Urban Growth, Land Use Planning, and Water Rights In Idaho

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A. Overview

In Idaho (and most western states), the law of water rights and land use planning developed along entirely different paths, which did not intersect until recently. Their interaction today is spotty and confused, based on sometimes conflicting and inadequate legislative direction.

The quick (and over-simplified) answer is that the Idaho Department of Water Quality ("IDWR") has control over the acquisition, transfer, and administration of water rights in Idaho, while cities and counties (together, referred to as municipalities) have control over land use. A third entity, the Idaho Department of Environmental Quality ("IDEQ"), has jurisdiction over water quality. This discussion focuses primarily on the authority of IDWR and municipalities.

IDWR traces its authority over water rights back to its predecessor, the Office of State Engineer, created in 1895 (five years after statehood). This authority is grounded in the State Constitution and buttressed by statutes dating to territorial times.[1]

Land use control and, in particular, the authority to zone, resides in Idaho cities and counties. Idaho is a Dillon's rule state (as opposed to a home rule state), meaning that cities and counties have no inherent authority to legislate. Rather, their law-making power derives from grants of authority found in or necessarily implied by the Idaho Constitution or statute.[2]

Despite being a Dillon's rule state, no statutory authorization is necessary for zoning, because the authority to zone derives directly from a self-executing grant under the State Constitution.[3] Specifically, the police power granted to municipalities (Idaho Const. art. XII, § 2) includes the power to zone.[4] Thus, cities have lawfully engaged in zoning even before the

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[1] Idaho Const. art. XV, approved in 1890, governs water rights. See, Dennis C. Colson, *Water Rights in the Idaho Constitution*, 53 Idaho Advocate, 20 (Dec. 2010). The first Idaho statute addressing water rights was enacted by the Territorial Legislature in 1881. 1881 Idaho Sess. Laws 273-75. The earliest parts of what is now Idaho's water code (Title 42) date to 1899. 1889 Idaho Sess. Laws, pp. 380-87; 1901 Idaho Sess. Laws, pp. 191-201, in particular § 9b at p. 200-01 (codified to Idaho Code § 42-101).

[2] *Bradbury v. City of Idaho Falls*, 32 Idaho 28, 32, 177 P. 388, 389 (1918) (Morgan, J.) (quoting 1 *Dillon on Municipal Corporations* § 237 (5th ed.)); *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980) (Donaldson, C.J.).

[3] In sharp contrast, the state constitutional taxing authority, Idaho Const. art. VII, § 6, is non-self-executing. Accordingly, impact fees, capitalization fees, service fees, and other "land use fees" all require statutory authority (except for those described as regulatory fees, which fall under the police power). This has given rise to a mountain of litigation in Idaho.

[4] "The power of counties and municipalities to zone is a police power authorized by Art. 12, § 2 of the Idaho Constitution." *Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 617, 661 P.2d 1214,

first comprehensive land use planning statute was enacted in 1975 (the Local Land Use Planning Act ("LLUPA"), Idaho Code §§ 67-6501 to 67-6538). Today, local authority over land use is controlled and constrained by the comprehensive regime set out in LLUPA. (*See* Allen, Meyer, Nelson & Lee, *Idaho Land Use Handbook* for a comprehensive discussion of LLUPA.)

These authorities over water and land use are largely distinct, but come into connection (and potential jurisdictional conflict) where IDWR seeks to guide land development through water rights administration or where municipalities seek to shape water policy. The discussion below explores eleven statutory provisions that bear on these jurisdictional quandaries:

1. The constitutional "preference" for domestic water rights
2. IDWR's consideration of the "local public interest" in water permitting
3. IDWR's authority to protect the economy of the basin of origin
4. IDWR's authority over out-of-state transfers
5. IDWR's authority to evaluate water conservation
6. IDWR's authority over municipal water rights for future needs
7. The obligation of municipalities to consider land use impacts on aquifers
8. The land use planning statute's requirement to use surface water where available
9. IDWR's "exclusive authority" over water rights
10. The limited ability of cities and developers to cross, use, or discharge into irrigation canals and drains
11. Responsibility for maintaining canals, ditches, laterals, and buried water conduits

B. The "preference" for domestic use is really a right to condemn.

Like the constitutions of several western states, Idaho's constitution ranks certain beneficial uses in terms of "preferences." Idaho's Constitution ranks domestic uses first, agricultural uses second, and manufacturing purposes third, except that in an "organized

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1216 (1983), *overruled on other grounds by City of Boise City v. Keep the Commandments Coalition*, 143 Idaho 254, 257, 141 P.3d 1123, 1126 (2006). *See*, Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?*, 14 Idaho L. Rev. 143, 154 (1977).

mining district" (an historical anachronism) mining uses have preference over all but domestic uses.[5]

These preferences mean much less than might appear. They provide neither "super-priority" status in the priority system nor authority for IDWR to "prefer" certain water uses over others in the approval or administration of rights. Rather, this constitutional preference simply confers on the preferred water user the right to condemn the water rights of a less preferred user.[6] Indeed, this is made explicit by the last sentence of section 3: "But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution."[7]

Thus, for instance, a farmer may condemn the water rights of a manufacturing operation, but would be required to reimburse the manufacturer for the fair market value of the water right taken. That, of course, is not likely to pencil out. Likewise, a municipal provider (whose municipal water needs are deemed "domestic" for this purpose) could, in theory, condemn any other use. The authors are unaware of an instance in Idaho where this constitutional condemnation power has been exercised.

