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

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MUNICIPAL WATER RIGHTS AND THE GROWING COMMUNITIES DOCTRINE

DEVELOPMENT, CODIFICATION, AND APPLICATION

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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.

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Municipal Water Rights

GROWING COMMUNITIES DOCTRINE IN IDAHO: JUDICIAL RECOGNITION

Future Growth

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.

Avoiding Forfeiture

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*).

Unquantified Right

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.

Municipal Protections

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).

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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

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"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*).

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Municipal Water Rights

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)

"Service Area" Flexibility

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).

Description Requirements

> 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.

City Limits

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.

Future Changes

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.

Revision Requirements

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.

Place of Use Description

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.

Development Boundary

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

Forfeiture Exemption

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

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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?

Colorado Diligence 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.

Potential Forfeiture

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.

Purchase of Rights

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

Speculation

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.

Colorado Municipalities

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.

Land Use Plans

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.

"Conflicted" Areas

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

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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.

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Municipal Water Rights

UWID Transfer

Claims Adjudicated

New Wells Capacity

Paper Rights Accumulation

Municipal Portfolios Confirmed

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

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.

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

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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 **c**ubic **f**eet per **s**econd (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.

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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.

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Municipal Water Rights

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).

Gradual Development Intent

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.

"Definitive Plan"

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.*

Investment

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.

Standard Relaxed

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.

Private Developers

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.

Ten Hookups

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.

"Stub-In" Rule

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

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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.

Options & Risks

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.

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.

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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.

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.

Additional Point of Diversion

> 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.

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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

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Municipal Water Rights

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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.

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STORMWATER REGULATION UPDATE

EPA EXPANDING PROGRAM

by Wendy L. Manley of Wendel Rosen Black & Dean, LLP (Oakland, CA)

Stormwater Regulation

Turbidity Limit

New Regulations

INTRODUCTION

New federal mandates are coming down the pipe from the US Environmental Protection Agency (EPA).

First, in December, 2009, EPA issued new effluent limitation guidelines for stormwater runoff from construction sites, which must be incorporated into the next generation of construction general permits as they are adopted. EPA established a turbidity limit of 280 NTU (**n**ephelometric **t**urbidity **u**nits — a measure of particulate concentration relying on light transmission) that will apply to larger (20+ acre) construction sites as soon as August 1, 2011. Two months before, California adopted a new construction stormwater permit with a numeric effluent limit of 500 NTU (see Manley, TWR# 68).

Second, and the focus of this article, additional federal regulations are in the works to expand and strengthen the nation's stormwater program. EPA has begun a process of gathering information from the public to inform its rulemaking under the federal Clean Water Act (CWA). Not only does it appear that the new regulations will impose significant new requirements and reach entities not previously regulated, the fundamental approach to stormwater control may shift.

Federal Stormwater Regulations

Phase I	Phase II
Finalized in 1990	Finalized in 1999
Regulates medium and large MS4s (defined as areas that serve 100,000 or more people) •10 categories of industrial operations • Active construction sites of 5 acres or more	Regulates small MS4s located in an "urbanized area" (UA) as defined by the Bureau of Census Additional MS4s outside of UAs designated by the NPDES permitting authority •Active construction activities disturbing between one and five acres
Requires: MS4s to develop and implement a stormwater management plan (SWMP) to • find and eliminated illicit discharges • control discharges from its system by addressing runoff from active construction sites, new development and redevelopment, industrial program	MS4 SWMP must include 6 minimum control measures: •Public Education & Outreach •Public Participation/Involvement •Illicit Discharge Detection & Elimination •Construction Site Runoff Control •Post-Construction Runoff Control •Pollution Prevention/Good Housekeeping
Construction and Industrial stormwater dischargers to develop and implement Stormwater Pollution Prevention Plan (SWPPP)	

Adapted from USEPA Rulemaking Presentation, 2010

BACKGROUND

Under the first phase of stormwater regulation in 1990, permits were required for the discharge of stormwater from industrial facilities, construction activities disturbing five or more acres of soil, and municipal separate storm sewer systems (MS4s) serving populations of more than 100,000. In the second phase, smaller MS4s in urban areas and construction sites between one and five acres were drawn into the program under regulations finalized in 1999. Federal regulations are implemented through state-issued permits in most states.

The implementation of **b**est **m**anagement **p**ractices (BMPs) under these programs has undoubtedly reduced the pollutants discharged in stormwater, but overall, the program has failed to meet expectations. Surface waters remain impaired, their beneficial uses compromised by urban runoff. In fact, in the biennial review of the list of impaired waters under CWA section 303(d), more pollutants continue to be added than are removed, leading some to characterize the stormwater program as a failure.

Report Critical

Stormwater Program Problems

NATIONAL RESEARCH COUNCIL REPORT

The new rulemaking is a response to an unflattering report, prepared at EPA's request, by the National Research Council (NRC) that evaluated the nation's stormwater program (see Urban Stormwater Management in the United States, October, 2008 available at: www.epa.gov/npdes/pubs/nrc_stormwaterreport.pdf). NRC, which functions under the National Academies of Science, Engineering and Institute of Medicine to provide science-based advice on government policies, characterized the national stormwater program as suffering from "poor accountability and uncertain effectiveness at improving the quality of the nation's waters."

The report enumerated a number of problems, including:

- Uncertainty in the performance of best management practices owing to limited information on their effectiveness
- Variable monitoring requirements
- An unclear connection between results and water quality
- A failure to effectively incorporate **t**otal **m**aximum **d**aily **l**oad (TMDL) limitations on pollutants into stormwater permits
- An absence of enforceable requirements

NRC further found that dischargers are allowed a "great deal of discretion to set their own standards and self-monitor" — contributing to overall weak compliance. Finding that states lack adequate resources to oversee their permits, NRC characterized state program implementation as "discouraging."

As a result, NRC concluded:

> The current approach is unlikely to produce an accurate picture of the problem and unlikely to adequately control stormwater's contribution to waterbody impairment.

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Stormwater Regulation

Approach Shift

Product Controls

Funds Allocation

Monitoring & Sampling

Wholistic Approach

Credit Trading

MS4 Empowerment

Urban Impacts

Considerations

NRC also had important comments about monitoring, modeling, and watershed permitting, among other things, that are revealed in the enumerated recommendations, below. As they are not within the topics identified by EPA in its rulemaking process, they are not discussed at length here. The reader is referred to the NRC report for more information.

NRC RECOMMENDATIONS

NRC made a number of recommendations, including the following:

- NRC said the program should shift from the traditional focus on the discharge of pollutants to more easily measured parameters, such as flow and impervious surface area. This approach would reduce the struggles related to the costly and technically difficult (if not impossible) issue of testing to measure pollutant loads, while allowing the program to better address water degradation resulting from increased flow volumes.
- NRC also recommended that EPA utilize its licensing authority to control products that contribute to stormwater pollution.
- Recognizing the inadequacy of resources, NRC challenged EPA to reassess its allocation of NPDES funds, which to date have been concentrated on reissuance of wastewater permits, rather than advancing the stormwater program which regulates more than five times as many permittees. EPA estimates approximately 100,000 entities nationwide are regulated under individual wastewater NPDES permits. By contrast, stormwater permittees, mostly under general permits, number around 0.5 million.
- NRC urged Congress to provide states financial support for "more meaningful regulation of stormwater discharges."
- NRC recommended that more sophisticated monitoring be undertaken at certain critical industrial sectors to enable establishment of benchmarks and technology-based effluent limitations.
- NRC also advised grab sampling be discontinued, and replaced by continuous, flow-weighted sampling methods.
- Effective management, NRC said, requires a wholistic approach rather than a piecemeal, parcel-by-parcel approach. Installing detention basins on a site-by-site basis "has been ineffective at protecting water quality in receiving waters and only partially effective in meeting flood control requirements."
- NRC recommended measures to harvest, infiltrate, and evapotranspirate stormwater as "critical to reducing the volume and pollutant loading of small storms."
- Urging innovation, NRC recommended watershed-based permits as "the course of action most likely to check and reverse degradation of the nation's aquatic resources," and further endorsed market-based trading of discharge credits.
- MS4s should be empowered to provide the first tier of oversight to industrial and construction stormwater dischargers, in analogous fashion to the wastewater pre-treatment program.

