The Water Report™
Water Rights, Water Quality & Water Solutions in the West

In This Issue:

Upcoming Stories:

Exempt Wells

Aquifer Storage & Recovery

& More!

MUNICIPAL WATER RIGHTS AND THE GROWING COMMUNITIES DOCTRINE

DEVELOPMENT, CODIFICATION, AND APPLICATION

by Christopher H. Meyer, Givens Pursley LLP (Boise, ID)

INTRODUCTION

A central premise of the Prior Appropriation Doctrine — use it (now) or lose it — is seemingly at odds with the needs of municipal providers to provide stable, long-term water supplies. Accordingly, the courts in many western states have carved out more liberal rules for providers of municipal water. Under what has come to be known as the "growing communities doctrine," water rights acquired for reasonably anticipated future needs may be held in reserve for decades without forfeiture. Yet the policy of sound planning that underlies the doctrine can lead to the opposite result as municipalities compete with each other to lock down long-term supplies.

A decade ago, Idaho codified the growing communities doctrine in order to retain the good policy benefits of the doctrine while avoiding the bad. This paper explores how Idaho's experiment has played out and what adjustments have been made along the way to implement the grand scheme. Although the paper focuses on Idaho's law, that experience may prove a useful model for other states.

BACKGROUND: THE COMMON LAW OF MUNICIPAL WATER RIGHTS

There is an inherent tension within the Prior Appropriation Doctrine. The doctrine, born during the nineteenth century settlement of the Western US, enthusiastically embraces the spirit of private initiative and entrepreneurial energy that characterized that era. Attention to environmental and other public interest concerns was not grafted onto the doctrine for many decades. From the outset, however, the Prior Appropriation Doctrine did not embrace all aspects of free-market capitalism. The doctrine's central focus on beneficial use reflects a deep-seated hostility to speculation.

In other contexts, speculation (and the investment resources it brings to the table) is considered the engine of private development and one of the hallmarks of the American success story. In water law, however, speculation is the nemesis of beneficial use. Water, unlike other real estate, is inherently a public resource. Accordingly, under the Prior Appropriation Doctrine, water is for those who put it to use now, not for those who would hoard it today so that it may be sold at a profit tomorrow.

In the early days, before permit systems were established in Idaho and most other Western states, a water right did not come into existence until actual diversion to beneficial use occurred. Except for certain small domestic wells, the permit/license process is now mandatory in Idaho. The statutory permit system provided some critical leeway to the developer of a new water right. Rather than engage in a risky race to develop a water supply, the user could obtain a water right permit in advance, which secured the quantity and priority of the water right sought. With permit in hand, the user then could obtain financing and proceed to construction of the diversion and delivery system with some confidence that water would be available. Once the project was completed and in use, a license would be awarded with a priority date relating back to the date of the application for the permit. Idaho Code § 42-219.

Municipal Water Rights

This article was adapted from a presentation by Christopher Meyer at the American Bar Association's 28th Annual Water Law Conference in San Diego, California on February 18, 2010.

Planning Horizon

In Idaho, the user might spend five years getting from permit to license, with a five-year extension upon a showing of need. In specified circumstances, further extensions might be obtained. Idaho Code §§ 42-204, 42-218, 42-128(a). Most practitioners find that the Idaho Department of Water Resources (IDWR) applies a lenient standard in determining good cause under the law that allows for a five-year extension. In most cases, that has proven to be sufficient time to design, fund, and construct a water project, at least for the typical irrigation project.

The system has not been entirely satisfactory, however, for municipal suppliers. Municipal suppliers shoulder an obligation unlike that of other water users — they are bound to serve all those customers who locate within their service area. "Public utilities have a duty to serve all customers within a service area, provided that the system as a whole can absorb the cost and still yield a reasonable rate of return. A leading California case extended the duty to serve to include a duty on water providers to acquire the necessary supplies to meet projected demands." Tarlock & Van de Wetering, *Western Growth and Sustainable Water Use: If There Are No "Natural Limits," Should We Worry About Water Supplies?*, 27 Pub. Land and Res. L. Rev. 33, 59 (2006) (citing *Lurawka v. Spring Valley Water Co.*, 146 P. 640, 645-46 (Cal. 1915)). Municipal suppliers never know how many customers they will be obligated to serve in the future, but understand that they must serve them. Thus, cities cannot wait for the future to unfold and simply hope that water may be obtained as needed. Although some uncertainty is inherent in growth projections, practical necessity demands that cities and utilities lay the foundation today to meet the water needs of the coming decades. Surface and underground supplies must be identified and acquired.

Water rights to serve these systems generally must be acquired long before the systems are in operation at full capacity. The planning horizon for these endeavors typically is longer than the five (or, with an extension, ten) year period Idaho's water licensing statute allows a water permit holder to prove beneficial use and obtain a license. Cities have argued that they should not be subject to such a limitation, and the courts have agreed.

The courts of Idaho and other Western states long ago recognized the unique obligations of municipalities and have treated them differently than other water users. The seminal statement comes from Colorado's Supreme Court:

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

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

This article employs the phrase "growing communities doctrine" to capture the essential points of the case law. This doctrine recognizes that long-term planning by municipalities, under proper circumstances, may be prudent, necessary, and lawful — and thus allows cities to hold water rights for long periods without fully developing them. The label has been employed by the Washington Supreme Court, *State of Washington, Dept. of Ecology v. Theodoratus*, 135 Wash.2d 582, 957 P.2d 1241 (1998) (dissent), and by numerous commentators, *e.g.*, Lora Lucero and A. Dan Tarlock, *Water Supply and Urban Growth in New Mexico: Same Old, Same Old or a New Era*?, 42 Nat. Resources J. 803 (2003). Although this shorthand description has yet to be employed by the Idaho Supreme Court and differs somewhat from the "great and growing cities doctrine" which has taken hold in Colorado, it captures the idea. The doctrine plainly applies to all growing communities, large and small, not just to great cities. For instance, in *Village of Peck v. Denison*, 92 Idaho 747, 751, 450 P.2d 310, 314 (1969), the doctrine was applied to a community of 200 inhabitants.

Subsequent decisions of the Colorado Supreme Court have reinforced the holding in *Sheriff*: "We cannot hold that a city more than others is entitled to decree for water beyond its own needs. However, an appropriator has a reasonable time in which to effect his originally intended use as well as to complete his originally intended means of diversion, and when appropriations are sought by a growing city, regard should be given to its reasonably anticipated requirements." *City & County of Denver v. Northern Colorado Water Conservancy Dist.*, 276 P.2d 992, 997 (1954). Known as the "*Blue River*" case, it approved a 50-year planning horizon. "Thus under *Blue River*, a city may appropriate water for its future needs without violating the prohibition on speculation so long as the amount of the appropriation is in line with the city's 'reasonably anticipated requirements.'" *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 38 (Colo. 1996). "The *Sheriff* decision clearly counsels against a strict application of the anti-speculation doctrine to municipalities seeking to provide for the future needs of their constituents." *Bijou*, 926 P.2d at 37.

The Water Report
(ISSN 1946-116X)
is published monthly by
Envirotech Publications, Inc.
260 North Polk Street,
Eugene, OR 97402

Editors: David Light
David Moon

Phone: 541/ 343-8504
Cellular: 541/ 517-5608
Fax: 541/ 683-8279
email:
thewaterreport@hotmail.com
website:
www.TheWaterReport.com

Subscription Rates:
$249 per year
Multiple subscription rates available.

Postmaster: Please send address corrections to
The Water Report,
260 North Polk Street,
Eugene, OR 97402

Municipal Water Rights

Future Growth

Avoiding Forfeiture

Unquantified Right

Municipal Protections

GROWING COMMUNITIES DOCTRINE IN IDAHO: JUDICIAL RECOGNITION

Two Idaho cases and one federal case applying Idaho law have squarely ruled that cities or private water utilities may obtain water rights of sufficient quantity to meet future population growth. In *City of Pocatello v. Murray*, 206 F. 72 (D. Idaho 1913) (aff'd, *Murray v. City of Pocatello*, 214 F. 214 (9th Cir. 1914), Pocatello granted a franchise to Murray and his associates to provide water to the city. The city complained that while Murray had delivered some water from Mink Creek, he had not obtained the entire supply physically available in the creek. Applying Idaho law, the federal court found Murray indeed had failed to fulfill his contractual obligation. The court rejected Murray's argument that it was against public policy for the city to appropriate more water than was then needed. The court declared that the leeway accorded agricultural users "should and doubtless would, be applied with even greater liberality to the superior and more elastic needs of a growing municipality." *Murray*, 206 F. at 80.