C. IDWR's scaled back authority to evaluate the local public interest test.

Prior to 1978, applications for water right appropriations and transfers were evaluated by IDWR solely on the basis of the traditional issues, such as injury, enlargement, beneficial use, and speculation. The environmental or land use impacts of water development were not a

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[5] "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriations shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution." Idaho Const. art. XV, § 3.

[6] *Montpelier Milling Co. v. City of Montpelier*, 19 Idaho 212, 113 P. 741 (1911).

[7] This language was noted, in support of this proposition, in *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 880-81, 154 P.3d 433, 451-52 (2007).

relevant consideration.[8] Indeed, in the early days of mining development, water uses often had horrific consequences on the local environment. At the time, that was considered the cost of progress.

In Idaho, this changed dramatically in 1978 when the Idaho Legislature added a "local public interest" review requirement to the criteria for approval of appropriations of new water rights.[9] 1978 Idaho Sess. Laws ch. 306, § 1 (codified as amended at Idaho Code §§ 42--202B(3), 42-203A(5)(e)).[10]

As originally enacted, the public interest provision granted IDWR broad authority to consider anything bearing on "the affairs of the people in the area directly affected by the proposed use." 1978 Idaho Sess. Laws ch. 306, § 1. This sweeping language opened the door for the Department to consider environmental and land use impacts associated with the project or development for which the water was needed.

The statute was hardly noticed for two decades. Then, in the late 1990s, it began to generate a substantial number of contested administrative cases. Opponents of unwelcome developments opposed water rights needed for the development. This tactic of challenging the water right, rather than the project itself, reflects the perceived inadequacy of other forums for citizen input. This coincided with the growth of the large-scale dairy industry in Idaho (whose economic power now exceeds that of Idaho's "Famous Potatoes"). Local public interest litigation, however, was not limited to dairy conflicts. Public interest battles also were waged by those opposing such things as a ski development, power plants, fish production facilities, residential subdivisions, and competing municipal water supplies.

These contests set off a firestorm of debate over the proper scope of the local public interest test. The resulting hue and cry resulted in an amendment to the local public interest language in 2003, over the objection of environmental groups and IDWR itself.

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

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

[10] This test was soon applied in other settings. In 1979, when the water supply bank was created, the local public interest test was made applicable to water bank rentals. 1979 Idaho Sess. Laws ch.193, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-1763). In 1981 the Legislature made the test applicable to changes (also known as transfers) of existing water rights. 1981 Idaho Sess. Laws ch. 147, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-222(1)).

In 2003, the Legislature redefined "local public interest," limiting its scope to "the effects of such use on the public water resource." 2003 Idaho Sess. Laws ch. 298 (codified at Idaho Code § 42-202B(3)).

Under this new test, a protestant could still complain, for instance, that a water right would dewater a trout stream. Presumably, the new definition also embraces water quality impacts. For instance, if a diversion from a stream would reduce the quantity of water remaining, and, thereby, the assimilative capacity of the stream, this impact would appear to be a proper matter for the Department to evaluate.

But evidence about dairy odors, noise, traffic, and other adverse effects of the project (unrelated to the water resource) was off limits in IDWR's consideration of the water right application. These are land use matters that must be taken up with municipal and other regulatory authorities with proper jurisdiction.

The examples above involve impacts caused by the diversion of water. What about adverse impacts resulting from the use of the diverted water? For instance, suppose an applicant sought a water right for use in a facility that would contaminate the water with pollutants, and the resulting waste water would eventually reach a nearby aquifer raising the level of contaminants in it. The current language speaks in terms of impacts of "a proposed water use" (and not just the diversion). This suggests that the Department is authorized to consider impacts including contaminated return flow, seepage, or waste water.

D. IDWR's basin-of-origin protection

As part of the 2003 amendment to the local public interest statutes, the Legislature added new protections against diversions of water to out-of-basin uses.[11] When water is moved from one basin to another, the Director must determine that the move "will not adversely affect the local economy of the watershed or local area in which the source of water originates" (*i.e.*, the basin of origin). 2003 Idaho Sess. Laws ch. 298 (H.B. 284). This is codified in multiple places: Idaho Code §§ 42-203A(5)(g) (appropriations), 42-222(1) (transfers), 42-240(5) (exchanges), 42-1763 (water bank).

Though its geographic scope is limited (diversions that take water out of the "watershed or local area" for use in another area), the authority granted IDRW over such out-of-basin transfers is broad. In contrast to the now restricted scope of the local public interest test, the new basin-of-origin protection is rather broad, allowing IDWR to consider effects on "the local

[11] An earlier basin-of-origin provision remains on the books. 1980 Idaho Sess. Laws ch. 186; 1986 Idaho Sess. Laws ch. 347 (codified as amended at Idaho Code § 42-226). It applies only to large new appropriations of ground water for use outside the "immediate ground water basin as defined by the director." It applies only to applications seeking water for irrigation of 5,000 acres or more or for a total volume of 10,000 acre-feet per year. Such a permit application requires special approval by both IDWR and the Idaho Legislature, based on "due consideration to the local economic and ecological impact of the project or development."

economy of the watershed or local area within which the source of water for the proposed use originates."

This protection, it appears, was aimed at protecting local areas from "Owens Valley" type water transfers that deprive a local community of its economic base.[12] Given that the statute's focus is on the basin of origin, not the new place of use, it would appear that the statute does not allow IDWR to consider the economic impact of the new project or development where it is located.

