

SECTION 9. That Chapter 17, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-1778, Idaho Code, and to read as follows:

42-1778. WATER RIGHTS ENFORCEMENT ACCOUNT. (1) The water rights enforcement account is hereby created and established in the agency asset fund.

(2) All moneys in the water rights enforcement account are reserved, set aside, appropriated and made available until expended as may be directed by the director of the department of water resources in carrying out a water rights enforcement program.

SECTION 10. That Section 42-1805, Idaho Code, be, and the same is hereby amended to read as follows:

42-1805. ADDITIONAL DUTIES. In addition to other duties prescribed by law, the director of the department of water resources shall have the following powers and duties:

(1) To represent the state in all matters pertaining to interstate and international water rights affecting Idaho water resources; and to cooperate with all agencies, now existing or hereafter to be formed, within the state or within other jurisdictions, in matters affecting the development of the water resources of this state.

(2) To prepare a present and continuing inventory of the water resources of this state, ascertain means and methods of conserving and augmenting these and determine as accurately as possible the most effective means by which these water resources may be applied for the benefit of the people of this state.

(3) To conduct surveys, tests, investigations, research, examinations, studies, and estimates of cost relating to availability of unappropriated water, effective use of existing supply, conservation, storage, distribution and use of water.

(4) To prepare and compile information and data obtained and to make the same available to interested individuals or agencies.

(5) To cooperate with and coordinate activities with the administrator of the division of environmental protection of the department of health and welfare as such activities relate to the functions of either or both departments concerning water quality. Such cooperation and coordination shall specifically require that:

(a) The director meet at least quarterly with the administrator and his

staff to discuss water quality programs. A copy of the minutes of such meeting shall be transmitted to the governor.

(b) The director transmit to the administrator, reports and information prepared by him pertaining to water quality programs, and proposed rules and regulations pertaining to water quality programs.

(c) The director shall make available to the administrator and the administrator shall make available to the director all notices of hearings relating to the promulgation of rules and regulations relating to water quality, waste discharge permits, and stream channel alteration, as such directly affect water quality, and notices of any other hearings and meetings which relate to water quality.

(6) To perform administrative duties and such other functions as the board may from time to time assign to the director to enable the board to carry out its powers and duties.

(7) After notice, to suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of minimum flow provisions of the state water plan.

(8) To promulgate, adopt, modify, repeal and enforce rules and regulations implementing or effectuating the powers and duties of the department.

(9) To seek a preliminary or permanent injunction, or both, or a temporary restraining order restraining any person from violating or attempting to violate (a) those provisions of law relating to all aspects of the appropriation of water, distribution of water, headgates and measuring devices; or (b) the administrative or judicial orders entered in accordance with the provisions of law.

IN THE SENATE
SENATE AMENDMENTS TO H.B. NO. 369

AMENDMENTS TO SECTION 8

On page 9 of the printed bill, following line 30, insert:

"(5) If the director of the department of water resources has issued an order to show cause why the director should not revoke a license, the licensee may, within twenty-one (21) days from the date of service of the order, notify the director in writing of the intent of the licensee to waive the right to an administrative hearing before the department and to file a complaint in the district court for a determination of the validity of the license. The complaint shall name the director of the department of water resources as a defendant and shall be filed either in the county where the point of diversion or the place of use under the license is located, or in the county where the director issued the order to show cause. The complaint shall be filed within forty-two (42) days of the date of service of the order to show cause by the director.".

On page 9 of the printed bill, in line 31, delete: "(5)" and insert: "(6)".

CORRECTION TO TITLE

On page 1 of the printed bill, in line 28, delete: "AND JUDICIAL REVIEW" and insert: ", JUDICIAL REVIEW OR RIGHT OF ACTION IN DISTRICT COURT".

1986

STATEMENT OF PURPOSE

RS 11737C1

Amends Title 42, Idaho Code, in several instances providing for better administration, more consideration of permittee making application for water rights, provides for legislative overview, allows for the Director of the Department to permit temporary change in the period of use for less than three years. Provides for an extension of time by the Director to an applicant for the development of a reservoir site and the completion of the work thereof if the applicant has exhibited reasonable deligence in the development of the project.

Provides the Department may make a reasonable charge for Notice of Application to be presented to interested parties. It stipulates that the transfer of a storage right for irrigation does not constitute an enlargement of that original right.

Provides for the cancellation of a permit and for hearings for those individuals who are affected. Allows the Department to issue Cease and Desist orders and provides for civil penalities. Sets up a water right enforcement account to be used by the Director for administration.

FISCAL NOTE

No fiscal impact.

STATEMENT OF PURPOSE/FISCAL NOTE H 369

1986 FINAL DAILY DATA

3/3 Pres signed
3/4 To Governor
3/4 Governor signed
Session Law Chapter 22
Effective: 7-1-86

H367..... By State Affairs
EMPLOYMENT SECURITY LAW - Amends existing law to establish a new rate class of deficit employers under the Employment Security Law and to also establish the contribution rates for such employers.

1/9 House intro - 1st rdg - to printing
1/10 Rpt prt - to St Aff
1/30 Rpt out - rec d/p - to 2nd rdg
1/31 2nd rdg - to 3rd rdg
2/3 3rd rdg - PASSED - 62-0-2
NAYS -- none.
Absent and excused -- Adams, Chadband.
Title apvd - to Senate
2/4 Senate intro - 1st rdg - to Comm/Lab
2/21 Rpt out - rec d/p - to 2nd rdg
2/24 2nd rdg - to 3rd rdg
2/26 3rd rdg - PASSED - 40-0-2
NAYS -- none.
Absent and excused -- Beitelspacher, McLaughlin.
Title apvd - to House
2/27 To enrol
2/28 Rpt enrol - Sp signed
3/3 Pres signed
3/4 To Governor
3/4 Governor signed
Session Law Chapter 23
Effective: 7-1-86

H368..... By Loveland, et al
ECONOMIC RECOVERY ACT - Amends, repeals and adds to existing law to enact the Idaho Economic Recovery Act of 1986, to raise the sales and use tax to 5%, to allow cities and counties to impose a local sales and use tax, to add state income tax brackets, to provide for the collection of corporate and self-employment income taxes quarterly, to lift the cap on property tax increases, and to appropriate moneys for education, the Permanent Building Account, the Revenue Sharing Account, the Budget Reserve Account, the State Board of Examiners for personnel costs, and the State Tax Commission.

1/10 House intro - 1st rdg - to printing
1/13 Rpt prt - to Rev/Tax

H369aaS..... By Resources & Conservation
WATER RIGHTS - Amends, repeals and adds to existing law to establish a system for the marketing of water rights in the state.

1/10 House intro - 1st rdg - to printing
1/13 Rpt prt - to Res/Con
1/22 Rpt out - rec d/p - to 2nd rdg
1/23 2nd rdg - to 3rd rdg
1/27 3rd rdg - PASSED - 61-0-2
NAYS -- none.
Absent and excused -- Kellogg, McDermott.
Title apvd - to Senate
1/28 Senate intro - 1st rdg - to Res/Env
3/18 Rpt out - to 14th Ord
3/21 Rpt out amen - to 1st rdg as amen
3/22 1st rdg - to 2nd rdg as amen
3/24 2nd rdg - to 3rd rdg as amen
3/24 3rd rdg as amen - PASSED - 33-8-1
NAYS -- Batt, Beck, Bray, Calabretta, Fairchild, Kiebert, Smyser, Thorne.
Absent and excused -- Watkins.

--CONTINUED--

Title apvd - to House
3/25 House concur in Senate amens - to engros
3/25 Rpt engros - 1st rdg - to 2nd rdg as amen
3/26 2nd rdg - to 3rd rdg as amen
3/27 3rd rdg as amen - PASSED - 60-0-4
NAYS -- none.
Absent and excused -- Bateman, Crane, Haagenson, Hansen.
Title apvd - to enrol
3/27 Rpt enrol - Sp signed - Pres signed
4/1 To Governor
4/4 Governor signed
Session Law Chapter 313
Effective: 7-1-86

H370..... By Revenue & Taxation
BEER - WINE - Repeals existing law to eliminate conflicting provisions in law relating to penalties and interest on beer and wine taxes.

1/10 House intro - 1st rdg - to printing
1/14 Rpt prt - to Rev/Tax
1/20 Rpt out - rec d/p - to 2nd rdg
1/21 2nd rdg - to 3rd rdg
1/22 3rd rdg - PASSED - 70-0-5
NAYS -- none.
Absent and excused -- Forrey, Johnson (6), Jones (23), Lucas, McDermott.
Title apvd - to Senate
1/23 Senate intro - 1st rdg - to Loc Gov
3/13 Rpt out - rec d/p - to 2nd rdg
3/14 2nd rdg - to 3rd rdg
3/24 3rd rdg - PASSED - 37-3-2
NAYS -- Risch, Smyser, Staker.
Absent and excused -- Chapman, Watkins.
Title apvd - to House
3/25 To enrol - rpt enrol - Sp signed
3/26 Pres signed - to Governor
4/1 Governor signed
Session Law Chapter 176
Effective: 7-1-86

H371..... By Revenue & Taxation
INCOME TAX, STATE - CORPORATIONS - Amends existing law to exempt nonprofit corporations from the minimum corporate state income tax.

1/10 House intro - 1st rdg - to printing
1/13 Rpt prt - to Rev/Tax
1/27 Rpt out - rec d/p - to 2nd rdg
1/28 2nd rdg - to 3rd rdg
1/29 3rd rdg - PASSED - 72-9-2
NAYS -- Bayer, Black, Hill, Infanger, Johnson (6), Jones (29), McCann, McDermott, Stoker.
Absent and excused -- Givens, Hawkins.
Title apvd - to Senate
1/30 Senate intro - 1st rdg - to Loc Gov
2/20 Rpt out - rec d/p - to 2nd rdg
2/21 2nd rdg - to 3rd rdg
2/25 3rd rdg - PASSED - 34-0-8
NAYS -- none.
Absent and excused -- Anderson, Beck, Calabretta, Crapo, Horsch, Noh, Rydalch, Tominaga.
Title apvd - to House
2/26 To enrol
2/27 Rpt enrol - Sp signed - Pres signed
2/28 To Governor
2/28 Governor signed
Session Law Chapter 18
Effective: 1-1-86

H372aa..... By Education
ELECTIONS - SCHOOL - Amends existing law to require that a

--CONTINUED--

(House)

MINUTES

RESOURCES AND CONSERVATION COMMITTEE

January 9, 1986

TIME: 1:40 p.m.

PLACE: Room 412 - Statehouse

PRESENT: Chairman Chatburn, Representatives Edwards, Bateman, Crozier, Duffin, Echohawk, Hansen, Hawkins, Jones, Linford, Little, Stanger, Stoicheff Stucki, Sutton and Wood

EXCUSED: Representatives Haagenson and A. Johnson

ABSENT: Representatives Brackett and Winchester

GUESTS: Mr. Kenneth Dunn, Director , Department of Water Resources and Mr. Dick Gardner, Department of Financial Management.

Chairman Chatburn called the meeting to order.

MOTION: Representative Stucki moved and Representative Sutton seconded that the Minutes of January 7, 1986, be approved.

MOTION CARRIED.

AMENDS TITLE 42, IDAHO CODE, IN SEVERAL INSTANCES PROVIDING FOR BETTER ADMINISTRATION, MORE CONSIDERATION OF PERMITTEE MAKING APPLICATION FOR WATER RIGHTS, PROVIDES FOR LEGISLATIVE OVERVIEW, ALLOWS FOR THE DIRECTOR OF THE DEPARTMENT TO PERMIT TEMPORARY CHANGE IN THE PERIOD OF USE FOR LESS THAN THREE YEARS. PROVIDES FOR AN EXTENSION OF TIME BY THE DIRECTOR TO AN APPLICANT FOR THE DEVELOPMENT OF A RESERVOIR SITE AND THE COMPLETION OF THE WORK THEREOF IF THE APPLICANT HAS EXHIBITED REASONABLE DELIGENCE IN THE DEVELOPMENT OF THE PROJECT.

PROVIDES THE DEPARTMENT MAY MAKE A REASONABLE CHARGE FOR NOTICE OF APPLICATION TO BE PRESENTED TO INTERESTED PARTIES. IT STIPULATES THAT THE TRANSFER OF A STORAGE RIGHT FOR IRRIGATION DOES NOT CONSTITUTE AN ENLARGEMENT OF THAT ORIGINAL RIGHT.

PROVIDES FOR THE CANCELLATION OF A PERMIT AND FOR HEARINGS FOR THOSE INDIVIDUALS WHO ARE AFFECTED. ALLOWS THE DEPARTMENT TO ISSUE CEASE AND DESIST ORDERS AND PROVIDES FOR CIVIL PENALITIES. SETS UP A WATER RIGHT ENFORCEMENT ACCOUNT TO BE USED BY THE DIRECTOR FOR ADMINISTRATION.

Chairman Chatburn reminded the Committee that the legislation before them does not change the law as it currently stands relative to water marketing, rather it speaks specifically to administrative procedures.

Mr. Dunn and Mr. Gardner were introduced and asked to answer questions posed by the Committee prior to printing and circulation of the legislation. Discussion and clarification on the amendatory matter included:

Section 1

42-108. CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, NATURE OF USE -- APPLICATION OF ACT.
The authority given to the Department Director to issue temporary permits for a period of less than three years without legislative approval. Mr. Dunn explained that extensions to the three year period will be allowed but are not beneficial to the user.

Section 2.
42-201. WATER RIGHTS ACQUIRED UNDER CHAPTER -- ILLEGAL APPLICATION OF WATER. Mr. Stucki questioned the Chapter number being referred to in this title. Mr. Little referred to the Code Book for clarification of said title and reported to the Committee that the Code reads and is printed exactly as above. It is the Chairman's opinion that the word "this" is implied between the words "under" and "chapter".

Section 2 - Item 2.
The present law states that users must have a permit to appropriate water but it doesn't say it is against the law to appropriate water without the permit. This legislation makes it clear that no person shall divert water without having a permit to do so.

The constitutionally of this language was questioned by Representatives Little but Mr. Dunn explained to the Committee that the State Supreme Court has upheld the appropriation document as constitutional.

Section 3
42-204. EXAMINATION -- PERMIT -- COMMENCEMENT OF WORK -- EXTENSIONS -- APPEAL. - Item 3.
Allows for a person constructing a reservoir of more than 10,000 acre feet capacity, more time for complation of works. The old statute allows for 20,000 acre feet.

Section 3 - Item 5.
Strikes archaic language.

Section 4
42-221. FEES OF DEPARTMENT. Item K.
Allows the Director authorization to set fees annually to recover costs of notification of application within a designated area.

Secton 5
42-222. CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR NATURE OF USE OF WATER UNDER ESTABLISHED RIGHTS -- FORFEITURE AND EXTENSION --APPEALS.
Provides for consistancy of language to comply with Section 42-203A, Idaho Code.

Section 7
42-311. CANCELLATION OF PERMIT -- GROUNDS -- HEARING -- PERMITTEE DEFINED.
Mr. Dunn explained that this section provides for the method of cancellation of permit based on specific grounds and describes the procedure the Director must follow. It provides the method of removing from the files permits that people have not developed and gives the Director the authority to have people comply with the conditions set forth in the permit.

Section 8
42-350. REVOCATION OF LICENSE -- GROUNDS -- HEARING -- LICENSEE DEFINED.
Sets the procedure the Director will follow to revoke a license that has not been used. In response to Mrs. Wood's questions regarding leased water, Mr. Dunn responded that leased water constitutes a use. This legislation does not apply to owners who are leasing their water rights.

Mr. Sutton asked the difference between a "permit" and a "license". Mr. Dunn explained that a permit is issued by the Director to develop the water and a license is the confirmation that the water was put to use.

At this point of the presentation, Mrs. Stanger brought up water rights within an irrigation district and Mr. Dunn explained that these rights are classified as irrigation district rights and operate within a different set of circumstances than everyone else in the State. Irrigation districts describe specific boundaries and for the right to use the water on a specified number of acres within the district. Most irrigation districts have contracts with the Federal Government for storage and those contracts place a lien on that specific piece of property and, therefore, all parties within said boundary are charged. Mr. Dunn said there is a procedure under law which allows property owners to petition out of a district but it is expensive and time consuming and that some districts cooperate but that many do not.

Section 8
42-351. ILLEGAL DIVERSION OR USE OF WATER -- CEASE AND DESIST ORDERS.
Allows the Director the responsibility to stop any person from diverting water without having obtained a valid water right.

Section 9
42-1778. WATER RIGHTS ENFORCEMENT ACCOUNT.
Allows the Director to seek an injunction or temporary restraining order against persons violating the law. Mr. Linford asked about the timing of such injunction or restraining order. Mr. Dunn explained illegal diversion and the fact that people found doing so are informed of its illegality and that most file for water rights. In order to continue to operate for the season they must purchase storage water from the District. If they refuse to cooperate, the pump will be shut off. Full cooperation has always been reached with the Department according to Mr. Dunn.

At this point of the presentation, there being no further questions or discussion, the Chairman asked for a motion on the legislation before the Committee.

MOTION: Representative Stucki moved and Representative Edwards seconded that RS 11737C1 be introduced.

MOTION CARRIED.

The meeting was adjourned at 2:20 p.m.

J. Vard Chatburn
J. VARD CHATBURN, Chairman

Linda Hildeman
Linda Hildeman, Secretary

(House)

MINUTES

RESOURCES AND CONSERVATION COMMITTEE

January 21, 1986

TIME: 2 p.m.

PLACE: Room 412 - Statehouse

PRESENT: Chairman Chatburn, Representatives Bateman, Brackett, Duffin, Echohawk, Edwards, Haagenson, Hansen, Hawkins, A. Johnson, Jones, Linford, Little, Stanger, Stoicheff, Stucki, Winchester, Wood.

EXCUSED: Representative Crozier and Sutton.

GUESTS: Mr. Kenneth Dunn, Director, Department of Water Resources, Mr. Dick Gardner, Department of Financial Management, and Mr. Sharl Champan, Executive Director, Idaho Water Users Association, Inc.

Chairman Chatburn called the meeting to order.

MOTION: Representative Stucki moved and Representative Stanger seconded that the Minutes of January 17, be approved.

RS 12018: TO EXPEDITE CONSIDERATION OF WATER RIGHT FILINGS BY CLARIFYING THE LOCATION AND NATURE OF WATER CONSIDERED AS TRUST WATER SUBJECT TO THE PUBLIC INTEREST REVIEW CRITERIA AND BY LIMITING THE REVIEW OF UNDEVELOPED EXISTING PERMITS TO THE PUBLIC INTEREST CRITERIA FOR THOSE PERMITS SEEKING TO DEVELOP TRUST WATER.

Mr. Dunn explained to the Committee that this legislation will change the language that was adopted last year as far as the Swan Falls agreement to make clear exactly what the Legislature intended. It also allows the Director to review only those outstanding undeveloped permits that are going to appropriate trust water. Mr. Jones asked for the definition of trust water and Mr. Dunn replied it was that water which becomes available for appropriation as a result of an agreement reached between the State and a utility that has a water right to make available for appropriation.

MOTION: Mr. Hawkins moved and Mr. Jones seconded that RS 12018 be introduced.

MOTION CARRIED.

RS 12020: TO EXPEDITE WATER RIGHT LICENSING. HOLDERS OF EXISTING PERMITS TO APPROPRIATE WATER WOULD BE REQUIRED TO SUBMIT TO THE DEPARTMENT OF WATER RESOURCES THE INFORMATION NECESSARY FOR CONFIRMING THE DEVELOPMENT ACCOMPLISHED UNDER THE PERMIT TO ALLOW A LICENSE TO BE ISSUED. ENGINEERS AND GEOLOGISTS QUALIFIED TO MAKE THE FIELD EXAMINATIONS WOULD BE CERTIFIED BY THE DEPARTMENT. A BACK-LOG EXISTS OF FIELD EXAMINATIONS FOR PERMITS UPON WHICH PROOF OF BENEFICIAL USE HAS BEEN SUBMITTED. THIS REPRESENTS A FOUR YEAR DELAY IN ISSUING LICENSES.

Mr. Dunn told the Committee that this legislation will provide that field examinations for a water right would be done by a consultant hired by the owner of the permit. Currently the State does the exams and has a backlog of approximately 4,000. Mr. Dunn's Department is able to complete between 600 to 700 per year. Exemptions are made in the legislation for single-family, domestic and stock watering permits and the State will continue to do the small exams. Individuals qualified to complete exams would be certified by the Department and registered in the State.

MOTION: Representative Winchester moved and Mrs. Wood seconded that RS 12020 be returned to sponsor.

SUBSTITUTE MOTION: Representative Johnson moved and Mr. Hansen seconded that RS 12020 be introduced.

SUBSTITUTE MOTION CARRIED.

RS 12017C1: THE PURPOSE OF THIS LEGISLATION IS TO KEEP THE STATE'S WATER RIGHT RECORDS CURRENT AND CORRECT. HOLDERS OF WATER RIGHTS WOULD BE REQUIRED TO NOTIFY THE DEPARTMENT OF WATER RESOURCES OF CHANGES IN OWNERSHIP OF WATER RIGHTS AND CHANGES OF ADDRESS OF WATER RIGHTS OWNERS.

Mr. Dunn explained that this legislation was drafted in response to comments received from legislators last year. Presently there is no requirement for people to notify the Department of a change of address or ownership changes. A fee up to $25.00 would be required when filing a change. Both Mrs. Stanger and Mr. Hansen told the Committee that their counties are in the process of re-numbering and all residents would be issued a new address. They asked if, in these cases, it would be necessary to file a change of address and Mr. Dunn applied in the affirmative.

Representative Johnson moved and Mrs. Edwards seconded that RS 12017C1 be returned to sponsor.

MOTION CARRIED.

H369: PROVIDES FOR BETTER ADMINISTRATION, MORE CONSIDERATION OF PERMITTEE MAKING APPLICATION FOR WATER RIGHTS, PROVIDES FOR LEGISLATIVE OVERVIEW, ALLOWS FOR THE DIRECTOR OF THE DEPARTMENT TO PERMIT TEMPORARY CHANGE IN THE PERIOD OF USE FOR LESS THAN THREE YEARS. PROVIDES FOR AN EXTENSION OF TIME BY THE DIRECTOR TO AN APPLICANT FOR THE DEVELOPMENT OF A RESERVOIR SITE AND THE COMPLETION OF THE WORK THEREOF IF THE APPLICANT HAS EXHIBITED REASONABLE DELIGENCE IN THE DEVELOPMENT OF THE PROJECT.

Mr. Gardner told the Committee this bill will give the Director the tools to better enforce the water rights we now have. Long term leasing language is clarified and Mr. Gardner encourages a "Do Pass" recommendation.

Mr. Dunn reviewed the changes in the bill as previously covered in the January 9, 1986 minutes.

MOTION: Representative Johnson moved and Mr. Stucki moved that H369 be sent to the floor with a DO PASS recommendation.

MOTION CARRIED. Representative Johnson will sponsor.

The meeting adjourned at 4:10 p.m.

J. Vard Chatburn

J. Vard Chatburn, Chairman

Linda Hildeman

Linda Hildeman, Secretary

1986 House Journal

SEIZURE, AND TO PROVIDE FOR DESTRUCTION OF DRUG AND NONDRUG EVIDENCE ON-SITE; AMENDING CHAPTER 27, TITLE 37, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 37-2744A, IDAHO CODE, TO PROVIDE AUTHORITY TO THE DEPARTMENT OF LAW ENFORCEMENT TO RECEIVE DONATIONS FROM FEDERAL ENFORCEMENT AGENCIES AND OTHER PERSONS OR ENTITIES FOR DEPOSIT INTO THE DRUG ENFORCEMENT DONATION ACCOUNT IF THE ACCEPTANCE OF THE DONATIONS IS LAWFUL; AND PROVIDING SEVERABILITY.

HOUSE BILL NO. 489
BY REVENUE AND TAXATION COMMITTEE
AN ACT

RELATING TO SNOWMOBILES AND ALL TERRAIN VEHICLES; AMENDING SECTION 49-2603, IDAHO CODE, TO DEFINE ALL TERRAIN VEHICLES; AMENDING SECTION 49-2605, IDAHO CODE, TO INCREASE CERTAIN FEES REGARDING REGISTRATION OF SNOWMOBILES, TO STRIKE LANGUAGE RELATING TO RENEWAL FOR A CERTIFICATE OF NUMBER, AND TO PROVIDE THAT THE ANNUAL FEES FOR CERTIFICATES OF NUMBER ISSUED TO DEALERS SHALL BE TEN DOLLARS; AMENDING SECTION 49-2608, IDAHO CODE, TO PROVIDE THAT AUTHORIZED AGENTS AND COUNTY ASSESSORS SHALL BE ENTITLED TO CHARGE AN ADDITIONAL ONE DOLLAR HANDLING FEE PER REGISTRATION FOR THE DISTRIBUTION OF CERTIFICATES OF NUMBER; AMENDING SECTION 49-2613, IDAHO CODE, TO INCREASE THE AMOUNT OF ESTIMATED PROPERTY DAMAGE INCURRED IN A SNOWMOBILE ACCIDENT BEFORE A PROPER LAW ENFORCEMENT AGENCY MUST BE NOTIFIED REGARDING THE FACTS OF THE ACCIDENT; AND AMENDING CHAPTER 26, TITLE 49, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 49-2616, IDAHO CODE, TO PROVIDE THAT ANY ALL TERRAIN VEHICLES OPERATING ON GROOMED SNOWMOBILE TRAILS DURING THE WINTER SNOWMOBILING SEASON SHALL BE REGISTERED, AND TO PROVIDE THAT COUNTIES SHALL HAVE THE OPTION TO ALLOW ALL TERRAIN VEHICLES, IF REGISTERED, TO USE SNOWMOBILE TRAILS IN THE COUNTY.

HOUSE BILL NO. 490
BY REVENUE AND TAXATION COMMITTEE
AN ACT

RELATING TO INCOME TAXES; AMENDING SECTION 63-3024, IDAHO CODE, TO PROVIDE A SCHEDULE OF RATES AND BRACKETS FOR INCOME TAX ON INDIVIDUALS, TRUSTS AND ESTATES; DECLARING AN EMERGENCY AND PROVIDING FOR RETROACTIVE APPLICATION.

H 485, H 486, H 487, H 488, H 489 and **H 490** were introduced, read the first time by title and referred to the Judiciary, Rules and Administration Committee for printing.

There being no objection, the House advanced to the Tenth Order of Business.

Second Reading of Bills and Joint Resolutions

H 403, by Business Committee, was read the second time by title and filed for third reading.

H 420, by State Affairs Committee, was read the second time by title and filed for third reading.

Third Reading of Bills and Joint Resolutions

H 369 was read the third time at length, section by section, and placed before the House for final consideration.

The question being, "Shall **H 369** pass?"

Roll call resulted as follows:
AYES — Adams, Allan, Antone, Bateman, Bayer, Bengson, Black, Boyd, Brackett, Braun, Brimhall, Brocksome, Brown, Burt, Callen, Chadband, Chatburn, Childers, Crane, Crow, Davis, Duffin, EchoHawk, Edwards, Field, Forrey, Fry, Geddes, Givens, Gurnsey, Haagenson, Hale, Hansen, Harris, Hawkins, Hay, Herndon, Hill, Hoagland, Hooper, Horvath, Infanger, Johnson (27), Johnson (6), Jones (23), Jones (29), Judd, Keeton, Kennevick, Linford, Little, Loveland, Lucas, Martens, McCann, Meline, Montgomery, Neibaur, Parks, Reid, Reynolds, Robbins, Scates, Schaefer, Scott, Sessions, Simpson, Slater, Smock, Sorensen, Speck, Stanger, Stoicheff, Stoker, Strasser, Stucki, Sutton, Tucker, Winchester, Wood, Mr. Speaker. Total -- 81.
NAYS — none.
Absent and excused -- Kellogg, McDermott. Total -- 2.
Total -- 83.

Whereupon the Speaker declared **H 369** passed the House. Title was approved and the bill ordered transmitted to the Senate.

Mr. Chatburn asked unanimous consent that the following letter of legislative intent be printed in the House Journal and that the legislative intent is expressed as the decision of the House of Representatives. There being no objection, it was so ordered.

LETTER OF INTENT
H 369

It is the intent of the Legislature that the historical use of the flood waters of any stream for irrigation is a beneficial use and may not be denied, provided no other water rights are injured thereby.

It is the intent that the five-year forfeiture statute for non-use of a water right shall not apply in the event the water is not available or the season is such that the water cannot be applied beneficially.

H 377 was read the third time at length, section by section, and placed before the House for final consideration.

The question being, "Shall **H 377** pass?"

Roll call resulted as follows:
AYES — Adams, Allan, Antone, Bateman, Bayer, Bengson, Black, Boyd, Brackett, Braun, Brimhall, Brocksome, Brown, Burt, Callen, Chadband, Chatburn, Childers, Crane, Crow, Davis, Duffin, EchoHawk, Edwards, Field, Forrey, Fry, Geddes, Givens, Gurnsey, Haagenson, Hale, Hansen, Harris, Hawkins, Hay, Herndon, Hill, Hoagland, Hooper, Horvath, Infanger, Johnson (27), Johnson (6), Jones (23), Jones (29), Judd, Keeton, Kennevick, Linford, Little, Loveland, Lucas, Martens, McCann, Meline, Montgomery, Neibaur, Parks, Reid, Reynolds, Robbins, Scates, Schaefer, Scott, Sessions, Simpson, Slater, Smock, Sorensen, Speck, Stanger, Stoicheff, Stoker, Strasser, Stucki, Sutton, Tucker, Wood, Mr. Speaker. Total — 80.
NAYS — Winchester. Total — 1.
Absent and excused -- Kellogg, McDermott. Total — 2.
Total -- 83.

Whereupon the Speaker declared **H 377** passed the House. Title was approved and the bill ordered transmitted to the Senate.

(SENATE)
MINUTES

RESOURCES AND ENVIROMENT COMMITTEE

MARCH 12, 1986 Rm 433, 1:30 pm

PRESENT: All members of the committee were present.

Chairman Noh called the meeting to order.

MOTION: Senator Little moved and Senator Beitelspacher seconded the minutes be approved.