In *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940), the Idaho Supreme Court upheld the city's right to purchase irrigation water rights and hold them for future municipal needs. The Court went on to hold that such water need not be applied to irrigation in the meantime to avoid forfeiture. "To require that would amount to nullifying the power granted to a municipality to acquire and hold water for future needs — an absolute necessity of life and existence for a municipality." *Id.* at 7. In support of its decision, the Idaho court quoted from a Wyoming case, *Holt v. Cheyenne*, 137 P. 876 (1914):

> [T]he Supreme Court of Wyoming had before it…the identical question presented in this case. The court held: "A city's right to appropriate the waters of a stream is not limited to the needs of its citizens at the time of the adjudication of its rights, but is entitled to appropriate for the probable future demands of its population." The court then reviewed numerous authorities holding that property may be held by a municipality for its future growth and development without being subject to adverse claims of others, and then continues: "Such, we think, is the better reasoning, and is supported by the great weight of authority and to which many courts have in later cases acceded, although a contrary doctrine has been announced in earlier decisions."

Id. at 6 (this quotation, which *Beus* attributed to *Holt*, is actually from the headnote to *Holt*).

In the more recent case of *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969), the court upheld the right of the village to obtain an unquantified water right for "all the flow" from a particular source. Whether the water was needed for current or future needs is somewhat unclear from the decision. However, the court noted in a footnote that:

> [A]lthough the Village of Peck became a municipality only after the events giving rise to this litigation, we would have found it difficult not to allow the appropriation of some excess water (had there been any in fact) under I.C. § 50-323 and its predecessors and *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940); see Hutchins, op. cit. at p. 44 (municipal use of water).

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

The Court's reference in the quotation above is to an article published a year earlier by Wells Hutchins, the distinguished water law scholar: *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1 (1968). Mr. Hutchins concluded that Idaho law does recognize water rights for future municipal growth: "[A] city is not limited in the amount of its appropriation to the needs of its citizens at the time of adjudication of its water right, but may dispose of and apply the surplus water to beneficial use up to the amount of its application." *Id.* at 44 n.211.

Idaho case law consistently has accommodated the special burdens on municipal water providers — providing them a measure of protection from the statutory forfeiture laws and common law abandonment principles. Under Idaho law, "[a]ll rights to the use of water…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..." Idaho Code § 42-222(2). As one commentator put it: "Therefore, when a municipal corporation acquires a water right, the city generally will not lose the water right due to nonuse." Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 294 (1990). In the same vein, the chief legal counsel of IDWR noted: "The general law regarding the quantity of a municipal water right appears to be that a city may acquire a preferred right to store or appropriate more water than is immediately needed, thus allowing for growth of the city." Phil Rassier, Chief Counsel, *IDWR Memorandum: Municipal Water Rights – Statutory Background* at 1 (May 7, 1979).

Municipal Water Rights

THE 1996 MUNICIPAL WATER RIGHTS ACT

IDAHO'S CODIFICATION OF THE GROWING COMMUNITIES DOCTRINE

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

The 1996 Act Recognized the Common Law as its Foundation

Common Law for Municipalities

In the law's statement of purpose, the Legislature recognized that it was not writing on a blank slate and specifically recognized and embraced the common law doctrine of special treatment for municipalities:

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

Legislation's Purpose

Statement of Purpose, R.S. 06104, which became, S.B. 1535, enacted as the Municipal Water Rights Act of 1996, 1996 Idaho Sess. Laws, ch. 297 (Act or 1996 Act hereafter).

Quantification of Reasonably Anticipated Future Needs

The 1996 Act is more than a codification of the common law. It contains several new concepts, and reflects a much more precise regulatory interpretation of the doctrine. The structure of the new approach is reflected in several newly defined terms of art, all contained in the following one-sentence summary of the statute: "Municipal providers" may secure water rights for "municipal purposes" of sufficient quantity to serve all "reasonably anticipated future needs" within an expanding "service area" during a specified "planning horizon." This article refers to water rights held for this purpose as "future needs" or "planning horizon" rights.

Terms of Art

The statute speaks in terms of "**r**easonably **a**nticipated **f**uture **n**eeds" (RAFN). This is convenient shorthand, but may be misleading. Indeed, the Act expressly provides that these rights serve a beneficial use now (by allowing cities to plan their growth in an orderly fashion), despite the fact that they may not be physically diverted for decades.

RAFN

The first term of art is "municipal provider" (Idaho Code § 42-202B(5)) — defined to include more than just cities. It encompasses water supplied to any unit of municipal, county or state government. For instance, a water supply acquired for a state university or state prison would fall within the definition of "municipal provider." It also includes private corporations and associations holding a franchise to supply water for municipal purposes. The largest example of this is privately held United Water Idaho, which serves parts of the Treasure Valley. Finally, the term includes corporations and associations supplying water for municipal purposes through a water supply system regulated by the Idaho Department of Environmental Quality as a "public water supply" under Idaho Code § 39-103(12). The definition of municipal provider includes those providing a "public water supply." This latter definition is quite broad. It includes systems "furnishing water for drinking or general domestic use in incorporated municipalities; or unincorporated communities where ten (10) or more premises or households are being served or intended to be served; or any other supply which serves water to the public and which the department declares to have potential health significance."

"Municipal Provider"

The term "municipal purposes" is broadly defined to include "residential, commercial, industrial, irrigation of parks and open space, and related purposes." Idaho Code § 42-202B(6). This list was intended to serve as a catch-all for virtually any use within a municipal service area that might be supplied by a municipal provider. An IDWR policy statement defined municipal use as including "domestic, irrigation, stockwater, fire protection, recreation, commercial, industrial, and any other water use incidental to the functioning of a city." Norman Young, *Administrator's Memorandum: Definition of "Municipal"* (Nov. 5, 1979)(*Young Memo*).

"Municipal Purposes"

The only use expressly excluded from municipal purposes is "water from geothermal sources for heating." Idaho Code § 42-202B(6). Thus, water rights for geothermal heating systems may be obtained only to meet current physical need. However, geothermal water used for non-heat purposes (such as drinking) does fall within the Act.

Geothermal Exclusion

Municipal Water Rights

"Future Needs"

Analysis Required

"Planning Horizon"

Colorado Decisions

Reasonableness Determination

Transfers v. New Appropriation

System Capacity

THE STATUTE DEFINES RAFN:

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

(Idaho Code § 42-202B(8)

The Act puts some sideboards on "future needs" by requiring them be documented with "population and other planning data" from the municipal provider to the satisfaction of IDWR. This additional planning burden is found in three places: the definition, the section on new applications, and the section concerning transfers.

To date, IDWR has considered only a few actual "future needs" or "planning horizon" water right applications. Depending on the circumstances of the case — for example, a defined number of housing units in a subdivision vs. an open-ended service area such as that served by a utility — IDWR may require sophisticated statistical analyses in connection with approving a municipal provider's planning horizon. With regard to a large application by United Water Idaho (a regulated utility), these analyses have taken into account such factors as price elasticity of water demand, the availability of non-potable lawn irrigation, shifts in demographics and the composition of population, changes in lifestyle, and conservation incentives.

Considerable Discretion in Establishing Duration of the Planning Horizon

The 1996 Act contains no limit on the duration of the "planning horizon" but simply entitles the municipal provider to demonstrate a reasonable period corresponding to its particular needs. "'Planning horizon' refers to the length of time that the department determines is reasonable for a municipal provider to hold water rights to meet reasonably anticipated future needs. The length of the planning horizon may vary according to the needs of the particular municipal provider." Idaho Code § 42-202B(7). For a slowly growing small town, private subdivision, or planned resort community, this could be as little as 15 years. For a larger growing city, a planning horizon of at least 25 and as much as 50 years would be appropriate.