E. IDWR's authority to evaluate out-of-state water transfers

In 1990, the Idaho Legislature enacted detailed legislation specifically dealing with out-of-state uses of water (by either appropriation or transfer of existing rights). 1990 Idaho Sess. Laws ch. 141 (codified primarily at Idaho Code § 42-401, but also §§ 42-203A(5)(f) and 42-222(1)) ("Water Export Act").

The Water Export Act was intended to bring the state into compliance with *Sporhase v. Nebraska ex rel. Douglas*, *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.), which set constitutional standards under the dormant commerce clause for when states may restrict water exports to other states. The Water Export Act included two primary elements.

First, it added a conservation requirement applicable to <u>all</u> water right applications (not just those out-of-state). See discussion in section 1.F at page 9. (This conservation requirement was added because states may not restrict the export of water unless they are conserving the resource within the state.)

Second, the Water Export Act repealed earlier measures aimed particularly at water use in Oregon, and replaced them with a set of rules applicable to all appropriations and transfers for use of water out-of-state. Such out-of-state uses were required to follow special procedures, and IDWR was required to address six additional "factors" addressing the availability of water in the sending and receiving states. Idaho Code § 42-401(3). The factors are:

> (1) The supply of water available to the state of Idaho;
> (2) The current and reasonably anticipated water demands of the state of Idaho;
> (c) Whether there are current or reasonably available 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;

[12] Owens Valley was a once thriving agricultural area that was largely dewatered by the Los Angeles Canal completed in 1913.

(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).

It is unclear how these factors would be applied or what sort of evidence the applicant would be expected to provide. They appear to be intended to give the Director very broad discretion. For the applicant, the result is to significantly increase uncertainty and transaction costs. Not surprisingly, out-of-state transfers are a rarity.

Out-of-state water bank rentals were made subject to the same five tests in 1992. 1992 Idaho Sess. Laws ch. 101, § 1 (codified at Idaho Code § 42-1763).

F. IDWR's authority to evaluate water conservation

As noted above, the Water Export Act included a conservation requirement applicable to all water right applications. The applicant for any new water right appropriation or transfer must show that the proposed use is consistent with (or not contrary to) "the conservation of water resources within the state of Idaho." Idaho Code §§ 42-203A(5)(f) (appropriations), 42-222(1) (transfers) 42-401(3) (out-of-state water exports).

This provision was used in 2002 to deny two water right applications filed in connection with two proposed gas-fired power projects near Rathdrum, Idaho. *In the Matter of Application for Permit No. 95-09069 in the Name of North Idaho Power LLC*, Before the Idaho Dep't of Water Resources (Preliminary Order, July 18, 2002); *In the Matter of Application for Permit No. 95-09086 in the Name of Kootenai Generation LLC*, Before the Idaho Dep't of Water Resources (Preliminary Order, July 18, 2002). Both applications were denied because the proposed natural gas-fired power projects proposed to employ water-based cooling technologies where other technologies were available. The Department concluded that the inefficient use of water threatened the Rathdrum Prairie Aquifer. This decision was based on the "conservation of water" test (Idaho Code §§ 42-203A(5)(f), 42-222(1), not the local public interest test. There is no appellate case law interpreting this provision.

It would seem that this provision could be used by IDWR, if it chose, to widen its role in the evaluation of the efficiency of all manner of water uses—from agricultural irrigation to housing developments. To date, however, IDWR has been guarded in its use of this conservation provision.

G. IDWR's responsibility to consider comprehensive planning in the context of RAFN rights

The courts of Idaho and other Western states have long recognized the unique obligations of municipalities to establish a long term water supply sufficient to meet all comers. Most water users are required to put water to use promptly in order to obtain and retain a water right. Idaho was the first state to recognize the need for special treatment for

municipal providers, allowing them to secure water rights for future needs. *City of Pocatello v. Murray*, 206 F. 72 (D. Idaho 1913), *aff'd, Murray v. City of Pocatello*, 214 F. 214 (9th Cir. 1914); *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940) (Holden, J.); *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969) (McQuade, J.). Colorado was quick to follow, and the doctrine has been most thoroughly discussed by the courts of that state. The seminal exposition comes from the Colorado Supreme Court, writing in 1939. *City & County of Denver v. Sheriff*, 96 P.2d 836, 841 (Colo. 1939).

What is known in Colorado as the "great and growing cities doctrine," is known in Idaho and elsewhere as the "growing communities doctrine"—underscoring that it applies to all municipalities. See Fereday, Meyer & Creamer, *Idaho Water Law Handbook*, for a detailed treatment of the common law and its codification.

In 1996, the Idaho Legislature codified the growing communities doctrine and established specific procedures and limitations governing a municipality's ability to acquire water rights (by appropriation or transfer) for "reasonably anticipated future needs ("RAFN").[13]

In the 1996 Act, the Legislature affirmed the growing community doctrine's role in Idaho water law, while placing clear sideboards on how it is applied. By requiring careful planning and full disclosure by municipal providers who seek future needs water rights, the statute establishes a cautious approach that is both sensitive to speculation and consistent with the Idaho's longstanding doctrine mandating the maximum use of this public resource.

The 1996 Act may be boiled down to one sentence (with defined terms underlined): "<u>Municipal providers</u>" may secure water rights for "<u>municipal purposes</u>" of sufficient quantity to serve all "<u>reasonably anticipated future needs</u>" (aka "RAFN") within an expanding "<u>service area</u>" during a specified "<u>planning horizon</u>."

On occasion, growing cities in other western states have engaged in costly races to lock up huge stockpiles of water rights. Each city's goal is to ensure that it, rather than its neighbor, will be able to grow. The primary authors of the 1996 Act were acutely aware of this phenomenon—particularly on the Front Range of Colorado—and took steps to limit the possibility that the special treatment accorded municipal providers would trigger similar "water wars" in Idaho.