Chairman Noh called the Committee's attention to the latest letter in their file from the Bergs on the Coeur d'Alene property.

SB 1404 REQUIRE F&G COMMISSION TO SET ASIDE A CERTAIN NUMBER OF NONRESIDENT DEER AND ELK TAGS FOR LICENSED OUTFITTERS AND GUIDES

Senator Beitelspacher explained the legislation and presented an amendment to the bill which is basicly the context of the legislation. The amendment would enable the Commission to set aside 25% of the nonresident deer and elk tags to be sold on a first-come, first-served basis. These tags would be only for people who have entered into an agreement for that year to utilize the services of an outfitter who is licensed. This 25% is established after the F&G Commission has established the number of nonresident tags for the year. If there are some tags not sold by July 1, they will be sold to the general public. The Outfitters and Guides marketing season is later in the year and often by this time, the deer and elk tags have been sold out for the season.

Senator Ringert asked what would happen to a tag if the client of an outfitter backed out of his committment and is there getting to be "traffic" in these tags?

Ken Norrie, F&G, said in cases where a person does not use a tag, he still has to pay for them so no loss monetarily. The individual may turn the tag back to the F&G Department and designate someone to use the tag or the tag is offered for sale to the next one on the list. There really isn't a way to make sure they aren't sold again as there always seems to be a way to get around something. It is hoped the wording in the bill will prevent this from happening.

Senator Beitelspacher commented this problem has existed for sometime and whether this bill exists or not, it will not add to the problem we already have.

Ken Norrie, F&G, stated the sponsor had come to them and asked for their input on the legislation. He said they did have some question about how the individual would take care of the game once killed, but assume someone would be along with them to take care of the game.

MOTION: Senator Peavey moved and Senator Beitelspacher seconded the bill go out with a "do pass" recommendation. Motion carried.

Representative Winchester, sponsor in the House, briefly spoke to the bill and how it had come about.

A short discussion followed on just "who" could hunt. The bill stipulates F&G will have the latitude to decide this after a person is determined to be physically handicapped.

→ HB 369 ADMINISTRATION OF WATER RIGHTS

The legislation would provide for better administration, more consideration of permitee making application for water rights, provides for legislative overview, allows for the Director of the Department to permit temporary change in the period of use for less than three years. Also provisions for an extension of time by the Director to an applicant for the development of a reservoir site and the completion of the work thereof if the applicant has exhibited reasonable deligence in the development of the project. There are provisions for the Department to make a reasonable charge for Notice of Application to be presented to interested parties. It stipulates that the transfer of a storage right for irrigation does not constitute an enlargement of that original right. Provides for the cancellation of a permit and for hearings for those individuals who are affected. Allows the Department to issue Cease and Desist orders and provides for civil penalities. Sets up a water right enforcement account to be used by the Director for administration.

Ken Dunn, Director, Water Resources, went through the bill explaining the changes and additions. The bill is the result of an interim committee making changes to a bill that was before the House last year.

Senator Ringert asked unanimous consent this bill be held until Friday for further discussion due to the Committee's time being up for the day. HB 369 will be first on the agenda for Friday.

Laird Noh, Chairman

Bev Mullins
Bev Mullins, Secretary

(SENATE)
MINUTES

RESOURCES AND ENVIRONMENT COMMITTEE

MARCH 14, 1986 Rm 433, 1:30 pm

PRESENT: All members were present except Senator Beitelspacher

Chairman Noh called the meeting to order.

MOTION: Senator Little moved and Senator Budge seconded the minutes of the last meeting be approved. Motion carried.

HB 369 ADMINISTRATION OF WATER RIGHTS

Ken Dunn, Water Resources, briefly summarized the intent of the legislation, which was before the committee for the second time.

A short discussion took place on the right to use stored water for irrigation purposes. The question was asked if this provided for the sale of this water. Mr. Dunn said a person could sell the water or lease it. Whichever he desired to do, but probably most of this would be done on a lease basis.

Senator Crapo wanted to know what was to stop someone with money from coming in and buying storage rights and taking water out of agriculture? Mr. Dunn replied that would mean a change of use. In the legislation this has to have approval of the Department and it is hoped this will take take of that situation.

Senator Ringert asked what was the Department's reasons for the Section 8 of the legislation?

Mr. Dunn, said it provides for cancelling a license after five years of continuous non-use. The Walker case, which was before the Supreme Court, spoke to this issue. They said the right was there and it was the duty of the Director to take some action. This section sets up a very precise procedure for revoking a license. It makes sure the Director of the Department does things as set up by the statutes.

Senator Ringert said he did not recall all of the Walker case but did not believe it gave this power to the Director.

Chairman Noh asked Senator Crapo if the Interim Committee addressed this point. Senator Crapo said he shared Senator Ringert's concerns of the Director having this power. The committee did consider the matter and decided to keep this section in the bill, though it was not a unanimous decision.

Mr. Dunn believes since the Jenkins case, the Director can by forfeiture cancel a license and that is the way the Department has operated.

Senator Crapo commented the question seems to be, do we want the Department to adjudicate the question or have the court determine this?

Senator Ringert commented there does seem to be a difference in philosophies here on Section 8.

Mr. Dunn stated he did not see Section 7 & 8 as changing the Department's authority but merely sets up a procedure for them to follow if action is needed.

Senator Crapo asked if a farmer sets aside some land for longer than five years, how would the five year continuous use point come into action?

Mr. Dunn replied there is a statute that allows another five years if a person asks for an extension before the first five year period is up.

A discussion followed on if lines 40-44 were in conflict with the Constitution. Mr. Dunn does not believe so, but Senator Ringert feels it may and that some of the language may be questioned.

Sherl Chapman, Water Users, said they have reviewed the concerns expressed here but do not know what the solution is. They do feel the section pertaining to the water bank needs to be taken care of. Above Milner there have been problems of water being diverted during low water. These concerns can be settled with some language in the bill and it is a situation that is badly in need of settlement. This legislation could be useful to the water using community.

Senator Crapo said there is much in this bill that is good and is needed. He noted there were two things he had a problem with when working on the legislation; the creation of a special account and solving problems in the Department rather than through the court system. However, he said he was voted down on both issues in the Interim Committee.

Chairman Noh suggested this be held over until Monday so Senators Crapo, Ringert and Horsch could work with Mr. Dunn on amendments for the Committee to consider. This was agreed to by the committee.

SB 1440 VOTING ON THE ACREAGE BASIS IN IRRIGATION DISTRICT ELECTIONS

Senator Ringert explained the bill would allow irrigation districts directors, either at the time of organizing the district or by special election in an organized district, to adopt the acreage basis of voting. A 2/3 majority would be required to adopt the acreage basis. He noted there were some technical concerns with the bill as well as the language, so would like for it to go to the 14th order.

MOTION: Senator Ringert moved and Senator Crapo seconded the bill go to the 14th order. Motion carried.

(SENATE)

MINUTES

RESOURCES AND ENVIRONMENT COMMITTEE

MARCH 17, 1986 Rm 433, 1:30 PM

PRESENT: All members of the committee were present.

Chairman Noh called the meeting to order.

MOTION: Senator Ringert moved and Senator Chapman seconded the minutes of the last meeting be approved as written. Motion carried.

HB 369 ADMINISTRATION OF WATER RIGHTS

Chairman Noh said he had talked to the Co-Chairman of the Interim Committee, Mr. Chatburn, regarding this legislation and he would like to see the bill left as is as the majority of the committee did vote to support this bill as is and the issues raised in our committee had been discussed in the Interim Committee.

Senator Chapman, Co-Chairman of the Committee that worked on the legislation agreed with Mr. Chatburn that this bill was a compromise and concern was expressed in the Interim Committee regarding the Director having so much authority, but the majority of the subcommittee did vote for that concept.

Senator Ringert said there was talk about the Jenkins decision on Friday and that he felt the decision was limited to transfer proceedings and after reading it again, he still feels that way. He does not feel the Director has been told to undertake a survey to see what licenses might be in forfeiture and believes this bill goes far beyond his authority and for this reason, he strongly opposes this legislation. He also said he had some problems with 42-351, line 3 of the bill. He would like to see something added to make an exception when vested water rights are at issue. He would like the issue to go through administrative procedures but if the user is not satisfied with the administrative hearing, it should be spelled out that he has a evidentiary hearing in the court.

Mr. Dunn believes a better decision would be reached by the Department than before the court as they have more experience in dealing with matters concerning water. He would recommend the bill in its present form without amendments.

Sherly Chapman, Water Users, commented that some water users have some concerns with the Director having the power to deny a right. This issue is of lesser importance to the users than the storage water section in the bill and the illegal diversion of water.

Senator Crapo remarked there is a definite difference in philosophies. People in the private sector do have concerns with the Director having this power. He sees two ways to go; (1) directly to court or (2) go through administrative procedures first, and then to court with provision that new evidence could not be presented in court without strict justification.

Senator Ringert wanted to clarify that he was speaking only to existent or non-existence of a property right.

MOTION: Senator Beitelspacher moved and Senator Little seconded the bill go to the 14th order. Motion carried.

HB 673 PROVIDE A NONRESIDENT THREE DAY FISHING LICENSE

Mr. Barton, F&G, explained the legislation is to provide a three day nonresident fishing license entitling a person to fish in the waters of the state for a period of 3 consecutive days. The fee for this license would be $10. He said the private vendors had requested this legislation as presently they feel there is alot of unnecessary paper work.

A short discussion followed on the fee and how it was arrived at for this license.

MOTION: Senator Beitelspacher moved and Senator Sverdsten seconded that this bill to go the floor with a "do pass" recommendation. Motion carried.

HB 555 PROVIDE FOR THE PAYMENT OF TRANSFER & INHERITANCE TAX REFUNDS FROM THE STATE REFUND ACCOUNT

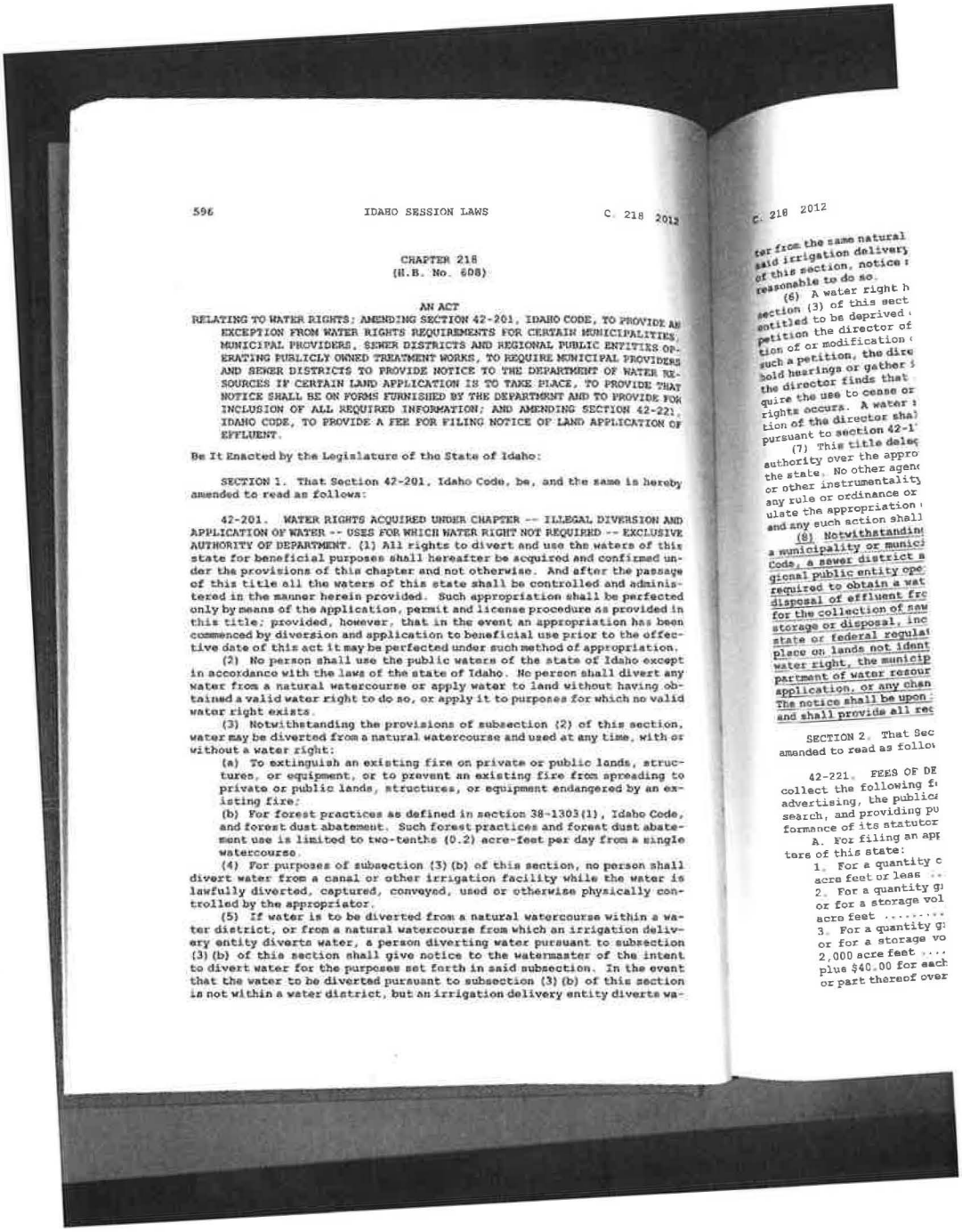
Dave Bivens, Farm Bureau, explained the legislation would create a funding source for the revolving fund to implement the Resource Conservation and Rangeland Development program. A diversion of 10% from the inheritance tax collection will generate an amount adequate to finance some pilot projects which qualify under the provisions of the program. He said approximately $150,000 would go into this revolving fund. He feels a conservation dollar invested in these areas will return many times that amount in prevention of erosion and pollution downstream and still have the initial dollar left to invest again.

Senator Sverdsten noted the interest rate on these loans was only 6%. He feels the rate should reflect the current rates.

Wayne Faude, Dept of Lands, said this interest rate came about as a result of the depressed conditions. The rate would be set through administrative procedures by the Commission.

Addendum C — H.B. 608, 2012 IDAHO SESS. LAWS, CH. 218 (CODIFIED AT IDAHO CODE §§ 42-201(8), 42-221(P)) AND ITS LEGISLATIVE HISTORY

1. 2012 Idaho Sess. Laws, ch. 218.
2. H.B. 608.
3. Statement of Purpose and Fiscal Note (RS 21325).
4. Final Daily Data 2012 (H.B. 608).
5. Agenda and Minutes, House State Affairs Committee (Feb. 28, 2012).
6. Agenda and Minutes, House Resources & Conservation Committee (Mar. 5, 2012).
7. Testimony of Lindley Kirkpatrick, McCall City Manager (Mar. 5, 2012).
8. Agenda and Minutes, Senate Resources & Environment Committee (Mar. 14, 2012).
9. Letter of Lindley Kirkpatrick, McCall City Manager (Mar. 14, 2012).
10. Memo of Ken Harward, Executive Director, Association of Idaho Cities (Mar. 14. 2012).
11. Agenda and Minutes, Senate Resources & Environment Committee (Mar. 16, 2012).
12. Testimony of Chris Meyer, counsel for McCall (Mar. 16. 2012).



CHAPTER 218
(H.B. No. 608)

AN ACT

RELATING TO WATER RIGHTS; AMENDING SECTION 42-201, IDAHO CODE, TO PROVIDE AN EXCEPTION FROM WATER RIGHTS REQUIREMENTS FOR CERTAIN MUNICIPALITIES, MUNICIPAL PROVIDERS, SEWER DISTRICTS AND REGIONAL PUBLIC ENTITIES OPERATING PUBLICLY OWNED TREATMENT WORKS, TO REQUIRE MUNICIPAL PROVIDERS AND SEWER DISTRICTS TO PROVIDE NOTICE TO THE DEPARTMENT OF WATER RESOURCES IF CERTAIN LAND APPLICATION IS TO TAKE PLACE, TO PROVIDE THAT NOTICE SHALL BE ON FORMS FURNISHED BY THE DEPARTMENT AND TO PROVIDE FOR INCLUSION OF ALL REQUIRED INFORMATION; AND AMENDING SECTION 42-221, IDAHO CODE, TO PROVIDE A FEE FOR FILING NOTICE OF LAND APPLICATION OF EFFLUENT.

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

SECTION 1. That Section 42-201, Idaho Code, be, and the same is hereby amended to read as follows:

42-201. WATER RIGHTS ACQUIRED UNDER CHAPTER -- ILLEGAL DIVERSION AND APPLICATION OF WATER -- USES FOR WHICH WATER RIGHT NOT REQUIRED -- EXCLUSIVE AUTHORITY OF DEPARTMENT. (1) All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise. And after the passage of this title all the waters of this state shall be controlled and administered in the manner herein provided. Such appropriation shall be perfected only by means of the application, permit and license procedure as provided in this title; provided, however, that in the event an appropriation has been commenced by diversion and application to beneficial use prior to the effective date of this act it may be perfected under such method of appropriation.

(2) No person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists.

(3) Notwithstanding the provisions of subsection (2) of this section, water may be diverted from a natural watercourse and used at any time, with or without a water right:

(a) To extinguish an existing fire on private or public lands, structures, or equipment, or to prevent an existing fire from spreading to private or public lands, structures, or equipment endangered by an existing fire;

(b) For forest practices as defined in section 38-1303(1), Idaho Code, and forest dust abatement. Such forest practices and forest dust abatement use is limited to two-tenths (0.2) acre-feet per day from a single watercourse.

(4) For purposes of subsection (3)(b) of this section, no person shall divert water from a canal or other irrigation facility while the water is lawfully diverted, captured, conveyed, used or otherwise physically controlled by the appropriator.

(5) If water is to be diverted from a natural watercourse within a water district, or from a natural watercourse from which an irrigation delivery entity diverts water, a person diverting water pursuant to subsection (3)(b) of this section shall give notice to the watermaster of the intent to divert water for the purposes set forth in said subsection. In the event that the water to be diverted pursuant to subsection (3)(b) of this section is not within a water district, but an irrigation delivery entity diverts wa-

ter from the same natural
said irrigation delivery
of this section, notice
reasonable to do so.

(6) A water right h
section (3) of this sect
entitled to be deprived
petition the director of
tion of or modification
such a petition, the dire
hold hearings or gather
the director finds that
quire the use to cease or
rights occurs. A water
tion of the director sha
pursuant to section 42-1

(7) This title dele
authority over the appro
the state. No other agen
or other instrumentality
any rule or ordinance or
ulate the appropriation
and any such action shall

(8) Notwithstandin
a municipality or munici
Code, a sewer district a
gional public entity ope
required to obtain a wat
disposal of effluent fro
for the collection of sew
storage or disposal, inc
state or federal regula
place on lands not ident
water right, the municip
partment of water resour
application, or any chan
The notice shall be upon
and shall provide all re

SECTION 2. That Sec
amended to read as follo

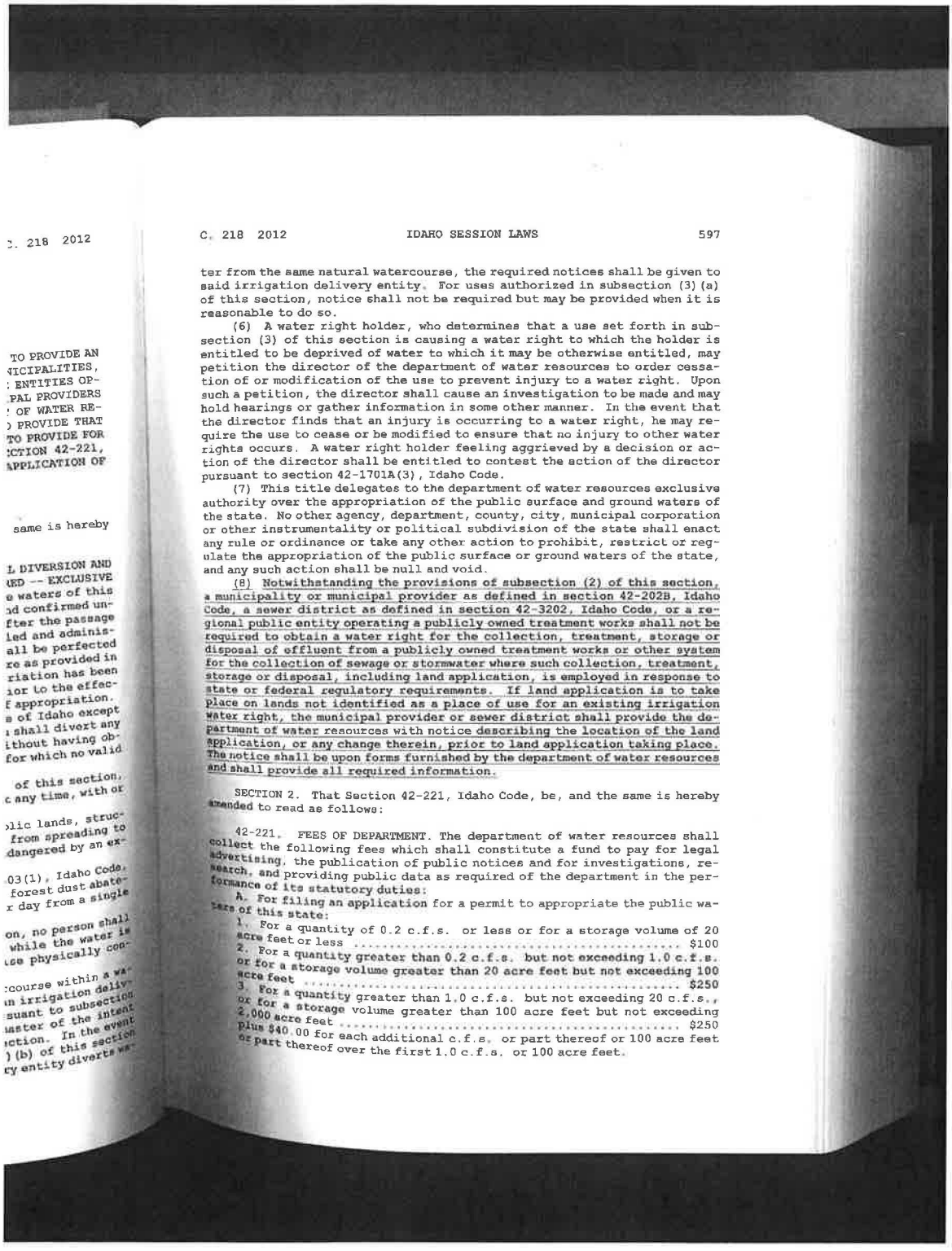
42-221. FEES OF DE
collect the following f
advertising, the public
search, and providing pu
formance of its statutor

A. For filing an app
ters of this state:

1. For a quantity o
acre feet or less ..

2. For a quantity g
or for a storage vol
acre feet .....

3. For a quantity g
or for a storage vo
2,000 acre feet ....
plus $40.00 for each
or part thereof over



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ter from the same natural watercourse, the required notices shall be given to said irrigation delivery entity. For uses authorized in subsection (3)(a) of this section, notice shall not be required but may be provided when it is reasonable to do so.

(6) A water right holder, who determines that a use set forth in subsection (3) of this section is causing a water right to which the holder is entitled to be deprived of water to which it may be otherwise entitled, may petition the director of the department of water resources to order cessation of or modification of the use to prevent injury to a water right. Upon such a petition, the director shall cause an investigation to be made and may hold hearings or gather information in some other manner. In the event that the director finds that an injury is occurring to a water right, he may require the use to cease or be modified to ensure that no injury to other water rights occurs. A water right holder feeling aggrieved by a decision or action of the director shall be entitled to contest the action of the director pursuant to section 42-1701A(3), Idaho Code.

(7) This title delegates to the department of water resources exclusive authority over the appropriation of the public surface and ground waters of the state. No other agency, department, county, city, municipal corporation or other instrumentality or political subdivision of the state shall enact any rule or ordinance or take any other action to prohibit, restrict or regulate the appropriation of the public surface or ground waters of the state, and any such action shall be null and void.

(8) Notwithstanding the provisions of subsection (2) of this section, a municipality or municipal provider as defined in section 42-202B, Idaho Code, a sewer district as defined in section 42-3202, Idaho Code, or a regional public entity operating a publicly owned treatment works shall not be required to obtain a water right for the collection, treatment, storage or disposal of effluent from a publicly owned treatment works or other system for the collection of sewage or stormwater where such collection, treatment, storage or disposal, including land application, is employed in response to state or federal regulatory requirements. If land application is to take place on lands not identified as a place of use for an existing irrigation water right, the municipal provider or sewer district shall provide the department of water resources with notice describing the location of the land application, or any change therein, prior to land application taking place. The notice shall be upon forms furnished by the department of water resources and shall provide all required information.

SECTION 2. That Section 42-221, Idaho Code, be, and the same is hereby amended to read as follows:

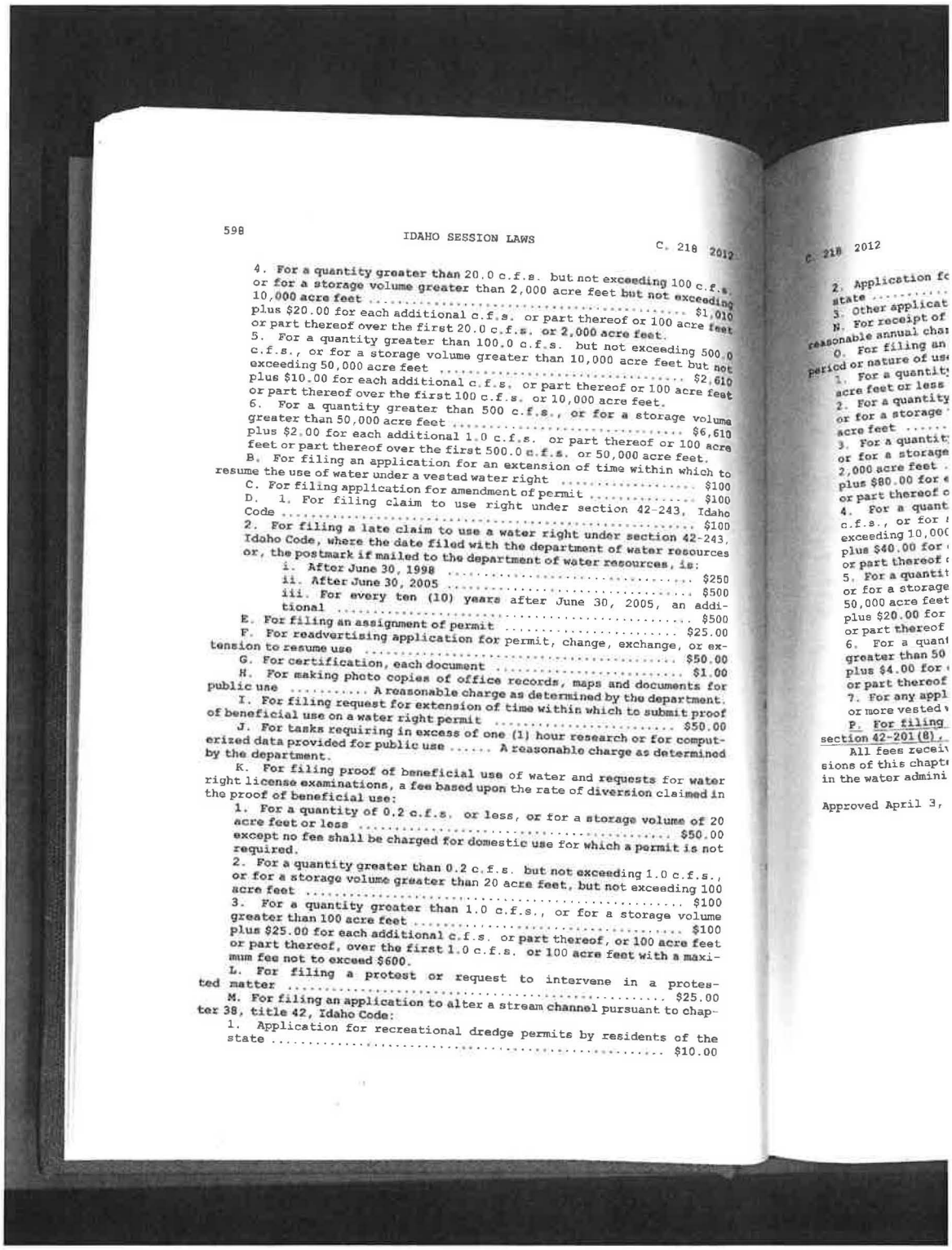
42-221. FEES OF DEPARTMENT. The department of water resources shall collect the following fees which shall constitute a fund to pay for legal advertising, the publication of public notices and for investigations, research, and providing public data as required of the department in the performance of its statutory duties:

A. For filing an application for a permit to appropriate the public waters of this state:

1. For a quantity of 0.2 c.f.s. or less or for a storage volume of 20 acre feet or less $100

2. For a quantity greater than 0.2 c.f.s. but not exceeding 1.0 c.f.s. or for a storage volume greater than 20 acre feet but not exceeding 100 acre feet $250

3. For a quantity greater than 1.0 c.f.s. but not exceeding 20 c.f.s., or for a storage volume greater than 100 acre feet but not exceeding 2,000 acre feet ..... $250 plus $40.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 1.0 c.f.s. or 100 acre feet.



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4. For a quantity greater than 20.0 c.f.s. but not exceeding 100 c.f.s. or for a storage volume greater than 2,000 acre feet but not exceeding 10,000 acre feet $1,010
plus $20.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 20.0 c.f.s. or 2,000 acre feet.

5. For a quantity greater than 100.0 c.f.s. but not exceeding 500.0 c.f.s., or for a storage volume greater than 10,000 acre feet but not exceeding 50,000 acre feet $2,610
plus $10.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 100 c.f.s. or 10,000 acre feet.

6. For a quantity greater than 500 c.f.s., or for a storage volume greater than 50,000 acre feet $6,610
plus $2.00 for each additional 1.0 c.f.s. or part thereof or 100 acre feet or part thereof over the first 500.0 c.f.s. or 50,000 acre feet.

