

2010 Idaho Water Reuse Conference
Municipal and Industrial Solutions

**Responses to Questions About Water Reuse in Idaho:
The Water Rights Implications**

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Author's Note: The questions in bold below were provided by the conference organizers in consultation with municipal water providers, industries, and others interested in reuse of effluent from sewage treatment and similar facilities.¹

- 1. Can a city be made to continue to discharge to surface waters by down stream holders of water rights rather than reuse the water?**

Brief response: The issue has never been litigated in Idaho so we don't know for sure. However, if the city's underlying water right is for municipal purposes having neither a volume limit nor a limit on its place of use other than the city limits or service area (i.e., it has an expanding service area), I think the better argument is that the city cannot be forced to continue the discharge and should be entitled to reuse the water within the municipality.

Longer response: The effluent reuse issue raises interesting water law questions. However, I believe these questions will be answered consistently with the brief response above, at least for municipal providers with an expanding service area. This is because of the flexibility afforded to these providers, the guidance on land application of effluent by the Idaho Department of Water Resources ("Department"), Idaho law pertaining to recapture of waste water, and policy reasons. It is likely these issues will be litigated, at least in the absence of legislation or agency rules resolving them.

The legal tension pertaining to the reuse of effluent arises from these basic tenets of western water law:

- a. Others may assert that they have the right to a continuation of the return flows resulting from the current system of effluent discharge.

Generally, an appropriator is entitled to place water to beneficial use according to the terms of the water right he holds, and is not entitled to change the use under the right if doing so reduces return flows relied upon by other appropriators or otherwise causes material injury. In the context of a water right transfer (a/k/a/ change), the general rule is that other appropriators, including juniors, are entitled to

¹ These responses are not legal advice. Each situation comes with its own facts requires its own legal analysis. Conference participants with questions on this topic are encouraged to consult their respective legal counsel.

have conditions in the source maintained as they found them when they first made their appropriation.² An appropriator may not change a water right's place of use, point of diversion, nature (type), or period of use without obtaining state approval. Approval will be denied if the change would increase the right's overall impact on the water source or on the rights of others—that is, its full impact after taking into account all consumption, evaporation, seepage, and return flows attributable to the exercise of the right pre-transfer.

On the other hand, certain changes are permissible without either approval or the need to answer to other appropriators. For example, an irrigator is entitled to switch to a more consumptive crop so long as the right remains within its licensed or decreed place of use, or an industry can alter its manufacturing process at its place of use even though this entails a higher percentage of consumption of the water it diverts. But neither would be able to add a type of use not allowed under the right.

- b. An appropriator may recapture and use waste water, but only in narrow circumstances.

Idaho law allows an appropriator to recapture water that otherwise would run off as what is sometimes termed “waste water” and reuse it on the same place of use and for the same purpose, provided the water has not left the appropriator's control and there is no impermissible enlargement involved. For example, a farmer might collect tailwater running off the end of a field and pump it back to cover a portion of his farm that is water short, so long as this portion is within the licensed or decreed place of use for the irrigation water right from which the waste originated.

Similarly, Idaho Code § 42-228 authorizes irrigation water right holders to install wells “for the sole purpose of recovering ground water resulting from irrigation under such irrigation works for further use on . . . lands to which the established water rights . . . are appurtenant.” These common law and statutory recapture rules are essentially a policy call that the State has made in implementing the prior appropriation doctrine; it is consistent with the doctrine's principles of non-waste and maximum use of water.

Since this right of recapture is considered part of the original water right, it would be allowed under the priority date of the original diversion even if recapture took place many years later. Even though the recapture almost always will result in some additional consumptive use and thus will reduce return flows and change stream conditions to some extent, others who may have come to rely on the waste waters may not insist that the original appropriator maintain the artificial conditions from which they have benefited.

However, as indicated above, this right to recapture is limited, and does not override the rule against enlargement. In the 2005 case of *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*,³ the Idaho Supreme Court again made it clear that an appropriator is limited to using reclaimed water “on its original appropriated lots.”

² *Crockett v. Jones*, 47 Idaho 497, 277 P. 550 (1929); *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912). The “no injury” rule has been codified at Idaho Code §§ 42-222 and 42-108. Another way of putting this, as has been noted by the Colorado Supreme Court, is that when an appropriator exercises his right he consumes a certain percentage of the water diverted, and “any unconsumed waters remain ‘[w]aters of the state’” and are available to others. *Water Supply and Storage Co. v. Curtis*, 733 P. 2d 680, 683 (Colo. 1987).