In order to avoid these problems, the 1996 Act imposes three anti-speculation requirements. First, the Act requires that the claimed future needs must not be "inconsistent

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[13] Municipal Water Rights Act of 1996 ("1996 Act"), 1996 Idaho Sess. Laws ch. 297 (codified as amended at Idaho Code §§ 42-202(2), 42-202(11), 42-202B, 42-217, 42-219(1), 42-219(2), 42-222(1), 42-223(2)). This list of codified sections excludes some minor "clean up" to other sections of the Water Code that were included in the 1996 Act. References to municipal providers are also found in Idaho Code §§ 43-335 and 43-338, dealing with the right of irrigation districts to lease water to municipal providers. These references were not part of the 1996 Act, but came a year later.

with comprehensive land use plans approved by each municipality." Second, the quantification of RAFN may not include "uses of water within areas overlapped by conflicting comprehensive land use plans." Idaho Code § 42-202B(8) (definition of "reasonably anticipated future needs"). Third, RAFN rights may not be sold. Idaho Code §§ 42-219(1), 42-222(1).

The first two of these speak directly to land use planning, and will be discussed further below. In a nutshell, the 1996 Act draws a clear jurisdictional boundary. It recognizes that municipalities have the duty to engage in comprehensive planning. IDWR is obligated to respect those planning documents, not to second guess them.

The first requirement—that projected future needs be consistent with comprehensive plans—is straightforward and not overly rigorous. Comprehensive plans are broad, conceptual planning documents, not specific descriptions of what is permitted where.[14] Comprehensive plans do not ordinarily contain detailed population or economic projections. Thus, not too much should be read into this consistency requirement. On the other hand, the consistency requirement means something. It requires that future needs projections tIDEW"ake into account the local government's vision of the future, at least on a macro scale. For example, if the comprehensive plan (or its associated future land use map) described an area as dedicated open space or preserved agricultural use, that, presumably, would be inconsistent with a quantification of RAFN based on high density development in the area.

The second requirement is a potentially draconian measure designed to provide an incentive to adjacent municipalities to cooperate in planning efforts. To the extent two or more municipalities assert planning authority over the same area and develop conflicting planning scenarios, future needs within that area may not be included in the quantification of any RAFN right. In other words, such areas must be excluded from what is informally known as the "planning area" for RAFN quantification.

As a practical matter, however, such conflicts are rare in Idaho. LLUPA does a good job of resolving disputes between cities over the direction of future growth. Each city is required to establish an "area of city impact" that defines the area beyond its current city limits where a city anticipates growing and, more specifically, extending city services and annexing. LLUPA provides a mechanism for cities and counties to resolve disputes over the boundaries of areas of city impact (to ensure that they do not overlap) and to determine whether the city's or the county's comprehensive plan and zoning ordinances will apply within the area of city impact. Idaho Code § 67-6526. The Act provides mechanisms for negotiation and, if necessary, judicial or political resolution. Even so, LLUPA has not eliminated all such conflicts.

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[14] Virtually all state zoning laws require local governments to adopt comprehensive plans. Idaho's requirement is found in the Local Land Use Planning Act ("LLUPA"), Idaho Code § 67-6508. *See* Allen, Meyer, Nelson & Lee, *Idaho Land Use Handbook* for a detailed discussion of this subject.

The 1996 Act's prohibition against serving "conflicting plans" areas applies equally to municipalities and to private utilities providing municipal water. Thus, a water utility cannot base its RAFN quantification on service to lands where two municipalities have an unresolved area of city impact dispute.

It bears emphasis that the "conflicting plans" areas probation applies only to water rights (or the portion thereof) held for RAFN. Municipal providers may acquire and hold water rights to serve existing or short-term needs within such "conflicted" areas.

H. Cities and counties are required to consider land use impacts on aquifers

In 1989, as part of larger legislation expanding IDEQ's role in ground water protection, the Idaho Legislature enacted a provision requiring municipalities to address ground water impacts when updating their comprehensive plans. 1989 Idaho Sess. Laws ch. 421 (now codified at Idaho Code § 67-6537(4)).

A comprehensive plan, as its name implies, is a comprehensive articulation of the conditions and objectives that will guide future growth within the geographic boundaries of the city or county. Idaho Code § 67-6508. "This Court has held that a comprehensive plan does not operate as legally controlling zoning law, but rather serves to guide and advise the governmental agencies responsible for making zoning decisions." *Urrutia v. Blaine County,* 134 Idaho 353, 357-58, 2 P.3d 738, 742-43 (2000) (Trout, C.J.)

However, LLUPA mandates that zoning ordinances must be "in accordance with" the comprehensive plan. Idaho Code §§ 67-6511 and 67-6535(1). Consequently, developers and others seeking or opposing rezones must pay particular attention to the comprehensive plan—including the development's impact on the aquifer, if any.

I. LLUPA's mandate for use of surface irrigation water when available

In 2005, the Idaho Legislature enacted legislation requiring land developers to use surface water for lawn irrigation systems if possible. 2005 Idaho Sess. Laws ch. 338) (H.B. 281) (codified at Idaho Code § 67-6537).[15] "All applicants proposing to make land use changes shall be required to use surface water, where reasonably available, as the primary water source for irrigation." Idaho Code § 67-6537(1). This mandate is driven by the assumption that ground water (which typically does not require treatment to be used as drinking water) is more precious than surface water.