In Colorado, two water districts serving a small city and surrounding areas sought "conditional water rights" to meet future needs under Colorado's common law governing municipal water rights. They sought to establish a 100-year planning horizon. The Colorado Supreme Court remanded for further evidence regarding the need for such a long planning horizon. *Pagosa Area Water and Sanitation Dist. v. Trout Unlimited*, 170 P.3d 307 (Colo. 2007) (*Pagosa I*). On remand, the applicants requested a 70-year planning horizon, which the water court cut back to 50 years. The water court included in the decree various "reality checks" requiring re-evaluation of needs every six years. On the second appeal, the Colorado Supreme Court upheld the 50-year planning horizon, but remanded to allow development of further evidence that the requested quantity was needed. The Court was concerned, among other things, that the districts were seeking substantial quantities of municipal water for releases to meet future, hypothetical recreational in-channel instream flow requirements. *Pagosa Area Water and Sanitation Dist. v. Trout Unlimited*, 219 P.3d 774 (Colo. 2009) (*Pagosa II*).

It bears emphasis that the 1996 Act does not create any automatic entitlement on the part of municipal providers to obtain water rights for long-term needs. Rather, the Act imposes on IDWR the responsibility to determine the reasonableness of applicant's asserted long-term requirements. No doubt, a body of administrative and judicial law will emerge over time establishing the amounts and kinds of proof an applicant must produce concerning future needs and planning horizon.

Transfers of water rights do not entail the two-stage process involved in obtaining new water rights (a permit, followed by proof of use at the time of licensing). This is not unique to the Act, but is the case for all water transfers in Idaho. Consequently, when an existing water right is transferred to municipal use under the Act, the duration of the planning horizon will be established just once, at the time of transfer.

In contrast, for a new appropriation of municipal water rights under the Act, the proper duration of the planning horizon will be evaluated at both the permit and license stage. In other words, the duration of the planning horizon may be re-adjusted by IDWR at the license stage where the user "proves up" the right.

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

IDWR, *Administrative Memorandum – Application Processing No. 63*, at 5 (June 15, 1999) which adopts by reference as departmental policy the letter from Karl J. Dreher to Christopher H. Meyer captioned "Municipal Water Rights" (June 14, 1999) (*Memo No. 63*).

Municipal Water Rights

"Service Area" Flexibility

Description Requirements

City Limits

Future Changes

Revision Requirements

Place of Use Description

Development Boundary

Forfeiture Exemption

By requiring foresight and planning, the statute establishes a progressive approach to the water right application process that seems squarely in furtherance of objectives of maximum use and conservation of water resources that are embedded features of Idaho's Prior Appropriation Doctrine.

Act Codified the Common Law Concept of a Flexible Service Area (Place of Use)

THE ACT PROVIDES FOR SUBSTANTIAL FLEXIBILITY IN ESTABLISHING A SERVICE AREA:

> "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).

> 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).

A basic element of every water right is its place of use. For most water rights, the exact boundaries of the place of use (or larger "permissible place of use") must be identified, and any change in these boundaries requires that the water right holder seek agency approval of the change. In the case of irrigation rights, the water right must identify the place of use by "legal subdivisions" — that is, down to the forty acre "quarter-quarter" of a one-square-mile section. Idaho Code § 42-202(6). This presents a problem in the case of traditional municipal water rights because the place of use changes as the city grows.

IDWR has long recognized this special feature of a municipal water right, and allowed it to be described simply by reference to the "city limits" of the community or the licensed service area of a water utility (*Young Memo*). What if a municipal supplier serves customers outside the city limits? The courts have never been called on to answer this question. In any event, this issue was clarified in the 1996 Act. A municipal provider's place of use is not limited to a city's corporate limits. Instead, it corresponds to the area actually served.

More significantly, the service area is not fixed in time, but automatically includes any future "changes therein after the permit or license is issued." Idaho Code § 42-202B(9). This clarifies that a municipal provider — either a traditional provider such as a municipality or a regulated private utility, or a non-traditional provider such as a non-utility corporation — is not required to seek a formal change in place of use each time the area it serves is expanded.

The 1996 Act does not specify whether or how often a municipal provider must update its description — other than a requirement to update all estimates and descriptions at the time of licensing. The proof of beneficial use statement required at the time of licensing shall require "a revised estimate of the reasonably anticipated future needs, a revised description of the service area, and a revised planning horizon, together with appropriate supporting documentation." Idaho Code § 42-217(¶4).

Municipal providers, however, may want to routinely update their service area descriptions to ensure that they continue to provide notice to the public and other water users. Although this is not required under the statute, doing so may foreclose arguments by potential protestants that they were not fairly put on notice of the scope of the provider's water rights portfolio.

Ordinarily, each water right application includes a place of use description. However, IDWR has allowed municipal providers to file a single description, and allow all (or most) water rights within its system to be governed by that description as it is updated. It is conceivable that a municipal provider could have more than one service area description if it operated in multiple, distinct, geographical areas.

In the case of a subdivision or planned community water right application, the place of use typically is fixed — it is the boundary of the development. Likewise, the amount of water that will be needed for the development is far easier to calculate. For these reasons, determining the amount of a RAFN water right for a subdivision almost always will be far simpler than doing so for a municipality or utility that is obligated to serve all who move into the city or service territory and that almost certainly will be expanding its service area boundary.

Protection of Municipal Water Rights From Forfeiture

The Act expressly exempts a municipal water provider's portfolio of municipal water rights from Idaho's automatic forfeiture statute, Idaho Code 42-222(2): "A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated

Municipal Water Rights

Colorado Diligence Review

Potential Forfeiture

Purchase of Rights

Speculation

Colorado Municipalities

Land Use Plans

"Conflicted" Areas

future needs." Idaho Code § 42-223(2). This protection is reinforced by the express declaration in the Act that water rights held for future needs constitute a beneficial use. Idaho Code §§ 42-222(1), 42-223(2).

To what extent does this constitute a blank check for municipal providers? If conditions change such that the water is no longer needed to meet RAFN, is the size of the water right subject to downward adjustment? Obviously, a downward adjustment may occur at the time of licensing — typically five to ten years after the appropriation. But what if conditions change after licensing? Or what if a transfer to RAFN is approved, in which case there is no further mechanism for automatic review?

In Colorado, where the growing communities doctrine emerged, this problem is solved by the mechanism of "conditional" water rights — municipal water rights held for future need (like all unperfected water rights) are subject to due diligence review every six years. As noted above, the Colorado Supreme Court in *Pagosa II* recently approved additional post-decree "reality checks" at six-year intervals to ensure that the water continues to be needed.

IDWR takes the position that such water rights — while free from automatic forfeiture after five years — still are subject to potential forfeiture within the context of the Act (*Memo No. 63*):

> If sufficient proof of beneficial use is submitted before the end of the permit development period and the municipal water right is licensed for an amount of water for "reasonably anticipated future needs," the requirement that the full system capacity needed to provide water for the reasonably anticipated future needs be constructed by the end of the municipality's planning horizon will continue as a condition of the license. If the municipal provider fails to construct the full system capacity needed to provide water for the reasonably anticipated future needs by the end of the planning horizon for the municipality, or the anticipated future needs do not materialize by the end of the planning horizon, the quantity of water under the license may be reduced to the capacity of the constructed system or the amount of water required to meet the needs that actually exist at the end of the planning horizon. Although a municipal provider can revise the planning horizon and amend its projections of reasonably anticipated future needs subsequent to the water right license being issued…the water right remains subject to being reduced or forfeited if actual use of the water does not occur.