B. For filing an application for an extension of time within which to resume the use of water under a vested water right $100

C. For filing application for amendment of permit $100

D. 1. For filing claim to use right under section 42-243, Idaho Code $100

2. For filing a late claim to use a water right under section 42-243, Idaho Code, where the date filed with the department of water resources or, the postmark if mailed to the department of water resources, is:

i. After June 30, 1998 ..... $250

ii. After June 30, 2005 ..... $500

iii. For every ten (10) years after June 30, 2005, an additional $500

E. For filing an assignment of permit $25.00

F. For readvertising application for permit, change, exchange, or extension to resume use $50.00

G. For certification, each document $1.00

H. For making photo copies of office records, maps and documents for public use ..... A reasonable charge as determined by the department.

I. For filing request for extension of time within which to submit proof of beneficial use on a water right permit $50.00

J. For tanks requiring in excess of one (1) hour research or for computerized data provided for public use ..... A reasonable charge as determined by the department.

K. For filing proof of beneficial use of water and requests for water right license examinations, a fee based upon the rate of diversion claimed in the proof of beneficial use:

1. For a quantity of 0.2 c.f.s. or less, or for a storage volume of 20 acre feet or less $50.00
except no fee shall be charged for domestic use for which a permit is not required.

2. For a quantity greater than 0.2 c.f.s. but not exceeding 1.0 c.f.s., or for a storage volume greater than 20 acre feet, but not exceeding 100 acre feet $100

3. For a quantity greater than 1.0 c.f.s., or for a storage volume greater than 100 acre feet $100
plus $25.00 for each additional c.f.s. or part thereof, or 100 acre feet or part thereof, over the first 1.0 c.f.s. or 100 acre feet with a maximum fee not to exceed $600.

L. For filing a protest or request to intervene in a protested matter $25.00

M. For filing an application to alter a stream channel pursuant to chapter 38, title 42, Idaho Code:

1. Application for recreational dredge permits by residents of the state $10.00

C. 218 2012

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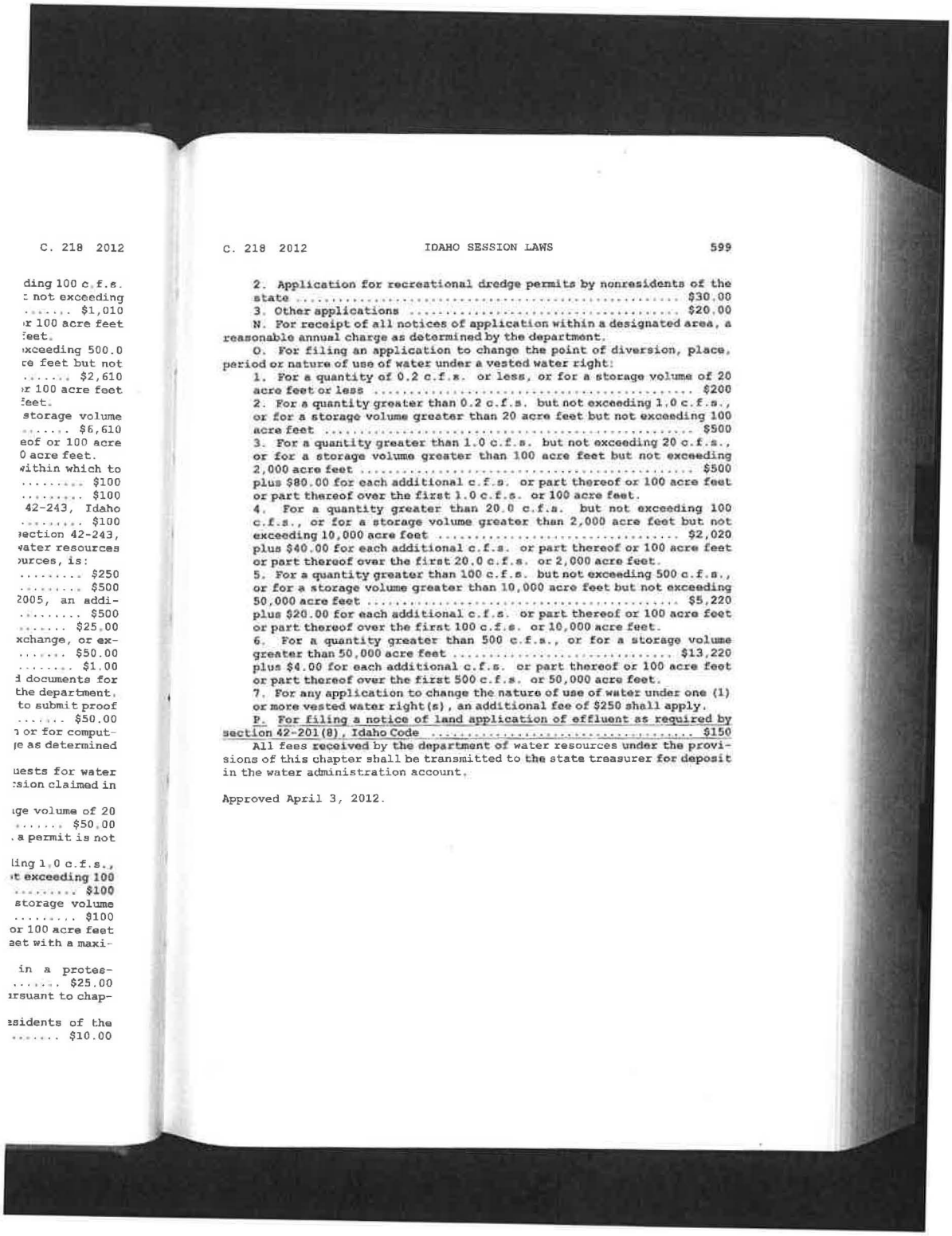
Approved April 3,



C. 218 2012

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2. Application for recreational dredge permits by nonresidents of the state $30.00
3. Other applications $20.00

N. For receipt of all notices of application within a designated area, a reasonable annual charge as determined by the department.

O. For filing an application to change the point of diversion, place, period or nature of use of water under a vested water right:

1. For a quantity of 0.2 c.f.s. or less, or for a storage volume of 20 acre feet or less $200
2. For a quantity greater than 0.2 c.f.s. but not exceeding 1.0 c.f.s., or for a storage volume greater than 20 acre feet but not exceeding 100 acre feet $500
3. For a quantity greater than 1.0 c.f.s. but not exceeding 20 c.f.s., or for a storage volume greater than 100 acre feet but not exceeding 2,000 acre feet $500
plus $80.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 1.0 c.f.s. or 100 acre feet.
4. For a quantity greater than 20.0 c.f.s. but not exceeding 100 c.f.s., or for a storage volume greater than 2,000 acre feet but not exceeding 10,000 acre feet $2,020
plus $40.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 20.0 c.f.s. or 2,000 acre feet.
5. For a quantity greater than 100 c.f.s. but not exceeding 500 c.f.s., or for a storage volume greater than 10,000 acre feet but not exceeding 50,000 acre feet $5,220
plus $20.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 100 c.f.s. or 10,000 acre feet.
6. For a quantity greater than 500 c.f.s., or for a storage volume greater than 50,000 acre feet $13,220
plus $4.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 500 c.f.s. or 50,000 acre feet.
7. For any application to change the nature of use of water under one (1) or more vested water right(s), an additional fee of $250 shall apply.

P. For filing a notice of land application of effluent as required by section 42-201(8), Idaho Code $150

All fees received by the department of water resources under the provisions of this chapter shall be transmitted to the state treasurer for deposit in the water administration account.

Approved April 3, 2012.

2012

LEGISLATURE OF THE STATE OF IDAHO
Sixty-first Legislature Second Regular Session - 2012

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 608

BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO WATER RIGHTS; AMENDING SECTION 42-201, IDAHO CODE, TO PROVIDE AN EXCEPTION FROM WATER RIGHTS REQUIREMENTS FOR CERTAIN MUNICIPALITIES, MUNICIPAL PROVIDERS, SEWER DISTRICTS AND REGIONAL PUBLIC ENTITIES OPERATING PUBLICLY OWNED TREATMENT WORKS, TO REQUIRE MUNICIPAL PROVIDERS AND SEWER DISTRICTS TO PROVIDE NOTICE TO THE DEPARTMENT OF WATER RESOURCES IF CERTAIN LAND APPLICATION IS TO TAKE PLACE, TO PROVIDE THAT NOTICE SHALL BE ON FORMS FURNISHED BY THE DEPARTMENT AND TO PROVIDE FOR INCLUSION OF ALL REQUIRED INFORMATION; AND AMENDING SECTION 42-221, IDAHO CODE, TO PROVIDE A FEE FOR FILING NOTICE OF LAND APPLICATION OF EFFLUENT.

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

SECTION 1. That Section 42-201, Idaho Code, be, and the same is hereby amended to read as follows:

42-201. WATER RIGHTS ACQUIRED UNDER CHAPTER -- ILLEGAL DIVERSION AND APPLICATION OF WATER -- USES FOR WHICH WATER RIGHT NOT REQUIRED -- EXCLUSIVE AUTHORITY OF DEPARTMENT. (1) All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise. And after the passage of this title all the waters of this state shall be controlled and administered in the manner herein provided. Such appropriation shall be perfected only by means of the application, permit and license procedure as provided in this title; provided, however, that in the event an appropriation has been commenced by diversion and application to beneficial use prior to the effective date of this act it may be perfected under such method of appropriation.

(2) No person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists.

(3) Notwithstanding the provisions of subsection (2) of this section, water may be diverted from a natural watercourse and used at any time, with or without a water right:

(a) To extinguish an existing fire on private or public lands, structures, or equipment, or to prevent an existing fire from spreading to private or public lands, structures, or equipment endangered by an existing fire;

(b) For forest practices as defined in section 38-1303(1), Idaho Code, and forest dust abatement. Such forest practices and forest dust abatement use is limited to two-tenths (0.2) acre-feet per day from a single watercourse.

(4) For purposes of subsection (3)(b) of this section, no person shall divert water from a canal or other irrigation facility while the water is lawfully diverted, captured, conveyed, used or otherwise physically controlled by the appropriator.

(5) If water is to be diverted from a natural watercourse within a water district, or from a natural watercourse from which an irrigation delivery entity diverts water, a person diverting water pursuant to subsection (3)(b) of this section shall give notice to the watermaster of the intent to divert water for the purposes set forth in said subsection. In the event that the water to be diverted pursuant to subsection (3)(b) of this section is not within a water district, but an irrigation delivery entity diverts water from the same natural watercourse, the required notices shall be given to said irrigation delivery entity. For uses authorized in subsection (3)(a) of this section, notice shall not be required but may be provided when it is reasonable to do so.

(6) A water right holder, who determines that a use set forth in subsection (3) of this section is causing a water right to which the holder is entitled to be deprived of water to which it may be otherwise entitled, may petition the director of the department of water resources to order cessation of or modification of the use to prevent injury to a water right. Upon such a petition, the director shall cause an investigation to be made and may hold hearings or gather information in some other manner. In the event that the director finds that an injury is occurring to a water right, he may require the use to cease or be modified to ensure that no injury to other water rights occurs. A water right holder feeling aggrieved by a decision or action of the director shall be entitled to contest the action of the director pursuant to section 42-1701A(3), Idaho Code.

(7) This title delegates to the department of water resources exclusive authority over the appropriation of the public surface and ground waters of the state. No other agency, department, county, city, municipal corporation or other instrumentality or political subdivision of the state shall enact any rule or ordinance or take any other action to prohibit, restrict or regulate the appropriation of the public surface or ground waters of the state, and any such action shall be null and void.

(8) Notwithstanding the provisions of subsection (2) of this section, a municipality or municipal provider as defined in section 42-202B, Idaho Code, a sewer district as defined in section 42-3202, Idaho Code, or a regional public entity operating a publicly owned treatment works shall not be required to obtain a water right for the collection, treatment, storage or disposal of effluent from a publicly owned treatment works or other system for the collection of sewage or stormwater where such collection, treatment, storage or disposal, including land application, is employed in response to state or federal regulatory requirements. If land application is to take place on lands not identified as a place of use for an existing irrigation water right, the municipal provider or sewer district shall provide the department of water resources with notice describing the location of the land application, or any change therein, prior to land application taking place. The notice shall be upon forms furnished by the department of water resources and shall provide all required information.

SECTION 2. That Section 42-221, Idaho Code, be, and the same is hereby amended to read as follows:

42-221. FEES OF DEPARTMENT. The department of water resources shall collect the following fees which shall constitute a fund to pay for legal advertising, the publication of public notices and for investigations, research, and providing public data as required of the department in the performance of its statutory duties:

A. For filing an application for a permit to appropriate the public waters of this state:

1. For a quantity of 0.2 c.f.s. or less or for a storage volume of 20 acre feet or less $100

2. For a quantity greater than 0.2 c.f.s. but not exceeding 1.0 c.f.s. or for a storage volume greater than 20 acre feet but not exceeding 100 acre feet $250

3. For a quantity greater than 1.0 c.f.s. but not exceeding 20 c.f.s., or for a storage volume greater than 100 acre feet but not exceeding 2,000 acre feet ..... $250 plus $40.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 1.0 c.f.s. or 100 acre feet.

4. For a quantity greater than 20.0 c.f.s. but not exceeding 100 c.f.s. or for a storage volume greater than 2,000 acre feet but not exceeding 10,000 acre feet ..... $1,010 plus $20.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 20.0 c.f.s. or 2,000 acre feet.

5. For a quantity greater than 100.0 c.f.s. but not exceeding 500.0 c.f.s., or for a storage volume greater than 10,000 acre feet but not exceeding 50,000 acre feet ..... $2,610 plus $10.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 100 c.f.s. or 10,000 acre feet.

6. For a quantity greater than 500 c.f.s., or for a storage volume greater than 50,000 acre feet .....$6,610 plus $2.00 for each additional 1.0 c.f.s. or part thereof or 100 acre feet or part thereof over the first 500.0 c.f.s. or 50,000 acre feet.

B. For filing an application for an extension of time within which to resume the use of water under a vested water right $100

C. For filing application for amendment of permit $100

D. 1. For filing claim to use right under section 42-243, Idaho Code $100

2. For filing a late claim to use a water right under section 42-243, Idaho Code, where the date filed with the department of water resources or, the postmark if mailed to the department of water resources, is:

i. After June 30, 1998 ..... $250

ii. After June 30, 2005 ..... $500

iii. For every ten (10) years after June 30, 2005, an additional $500

E. For filing an assignment of permit $25.00

F. For readvertising application for permit, change, exchange, or extension to resume use $50.00

G. For certification, each document $1.00

H. For making photo copies of office records, maps and documents for public use ..... A reasonable charge as determined by the department.

I. For filing request for extension of time within which to submit proof of beneficial use on a water right permit $50.00

J. For tasks requiring in excess of one (1) hour research or for computerized data provided for public use ..... A reasonable charge as determined by the department.

K. For filing proof of beneficial use of water and requests for water right license examinations, a fee based upon the rate of diversion claimed in the proof of beneficial use:

1. For a quantity of 0.2 c.f.s. or less, or for a storage volume of 20 acre feet or less $50.00
except no fee shall be charged for domestic use for which a permit is not required.

2. For a quantity greater than 0.2 c.f.s. but not exceeding 1.0 c.f.s., or for a storage volume greater than 20 acre feet, but not exceeding 100 acre feet $100

3. For a quantity greater than 1.0 c.f.s., or for a storage volume greater than 100 acre feet $100
plus $25.00 for each additional c.f.s. or part thereof, or 100 acre feet or part thereof, over the first 1.0 c.f.s. or 100 acre feet with a maximum fee not to exceed $600.

L. For filing a protest or request to intervene in a protested matter $25.00

M. For filing an application to alter a stream channel pursuant to chapter 38, title 42, Idaho Code:

1. Application for recreational dredge permits by residents of the state $10.00

2. Application for recreational dredge permits by nonresidents of the state $30.00

3. Other applications $20.00

N. For receipt of all notices of application within a designated area, a reasonable annual charge as determined by the department.

O. For filing an application to change the point of diversion, place, period or nature of use of water under a vested water right:

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3. For a quantity greater than 1.0 c.f.s. but not exceeding 20 c.f.s., or for a storage volume greater than 100 acre feet but not exceeding 2,000 acre feet $500
plus $80.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 1.0 c.f.s. or 100 acre feet.

4. For a quantity greater than 20.0 c.f.s. but not exceeding 100 c.f.s., or for a storage volume greater than 2,000 acre feet but not exceeding 10,000 acre feet $2,020
plus $40.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 20.0 c.f.s. or 2,000 acre feet.

5. For a quantity greater than 100 c.f.s. but not exceeding 500 c.f.s., or for a storage volume greater than 10,000 acre feet but not exceeding 50,000 acre feet ..... $5,220 plus $20.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 100 c.f.s. or 10,000 acre feet.

6. For a quantity greater than 500 c.f.s., or for a storage volume greater than 50,000 acre feet ..... $13,220 plus $4.00 for each additional c.f.s. or part thereof or 100 acre feet or part thereof over the first 500 c.f.s. or 50,000 acre feet.

7. For any application to change the nature of use of water under one (1) or more vested water right(s), an additional fee of $250 shall apply.

P. For filing a notice of land application of effluent as required by section 42-201(8), Idaho Code $150

All fees received by the department of water resources under the provisions of this chapter shall be transmitted to the state treasurer for deposit in the water administration account.

2012

STATEMENT OF PURPOSE

RS21325

The purpose of this legislation is to clarify that a separate water right is not required for the collection, treatment storage or disposal storage, including land application, of the effluent from publicly owned treatment works. Effluent is water that has already been diverted under an existing right and has not been returned to the waters of the state. If the land application is to be on land for which there is not already identified a place of use for an existing water right, notice of the place of use will be provided to the department of water resources to allow the department to have complete records of where the water is being used.

FISCAL NOTE

This bill, if passed, will have a positive fiscal impact to both the state and to local jurisdictions. The local jurisdictions will no longer incur the costs associated with the application process and the filing fee for a new water right application for water that has previously been appropriated. The department of water resources will no longer incur the expense in personnel time, and other overhead costs, associated with processing of those water right applications.

Contact:
Name: Representative John A. Stevenson
Phone: (208) 332-1000
Ken Harward
Association of Idaho Cities
(208) 344-8594

Statement of Purpose / Fiscal Note **H0608**

H0604 .....by EDUCATION

EDUCATION - Amends existing law relating to education to revise provisions relating to the adoption of curricular materials, to provide for certain fees, to provide that the board shall, by rule, determine the process by which the department of Education reviews and approves online courses and the fees necessary to defray the department's cost of such review and approval process.

02/28 House intro - 1st rdg - to printing
02/29 Rpt prt - to Educ
03/02 Rpt out - rec d/p - to 2nd rdg
03/05 2nd rdg - to 3rd rdg
03/06 3rd rdg - **PASSED - 65-0-5**
AYES -- Andrus, Barbieri, Barrett, Batt, Bayer, Bedke, Bell, Bilbao, Black, Block(Block), Bolz, Boyle, Buckner-Webb, Burgoyne, Chadderdon, Chew, Collins, Crane, Cronin, DeMordaunt, Ellsworth, Eskridge, Gibbs, Guthrie, Hagedorn, Hart, Hartgen, Harwood(DeVries), Henderson, Higgins, Jaquet, Killen, King, Lacey, Loertscher, Luker, Marriott, McGeachin, McMillan, Moyle, Nesset, Nielsen, Nonini, Palmer, Patrick, Pence, Perry, Raybould, Ringo, Roberts, Rusche, Schaefer, Shirley, Sims, Smith(30), Smith(24), Stevenson, Thayn, Thompson, Trail, Vander Woude, Wills, Wood(27), Wood(35), Mr. Speaker
NAYS -- None
Absent and excused -- Anderson, Bateman, Lake, Shepherd, Simpson
Floor Sponsor - Pence
Title apvd - to Senate
03/07 Senate intro - 1st rdg - to Educ
03/14 Rpt out - rec d/p - to 2nd rdg
03/15 2nd rdg - to 3rd rdg
03/20 3rd rdg - **PASSED - 33-0-2**
AYES -- Andreason, Bair, Bilyeu, Bock, Broadsword, Cameron, Corder, Darrington, Davis, Fulcher, Goedde, Hammond, Heider, Hill, Johnson, Keough, LeFavour, Lodge, Malepeai, McKague, McKenzie, Mortimer, Nuxoll, Rice, Schmidt, Siddoway, Smyser, Stennett, Tippets, Toryanski, Vick, Werk, Winder
NAYS -- None
Absent and excused -- Brackett, Pearce
Floor Sponsor - Goedde
Title apvd - to House
03/21 To enrol
03/22 Rpt enrol - Sp signed
Pres signed
03/23 To Governor
03/26 Rpt delivered to Governor on 03/23
03/29 Governor signed
Session Law Chapter 189
Effective: 07/01/12

H0605 .....by EDUCATION

EDUCATION - Amends existing law relating to education to revise provisions relating to a fee for a criminal history check; to provide that the school districts shall provide the State Department of Education certain electronic mail addresses of all certificated employees and to provide for a notification.

02/28 House intro - 1st rdg - to printing
02/29 Rpt prt - to Educ
03/02 Rpt out - rec d/p - to 2nd rdg
03/05 2nd rdg - to 3rd rdg
Ret'd to Educ

H0606aa .....by REVENUE AND TAXATION

AGRICULTURE - TAX CREDIT - Adds to existing law to provide the agricultural business investment tax credit against state income tax.

02/29 House intro - 1st rdg - to printing
03/01 Rpt prt - to Rev/Tax
03/12 Rpt out - to Gen Ord
03/19 Rpt out amen - to engros
Rpt engros - 1st rdg - to 2nd rdg as amen
03/20 2nd rdg - to 3rd rdg as amen
Rls susp - **PASSED - 62-6-2**
AYES -- Anderson, Andrus, Bateman, Batt, Bayer, Bedke, Bell, Bilbao, Black, Block(Block), Bolz, Boyle, Buckner-Webb, Burgoyne, Chadderdon, Chew, Collins, Crane, Cronin, DeMordaunt, Ellsworth, Eskridge, Gibbs, Guthrie, Hagedorn, Hart, Hartgen, Henderson, Jaquet, Killen, King, Lacey, Loertscher, McGeachin, McMillan, Moyle, Nesset, Nielsen, Nonini, Palmer, Patrick, Pence, Perry, Raybould, Ringo, Roberts, Rusche, Schaefer, Shepherd, Shirley, Simpson, Smith(30), Smith(24), Stevenson, Thayn, Thompson, Trail, Vander Woude, Wills, Wood (27), Wood(35), Mr. Speaker
NAYS -- Barbieri, Barrett, Harwood, Luker, Marriott, Sims
Absent and excused -- Higgins, Lake
Floor Sponsors - Lacey & Pence
Title apvd - to Senate
03/22 Senate intro - 1st rdg - to Loc Gov

H0607 .....by STATE AFFAIRS

PUBLIC EMPLOYEE RETIREMENT SYSTEM - Amends existing law relating to the Public Employee Retirement System to revise provisions relating to those that do not meet the definition of "employee."

02/29 House intro - 1st rdg - to printing
03/01 Rpt prt - to Com/ReRes
03/08 Rpt out - rec d/p - to 2nd rdg
03/09 2nd rdg - to 3rd rdg
Rls susp - **PASSED - 65-0-5**
AYES -- Andrus, Barbieri, Barrett, Bateman, Batt, Bayer, Bell, Bilbao, Black, Block(Block), Bolz, Boyle, Buckner-Webb, Burgoyne, Chadderdon, Chew, Collins, Crane, Cronin, DeMordaunt, Ellsworth, Eskridge, Gibbs, Guthrie, Hagedorn, Hart, Hartgen, Harwood(DeVries), Henderson, Higgins, Jaquet, Killen, King, Lacey, Lake, Loertscher, Luker, Marriott, McMillan, Moyle, Nesset, Nielsen, Nonini, Palmer, Patrick, Pence, Perry, Raybould, Ringo, Roberts, Rusche, Schaefer, Shepherd, Shirley, Simpson, Sims, Smith(30), Smith(24), Stevenson, Thayn, Trail, Vander Woude, Wills, Wood (27), Wood (35)
NAYS -- None
Absent and excused -- Anderson, Bedke, McGeachin, Thompson, Mr. Speaker
Floor Sponsor - Stevenson
Title apvd - to Senate
03/12 Senate intro - 1st rdg - to Com/ReRes
03/16 Rpt out - rec d/p - to 2nd rdg
03/19 2nd rdg - to 3rd rdg
03/21 3rd rdg - **PASSED - 35-0-0**
AYES -- Andreason, Bair, Bilyeu, Bock, Brackett, Broadsword, Cameron, Corder, Darrington, Davis, Fulcher, Goedde, Hammond, Heider, Hill, Johnson, Keough, LeFavour, Lodge, Malepeai, McKague, McKenzie, Mortimer, Nuxoll, Pearce, Rice, Schmidt, Siddoway, Smyser, Stennett, Tippets, Toryanski, Vick, Werk, Winder
NAYS -- None
Absent and excused -- None
Floor Sponsor - Tippets
Title apvd - to House
03/22 To enrol
03/23 Rpt enrol - Sp signed
03/26 Pres signed
To Governor
03/27 Rpt delivered to Governor on 03/26
04/03 Governor signed
Session Law Chapter 217
Effective: 04/03/12

H0608 .....by STATE AFFAIRS

WATER RIGHTS - Amends existing law relating to water rights to provide an exception from water rights requirements for certain municipalities, municipal providers, sewer districts and regional public entities operating publicly owned treatment works, to require municipal providers and sewer districts to provide notice to the Department of Water Resources if certain land application is to take place, to provide that notice shall be on forms furnished by the department, to provide for inclusion of all required information; and to provide a fee for filing notice of land application of effluent.

02/29 House intro - 1st rdg - to printing
03/01 Rpt prt - to Res/Con
03/06 Rpt out - rec d/p - to 2nd rdg
03/07 2nd rdg - to 3rd rdg
03/08 3rd rdg - **PASSED - 62-0-8**
AYES -- Anderson, Andrus, Bateman, Batt, Bedke, Bell, Bilbao, Black, Bolz, Boyle, Buckner-Webb, Burgoyne, Chadderdon, Chew, Collins, Crane, Cronin, DeMordaunt, Ellsworth, Eskridge, Gibbs, Guthrie, Hagedorn, Hart, Hartgen, Harwood(DeVries),

2012 FINAL DAILY DATA

Henderson, Higgins, King, Lacey, Loertscher, Luker, Marriott, McGeachin, McMillan, Moyle, Nesset, Nielsen, Nonini, Palmer, Patrick, Pence, Perry, Raybould, Ringo, Roberts, Rusche, Schaefer, Shepherd, Shirley, Simpson, Sims, Smith(30), Smith (24), Stevenson, Thayn, Thompson, Trail, Vander Woude, Wills, Wood(27), Mr. Speaker
NAYS -- None
Absent and excused -- Barbieri, Barrett, Bayer, Block(Block), Jaquet, Killen, Lake, Wood(35)
Floor Sponsor - Stevenson
Title apvd - to Senate

03/09 Senate intro - 1st rdg - to Res/Env
03/19 Rpt out - rec d/p - to 2nd rdg
03/20 2nd rdg - to 3rd rdg
03/22 3rd rdg - **PASSED - 33-0-2**
AYES -- Andreason, Bair, Bilyeu, Bock, Brackett, Broadsword, Cameron, Corder, Darrington, Davis, Fulcher, Goedde, Heider, Hill, Johnson, Keough, LeFavour, Lodge, Malepeai, McKague, McKenzie, Nuxoll, Pearce, Rice, Schmidt, Siddoway, Smyser, Stennett, Tippets, Toryanski, Vick, Werk, Winder
NAYS -- None
Absent and excused -- Hammond, Mortimer
Floor Sponsor - Heider
Title apvd - to House
03/23 To enrol
Rpt enrol - Sp signed
03/26 Pres signed
To Governor
03/27 Rpt delivered to Governor on 03/26
04/03 Governor signed
Session Law Chapter 218
Effective: 07/01/12

H0609 .....by STATE AFFAIRS
PUBLIC ASSISTANCE LAW - Amends existing law relating to Public Assistance Law to revise provisions relating to dental services for certain Medicaid participants and to revise provisions relating to the rulemaking authority of the Department of Health and Welfare.

02/29 House intro - 1st rdg - to printing
03/01 Rpt prt - to Health/Wel
03/07 Rpt out - rec d/p - to 2nd rdg
03/08 2nd rdg - to 3rd rdg
Rls susp - **PASSED - 65-0-5**
AYES -- Anderson, Andrus, Barbieri, Barrett, Bateman, Batt, Bayer, Bedke, Bell, Bilbao, Black, Bolz, Boyle, Buckner-Webb, Burgoyne, Chadderdon, Chew, Collins, Crane, Cronin, DeMordaunt, Ellsworth, Eskridge, Gibbs, Guthrie, Hagedorn, Hart, Hartgen, Harwood(DeVries), Henderson, Higgins, King, Lacey, Lake, Loertscher, Luker, Marriott, McGeachin, McMillan, Moyle, Nesset, Nielsen, Nonini, Palmer, Patrick, Pence, Perry, Raybould, Ringo, Roberts, Rusche, Schaefer, Shepherd, Shirley, Sims, Smith(30), Smith(24), Stevenson, Thayn, Thompson, Trail, Vander Woude, Wood(27), Wood(35), Mr. Speaker
NAYS -- None
Absent and excused -- Block(Block), Jaquet, Killen, Simpson, Wills
Floor Sponsor - McGeachin
Title apvd - to Senate
03/09 Senate intro - 1st rdg - to Health/Wel
03/15 Rpt out - rec d/p - to 2nd rdg
03/16 2nd rdg - to 3rd rdg
03/20 3rd rdg - **PASSED - 35-0-0**
AYES -- Andreason, Bair, Bilyeu, Bock, Brackett, Broadsword, Cameron, Corder, Darrington, Davis, Fulcher, Goedde, Hammond, Heider, Hill, Johnson, Keough, LeFavour, Lodge, Malepeai, McKague, McKenzie, Mortimer, Nuxoll, Pearce, Rice, Schmidt, Siddoway, Smyser, Stennett, Tippets, Toryanski, Vick, Werk, Winder
NAYS -- None
Absent and excused -- None
Floor Sponsor - Lodge
Title apvd - to House
03/21 To enrol
03/22 Rpt enrol - Sp signed
Pres signed
03/23 To Governor
03/26 Rpt delivered to Governor on 03/23
03/29 Governor signed
Session Law Chapter 190
Effective: 07/01/12

H0610 .....by WAYS AND MEANS
FIRE PROTECTION DISTRICTS - Amends existing law relating to fire protection districts to establish provisions relating to the deannexation of certain territory from a fire protection district.