The legislation is not directed to IDWR. Instead, it amended LLUPA, which governs planning and zoning actions by cities and counties.

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[15] Idaho Code § 67-6537 was first enacted as a part of the Ground Water Quality Protection Act of 1989, 1989 Idaho Sess. Laws ch. 421. At that time, it merely required local comprehensive plans to consider ground water protection (see discussion in section ~). It was not until 2005 that the provision was amended to add the substantive mandate to developers to use surface water when available.

The 2005 act applies to any applicant "proposing to make land use changes." That is very broad, presumably including zoning changes, special use permits, planned unit developments, annexations, or any other application for a new land use.

Thus, if a developer of agricultural land served by surface water seeks a land use entitlement, he or she is obligated to install a separate lawn irrigation system to utilize that water (rather than relying on municipal water that uses on ground water). The effect of this requirement is the proliferation of separate, unmetered lawn irrigation systems. Without the price signal of metering, effective water conservation is difficult to achieve. The City of Denver learned this the hard way, when it was forced to retrofit the entire city which was originally unmetered.

The requirement applies where surface water is "reasonably available." The act defines this as where surface water is appurtenant to the property, or reasonably could be made appurtenant, or where it could be obtained from an irrigation district or other entity. Idaho Code § 67-6537(1)(a). In other words, even if the land does not have surface water available today, the owner might be obligated to acquire surface water rights.

The requirement to use surface water where available raises a number of questions:

1. Does the act prohibit a municipal water provider (relying at least in part on ground water supplies) from serving homes that use the municipal water for lawn irrigation? Answer: No. The act applies to developers appearing before zoning bodies, not to municipal water providers whose water rights are administered by IDWR. Thus, it has no affect on what a municipal provider (or anyone else) does with its water rights. This is reinforced by subsection 3 of the act which states that nothing in the statute is intended to override or amend the Water Code. Idaho Code § 67-6537(3). Thus, the statute has no impact on IDWR's review of a water right application or any other administration of water rights.

2. Would the act require the developer of a shopping mall to install a separate surface-based irrigation system to irrigate the trees and shrubs in the parking lot? Answer: Arguably yes, if surface water is reasonably available. On the other hand, the mandate, though written in absolute terms, should be read in context, allowing the municipality to exercise some discretion. The first sentence of the act says that its purpose is to "<u>encourage</u> the use of surface water," not to mandate it. Moreover, the requirement is placed in a planning statute, LLUPA, which is built on the exercise of discretion. Thus, in determining whether surface water is reasonably available, one would think that the zoning board should be entitled to consider such things as the economic feasibility and efficiency.

3. Does this provision prohibit a municipal provider or subdivision developer from land applying treated municipal effluent from derived from ground

water to parks, open space, golf courses, and common areas? Answer: No. IDWR takes the position that it does not, so long as the ground water was first used for in-house culinary purposes (as opposed to lawn irrigation). This also would seem logical from a physical standpoint: Once the water emerges from the treatment plant, it should be viewed as surface water.

4. If a proposed development is within an irrigation district that has surface water available for irrigation, can the municipality require that the development's irrigation be served instead by reuse water provided by the city?[16] Answer: Probably yes. Assuming that the reuse is seen as surface water, the statute raises no impediment to such a city requirement.[17] However, assuming the subdivision remains within the irrigation district, its landowners would be subject to irrigation district assessments whether they get water from the district or not.

5. Can a new development use ground water to irrigate lawns and landscaping during the "shoulder season" (when surface water is not available in the spring and fall)? Answer: Yes. The statute requires only that surface water serve as the primary source of water, and it must be reasonably available.

6. Can an applicant install an efficient irrigation system that uses a portion of the former surface right, and sell the balance to another user?[18] Answer: Yes. The act does not limit the ability of a landowner to sell off the unused portion of surface rights associated with a developed parcel. In other words, the act says that if there is surface water on the property, it must be used.

7. Rather than directly applying the surface water, can the surface water be put to use indirectly as mitigation for a ground water right that serves the new development? Answer: Arguably yes. The statute requires the developer to "use the surface water . . . as the primary water source for irrigation."

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[16] For "Class A wastewater," which has been treated essentially to drinking water standards, the IDEQ guidance does not require any buffer zones between use areas and, for example, private dwellings. *Guidance for Reclamation and Reuse of Municipal and Industrial Wastewater*, Idaho Department of Environmental Quality at 6-17 (September 2007).

[17] The "irrigate with surface water" statute, Idaho Code § 67-6537, raises no impediment, but it is possible an opponent of the city's plan might assert that Idaho Code § 42-201(7), discussed below, would block the city from requiring that the reuse water be employed for subdivision irrigation. However, that provision addresses agency "authority over the appropriation of the public surface water and ground waters of the state." To the extent supplying reuse water for irrigation is not mandating an appropriation, it would appear this statute would not come into play.

[18] Splitting a water right and selling a portion is relatively easy if the land is served by it own water right(s). It is far more difficult if the land is served by an irrigation district, whose consent (and possibly the consent of the federal water provider) will be required.

Arguably, use of the water in a mitigation plan would satisfy this requirement, but there has been no ruling or Departmental guidance on this point.

H.B. 281 also raises constitutional questions under the Fifth Amendment (takings).[19]

J. IDWR's "exclusive authority" over water rights (Idaho Code § 42-201(7))

In 2006, the Idaho Legislature enacted a statute intended to shore up IDWR's authority over water rights. 2006 Idaho Sess. Laws ch. 256 (S.B. 1353) (codified at Idaho Code § 42-201(7)). The bill delegates to IDWR "exclusive authority over the appropriation of the public surface water and ground waters of the state" and prohibits any other agency from taking any "action to prohibit, restrict or regulate the appropriation" of water.