ONGOING SURFACE WATER QUALITY PROBLEMS

Recent assessments indicate that urban stormwater is the primary source of water quality impairment for 18 % of lakes, 13 % of rivers and 32 % of estuaries. In analyzing the problem, NRC determined that the primary cause is the "loss of water-retaining and evapotranspirating functions of soil and vegetation resulting from changes in hydrology that occurs with urbanization." Impervious surfaces and the channelized draining of developed land accelerate and increase the volume of runoff, which erodes stream channels and transports pollutants and sediment to receiving waters. In other words, the design and drainage infrastructure of our cities contributes as much or more to water quality impairment than the daily activities of their populations. This is reflected in the increased interest in recent years on "post-construction controls," "green infrastructure" and "Low Impact Development," where site design incorporates features such as swales, permeable paving and retention ponds to infiltrate, retain and slow the run off of stormwater.

NRC acknowledged that the relationships between urban features and ecological communities are complex and poorly understood, but found the science supports a number of overarching truths that are not well integrated into stormwater decision-making.

Important stormwater considerations include:

- Landcover relates directly with downstream water quality; all highly urban watersheds produce severely degraded receiving waters.
- The effects of altered hydrology, altered habitat, and polluted runoff must be better studied and taken into account if regulation is to effectively protect aquatic ecosystems.

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Stormwater Regulation

Hydro-Modification Criteria

• The assessment of urban impacts on streams must consider the full range of hydrologic changes, including: sequence and frequency of flows; the rate of rise and fall of the hydrograph; and seasonal differences. Thus, mitigation of urban development impacts must do more than reduce post-development peak flows to pre-development levels.

EPA sees an opportunity in new development to minimize the long-term impacts on stormwater by incorporating design and structural features that address problems of impervious surface, flow alterations and other landscape features. In short, EPA hopes to prevent urban runoff problems from getting worse.

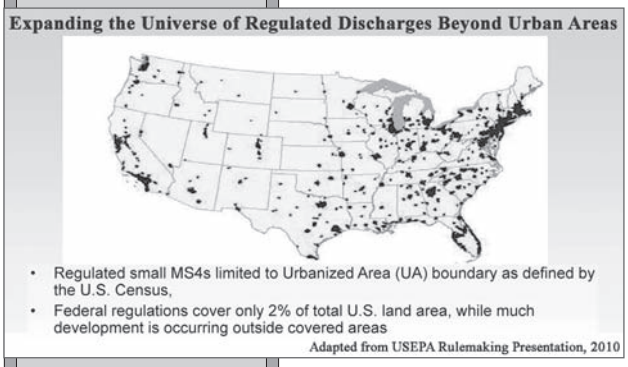
Concurrently, an intensive effort is underway in California to develop a methodology for the development of hydromodification control criteria for new development. See, *Development and Implementation of Hydromodification Control Criteria Methodology for the Central Coast Region, A Scope of Work for Phase 1 of the Joint Effort for Hydromodification Control*, Dec. 22, 2009. Available at: www.swrcb.ca.gov/rwqcb3/water_issues/programs/stormwater/docs/lid/joint_effort_scope.pdf

Public Comment

EPA RULEMAKING: NEXT STEPS

EPA formally announced its planned rulemaking just days before the New Year (see 74 Fed. Reg. 68617, and www.epa.gov/npdes/regulations/fedreg_swmanagement.pdf). In this first phase of the process, EPA is assessing information provided during a public comment period which ended in February. In addition, EPA held several workshops this winter at major cities. EPA is seeking input in five discrete areas, which reveals the direction it is leaning with regard to its rulemaking.

EPA STORMWATER REGULATION AREAS OF INTEREST INCLUDE:



1) **Extended Geographic Scope**. The issues of urbanization are addressed through MS4 stormwater permits, which are only required in urban areas. While urban areas are largely built up, growth and development (and worsening of runoff conditions) continue in unregulated suburban areas where a large portion of the population lives. Consequently, EPA is seeking input on how to extend regulation to development in sub-urban and rural areas. This could result in a shift in the way stormwater is regulated — factors such as impervious surface area or development size could trigger regulatory requirements outside of urban areas.

Development Controls

2) **Substantive Post-Construction Requirements** for new development and redevelopment. EPA is considering a comprehensive program to reduce stormwater discharges from new development and redevelopment. What requirements should be established? Should national or regional standards be developed? Should post-construction hydrology match pre-development hydrology? While a critical component to controlling the quality and quantity of urban runoff, development controls may shift development patterns, complicate local land use planning, and most certainly are of concern to developers. Also, the cost and responsibility for long-term maintenance of structural controls will have to be allocated. On the other hand, attractively designed stormwater management features (retention ponds, rain gardens, green roofs) can make properties more marketable.

3) **Convergence of Requirements for Phase I and II MS4s.** Larger MS4s regulated under Phase I permits have different requirements than smaller MS4s under Phase II. EPA is exploring whether MS4 requirements should be uniform. Conforming the two programs would likely mean greater cost to smaller communities to meet the more extensive requirements of the Phase I program.

Retrofitting Requirements

4) **Retrofitting.** To correct the problems of existing development, EPA is looking at strategies to require retrofitting of existing stormwater management facilities. The replacement of the country's aging infrastructure provides an opportunity to improve its function, but comprehensive system renovation is cost prohibitive for most communities. What conditions or activities will trigger retrofitting? How will piecemeal retrofit projects be integrated into an existing system without creating problems elsewhere? How can this be applied to areas outside regulated MS4s?

Receiving Waters

5) **Sensitive Waterbodies.** EPA is considering whether and how to protect sensitive receiving waters. Vegetative buffers, additional controls on construction activities, and other strategies are under consideration as strategies to protect sensitive waterbodies, such as Chesapeake Bay and San Francisco Bay. Naturally, a large part of the discussion will focus on what defines a "sensitive waterbody" and who makes the determination. Watershed-based regulation may be the most effective approach to protecting sensitive waterbodies, but coordinating multiple political jurisdictions has proved too difficult in many cases.

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These topics have been discussed in various corners, and some even implemented. California took an aggressive stance on post-construction requirements for new development and redevelopment projects in Phase I MS4 permits over a decade ago, and just last October, extended similar requirements to suburban and rural areas through the statewide general permit for construction activities. Some states regulate certain small MS4s outside of urban areas, and some cities have experience implementing retrofit programs. California has imposed more stringent restrictions on discharges to coastal waters designated as "areas of special biological significance." EPA is actively investigating these programs to benefit from the lessons learned.

Despite the appeal of a level national playing field from federal regulation, regional and local variables such as climate and soils weigh heavily in determining the most effective stormwater controls. For example, infiltration is not viable where water tables are high or soils are impenetrable clay. EPA will have to balance the simplicity of a one-size-fits-all program with flexibility to accommodate local conditions.

Rulemaking Process and Timeline

EPA plans to circulate questionnaires this summer to states, regulated MS4s, and the construction industry. After data and comments have been collected, EPA staff will retreat to develop a proposal for new regulations. Currently, the target for the release of draft rules is September, 2011. At that time, public comments will again be solicited and considered. EPA hopes to adopt final regulations by 2012.

More information, including proposed questionnaires and supporting documentation are available at EPA's website: http://cfpub.epa.gov/npdes/stormwater/rulemaking.cfm#stakeholder

CONCLUSION

Many would agree that current stormwater regulation is falling well short of its objectives, and for a number of reasons. The program has critics across the spectrum, including agency staff as well as the regulated and environmental communities. Given that stormwater impacts on receiving waters are far better understood now than when regulations were first crafted twenty years ago, many are also hopeful that EPA's current regulatory effort will provide an opportunity to improve stormwater regulation in a way that translates to meaningful water quality improvements.

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Interbasin Transfers

Transfer Plans

NEW ERA OF INTERBASIN WATER TRANSFERS: PART II

by Barbara Cosens, University of Idaho School of Law (Moscow, ID)

Introduction

Part I of this article presented a discussion of the new era of interbasin water transfers, focusing on climate change, transfer requirements and regulation, and the environmental issues that impact such transfers (see *TWR* #72). Part II provides a more detailed look at some specific planned transfers and how various issues are being addressed.