02/29 House intro - 1st rdg - to printing
03/01 Rpt prt - to Loc Gov

H0611 .....by WAYS AND MEANS
LIVESTOCK LIENS - Amends existing law relating to livestock liens to revise provisions relating to the sale of certain livestock at public auction.

02/29 House intro - 1st rdg - to printing
03/01 Rpt prt - to Agric Aff
03/09 Rpt out - rec d/p - to 2nd rdg
03/12 2nd rdg - to 3rd rdg
03/13 3rd rdg - **PASSED - 62-0-8**
AYES -- Anderson, Andrus, Barbieri, Barrett, Bateman, Bayer, Bedke, Bell, Block(Block), Bolz, Boyle, Buckner-Webb, Burgoyne, Chadderdon, Chew, Collins, Cronin, DeMordaunt, Ellsworth, Eskridge, Gibbs, Guthrie, Hagedorn, Hart, Hartgen, Harwood, Henderson, Jaquet, Killen, King, Lacey, Lake, Loertscher, Luker, Marriott, McMillan(McMillan), Moyle, Nesset, Nielsen, Nonini, Patrick, Pence, Perry, Raybould, Ringo, Roberts, Rusche, Schaefer, Shepherd, Simpson, Sims, Smith(30), Smith(24), Stevenson, Thayn, Thompson, Trail, Vander Woude, Wills, Wood(27), Wood(35), Mr. Speaker
NAYS -- None
Absent and excused -- Batt, Bilbao, Black, Crane, Higgins, McGeachin, Palmer, Shirley
Floor Sponsor - Boyle
Title apvd - to Senate
03/14 Senate intro - 1st rdg - to Agric Aff
03/22 Rpt out - rec d/p - to 2nd rdg
03/23 2nd rdg - to 3rd rdg
03/27 3rd rdg - **PASSED - 33-0-2**
AYES -- Andreason, Bair, Bilyeu, Bock, Broadsword, Cameron, Corder, Darrington, Davis, Fulcher, Goedde, Hammond, Heider, Hill, Johnson, Keough, LeFavour, Lodge, Malepeai, McKague, Mortimer, Nuxoll, Pearce, Rice, Schmidt, Siddoway, Smyser, Stennett, Tippets, Toryanski, Vick, Werk, Winder
NAYS -- None
Absent and excused -- Brackett, McKenzie
Floor Sponsor - Smyser
Title apvd - to House
03/28 To enrol
Rpt enrol - Sp signed
03/29 Pres signed
To Governor
Rpt delivered to Governor on 03/29
Law without signature
Session Law Chapter 341
Effective: 07/01/12

H0612 .....by WAYS AND MEANS
ENDOWMENT LANDS - Amends existing law relating to endowment lands to revise the powers and duties of the State Land Board to provide requirements associated with the exchange of endowment lands or the use of proceeds from the sale at public auction of endowment lands.

02/29 House intro - 1st rdg - to printing
03/01 Rpt prt - to Res/Con

H0613 .....by WAYS AND MEANS
IDAHO TRAVEL AND CONVENTION INDUSTRY COUNCIL - Amends existing law relating to the Idaho Travel and Convention Industry Council to revise provisions relating to the term of office and removal of members of the Idaho Travel and Convention Industry Council.

02/29 House intro - 1st rdg - to printing
03/01 Rpt prt - to St Aff
03/13 Rpt out - rec d/p - to 2nd rdg
03/14 2nd rdg - to 3rd rdg
Rls susp - **PASSED - 68-0-2**
AYES -- Anderson, Andrus, Barbieri, Barrett, Bateman, Batt, Bayer, Bedke, Bell, Bilbao (Reynoldson), Black, Block(Block), Bolz, Boyle, Buckner-Webb, Burgoyne, Chadderdon, Chew, Collins, Crane, Cronin, DeMordaunt, Ellsworth, Eskridge, Gibbs, Guthrie, Hagedorn, Hart, Hartgen, Harwood, Henderson, Higgins, Jaquet, Killen, King, Lacey,

AGENDA

HOUSE STATE AFFAIRS COMMITTEE

8:30 A.M.
Room EW40
Tuesday, February 28, 2012

SUBJECT	DESCRIPTION	PRESENTER
RS 21366	Public Assistance Law	Rep. McGeachin
RS 21324	PERSI / Employee Defined	Rep. Stevenson
RS 21325	Water Rights	Rep. Stevenson
H 478	Sale of Liquor by the Drink	Bill Roden
HJM 11	Amendments Convention	Rep. Nielsen

If you have written testimony, please provide a copy of it to the committee secretary to ensure accuracy of records.

COMMITTEE MEMBERS

Chairman Loertscher
Vice Chairman Crane
Rep Stevenson
Rep Black
Rep Anderson(Keough)
Rep Andrus
Rep Bilbao
Rep Luker
Rep Palmer
Rep Simpson
Rep Guthrie
Rep Henderson
Rep McGeachin
Rep Sims
Rep Batt
Rep Smith(30)
Rep King
Rep Higgins
Rep Buckner-Webb

COMMITTEE SECRETARY

Lissa Cochrane
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email: lcochrane@house.idaho.gov

MINUTES

HOUSE STATE AFFAIRS COMMITTEE

DATE:	Tuesday, February 28, 2012
TIME:	8:30 A.M.
PLACE:	Room EW40
MEMBERS:	Chairman Loertscher, Vice Chairman Crane, Representative(s) Stevenson, Black, Anderson (Keough), Andrus, Bilbao, Luker, Palmer, Simpson, Guthrie, Henderson, McGeachin, Sims, Batt, Smith(30), King, Higgins, Buckner-Webb
ABSENT/ EXCUSED:	Representative(s) Henderson, Buckner-Webb
GUESTS:	Curtis Kemp, Ketchum City Council; Russell Westerberg, Hagadone Hospitality; Elizabeth Criner, Idaho State Dental Association (ISDA); Bill Roden, Knob Hill Inn; Brett Matteson, Knob Hill Inn; Sarah Fuhriman, Roden Law Office; Tony Smith, Benton Ellis; Kerry Ellen Elliott, Idaho Association of Counties; Ken Burgess, Idaho Licensed Beverage Association.

Chairman Loertscher called the meeting to order at 8:35 a.m.

Rep. Batt made a motion to approve the minutes of February 21, 2012 as written. **Motion carried by voice vote.**

Rep. Higgins made a motion to approve the minutes of February 17 and 20, 2012 as written. **Motion carried by voice vote.**

RS 21366: **Rep. McGeachin** presented **RS 21366**, proposed legislation to restore cuts to Medicaid made during the 2011 Legislation Session in **H 260.** Rep. McGeachin explained that **RS 21366** will restore $1.5 million to the State's General Fund. The three programs targeted for restoration include preventive dental services, duplicative skill treatment for individuals with mental health and developmental disabilities, and removal of the individualized tiered budgets for adults.

MOTION: **Rep. Bilbao** made a motion to introduce **RS 21366. Motion carried by voice vote.**

RS 21324: **Rep. Stevenson** presented **RS 21324**, proposed legislation to replace **H 445.** Rep. Stevenson stated that **H 445** inadvertently included school bus drivers and librarians in the revised definition of "employee". Rep. Stevenson explained that **RS 21324** came about because cemetery districts requested exemptions for their employees, but PERSI stated they did not qualify. **RS 21324** will provide an exemption for cemetery districts and mosquito abatement districts. Currently, Idaho Code requires certification that the position is seasonal and affected by weather and the growing season. Cities such as Rexburg had seasonal employees working on projects outside of the growing season and they were not able to exempt them. **RS 21324** resolves this and removes this requirement.

MOTION: **Rep. Smith** made a motion to introduce **RS 21324. Motion carried by voice vote.**

RS 21325: **Rep. Stevenson** presented **RS 21325**, proposed legislation to clarify that a separate water right is not required for the collection, treatment storage or disposal storage, including land application, of the effluent from publicly owned treatment works. Rep. Stevenson stated this legislation was brought by the Association of Cities due to a situation that arose in McCall. They were combining wastewater from the city with a sewer district and realized each individual entity did not require a permit, but when combined, there was ambiguity. **RS 21325** makes it clear that when you combine these two sources, if a land application is to take place, this will not require a permit. There will be a filing fee for a notice of land application of effluent.

MOTION: **Rep. Higgins** made a motion to introduce **RS 21325. Motion carried by voice vote.**

H 478: **Bill Roden**, representing Knob Hill Inn of Ketchum, presented **H 478,** legislation to authorize the issuance of a state retail license to resort city inns situated in a resort city with a population not in excess of 10,000 for the retail sale of liquor-by-the-drink. Mr. Roden explained that ten (10) resort cities such as Sandpoint, Riggins, McCall, Lava Hot Springs, Ketchum and others have local-option taxes that allow an occupancy tax on lodging accommodations, and a tax upon liquor-by-the-drink, wine and beer sold at retail for consumption on the licensed premises. **H 478** will allow for the issuance of a license for liquor-by-the-drink for resort inns subject to the approval of the city council and the mayor. The resort must have a minimum of 15 guest rooms, a number lessened to accommodate the smaller cities. The license is not transferable and cannot be sold to other locations unlike other liquor licenses in Idaho. Mr. Roden noted that **H 478** will allow resorts to offer products to attract guests and encourage further investment in these kinds of facilities.

In response to questions, **Mr. Roden** explained that while current licenses are transferable and have been sold in excess of $200,000 or more, **H 478** provides for a liquor-by-the-drink license that is not transferable. A person would have to buy the business in its entirety. Mr. Roden noted that these resort inns, with a minimum requirement of 15 guest rooms, provide an attraction for the area and jobs for the local economy. It gives people a reason to visit the area and **H 478** may attract more investments in the community. While it is not the intent of **H 478** to have resorts sell their more expensive license to obtain a non-transferable license; Mr. Roden acknowledged it is possible. Mr. Roden stated that **H 478** will not take funds away from the General Fund. The State will receive funds from annual license renewals.

Chairman Loertscher turned the gavel over to **Vice-Chairman Crane.**

Rep. Jaquet spoke **in support of H 478.** She acknowledged that the market rate for liquor licenses has been in excess of $300,000. Rep Jaquet noted that under **H 478**, the mayor and the city council would have to agree to grant the license and the city has to charge the occupancy and liquor-by-the-drink tax.

Curtis Kemp, Ketchum City Council, testified **in support of H 478** at the request of **Mayor Hall**. Mr. Kemp stated that **H 478** would allow a small hotel to be successful in a competitive environment. **H 478** is economic development.

In response to questions, **Mr. Kemp** advised that it is possible that it might be effective to place an upper limit on the number of guest rooms a resort city inn can have, but he would be grateful to have a "Holiday Inn" or another large hotel. Ketchum has projects in the pipeline, but they haven't broken ground as of yet. They are looking for the smallest improvement.

Brett Matteson, Columbia Hospitality for the Knob Hill Inn, testified **in support of H 478.** Mr. Matteson noted the partners of Knob Hill Inn bought the failing property at an auction. Mr. Matteson stated that to be a world-class destination, a resort needs all the products and services that other properties have to offer. **H 478** would generate more profit for the owners, but it would also bring more jobs and improvements for the community. It might fuel other developments.

In response to questions, **Mr. Matteson** stated that **H 478** would provide an economic benefit. They would be able to compete with other destinations and spend more money on marketing.

Ken Burgess, Idaho Licensed Beverage Association, testified **in support of H**

AGENDA
HOUSE RESOURCES & CONSERVATION COMMITTEE
1:30 p.m. or Upon Adjournment
Room EW40
Monday, March 05, 2012

SUBJECT	DESCRIPTION	PRESENTER
	Fire Protection and Timber Harvest	Mark Woods, SITPA, Fire Warden Howard Weeks, CPTPA, Fire Warden
→ H 608	Water rights	Ken Harward, Assoc. of Idaho Cities
H 542	Motorized vehicles, hunting from	Rep. Boyle

If you have written testimony, please provide a copy of it to the committee secretary to ensure accuracy of records.

COMMITTEE MEMBERS

Chairman Stevenson
Vice Chairman Shepherd
Rep Wood(35)
Rep Barrett
Rep Moyle
Rep Eskridge
Rep Raybould
Rep Bedke
Rep Andrus
Rep Wood(27)
Rep Boyle
Rep Hagedorn
Rep Harwood
Rep Vander Woude
Rep Gibbs
Rep Pence
Rep Higgins
Rep Lacey

COMMITTEE SECRETARY

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MINUTES

HOUSE RESOURCES & CONSERVATION COMMITTEE

DATE: Monday, March 05, 2012

TIME: 1:30 p.m. or Upon Adjournment

PLACE: Room EW40

MEMBERS: Chairman Stevenson, Vice Chairman Shepherd, Representative(s) Wood(35), Barrett, Moyle, Eskridge, Raybould, Bedke, Andrus, Wood(27), Boyle, Hagedorn, Harwood (DeVries), Vander Woude, Gibbs, Pence, Higgins, Lacey

ABSENT/ EXCUSED: Representatives Moyle, Gibbs and Lacey

GUESTS: Mark Woods, SITPA; Lindley Kirkpatrick, Christopher Meyer, City of McCall; Sandra Mitchell, IRC; Jeff Peppersack, IDWR; John Homan, AG IDWR; Craig Mickelson, Joie McGarvin, Russell Westerberg, ICOA; Marie Kellner, Johathan Oppenheimer, Idaho Conservation League, Benjamin Davenport, Risch Pisca; Andy Brunelle, US Forest Services, Jim Unsworth, IDFG; Elizabeth Criner, NWFPA

A quorum being present, **Chairman Stevenson** called the meeting to order at 2:52 p.m.

MOTION: **Rep. Raybould** made a motion to approve the minutes of Wednesday, February 29, 2012. **Motion carried by voice vote.**

Mark Woods, Southern Idaho Timber Protective Association (SITPA), said the Timber Protection Association's history is long in Idaho. He said cooperative fire protection is still in use today and is the core of the Association. He said anyone owning forest lands can become a member of the Association. It is voluntary and open to all forest landowners. He reviewed the three methods that private forest landowners can choose to meet Idaho's Association membership requirements. He reviewed the membership rates. He stated the Associations are organized as private non-profit organizations. He gave an overview of the organization. He explained his duties as forest warden. He said they have a history that is long and efficient and cost effective. He reviewed the number of fires in the districts in the last 20 years. He said the concept of cooperative fire management is the key to success. He said their mission is the preservation, perpetuation and protection of the forest and of the forest lands of Idaho. He thanked the legislators for the opportunity to speak to them.

Howard Weeks, Clearwater-Potlatch Timber Protective Association, thanked the members for the opportunity to share their presentation. He said in the 1900's fire protection associations began to be established. In 1925 the Idaho Forestry Act was established and fire prevention codes were added. He reviewed the Association's vision, concerns and efforts through the years. He reviewed the first decade of fire operation and said through the next three decades there was a decline. He said they now maintain a minimum level of fire losses. Mr. Weeks reviewed suppression capabilities and what they have to work with to protect the forest. He explained their work on the health of forests using prescribed fires, site preparation, and hazard reduction. He explained their concerns for Airsheds and smoke dispersion. He said they have a plan when doing prescribed burning to minimize the impact to the public. He reviewed some numbers for fire preparedness funding.

→ **H 608:** Ken Harward, Idaho Association of Cities, yielded to **Mr. Lindley Kirkpatrick** to explain the legislation.

Lindley Kirkpatrick, City of McCall, spoke in **support of H 608**. He said this bill will clarify that cities and sewer districts are not required to obtain a water right for distribution of waste water on land. He said they worked with the Department of Water Resources and the Association of Cities and both support this measure. He said this doesn't change anything about DEQ's reuse tools, it only allows cities to use wastewater on growing crops. He said McCall has a water treatment plant and a wastewater treatment plant. He said Water Resources has assured the city they can reuse waste water when they have a municipal water right. He said it is not clear that the city can reuse waste water from a plant that does not have a municipal water right. Mr. Kirkpatrick said McCall contracts from an irrigation district that does not have a water right. He said the bill is crafted narrowly. He reviewed the new language in the bill.

Christopher Meyer, Givens Pursley, representing the City of McCall, reviewed the legislation. He said it is a simple measure of whether cities must first obtain a water right for land application of waste water reuse. He said they approached Water Resources on the issue and there were a number of circumstances where there is a question of whether it is lawful or not. He said getting a water right could be a lengthy and contentious process. He said this measure would answer a simple question. He said they have worked closely with the Dept. of Water Resources and with the Idaho Water Users Association. He said they do not oppose this bill.

In response to Committee questions, **Mr. Meyer** said this legislation would not authorize or prohibit the city from having storm water run off processed through the wastewater treatment plant and discharge back into a canal. He also said this legislation does not apply any new authorities to cities for depositing affluent on growing crops. He said those situations are covered by DEQ rules and are separate from this legislation.

MOTION: **Rep. Raybould** made a motion to send **H 608** to the floor with a **DO PASS** recommendation. **Motion carried by voice vote. Rep. Stevenson** will sponsor the bill on the floor.

H 542: **Craig Mickelson**, ICOA, said he represents game wardens around the state. He said he strongly opposes **H 542**. He said the bill would reduce the ability for conservation offices to do their job. He reviewed the adverse effects of the bill.

Johathan Oppenheimer, Idaho Conservation League, said this bill removes the Fish and Game's ability to manage wildlife. He said it is appropriate for the Department to regulate hunters and those not pursuing game are not effected by the regulation. He said this is more about fair game hunting than it is about access. He encourage the Committee to withdraw the bill and work with Fish and Game on this issue.

Angela Rossmann, Idaho Wildlife Federation, said their issues have been addressed and they support the Fish and Game Commission and their ability to regulate hunting in certain units.

Benjamin Davenport, Idaho Outfitters and Guides Assoc., said this is not an anti-OHV issue. He said the issue has been more polarized since the last Session. He said the Association still has some concerns that this may potentially force the Fish and Game to use other tools to manage game. He said there is concern with the potential of a reduction in hunting opportunity.

HOUSE RESOURCES AND CONSERVATION COMMITTEE

Sign-In Sheet **Date:** March 5, 2012

PLEASE PRINT Name	Phone	Representing Company/Organization	Legislation Interested In	Wish To Testify	Pro	Con
MARK Woods	208-634-2268	SITPA	Presenter			
Lindley Kirkpatrick	208-634-1003	City of McCall	HB608	Y	Y	
Christopher H. Meyer	208-388-1236	City of McCall	HB608	Y	Y	
Sandra Mitchell	208-424-3870	IRC	542	Y	Y	
Jeff Pappersack	208-287-4948	IDWR	HB608	N		
John Homan	208-287-4812	Atty Gen - represent IDWR	HB608	N		
Craig Nickelson	208-860-8757	ICOA	HB542	Yes		X
Joie McGarvin		ICOA	542	NO		X
Russell Weslenberg		ICOA	HB542	NO		X
Marie Callaway Kellner	423.75-6966	Idaho Conservation League	H608	No		
Jonathan Oppenheimer	208-345-6942 ext. 26	Idaho Conservation league	HB 542	Yes		X
Benjamin Davenport		Risch Pisca	H542	yes		X
Andy Brunelle		US Forest Service	H542	No		
Jim Unsworth		IDFG	542	No		

HOUSE RESOURCES AND CONSERVATION COMMITTEE

Sign-In Sheet **Date:** March 5, 2012

PLEASE PRINT Name	Phone	Representing Company/Organization	Legislation Interested In	Wish To Testify	Pro	Con
Elizabeth Criner	385-7070	NWFPA	HB 608	No		

House Bill 608
March 5, 2012

Chairman Stevenson and members of the Committee,

My name is Lindley Kirkpatrick and I am the McCall City Manager.

I am here today to testify in support of House Bill 608.

The purpose of this legislation is to clarify that cities and sewer districts are not required to obtain a water right for the treatment – and especially disposal – of wastewater effluent.

We have worked closely with the Department of Water Resources, the Department of Environmental Quality, and the Idaho Water Users Association to develop the language in the bill before you today. We also worked with the Association of Idaho Cities, and this bill has their support. Ken Harward and Nancy Stricklin are here today on behalf of AIC. I am advised that the Department of Water Resources also supports this proposal. I believe that Shelly Keen and John Homan of IDWR are here today to express the Department's support and answer any questions you may have from the Department's perspective. Finally, the City's special water counsel, Chris Meyer, is also here and will say a few words about the measure.

I want to be clear up front: this doesn't change anything about DEQ's reuse rules. It only addresses the authority to use treated effluent to grow crops or for another beneficial use.

The issue here is the ability to land apply treated effluent that does not originate from a municipal water right. Like many cities, McCall has a water treatment plant and a wastewater treatment plant. We have a municipal water right for the water which we treat and deliver to our residents. We eventually collect and treat that water again, and dispose of the wastewater effluent by land applying it.

We have received assurances from IDWR that cities and sewer district's can land apply their own effluent – water that comes from their own water right. What is not clearly authorized is the land application of treated effluent when there isn't a municipal water right for the original, source drinking water. An example of that situation is in McCall, where we treat wastewater from a sewer district, located outside the city limits. That sewer district does not have a water right. They collect wastewater which was initially diverted by numerous private landowners each operating their own domestic wells or other water sources. They deliver that wastewater to us, we treat it, and land apply it. It is that land application which is of concern here.

We've tried to craft this proposal narrowly to apply to only cities, sewer districts and other publicly-owned treatment works. We don't want to get tangled up with any industrial users or private environmental remediation efforts.

There are already specific exemptions in Idaho Law – at 42-201. For example, you don't need a water right for fire fighting activities and for forest management practices. This proposal simply adds a similar exemption for the land application of treated wastewater by cities and sewer districts. The new language appears as a new section 8, and can be seen on page two of the Bill. Additionally, 42-221 is also amended to require that notice be provided to the Department of Water Resources and establish a fee of $150. We worked with the Department closely to come up with that provision. It will allow the Department to monitor and track any use of this exemption.

Mr. Chairman, I'll stand for any questions, and I hope that the Committee will support this proposal.

Thank you.

AMENDED #1 AGENDA
SENATE RESOURCES & ENVIRONMENT COMMITTEE
1:30 P.M.
Room WW55
Wednesday, March 14, 2012

SUBJECT	DESCRIPTION	PRESENTER
APPROVAL OF MINUTES	Minutes of March 2, 2012	Senator Werk
H 495	Continuation of Hearing Relating to State Endowment Lands	Representative John Vander Woude
H 494	Continuation of Hearing Relating to the Idaho Board of Scaling Practices	Representative Scott Bedke
H 496	Continuation of Hearing Relating to Exemption of Members of Armed Forces, Reserves, National Guard by Fish & Game, and Veterans from Hunter Education Requirements	Representative Lynn M. Luker
→ **H 608***	Relating to Water Rights	Ken Harward, Association of Idaho Cities

If you have written testimony, please provide a copy of it to the committee secretary to ensure accuracy of records.

COMMITTEE MEMBERS

Chairman Pearce
Vice Chairman Bair
Sen Cameron
Sen Siddoway
Sen Brackett
Sen Heider
Sen Tippets
Sen Werk
Sen Stennett

COMMITTEE SECRETARY

Linda Kambeitz
Room: WW37
Phone: (208) 332-1323
email: sres@senate.idaho.gov

* H 608 - AGENDA ONLY. THE BILL WAS NOT DISCUSSED THIS DAY.

CITY OF MCCALL

March 14, 2012

H609

Senator Monty Pearce, Chair
Senate Resources & Environment Committee
State Capitol Building
PO Box 83720
Boise, ID 83720-0081

re: House Bill 608

Dear Senator Pearce and Members of the Committee:

The City of McCall strongly supports House Bill 608. The purpose of this bill is to clarify that cities and sewer districts are not required to obtain a water right for the treatment and disposal of wastewater effluent.

This bill makes no changes to any water quality requirements imposed by the Department of Environmental Quality. It only addresses the authority to use treated effluent to grow crops or for another beneficial use. Specifically, the issue here is the ability to land apply treated effluent that does not originate from a municipal water right.

We have received assurances from the Department of Water Resources that cities and sewer districts can land apply their own effluent – water that comes from their own water right. What is not clearly authorized is the land application of treated effluent when there isn't a municipal water right for the original, source drinking water. There are many situations around the state where publicly owned treatment facilities accept wastewater from sewer districts or other entities which do not have water rights. This bill addresses those situations.

For example, the City of McCall treats wastewater from a sewer district, located outside the city limits. That sewer district does not have a water right. They collect wastewater which was initially diverted by numerous private landowners each operating their own domestic wells or other water sources. They deliver that wastewater to us, we treat it, and then land apply it, all in conformance with DEQ's water quality standards.

We have worked closely with the Department of Water Resources, the Department of Environmental Quality, and the Association of Idaho Cities to develop this proposal. This bill reflects the concerns of those agencies, and has their support. Further, we have coordinated with the Idaho Water Users Association, and have addressed their concerns in this proposal.

The City appreciates the Committee's consideration, and respectfully urges the Committee to support the bill.

Sincerely,

Lindley Kirkpatrick, AICP
City Manager

216 East Park Street • McCall, Idaho 83638 • (208) 634-7142 • Fax (208) 634-3038

Association of Idaho Cities
3100 South Vista, Suite 310, Boise, Idaho 83705
Telephone (208) 344-8594
Fax (208) 344-8677
www.idahocities.org

HB 608

Wednesday, March 14, 2012

To: Senate Resources & Environment Committee

Sen. Monty Pearce, Chair	**Sen. Steve Bair, Vice Chair**
Sen. Dean Cameron	**Sen. Jeff Siddoway**
Sen. Bert Brackett	**Sen. Lee Heider**
Sen. John Tippets	**Sen. Elliot Werk**
Sen. Michelle Stennett	

From: Ken Harward, Executive Director

Re: AIC Supports House Bill 608 on Water Rights for Land Application of Effluent

The Association of Idaho Cities strongly supports House Bill 608, which would clarify that a separate water right is not required for the collection, treatment, storage, or disposal of effluent from publicly owned treatment works when wastewater is treated and disposed on behalf of entities that do not have a municipal water right.

Currently, municipalities that land apply treated effluent are not required to obtain water rights when the water is diverted under an existing right. However, there are many situations where publicly owned treatment facilities accept wastewater from sewer districts and other entities which do not have water rights.

For example, the City of McCall accepts wastewater from a sewer district located outside of city limits. The sewer district does not have a water right—they collect wastewater which was initially diverted by a number of private landowners each with their own well. The City of McCall treats the wastewater and land applies the treated effluent to comply with federal regulations.

Another example is the Hayden Area Regional Sewer Board (HARSB). The city of Hayden does not provide municipal water service and thus does not have a municipal water right, but the city does collect wastewater which is then transmitted into a regional sewer treatment system. HARSB also receives wastewater from Kootenai County and Hayden Lake Recreational Water and Sewer District. The treated effluent is then land applied during certain times of the year.

In the event that land application is to occur on land for which there is not already identified a place of use for an existing water right, notice of the place of use will be provided to the Department of Water Resources to ensure the department is informed about where water is being used.

House Bill 608 will benefit communities around the state that are working to provide wastewater treatment and disposal as efficiently and effectively as possible, while complying with a myriad of federal water quality requirements. We appreciate the committee's consideration of this bill and respectfully ask for your support.

AGENDA

SENATE RESOURCES & ENVIRONMENT COMMITTEE

1:00 P.M.
Room WW55
Friday, March 16, 2012

	DESCRIPTION	PRESENTER
APPROVAL OF MINUTES	February 20 and March 12, 2012	Senator Brackett Senator Tippets
H495	Discussion	
H 494	Continuation of Hearing Relating to the Idaho Board of Scaling Practices	Representative Scott Bedke
H 496	Continuation of Hearing Relating to Exemption of Members of Armed Forces, Reserves, National Guard by Fish and Game, and Veterans from Hunter Education Requirements	Representative Lynn M. Luker
→ **H 608**	Continuation of Hearing Relating to Water Rights	Ken Harward, Association of Idaho Cities

If you have written testimony, please provide a copy of it to the committee secretary to ensure accuracy of records.

COMMITTEE MEMBERS

Chairman Pearce
Vice Chairman Bair
Sen Cameron
Sen Siddoway
Sen Brackett
Sen Heider
Sen Tippets
Sen Werk
Sen Stennett

COMMITTEE SECRETARY

Linda Kambeitz
Room: WW37
Phone: (208) 332-1323
email: sres@senate.idaho.gov

MINUTES Bair OK

SENATE RESOURCES & ENVIRONMENT COMMITTEE

DATE:	Friday, March 16, 2012
TIME:	1:00 P.M.
PLACE:	Room WW55
MEMBERS PRESENT:	Chairman Pearce, Vice Chairman Bair, Senators Cameron, Siddoway, Heider, Tippets, and Stennett
ABSENT/ EXCUSED:	**Senators Werk** and **Brackett.**
NOTE:	The sign-in sheet, testimonies, and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.
CALL TO ORDER:	**Chairman Pearce** called the meeting to order at 1:05 p.m.
H 494:	Continuation of Hearing Relating to the Idaho Board of Scaling Practices. **Tom Schultz**, Director, Department of Lands, presented this bill to the Committee.

Mr. Schultz said this bill would amend membership requirements of the Idaho Board of Scaling Practices and would create one new Board member position. He said current statute provisions require two Board members be appointed by the Governor from nominees provided by Intermountain Forest Association (IFA). He further stated that due to the dissolution of the IFA in Idaho, amendments to the statute addressing Sealing Board membership were necessary. The proposed amendments set requirements for gubernatorial appointments intended to reflect balanced representation on the Scaling Board with equal opportunity for nominations from a broad spectrum of the timber community. **Mr. Schultz** said the bill contained an emergency clause to provide for gubernatorial appointments on a current IFA member term expiration as well as a new member appointment, before the Scaling Board budget and assessment-setting meeting conducted prior to the start of fiscal year 2013.