The legislation was a direct response to a draft ordinance contemplated by the City of Parma that would have required the City's approval of any new ground water well. The bill's sponsors viewed this as an attempt by the City to usurp IDWR's authority (and potentially limit the ability of well drillers to install new wells). Accordingly, the bill clarifies that local governments may not set up regulatory processes that mimic the responsibilities of IDWR regarding the appropriation of water.

Presumably, the bill does not interfere with other proper governmental regulatory activity dealing with water and sewer systems. Indeed, the Statement of Purpose accompanying the bill says as much: "It will have no impact on the zoning authority or other powers inherent in political subdivisions. There would be no impact on private contracts, covenants, or restrictions."

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[19] The measure probably does not qualify as a physical invasion, and thus is not a *per se* taking under that line of cases. *Loretto v. Teleprompter Manhattan CATV Corp.*, 444 U.S. 164 (1979). On the other hand, if rigidly applied, it may constitute a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and its progeny. Most notably, the provision would appear to falter under the cases dealing with "exactions." In *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), the Supreme Court held an exaction is a taking if it does not substantially advance the same governmental interest that would justify denial of the zoning application. In other words, there must be an "essential nexus" between the restriction on the use of the surface water and the goals of the planning and zoning act. One could argue that there is no such connection, an argument reinforced by the Legislature's decision to address this question in LLUPA, rather than the Water Code.

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Supreme Court elaborated further on the subject, declaring that there must be "rough proportionality" between the required dedication and the impact of the proposed development. H.B. 281 appears quite vulnerable on this point. Indeed, the problem with H.B. 281 is that it is a blanket prohibition that takes no account of the individual circumstances, and thus no account of the actual impacts of a particular development on the ground and surface water supply.

Thus, it appears that local governments may continue to enact zoning regulations even if they impinge on water rights in some ways, so long as the justification for the restriction relates to some proper police power concern distinct from the management of water resources.[20] For example, it would appear that a city or county would have ample justification as a matter of local municipal concern to require that applicants for developments of a certain size provide water rights or a central water delivery system to serve the new development.[21] Presumably a city could require developers to employ efficient irrigation or other water use systems, if it had distinct local justification for doing so. However, local governments are prohibited from using their local zoning authority to address what are really water appropriation duties assigned to IDWR. Two recent cases illustrate this.

Ralph Naylor Farms v. Latah County ("Naylor Farms"), 144 Idaho 806, 172 P.3d 1081 (2007) (Trout, J. Pro. Tem.), involved an ordinance adopted by Latah County creating the "Moscow Sub-basin Groundwater Management Overlay Zone." The ordinance prohibited the county from accepting applications for specified new land uses that were found to consume large quantities of water (mineral extraction and processing, large CAFOs, and golf courses). The ordinance was enacted as a direct response to the county's failed protest of Naylor Farms' application to IDWR for a ground water right for clay processing.

The district court invalidated the ordinance on the basis that it was preempted by the authority granted to IDWR to regulate water resources. The county did not appeal. Instead, the prevailing applicant appealed the district court's denial of its attorney fee request. While the appeal dealt with attorney fees, the Idaho Supreme Court found it necessary to discuss the merits of the preemption issue, essentially upholding the district court's preemption analysis.[22] Neither the parties nor the Court discussed Idaho Code § 42-201(4), which was enacted in 2006, the year after the county adopted the ordinance in question. Instead, the district court applied a common law implied preemption analysis under *Envirosafe Services of Idaho, Inc. v.*

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[20] Likewise, it appears that IDEQ may continue to administer its wellhead protection program.

[21] Such a requirement for central water and sewer was upheld in *Sanders Orchard v. Gem County,* 137 Idaho 695, 702, 52 P.2d 840, 847 (2002), in which the Court vacated the county's denial of a subdivision plat on the basis of the developer's failure to provide for a central water and sewer system. The Court found that there was no evidence in the record to support the county's factual conclusion that sewer would soon be extended to the area. However, the Court made clear that the county had the authority to consider the feasibility of installing central water and sewer. Indeed, the Court strongly implied that the county could have simply mandated such a requirement without need for individual factual determinations. *Sanders*, 137 Idaho at 702-03, n.6, 52 P.3d at 847-48, n.6.

[22] Since the county failed to appeal, the Idaho Supreme Court accepted the district court's determination as a given. On the other hand, the Idaho Supreme Court did not appear to be the least bit troubled by the district court's ruling on the merits, saying at one point "we respect the district court's analysis." *Naylor Farms* at 813, 172 P.3d at 1986. Ultimately, however, the Idaho Supreme Court upheld the district court's decision not to award attorney fees against the county.

County of Owyhee, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987). (See Allen, Meyer, Nelson & Lee, *Idaho Land Use Handbook* for a discussion of the attorney fee issue.)

On May 6, 2008, District Court Judge Elgee issued a decision in *Eagle Creek Partners, LLC v. Blaine County,* Case No. CR-2007-670, Idaho, Fifth Judicial Dist. (May 6, 2008), invalidating the county's requirement that the developer not employ a series of ponds as part of its irrigation water delivery system. The district court ruled that the county's authority to require more efficient irrigation is preempted by IDWR's authority to regulate water rights.