A different situation is presented if a municipal provider acquires a non-municipal water right to hold in its portfolio for future needs purposes but, in the interim, continues its original use. For example, the water might continue to be used for farming via a lease-back arrangement. In this case, forfeiture would not come into play because the right continues to be placed to beneficial use as originally licensed. If, instead, the acquired water right is no longer used for its original purpose and is simply held in the municipal provider's portfolio for presumed future use, it may be immune from forfeiture under the common law growing communities doctrine. However, in such a case the municipal provider would be wise to transfer the right to municipal purposes under the Act to bring it within this express non-forfeiture provision.

Strong Anti-Speculation Provisions in the Act

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

In Colorado, a 1979 statute codified a fairly strong anti-speculation rule announced in *Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566 (Colo. 1979). *Vidler* denied a conditional water right to a private developer who hoped "to sell water to municipalities on the eastern slope for general municipal use but had not obtained firm contractual commitments binding those municipalities to purchase or receive the water." *Id.* at 568-69. The statute codified this rule but exempted governmental entities. Colo.Rev.Stat.§37-92-103(3)(a). The net result is that Colorado cities are incentivized to acquire as much water as possible. If it turns out they do not need it, they may sell it to their neighbors.

Idaho's Act requires that the asserted future needs must "not be inconsistent with comprehensive land use plans approved by each municipality" within the service area, and may not include "uses of water within areas overlapped by conflicting comprehensive land use plans." Idaho Code § 42-202B(8).

The first requirement (consistency with the comprehensive plan) appears to be relatively benign. Comprehensive plans are broad, conceptual planning documents that do not contain detailed water demand projections. Thus, not too much should be read into this requirement. On the other hand, if the comprehensive plan (or its associated future land use map) described an area as open space or agricultural, that might be found to be "inconsistent" with a quantification of RAFN that assumed high density development in the area.

The second requirement (exclusion of "conflicted" areas) is a potentially draconian measure designed to provide an incentive to adjacent municipalities to cooperate in planning efforts. To the extent two

Municipal Water Rights

Planning Act Provisions

"Conflicted" Areas

Transfer Limitations

Sale Prohibition

Service Area Sale

Transferability Limitation

or more municipalities assert planning authority over the same area and develop conflicting planning scenarios, none of them may obtain a "planning horizon" water right for its part of the overlapped area.

It remains to be seen how the Act's prohibition against serving these "conflicted" areas will be interpreted and applied. As a practical matter, the Local Land Use Planning Act (LLUPA), Idaho Code §§ 67-6501 to 67-6537, does a good job of resolving many of these disputes over the direction of future growth. Each city is required to establish an "area of city impact" that defines the area beyond the city's current boundary where a city anticipates growing. 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.

LLUPA applies only to cities and counties. The Idaho Public Utilities Commission (IPUC) is charged with resolving disputes over the bounds of certificated service areas for investor-owned utilities. Neither LLUPA nor the IPUC, however, is geared toward resolution of service area disputes between cities and private utilities.

The 1996 Act's prohibition against serving "conflicted" areas applies equally to municipalities and to private utilities providing municipal water. For example, several neighborhoods and commercial areas were left out of the "planning horizon" calculation in the first application for RAFN water rights in Idaho by United Water Idaho (a private water utility) in its so-called Integrated Municipal Application Package or "IMAP."

It bears emphasis that the "conflicted" areas prohibiton applies to only water rights (or the portion thereof) held for RAFN. Municipal providers may acquire and hold water rights to serve existing needs within such "conflicted" areas, even if RAFN rights are unavailable.

The Act also reduces the opportunity for speculation by prohibiting the transfer of RAFN water rights by a municipal provider to a place of use outside the service area or to a new nature (purpose) of use. This provision is stated twice in the Act.

IN THE CONTEXT OF LICENSING SUCH WATER RIGHTS:

> The director shall condition the license to prohibit any transfer of the place of use outside the service area…or to a new nature of use of amounts held for reasonably anticipated future needs together with such other conditions as the director may deem appropriate.

Idaho Code § 42-219(1).

AND IN THE SECTION OF THE WATER CODE DEALING WITH TRANSFERS OF WATER RIGHTS:

> When a water right or a portion thereof to be changed is held by a municipal provider for municipal purposes…that portion of the right held for reasonably anticipated future needs at the time of the change shall not be changed to a place of use outside the service area…or to a new nature of use.

Idaho Code § 42-222(1).

In other words, the statute recognizes that while a municipality, private water utility, or other municipal water provider is accorded leeway in holding water rights to meet future needs, the quid pro quo is that the place of use under such rights cannot be changed to property outside the provider's service area — such as land owned or served by some other entity, even another municipal provider. Rights acquired under the 1996 Act are limited to the provider's original service area and those additions to that service area occurring through growth accounted for in its future needs showing. The presumed intent of this provision is to prohibit a municipal provider from selling off a portion of its future needs water right to another entity.

On the other hand, this restriction should not apply where one provider conveys a service area to another provider who continues serving the original customers. For example, an RAFN right could be obtained by private developer for a planned community. In the future, that provider might convey the water right (and likely the delivery system) to the municipality or other municipal provider serving the surrounding or adjacent area. Presumably, the new municipal provider could then integrate the water right into its larger service network. Although this would entail a change in the place of use, this would not appear to violate the Act's prohibiton against changing the place of use to an area outside the service area. Although the Act's language is, perhaps, ambiguous, the better reading is that it prohibits changes to an entirely different place of use outside the service area, and does not prohibit the right from being changed to serve a new larger service area that includes the original service area.

In a sense, the Legislature determined to remove one stick from the property owner's bundle of rights — free transferability — in recognition of the fact that municipal suppliers hold a stick that other water right holders do not (the right to acquire water rights for long-term needs without fear of forfeiture). There is nothing in the Act indicating any restriction on a municipal provider selling to a successor entity that will continue operating the same system in the same service area.

Municipal Water Rights

UWID Transfer

Claims Adjudicated

New Wells Capacity

Paper Rights Accumulation

Municipal Portfolios Confirmed

APPLICATION & NON-APPLICATION OF THE 1996 ACT

EXPERIENCES THUS FAR

Surprisingly few RAFN municipal water rights under the Act have been sought in Idaho. The first application filed under the Act was a massive transfer application covering the entire portfolio of municipal water rights owned by United Water Idaho (UWID), the privately-owned utility providing water to Boise and surrounding communities. The application — termed the Integrated Municipal Application Package (IMAP) — sought to transfer UWID's portfolio of municipal water rights to achieve alternative points of diversion and to bring them within the 1996 Act. In so doing, the applicant sought to establish a 50-year planning horizon and RAFN needs that substantially exceeded its total portfolio. This application engendered considerable controversy, some of which may have been due it part to misunderstanding its nature. The IMAP did not seek to appropriate new water rights. If approved, however, the planning horizon and RAFN would have authorized UWID to acquire other water rights by appropriation or transfer to fill in the difference between its current portfolio and its projected needs.

After contentious pre-hearing litigation, the Director of IDWR stayed the proceeding. He determined that it made more sense to allow the contentious issues underlying the application (e.g., potential forfeiture allegations) to be resolved by the Snake River Basin Adjudication (SRBA), which was then getting underway. The Director's intuition proved correct. For reasons that are not entirely clear, perhaps including litigation fatigue, no one objected to UWID's claims in the SRBA. As of this writing, it is anticipated that those claims will be approved and "partially decreed" shortly. Of course, the SRBA process does not establish a future planning horizon nor does it quantify RAFN. It did, however, resolve in UWID's favor the potentially most contentious issue — forfeiture. As a result, UWID (like many other water providers) will now hold partial decrees for a portfolio of water rights whose total pumping capacity exceeds its current peak demand. In essence, SRBA has created an RAFN portfolio for many Idaho water providers on an *ad hoc* basis without the benefit (or the burden) of the 1996 Act.

This occurred as a result of happenstance. For decades, it was the practice in Idaho for municipal water providers (and everyone else for that matter) to obtain new water rights for each new well they drilled — rather than transferring existing water rights to the new point(s) of diversion.

As explained in an IDWR Memo:

> [e]ven though a municipal system may have included multiple wells and pumps, IDWR typically licensed a water right based on the diversion capacity of an individual well and pump listed as a single point of diversion on the water right. IDWR typically did not review the overall system capacity and evaluate the new well as an additional increment of diversion capacity or beneficial use under the entire system due to that point of diversion.