Mr. Schultz said the Scaling Board did vote on this bill at a board meeting in support of this bill. A copy of his talking points is attached to the minutes.

There was no one who wanted to testify.

MOTION: **Senator Siddoway** made a motion, **seconded** by **Senator Heider**, to send H 494 to the floor with a **"do pass".** The motion **carried** by a **voice vote. Senator Siddoway** will carry this bill on the floor.

H 608: Continuation of Hearing Relating to Water Rights. **Chris Meyer**, Attorney with Givens-Pursley and representing the City of McCall, presented this bill on behalf of **Representative Stevenson** and **Ken Harward**, Association of Idaho Cities. **Mr. Meyer** said the purpose of this legislation was to clarify that a separate water right was not required for the collection, treatment storage or disposal storage, including land application, of the effluent from publicly owned treatment works. He said effluent was water that had already been diverted under an existing right and had not been returned to the waters of the state. **Mr. Meyer** further pointed out, that if the land application was to be on land which was not already identified as a place of use for an existing water right, notice of the place of use would be provided to the Department of Water Resources. This would allow the Department

to have complete records of where the water was to be used. He said this bill resolved this question.

Mr. Meyer passed out two letters in support of H 608. One letter was from the Association of Idaho Cities and the other one was from the City of McCall, copies of which are attached to the minutes. He said the City of McCall faced a zero phosphorous limit at Lake Cascade. As a consequence, putting that water back onto the lake, no matter how well treated, was a physical and financial impossibility. He indicated he was not aware of a city or sewer district that had ever obtained a water right in connection with such land application or other disposal place. He had received assurances that obtaining an additional water right would not be a requirement from the Department of Water Resources. Based on his own research, to the extent the municipality land applied water that was traceable to its own municipal water right, that municipality didn't need to do anything further and that it was covered by that initial water right.

Mr. Meyer said, in many instances, though, the cities "land apply" water that came from sources that were other than its own municipal water right, which raised a question. For example, the City of McCall accepts sewage water from outside the city limits, collected by a sewer district. This is a cooperative venture that makes a lot of sense economically and environmentally when it applies that water altogether. They are not the only ones who face this question. He cited the City of Boise as another example. The water doesn't come from its own municipal water rights because it doesn't own any. He said there were probably others. The purpose of this legislation, he said, was to get the water lawyers out of this business and to allow municipalities to spend their dollars and focus their attention on the issue at hand, which was the water quality side of the equation. The Department of Water Resources was involved in drafting this legislation and added some provisions to it, notably, a provision requiring notification of the Department of Water Resources when there is a land application and the payment of a small fee to cover their administrative costs.

MOTION: **Senator Heider** made a motion, **seconded** by **Senator Bair,** to send H 608 to the floor with a **"do pass"** recommendation. The motion **carried** by a voice vote. **Senator Heider** will carry this bill on the floor.

APPROVAL OF MINUTES: **Senator Heider** made a motion, **seconded** by **Senator Siddoway,** to approve the minutes of February 20, 2012. The motion **carried** by a **voice vote.**

Senator Tippets made a motion, **seconded** by **Senator Heider**, to approve the minutes of March 12, 2012. The motion **carried** by a **voice vote.**

DISCUSSION OF H 495: Relating to State Endowment Lands. Chairman **Pearce** said the testimony had been heard and the hearing was closed.

SENATE RESOURCES AND ENVIRONMENT COMMITTEE

Sign-In Sheet **March 16, 2012**

PLEASE PRINT Name	Phone	Representing Company/Organization	Legislation Interested In	Wish To Testify	Pro	Con	
Rhett Moore	562-9660	Hunter Ed Instructor Assoc	H496	Y		X	-
Sharon Kiefer	334-3771	IDFG	H496	Y		X	+
Laurie Boeckel	408-5805	Idaho PTA	H495	N			
Tom Schultz	334-0280	IDL	494	Y	✓		+
SAN SYLVESTER	890-2291		495			X	
ROBIN NETTINGA	344-1341	IEA	495			X	
Chris Meyer	388-1236	City of McCall	608	Y	✓		+
Bill Lenden	939-0398	ID Conservation Officers	H496	yes		✓	+
Max Greenlee		Rush Pisca	H0494	N			+
GARRICK BAXTER	287-4811	IDWR	H6008	N			
Shelley Keen	287-4947	IDWR	H608	N			
Scott Phillips		SLO		No			
Bruno Bennett	208-819-0035			No			
Jay Stark	208-866-3613	Idaho Hunter Ed, IHEA	H496	yes		X	+
Emily Anderson		Idaho Dept of Lands		N			
Ron Galloway	208 6020213	HEd	496	yes		X	+
Larry Johnson	334-3312	Investment Board	495	No			

Senate Resources and Environment Committee

Hearing on H.B. 608

March 16, 2012

Republicans	Democrats
Chair Monty J. Pearce	Elliot Werk
Vice Chair Steve Bair	Michelle Stennett
Dean L. Cameron	
Jeff C. Siddoway	
Bert Brackett	
Lee Heider	
John Tippets	

Chairman Pearce and members of the Committee, good afternoon. I am Chris Meyer with the law firm of Givens Pursley. I thank you for the opportunity to speak with you today.

Garrick Baxter and Shelly Keen of the Idaho Department of Water Resources are here as well and available for questions.

Ken Harward of the Association of Idaho Cities and Lindley Kirkpatrick, City Manager of the City of McCall, had hoped to present as well, but they are out of town and unable to attend today's rescheduled hearing.

I serve as special water counsel to the City of McCall. I also represent a number of other municipal entities on water rights matters, but am here today on behalf of the City of McCall.

H.B. 608 is a simple measure. It resolves the question of whether cities and other public entities engaged in land application of wastewater must first obtain a water right for what they do.

Years ago, back in the day, cities collected sewage, treated it minimally, and discharged it to rivers, lakes, and drains. As federal environmental regulations have tightened in recent years, this is often no longer an option. The City of McCall, for instance, faces a zero phosphorous limit in Lake Cascade. In order to comply with increasingly strict environmental requirements, McCall and others are turning more and more to land application of wastewater.

I am not aware of any city or sewer district that has ever obtained a water right for that purpose. Of those that I have spoken to, I hear over and over that this is an issue they just try to ignore.

But, as Cities are now being called upon to invest millions and millions of dollars in water quality strategies, my advice to them is that they should not just ignore this issue.

I made inquiries at IDWR to see if we could resolve this issue without the sometimes costly and contentious process of securing a new water right. The legal team at IDWR agreed that, based on common law principles, it is clear that a city can treat and dispose of water it diverts under its municipal water rights, and it doesn't need a new water right to do so. A question arises, however, as to the treatment and disposal of water that is not part of a municipal water right.

As Mr. Kirkpatrick explained, the City of McCall land applies not only its own municipal water, but water collected outside the city.

McCall is the example that brings us here today, but they are not alone. Another example is the City of Boise which manages wastewater but does not own municipal water rights. Another is the Hayden Area Regional Sewer Board (HARSB). Another is the North Kootenai Water and Sewer District. Undoubtedly there are others. This really is a state-wide issue.

Sorting out whether the molecules in the sewage effluent can be traced to a municipal water right or really came from somewhere else (such as a can of Pepsi) would be a bonanza for water lawyers. It could send many kids to college. But it would accomplish nothing for the People of Idaho.

This bill is the opposite of a "Full Employment Act for Water Lawyers." It eliminates uncertainty. It eliminates the basis for litigation. And it allows cities and other public entities to focus on what they should be focused on: Developing the most efficient, lowest cost solutions to meet water quality requirements. In short, it allows cities to spend their resources on engineers rather than lawyers. And that is a good thing. There will always be work for the lawyers. They don't need this to keep them busy.

It also allows the Department of Water Resources to devote its scarce resources to tackling the important water issues facing the State.

As Mr. Kirkpatrick mentioned in his testimony, the City of McCall has reached out to a broad range of affected interests including other cities, sewer districts and operators of publicly owned treatment works.

The first thing we did was to meet with the legislative committee of Idaho Water Users Association, where we secured a "neutral" or "do not oppose" position on the bill.

There is strong support for this, across the board. The Association of Idaho Cities is firmly behind it. Both IDWR and DEQ favor the measure.

In short, this is a simple bill that provides a simple answer to a simple question. It doesn't solve the world's problems. It certainly doesn't solve the enormous challenge of water quality regulation. All those requirements remain in place and are unaffected by this bill. What it does is ensure that cities can focus on water quality without having to worry about yet another problem.

Addendum D COMMUNICATIONS WITH IDWR REGARDING BLACK ROCK UTILITIES, INC.

1. Letter from Christopher Meyer to Gary Spackman re water right nos. 95-9055 and 95-9248 (Sept. 2, 2008) (with four enclosures).
2. Review Memo by Mat Weaver re water right nos. 95-9055 and 95-9248 (Sept. 23, 2008).
3. Letter from Mat Weaver to Christopher Meyer re water right nos. 95-9055 and 95-9248 (Sept. 29, 2008).

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CELL: 208 407-2792
EMAIL: chrismeyer@givenspursley.com

September 2, 2008

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

Re: *Water Right Nos. 95-9055 and 95-9248 – Land Application of Treated Effluent*

Dear Mr. Spackman:

I am writing on behalf of my client, Black Rock Utilities, Inc. ("Black Rock"), owner of the above-captioned water right permits. Both permits are for municipal use of ground water. I spoke on Friday with Bob Haynes, and he suggested that I write to you.

The purpose of this letter is to inquire as to whether any amendment of these permits is required in order for Black Rock to apply treated effluent derived from these rights to golf courses within The Club at Black Rock and Black Rock North (collectively the "Project"). As you may recall, The Club at Black Rock is the original project, now nearly complete, and Black Rock North is the adjacent expansion.

Black Rock's Application for Amendment of Permit to Water Right No. 95-9045 (Application No. 74780) is now pending before the Idaho Department of Water Resources ("IDWR" or the "Department"). In our settlement conference last week, the Protestants urged Black Rock to expedite its plans to land apply treated effluent from its municipal ground water rights to golf courses within the Project. This would reduce, but not replace, the need for surface irrigation on that property. Black Rock believes that this is an environmentally sound water conservation practice and wishes to do so. Black Rock has been working with the Idaho Department of Environmental Quality to obtain the appropriate environmental permits. Black Rock previously obtained informal assurance from the Northern Regional Office that no

amendment of its water right permits would be required. I am writing to you seeking confirmation of that conclusion.

I believe the general rule is clear that a municipal provider may land apply treated effluent derived from its municipal water rights to land within its expanding municipal service area without any amendment of its water rights.[1] However, there are special considerations here. Specifically, we wish to confirm that following statements are true, without any amendment of the current permits:

1. The condition on Water Right No. 95-9055 stating "Place of use is within the service area of CAG Investments, LLC." will be understood to apply to the service area of the current owner and municipal provider, Black Rock Utilities, Inc.

2. The place of use for Water Right No. 95-9055 describes an expanding municipal service area and is not limited to the specific forty-acre tracts identified in the Water Permit Report.

3. The condition on Water Right No. 95-9055 prohibiting use of this ground water right for irrigation of land to which surface rights are available does not prohibit land application of treated municipal effluent on such land.

4. The condition on Water Right No. 95-9248 stating "Place of use is within the area served by the public water supply system of The Ridge at Blackrock Bay Homes, Inc. The place of use is generally located within Government Lot Numbers 1, 2, and 3 of Section 9, Township 48N, Range 4W." will be understood to apply to the service area of the current owner and municipal provider, Black Rock Utilities, Inc.

5. The place of use for Water Right No. 95-9248 describes an expanding municipal service area and is not limited to the lots identified in the condition quoted above.

I offer the following additional information and explanation.

---

[1] "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) (application requirements for municipal service providers). "'Service area' means that area within which a municipal provider is or becomes entitled or obligated to provide water for municipal purposes. . . . 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." Idaho Code § 42-202B(9) (definition of "service area").

Water Right No. 95-9055

Water Right No. 95-9055 contains a "condition of approval" stating: "Place of use is within the service area of CAG Investments, LLC." This is listed as Condition No. 6 on the Water Permit Report.

First, Black Rock seeks assurance that there is no need to amend the permit to change the reference in the condition from the former owner, CAG Investments, LLC, to the current owner, Black Rock. The permit was assigned to Black Rock Utilities, Inc. on January 11, 2006 and the assignment was approved by the Department on January 20, 2006.

Second, Black Rock seeks assurance that the referenced condition describes an expanding municipal service area under Idaho Code § 42-202B(9) and is not limited to the forty-acre tracts listed on the water right. This condition appears on the Water Permit Report available on IDWR's website, but not on the original hard copy of the permit (copies of each are enclosed). Apparently the Department initially took the position that the place of use should be described by forty-acre tracts. Indeed, the Water Permit Report continues to list a series of forty-acre tracts, which are no longer representative of Black Rock's current Project boundary (which has expanded to include Black Rock North). An IDWR internal memorandum to the file from Sharla [Curtis?] dated July 25, 2001 states: "The applicant is a development company which does not serve as a typical water provider with a service area. This application is for a specific development and the place of use to be covered by the municipal permit was listed by ¼¼. Therefore, the permit will be issued with the place of use spelled out like the application instead of with a general remark allowing the use within a service area." Apparently, the Department later determined that this was incorrect and added the above-quoted condition describing the place of use based on the municipal provider's service area. Black Rock seeks confirmation that the place of use description set out in the above-quoted condition establishes an expanding municipal service area, that the list of forty-acre tracts on the permit is not controlling, and that there is no need to amend the Permit to describe land within Black Rock North.

Third, Black Rock seeks your advice as to the effect of the condition which states: "The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping." This is listed as Condition No. 5 on the Water Permit Report and Condition No. 7 on the original Permit.

This provision appears to have been inspired by Idaho Code § 67-6537 enacted in 2005. This statute, which is directed to local land use entities, not IDWR, requires land use applicants under the Local Land Use Planning Act to use surface water as the primary source of supply if it is "reasonably available." It is my understanding that the Department does not view this statute

as prohibiting land application of municipal effluent from ground water to land where surface water is available, so long as the ground water was first used for in-house culinary purposes. Accordingly, we trust that the referenced condition is intended to prohibit only the use of this ground water right for direct irrigation, and does prohibit the environmentally desirable goal of land application of treated effluent.

Water Right No. 95-9248

Black Rock also owns Water Right No. 95-9248, which it acquired from the prior owner, The Ridge at Black Rock Bay Homes, Inc., via an Assignment of Permit dated October 11, 2007.[2]

Unlike Water Right No. 95-9055, this water right does not identify any place of use on its face. Instead, it contains a condition stating: "Place of use is within the area served by the public water supply system of The Ridge at Blackrock Bay Homes, Inc. The place of use is generally located within Government Lot Numbers 1, 2, and 3 of Section 9, Township 48N, Range 4W." This is displayed as Condition No. 4 of the Water Permit Report and Condition No. 6 on the original Permit.

Black Rock seeks assurance that the reference to the service area of the former owner, The Ridge at Black Rock Bay Homes, Inc., will be understood to apply to the entire service area of the current owner and municipal provider, Black Rock Utilities, Inc. Black Rock also seeks assurance that the reference to three specific lots does not limit the place of use, and that the municipal service area may change (without need for amendment or transfer) in accordance with Idaho Code § 42-202B(9). This way, if it becomes practicable, treated effluent from this right could be incorporated into a common land application program with effluent from Water Right No. 95-9055.

I thank you for your consideration and attention. If Kyle Capps or I can provide additional information, we would be pleased to do so. My direct dial is provided above. You may reach Kyle on his cell phone at 208-755-4744. We look forward to your guidance.

Sincerely,

Christopher H. Meyer

[2] Upon purchase of this separate development, The Ridge at Black Rock Bay was folded into The Club at Black Rock for development purposes. However, the homes and lawns served by this water right are served by a physically separate ground water system under Water Right No. 95-9248. Since no surface water right was available for this ground water right when it was permitted, the permit does not contain a condition similar that that included for No. 95-9055 prohibiting irrigation of lands to which surface rights are available.

Encl: Water Permit Report for Water Right No. 95-9055
Original Permit for Water Right No. 95-9055
Water Permit Report for Water Right No. 95-9248
Original Permit for Water Right No. 95-9248

cc: Robert G. Haynes, Regional Manager, Northern Regional Office, IDWR
Kyle Capps, Vice President, Black Rock Development
John R. Layman, Layman, Layman & Robinson
Amie L. Anderson, Layman, Layman & Robinson
Scott N. King, Senior Project Engineer, SPF Water Engineering, LLC
Barry Rosenberg, Executive Director, Kootenai Environmental Alliance
Jai K. Nelson, Coordinator, Coalition for Positive Rural Growth

CHM:ch
S:\CLIENTS\8928\1\CHM Ltr to Gary Spackman re 95-9055 and 95-9248.DOC

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Permit Report

09/02/2008

WATER RIGHT NO. 95-9055

Owner Type	Name and Address
Current Owner	BLACK ROCK UTILITIES INC KYLE CAPPS, CGCS PO BOX 3070 COEUR D ALENE, ID 83816 (208) 665-2005
Original Owner	CAG INVESTMENTS LLC 210 SHERMAN AVE STE 117 COEUR D ALENE, ID 83814 (208)676-8696

Priority Date: 11/13/2000
Status: Active

Source	Tributary
GROUND WATER	

Beneficial Use	From	To	Diversion Rate	Volume
MUNICIPAL	01/01	12/31	1 CFS	
Total Diversion			1 CFS	

Location of Point(s) of Diversion:

GROUND WATER	NENW	Sec. 16	Township 48N	Range 04W	KOOTENAI County
GROUND WATER	SWNW Lt 2	Sec. 16	Township 48N	Range 04W	KOOTENAI County
GROUND WATER	SWNW Lt 2	Sec. 16	Township 48N	Range 04W	KOOTENAI County
GROUND WATER	SWNW Lt 2	Sec. 16	Township 48N	Range 04W	KOOTENAI County

GROUND WATER	SENW Lt 3	Sec. 16	Township 48N	Range 04W	KOOTENAI County
GROUND WATER	SENW Lt 3	Sec. 16	Township 48N	Range 04W	KOOTENAI County
GROUND WATER	SENW Lt 3	Sec. 16	Township 48N	Range 04W	KOOTENAI County

Place(s) of use:

Place of Use Legal Description: MUNICIPAL KOOTENAI County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
48N	04W	8		SWNE			SENE							
				NESW			NWSW			SESW				
				NESE			NWSE			SWSE			SESE	
		9		NENW			NWNW			SWNW			SENW	
				NESW			NWSW			SWSW			SESW	
		16		NWNE										
				NENW			NWNW			SWNW			SENW	
		17		NENE										

Conditions of Approval:

1.	26A	Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which permit holder had no control.
2.	004	The issuance of this right does not grant any right-of-way or easement across the land of another.
3.	046	Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
4.	01M	After specific notification by the Department, the right holder shall install a suitable measuring device or shall enter into an agreement with the Department to determine the amount of water diverted from power records and shall annually report the information to the Department.
5.	102	The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping.
6.		Place of use is within the service area of CAG Investments, LLC.

Dates:
Proof Due Date: 08/01/2011
Proof Made Date:
Approved Date: 08/08/2001
Moratorium Expiration Date:
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
Application Received Date: 11/13/2000

Protest Deadline Date: 02/05/2001
Number of Protests: 0
Field Exam Date::
Date Sent to State Off:
Date Received at State Off:

Other Information:
State or Federal:
Owner Name Connector:
Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False
Close

State of Idaho
Department of Water Resources

Permit to Appropriate Water

NO. 95-09055

Priority: 11/13/2000 Maximum Diversion Rate: 1.00 CFS

This is to certify, that CAG INVESTMENTS LLC
210 SHERMAN AVE STE 117
COEUR D ALENE ID 83814

has applied for a permit to appropriate water from:

Source: GROUND WATER

and a permit is APPROVED for development of water as follows:

BENEFICIAL USE	PERIOD OF USE	RATE OF DIVERSION
MUNICIPAL	01/01 to 12/31	1.00 CFS

LOCATION OF POINT(S) OF DIVERSION:

GROUND WATER		NE¼NW¼	Sec. 16, Twp 48N, Rge 04W, B.M.	KOOTENAI County
GROUND WATER	L2	SW¼NW¼	Sec. 16, Twp 48N, Rge 04W, B.M.	KOOTENAI County
GROUND WATER	L2	SW¼NW¼	Sec. 16, Twp 48N, Rge 04W, B.M.	KOOTENAI County
GROUND WATER	L2	SW¼NW¼	Sec. 16, Twp 48N, Rge 04W, B.M.	KOOTENAI County
GROUND WATER	L3	SE¼NW¼	Sec. 16, Twp 48N, Rge 04W, B.M.	KOOTENAI County
GROUND WATER	L3	SE¼NW¼	Sec. 16, Twp 48N, Rge 04W, B.M.	KOOTENAI County
GROUND WATER	L3	SE¼NW¼	Sec. 16, Twp 48N, Rge 04W, B.M.	KOOTENAI County

PLACE OF USE: MUNICIPAL

Twp Rge Sec	NE				NW				SW				SE				Totals
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
48N 04W 8			X	X					X	X		X	X	X	X	X	
48N 04W 9					X	X	X	X	X	X	X	X					
48N 04W 16		X			X	X	X	X									
48N 04W 17	X																

CONDITIONS OF APPROVAL

1. Proof of application of water to beneficial use shall be submitted on or before **August 1, 2006.**
2. Subject to all prior water rights.
3. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which permit holder had no control.
4. The issuance of this right does not grant any right-of-way or easement across the land of another.
5. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
6. After specific notification by the Department, the right holder shall install a suitable measuring device or shall enter into an agreement with the Department to determine the amount of water diverted from power records and shall annually report the information to the Department.

Scan from this point down.

MICROFILMED
OCT 12 2005

State of Idaho
Department of Water Resources

Permit to Appropriate Water

NO. 95-09055

CONDITIONS OF APPROVAL

7. The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping.

This permit is issued pursuant to the provisions of Section 42-204, Idaho Code. Witness the signature of the Director, affixed at Boise, this 8th day of August, 2001.

KARL J DREHER, Director
for

MICROFILMED
OCT 12 2001

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Permit Report

09/02/2008

WATER RIGHT NO. 95-9248

Owner Type	Name and Address
Current Owner	BLACK ROCK UTILITIES INC KYLE CAPPS, CGCS PO BOX 3070 COEUR D ALENE, ID 83816 (208) 665-2005
Original Owner	THE RIDGE AT BLACKROCK BAY HOMES INC 10636 N GOVERNMENT WAY HAYDEN, ID 83835 (208)772-5121

Priority Date: 10/25/2004
Status: Active

Source	Tributary
GROUND WATER	

Beneficial Use	From	To	Diversion Rate	Volume
MUNICIPAL	01/01	12/31	0.25 CFS	
Total Diversion			0.25 CFS	

Location of Point(s) of Diversion:

GROUND WATER	NENE Lt 1	Sec. 09	Township 48N	Range 04W	KOOTENAI County

Place(s) of use:

Place of Use Legal Description: MUNICIPAL KOOTENAI County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
48N	04W	9	1	NENE		2	NWNE							
			3	NENW										

Conditions of Approval:

1.	26A	Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.
2.	046	Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.
3.	134	Prior to or in connection with the proof of beneficial use statement to be submitted for municipal water use under this right, the right holder shall provide the department with documentation showing that the water supply system is being regulated by the Idaho Department of Environmental Quality as a public water supply and that it has been issued a public water supply number.
4.	128	Place of use is within the area served by the public water supply system of The Ridge at Blackrock Bay Homes, Inc. The place of use is generally located within Government Lot Numbers 1, 2, 3 and 4, Section 9, Township 48N, Range 4W.
5.	01M	After specific notification by the Department, the right holder shall install a suitable measuring device or shall enter into an agreement with the Department to determine the amount of water diverted from power records and shall annually report the information to the Department.

Dates:
Proof Due Date: 03/01/2010
Proof Made Date:
Approved Date: 03/09/2005
Moratorium Expiration Date:
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
Application Received Date: 10/25/2004
Protest Deadline Date: 02/07/2005
Number of Protests: 0
Field Exam Date::
Date Sent to State Off:
Date Received at State Off:

Other Information:
State or Federal:
Owner Name Connector:

http://www.idwr.idaho.gov/apps/ExtSearch/RightReportAJ.asp?BasinNumber=95&Sequenc... 9/2/2008

Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False
Close

State of Idaho
Department of Water Resources

Permit to Appropriate Water

NO. 95-09248

Priority: October 25, 2004 Maximum Diversion Rate: 0.25 CFS

This is to certify, that THE RIDGE AT BLACKROCK BAY HOMES INC
10636 N GOVERNMENT WAY
HAYDEN ID 83835

has applied for a permit to appropriate water from:

Source: GROUND WATER

and a permit is APPROVED for development of water as follows:

BENEFICIAL USE	PERIOD OF USE	RATE OF DIVERSION
MUNICIPAL	01/01 to 12/31	0.25 CFS

LOCATION OF POINT(S) OF DIVERSION:
GROUND WATER L1 (NE¼ NE¼) Sec. 9, Twp 48N, Rge 04W, B.M. KOOTENAI County

CONDITIONS OF APPROVAL

1. Proof of application of water to beneficial use shall be submitted on or before **March 01, 2010.**
2. Subject to all prior water rights.
3. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.
4. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.
5. Prior to or in connection with the proof of beneficial use statement to be submitted for municipal water use under this right, the right holder shall provide the department with documentation showing that the water supply system is being regulated by the Idaho Department of Environmental Quality as a public water supply and that it has been issued a public water supply number.
6. Place of use is within the area served by the public water supply system of The Ridge at Blackrock Bay Homes, Inc. The place of use is generally located within Government Lot Numbers 1, 2, and 3 of Section 9, Township 48N, Range 4W.
7. After specific notification by the Department, the right holder shall install a suitable measuring device or shall enter into an agreement with the Department to determine the amount of water diverted from power records and shall annually report the information to the Department.

This permit is issued pursuant to the provisions of Section 42-204, Idaho Code. Witness the signature of the Director, affixed at Boise, this 9th day of March, 20 05.

Gary Spackman

for KARL J DREHER, Director

REVIEW MEMO

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
322 E. FRONT STREET, P.O. BOX 83720, BOISE, IDAHO 83720-0098
PHONE: (208) 287-4800 FAX: (208) 287-6700

DATE: SEPTEMBER 23, 2008

TO: Jeff Peppersack

FROM: Mat Weaver MW

CC: **GARY SPACKMAN**

SUBJECT: REVIEW OF PERMITS 95-9055 AND 95-9248 AND GENERATION OF RESPONSES TO QUESTIONS PERTAINING TO THESE PERMITS FROM CHRISTOPHER MEYER OF GIVEN PURSLEY, LLP RECEIVED IN A LETTER DATED SEPTEMBER 2, 2008.

INTRODUCTION

On September 3, 2008 the Idaho Department of Water Resources (IDWR) received a letter from Christopher Meyer pertaining to the status and conditions of permits 95-9055 and 95-9248 and the impact, if any, that the current state of the permits will have on the Permit Holder's desired ability to land apply treated wastewater resulting from water previously diverted and used for municipal purposes under these permits. This memorandum is an attempt to summarize the state of the permits, specifically address Mr. Meyer's questions, and provide background on the suitability and legality of the land application of wastewater generated under the permits in question.

PERMIT 95-9055

Permit 95-9055 was approved on August 8, 2001 with a priority date of November 13, 2000 for the diversion of 1.00 CFS of groundwater for municipal use on ground specifically identified by quarter-quarter description on the permit. The permit described seven different points of diversion. The application indicates that the desired uses included the following: domestic use in 381 homes, potable services to a golf course clubhouse and restrooms, potable services to an equestrian center, potable services to a maintenance center, potable services to the subdivision's sales center, potable services to a fire station, and potables services to the subdivision's recreation areas. Irrigation was not requested as a beneficial use. On January 12, 2006 the permit was assigned to Black Rock Utilities, Inc. from the applicant CAG Investments, LLC. On September 20, 2006

an extension of time was awarded to the permit holder extending the proof of beneficial use due date to August 1, 2011.

A review of the place of use (POU) shape in the Water Rights data base indicates a discrepancy between the description on the permit and the shape file. The shape file does not include the NW quarter of the NE quarter of Section 16, T48N, R04W, but is the same in all other regards. Further confusion in the POU is found when comparing the POU description of the "proof report" (Water Permit Report) to the description of the actual permit. The POU legal descriptions are identical between the two documents, however, the proof report contains a condition not found on the actual permit stating, *"Place of use is within the service area of CAG Investments, LLC"*. In a memo to the file dated July 25, 2001 Sharla Curtis specifically states that *"the permit will be issued with the place of [use] spelled out like the application instead of with a general remark allowing the use with in a service area."* From this memo is seems clear that the intent at the time the permit was issued and approved was to describe the POU for permit 95-9055 specifically by quarter-quarter legal description and not generally by "service area".

PERMIT 95-9248

Permit 95-9248 was approved on March 9, 2005 with a priority date of October 25, 2004 for the diversion of 0.25 CFS of groundwater for municipal use on ground described by condition six as, *"Place of use is within the area served by the public water supply system of The Ridge of Blackrock Bay Homes, Inc. The place of use is generally located within Government Lot Numbers 1, 2, and 3 of section 9, T48N, R04W."* The permit described a single point of diversion. The only use described on the approved application is municipal. However, the original application[1] that was submitted indicates domestic, fire protection, and irrigation as the requested beneficial uses. On October 11, 2007 the permit was assigned to Black Rock Utilities, Inc. from the applicant Ridge at Black Rock Bay Homes, Inc.

Review of the POU shape file in the Water Rights data base and on the POU described by the proof report indicates a slight discrepancy in regards to the proof report. Unlike the actual permit, and the POU shape file, the proof report includes government lot 4 as part of the general description in condition one (128).

Refer to Exhibit 1, attached, for a graphical depiction of permits 95-9055 and 95-9248.