The message from *Naylor Farms* and *Eagle Creek* appears to be that counties may not employ zoning laws to engage in what is really water resource management. That is exclusively IDWR's domain. Thus, municipalities may not prohibit golf courses or aesthetic ponds because, in their opinion, they use too much water and may impair the aquifer.[23] This is not to say, of course, that local governments are obligated to grant every zoning request simply because the applicant has obtained a water right for it. But it is to say that the reason for restricting or prohibiting the development had better be something other than "it is good water resource management." Just where the line is between legitimate local regulation and improper intrusions into IDWR's authority remains to be worked out. It bears emphasis that we do not yet have a definitive ruling from the Idaho Supreme Court.

K. Cities' and developers' rights to cross, use, or discharge into irrigation canals and drains

Many Idaho cities contain substantial networks of irrigation canals, ditches, laterals, and drains, and the associated easements along these waterways necessary for their management and repair. The easements for these irrigation facilities, usually acquired by prescription (and recognized by statute24) typically are owned by the irrigation district, canal company, lateral water users association, or individual that owns or claims the ditch or drain. As cities have grown, more and more public and private facilities need to cross over, under, or along these irrigation conduits or their associated easement areas. These facilities include such things as water and sewer pipelines, electrical utility lines, sidewalks, bridges, public pathways, landscaping, and storm water conveyance systems. Similarly, municipal water providers sometimes need to discharge water from wells as part of the well completion or maintenance

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[23] This seems at odds with Idaho Code § 67-6537(4) (discussed in section 1.H at page 12), which requires municipalities to address aquifer impacts in their comprehensive planning documents. *Naylor Farms* did not mention this statute, which had been on the books 18 years. Apparently municipalities are supposed to think about aquifer impacts, but not do anything about aquifer impacts.

[24] Idaho Code § 42-1102 ("The existence of a visible ditch, canal or conduit shall constitute notice to the owner . . . of the underlying servient estate, that the owner of the ditch . . . has the right-of-way and incidental rights confirmed or granted by this section.") and Idaho Code § 42-1204 (ditch or canal owners "have the right to enter the land across which the right-of-way extends, for the purposes of cleaning, repairing and maintaining" the ditch "and to occupy such width of the land along the banks of the ditch . . . as is necessary to properly do the work").

process; canals or drains are a logical place to do so. Storm water historically has been discharged to irrigation canals or drains in many cases, and new land uses change flow patterns and lead to additional, or changed, stormwater discharges.

Idaho Code §§ 42-1209, 42-1102, and 42-1108 are the principal statutes addressing the question of how, or whether, entities may place such facilities—"encroachments" as they are termed in section 42-1209—within irrigation entity easements.

Idaho Code § 42-1204 expressly obligates the operators of ditches and canals to maintain their systems so as to avoid injury to others.

Section 42-1108 seemingly is an expression of legislative recognition that canals and drains should not be used to block land use changes or the construction of needed infrastructure, provided, of course, that it can be done without damage to the canal. This provision prohibits the owner of a ditch, flume or conduit from denying another the "right to cross their right of way with another ditch, flume or conduit," provided that "the same can be done in a convenient and safe manner" and the person building the crossing facility remains liable for any damages to the existing ditch. This language appears to provide a city or other entity an entitlement to place an encroachment—or at least a "ditch, flume or conduit"—in an irrigation easement, while remaining obligated to protect the irrigation entity from damage. However, this section probably would be read together with the more specific sections 42-1102 and 42-1209 so as to give effect to each. There is no case law discussing the interplay between these statutes.

Idaho Code sections 42-1102 and 42-1209 each require those seeking to build an encroachment to obtain the "written permission of the owner of the right-of-way in order to ensure that any such encroachments will not unreasonably or materially interfere with the use or enjoyment of the right-of-way."[25] They also confirm the common law rule that the person

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[25] Idaho Code § 42-1209 provides in full: "Easements or rights-of-way of irrigation districts, Carey act operating companies, nonprofit irrigation entities, lateral ditch associations, and drainage districts are essential for the operations of such irrigation and drainage entities. Accordingly, no person or entity shall cause or permit any encroachments onto the easements or rights-of-way, including any public or private roads, utilities, fences, gates, pipelines, structures or other construction or placement of objects, without the written permission of the irrigation district, Carey act operating company, nonprofit irrigation entity, lateral ditch association, or drainage district owning the easement or right-of-way, in order to ensure that any such encroachments will not unreasonably or materially interfere with the use and enjoyment of the easement or right-of-way. Encroachments of any kind placed in such easement or right-of-way, without such express written permission shall be removed at the expense of the person or entity causing or permitting such encroachments, upon the request of the owner of the easement or right-of-way, in the event that any such encroachments unreasonably or materially interfere with the use and enjoyment of the easement or right-of-way. Nothing in this section shall in any way affect the exercise of the right of eminent domain for the public purposes set forth in section 7-701, Idaho Code."

making the encroachment will remain liable to the irrigation entity for damages caused by any encroachment, and expressly preserve the right of eminent domain under Idaho Code § 7-701.

In *Pioneer Irrigation Dist. v. City of Caldwell,* 153 Idaho 593, 288 P.3d 810 (2012) (Horton, J.), the Idaho Supreme Court considered whether a city could discharge stormwater into an irrigation district's canals and maintain urban stormwater discharge conduits within the district's canal easement. The irrigation district, claiming the conduits and discharges are trespasses on an exclusive canal easement, sought an injunction requiring their removal at the city's expense.