Jeff Peppersack, *Administrator's Memorandum, Application Processing No. 18, Licensing No. 1* (Oct. 19, 2009) at 1-2 (*Memo No. 18*).

Over the years, as old wells were abandoned but their water rights were retained, this resulted in an accumulation of paper water rights sometimes substantially exceeding the current needs of the provider. Rather than going through the rigorous, planning-based evaluation process contemplated by the 1996 Act and IMAP, the SRBA simply blessed whatever portfolios happened to exist at the time. All this happened, incredibly, without litigation. There were, and continue to be, litigations over side issues regarding municipal water rights in the SRBA. For instance, the City of Pocatello challenged conditions imposed by IDWR on each of its water rights dealing with alternative points of diversion. *In Re SRBA*, Case No. 39576, Subcase Nos. 29-271 et al., Memorandum Decision and Order on Challenge (City of Pocatello) (5th Dist. Idaho Nov. 9, 2009) (motion for reconsideration pending as of Mar. 6, 2010). None of them, however, have taken note of the elephant in the room: the confirmation of entire portfolios of municipal water rights without evaluation of current or future needs, resulting in the *ad hoc* creation of substantial portfolios of RAFN water rights.

Going forward, these municipal providers will need to pursue applications under the Act to extend their planning horizons and expand their portfolios beyond whatever was SRBA-adjudicated. Doing so will also better insulate their portfolios from any potential collateral attack based on post-SRBA forfeiture.

Table 1: Water Rights Approved for RAFN (as of December 2009)

Municipal Provider	Acquired by	Status	Planning Horizon	Flow Rate (cfs)	Annual Volume (acre-feet)	Water Right Number
Tamarack Resort	Appropriation	Permit	15 years	8.6	1,248	65-22357
City of Nampa	Appropriation	Permit	21 years	4.5	n/a	63-33022
City of Nampa	Appropriation	Permit	21 years	5.0	n/a	63-32835
City of Bonners Ferry	Appropriation	Permit	20 years	3.8	n/a	98-7825
Ross Point Water District	Appropriation	License	20 years	5.25	n/a	95-9009
City of Fruitland	Appropriation	Permit	20 years	8.09	n/a	65-23088
Idaho Dep't of Transportation	Transfer	Decreed	22 years	0.13	19.8	37-20853
Moreland Water & Sewer District	Appropriation	Lapsed	30 years	n/a	n/a	35-13365

Municipal Water Rights

Pre-1996 Rights

Forfeiture Defenses

Uncertainty

Alternative Diversions

Injury Issues (Wells)

TRANSITION FROM COMMON LAW TO STATUTORY SCHEME

Even after the 1996 Act, the common law "growing communities doctrine" remains significant in Idaho. Existing municipal water rights, at least those held by traditional municipal providers such as cities and regulated water utilities, are not affected by the Act. One might argue that in adopting a codified municipal rights law for some water rights, the Legislature intended to repeal common law protections for other municipal water rights. This does not appear to be the intent of the Legislature, however. As noted above, the Act's *Statement of Purpose* expressly disclaims any intent to change the common law. Moreover, the Act contains a savings clause, Idaho Code § 42-202(11), which purports to preserve the common law's protection for pre-1996 municipal rights. In the end, of course, the common law is whatever the State's courts say it is. Because most municipal providers have not taken the affirmative steps required to bring their water right portfolios within the 1996 Act, the common law continues to apply to the vast majority of municipal water rights in Idaho.

The principal effect of this is that the common law doctrine continues to provide defenses from forfeiture to these traditional municipal providers that have acquired water right portfolios exceeding their immediate physical needs. This conclusion is supported by a 1999 IDWR guidance to the effect that forfeiture and abandonment apply to municipal rights, but only when the municipal supplier has no current or future need for them. *Memo No. 63* at 5.

Even under common law, the municipal provider must demonstrate that it has a growing service area and that its portfolio is reasonably necessary to serve its anticipated needs. A court could determine that a municipality or utility holds more water rights than it will ever be able to put to use, and declare the surplus forfeited. Given such uncertainty, municipal providers are well advised to bring their portfolios within the scope of the 1996 Act at their earliest opportunity. Although the Act does not specifically address how a municipality does this, an IDWR 1999 guidance concludes that existing municipal permits and water rights may be brought under the 1996 Act by amendment or transfer. *Memo No. 63* at 1-2.

At the same time, a city or utility may wish to change its diversion points to more fully integrate its production and delivery system, particularly where it relies heavily on groundwater. Indeed, IDWR has acknowledged the appropriateness of this sort of system-wide change for municipal water rights (see *Id.* at 1-2). For instance, a municipality or utility relying on a network of wells with a separate water right for each may wish to make each point of diversion an alternative point of diversion for each of the others. This allows the city the flexibility to pump water anywhere from the system and enhance efficiency, so long as injury to other users is avoided.

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

To implement this policy, IDWR will maintain a record of the original priority date associated with each water right at each well. These would become relevant in the event of a call based on well interference. However, they would not be relevant (and the provider would have the advantage of additional flexibility) in the event of an aquifer-wide call on the reservoir. *Memo No. 63* at 2.

Of course, if the municipal water rights portfolio survives the scrutiny entailed in the transfer process, it will be accorded the more express protections available under the Act (e.g., expanding service areas). On the whole, such a portfolio stands a much better chance of surviving an adjudication of water rights intact.

Municipal Water Rights

Volume Cap

Municipal Distinction

"Installed Capacity" Rule

Peak Flow Rate

"Base Load"

Proof Issue

"Full Capacity of the System"

QUANTIFYING A MUNICIPAL WATER RIGHT

Common Law Rule for Municipalities: Installed Capacity/No Annual Volume Limit

Most water rights are quantified in terms of both diversion rate (i.e. flow rate) and annual volume (i.e. duty) diverted. The annual volume thus serves as a cap or upper limit on diversions. Typically, the volume is only a fraction of what would be pumped were a water right diverted at its full rate 24 hours a day, 365 days a year. This reflects the fact that most water rights are not operated at full capacity at all times; doing so would far exceed beneficial use in most cases. The annual volume is intended to reflect the actual use pattern and to make that a permanent feature of the right.

Municipal water rights held by cities or regulated utilities are treated differently. It has long been IDWR's policy to quantify water rights held by these traditional entities solely in terms of a diversion rate with no annual volume cap. A. Kenneth Dunn, IDWR, *Administrator's Memorandum – Licensing Procedures* (Apr. 7, 1975) (superseded by *Memo No. 18* (Oct. 19, 2009)). This is one feature of the common law growing communities doctrine in Idaho.

Moreover, under what is known as the "installed capacity" rule the diversion rate for rights held by cities and public utilities is based on the installed capacity, not the pattern of actual diversions at the time of proof. Proof ordinarily occurs five years after permit issuance, with a possible one time five-year extension (there are a handful of statutory exceptions allowing extension of the proof period, but they are quite limited). This is a second way in which municipalities historically have been allowed to grow into their water rights under the growing communities doctrine. "A municipal right should not be quantified by the rate of flow beneficially used at the time of the examination, but rather by the capacity of the diversion works." A footnote to this sentence provided: "This quantification must be limited to a 'reasonable' extent. For example, the diversion of an entire stream when only a small portion is beneficially used may not be reasonable." *Young Memo* at 1, n.1 (Nov. 5, 1979). A more recent departmental memorandum described the test as being based on "the volume of water capable of being produced by the installed diverting works." L. Glen Saxton, IDWR, *Memorandum – Water Rights for Municipal Use* at 1 (Mar. 18, 1998) (superseded by *Memo No. 63*). Thus, so long as the diversion capacity is in place, the municipality or public utility has been allowed to grow into the water right's full use as customer demand grows over time — subject to the reasonableness test mentioned above.