BACKGROUND AND DISCUSSION

Municipal Purpose and Municipal Provider

The beneficial use described under both permits is for "municipal purposes". Municipal Purposes as defined in Idaho Statute § 42-202B (6) refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purpose, 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 Statute § 42-202B (5, c) recognizes any 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, as a Municipal Provider. Review of the permits and the permit holder indicates that it is justifiable and appropriate to call the permit holder a Municipal Provider and to describe the beneficial use as for municipal purposes.

Review of the files associated with both permits and the letter sent by Mr. Meyer, makes obvious that one of the municipal purposes that will be provided for under these permits is irrigation. Idaho Statute § 42-219 (2) has the following to say in regards to irrigation under municipal rights, *"If the [irrigation] 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."* This statute would seem to place requirements regarding the inclusion of the delineation of the place of use on the issuance of future licenses. In the case of municipal uses the place of use is synonymous with the "service area", Idaho Statute § 42-202B (9) describes the service area for a municipal provider that is not a municipality, as the area that it is authorized or obligated to serve, including changes therein after the permit or license is issued. If we recognize the permit holder as a Municipal Provider, and in light of the municipal use authorized under the permits, it would seem that the permit holder is within their rights as described under the law to irrigate anywhere within their place of use, even if that place of use is modified after the issuance of a permit or the license. Provided the place of use is within the area that the permit holder is "authorized or obligated to serve" and is seemingly described in some manner under the planning horizon for reasonably anticipated future needs.

Land Application and the Reuse of Municipal Water

In regards to the land application of treated municipal waters to the Black Rock project I have recognized and addressed two issues: (1) is this use allowed for under the municipal use umbrella, and (2) would the land application represent a historical enlargement of actual consumptive use associated with the permit.

In regards to issue number one, Idaho Statute § 42-202(2) states the following, *"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."* It seems clear from this language that every intended use need not be described in the application. In addition, the land application of wastewater is going to be used as a source of irrigation for the golf course and irrigation is expressly listed as a municipal purpose under § 42-202B (6). It therefore can be concluded that land application for the intent of irrigation can and should be allowed for under the general heading of municipal purposes.

The second issue deals with the enlargement of the historical consumptive use of the water diverted under the permit. The municipal use is recognized by IDWR as being completely consumptive, in actuality this may or may not be the case. Certainly the uses of water under the general heading of municipal use are varied enough that it is not unreasonable to assume that some of that water is in fact returned to the surrounding environment. Especially in the instance of the Black Rock project which is a stand alone

community with water treatment, wastewater treatment, and irrigation all occurring and being contained within the development. By this reasoning land application, a fully consumptive process, would represent some additional volume of consumption, or loss of water from the development, over and above the historical quantity of water lost from the development under the previous practices, which did not include land application. So should this enlargement of consumptive water be allowed?

If we consider the Administrator's Application Processing Memorandum No. 61 regarding industrial waste water and take forward the reasoning and direction put forth in that memo and apply it to municipal waste water, then the "consumptive use" associated with the use can increase (over the historical base line value) up to the amount determined to be consistent with the original water rights as reasonably necessary to meet treatment (land application) requirements. In addition, the reuse of this water may represent an increase in actual water depletion from the system, but were it not used the irrigation would still take place, simply under another permit (95-9045) applied for expressly for that use, which would divert surface water. Finally, the permit holder has not submitted proof of beneficial use to IDWR, and is not required to do so for some 2-3 years, so it would seem premature to evaluate the total beneficial use of water at this interim time. For all these reasons it would seem that any enlargement of the consumptive component of the permit associated with the new practice of land application, can and should be allowed by IDWR.

QUESTIONS

In Mr. Meyer's letter dated September 2, 2008 there were five explicit questions put to IDWR for response. Find below the questions recreated from his letter in italics followed by my response based upon the finding outlined above and my experience at IDWR.

1. *The condition on Water Right No. 95-5055 stating "Place of use is within the service area of CAG Investments, LLC." will be understood to apply to the service area of the current owner and municipal provider, Black Rock Utilities, Inc.*

   A basic premise at IDWR is that the Water Right database is a representation of the actual records it reflects and is not in actuality an official record in it of itself. Ideally, the data base would be an exact simulacrum of the official record. However, this is not always the case, as is illustrated with permit 95-9055. As explained above in detail there is a discrepancy between the place of use described upon the actual signed permit and the proof report document generated from information contained in the data base. The signed permit represents the governing document in describing the nature of the permit, and as such there is currently no recognized "service area" associated with this permit. Instead the place of use is described in full on the permit by the traditional means of a specific quarter-quarter delineation. Due to this fact, IDWR does not recognize any service area associated with this permit, in the name of Black Rock Utilities, Inc. or otherwise.

2. *The place of use for Water Right No. 95-9055 describes an expanding municipal service area and is not limited to the specific forty-acre tracts identified in the Water Permit Report.*
   No, the place of use described on permit 95-9055 does not describe an expanding municipal service area; instead it delineates a specific place of use by quarter-quarter description.

3. *The condition of Water Right No. 95-9055 prohibiting use of this ground water right for irrigation of land to which surface rights are available does not prohibit land application of treated municipal effluent on such land.*
   Mr. Meyer is correct in this regard. This condition is speaking to the primary or first use the diverted groundwater is put to. IDWR recognizes Municipal Use as being fully consumptive, as such, once the groundwater has served its initial purpose the Municipal Provider is free to use or reuse the reclaimed water at their discretion[2].

4. *The condition on Water Right No. 95-9248 stating "Place of use is within the area served by the public water supply system of the Ridge at Blackrock Bay Homes, Inc. The place of use is generally located within Government Lot Numbers 1, 2, and 3 of section 9, Township 48N, Range 4W." will be understood to apply to the service area of the current owner and municipal provider, Black Rock Utilities, Inc..*
   Permit 95-9248 is clear in its recognition of a service area as the beneficial place of use of the water diverted under the permit. With the assignment of the permit from The Ridge at Blackrock Bay Homes, Inc. to Black Rock Utilities, Inc., and with the understanding that the intent to beneficially use the water under the new ownership is at essence the same as under the previous ownership, it seems reasonable and prudent that the purpose of the permit is to serve the service area associated with the physical lands that comprise the Black Rock project, regardless of the name attached to the service area or Municipal Provider on the permit.

5. *The place of use for Water right No. 95-9248 describes an expanding municipal service area and is not limited to the lots identified in the condition quoted above.*
   Based upon Idaho Statutes § 42-202(B) and § 42-219, as previously described in greater detail in the BACKGROUND section of this memo, the place of use for Water Right 95-9248 describes and expanding municipal service area and is not limited to the lots identified in condition number six of the actual water permit.

GENERAL QUESTIONS

The expressed purpose of Mr. Meyer's letter is to determine whether any amendment of permits 95-9055 and 95-9248 are required in order for the Black Rock development to apply treated effluent derived from these rights to golf courses within The Club at Black Rock and Black Rock North projects. The essence of this question is two fold, one is land application a use recognized under the current municipal use umbrella, and two do either permits need to be amended to accommodate this goal.

LAND APPLICATION

Based upon my discussion in the BACKGROUND section of this memo it seems to me that not only is the land application of treated wastewater allowed for under the municipal use general heading, but should be encouraged as a valid and worth while conservation effort.

PERMIT AMENDMENTS

As addressed earlier permit 95-9055 does not have a general "service area" description of its place of use. With this understanding any land application of treated wastewater would have to be applied to those portions of the golf course(s) that are within the described place of use on the actual permit document. A cursory review of aerial imagery from 2006 associated with the place of use of permit 95-9055 seems to indicate that the existing golf course at that time was completely contained within the boundary. However, I'm not sure where the "Black Rock North" development or any future golf course expansions may be in respect to the permit's place of use.

In the event that the permit holder desires to land apply water outside the current place of use, a permit amendment would be required to modify the place of use. Rather than modify the existing delineation it would be recommended that the permit holder amend their permit so that the place of use is described generally by a "service area". In regards to public advertisement of the proposed amendment, it is at the discretion of the Director. In light of the fact that the original public notice for this permit used the language *"municipal use is within the service area of the applicant"* it does not seem necessary for IDWR to require an additional public advertisement of the amendment, assuming the only change would be in describing the place of use by a service area.

In the case of permit 95-9248 the place of use is generally described as a "service area" and as such the place of use may be modified as needed by the permit holder at any time. Therefore an amendment for this permit would not be required to accommodate the land application of reclaimed municipal water.

---

[1] Review of the file indicates two applications were submitted. One was submitted by Blue Diamond Investment, LLC on June 9, 2004 and does not appear to have been the basis of the permit. The second was also submitted on June 9, 2004 by The Ridge at Black Rocks Bay Homes, Inc. and appears to be the basis of the issued permit. To my knowledge there is no discussion or indication in the file as to why there were two applications or why the Blue Diamond application was not used.

[2] This position does not seem to be explicitly articulated in any Idaho Statute or IDWR Administrator's Memorandum that I reviewed. However, this position does seem to have been regularly upheld in case law, although not completely with out rulings in the opposite, and is well summarized by Mr. Phil Rassier in his Memo to Norm Young from September 5, 1996 titled "Land Application of Industrial Effluent".

State of Idaho
DEPARTMENT OF WATER RESOURCES
322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor
DAVID R. TUTHILL, JR.
Director

September 29, 2008

CHRISTOPHER H MEYER
GIVENS PURSLEY LLP
601 W BANNOCK ST
PO BOX 2720
BOISE ID 83701-2720

RE: Water Right Nos. 95-9055 and 95-9248 – Land Application of Treated Effluent

Dear Mr. Meyer:

This letter responds to your written correspondence dated September 2, 2008 regarding water right permits nos. 95-9055 and 95-9248. Your letter posed the general question of whether either permit must be amended to land apply treated wastewater to golf courses within The Club at Black Rock and Black Rock North (collectively the "Project"). In addition, you asked five specific questions pertaining to this issue. Please find below each of your questions restated in italics followed by my response.

1. *The condition on Water Right No. 95-9055 stating "Place of use is within the service area of CAG Investments, LLC." will be understood to apply to the service area of the current owner and municipal provider, Black Rock Utilities, Inc.*

The water right database is a representation of the actual water right documents and is not an official record. Ideally, the data base would be an exact simulacrum of the official record. Nonetheless, there is a discrepancy between the place of use described upon the actual signed permit and the proof report document generated from information contained in the data base. The signed permit establishes the terms of the permit. Permit no. 95-9055 does not describe a "service area" place of use. Instead, the permit describes the place of use by the traditional means of a specific quarter-quarter delineation.

2. *The place of use for Water Right No. 95-9055 describes an expanding municipal service area and is not limited to the specific forty-acre tracts identified in the Water Permit Report.*

Unfortunately, the place of use identified on the official record of permit no. 95-9055 does not describe an expanding municipal service area but delineates a specific place of use by quarter-quarter description.

3. *The condition of Water Right No. 95-9055 prohibiting use of this ground water right for irrigation of land to which surface rights are available does not prohibit land application of treated municipal effluent on such land.*

You are correct. This condition addresses the primary or first use of the diverted groundwater. IDWR recognizes municipal use as being fully consumptive. Once the

groundwater has been used for its initial purpose, the municipal provider may reuse the reclaimed water within its place of use for other purposes that are defined as specific uses of water within the broader municipal purpose.

4. The condition on Water Right No. 95-9248 stating "Place of use is within the area served by the public water supply system of the Ridge at Blackrock Bay Homes, Inc. The place of use is generally located within Government Lot Numbers 1, 2, and 3 of section 9, Township 48N, Range 4W." will be understood to apply to the service area of the current owner and municipal provider, Black Rock Utilities, Inc.

Permit no. 95-9248 recognizes a generally described service area as the place of use of the water diverted under the permit. The Ridge at Blackrock Bay Homes, Inc. assigned the permit to Black Rock Utilities, Inc., and Black Rock intends to similarly use the water. The service area is the portion of the Black Rock project served by the Black Rock municipal system.

5. The place of use for Water right No. 95-9248 describes an expanding municipal service area and is not limited to the lots identified in the condition quoted above.

Based upon Idaho Code § 42-202(B) and § 42-219, the place of use for permit no. 95-9248 describes an expanding municipal service area and is not limited to the lots identified in condition number six of the permit.

In response to your general question of whether a permit amendment is required to land apply treated wastewater to golf courses within the project, the answer is different for each permit. Permit no. 95-9055 does not describe a "service area" place of use. Treated water used for irrigation would have to be applied to those portions of the golf course(s) that are within the described place of use on the permit document.

If Black Rock wishes to land apply water diverted under permit no. 95-9055 outside the current place of use, a permit amendment would be required modifying the place of use. IDWR has discretion to publish notice of an application for amendment. The original public notice for this permit used the language "municipal use is within the service area of the applicant." IDWR will not require publication of notice of the application for amendment, assuming Black Rock only proposes to change the place of use to a generally described service area.

Permit no. 95-9248 describes the place of use as a "service area." The place of use may change as the service area changes. An amendment to permit no. 95-9248 is not required to land apply reclaimed municipal water.

Respectfully,

Gary Spackman

Cc: Bob Haynes, Regional Manager, Northern Regional Office, IDWR
John R. Layman, Layman, Layman & Robinson
Barry Rosenberg, Executive Director, Kootenai Environmental Alliance
Jai K. Nelson, Coordinator, Coalition for Positive Rural Growth

Addendum E COMMUNICATIONS WITH IDWR/AG REGARDING NAMPA

1. Letter from Christopher Meyer to Steven Strack (May 19, 2011) (with enclosed copy of letter from Steven Strack to Randall Fife (June 16, 2005)).
2. Letter from Christopher Meyer to Garrick Baxter and Jeff Peppersack (May 24, 2011) (including an attachment from the Water Law Handbook).
3. Letter from Garrick Baxter to Chris Meyer (May 26, 2011).
4. Letter from Christopher Meyer to Garrick Baxter (June 2, 2011) (including a copy of the May 24, 2011 letter with hand-written notes showing edits made by Garrick Baxter in his letter of May 26, 2011).
5. Letter from Garrick Baxter to Christopher Meyer (June 3, 2011).

Letter from Christopher Meyer to Steven Strack (May 19, 2011) (with attached copy of letter from Steven Strack to Randall Fife (June 16, 2005)

GIVENS PURSLEY LLP

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May 19, 2011

Steven W. Strack
Senior Deputy Attorney General
Office of the Attorney General
Natural Resources Division
P.O. Box 83720
Boise, ID 83720-0010

Re: City of Nampa: Use of water treatment facility outside of city limits

Dear Mr. Strack:

It was a pleasure to speak with you on Monday. As promised, I am writing to memorialize our discussion. Specifically, I wish to confirm that the views expressed in the letter you provided to Moscow City Attorney Randall Fife on June 16, 2005 (copy attached) are consistent with the advice we have received from IDWR staff respecting a possible wastewater infiltration project.

My client, the City of Nampa, is contemplating construction of such a facility as one option for meeting water quality requirements. As I mentioned, I met on Monday with Jeff Peppersack and Garrick Baxter of IDWR and Jeff Johnson and Steve Burgos of Brown and Caldwell to discuss water rights implications of such a project. If the City pursues the project, it would likely be located south of the City outside of the city limits and outside of the area of city impact.

Jeff Peppersack and Garrick Baxter expressed their view, based on current Department policy and guidance, that operation of such a facility would not require a new water right or a transfer of the City's existing water rights, so long as the purpose of the facility is to provide treatment to meet mandatory water quality requirements.

Moreover, they expressed the view that no legal obstacle is imposed by the fact that the facility likely would be located outside of the city limits. Jeff explained that the City would simply need to notify the Department of the location of the wastewater infiltration facilities so

that the Department could update its GIS shape file describing the City's service area. This would be the only administrative action required.

It was their view that an infiltration project to meet mandatory water quality requirements would constitute a municipal use of water. Accordingly, the service area of the City would expand to include this use. The water code was amended in 1996 to provide expressly for such a flexible, expanding service area, and that definition expressly recognizes that the service area may reach beyond a city's boundaries. The statute defines a municipal provider's "service area" as follows:[1]

> "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.

Idaho Code § 42-202B(9) (emphasis supplied).

The City's contemplated wastewater infiltration facility meets this test. First, it would be "within the municipality's established planning area." "Planning area" is not a defined term but is understood to refer to the area used by the City or other municipal provider to plan for current and future water requirements. Second, the infiltration project would be physically connected via pipeline or other conveyance with the City's wastewater collection and treatment system which is, in essence, a continuation of the City's water delivery system. Accordingly, it satisfies the definitional requirement that "the constructed delivery system for the area shares a common water distribution system with lands located within the corporate limits."

After the meeting at IDWR, I reviewed your letter to Mr. Fife. I then called you to confirm that nothing in that letter expresses a contrary view, particularly with respect to location of the infiltration facility outside of city boundaries. The letter to Mr. Fife, of course, addressed a different and more complex question: Can a city provide water to customers in another state? Thankfully, we need not grapple with that issue here. In answering that question, the Fife letter made reference to statutory provisions and case law dealing with the issue of water service by a

[1] By the way, the reference in the Dykes letter to Idaho Code § 42-203 appears to be in error. The language quoted is from Idaho Code § 42-202B(9).

municipality outside of its boundaries. As I understand it, you agree that none of those authorities pose a problem here. I will step through this conclusion briefly.

The Fife letter references Idaho Code § 50-323 which provides:

> Cities are hereby empowered to establish, create, develop, maintain and operate domestic water systems; provide for domestic water from wells, streams, water sheds or any other source; provide for storage, treatment and transmission of the same to the inhabitants of the city; and to do all things necessary to protect the source of water from contamination. The term "domestic water systems" and "domestic water" includes by way of example but not by way of limitation, a public water system providing water at any temperature for space heating or cooling, culinary, sanitary, recreational or therapeutic uses.

Idaho Code § 50-323 (emphasis supplied).

The first authorizing clause ("Cities are hereby empowered to establish, create, develop, maintain and operate domestic water systems") is not limited to the city limits. The clause mentioned in your letter ("provide for storage, treatment and transmission of the same to the inhabitants of the city") might be read as a geographic constraint but, in context, should not be so understood. First, as noted, other clauses provide express authorization that are not so limited. Second, the reference limiting a city's authority to "inhabitants of the city" is written in terms of water deliveries to customers and should not apply to limit the physical location of post-use water treatment. Instead, post-use water treatment would more properly fall under the final clause ("to do all things necessary to protect the source of water from contamination") which is not limited geographically. In any event, the language in section 50-323 must be read in light of the more recently enacted definition of "service area" in the 1996 Act, discussed above, which expressly authorizes deliveries outside of a city's boundaries. Moreover, common sense indicates that cities have general police power authority to own and operate facilities outside of their city limits. Surely, for example, a city could operate a garage for city vehicles outside of its boundaries. A treatment facility should be no different.

This is not to say that the "inhabitants of the city" language is meaningless surplusage. The meaning, however, is found in other contexts. For example, the language is meaningful in the context of the authority of a city to enter into franchise agreements, as noted in the case you cited, *Albert v. Boise Water Corp.*, 118 Idaho 136, 143, 795 P.2d 298, 305 (1990). Thus, it makes sense that cities should be allowed to enter into exclusive franchise agreements (exempt from anti-trust laws) only within their city limits. Likewise, they could not issue regulations governing water use (such as a requirement to hook up to city water) outside of the city's boundaries. But geographic boundaries should not come into play in other contexts, such as where to locate a treatment facility.

I trust that this letter fairly summarizes our discussion. If, instead, you believe that the City of Nampa may not be authorized to operate a water treatment facility (e.g., an infiltration basin) outside of its city limits, please let me know. I will copy Jeff Peppersack and Garrick Baxter, and ask that they, too, let me know if I have failed to accurately summarize their understandings.

Thanks to each of you for your assistance in this matter. I am sure it is apparent how important it is to Nampa to get this right.

Sincerely,

Christopher H. Meyer

Encl: Letter from Steven W. Strack to Randall D. Fife (June 16, 2005)

ec: Jeff Peppersack, Water Allocation Bureau Chief, IDWR
Garrick L. Baxter, Deputy Attorney General
Michael J. Fuss, Director, Public Works Department
Lenard Grady, City Engineer, Engineering Division
Kim Lord, Water Superintendent, Waterworks Division
Terrence R. White, White, Peterson, Gigray, Rossman, Nye & Nichols, P.A.
Jeffrey Johnson and Steve Burgos, Brown and Caldwell
Terry M. Scanlan, Roxanne Brown, and Stuart Hurley, SPF Water Engineering, LLC

CHM:ch

1169139_1 / 4628-1

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

June 16, 2005

Randall D. Fife
City Attorney
City of Moscow
P.O. Box 9203
Moscow, ID 83843-1703

Re: Provision of Water and/or Sewer Services by an Idaho Municipality to Out-of-State Governmental or Private Entities.

Dear Mr. Fife:

Your letter asked four questions:

(1) Are there state prohibitions on cities providing water and/or sewer services to extra-territorial governments or private users?

(2) Do principles of state ownership of water prohibit a city from providing domestic water services to customers outside the state?

(3) Would provision of water and/or sewer services to extra-territorial governments or private users adversely affect current city water permits and licenses?

(4) May a city, as a municipal corporation, sell water and/or water related services as a commodity similar to how Idaho water bottlers appear to do?

Delivery of water to customers outside municipal boundaries.

Among the powers of municipal corporations is the power to "operate their own utility systems and provide water, power light, gas and other utility services *within the city limits*." Alpert v. Boise Water Corp., 118 Idaho 136, 143, 795 P.2d 298, 305 (1990) (emphasis added). Idaho Code § 50-323 provides that cities may "provide for storage, treatment and transmission of [domestic water] to the inhabitants of the city." Idaho Code § 42-203 provides that the service area of a municipality "shall correspond to its corporate limits." The term "service area" also includes lands outside the city boundaries, but within a city's planning area, if the delivery system within the planning area shares a common water distribution system with lands within the

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corporate boundaries. *Id.* Service areas must be defined in any water license issued to a municipal provider, and the license must be conditioned "to prohibit any transfer of the place of use outside the service area." Idaho Code § 42-219. Thus, as a general matter, cities may not contract to provide water services to private users who reside outside the city boundaries or outside the service area defined in the city's water right license.

Cities within Idaho are also authorized to enter into joint service agreements with other municipalities where it is more practical to construct and maintain a unified water or sewage system than for each city to provide separately such services to their respective residents. Idaho Code §§ 50-1022 to -1025. In such a case, each city's water rights would presumably be amended so that the service area included all lands within the corporate boundaries of the two cities.

Similar arrangements with out-of-state cities are potentially available under the Joint Exercise of Powers Act, Idaho Code §§ 67-2326 to -2333, which authorizes public agencies in Idaho to enter into cooperative agreements with other public agencies in Idaho and other states. Idaho Code § 67-2327 defines "public agency" to include cities. One important caveat on the exercise of joint powers is that:

> nothing in this act shall be construed to extend the jurisdiction, power, privilege or authority of the state or public agency thereof, beyond the power, privilege or authority said state or public agency might have if acting alone.

Idaho Code § 67-2328. This prohibition on using the Joint Exercise of Powers Act to expand jurisdiction is especially important in the context of municipalities, which may exercise "only those powers granted to them by the State Constitution or the legislature." Alpert, 118 Idaho at 142, 795 P.2d at 304. Thus, any provision of water within an out-of-state city or county would have to comply with the joint service provisions of Idaho Code §§ 50-1022 to -1025. And, when delivering services to out-of-state entities, any agreement to jointly exercise powers would have to be carefully crafted to address issues such as the authority to levy and collect taxes and fees. Obviously, an Idaho city would have no authority to levy taxes on out-of-state residents, and the levy and collection of taxes would likely have to be carried out by the cooperating out-of-state city.

Aside from the implied authority derived from the Joint Exercise of Powers Act and Idaho Code §§ 50-1022 through -1025, we have found no authority in the Idaho Code allowing a city to provide water and sewer services to out-of-state customers. Indeed, the only provision in the Idaho Code addressing city authority to provide water to out-of-state customers is Idaho Code § 50-234, which authorizes agreements with cities outside state boundaries to "purchase or lease [the] out of state water distributing system, plant, and equipment of privately owned utilities" for the purpose of providing water to both cities "from an out of state [water] source."

While Idaho Code § 50-234 addresses the joint use of out-of-state water sources, it is silent as to use of Idaho water sources to service out-of-state customers.

Principles governing out-of-state use of water

Presuming that the City of Moscow were to enter into a joint service agreement with an out-of-state city, the City of Moscow would have to obtain a change of its water rights before providing water to customers in the other city.

State law does allow the use of water outside the state. Any provision of water to out-of-state entities, however, must comply with Idaho Code § 42-401(2), which requires that:

> Any person, firm or corporation or any other entity intending to withdraw water from any surface or underground water source in the state of Idaho and transport it for use outside the state or to change the place or purpose of use of a water right from a place in Idaho to a place outside the state shall file with the department of water resources an application for a permit to do so, subject to the requirements of chapter 2, title 42, Idaho Code.

In the case of an existing water right, an application to amend a permit or to transfer a licensed or decreed right would have to be filed, rather than an application for a new permit. *See* Idaho Code §§ 42-211 and 42-222. In determining whether to approve an applicant's use of water outside the state, the Director of the Department of Water Resources "must find that the applicant's use of water outside the state is consistent with the provisions of section 42-203A(5), Idaho Code." Section 42-203A(5) authorizes the director to reject applications where:

> [T]he proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will 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 . . . .

Assuming the application were not rejected under the criteria of § 42-203A(5), the director, in assessing whether water should be appropriated for use outside the state, would then consider the following factors:

(a) The supply of water available to the state of Idaho;
(b) The current and reasonably anticipated water demands of the state of Idaho;
(c) Whether there are current or reasonably anticipated water shortages within the state of Idaho;
(d) Whether the water that is the subject of the application could feasibly be used to alleviate current or reasonably anticipated water shortages within the state of Idaho;
(e) The supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
(f) The demands placed on the applicant's supply in the state where the applicant intends to use the water.

Idaho Code § 42-401(3). Finally, any water right held by the city would have to be modified to reflect the joint service area of the involved cities.

Sale of Water as a Commodity

Municipal water rights are held for "residential, commercial, industrial, irrigation of parks and open space, and related purposes ... which a municipal provider is entitled or obligated to supply to all those users within a service area ...." Idaho Code § 42-202B. If a city desired to use part of its water as a commodity for commercial sale, the nature of use would change from municipal purposes to commercial purposes, and the city would have to seek an amendment of its water right permits or licenses pursuant to Idaho Code § 42-222 before engaging in such uses.

Sincerely,

STEVEN W. STRACK
Deputy Attorney General
Natural Resources Division

SWS/pb

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May 24, 2011

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Re: City of Nampa, re-use of effluent

Dear Garrick and Jeff:

This letter follows up on our meeting in your offices on May 16, 2011. That meeting was attended also by Jeff Johnson and Steve Burgos of Brown and Caldwell. We met to explore water right issues that might be presented by a project the City of Nampa is contemplating that would re-direct its municipal effluent from Indian Creek to infiltration basins the City could construct south of the City.

In that meeting we discussed a wide range of water rights issues potentially affecting such a project. This letter addresses only one: the right of cities to recapture and reuse municipal effluent. (A separate letter from me to Steve Strack dated May 19, 2011 addressed the City's authority to locate the project outside of the city limits.) You confirmed my understanding that a city may recapture and reuse its municipal effluent and apply it to other uses within its growing service area, and that doing so does not cause legal injury to other water uses. You also confirmed that, if required to meet environmental regulations, treatment utilizing an infiltration basin would be viewed as being within the existing municipal use. You also confirmed that the uses could be modified over time. For example, as conditions change and demand grows, the City could put less water into recharge and use some or all of the effluent to serve new customers (e.g., for lawn or open space irrigation). Finally, you confirmed that these

uses would not require a transfer—assuming that the reuse of the effluent was required in order to satisfy environmental requirements.

Following our meeting, I undertook some additional research on the topic. Although there is plenty of Idaho law on the subject of recapture and reuse in the context of irrigation rights, I have not encountered any Idaho case law directly addressing the issue in the context of reuse of municipal effluent. Fortunately, there is a substantial body of law on the subject from other western states. It is entirely consistent with the views you expressed at the meeting.

I thought it might be helpful to share the results of this research with you. Please see the enclosed summary, notably subsection "C" dealing with municipal effluent. I anticipate that this will be added to the Water Law Handbook as a replacement for Chapter 16. If you have any additional thoughts or authorities that I should be aware of, I would be most appreciative of your sharing them with me.

The bottom line is that I believe the Department is on solid footing here. I will counsel the City that there is good support for the proposition that it may recapture effluent and direct it to aquifer recharge and, perhaps later, use it to support expanding municipal demand (e.g., lawn irrigation) as the City grows. As you noted in our meeting, if this is done in order to meet mandatory environmental regulations, both such uses would be viewed as part of the municipal use and no transfer application would be required.

Sincerely,

Christopher H. Meyer

Encl: Recapture and Appropriation of Waste Water

ec: Michael J. Fuss, Lenard Grady, and Kim Lord, City of Nampa
Jeffrey Johnson and Steve Burgos, Brown and Caldwell
Terry M. Scanlan, Roxanne Brown, and Stuart Hurley, SPF Water Engineering, LLC

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RECAPTURE AND APPROPRIATION OF WASTE WATER

A. Overview

Few water uses consume one hundred percent of that which is diverted. Most water uses entail the release of some "waste water," that is, water that is diverted for beneficial use, but is not consumed. Irrigation uses, in particular, involve diversions that alter natural flow patterns and can result in increased discharge of waste water in other areas.

The term "waste water" as used here includes the tail water accruing at the end of an irrigated field, the seepage water that leaks out of canals or reservoirs, the excess water applied to crops that percolates into the soil, and wastewater generated by industrial processes or by a municipality.[522] (Note that wastewater—typically written without a space—refers to effluent from industries or municipal treatment plants.) The term "return flow" also is used as a catch-all to describe any water that is diverted, but not consumed, and eventually returns to a stream or aquifer, either that from which it originated or some other. In common usage, return flow is used to describe the water that reaches a stream or aquifer after the first use and, hence, becomes part of the public water supply available for appropriation. Waste water, if not recaptured by the appropriator or appropriated by another, becomes return flow.

This section explores the rights of the original appropriator to recapture his or her own waste water and the rights of third parties to obtain an appropriation of waste water released by another.