Current Plans for Interbasin Water Transfers

When this article was written, plans for interbasin water transfers could be found throughout the continental United States. Many of these proposals are in the lengthy process of formulating or obtaining comments on the associated draft Environmental Imact Statement (EIS). A table presenting salient aspects of major current interbasin water transfer proposals in the planning stage, including where the proposals are in terms of environmental compliance, has been prepared by your author. A copy of that table (Excel or Word format) is available upon request from: thewaterreport@hotmail.com.

To provide a range of geographic locations and issues, the following article will look at:

- Competing private and public proposals to transfer water from the upper Colorado River basin to the Front Range of Colorado
- Opposition to efforts to supplement the municipal water of Atlanta, Georgia by Alabama and Florida
- A privately financed plan to mine the Ogallala Aquifer in the Texas panhandle and sell the water to Dallas
- Efforts of the Southern Nevada Water Authority to develop groundwater in northeastern Nevada for transfer to Las Vegas
- A revisiting of the Pick-Sloan program through a proposed transfer of water from the Missouri River to the Red River (part of the Hudson Bay drainage)

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Interbasin Transfers

Front Range

Reclamation Storage

Opposition

This article is Part II of a revision of a paper by Barbara Cosens entitled *The Eternal Quest for Water: Historical Overview and Current Examination of Interbasin Transfers of Water,* originally published by the Rocky Mountain Mineral Law Foundation in the Proceedings of the 55th Annual Rocky Mountain Mineral Law Institute (2009).

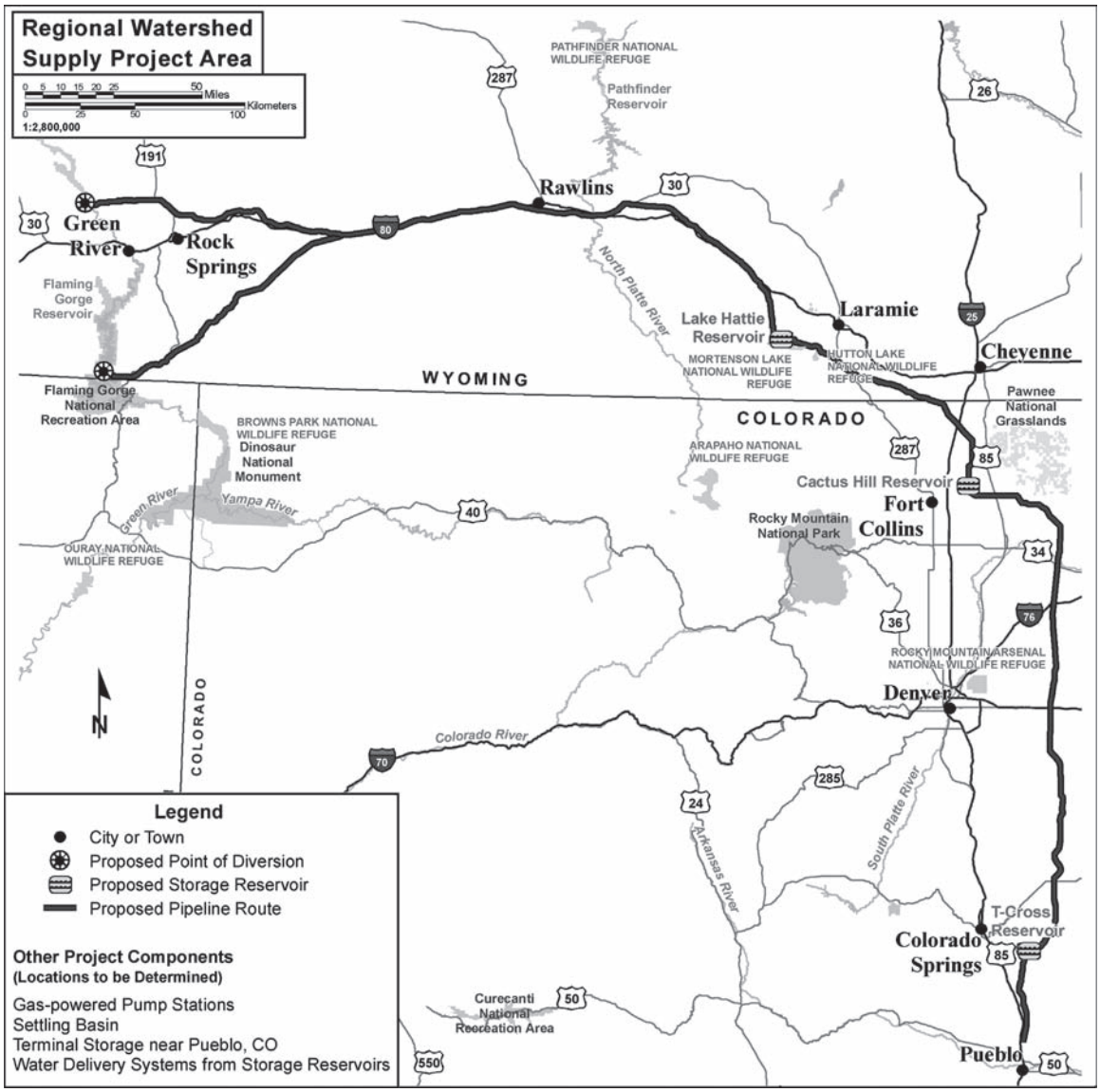
The Big Straw: Colorado River Basin to the Front Range (Wyoming and Colorado)

The Regional Watershed Supply Project, also known as the Big Straw, proposes to take 250,000 acre-feet (AF) of water annually from Flaming Gorge Reservoir and the Green River in Wyoming and transport it via a 560-mile pipeline to the Front Range of Colorado. The proposed project includes four storage reservoirs and a price tag of $3-5 billion. Private entrepreneur Aaron Millions formed Million Conservation Resource Group to undertake the project after doing his thesis on it at Colorado State University. The project proposes to use water from Colorado's allocation from the Colorado River, but the required permits and permission from the upper basin states have not yet been obtained.

The Big Straw requires contracts from Reclamation for water from storage in Flaming Gorge Reservoir and permits from the US Army Corp of Engineers (Corps), thus triggering NEPA. The Corps has taken the role of lead agency and is preparing a draft EIS due to implications of the proposed project under its CWA Section 404 authority. The draft EIS is expected out in 2012 with a final EIS by 2014.[1]

Meanwhile, concerned with private development for public water supplies, the South Metro Water Group, an association of thirteen water districts serving areas south of Denver, proposes to develop the same project in partnership with some Wyoming water districts, as a public endeavor. News articles suggest that Millions group and the South Metro group are currently not on the best of terms.[2]

In addition to competition between the public and private interests, the project is opposed by western slope water interests and environmental groups. Among other things, environmentalist claim that in the face of climate change, additional water from the Colorado River basin exits only on paper. By contrast, western slope water users hope to fill their own water needs from the Green and Yampa Rivers.



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Interbasin Transfers

Atlanta Allocation

Compacts

Operational Change

Lake Lanier and the Tri-State Water War: Georgia, Alabama and Florida

Western water lawyers were probably surprised, and in some cases relieved, to learn that the southeastern states in the US could also fight over water. Periods of drought beginning in the 1980's and continued population growth has led Atlanta to look to new supplies from the Chattahoochee, Flint, and Coosa Rivers, sources shared with the downstream states of Alabama and Florida. In 1990, Atlanta began seeking an increased allocation from Lake Lanier, a Corps project built in 1947 on the Chattahoochee River northeast of Atlanta.[3] The Corps approved an initial increase in allocation to Atlanta. The long-term plan would increase storage on the Chattahoochee and Flint Rivers to be transferred to Lake Lanier.

These efforts have repeatedly been opposed by Alabama and Florida. Alabama is concerned that reduced flow in a river that already carries Atlanta's wastewater threatens the water quality of its own water supply. Florida is concerned that reduced flow into Apalachicola Bay will threaten its oyster industry. Initial challenges led to negotiation of two compacts (the ACT: Alabama-Coosa-Tallapoosa Compact and the ACF: Apalachicola-Chattahoochee-Flint Compact), with temporary measures and authorization to develop a tri-state allocation. In 2003 and 2004, the compacts expired without an agreement.