In other words, at common law, a municipal water right is quantified only in terms of its peak instantaneous diversion rate. Initially, it might be pumped at or near that peak only during a few days (or even a few minutes or hours) on the hottest days of summer. Over time, the municipality would pump the right at its full rate more and more days out of the year as demand grows. Eventually a municipal provider will pump its older water rights at their full licensed flow rate essentially all day, 365 days a year — thus constituting its "base load." Meanwhile, new, junior water rights would have been acquired as needed to serve the ever-growing summer peak. Eventually, they too will be used more and more, thus falling into the growing base load. In this way, the growing communities doctrine allows a municipality over time both to "grow into" and maximize diversions under its water rights portfolio.

Proof Required for RAFN Municipal Water Rights ("Capacity of the System" Standard)

Although the 1996 Act allows a municipal provider to obtain an RAFN water right based on a long-term planning horizon, the Act does not extend the date on which the permittee must prove beneficial use (and thus be entitled to a license). Thus, even if a municipal provider were to obtain a permit with a planning horizon of, say, 50 years, the provider still would be required to prove up the right at the licensing examination in five years after the permit is issued (or ten years, if an extension is granted). Thus, the dilemma arises: how does a municipal provider prove up a water right in just a few years when the provider will not grow into the right until a much longer period passes?

As noted, cities and public utilities were allowed under common law to prove up their municipal water rights under the "installed capacity" standard based on the system's diversion or pumping capacity (in gallons per minute or cfs) installed at the time of proof — regardless of the level of actual production.

The 1996 Act modifies this standard for RAFN water rights. Under the Act, a "license may be issued to a municipal provider for an amount up to the full capacity of the system constructed or used in accordance with the original permit provided that the director determines that the amount is reasonably necessary to provide for the existing uses and reasonably anticipated future needs within the service area..." Idaho Code § 42-219(1). The statute's reference to "capacity of the system" sounds similar to the common law "installed capacity" rule described above. There is a key difference, however. The common law "installed capacity" rule caps the diversion rate based on the capacity of the wells and pumps that are in place and operational at the time of proof. The "capacity of the system" rule adopted by the Act allows an RAFN municipal water right to be licensed on the basis of the total capacity of the system that the municipal provider is undertaking to develop; it is not limited to what is actually installed at the time of proof.

Municipal Water Rights

Gradual Development Intent

"Definitive Plan"

Investment

Standard Relaxed

Private Developers

Ten Hookups

"Stub-In" Rule

Thus, in the case of RAFN water rights, the IDWR Director's task is to determine the capacity of the system to be constructed and used in accordance with the original permit during the course of the planning horizon. In short, an RAFN right established under the 1996 Act will be licensed with a diversion rate based on the reasonably anticipated capacity of the system at build out, as evidenced at the time of proof by substantial commitments by the permit holder. This is confirmed by IDWR's guidance:

> Some might construe this [capacity of the system] limitation to require that a municipal provider fully construct the system used to divert or deliver water associated with a water right for an amount "reasonably necessary to provide for the existing uses and reasonably anticipated future needs within the service area…" However, such interpretation would not be consistent with the intent of the 1996 Municipal Water Rights Act.

Memo No. 63 (emphasis original).

Memo No. 63 also explains that requiring a municipal provider to construct its entire diversion and delivery system by the time of proof would defeat the Act's central objective of allowing the appropriator to gradually, economically, and efficiently develop its system within the proven planning horizon. Instead, IDWR interprets the statute as requiring tangible evidence of the provider's commitment to complete the system within the planning horizon. A bald assertion by the right holder will not suffice. Although the 1996 Act enlarged the definition of "municipal provider" to include entities other than cities and public utilities, it also evidenced a strong policy against speculation in water rights.

Accordingly, the guidance provides that to satisfy the "capacity of the system" criterion in Idaho Code § 42-219(1), the municipal provider of surface water must provide evidence of "a definitive plan for fully constructing the system" and a "substantial investment in the unconstructed capacity of the total system." *Memo No. 63* at 3. Likewise, a municipal provider of groundwater must demonstrate that "the constructed portions of the system were shown to be significant, integral phases of implementing a detailed plan to provide the full capacity of the system and there was substantial planning, design, and investment in the unconstructed capacity of the complete system." *Id.* The guidance then lists seven criteria IDWR will evaluate in determining whether the "capacity of the system" standard is met, including such things as: a detailed overall design; a financing plan; environmental studies; land acquisition; construction of mains, storage, or other system components; and development of an operations protocol. *Id.* at 3-4. All of this is consistent with the requirement to establish a planning horizon and identify specific future needs.

In sum, with respect to RAFN water rights, the Act continues the prior common law practice of quantifying municipal water rights based solely on the diversion rate. It goes on, however, to relax the standard for quantifying that diversion rate from the common law "installed capacity" rule (which focuses on capacity actually installed at the time of proof) to the "capacity of the system" rule (which requires some installed facilities but takes into account reasonably anticipated expansions in the system during the planning horizon).

Licensing "Non-RAFN" Municipal Water Rights for Non-Traditional Municipal Providers

The 1996 Act left unanswered several questions about how the Act will treat the person obtaining a municipal water permit who is neither a city nor a regulated private utility, or the entity that is a traditional municipal provider but who chooses not to apply for an RAFN water right.

The primary example is the private developer of a residential subdivision or planned community. Before the Act, a subdivision developer who acquired water rights and built a non-profit potable water delivery system for the project was not viewed as a municipal provider (or a public utility, for that matter). Such entities simply obtained ordinary domestic, commercial, and/or irrigation water rights for the system and made proof within the statutory periods for licensure. Often, the system would be turned over to homeowners association to own and operate. The subdivision developer also could not take advantage of the common law growing communities doctrine. "Only the city or its delivery agent, for example Boise Water Corporation, can obtain a municipal water right. Unincorporated cities, subdivisions outside of city limits and other users of common water systems must identify the separate uses of domestic, irrigation, commercial, etc., and identify the specific place of use." *Young Memo* (1979). Under the Act, the developer of a subdivision of 10 homes or more may be able to qualify as a municipal provider.

A strict application of Idaho law would require all the subdivision's water right to be put to beneficial use at the time of proof. The licensed amount would thus be limited to actual diversions necessary to serve all houses or other facilities built, occupied, and actually using water at the time of licensing. Water for unbuilt or unsold lots simply would not be counted in calculating the licensed diversion rate.

However, IDWR has not applied such a strict interpretation of the beneficial use rule to subdivisions. Instead, even before the 1996 Act, IDWR extended a degree of leniency to subdivision developers by way of its informal "stub-in" practice (which refers to a lot's having a service line "stubbed-in" to a buildable lot from the water main). Under this practice a water right is licensed for the amount of flow necessary to serve each lot in the subdivision to which an actual "water delivery system has been installed" (provided a

Municipal Water Rights

IDWR Rationale

diversion facility is in place). Accordingly, a subdivision developer may obtain a license for the diversion rate necessary to serve the lots that are stubbed-in and capable of being served, even if there are no houses or other structures, and therefore no current beneficial use of water.

IDWR EXPLAINED THE REASON FOR THE "STUB-IN" PRACTICE THIS WAY:

> The Department's stub-in practice recognized that the full build out of a subdivision can take longer than the number of years the Department could authorize for completion of a water appropriation project. By issuing a water right license for domestic uses that were yet to be completed, the Department avoided a parade of individual water right filings as each lot was sold. The stub-in practice also helped subdivision developers obtain financing by providing some assurance to lending institutions that a development project would not fail due to water right availability issues that may have arisen as the individual lots were built out over time.

Memo No. 18 at 2.

Private Developers' Choices

As noted above, private subdivision developers may now qualify as "municipal providers" under the 1996 Act. Idaho Code § 42-202B(5)(c) (definition of municipal provider includes those providing a "public water supply"). However, in some respects the policies applicable to subdivision and planned community developers have become less clear. This is because — while the Act defined "municipal provider" more broadly to encompass private subdivision developers — it did not address municipal water right licensing requirements for those applicants. Many such applicants now undeniably anticipate that they will be "municipal providers" even though they have elected to prove neither a planning horizon nor RAFN.