B. Recapture of irrigation waste water by the original diverter

One principle governing waste water is that an irrigator "is not bound to maintain conditions giving rise to the waste of water from any particular part of its system for the benefit of individuals who may have been making use of the waste." Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 100 (1968). Thus, the original appropriator is free to abandon or modify the activity producing the waste. Perhaps the most common scenarios are the conversion from flood irrigation to sprinklers or the replacement of a leaky ditch with a pipeline. After the improvement is made, less water is applied to the field and/or less water escapes along the conveyance. As a result, the neighboring hydrology may be affected and water available to serve other water rights could be reduced. Holders of those rights, however, have no legal basis to object to such efficiency improvements by their neighbors.

This right to increase efficiency includes the appropriator's right to recapture waste water before he or she has relinquished control by allowing the waste water to reach a natural stream or aquifer. "It is settled law that seepage and waste water belong to the original appropriator and, in the absence of abandonment or forfeiture, may be reclaimed by such appropriator as long as he is willing to put it to beneficial use."[523] For example, a farmer may capture tail water running off the low end of a field and pump it back to a portion of the field that, due to topography or other factors, was chronically under-irrigated. This recapture may even occur years after the original diversion is initiated. Since the right of recapture is considered part of the original water right, it would be allowed under the priority date of the original diversion—provided the recaptured waste water is put to beneficial use on the original parcel (for example to water an area that previously was under-irrigated). Others who may have come to rely on the waste water may not insist that the

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[522] In *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P.3d 78 (2005) (emphasis omitted), the Idaho Supreme Court (quoting the SRBA Court) defined waste water as: "(1) water purposely discharged from the project works because of operation of necessities, (2) water leading from ditches and other works, and (3) excess water flowing from irrigated lands, either on the surface or seeping under it."

[523] *Reynolds Irrigation Dist. v. Sproat*, 70 Idaho 217, 222, 214 P.2d 880 (1950). *See also Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980); *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927) (third parties may appropriate waste water, subject to the original appropriator's right, in good faith, and to cease wasting it and put it to a beneficial use); and *In re Boyer*, 73 Idaho 152, 248 P.2d 540 (1952). None of these cases addresses the question whether one may reduce waste, then transfer the surplus to some new use. Later opinions make clear that an appropriator may not do this. *See, e.g., Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (Basin-Wide Issue No. 4).

original appropriator maintain the artificial conditions from which they have benefited. However, it perhaps conveys the wrong message to conclude that all seepage and waste water literally "belong" to the original appropriator.

The right to recapture waste water does not override other principles of water law, the most important of which likely is the rule against enlargement of a water right. In *United States v. Haga*, 276 F. 41 (Dist. Idaho 1921), the District Court suggested that the beneficial use of the conserved waste or seepage must occur within the same lands for which the water originally was appropriated.[524] This limitation—that recaptured waste or seepage water may be used only on the original lands—reinforces Idaho's anti-enlargement policy. Allowing a water user to make more complete use of water under his or her water right within the licensed or decreed place of use, and for the licensed or decreed purpose, promotes efficiency and the full beneficial use of water under the right; doing so logically has been seen by Idaho courts as fully within the original right.

The Idaho Supreme Court reiterated the non-enlargement limitation, and further enforced the rule of *Fremont-Madison*,[525] in *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water District*, a 2005 opinion where the Court ruled that "A&B may use the [reclaimed waste] water on its original appropriated lots."[526] The *A&B* Court not only emphasized this point, but went beyond it to state that an excess of waste water obligates the appropriator to diminish its diversion to reduce the waste:

> As the Ground Water Users and the State appropriately note, should A&B find itself in the unique situation of having more excess drain and/or waste water than it can reuse on its appropriated properties, Idaho water law requires the district to diminish its diversion. Reclamation Act of June 17, 1902, ch. 1093, § 8, 32 Stat. 388, 390.

A&B, 141 Idaho at 752, 118 P.3d at 84.[527]

Thus, if recapture and onsite re-use proves so effective that less water is required to accomplish the licensed or decreed beneficial use, the user may be required to reduce his or her diversion accordingly. This may mean that the right itself is reduced, either immediately or at some time in the future—such as when it is evaluated in a transfer, for example. On the other hand, depending on the circumstances, the user may retain the right to cease the recapture and revert to the prior regime.

But there is more to say about the ruling in *A&B*, and it further reinforces the point that seepage cannot be used for enlargements, such as irrigation of new lands. The central dispute in the case concerned 2,363 acres the irrigation district was irrigating but which were in excess of the water right's licensed acreage. The district explained that the acres were irrigated with waste water originating from both the district's ground water delivery system and natural runoff, and argued that it should be allowed to do this because it "owned" the waste water. The plaintiffs, who were junior ground water users, asserted that these additional acres were illegal enlargements and that a water right to irrigate them could be recognized, if at all, only under Idaho's amnesty statute, Idaho Code § 42-1426, in which case the right would have to take a subordinated priority tied to the 1994 date the statute was passed. This had been the essential ruling in *Fremont-Madison*. Indeed, the amnesty statute itself explains the Legislature's recognition that enlargements arose "through water conservation and other means" that allow more acres to be irrigated with the same diversion. Reducing or recapturing waste water is a classic example of water conservation.

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[524] The court referred only to the beneficial uses on the "project" lands, which in that case included a federal irrigation project in the Boise River Basin.

[525] *Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (Basin-Wide Issue No. 4).

[526] *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 752, 118 P.3d 78, 84 (June 21, 2005).

[527] The reference to the Reclamation Act, presumably, is intended to embrace Congress' recognition that beneficial use of water is "the basis, the measure and the limit" of a water right. See discussion in section 3.D at page 12.

The *A&B* court took an exacting approach in its discussion of recaptured drain or seepage water which again emphasizes that this water cannot serve new lands without a new water right. The irrigation district had contended that the "source" of water to irrigate the extra acres is waste water, and not ground water under the district's original water right (even though the waste water originated primarily from the ground water supply). Although the Idaho Supreme Court ultimately rejected this and agreed with the district court that the source was the district's original ground water source, it did entertain the question of what would happen had it viewed the source as simply "waste water" not originating from the district's licensed diversion. It found the result in that case would be that:

> A&B's additional 2,363.1 acres neither qualifies as an enlargement or for amnesty under I.C. § 42-1426 based upon a finding that the water source is recaptured drain and/or waste water. A&B is not seeking to expand the number of acres it irrigates with original ground water under right no. 36-02080. Rather, it relies on an unappropriated source, that of recaptured drain and/or waste water to irrigate its additional acres. This is in violation of the mandatory water permit requirements. Idaho Code § 42-229 (2003). Treating the water as something other than ground water, A&B must seek a new water right for this water source prior to any further use on the 2,363.1 acres.

A&B, 141 Idaho at 751-52, 118 P.3d at 83-84.

In a footnote, the Court held that "appropriation under the mandatory permit scheme is the only method by which this water can now be put to beneficial use." *A&B*, 141 Idaho at 752, 118 P.3d at 84, n. 1. Ultimately, the Court found that the district's source was water diverted under its original ground water right (although recaptured on the surface as seepage or waste), and that the district therefore did qualify for the amnesty. Accordingly, the district was able to continue irrigating the enlarged acres, but was required to accept the subordination condition on the new water right for them.

Provisions of Idaho's water code other than the amnesty provision discussed above also are consistent with the non-enlargement principle when it comes to an appropriator's collection and use of waste water arising from his irrigation practices. An Idaho statute authorizes the construction of wells by a person owning irrigation works "for the sole purpose of recovering ground water resulting from irrigation under such irrigation works for further use . . . on lands to which the established water rights of the parties constructing the wells are appurtenant." Idaho Code § 42-228.[528] In other words, this statutory pronouncement on the recapture of waste or seepage water expressly restricts the use of the recaptured water to the original place of use – that is, enlargements are not allowed. Likewise, Idaho's transfer statute expressly prohibits enlargements as a result of any transfer. Idaho Code § 42-222(1).

In summary, although the cases authorizing an appropriator's recapture and re-use of waste water[529] did not expressly address the enlargement issue, it now has been addressed, and in clear terms. If additional lands or other uses are to be added to a water right through the recapture of waste water, a new water right will be necessary.

C. Reuse of municipal effluent.

The same basic principles of recapture and reuse apply in the context of municipal wastewater. Thus, a city may recapture and reuse effluent from its sewage treatment plant before it is released to a public water body. Likewise, farmers or others who had come to rely on the prior discharge of that wastewater cannot complain when the city recaptures and reuses it.

But there are differences when it comes to municipal wastewater. Under Idaho law, muncipal water rights are different from others in two important respects. First, they do not have a fixed place of use. Instead, a municipal service

[528] This statute allows shallow ground water wells to recapture seepage originating from the surface irrigation of a parcel, roughly equivalent to a seepage ditch at the end of a field from which the farmer pumps water back to fully irrigate the parcel.

[529] *E.g.*, as *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927); *In re Boyer*, 73 Idaho 152, 248 P.2d 540 (1952); *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980).

area grows over time as does demand. In addition, municipal use encompasses a broad range of uses from low consumptive domestic uses to high consumptive uses by industries served by the municipal provider. This mix may change over time. Accordingly, the Department deems municipal water rights to be potentially 100 percent consumptive. As a result, cities may recapture wastewater and reuse it for other municipal uses (such as watering parks, golf courses, or lawns) and such use is not deemed to be an enlargement. "This rule [limiting reuse to the original irrigated land] was changed for municipalities, without an adjustment period for those who had relied on the return flow, when the courts allowed municipalities to start consuming their sewage effluent through disposal methods that no longer sent it back to the stream as return flow." Robert E. Beck, *Municipal Water Priorities/Preferences in Times of Scarcity: The Impact of Urban Demand on Natural Resource Industries*, 56 Rocky Mtn. Min. L. Inst. § 7.02[4] (2010).

While Idaho courts have not yet had occasion to address the issue, other state courts have consistently upheld the right of municipal providers to recapture and reuse municipal effluent and even, in some cases, to sell it to others.[530] The only limitation seems to be that the recapture occur before the water reaches a public water body.[531]

The effluent reuse issue was addressed in *Reynolds v. City of Roswell*, 654 P.2d 537 (N.M. 1982). First, the Court recognized the principle that the recapture must occur before the water reaches a natural watercourse.

> The City readily acknowledges, and we agree, that once the effluent actually reaches a water course or underground reservoir [i.e., an aquifer], the City has lost control over the water and cannot recapture it. That is what the courts state in the cases relied upon by the State Engineer. *See Brantley v. Carlsbad Irr. Dist.*, 92 N.M. 280, 587 P.2d 427 (1978); *Kelley v. Carlsbad Irrigation District*, 76 N.M. 466, 415 P.2d 849 (1966); *State v. King*, 63 N.M. 425, 321 P.2d 200 (1958); *Rio Grande Reservoir and Ditch Co. v. Wagon Wheel Gap Improvement Co.*, 68 Colo. 437, 191 P. 129 (1920).
>
> We stress that the specific legal issues on appeal in this case do not concern the recapture of water which has escaped into and have become commingled with the natural public waters, whether surface or underground. The issue here is whether Roswell may take the sewage effluent before it is discharged as waste or drainage water and reuse it for municipal purposes.

Reynolds, 654 P.2d at 540-41.

The *Reynolds* court then overturned conditions imposed by the New Mexico State Engineer that would have limited the City to its prior level of consumptive use. In reaching its decision, the Court quoted at length from a 1925 decision by the Wyoming Supreme Court directly addressing the right of a city to reuse its wastewater to extinction:

> It is not strange that we are unable to find any cases considering the right of a city to dispose of its unpurified sewage for irrigation purposes. Most of the controversies with respect to sewage that have gotten into the courts concern the rights of those who claim that in disposing of its sewage the city is guilty of maintaining a nuisance. In this case both the plaintiff and defendant are satisfied, for the present at least, and in fact insist, that the city discharge its sewage in such a way and at such place as will permit them to use it. It is well known that the disposition of sewage is one of the important problems that embarrass municipalities. In order to dispose of it without injury to others, a city may often be confronted with the necessity of choosing between several different

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[530] In addition, at least five states have adopted statutes regulating, facilitiating, and encouraging the reuse of municipal effluent. Or. Rev. Stat. §§ 537.131, 537.132, 540.510; Cal. Water Code §§ 13551-13556; Nev. Rev. Stat. Ann. § 533.024; Wash. Rev. Code §§ 90.44.062 to 140; Utah Code Ann. §§ 73-3c-1 to 73-3c-8.

[531] Perhaps a city could engage in an aquifer storage and recovery project employing treated effluent. Doing so would require affirmative steps to measure and control the stored water, as well as the acquisition of corresponding water rights and/or approval of a mitigation plan. See discussion in section 19.C at page 168.

> plans, and in the selection of the plan to be followed we think it should be permitted to exercise a wide discretion. In determining how it will make a proper disposition of that which may be termed a potential nuisance, we think the city should not be hampered by a rule that would always require the sewage to be treated as waste or surplus waters. Sewage is something which the city has on its hands, and which must be disposed of in such a way that it will not cause damage to others. It would often be considered the height of efficiency if it could be disposed of in some other manner than by discharging it into a stream. Even in this state, where the conservation of water for irrigation is so important, we would not care to hold that in disposing of sewage the city could not adopt some means that would completely consume it. It might, we think, be diverted to waste places, or to any chosen place where it would not become a nuisance, without any consideration of the demands of water users who might be benefited by its disposition in some other manner. In providing such a place, the city might acquire the right to discharge the sewage on the lands of any person willing to suffer such a use of his lands, and we see no reason why this right might not be gained by the city in consideration of the landowner's right to use or dispose of the sewage in any lawful way. From these views with reference to the city's rights, it follows that the sewage deposited from the so-called "sewer east of Lake Minnehaha" should not be considered as a part of the public waters of the state subject to the rights of the appropriators from Crow creek. It is our opinion, therefore, that the plaintiff, as an appropriator of waters of Crow creek, has no right to question the contract between the city and the defendant in so far as it provided for the discharge and use of sewage from the sewer line last mentioned.

Wyoming Hereford Ranch v. Hammond Packing Co., 236 P. 764, 772 (Wyo. 1925) (emphasis supplied). This 1925 decision continues to be cited and quoted for its bedrock principles.

In *Wyoming Hereford*, there were two sewer lines from the City. The Court, however, limited its holding above to the effluent delivered directly to the packing company. The other sewer line discharged back into the river which carried the water to the packing company. Once the water "becomes comingled with the waters of the stream" it is no longer the City's to recapture. Wyoming Hereford, 236 P. at 773. This limitation on the right to recapture is consistent with that in *Reynolds*, discussed above, and *City of San Marcos v. Texas Comm'n on Envt.l Quality*, 128 S.W.3d (Texas Ct. App. 2004), discussed below.

This Wyoming case, in turn, was relied on by the Arizona Supreme Court in reaching a similar conclusion confirming the right to recapture municipal effluent in that state. *Arizona Public Service Co. v. Long*, 773 P.2d 988 (Ariz. 1989).[532] In the Arizona case, holders of junior downstream irrigation rights had come to rely on effluent discharged by Pheonix and other cities. They sued to stop the cities from selling that effluent to a utility that would use it for cooling water at a nuclear power plant. The Arizona Supreme Court upheld the cities' right to do so, holding that they could put their sewage effluent to any reasonable use that would allow them to maximize its use and its economic value. The Arizona Court of Appeals confirmed these principles in *Arizona Water Co. v. City of Bisbee*, 836 P.2d 389 (Ariz. Ct. App. 1991), a case involving a city's sale of effluent to Phelps Dodge for use in copper leaching operations.

In *Barrack v. City of Lafayette*, 829 P.2d 424 (Colo. Ct. App. 1992), the Colorado Court of Appeals released the city from liability for no longer providing effluent water under a contract with plaintiffs when environmental regulations made that delivery illegal. In so ruling, the court ruled that plaintiffs' procedural due process was not violated because they had no property interest in the effluent.

In *City of San Marcos v. Texas Comm'n on Envt.l Quality*, 128 S.W.3d (Texas Ct. App. 2004), the Texas Court of Appeals found that the City of San Marcos did not have the right to recapture its wastewater effluent in a river three miles

[532] This important case is discussed in Ginette Chapman, Note, *From Toilet to Tap: The Growing Use of Reclaimed Water and the Legal System's Response*, 47 Ariz. L. Rev. 773 (2005), and 2 Robert E. Beck, *Waters and Water Rights* § 13.04 (2000).

downstream of the sewage treatment plant. The City sought to recapture the water, treat it, pipe it back to the City, and add it to its municipal supply. The purpose of leaving it in the river for so long was to allow the effluent to be diluted with cleaner river water, thus reducing the cost of treatment after recapture. In rejecting the plan, the court concluded that the character of the water changed once the City released it to the rivder, whereupon it became public water. "By intentionally discharging its effluent into the river, where it eventually commingles with the State's water, the City effectively abandons its control over the identifying characteristics of its property. This physical reality suggests that the City is voluntarily and intentionally abandoning its ownership rights over the effluent." *San Marcos*, 128 S.W.3d at 277. By clear implication, however, the City would have been allowed to recapture and reuse its wastewater if it had done so before returning it to the river. Indeed, as the court noted, that was exactly what the City's opponents said: "If the City wants to reuse its wastewater, it should use it directly rather than unnecessarily mixing it with the pure river water." *San Marcos*, 128 S.W.3d at 267.[533]

D. Appropriation of waste water by a third party

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

However, as indicated above, an important caveat is that the new appropriator of waste water has no guarantee that the waste water will continue to be available. For instance, the original appropriator who generates the waste water could cease diverting altogether so as to leave the new appropriator without a water source. Likewise, the original appropriator might alter his or her operation to reduce the amount of waste water generated (e.g., by ditch lining). Finally, as noted, the original appropriator may recapture the waste water for use on existing lands.

In *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927), the court confirmed the basic right to appropriate waste and seepage water made available as a by-product of the diversions of other appropriators. (Prior to this decision, there was some thought that appropriations might be limited to water naturally occurring.) Indeed, in *Sebern*, the waste water appropriator was allowed to re-establish his diversion of waste water after a waste ditch was relocated by another appropriator. The court added the now-familiar caveat, however, that the waste water appropriation is "subject to the right of the owner [that is, the person generating the waste water] to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use." *Sebern*, 44 Idaho at 418. This is significant given that in a change or transfer application, the prior appropriator is not allowed to make any change (even in good faith) that would injure a junior.

In *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980), the Idaho Supreme Court unanimously reaffirmed the principle that a third-party appropriator of waste water may not compel the original diverter to continue the practices leading to the generation of the waste water. The court emphasized that it makes no difference whether the waste water arises before the use (from a leaky canal) or after the use (from post-irrigation tail water, for example). The original appropriator may at any time cease the practice giving rise to the waste water, even to the detriment of those who hold valid water rights in that waste water (subject, of course, to the limitations as to non-enlargement and beneficial use as described in *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 752, 118 P.3d 78, 84 (2005)).

These legal principles pertaining to waste water have been followed in the Snake River Basin Adjudication ("SRBA"). Special Master Terry Dolan reiterated these principles in *Special Master's Report, In re SRBA*, Case No. 39576, Subcases 75-4471 and 75-10475 (Silver Creek Ranch Trust) at 4 and 6-7 (September 28, 2009). Similarly, in *In re: Janicek Properties, LLC, Memorandum Decision and Order on Motion for Summary Judgment, In re SRBA*, District Court of the Fifth Jud. Dist. Of the State of Idaho, Subcase No. 63-27475 (May 2, 2008), the Bureau of Reclamation and

[533] Texas, by the way, is the only western state that applies a rule of capture (rather than the prior appropriation doctrine) to ground water. (The City's water supply, and hence its effluent, was based entirely on ground water.) The court discussed the rule of capture at some length, but it does not seem that the outcome would be any different had the prior appropriation doctrine applied instead.

its contracting irrigation district argued that they constructed a drain and could trace most or even all of the water in it to seepage and return flows from the district's irrigated lands. They contended that the drain was not a natural watercourse and that they should be deemed the owner of the drain and the water in it. Based on this reasoning, they asked the adjudication court to invalidate a farmer's 1951-priority licensed water right pursuant to which he pumped water from the drain to irrigate his crops. The Special Master rejected this challenge to the farmer's drain water right, ruling that, regardless of who constructs a drain, the water in it is "public water of the state of Idaho and subject to appropriation and beneficial use." *Janicek Properties*, slip op. at 6. The court found that whether the drain is a natural watercourse "is immaterial—what matters is that the water is water of the state" and is subject to appropriation. *Id.* at 8.

Once water is released by the original appropriator and is beyond his or her control (whether that be to an artificial conveyance such as a drain or to a natural stream or aquifer), it becomes public water once again and subject to appropriation. Referring to such a source as "waste water" undoubtedly has led to some confusion over the years. Other than the caveat discussed above (that the new appropriator cannot complain if the waste water is no longer supplied), there is little to be gained in attempting to distinguish it from water occurring naturally. Even a constructed drain at times will carry natural runoff. Similarly, natural stream flows in agricultural areas nearly always contain some measure of return flow and seepage, either those flowing to the stream as surface returns or those arriving through ground water discharge. The essential rule is simply that public waters are subject to appropriation regardless of their origin or whether they are found in drains or similar structures.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

May 26, 2011

Christopher H. Meyer
GIVENS PURSLEY LLP
Post Office Box 2720
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Re: City of Nampa municipal effluent

Dear Chris,

This letter is in response to your letter of May 24, 2011, which documents the issues discussed at a meeting held on May 16, 2011. Jeff Peppersack and I appreciated meeting with you and the gentlemen from Brown and Caldwell on May 16th. Our conversation, regarding the City of Nampa's proposal to re-direct its municipal effluent from Indian Creek to infiltration basins south of the City, was a productive discussion. As explained at our meeting, the Department is not aware of any legal impediment to the City being able to reuse its municipal effluent for other municipal purposes within its growing service area. That said, I am writing to clarify the Department's understanding of the issues discussed at our May 16th meeting as those issues are explained in your May 24th letter.

First, the Department would like to clarify a subtle but important point. The second paragraph of page one states "You confirmed my understanding that a city may recapture and reuse its municipal effluent and apply it to other uses within its growing service area." It is important to clarify that the use which the effluent can be put must continue to be a municipal use. I believe that this is likely your understanding as well. If so, the term "municipal" should be inserted as follows: "You confirmed my understanding that a city may recapture and reuse its municipal effluent and apply it to other municipal uses within its growing service area."

Second, the example used in the second paragraph should also be clarified. It provides: "For example, as conditions change and demand grows, the City could put less water into recharge and use some or all of the effluent to serve new customers (e.g. for lawn or open space irrigation)." The use of the term "recharge" raises a new issue that was not within the scope of our discussion. The context of our conversation was the treatment of water by infiltration, not recharge per se. Again, this is a subtle but important distinction to the Department. The following more accurately states the Department's current understanding regarding the City of

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Nampa's proposed project: "For example, as conditions change and demand grows, the City could put less water into treatment of effluent by infiltration and instead use some or all of the effluent for other municipal uses within its growing service area (e.g. for lawn or open space irrigation)." This more accurately encompasses the scope of our discussion. Similarly, the May 24th letter would better reflect our conversation if "aquifer recharge" in the last paragraph on page two was replaced with "treatment of effluent by infiltration."

Thank you for taking the time to document our conversation at the May 16th meeting. I hope this letter helps clarify the Department's position regarding the City of Nampa's proposed project. Please feel free to contact me if you have any questions.

Sincerely,

Garrick Baxter
Deputy Attorney General
Idaho Department of Water Resources

cc: Jeff Peppersack

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Via Email and U.S. Mail

June 2, 2011

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Re: City of Nampa, re-use of effluent

Dear Garrick:

Thank you for your letter of May 26, 2011, responding to mine of May 24, 2011. Your comments are well taken and appreciated. For convenient reference in the future, I have hand-written your suggested changes on a copy of my May 24, 2011 letter. I enclose a copy for your file.

Your comments accurately capture our conversation and the informal guidance you have provided to the City of Nampa. The issue at hand and the primary focus of our meeting on May 16, 2011 is whether the City of Nampa would be allowed to re-direct its municipal effluent to an infiltration basin as a means of complying with federally-mandated water quality requirements. You have answered that question in the affirmative.

As noted in my prior letter, there is a broader range of water rights issues that could be presented down the road but do not need to be resolved at this time. I write to confirm that your letter of May 26, 2011 does not preclude exploring those issues if and when the occasion arises.

In the first clarification you provided, you noted that a city may recapture and reuse its municipal effluent and apply it to other municipal uses within its growing service area, and that

doing so does not cause legal injury to other water users. I agree that limiting this statement to municipal uses is necessary in order for this to be accomplished without a change in an element of the water right. However, it seems plausible to me that, based on a transfer, it would be possible for a city to recapture its municipal effluent and make that water available to other non-municipal uses. I am not aware of any Idaho authority on this. But I have encountered authorities from Wyoming and New Mexico that support this conclusion.

In *Wyoming Hereford Ranch v. Hammond Packing Co.*, 236 P. 764, 772 (Wyo. 1925), the Wyoming Supreme Court allowed the City of Cheyenne to enter into a contract whereby effluent previously discharged to a creek was delivered to a packing company "in such a way and at such place as will permit [the packing company] to use it." *Wyoming Hereford*, 236 P. at 772. (Another part of the contract was disallowed, because it used the creek as a delivery system.) Plainly this new use was not municipal, yet it was allowed irrespective of its impact on downstream users who previously benefited from the discharge of the effluent. "It might, we think, be diverted to waste places, or to any chosen place where it would not become a nuisance, without any consideration of the demands of water users who might be benefited by its disposition in some other manner. In providing such a place, the city might acquire the right to discharge the sewage on the lands of any person willing to suffer such a use of his lands, and we see no reason why this right might not be gained by the city in consideration of the landowner's right to use or dispose of the sewage in any lawful way." *Id.* (emphasis supplied).

In a more recent case, *Reynolds v. City of Roswell*, 654 P.2d 537 (N.M. 1982), the New Mexico Supreme Court relied on and quoted extensively from *Wyoming Hereford*. That case involved the City of Roswell's recapture of effluent for its own municipal use. While the ruling focused on the city's own use of its effluent for municipal purposes, the Court noted that for years "treated effluent had been sold to some farmers located east of the city, and has been sold to the Roswell Country Club for fairway watering purposes." *City of Roswell*, 654 P.2d at 538. Indeed, the State Engineer specifically addressed these uses in his conditions: "The State Engineer's conditions required that the city either continue selling treated effluent to the farmers east of the City and to the Roswell Country Club or to continue discharging treated effluent directly into the Hondo River." *City of Roswell*, 654 P.2d at 538. The Court disagreed, saying that the city was not required to maintain the prior regime of return flow. Nothing in the ruling, however, suggested that there was anything wrong with these non-municipal uses. Hence, there is a very strong implication that the sales to non-municipal uses were valid and the city could chose to continue them if it liked.

Let me emphasize that I am not trying to argue this point now. I just want to keep the door open for further discussion should the occasion arise.

The same is true for the second issue you addressed. You have confirmed that in the future the City may "put less water into treatment of effluent by infiltration and use some or all of the effluent to serve new customers." This is most helpful and fully answers the question I posed to you. Again, however, I hope there is no need to close the door on the possibility that

the City might explore other options including, for example, mitigation credits for aquifer recharge.

At this point, it would be premature for me to ask for departmental guidance on these side issues. I just hope that we may clarify that your letter of May 26, 2011 was not intended to preclude further exploration of these topics should the City move in that direction.

It is always a pleasure to work with you, Jeff Peppersack, and others at the Department. Thank you once again for your assistance and guidance, which the City greatly appreciates.

Sincerely,

Christopher H. Meyer

Encl: Copy of my letter of May 24, 2011 with hand-written edits reflecting Garrick Baxter's comments of May 26, 2011

cc: Jeff Peppersack, IDWR
Michael J. Fuss, Lenard Grady, and Kim Lord, City of Nampa
Jeffrey Johnson and Steve Burgos, Brown and Caldwell
Terry M. Scanlan, Roxanne Brown, and Stuart Hurley, SPF Water Engineering, LLC

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GIVENS PURSLEY LLP

Edits noted per letter of 5-26-2011 from Garrick Baxter. cll

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Via Email and U.S. Mail

May 24, 2011

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Re: City of Nampa, re-use of effluent

Dear Garrick and Jeff:

This letter follows up on our meeting in your offices on May 16, 2011. That meeting was attended also by Jeff Johnson and Steve Burgos of Brown and Caldwell. We met to explore water right issues that might be presented by a project the City of Nampa is contemplating that would re-direct its municipal effluent from Indian Creek to infiltration basins the City could construct south of the City.

In that meeting we discussed a wide range of water rights issues potentially affecting such a project. This letter addresses only one: the right of cities to recapture and reuse municipal effluent. (A separate letter from me to Steve Strack dated May 19, 2011 addressed the City's authority to locate the project outside of the city limits.) You confirmed my understanding that a city may recapture and reuse its municipal effluent and apply it to other municipal uses within its growing service area, and that doing so does not cause legal injury to other water uses. You also confirmed that, if required to meet environmental regulations, treatment utilizing an infiltration basin would be viewed as being within the existing municipal use. You also confirmed that the uses could be modified over time. For example, as conditions change and demand grows, the City could put less water into ~~recharge~~ treatment of effluent by infiltration and use some or all of the effluent to serve new customers (e.g., for lawn or open space irrigation). Finally, you confirmed that these

uses would not require a transfer—assuming that the reuse of the effluent was required in order to satisfy environmental requirements.

Following our meeting, I undertook some additional research on the topic. Although there is plenty of Idaho law on the subject of recapture and reuse in the context of irrigation rights, I have not encountered any Idaho case law directly addressing the issue in the context of reuse of municipal effluent. Fortunately, there is a substantial body of law on the subject from other western states. It is entirely consistent with the views you expressed at the meeting.

I thought it might be helpful to share the results of this research with you. Please see the enclosed summary, notably subsection "C" dealing with municipal effluent. I anticipate that this will be added to the Water Law Handbook as a replacement for Chapter 16. If you have any additional thoughts or authorities that I should be aware of, I would be most appreciative of your sharing them with me.