In 2008, Florida and Alabama won a round in the D.C. Circuit court when that court held that the re-allocation of water to Georgia constituted a "major operational change" for purposes of the Water Supply Act (WSA),[4] thus requiring Congressional approval.[5] With Alabama and Florida in opposition, such approval would never be received in the Senate. On July 17, 2009, Senior Judge Paul Magnuson of the US District Court in Florida ruled that the reallocation of water from Lake Lanier to Atlanta did violate WSA, but stayed the action for three years to give the three states time to resolve the issues.[6] During that time, Georgia must either find an alternative supply, obtain permission from Congress to continue withdrawals, or work out a deal with Florida and Alabama. Secretary of the Interior Ken Salazar has offered his assistance in negotiations among the three states.

T. Boone Pickens and the Ogallala Aquifer: Texas

The name T. Boone Pickens evokes images of oil man and wind energy promoter, among others. We can now add to that list: water baron. Pickens has plans to develop groundwater from his 24,000-acre Mesa Vista Ranch by tapping the Ogallala Aquifer. Information on the project can be found on the website of Pickens' water company, Mesa Water, at: www.mesawater.com. Through formation of Mesa Water, he plans to acquire water rights for a total of 320,000 AF of water a year and has offered to sell the water and pipe it via an estimated $2.1 billion, 654-mile pipeline to cities to the south, including Dallas, El Paso and San Antonio. Although he has no takers at this time, predictions are that increased population and drought will eventually lead to a buyer. In the meantime, Pickens has encountered a few problems with his proposed pipeline route. His intent is to use the same right-of-way as the transmission lines proposed for delivering power from his wind farms. Complications associated with seeking to do both projects at the same time have led him to prioritize the transmission lines.

The Ogallala Aquifer spans eight states, including Texas, with a total overlying surface area of 174,000 acres. Ninety-four percent of the 13.6 million irrigated acres in the High Plains region are irrigated from the aquifer, giving rise to a $20 billion per year agricultural business. Pumping exceeds recharge to the aquifer and declines of up to 150 feet have been reported. Scientists report that "[t]oday the Ogallala Aquifer is being depleted at an annual volume equivalent to 18 Colorado Rivers."[7] Despite its key economic importance to the eight states overlying it, no compact for allocation or management of the Ogallala Aquifer exists among any of the states. Texas adheres to the common law rule that landowners have unrestricted rights to pump any water beneath their land. Groundwater conservation districts in Texas do have the authority to regulate groundwater within their districts. The Panhandle Groundwater Conservation District, which covers the region in which Pickens' wells will lie, requires specific spacing on wells, completion to prevent communication between other aquifers and the Ogallala Aquifer, and authorizes mining by placing a limit on depletion of 50% in 50 years and 70% in 100 years.[8]

[**Editor's Note:** *TWR* #52 (June 2008) contains a response from Robert Stillwell, General Counsel of Mesa Water LP, to an earlier article that Stillwell maintained cast Mr. Pickens in a negative light. Stillwell noted that local groundwater conservation districts established by the Texas Legislature will regulate and limit production of groundwater. Stillwell also noted the difference between Mesa Water and some current irrigation users of the Ogallala Aquifer that are not supportive of those production limits. At that point, Stillwell estimated the Mesa Water project would entail 200,000 AF, or 8% of the total production from their four-county area.]

Groundwater Sources

Lake Mead Level

Southern Nevada Water Authority's Groundwater Development Project: Nevada

With one of the fastest rates of growth in the nation, at least until the recent economic downturn, it is no secret that Las Vegas needs water. With Nevada's limited allocation from the Colorado River facing even further limitations should extended drought continue to deplete storage on the river, Las Vegas has turned to groundwater supplies in northeastern Nevada. A plan by the Southern Nevada Water Authority (SNWA) calls for a 306-mile pipeline to deliver over 170,000 AF of water from the Spring, Delmar, Dry Lake, Cave, and Snake Valleys at an estimated cost of $2-3.5 billion. Information is available on SNWA's website: www.snwa.com/html/system_gdp.html.

In June 2009, Patricia Mulroy, General Manager of SNWA, announced a decision by her board to place any decision to build the pipeline on hold until Lake Mead falls to a water level of 1075 feet in elevation. The 1075-foot mark, referred to in the press as a "trigger point," has not been reached since 1937. At the time of the announcement the lake level was at 1098 feet.

The trigger point does have some meaning in terms of water supply. Under the "2007 Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lakes Powell and Mead," the

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Interbasin Transfers

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1075 foot water level is the threshold for shared shortages, with Nevada's share at 13,000 AF.[9] It also gives SNWA time to build the pipeline before lake levels reach 1050 feet — the point at which SNWA will have to shut down one of its two intakes at Lake Mead.

SNWA's applications for permits for groundwater in the northeastern Nevada valleys have not proceeded without opposition. Ranchers in the various valleys raised objections during permit hearings, although most have settled. Settlement agreements require limitations on pumping in the initial years, monitoring, and conservation measures to prevent impacts.[10] Environmental groups remain in opposition and have sought ESA-listing of the least chub, a minnow found in the area.

On January 28, 2010, the Nevada Supreme Court held that the Nevada State Engineer's failure to act until 2006 on certain SNWA permit applications filed in 1989, violated the statutory requirement that action be taken within one year. The court further ruled that this failure was not retroactively cured by 2003 Nevada legislation, which allowed longer delays for applications for municipal water.[11] The court was both reluctant to require re-filing by SNWA for something that was the error of the State Engineer, and reluctant to allow the applications to go forward given new residents in the affected valleys and the failure of some protestants to receive notice (having changed address since 1989). The court remanded the case to the district court for full hearings on the appropriate remedy, "namely whether SNWA is required to file new applications or whether the state engineer is required to re-notice and re-open the protest period."[12]

Recently the Nevada State Engineer postponed hearings on the Snake Valley permits until 2011. Groundwater in Snake Valley is shared with Utah. With its own hopes to develop this water for the Cedar City and St. George areas, Utah sought federal review of the affects of the SNWA proposal on an interstate groundwater system and was successful in getting Congress to require an interstate agreement before water could be diverted out of a groundwater basin shared by the two states.[13] In August, 2009, after four years of negotiations, the states released a draft agreement for comment.[14] The comment period ended Sept. 30, 2009 and opposition to the agreement in Utah has been vocal.

The Red River Valley Water Supply Project: North Dakota

The North Dakota Water Supply Act of 2000 (2000 Act)[15] is the latest in a long series of attempts to realize water projects promised by the Flood Control Act of 1944 (referred to as Pick-Sloan).[16] The 2000 Act authorizes an environmental impact statement (EIS) by Reclamation on the transfer of water from storage behind Garrison Dam on the Missouri River, to the Red River Valley (part of the Hudson Bay drainage system) for irrigation and municipal use.

The interbasin transfer is opposed by Canada.[17] Studies by the International Joint Commission released in 1977 expressed concerns with transfer of biota and invasive species.[18] In 2005, Manitoba was successful in court when it sought greater environmental review on these issues.[19] The revised final EIS was completed in 2007. The 2000 Act requires submission of the EIS to Congress for authorization of design and construction.[20] One of the issues that must be tackled to address Canada's concerns is the biological standards for pre-treatment of water to avoid introduction of biota and invasive species. The Record of Decision released in January 2009, includes biota treatment before the water is transferred into the Hudson drainage.[21]

Conclusion

Interbasin water transfers to serve municipal needs will only increase in the future, especially in light of climate change. Upfront assessment and design of such transfers, during environmental review and permitting stages, pays off in the long run (see Part I, *TWR* #72). As Part II makes abundantly clear, controversies over major water transfers are not likely to abate no matter how necessary they may be in certain circumstances. Interbasin transfers can also be expected to be proposed throughout the US and not just in the arid West.