The Idaho Supreme Court considered the matter in light of Idaho Code § 42-1209. The Court held that "the ditch owner is vested with the discretion to determine whether an encroachment would result in unreasonable or material interference with the easement or right-of-way." *Pioneer*, 153 Idaho at 598, 288 P.3d at 815. But that determination is subject to limited judicial review. The Court then remanded the matter to the district court "to determine whether a reasonable decision-making process was employed, and whether the decision was arbitrary and capricious or based upon clearly erroneous findings." *Pioneer*, 153 Idaho at 601, 288 P.3d at 818.[26]

As to the question about removing the encroachment, the Court found that the irrigation entity could engage in "self-help" and remove the encroachment itself at the encroacher's expense if four conditions are met: (1) the encroachment was built after 2004 effective date of section 42-1209; (2) the encroachment was constructed without permission; (3) "the encroachment must unreasonably or materially interfere with the use and enjoyment of the easement"; and (4) the irrigation entity first must request that the party responsible for the encroachment remove it.

The Court disagreed with the irrigation district that its easements are exclusive. The Court noted that, under the common law, irrigation canal easements are not exclusive, citing, *inter alia, Pioneer Irrigation Dist. v. Mussell,* 138 Idaho 28, 33, 72 P.3d 868, 873 (2003) and *Nampa & Meridian Irrigation Dist. v. Washington Federal Savings,* 135 Idaho 518, 20 P.3d 702 (2001). It found no indication that, in enacting section 42-1209, the Legislature sought to abrogate the common law. *Pioneer*, 153 Idaho at 601, 288 P.3d at 818. On this point all five justices agreed.

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[26] Such a review standard is familiar in the context of actions by state agencies or municipalities that engage in a meaningful fact-finding and hearing procedure, produce a record, and issue a final order that then will be subject to judicial review under Idaho's Administrative Procedure Act ("IAPA"), Idaho Code §§ 67-5201 *et seq.* The IAPA contains essentially the same deferential "arbitrary and capricious" standard the *Caldwell* Court concluded should be applied to an irrigation entity's decision regarding permission for an encroachment. While irrigation districts do not ordinarily hold hearings, employ procedures that ensure due process, or develop a record of decision, the Court concluded that section 42-1209 requires courts to extend "judicial deference" to the irrigation entity's decision to grant or withhold permission.

L. Responsibility for maintaining canals, ditches, laterals, and buried water conduits

It is the duty of the owner of a canal, ditch, or other water conduit to maintain it:

> The owners or constructors of ditches, canals, works or other aqueducts, and their successors in interest, using and employing the same to convey the waters of any stream or spring, whether the said ditches, canals, works or aqueducts be upon the lands owned or claimed by them, or upon other lands, must carefully keep and maintain the same, and the embankments, flumes or other conduits, by which such waters are or may be conducted, in good repair and condition, so as not to damage or in any way injure the property or premises of others.

Idaho Code § 42-1204.

Similarly (or redundantly), the owner of any ditch, canal, or conduit is responsible to "carefully keep and maintain the embankments thereof in good repair." Idaho Code § 42-1203.

Another statute says the same thing in the context of laterals: "The improvement, repair and maintenance of any such lateral or distributing ditch shall be under the direction of the directors of the association." Idaho Code § 42-1303.[27]

While the irrigation entity has the maintenance duty, the extent of liability for breach of that duty was limited by the Legislature in 2012:

> The duties referenced in this section, whether statutory or common law, require reasonable care only, and shall not be construed to impose strict liability or to otherwise enlarge the liability of the owner or owners of any irrigating ditch, canal or conduit. The owners or constructors of such ditches, canals, works or other aqueducts, while responsible for their own acts or omissions, shall not be liable for damage or injury caused by: (1) The diversion or discharge of water into a ditch, canal or conduit by a third party without the permission of the owner or owners of

[27] "Where a ditch is common property, or there is a common right to the use of the water of a ditch without payment therefor, and any labor or materials are necessary for the repair or cleaning of the ditch, or any gate or flume thereon or thereunto belonging, the watermaster of the district may make a fair pro rata assessment of labor or materials against the inhabitants of the district claiming the use of such water, according to the benefits received by each; and if any person so assessed neglects or refuses, for the period of three (3) days after notice so to do from the watermaster or his deputy, to furnish his just proportion of the necessary labor or materials, according to such assessment, he must pay his pro rata in cash, to be recovered, with costs, in an action by the watermaster in his own name." Idaho Code § 42-1206.

> the ditch, canal or conduit; (2) Any other act or omission of a third party, other than an employee or agent of the owner or owners of the ditch, canal or conduit; or (3) An act of God, including fire, earthquake, storm or similar natural phenomenon.

Idaho Code § 42-1203. Functionally identical language was added in 2012 to Idaho Code § 42-1204.

A landowner whose land is crossed by a ditch, canal, lateral or drain or buried irrigation conduit has a right to change the location of the conveyance to another place on his or her land or within a neighbor's easement, or to bury the conveyance, if this may be done without impairing the water flow. When the landowner decides to bury the water conveyance, the owner of the conveyance remains responsible for its maintenance. But there is a catch: "The right and responsibility for operation and maintenance shall remain with the owner of the ditch, canal, lateral or drain, but the landowner, his heirs, executors, administrators, successors and assigns, shall be responsible for any increased operation and maintenance costs, including rehabilitation and replacement, unless otherwise agreed in writing with the owner." Idaho Code § 42-1207.

There is even a criminal statute on the subject. "The right and responsibility for operation and maintenance shall remain with the owner of the ditch, canal, lateral or drain, but the landowner shall be responsible for any increased operation and maintenance costs, including rehabilitation and replacement, unless otherwise agreed in writing with the owner." Idaho Code § 18-4308.

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