The bottom line is that I believe the Department is on solid footing here. I will counsel the City that there is good support for the proposition that it may recapture effluent and direct it to aquifer recharge and, perhaps later, use it to support expanding municipal demand (e.g., lawn irrigation) as the City grows. As you noted in our meeting, if this is done in order to meet mandatory environmental regulations, both such uses would be viewed as part of the municipal use and no transfer application would be required.

Sincerely,

Christopher H. Meyer

Encl: Recapture and Appropriation of Waste Water

cc: Michael J. Fuss, Lenard Grady, and Kim Lord, City of Nampa
Jeffrey Johnson and Steve Burgos, Brown and Caldwell
Terry M. Scanlan, Roxanne Brown, and Stuart Hurley, SPF Water Engineering, LLC

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STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

June 3, 2011

Christopher H. Meyer
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Re: City of Nampa

Dear Chris,

Thank you for your letter of June 2, 2011 regarding our recent correspondence on the subject of the City of Nampa's water use. I would like to alleviate any concerns you have regarding the scope of my letter of May 26, 2011. My letter was not intended to preclude further exploration of the topics highlighted in your June 2, 2011 letter, should the City intend to move in that direction in the future. My letter was intended only to clarify the scope of the specific issues which we discussed at our May 16, 2011 meeting.

As always, I appreciate working with you on these important and interesting issues. Please let me know if you have any further questions.

Sincerely,

Garrick L. Baxter
Deputy Attorney General
Idaho Department of Water Resources

cc: Jeff Peppersack

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Addendum F COMMUNICATIONS WITH IDWR/AG REGARDING MCCALL

1. Letter from Christopher Meyer to Garrick Baxter (August 18, 2011).
2. Letter from Garrick Baxter to Christopher Meyer (September 7, 2011).
3. Letter from Christopher Meyer to Garrick Baxter (September 16, 2011).
4. Letter from Garrick Baxter to Christopher Meyer (September 19, 2011).

Letter from Christopher Meyer to Garrick Baxter (August 18, 2011)

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August 18, 2011

Garrick L. Baxter
Deputy Attorney General
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

Re: City of McCall - Land application of municipal effluent outside of city limits

Dear Garrick:

Thank you for taking my call the other day inquiring as to whether my client, the City of McCall, has authority to land apply water it collects as municipal effluent on lands outside of the city limits under its existing municipal water rights. You suggested that I provide a letter to the Idaho Department of Water Resources ("IDWR" or "Department") setting out the City's understanding of the governing law and seeking confirmation that the City has this authority. This letter is intended to serve that purpose.

The City serves customers within its service area with municipal water rights including the following:

No. 65-10344 (5.13 cfs, 1918 priority, Payette Lake)
No. 65-10345 (2.31 cfs, 1968 priority, Payette Lake)
No. 65-12607 (3.88 cfs, 1983 priority, Payette Lake)
No. 65-13476 (2.23 cfs, 1993 priority, ground water)
No. 65-13796 (6.4 cfs, 1998 priority, ground water)

The Municipal Water Rights Act of 1996 ("1996 Act") defines three categories of municipal provider. The first is "[a] municipality that provides water for municipal purposes to

its residents and other users within its service area." Idaho Code § 42-202B(5)(a). The City plainly meets this definition.

It is a well established principle under the Prior Appropriation Doctrine that an appropriator may recapture water that he or she has applied to beneficial use while it is still under the appropriator's control and re-use that water on lands authorized within the original right. "It is settled law that seepage and waste water belong to the original appropriator and, in the absence of abandonment or forfeiture, may be reclaimed by such appropriator as long as he is willing to put it to beneficial use." *Reynolds Irrigation Dist. v. Sproat*, 70 Idaho 217, 222, 214 P.2d 880 (1950). *See also Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980); *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927); and *In re Boyer*, 73 Idaho 152, 248 P.2d 540 (1952).

This is true even if the re-use reduces the water available to other water users downstream. As Mr. Hutchins noted in his seminal article, an irrigator "is not bound to maintain conditions giving rise to the waste of water from any particular part of its system for the benefit of individuals who may have been making use of the waste." Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 100 (1968).

A natural extension of this principle is that cities may recapture their sewage effluent before it reaches a natural water body and may apply that water to additional municipal uses within the original water right. A city's right to recapture and reuse municipal effluent was recognized in *Reynolds v. City of Roswell*, 654 P.2d 537 (N.M. 1982). In reaching its decision, the *Reynolds* Court quoted at length from a 1925 decision by the Wyoming Supreme Court directly addressing the right of a city to reuse its wastewater to extinction—in this case by land application. "It is well known that the disposition of sewage is one of the important problems that embarrass municipalities. In order to dispose of it without injury to others, a city may often be confronted with the necessity of choosing between several different plans, and in the selection of the plan to be followed we think it should be permitted to exercise a wide discretion." *Wyoming Hereford Ranch v. Hammond Packing Co.*, 236 P. 764, 772 (Wyo. 1925). This Wyoming case, in turn, was relied on by the Arizona Supreme Court in reaching a similar conclusion confirming the right to recapture municipal effluent and sell it for cooling water to a nuclear power plant. *Arizona Public Service Co. v. Long*, 773 P.2d 988 (Ariz. 1989).

The next question is whether land application is a proper municipal use. The 1996 Act defines municipal purposes broadly:

> "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(6). Although this definition does not expressly identify land application as a municipal purpose, it does include the broad catch-all phrase, "related purposes."

Consistent with this broad definition, the Department's guidance recognizes that land application of effluent may be treated as part of the original water right.[1] This guidance is aimed primarily at land application of industrial effluent. However, the same broad principles would apply to municipal effluent. Indeed, the 2009 guidance expressly references municipal land application, as well as land application of industrial and other effluent. Transfer Processing Memo No. 24, § 5d(9) at 31.

Other parts of the guidance specifically provide that in order to be considered part of the same beneficial use as the underlying water right, the land application must be undertaken to meet mandatory regulatory requirements. "Waste water treatment necessary to meet adopted state water quality requirements will be considered to be part of the use authorized under the industrial right." Application Processing Memo No. 61, § 1 at 3.[2] The City's land application was undertaken as a direct result of compliance obligations under section 402 of the federal Clean Water Act.[3] Accordingly, land application by the City of McCall is a proper municipal purpose encompassed by its municipal water rights.

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[1] Two guidance documents were issued by the Department in 1996. Phil Rassier, Chief Counsel, *IDWR Memorandum: Land Application of Industrial Effluent* (Sept. 5, 1996); Norm Young, IDWR, *Administrator's Memorandum – Application Processing No. 61* ("Application Processing Memo No. 61") (Sept. 27, 1996). This guidance has been modified to some extent by a broader guidance document, *Transfer Processing Policies & Procedures* ("Transfer Processing Memo No. 24") (revised Dec. 21, 2009).

[2] Note that the requirement for a transfer application stated in Application Processing Memo No. 61, § 3 at 3 has been overridden by the more recent guidance in Transfer Processing Memo No. 24, at 3 n.1. Accordingly, no transfer application is required where the land application occurs on lands that were previously cultivated with a full existing water right. Transfer Processing Memo No. 24, § 1 at 3, § 2 at 7, § 3(6)(g)(ii). Such is the case here.

[3] In 1996, the Environmental Protection Agency ("EPA") issued an NPDES permit to the City and the Idaho Department of Environmental Quality ("DEQ") issued a section 401 certification for that permit, both of which imposed a zero discharge limit for phosphorous. The zero discharge was driven by the Cascade Reservoir Watershed Management Plan issued by DEQ on October 1, 1995. This plan was the functional equivalent of a TMDL (total maximum daily load) required by section 303(d) of the Clean Water Act. EPA approved the TMDL in May of 1996. The TMDL requires a 37% reduction in the overall phosphorous load, with the City's load allocation set to zero.

The permit established a compliance schedule for the zero discharge limit. The City filed an administrative appeal of the 401 certification with DEQ. This resulted in the first of four consent orders being issued on July 27, 1998.

The City then went to work on a land application system to achieve the requirements imposed by the permit and the consent orders. This effort resulted in a *Three-Way Agreement* among the City, the Lake Irrigation District (which owns legal title to the water rights used for mixing), and the J-Ditch Pipeline Association (which I believe was responsible for constructing and maintaining the distribution system that leaves the mixing station to deliver enhanced irrigation water to the farmers). The *Three-Way Agreement* contemplated individual contracts between the farmers and the City. A series of 20-year *Water User and Supply Agreements* were executed in 1997, which remain effective through 2016.

The next question is whether the land application may occur beyond McCall's city limits. This is addressed by the 1996 Act which expressly authorizes municipal providers to serve within a flexibly-defined service area. That authority is found in two places.

First, it is noted in the definition of "municipal purposes" quoted above, which states that the municipal purposes include uses "located outside the boundaries of a municipality served by a municipal provider." Idaho Code § 42-202B(6).

Second, the term "service area" is defined by the 1996 Act as follows:

> "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.

Idaho Code § 42-202B(9) (emphasis supplied). This definition expressly authorizes service outside of a city's service area so long as two conditions are met.

First, the land application must be "within the municipality's established planning area." "Planning area," however, is not a defined term. It is an informal term generally understood to refer to the area used by a city for water rights planning purposes as it plans for current and future water requirements.[4] In other words, the 1996 Act requires that land application outside the city limits must be undertaken as part of a city's long-term water planning effort. Given the long history of development of this project within the context of environmental regulatory requirements (see footnote 3), this condition is satisfied.

Second, in order to satisfy the requirement that "the constructed delivery system for the area shares a common water distribution system with lands located within the corporate limits," it should be sufficient to demonstrate that the land application is physically connected via pipeline or other artificial conveyance with the City's wastewater collection and treatment system. For example, it could not be viewed as part of the original water right if the effluent

[4] The term "planning area" in the 1996 Act should not be confused with the city's "area of city impact." The latter is a distinct term meaningful in the context of annexation rules under the Local Land Use Planning Act, Idaho Code § 67-6526.

were placed into a natural stream and diverted later for land application.[5] McCall's treated effluent is completely contained and controlled within a series of pipes or other artificial conveyances from the place where the sewage is captured to the place where it is land applied. It is of no consequence that some or all of these conveyance and delivery systems are owned by others so long as the land application is undertaken pursuant to contract or other agreement with the City. Accordingly, this condition is satisfied as well.

The only other statute potentially bearing on the question of municipal water uses outside of the City's city limits is Idaho Code § 50-323. It provides:

> Cities are hereby empowered to establish, create, develop, maintain and operate domestic water systems; provide for domestic water from wells, streams, water sheds or any other source; provide for storage, treatment and transmission of the same to the inhabitants of the city; and to do all things necessary to protect the source of water from contamination. The term "domestic water systems" and "domestic water" includes by way of example but not by way of limitation, a public water system providing water at any temperature for space heating or cooling, culinary, sanitary, recreational or therapeutic uses.

Idaho Code § 50-323 (emphasis supplied). This does not impose any limitation. The authorizing clause ("Cities are hereby empowered to establish, create, develop, maintain and operate domestic water systems") is not limited to the city limits. Moreover, treatment of municipal effluent through land application would fall under the final clause ("to do all things necessary to protect the source of water from contamination"), which is not limited geographically.

For these reasons, it is my conclusion that the City of McCall is authorized to land apply its captured municipal effluent on lands outside of the city limits, and such use is authorized under the City's existing municipal water rights without need for transfer. This conclusion is premised on my representations to you in this letter that the land application is mandated by environmental requirements, that the lands on which the land application occurs were previously served by full existing water rights, and that the City has authority via contract or otherwise to land apply on these lands.

The City believes that these conclusions are fully consistent with the principles of optimum utilization embodied in Idaho's constitution. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973). It is in the public interest to encourage well-designed land application projects that enable cities to meet increasingly strict environmental requirements at

[5] This is consistent with the law elsewhere in the West. In *City of San Marcos v. Texas Comm'n on Envt.l Quality*, 128 S.W.3d (Texas Ct. App. 2004), the Texas Court of Appeals found that the City of San Marcos did not have the right to recapture its wastewater effluent in a river three miles downstream of the sewage treatment plant.

lower cost while promoting water conservation and facilitating additional beneficial use of water. Idaho's water law fully accommodates such undertakings.

As we discussed, I would very much appreciate your review, on behalf of the Department, of the conclusions reached in this letter. I look forward to hearing back from you in that regard. Thank you in advance for the time and effort you, the Acting Director, and others at the Department have invested in this review. It is important to the City to have clarity on these issues.

Sincerely,

Christopher H. Meyer

cc: Gary Spackman
Jeff Peppersack
John Westra
Steve Lester
Lindley Kirkpatrick

CHM:ch

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Letter from Garrick Baxter to Christopher Meyer (September 7, 2011)

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN
September 7, 2011

Christopher H. Meyer
Givens Pursley LLP
601 West Bannock St
P.O. Box 2720
Boise, ID 83702

Re: City of McCall - Land application of municipal effluent outside of city limits

Dear Chris:

This responds to your letter of August 18, 2011 requesting confirmation that the City of McCall ("City") has authority to land apply its municipal effluent to lands located beyond the city limits but within the City's service area. I have reviewed your letter with staff of the Idaho Department of Water Resources ("IDWR") and am able to confirm that on the issue of whether municipal reuse of waste water comes within the original use of the municipal right, your analysis is consistent with current IDWR policy. Waste water treatment necessary to meet adopted state water quality requirements is considered by IDWR as part of the use authorized under a municipal right so long as the treatment process complies with the best management practices required by the Idaho Department of Environmental Quality, the U.S. Environmental Protection Agency, or other state or federal agency having regulatory jurisdiction. For new uses of municipal waste water that are not necessary to meet water quality requirements, an application for permit to appropriate water should be filed as required by Idaho Code § 42-202.

One concern raised by IDWR relates to your analysis of the place of use for a municipal provider. As you correctly recognize, the Municipal Water Rights Act of 1996 expressly authorizes municipal providers to serve within a "service area" that may include lands "located outside the boundaries of a municipality served by a municipal provider." Idaho Code § 42-202B(6). The term "service area" is defined by the 1996 Act as follows:

> "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

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> 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.

Idaho Code § 42-202B(9) (emphasis supplied).

Under this statute, only if the constructed delivery system for the area outside the city limits shares a common water distribution system with lands located within the corporate limits, may the area outside the city limits be considered part of the city's service area. In the City's case, the Department understands that the City uses a series of privately owned irrigation ditches to transport effluent to lands outside the city limits. The Department has questions regarding the process in which the City delivers effluent to the lands outside the city limits. A measure of control and supervision is at least implied for a delivery system to be considered a "common" water distribution system. The Department does not have a complete understanding of how the effluent is tracked and delivered by the City. In short, the Department would need a better understanding of the City's actual delivery process to be able to answer whether the use of private irrigation ditches by the City would satisfy Idaho Code § 42-202B.

The Department would be happy to meet with you and your clients to discuss this matter further. Let me know if you would like to set up a meeting.

Sincerely,

Garrick L. Baxter
Deputy Attorney General
Idaho Department of Water Resources

cc: Gary Spackman
Jeff Peppersack
John Westra
Steve Lester

Letter from Christopher Meyer to Garrick Baxter (September 16, 2011)

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September 16, 2011

Garrick L. Baxter
Deputy Attorney General
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098
garrick.baxter@idwr.idaho.gov

Re: City of McCall - Land application of municipal effluent outside of city limits

Dear Garrick:

Thank you for your letter of September 7, 2011. I am writing to respond to your request for more information on the delivery system used by the City of McCall for its land application. I have spoken with Peter Borner, the City's Public Works Director. Mr. Borner has confirmed the following facts:

The City owns and operates its wastewater treatment facility near the edge of town. Water is piped from the wastewater treatment facility to another facility known as the mixing station located on leased land approximately three miles south of the City. The City owns, operates, and controls the water treatment facility, the mixing station, and the pipe carrying the water from the water treatment facility to the mixing station.

The purpose of the mixing station is to add irrigation water to dilute the treated effluent from the wastewater treatment plant prior to land application. The irrigation water is provided under other water rights not owned by the City. The diluted effluent is then piped directly to center pivots or other delivery systems on farms under contract with the City for land application. The piping from the mixing station to the farms is owned by irrigation entities and/or the farmers themselves.

It is my understanding that the chief concern of the Department is that the treated effluent be under the physical control and direction of the City or others throughout the delivery process, and that the water not simply be used to augment the water supply of an irrigation district without the ability to determine which land actually receives the effluent. I can assure you that the City's system satisfies this requirement.

Based on this additional information, the City would appreciate receiving confirmation from the Department that its use of its municipal wastewater for land application as described in this letter and my letter of August 18, 2011 is a municipal use falling within the scope of its municipal water rights.

I thank you, Mr. Spackman, Mr. Peppersack, and Mr. Westra for your attention to this inquiry.

Sincerely,

Christopher H. Meyer

cc: Gary Spackman
Jeff Peppersack
John Westra
Steve Lester
Lindley Kirkpatrick
Peter Borner

CHM:js

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Letter from Garrick Baxter to Christopher Meyer (September 19, 2011)

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

September 19, 2011

Christopher H. Meyer
Givens Pursley LLP
601 West Bannock St
P.O. Box 2720
Boise, ID 83702

Re: City of McCall - Land application of municipal effluent outside of city limits

Dear Chris:

Thank you for your letter dated September 17, 2011. You letter alleviates the Department's concerns regarding the City of McCall's effluent distribution system. Based upon the representations in your letter, the Department agrees that the lands served outside the City of McCall's corporate limits share a common water distribution system with lands located within the corporate limits. So as long as the City of McCall is land applying its captured municipal effluent as part of a treatment process to meet adopted state water quality requirements (this issue was discussed in my letter to you dated September 7, 2011), the Department agrees that the use (and location) is in conformance with City of McCall's municipal water right.

Sincerely,

Garrick L. Baxter
Deputy Attorney General
Idaho Department of Water Resources

cc: Gary Spackman
Jeff Peppersack
John Westra
Steve Lester

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Addendum G APPLICATION PROCESSING MEMO NO. 61

1. Memorandum from Norm Young to IDWR (Sept. 27, 1996).
2. Memorandum from Phil Rassier to Norm Young (Sept. 5, 1996).

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000
Phone: (208) 327-7900 FAX: (208) 327-7866

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

ADMINISTRATOR'S MEMORANDUM

APPLICATION PROCESSING MEMORANDUM NO. 61

TO: **WATER ALLOCATION BUREAU, ADJUDICATION BUREAU AND REGIONAL OFFICES**

FROM: **NORM YOUNG**

SUBJECT: **WATER RIGHT FILING REQUIREMENTS FOR INDUSTRIAL WASTE WATER USE AND TREATMENT (INTERIM POLICY)**

DATE: **September 27, 1996**

PURPOSE OF MEMORANDUM

Because much of southern Idaho is included within areas covered by moratoriums or other designations that prevent or limit approval of new applications to appropriate water, water users are seeking innovative ways of using water for new and expanded projects. The waste water from industrial processes is one source of water for such uses. In addition, more restrictive water quality requirements are causing industrial water users to implement land disposal methods, create wetlands, capture and reuse waste water, and to provide for on-site containment of waste water.

The administrative requirements addressing the use of industrial waste water have not been clearly set forth. Direction is needed to guide staff and water users concerning the types of applications, if any, that need to be made, the criteria for considering such applications, and conditions that may be appropriate for approved applications. This memorandum addresses the water right filing requirements for the treatment of waste water and the reuse of waste water from industrial processes.

This memorandum provides interim guidance pending additional determination of policy and requirements through changes to law, adoption of rules or court rulings. Because a basic premise of this memorandum is that the consumptive use authorized by a water right for industrial purposes can be 100% of the amount diverted, depending on particular factual issues, this memorandum does not apply to waste water from uses which could not be 100% consumptive.

For purposes of this memorandum "waste water" is effluent, treated or untreated, from authorized beneficial uses under an industrial or other potentially 100% consumptive water right, prior to its being returned to a public water source. Waste water may contain solid waste and other contaminates, but for purposes of this memorandum it is a liquid, fluid enough to flow in an open channel or unpressurized pipeline.

AN EXAMPLE OF A TYPICAL SITUATION

An industrial user has for many years disposed of waste water diverted from the aquifer under a licensed right through a series of ponds which evaporate part of the water with the remainder seeping to the regional aquifer. In this instance, DEQ is requiring that water not be allowed to seep to the aquifer and has suggested land application. The land available for disposing of the waste is in sagebrush and does not have an irrigation water right. Each gallon of waste water land applied will have to be diluted with 3 to 4 gallons of fresh water. The net depletion from the aquifer will be increased 400 af/yr by the new water treatment requirements. Are water right related approvals required from IDWR to authorize surface disposal of the waste water?

LEGAL PRINCIPLES

The continuum of options for considering this mattter is bounded by two principles. At one end of the continuum, the treatment necessary to comply with water quality requirements may be a part of the diversion and beneficial use authorized under the industrial water right. If the industrial right is a fully consumptive right, then as water quality requirements require a change in treatment, the amount of the water consumed can be increased. However, the diversion rate, annual volume diverted, and season of use established under the right cannot be increased. Any fresh water needed to dilute the waste water must be within the quantity elements of the industrial right or be covered by another water right.

At the other end of the continuum, the industrial right may be construed to authorize only the beneficial use established and historically used under the industrial right. Any increase in consumptive use (or other element of the right) would require a new water right. Depending upon the availability of water for appropriation, this may require the holder of the industrial right to mitigate injury to other users or obtain an existing right to cover the expanded consumption.

A brief review of the legal and administrative precedents (see Phil Rassier's attached memorandum) indicates that the existing law in Idaho does not provide strong guidance as to whether the land application of industrial waste water initiated to comply with water quality requirements should be considered to come within the original purpose of use of the industrial right, whether it should be treated as an added beneficial use of the water requiring a new water right, or whether some intermediate consideration should be used.

APPLICATION OF PRINCIPLES

IDWR will apply the following policies until or unless further guidance is provided:

1. Waste water treatment necessary to meet adopted state water quality requirements will be considered to be a part of the use authorized under the industrial right. The method of treatment must be "reasonable." IDWR will consider a treatment method to be reasonable if it is in accordance with best management practices recognized by Idaho Division of Environmental Quality, the U.S. Environmental Protection Agency, or other responsible state or federal agency.

2. Consumptive use can increase up to the amount determined to be consistent with the original water right as reasonably necessary to meet treatment requirements. Diversion rate, annual volume diverted, and season of use cannot exceed the permitted, licensed or decreed amounts for these parameters.

3. If the treatment method for industrial waste water is changed to land application on cultivated fields or any other method that beneficially uses the water, the industrial right must be changed to include the new use. This will require a transfer application to be filed, processed and approved in accordance with Section 42-222, Idaho Code, to include a new location for a waste treatment practice, such as land application, and other conditions of approval that may be necessary to prevent injury to other valid water rights.

4. For new uses of industrial waste water that are not necessary to meet water quality requirements, an application for permit to appropriate water should be filed as required by Section 42-107, Idaho Code.

5. Fresh water required to dilute the waste water for treatments such as land application must be diverted in accordance with a water right. This can be the industrial right if adequate rate and volume are available under the right. If not, another right must be provided. In areas where new allocations are limited or prevented by moratorium orders or other designations, establishment of a new right will require appropriate provisions to mitigate the depletion from the source.

Attachment: P. Rassier's Memorandum

MEMORANDUM

TO: Norm Young

FROM: Phil Rassier PJR

RE: Land Application of Industrial Effluent

DATE: September 5, 1996

You have asked for legal guidance regarding the water right implications created when a private industrial water user elects to land apply its industrial effluent because the company is required by environmental constraints to prohibit its waste water effluent from continuing to reach a public water source. The water rights issue created when an industrial water user adopts a land-application method of disposing of its effluent is whether the change results in an impermissible enlargement of its underlying water right by increasing the amount of water consumptively used. Previously, some percent of the water in the effluent was returned to a public stream or allowed to percolate into the ground water. The goal of land application of the effluent is that it all will be absorbed by the growing crops or evaporated to the atmosphere. The use of water under the industrial water right thus becomes 100 percent consumptive where before it was not.

The case law addressing this issue appears to deal almost exclusively with the disposal of municipal effluent. In the case of municipalities, the majority view is that the proper disposal of effluent from waste treatment facilities comes within the parameters of the beneficial use of a municipal water right. One of the most frequently cited cases is *Arizona Public Service Co. v. Long*, 773 P.2d 988 (Ariz. 1989). In this case, the owners of downstream junior water rights that had historically used the effluent for irrigation following upstream discharge sued the City of Phoenix alleging that the city had no right to contract with a utility for the transport and use of the effluent in the cooling towers of a nuclear power plant. The court upheld the contract, holding that sewage effluent was neither surface water nor ground water, but was simply a noxious by-product which the city must dispose of without endangering the public health and without violating any federal or state pollution laws. In reaching it decision, the Arizona Court quoted from a much earlier Wyoming decision which upheld the sale by a city of effluent discharged directly into the buyer's ditch, but also held that effluent discharged into a stream became public water subject to appropriation. *Wyoming Hereford Ranch v. Hammond Packing Co.*, 236 P.2d 764 (Wy. 1925). The *Arizona Public Service* case generally holds that cities may put their sewage effluent to any reasonable use that would allow them to maximize their use of the appropriated water and dispose of it in an economically feasible manner. Beck, *Waters and Water Rights*, § 16.04(c)(6) (1991).

In an even more recent Arizona case, the court upheld a city contract for the disposal of its effluent noting that the effluent from the city of Bisbee delivered to Phelps Dodge for copper leaching operations was not useable for drinking water, irrigation, or fire protection purposes and

that it was only useful for the leaching operation. The city contract had been challenged by the local water utility that otherwise would have provided water for the leaching operation.

Other cases reviewed have reached results similar to that in Arizona for municipal entities without as much emphasis on the distinct character of effluent. In a more recent Wyoming case, the court held that the City of Roswell could recapture its sewage effluent before it is discharged as waste or drainage and reuse it for municipal purposes. *Reynolds v. City of Roswell*, 654 P.2d 537 (Wy. 1982). The court characterized sewage effluent as artificial water and therefore primarily private and subject to beneficial use by the owner and developer thereof because treated sewage effluent depends upon the acts of man.

In the early Colorado case of *Pulaski Irrigation Ditch Co., et al v. City of Trinidad, et al*,203 P. 681 (Colo. 1922), the court held that where a city had voluntarily chosen to treat its effluent in a manner that produced surplus water, it did not have the right to sell its purified water. The court went on to recognize, however, that where there is no other practicable method of disposing of the sewage, public policy might permit its disposal by the evaporation of the water. 203 P. at 683. A more recent Colorado case, *Metropolitan Denver Sewage Disposal District No. 1 v. Farmers Reservoir & Irrigation Co.*, 499 P.2d 1190 (Colo. 1972) merely holds that changes in the points of return of waste water to a stream are not governed by the same rules as changes of points of diversion and that there is no vested right in downstream appropriators to maintenance of the same point of return of irrigation waste water or effluent from a municipality or a sanitation district. In *Barrack v. City of Lafayette*, 829 P.2d 424 (Colo. App. 1992), the court held that impossibility of performance relieved the city from any obligation to deliver effluent to plaintiffs after state regulation made such delivery illegal. The court concluded that plaintiffs had no property right to the delivery of untreated water that could no longer be legally delivered.

In 1991, Nevada and Oregon each enacted legislation addressing the reuse of effluent or reclaimed water. The Oregon statute defines "reclaimed water" as "water that has been used for municipal purposes and after such use has been treated in a sewage treatment system and that, as a result of treatment, is suitable for a direct beneficial purpose or a controlled use that could not otherwise occur. OR. REV. STAT. § 537.131. The new legislation requires any person who is using or intends to use reclaimed water to file a Reclaimed Water Registration form with the Oregon Water Resources Department. The statute provides the circumstances under which potentially affected water users must be notified of the proposal and of their rights of preference to the use of the water under certain circumstances. The Nevada statute, by contrast, merely provides a statement of legislature policy encouraging and promoting the use of effluent, where that use is not contrary to the public health, safety or welfare, and where that use does not interfere with federal obligations to deliver water of the Colorado River. N.R.S. § 533.024.

The review of existing case law provides significant guidance with respect to the handling

of municipal effluent. None of the reported cases I have reviewed, however, address whether the same or some different analysis should be applied when the effluent is produced by a private industrial user rather than by a municipality. This issue was raised but not addressed in *Wyoming, et al v. Husky Oil Company*, 575 P.2d 262 (Wy. 1978). The case arose as an action for declaratory relief by Husky Oil seeking a determination that its plan to impound and evaporate effluent water rather than continue to discharge it to a natural stream was not subject to the jurisdiction of the State Engineer and did not infringe upon any rights of downstream water appropriators. The majority of the Court voted to remand the case to the trial court for a full factual trial and to join other indispensable parties to the action. A lengthy dissent, however, proceeded to analyze the merits of the case. The dissent characterized the proposed change as an expansion of the original industrial water right for the refining process to now include the additional use of pollution abatement. The dissent concluded that Husky should be required to apply to the State Engineer for a permit for the additional use.

Before the Department, we have the precedence of issuing waste water permit nos. 29-7437 and 29-7431 to the J.R. Simplot Company and to the City of Pocatello respectively in 1978. The two permits were for the use of waste water from the city's sewage treatment plant and from the Simplot Fertilizer Plant at Pocatello. The waste water from both facilities was previously discharged to the Portneuf River. The applications specified 3,124 acres of land on which the water would be used for irrigation. Some 1,613 of these acres were not owned by the city or the J.R. Simplot Company but were covered by user agreements with the owners of the land. The decision does not address any concern that may have existed about discontinuing the practice of discharging the effluent to the river. The concerns with the project revolved more around the health and safety implications of the project.

Existing law in Idaho does not provide strong guidance as to whether the land application of industrial effluent initiated to comply with water quality requirements should be considered to come within the original purpose of use of the industrial water right, or should be treated as an added beneficial use of the water requiring a new water right to be obtained or established. If the Department determines that a new separate water right should be required, the option of allowing the user to appropriate the industrial waste water for the new purpose of pollution abatement through land application of the effluent should be considered. This approach is consistent with that taken by the Department in 1978 with the City of Pocatello and J. R. Simplot filings.

Please let me know if you desire further review or discussion of these issues.