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ENDNOTES

1 See www.nwo.usace.army.mil/html/od-tl/eis/RWSP-EIS.html
2 See The Pueblo Chieftain, Feb. 5, 2009
3 See www.alabamarivers.org/current-work/water-wars; www.ajc.com/metro/content/metro/stories/2009/05/17/water_wars_judge_magnuson.html
4 USC §390b(d)
5 *Southeastern Federal Power Customers v. Geren*, 514 F.3d 1316 (D.C. Cir., 2008), cert. denied, 129 S.Ct. 898 (2009)
6 *In re Tri-States Water Litigation*, __ F.Supp 2d.__ , 2009 WL 2371506 (M.D. Fla., July 17, 2009)
7Jane Braxton Little, *The Ogallala Aquifer: Saving a Vital U.S. Water Resource*, Scientific American, March 2009 Special Ed., available at: www.scientificamerican.com/article.cfm?id=the-ogallala-aquifer
8 Rules 8, 13, and 15, respectively, Rules of Panhandle Groundwater Conservation District, Amended September 20, 2006, available at: www.pgcd.us/
9 Record of Decision, December 2007, vailable at: www.usbr.gov/lc/region/programs/strategies/RecordofDecision.pdf
10 See e.g., Spring Valley Hydrologic Monitoring and Mitigation Plan, Doc. No. WRD-0003, SNWA, available at: www.snwa.com/assets/pdf/system_gdp_hydro_monitoring_plan.pdf
11 *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. 2 (January 28, 2010)
12 *Id*. at 16
13 Public Law 108-424, Sec. 301(e)(3)
14 Draft agreement available at: http://naturalresources.utah.gov/about-dnr/snake-valley-groundwater-agreement.html
15 Dakota Water Resources Act of 2000, §§5 and 8, Pub. L. No. 106-554, 114 Stat. 2763A-281
16 Flood Control Act of 1944, 16 U.S.C. 460d, and various sections of Titles 33 and 43 U.S.C; P.L. 78-534, December 22, 1944; 58 Stat. 887; see also, The Garrison Diversion Reformulation Act of 1986, Public Law 99-294, 100 Stat. 418
17 See e.g., *Potential Transboundary Water Projects*, Manitoba Water Steward, available at: www.gov.mb.ca/waterstewardship/water_info/transboundary/potential.html
18 *Transboundary Implications of the Garrison Diversion Unit*, Report of the IJC to the Governments of Canada and the US (1977), available at: www.ijc.org/php/publications/pdf/ID582.pdf
19 *Manitoba v. Norton*, 398 F.Supp. 2d. 41 (2005)
20 See Reclamation, Great Plains Region Quarterly NEPA Action Reports, Dakota Office, available at: www.usbr.gov/gp/nepa/quarterly.cfm#dkao; see also Supplemental Draft Environmental Impact Statement Red River Valley Water Supply Project, Appendices, available at: www.rrvwsp.com/rrvwsp_cd/Appendixes/SDEIS%20Appendix.pdf
21 ROD available at: www.usbr.gov/gp/dkao/naws/rod_naws.pdf

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WATER BRIEFS

AREA OF ORIGIN CA
RECLAMATION LAWSUIT

On February 11, the Tehama-Colusa Canal Authority (TCCA) filed a lawsuit in federal court seeking an injunction that would prevent the US Bureau of Reclamation (Reclamation) from taking water from the Central Valley Project (CVP) out of its "area of origin" and sending it south to the San Joaquin Delta before the needs of the local agriculture community are met. TCCA claims that Reclamation's operation of the Central Valley Projects fails to comply with state law which protects the "area of origin" — i.e. areas where water originates are entitled to a priority right to all the water reasonably required to supply the beneficial needs of the area and the property owners residing within it (codified in the California Water Code, Section 11460). See Cosens, *TWR* #72. TCCA's Complaint states that "In issuing the water right permits for the CVP, the California State Water Resources Control Board...conditioned Reclamation's permits on operating the CVP in conformance with Water Code § 11460 and other state law area of origin protections." Complaint at 5.

The lawsuit is designed to require Reclamation to operate CVP in accordance with the area of origin law. Reclamation would then have to provide a full supply of water to the TCCA CVP water service contractors within the area of origin, prior to exporting any water outside of the region. The lawsuit does not seek compensation for past refusals by Reclamation to operate the CVP in such a manner. Information from TCCA noted that TCCA contractors received only 40 percent of the water under their contracts for 2008 and 2009, when Reclamation exported water outside of the watershed of origin.

TCCA is a joint powers authority consisting of 16 water districts that deliver water to 150,000 acres of irrigated agriculture throughout four counties (Tehama, Glenn, Colusa, and Yolo). TCCA operates and maintains a 140 mile long dual-canal system.
For info: Jeffrey Sutton, TCCA, 530/ 934-2125 or jsutton@tccanal.com

"CONSERVATION" RIGHT KS
BENEFICIAL USE DEFINITION

The Kansas Department of Agriculture recently introduced legislation to promote the voluntary conservation of water, marking a substantial shift in water policy from the previous half-century. "In the past, water rights holders have been required to put to beneficial use their water right or risk losing the right to abandonment, which contributed to the notion of 'use-it-or-lose-it.' Today, we are asking the legislature to approve a statutory change that would recognize conservation as a beneficial use," said Josh Svaty, Secretary of Agriculture. "The program would be voluntary, and would allow producers that wish to save water for future use or future generations to have that opportunity without risk of losing the property right they developed."

Previously, if a water right holder wished to keep their water right but not pump water, he could enroll it in the Water Rights Conservation Program (WRCP), a temporary program which was suspended due budget shortfalls in the fall of 2009. "This is a solution for WRCP, but it also goes a significant step further," said Svaty. "We are now recognizing conservation as a beneficial use of our water resource, and allowing producers to make a voluntary decision to change their water rights to conservation water rights for as long as they wish. Furthermore, we can manage this new system within our existing administrative resources, keeping fees static and solving the budget problem WRCP presented."

The bill applies to all vested or perfected water rights statewide. The water right holder would apply to change all or a portion of the water right from its current use to a conservation right. The one-page bill simply defines "conservation use" as "the maintenance of a water right for future use" then goes on to state that "Conservation use shall be a distinct beneficial use of water. Diversion under a conservation use water right shall be prohibited."

Essentially, the bill allows a water user to protect a water right from abandonment (forfeiture) by changing the use to "conservation" and then not diverting the right from the source for any use. If the water right holder wanted to use that water for a different purpose in the future, he or she would make a subsequent change application to the Division of Water Resources.
For info: Lisa Taylor, KS Dept. of Ag, 785/ 296-2653, lisa.taylor@kda.ks.gov or www.ksda.gov/search/?search=conservation+bill&x=0&y=0

WATERSMART INTIATIVE US
INTERIOR STRATEGY

On February 22, Secretary of the Interior Ken Salazar signed an order establishing a new water sustainability strategy for the US. Salazar showcased the Department of the Interior's WaterSMART Initiative at a press conference featuring a geospatial presentation on water supply and demand. The "SMART" in WaterSMART stands for "Sustain and Manage America's Resources for Tomorrow." He noted that the 2011 budget proposed by President Obama for Interior doubles the current enacted 2010 appropriations for water programs to move the initiative forward and includes $72.9 million for the WaterSMART program (total increase of $36.4 million over 2010).

"The federal government's existing water policies and programs simply aren't built for 21st century pressures on water supplies," Salazar said. "Population growth, climate change, rising energy demands' environmental needs, aging infrastructure, risks to drinking water supplies — those are just some of the challenges."

Salazar is directing Interior to increase available water supply for agricultural, municipal, industrial, and environmental uses in the western US by 350,000 acre-feet by 2012. A workshop was held on February 23rd in Nevada for stakeholders from the seven Colorado River Basin states to help frame the new initiative and to discuss issues such as how to adjust to the anticipated 20% reduction in water flow in the Colorado River due to climate change.

The WaterSMART order has several parts, all of which are focused on improving water conservation and helping water and resource managers make wise decisions about water use, including: a national framework to integrate and coordinate water sustainability efforts of Interior and its federal, state and private partners; expansion of Reclamation's various grant programs and its studies of entire river basins; a big boost to the US Geological Survey's National Water Census, which will be conducted for the first time in 30 years; and a clearinghouse for the public. Through the clearinghouse, Interior will provide leadership and assistance to state and local governments, tribal nations, and others in water conservation, sustainable

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water strategies, incentives, and the most cost-effective technologies. WaterSMART will identify the water footprint of various energy technologies and make sure that it is considered as part of any decision process on the development of such technologies. WaterSMART's water footprint reduction program for facilities and water-consuming operations will be designed to exceed the goal established by President Obama to reduce overall consumption of potable water by 26 percent by 2020 and industrial, landscaping, and agricultural water by 20 percent by 2020.
For info: Joan Moody, Interior, 202/ 208-6416; Complete copy of the Secretarial order at: http://doi.gov/news/pressreleases/upload/WaterSMARTOrder.pdf

TRIBAL CWA PROGRAM US
NONPOINT SOURCE POLLUTION

EPA's Office of Wetlands, Oceans, and Watersheds recently released the Handbook for Developing and Managing Tribal Nonpoint Source Pollution Programs Under Section 319 of the Clean Water Act. EPA developed the Handbook to support the continued growth and sophistication of Tribal participation in the Clean Water Act Section 319 program.