Under the 1996 Act a subdivision developer can apply for a water right that is termed "municipal" (as opposed to domestic and irrigation as was the norm previously) and seek benefits of the 1996 Act. However, most developers in Idaho so far have not sought to seek or prove RAFN or a planning horizon. Instead, they typically file a simple, short-form water right application that offers little in the way of overall design, time horizons for full build-out, engineering designs, and the like.

Options & Risks

This is counter-intuitive. Given the substantial benefits extended by the 1996 Act, one would think that both traditional municipal providers and subdivision developers who now qualify as municipal providers would want to take advantage of them. As noted, though, not all applicants for municipal water rights seek an RAFN component. Indeed, IDWR views doing so as optional. "If the extent of the proposed development will be completed during the permit development period, the applicant does not need to provide the additional information relative to RAFN/PH [reasonably anticipated future needs/planning horizon]." *Saxton Memo* at 1. Accordingly, most subdivision developers and even some cities have elected to forego the future needs benefits of newly acquired municipal water rights. In so doing, they save themselves the trouble of proving a planning horizon and quantifying their RAFN, and they also avoid the public disclosure obligations and added scrutiny that may be brought to their application. Doing so, however, entails risk. Without a future needs component, they will be obligated to prove up at the end of five, or at most ten years, without the benefit of the "capacity of the system" provision described above for holders of future needs rights.

Purpose Limitation

This potential problem was illustrated by a recent application. The City of Eagle sought to appropriate water for municipal purposes, claiming 2.23 cfs for general municipal use and 6.68 cfs for fire protection. *In the Matter of Applications To Appropriate Water Nos. 63-32089 and 63-32090 in the Name of the City of Eagle*, Final Order (IDWR, Feb. 26, 2008) (on appeal as of August 2008). The City expressly declined to pursue a future needs component under the 1996 Act, instead stating that its application was justified on the basis of needs that would be experienced in the next five years. Accordingly, the City established no planning horizon and presented no evidence of long-term need. IDWR responded by limiting general municipal use under the permit to 2.23 cfs and limiting the extra 6.68 cfs to fire protection use. "Recognizing the entire 6.68 cfs for fire protection within the broad municipal definition would create a de facto water right for reasonably anticipated future needs." Final Order at 11. Essentially, the City had hoped to obtain a large water right based on fire protection needs, and then use that water for any municipal purpose. IDWR rejected this approach, noting that the City had elected not to pursue the permit based on its "future needs" under the 1996 Act.

Non-RAFN Rights

In 2009, IDWR issued guidance specifically addressing how non-RAFN municipal water rights will be evaluated at the permitting and licensing stages. *Memo No. 18*. IDWR's guidance with respect to holders of non-RAFN municipal rights takes into account whether the permit holder is a traditional municipal provider under the common law (a city, public utility, or water district) or a private developer that now falls within the statutory definition of municipal provider (referred to as a "non-traditional" municipal provider). Cities and other traditional municipal providers continue to have the benefit of the special treatment that municipalities were accorded under the common law, even if they do not seek an RAFN water right. That is, they will be entitled to prove up non-RAFN water permits with a diversion rate based on installed capacity and no annual volume limit.

Municipal Water Rights

RAFN v. Traditional Standards

In contrast, private developers holding non-RAFN municipal water right permits are not eligible to take advantage of the common law benefiting municipalities (excluding the limited "stub-in" policy discussed above). Thus, if they elect not to take advantage of the 1996 Act's opportunity to establish a long-term planning horizon, they will be subject to the traditional tests for non-municipal developers at the time of proof. Specifically, at the time of proof, both the licensed diversion rate and annual volume will be determined as a matter of routine on the basis of installed capacity, limited by the significant caveat: the quantity will be reduced if the installed capacity is "significantly greater than the diversion required to meet the needs of the developed service area (including stub-ins)." *Memo No. 18*, at 7 n.3.

This still is a rather generous standard in that the developer is allowed to obtain a license to serve homes that are not yet sold or even constructed. But this is less generous than the common law "installed capacity" rule applicable to cities and the "capacity of the system" standard applicable to all holders of future needs municipal water rights under the 1996 Act.

Additional Point of Diversion

IDWR's 2009 guidance (*Memo No. 18*) also brings to an abrupt halt the longstanding practice of municipalities and others of simply obtaining a new water right every time a new well or other diversion structure is installed. As noted above, this practice gave rise, by way of happenstance, to future needs water rights. Henceforth, the only way to obtain a water right for RAFN is by compliance with the procedural and substantive requirements of the 1996 Act. Thus, IDWR will require that both traditional municipal providers and non-traditional municipal providers demonstrate that non-RAFN water rights will be diverted and placed to beneficial use within the five (or at most ten) year prove-up period.

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

Memo No. 18 at 3-4. The above quotation is in reference to traditional municipal providers. A similar requirement applies to non-traditional municipal providers. *Memo No. 18* at 6.

Actual Use

At the time of licensing, IDWR will take another look at the extent water under the non-RAFN water right actually was diverted to beneficial use. As discussed above, non-traditional municipal providers are subject to the stub-in practice. Traditional municipal providers are subject to the "incremental installed capacity" rule discussed above, subject to this caveat: "However, beneficial use may be further limited if the intended use described in the application as justification for the permit was not accomplished." *Memo No. 18* at 5. For both traditional and non-traditional municipal providers, "when determining the installed capacity for licensing purposes, the entire municipal portfolio of water rights must be considered to determine the actual increase in installed capacity provided by the permit for the municipal use." *Memo No. 18* at 7.

2009 Guidance

The 2009 guidance also states IDWR's rejection of efforts by municipal providers to inflate the size of their non-RAFN water rights by including fire flows as part of the municipal right. *Memo No. 18* at 4, 6.

The 2009 guidance prohibits holders of non-RAFN permits issued after the date of the guidance from amending the permit to allow the right to be held for RAFN purposes. *Memo No. 18* at 5, 6. As for permits issued before the guidance, IDWR retains some flexibility to consider the circumstances. "Existing permits issued prior to the date of this memorandum should be handled on a case-by-case basis when determining beneficial use for licensing purposes. Determination of beneficial use for permits pre-dating this memorandum [of 10-19-2009] may depend on the date the permit was issued in relation to the 1996 Municipal Water Rights Act and/or any specific intent to limit the beneficial use that could be developed under the permit at the time it was issued." *Memo No. 18* at 1.

Summary

IN SUMMARY:

- Private subdividers/planned community developers may obtain municipal water rights that take advantage of the expanding service area provision of the 1996 Act without seeking to show RAFN or a planning horizon.
- Many developers to date have opted to apply for a municipal water right without identifying a long-term planning horizon or quantifying future needs. In so doing, they forego the principal benefit of the 1996 Act. Under IDWR's 2009 guidance, these applicants will be subject to stricter limits in quantifying the right at the time of licensing. Traditional municipal providers seeking non-RAFN rights are subject to the installed capacity rule; non-traditional municipal providers are subject to the stub-in practice. Neither will get the benefit of the "capacity of the system" standard at licensing.
- Applicants for non-RAFN water rights must demonstrate that they will divert and put to beneficial use the additional increment of capacity within five or at most ten years.
- Applicants for non-RAFN water rights may not inflate the quantity of their water rights by including fire flows.
- Non-RAFN permits may not be amended to allow water to be held for RAFN.