In the Handbook, all aspects of the grants funding process are clearly explained, demonstrating how Tribes can use Section 319 program funds to implement programs and projects to reduce pollution and restore water quality. It also provides a great deal of technical information regarding nonpoint source pollution; how to develop and assess available data to develop a plan of action; and how to implement activities to solve the problem.
For info: Handbook available on the Tribal Nonpoint Source Web site: www.epa.gov/nps/tribal/

WATER TRUST MT
NEW COALITION ANNOUNCED

The Clark Fork Coalition (Coalition) announced today that it is acquiring the Montana Water Trust and adding streamflow restoration to better protect and restore the Clark Fork watershed. The Coalition is bringing on board all three Water Trust staff in an expansion that will enable the group to broker voluntary water transfers aimed at increasing the amount of water flowing in western Montana's streams. According to the Coalition's executive director Karen Knudsen, adding flow restoration to its toolbox will enable the group to promote watershed health on a greater scale. The expansion will help accelerate the pace of river restoration and community revitalization in the Clark Fork basin. "The removal of Milltown Dam two years ago really opened the door to full-scale recovery of the watershed, and in response, we've been scaling up our work to improve the Clark Forks feeder creeks and streams," says Knudsen. "With this newly-acquired expertise, now we can focus on the flow piece for a complete restoration solution."

In Montana, the business of putting more water in a river or stream is accomplished by partnering with ranchers and other water users to transfer water rights through lease, purchase, or irrigation efficiency projects that improve how water is transported. Knudsen says that with the addition of Water Trust staff, the Coalition is now equipped to broker projects that add value to agricultural operations, keep critical river habitats wet year-round, and ensure that Montana streams are resilient to buffer impacts of growth and development, as well as climate change.
For info: Clark Fork Coalition, 406/542-0539 or www.clarkfork.org

WETLAND BANK WA
NEW RULES - NEW BANK

The Washington Department of Ecology (Ecology) has used its new rule establishing an approval process for wetland mitigation banks to certify the proposed Columbia River Wetland Mitigation Bank (Bank) at the Port of Vancouver. State and federal laws prohibit the loss of wetlands due to development. In September 2009, Ecology adopted a rule establishing criteria and a certification process for wetland mitigation banks across the state. The Vancouver wetland is the first to be certified under the new rule. It is also the second to be certified under a new federal rule established by the US Army Corps and EPA.

The availability of wetland credits doesn't eliminate or change local, state and federal regulations requiring developers to avoid and minimize wetland damage. Wetland mitigation banks allow developers to provide compensation before harming a wetland at another site. Developers can purchase "credits" from the banks — subject to regulatory approval — to offset wetland losses that cannot be avoided. Lauren Driscoll, who oversees Ecology's wetland banking program, said wetland banks are a less expensive alternative than investing in solely human-engineered solutions to purify water and provide flood protection and critical habitat.

Ecology's action helps move the 154-acre Bank a step closer toward being built and offering mitigation credits for projects impacting wetlands in the lower Columbia River basin in Washington. The area includes portions of Clark and Cowlitz counties as well as a small area in Skamania County. Clark County Mitigation Partners, the private company seeking to build and operate the bank, still needs to obtain several local permits and fulfill additional requirements outlined in their agreement with the regulatory agencies before they have approval to sell credits. Before it can begin operations, the Bank will be permanently protected through a conservation easement recorded on the property by the Port of Vancouver and held by Ducks Unlimited. The firm would then create new wetlands and enhance existing wetland and upland habitat areas at the site.

The site is expected to generate nearly 54 credits. Each credit represents 2.9 acres of work on the ground that developers can use to offset impacts to wetlands in the mitigation bank's service area. The proposed Bank is on Port of Vancouver property located in Vancouver. The Port set aside the parcel to be used as a mitigation bank and protected in perpetuity. The Bank would be regulated by an interagency review team made up of representatives from Ecology, Army Corp, EPA, US Fish & Wildlife Service, City of Vancouver and Clark County.
For info: Curt Hart, Ecology, 360/ 407-6990, char461@ecy.wa.gov or www.ecy.wa.gov/mitigation/index.html

WATER RIGHTS SYSTEM CA
INFORMATION MANAGEMENT

The Electronic Water Rights Information Management System (eWRIMS) — a database developed by the state water board — tracks information on water rights in California. It includes a geographic information system component that can display points of diversion for water rights that

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WATER BRIEFS

can be searched by the owner's name, watershed, stream system and county. eWRIMS also now features an online reporting component for water users (optional at this point). The Report Management System provides water right holders the ability to report monthly diversion and use electronically, with four types of water use reports supported by the system: Supplemental Statements of Diversion and Use, Report of Licensee, Progress Report by Permittee, and Groundwater Extraction Notices.
For info: SWRCB, 916/ 341-5300 or ewrims@waterboards.ca.gov; eWRIMS available at: www.swrcb.ca.gov/ewrims/

CONSERVATION REPORT US

AGRICULTURAL INNOVATIONS

A new report and video from the Pacific Institute, *California Farm Water Success Stories*, uses seven case studies to showcase agricultural water use innovations and demonstrate how these alternatives to traditional approaches can help meet water management challenges now and into the future. The cases in the Pacific Institute report and video demonstrate diverse strategies that can reduce pressures on scarce water resources, from planning and management practices, technological improvements, and use of recycled water, to quantitative targets and financial incentives. The results are efficient water use or enhanced water quality, increased crop yields or quality, and multiple benefits for other water users, such as providing increased flood protection, drought-resilience, or habitat for wildlife.
For info: Report and video available at Pacific Institute website: www.pacinst.org/reports/success_stories/index.htm

KLAMATH SETTLEMENT OR/CA

AGREEMENTS SIGNED

Following years of controversy and then detailed negotiations, the Klamath Basin Restoration Agreement (KBRA) and the Klamath Hydropower Settlement Agreement (KHSA) were signed on February 18th in the Oregon Capitol Building in Salem, Oregon (see Spain, *TWRs* #70 & #71; Simmons, *TWR* #49). Members of the Obama Administration, California and Oregon's Governors, the Secretary of the Interior, and representatives of many Klamath Basin stakeholder groups who have been working on the Agreements for years came together to sign the documents.

The two historic Agreements together would cap irrigation water demand in the upper Basin and add to water storage, putting between 130,000 and 230,000 acre-feet more water in the Klamath River for salmon, and initiating a 50-year commitment to restoring and preserving the Klamath Basin. Included in the plan is the removal of four hydropower dams that block more than 600 stream miles of once-productive salmon habitat, in what would be largest dam removal project in history. Supporters will now seek funds from Congress to invest in Klamath restoration and implement the comprehensive restoration plan. Additional financial investments are intended to diversify agricultural, Tribal and county economies, and will also include extensive renewable energy development.
For info: Agreements and summaries: www.edsheets.com/Klamathdocs.html; Compilation of reports and analyses: www.americanrivers.org/; Tribal perspectives on both Agreements: www.klamathrestoration.org; and Agricultural perspectives on both Agreements: http://kwua.org & http://ukwua.com

BASIN CLOSURE WA

CLOSURE DENIED

For the second time in two years, the Washington Department of Ecology (Ecology) has turned down a request to close the Johns Creek basin near Shelton to new water use. The Squaxin Island Tribe raised concerns in 2008 and again in late 2009 that wells in the area are hurting stream flows in the creek and asked Ecology to limit future well use by rule. Ecology is, however, pursuing an agreement with Mason County to require new wells put to use near Johns Creek to serve in-home needs only. The current rule language allows this action if warranted.

Ecology met February 8th with local business, government and community leaders to outline the Tribe's request and potential options. Attendees voiced a need for a comprehensive groundwater study before amending the instream flow rule. Ecology is preparing a grant proposal to EPA for funds to carry out such a study. The application is due in early March and a funding decision should be made this summer.
For info: Dan Partridge, Ecology, 360/ 407-6149 or www.ecy.wa.gov

INSTREAM FLOWS CA

FISH & GAME ANNUAL REPORT

The California Fish & Game Department (Department) on February 15th released its "Instream Flow Program Annual Report" for 2009. As noted in the Preface, "The primary objective of the Department's Instream Flow Program is to develop scientific information on the relationships between flow and available stream habitat to determine what flows are needed to maintain healthy conditions for fish and wildlife. Relationships between flow and habitat will be developed on the selected streams for each species' critical lifestage need, including spawning, rearing and migration. The Department has interest in assuring that water flows within streams are maintained at levels which are adequate for long-term protection, maintenance and proper stewardship of those resources."

The Department's priority stream list contains a ranked list of streams and watercourses identified throughout the state for which minimum flow levels need to be established. The list of 22 priority streams or watercourses for future instream flow work was developed pursuant to Public Resources Code (PRC) 10004 in 2008. In developing the ranking, Department staff considered criteria such as: 1) presence of coho or other anadromous species; 2) likelihood that the Department flow recommendations would provide a high level of improvement; 3) availability of recent flow studies or other relevant data; and 4) the possibility of partners/willing landowners. The Department continued to use the priority streams list developed in 2008 for prioritizing flow related efforts and did not revise the list in 2009. Several flow studies were initiated by the Department in 2009. The flow studies include the following from the Department's 2008 priority streams list: the Big Sur River, the Santa Maria River, and the Shasta River.

An application fee (environmental filing fee) for water diversions is currently imposed by PRC Sections 10000-10005 to fund the Department's Instream Flow Program. In 2009 the Department received $74,983 pursuant to PRC 10005 from the State Water Resources Control Board.
For info: Robert W. Holmes, CDFG, 916/ 324-0838, rholmes@dfg.ca.gov or www.dfg.ca.gov/water/instream_flow_docs.html

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CALENDAR

March 15-18 CA
20th Annual International Conference on Soils, Sediments, Water & Energy, San Diego. Marriott Mission Valley. For info: www.aehsfoundation.org/

March 16-17 NV
2010 Tahoe Basin Science Conference, Incline Village. Sponsored by Nevada Water Resources Association. For info: NVWRA, 775/ 473-5473 or website: www.nvwra.org/

March 16-18 OR
Managing Uncertainty with Systematic Planning Course, Portland. Hilton Airport. For info: Sebastian Tindall, QE3C Inc., 509/ 845-7078 or www.qe3c.com/

March 17 CA
Assn. of California Water Agencies Legislative Symposium, Sacramento. Sacramento Convention Ctr. For info: ACWA, 916/ 441-4545 or website: www.acwa.com

March 18 CA
CEQA & Climate Change: An In-Depth Update Course, Sacramento. Sutter Square Galleria, 2901 K Street. For info: UC Davis Extension, 800/ 752-0881 or http://extension.ucdavis.edu

March 18 CA
Sustainable Water Resources Management in Site Design & Development Course, Sacramento. Sutter Square Galleria, 2901 K Street. For info: UC Davis Extension, 800/ 752-0881 or http://extension.ucdavis.edu

March 18 WA
Effectiveness of High Efficiency Street Sweeping in Seattle Meeting, Bellevue. HDR, 500 108th Ave. NE. For info: Joshua Phillips, joshua.civil@gmail.com

March 18 WA
Workshop on Rain Garden Design & Construction, Bothell. Advance Registration Required. For info: Stacey Gianas, Stewardship Partners, 206/ 292-9875, sg@stewardshippartners.org or www.stewardshippartners.org

March 18-19 WA
Conservation Easements Seminar: Conserving Land, Protecting Our Future, Seattle. Grand Hyatt. For info: CLE International, 800/ 873-7130 or website: www.cle.com

March 18-19 NV
Nevada Water Law Seminar, Reno. For info: CLE International, 800/ 873-7130 or website: www.cle.com

March 18-20 UT
Conference on Environmental Law 39th Annual, Salt Lake City. Grand America Hotel. Sponsored by American Bar Association. For info: ABA website: www.abanet.org/environ/calendar/

March 22-23 CA
Endangered Species Act Seminar, San Diego. For info: CLE International, 800/ 873-7130 or website: www.cle.com

March 22-24 CA
Proceeding to Develop Flow Criteria for the Delta Ecosystem Necessary to Protect Public Trust Resources, Sacramento. Cal-EPA Bldg, 1001 I Street. SWRCB Proceeding. For info: Philip Crader, SWRCB, 916/ 341-5438, pcrader@waterboards.ca.gov or www.waterboards.ca.gov

March 23-24 NY
Wall Street GREEN Trading Summit IX, New York. The Times Center. For info: Summit, 212/ 222-3775 or www.wsgts.com

March 24-25 OR
Riverbank Erosion & Erosion Management Course, Corvallis. OSU's LaSells Steward Conf. Ctr. For info: Peter Klingeman, peter.klingeman@oregonstate.edu or http://cce.oregonstate.edu/workshops/water.html

March 24-26 BC
Globe 2010: Energy & Environment Trade Fair, Vancouver. For Display, Contact: Sunun Setboonsarng, Oregon Business Development Dept., 503/ 229-6057 or sunun.setboonsarng@state.or.us. For info: www.globe2010.com

March 24-26 CA
International Drought Symposium, Riverside. Marriott Hotel. Sponsored by UC Riverside. For info: http://cnas.ucr.edu/drought-symposium/

March 25 OR
Solar Power: Projects & Permitting Seminar, Portland. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

March 25 WA
Sustainable Development & Green Building Seminar, Seattle. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

March 25-26 CA
"Moving Forward" Water Education Foundation 27th Annual Executive Briefing, Sacramento. Doubletree Hotel. For info: WEF, 916/ 444-6240, feedback@watereducation.org or www.watereducation.org

March 25-26 OK
Oklahoma Water Law Seminar, Tulsa. For info: CLE International, 800/ 873-7130 or website: www.cle.com

March 26 WA
Water Marketing Seminar, Spokane. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

March 26 WA
Storming the Central Sound Conference: Action Through Education, Outreach & Service, Seattle. Art Museum, 9am-4pm. For info: Justine Asohmbom, Ecology, 425/ 649-7108 or juas461@ecy.wa.gov

March 26-28 OR
Confluences: Water & Justice Symposium, Portland. University of Portland. For info: Amy Leisher, UP, 503/ 943-7864 or leisher@up.edu

March 29 MT
Water in the West Forum, Great Falls. MT Electric Cooperatives' Ass'n Conf. Rm., 501 Bay Drive. For info: Montana Farmer's Union, 800/ 234-4071

March 29-31 FL
GIS & Water Resources VI: AWRA Spring Specialty Conference, Orlando. Rosen Shingle Creek Hotel. For info: AWRA website: www.awra.org/

March 31 WA
Redevelopment of Contaminated Property Seminar, Seattle. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

April 1 CA
Sustainable Water Resources Management in Site Design & Development Course, Sacramento. Sutter Square Galleria, 2901 K Street. For info: UC Davis Extension, 800/ 752-0881 or http://extension.ucdavis.edu

April 2 CO
Annual Water Seminar: Southwestern Water Conservation District, Durango. Doubletree Hotel. For info: http://swwcd.org/programs

April 6-7 OR
Oregon Brownfields Conference & Awards Luncheon, Salem. For info: Sue Moir, NEBC, 503/ 227-6361 or sue@nebc.org

April 6-7 WY
Wyoming Reclamation & Restoration Symposium: Recent Successes & Current Challenges, Laramie. Hilton Garden Inn & UW Conference Ctr. For info: www.uwyo.edu/wrrc-symposium/default_text.asp

April 7 TX
Water Rights Law 101 - Texas Seminar, Austin. Sheraton Hotel. Sponsored by State BAR of Texas. For info: Texas BAR, 800/ 204-2222 or www.texasbarcle.com