The State of Idaho 1996 Municipal Water Rights Act is codified as follows:

Idaho Code § 42-202(2)	An application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied by sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made.
Idaho Code § 42-202(11)	Provided further, that water rights held by municipal providers prior to July 1, 1996, shall not be limited thereby.
Idaho Code § 42-202B(4)	"Municipality" means a city incorporated under section 50-102, Idaho Code, a county, or the state of Idaho acting through a department or institution.
Idaho Code § 42-202B(5)	"Municipal provider" means: (a) A municipality that provides water for municipal purposes to its residents and other users within its service area; (b) Any corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area; or (c) A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a "public water supply" as described in section 39-103(12), Idaho Code.
Idaho Code § 42-202B(6)	"Municipal purposes" refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider.
Idaho Code § 42-202B(7)	"Planning horizon" refers to the length of time that the department determines is reasonable for a municipal provider to hold water rights to meet reasonably anticipated future needs. The length of the planning horizon may vary according to the needs of the particular municipal provider.
Idaho Code § 42-202B(8)	"Reasonably anticipated future needs" refers to future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality. Reasonably anticipated future needs shall not include uses of water within areas overlapped by conflicting comprehensive land use plans.
Idaho Code § 42-202B(9)	"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 § 42-217	On or before the date set for the beneficial use of waters appropriated under the provisions of this chapter, the permit holder shall submit a statement that he has used such water for the beneficial purpose allowed by the permit. The statement shall include: ...4. In the case of a municipal provider, a revised estimate of the reasonably anticipated future needs, a revised description of the service area, and a revised planning horizon, together with appropriate supporting documentation.
Idaho Code § 42-219(1)	A license may be issued to a municipal provider for an amount up to the full capacity of the system constructed or used in accordance with the original permit provided that the director determines that the amount is reasonably necessary to provide for the existing uses and reasonably anticipated future needs within the service area and otherwise satisfies the definitions and requirements specified in this chapter for such use. The director shall condition the license to prohibit any transfer of the place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use of amounts held for reasonably anticipated future needs together with such other conditions as the director may deem appropriate.
Idaho Code § 42-219(2)	If the use is for municipal purposes, the license shall describe the service area and shall state the planning horizon for that portion of the right, if any, to be used for reasonably anticipated future needs.
Idaho Code § 42-222(1)	When the nature of use of the water right is to be changed to municipal purposes and some or all of the right will be held by a municipal provider to serve reasonably anticipated future needs, the municipal provider shall provide to the department sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made. When a water right or a portion thereof to be changed is held by a municipal provider for municipal purposes, as defined in section 42-202B, Idaho Code, that portion of the right held for reasonably anticipated future needs at the time of the change shall not be changed to a place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use. The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.
Idaho Code § 42-223(2)	A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs.

Municipal Water Rights

MUNICIPAL WATER RIGHTS & INSTREAM FLOWS

A recent Colorado Supreme Court case dealt with the interaction of municipal water rights to meet future needs and instream flow water rights. In *Pagosa Area Water and Sanitation Dist. v. Trout Unlimited*, 219 P.3d 774 (Colo. 2009) (*Pagosa II*), two water districts sought future need water rights for municipal purposes. The water districts included in the quantification of their future needs a substantial quantity of water to cover releases to meet instream flow requirements that might be imposed in the future. The Idaho Supreme Court disallowed this portion of the conditional water rights, describing them as "speculative" and "hypothetical." *Pagosa II*, 219 P.3d at 872. The Court noted that the districts could have made in-channel

Municipal Water Rights

Chris Meyer has been a leader in the fields of water, land use, environmental, constitutional and administrative law for twenty-five years. Chris is listed in the Idaho Yearbook Directory as "centrally located in the world of Idaho public affairs" and "a key figure in Idaho water law." Chris has earned Martindale-Hubbell's highest rating for practicing attorneys (AV), and is listed in The Best Lawyers in American, Mountain States Super Lawyers, Chambers USA, Who's Who in America, and Who's Who in American Law. He also serves as coordinator of the Idaho Environmental Forum, the largest environmental policy group in the state. Before joining Givens Pursley in 1991, Chris held the position of adjunct professor at the University of Colorado Law School where he taught water law, negotiation and environmental law. Prior to that, he practiced environmental law in Washington, D.C. Chris has written extensively on environmental and natural resource law subjects, and is a frequent speaker at law forums throughout the US.

water right applications of their own, but chose not to do so. "Instead, they have attempted to appropriate water quantities they may not need within their service system in order to obtain a priority over a potential City of Pagosa Springs kayak course." *Pagosa II*, 219 P.3d at 783. The problem, as the Court saw it, was not with the concept of the water districts appropriating municipal water rights to allow diversion and release to meet instream flow requirements. Rather, the problem was that the instream flow needs were hypothetical. "Thus, an applicant might obtain a conditional water right to benefit Colorado Water Conservation Board instream flow rights, to benefit in-channel diversion rights of another governmental entity, and/or to meet federal bypass flow requirements, if it demonstrates a substantial probability that it will use such amounts during the water supply planning period, thereby justifying the decree award." *Pagosa II*, 219 P.3d at 783.

We are aware of no circumstance in Idaho in which a municipal water provider has sought to appropriate water in order to meet instream flow needs. On the other hand, United Water Idaho did enter into a stipulation whereby a junior, 1993-priority "flood right" out of the Boise River was subordinated to future instream flow water rights of a particular quantity if and when such instream flow rights are established. Water Right No. 63-12055.

CONCLUSION

The promise of the 1996 Act remains largely unfulfilled. One would have expected that in 14 years, a considerable body of experience, insight, and precedent would have been established. That has not occurred. Only a handful of RAFN applications have been submitted. IDWR shut down the largest RAFN application (United Water Idaho's "IMAP"), deferring instead to an *ad hoc* approach under the SRBA. The second largest RAFN approval was awarded in 2002 for the now troubled Tamarack ski resort. Ironically, IDWR recently disavowed that precedent, contending in a 2009 decision (now on appeal) that private developers that are not currently serving other municipal customers in Idaho are ineligible for RAFN water rights, even if they will qualify as municipal providers once the permit is issued. *In the Matter of Application to Appropriate Water No. 63-32573 in the Name of M3 Eagle LLC*, Amended Final Order (Idaho Dep't of Water Rescources Jan. 25, 2010) (issued by Interim Director Gary Spackman), *on appeal, M3 Eagle LLC v. Idaho Dep't of Water Resources*, Case No. CVOC1003180, Petition for Judicial Review (4th Dist. Idaho Feb. 19, 2010).

The biggest single development in municipal rights is IDWR's 2009 guidance. It demonstrates a renewed commitment by the Department to implement the legislative vision in the 1996 Act. It also reflects a much stricter approach to non-RAFN municipal rights, first signaled in IDWR's rejection of the City of Eagle's claim for a large non-RAFN water right discussed above. For years, municipal providers failed to take advantage of the benefits of the 1996 Act, and IDWR — by treating RAFN rights as "optional" — did little to change that inertia. This new guidance makes the cost of opting out much more apparent; it is likely to push more municipal providers to take on the challenge of full-fledged RAFN applications.

The new guidance, however, leaves many questions unanswered. To date, the longest, non-lapsed, approved RAFN permit is for 22 years — hardly a "long term" planning vision. There is no precedent for how IDWR will approach longer planning horizons, such as the 50 years sought under the IMAP. Likewise, it remains unclear how much rigor will be demanded of applicants in for longer demand projections or how IDWR will deal with their inherent uncertainty.

Frankly, the 1996 Act is not well suited to deal with that uncertainty. The RAFN provisions were grafted onto a water code that was designed in the last century primarily for irrigation and other more easily defined water rights. Accordingly, the prove-up remains at five to ten years — long before the RAFN projections unfold — and there is no statutory mechanism for ongoing oversight. To the extent such oversight occurs, it is likely to occur by way of conditions imposed on new RAFN rights. Those conditions could range from ongoing monitoring and reporting requirements, to open-ended reopener or "claw back" provisions in the event population forecasts fail to materialize or other conditions (such as global warming, conjunctive management, or water reuse technologies) change the fundamentals.

It is also unclear how or whether IDWR will encourage or demand cooperative efforts among water providers serving the same region. IDWR's recent ruling on the M3 Eagle application suggests that the Department may take a more aggressive approach than it has in the past in evaluating region-wide water supplies and region-wide allocation. This, in turn, raises interesting and difficult questions about whether IDWR or local officials should be making decisions about city planning and zoning.

In sum, the big sleep is over. While the path ahead is not entirely clear, recent developments suggest that IDWR intends to play a more active role in shaping the future of municipal water supply.

For Additional Information:
Christopher Meyer, Givens Pursley LLP (Boise, ID)
208/ 388-1236 or chrismeyer@givenspursley.com