April 7-8 WA
Construction Site Erosion & Pollution Control, Bellevue. UW Bellevue. For info: UW Engineering website: www.engr.washington.edu/epp/cee/wet.html

April 8 AZ
***Arizona v. California* & the Colorado River Basin (Brown Bag), Tucson.** WRRC, 350 N. Campbell Ave., 4:15-5:30pm. For info: WRRC, 520/ 621-9591, wrrc@cals.arizona.edu or http://cals.arizona.edu/azwater

April 8-9 TX
The Changing Face of Water Rights Seminar, Austin. Sheraton Hotel. Sponsored by State BAR of Texas. For info: Texas BAR, 800/ 204-2222 or www.texasbarcle.com

April 8-9 WA
Clean Water & Stormwater Seminar, Seattle. Hilton Hotel. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

April 9 CA
Energy Generation Using Anaerobic Treatment of Livestock Wastes Course, Davis. Da Vinci Bldg., 1632 Da Vinci Ct. For info: UC Davis Extension, 800/ 752-0881 or http://extension.ucdavis.edu

April 9 ID
Energy Independence: Challenges Facing the West in Adopting Alternative & Renewable Energy Resources Symposium, Boise. City Hall Bldg. For info: www.lawreview.uidaho.edu/advisory.html

April 11-14 GA
Emerging Issues Along Urban-Rural Interfaces Conference, Atlanta. For info: http://emergingissues.interfacesouth.org/

April 11-15 CO
Groundwater for a Thirsty World: 2010 Groundwater Summit & Ground Water Protection Council Spring Meeting, Denver. Westin Tabor Center. For info: www.gwpc.org

April 12-16 WA
Wetland Delineation Intensive Course, Seattle. Edmonds Conference Ctr. Sponsored by UW College of Engineering. For info: www.engr.washington.edu/epp/cee/wet.html

April 13-16 TX
Texas Water 2010 Conference, Corpus Christi. For info: TWinfo@tawwa.org, 512/251-9101 or www.texas-water.com/contactus.html

April 14 OR
Climate Change Policy Speech by Gov. Kulongoski, Eugene. UO Law School, Rm 175. For info: Abbie Stillie, Wayne Morse Center, astilie@uoregon.edu

April 14-15 WA
Global Marine Renewable Energy Conference (3rd Annual), Seattle. Bell Harbor Int'l Convention Ctr. For info: www.globalmarinerenewable.com/

April 15 CO
Introduction to Phytoremediation & Plant/Groundwater Interactions Course, Denver. For info: National Ground Water Ass'n, 800/ 551-7379 or www.ngwa.org

April 15 AZ
When Will the Reservoirs Run Dry: Looming Water Crisis in the SW (Brown Bag), Tucson. TBD, 4-5pm. For info: WRRC, 520/ 621-9591, wrrc@cals.arizona.edu or http://cals.arizona.edu/azwater

April 15 CA
Sustainable Water Resources Management in Site Design & Development Course, Sacramento. Sutter Square Galleria, For info: UC Davis, 800/ 752-0881 or http://extension.ucdavis.edu

April 15-16 DC
Energy & Climate Ministerial of the Americas, Washington. For info: DOE: www.energy.gov/news2009/8251.htm

April 15-16 CO
Guidelines for Groundwater Legal Consultation Course, Denver. For info: National Ground Water Ass'n, 800/ 551-7379 or www.nvwra.org/events

April 16 ID
The United States & Tribal Nations: An Evolving Relationship Guided by Domestic & Int'l Law Lecture, Moscow & Boise. ASUI-Kibbie Activity Center & UI_Boise Water Ctr. Guests: Larry Echo Hawk & Rebecca Tsosie. For info: Helen Albertson-Ploucha, hap@uidaho.edu or www.uidaho.edu/law

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Water Rights, Water Quality & Water Solutions in the West
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CALENDAR

(continued from previous page)

April 18-20 — **FL**

Waste to Fuels Conference & Trade Show, Jacksonville. For info: www.waste-to-fuels.org

April 20

Practicioner's Guide to Isotope Hydrology Course, Webinar. For info: National Ground Water Ass'n, 800/ 551-7379 or www.ngwa.org

April 20-21 — **WA**

Certified Erosion & Sediment Control Lead Training Course, Seattle. NWETC Headqtrs, 650 South Orcas Street. For info: NWETC, 206/ 762-1976 or www.nwetc.org/

April 21 — **WA**

GoGreen '10: Cultivating Sustainable Business Conference, Seattle. For info: http://seattle.gogreenconference.net

April 21-22 — **OR**

Future Energy Conference: Business of Renewable Energy & Efficiency in the NW, Portland. Oregon Convention Center. Presented by NW Environmental Business Council & NW Energy Efficiency Council. For info: www.futureenergyconference.com

April 22 — **CA**

Santa Ana River Watershed 2010: Working Together for a Sustainable Future Conference, Anaheim. Convened by Santa Ana Watershed Project Authority. For info: Jean Nordmann, 916/ 444-6240, jnordmann@watereducation.org or www.watereducation.org/conferences

April 22 — **WA**

CERCLA & MTCA Conference, Seattle. For info: Holly Duncan, Environmental Law Education Center, 503/ 282-5220, hduncan@elecenter.com or www.elecenter.com

April 23-25 — **BC, Canada**

7th Annual Fisheries & Marine Ecosystems Graduate Conference, Camp Howdy. For info: http://fameconference.org

April 24-25 — **OR**

Oregon AgFest, Salem. Oregon State Fairgrounds. For info: http://oragfest.com

April 25-29 — **CO**

Seventh National Monitoring Conference: Monitoring from the Summit to the Sea, Denver. Sponsored by National Water Quality Monitoring Council. For info: Conf. website: http://acwi.gov/monitoring/

April 26-27 — **France**

Global Water Summit 2010: Transforming the World of Water, Paris. Marriott Rive Gauche. For info: www.globalwaterintel.com/

April 26-28 — **NV**

Environmental Law: Protection of Native American Natural Resources Conference, Las Vegas. For info: Falmouth Institute: www.falmouthinstitute.com/

April 26-30 — **WA**

Contaminant Chemistry, Transport, Fate & Remediation in Soil & Groundwater Course, Seattle. EOS Alliance HQ, 650 Orcas Street. Split Day Courses Available. For info: NWETC, 206/ 762-1976 or www.nwetc.org/

April 27 — **MT**

Water Rights: What You Need to Know, Missoula. Sponsored by Montana Watercourse & DNRC. For info: Janet Bender-Keigley, 406/ 994-6671, jkeigley@montana.edu or www.mtwatercourse.org

April 28 — **AZ**

Brown Bag Speech - Benjamin Grumbles, ADEQ Director, Tucson. For info: Jane Cripps, WRRC, 520/ 621-9591 x55 or jcripps@cals.arizona.edu

April 28 — **WA**

Stream & Wetland Ecology Basic Training, Everett. NW Stream Center, Snohomish County's McColum Park. Sponsored by Adopt-A-Stream Foundation. For info: ASA, 425/ 316-8592 or aasf@streamkeeper.org

April 28-30 — **CO**

Managing Agricultural Landscapes for Environmental Quality II Conference, Denver. Renaissance Denver. Sponsored by Soil & Water Conservation Society. For info: www.swcs.org/

April 29 — **CA**

Sustainable Water Resources Management in Site Design & Development Course, Sacramento. Sutter Square Galleria, 2901 K Street. For info: UC Davis Extension, 800/ 752-0881 or http://extension.ucdavis.edu

April 29 — **Canada**

Engineering in a Climate of Change: Making the Lakes Great Conference, Toronto. MaRS Discovery Dist. For info: www.ospeclimatechange.ca/

April 29-30 — **DC**

Climate Change Regulation Seminar, Washington. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

April 29-30 — **WY**

Wyoming Water & Energy Development Law Seminar, Cheyenne. For info: CLE International, 800/ 873-7130 or website: www.cle.com

April 29-30 — **CO**

Due Diligence in Natural Resources Transactions, Westminster. Sponsored by Rocky Mt. Mineral Law Foundation. For info: www.rmmlf.org

May 3-4 — **AK**

Climate Change in Alaska Seminar, Anchorage. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com