³ *A&B Irrig. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 752, 118 P.3d 78, 84 (2005).

As the Ground Water Users and the State appropriately note, should A&B find itself in the unique situation of having more excess drain and/or waste water than it can reuse on its appropriated properties, Idaho water law requires the district to diminish its diversion. Reclamation Act of June 17, 1902, ch. 1093, § 8, 32 Stat. 388, 390.”⁴

This is consistent with other Idaho decisions.⁵ Thus, in Idaho an irrigator is free to recapture waste water—at least if he does so before it has left his property and become part of a drain or a natural water body—but cannot add acres to the place of use specified in his water right license or decree. Perhaps more importantly, as the quote above shows, if recapture (or presumably some other efficiency improvement) proves so effective that less water is required to accomplish the right’s beneficial use, the user may be required to reduce his or her diversion accordingly.⁶

Indeed Idaho’s Constitution establishes that private rights in the public’s unappropriated waters “shall never be denied,” but expressly states that these rights are for “beneficial uses” and that priority itself is recognized only among those actually “using” the water.⁷ There is no right to divert any water for no beneficial use. Of course, a city or other municipal provider really has little control over the amount of water entering its treatment plant, and generally would not be in a position to “reduce diversions.” Again, it would appear to have more flexibility than, say, an irrigator, in recapturing and reusing its effluent if necessary to meet water quality or other goals, or to reduce other diversions for municipal purposes.

These rules—no enlargements, no changes in stream conditions due to a transfer—could be seen as impediments to any proposed reuse of sewage effluent that previously was discharged into the river and supplied other appropriators. However, in the case of a city with an expanding service area, there is a strong argument that recapture and reuse would be permissible because it is occurring on the water right’s place of use (thus no expansion), and because no transfer is involved.

⁴ *A&B Irrigation Dist.*, 141 Idaho at 752, 118 P.3d at 84. The reference to the Reclamation Act presumably is intended to embrace Congress’ recognition that beneficial use of water is “the basis, the measure and the limit” of a water right. 43 U.S.C. § 383.

⁵ See, e.g., *United States v. Haga*, 276 F. 41 (D. Idaho 1921). The *Haga* court also suggested that the beneficial use of the recaptured waste or seepage must occur within the same lands for which the water originally was appropriated. The court referred to the beneficial uses on the “project” lands, which in that case included a federal irrigation project in the Boise River Basin.

⁶ The limited recapture authorization rule is essentially this: “Make full beneficial use of your water right according to its terms, even if this means using it more consumptively in your existing operation, but do not attempt to enlarge your water right by, for example, adding irrigated acres. If you wish to do that, then apply for a new water right. You may change elements of your water right so as long as you get state approval and do not increase its consumptive use or change conditions on the source to the detriment of existing users.” This is why conserving water—by, for example, replacing a leaky ditch with a pipeline—may serve both the public good and other water users but does not vest the appropriator with a right to use the “saved” water for a new use (such as irrigating new acres). In effect, the water supposedly saved already was spoken for somewhere else in the system. The fundamental rule embodied in the recapture situation, especially when put as starkly as did the Idaho Supreme Court in *A&B Irrigation District*, is understandably difficult for many appropriators to face: If I become more efficient and thereby reduce my diversion requirement, could I ultimately be reducing the amount of diversion allowed under my water right? The answer essentially is “yes.” The appropriator still has the ability to make the full beneficial use as originally licensed, and under certain circumstances could revert back to the less efficient diversion method. But actual beneficial use is right’s measure and limit.

⁷ Idaho Const. Art. XV, Sec. 3. In *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 154 P.3d 433, 447-48 (2007), the Idaho Supreme Court ruled that it is a “constitutional requirement that priority over water be extended only to those using the water.”

Due to their special responsibilities, cities and other municipal providers, have been found to have the right to develop the full amount of its municipal water right over time and within the city limits as these expand over time. This includes the right to increase its average rate of diversion as growth occurs, limited only by the rate limit specified in its license or decree. It is not an enlargement of a city's municipal right for a customer to add irrigation acreage to his city water use. Similarly, it should not be an enlargement to add irrigation by reuse of water originally diverted under the city's municipal water rights. Again, there have been no judicial rulings in Idaho on this point.

- c. Rulings from other states have not been sympathetic to the recapture of effluent by cities, at least where the effluent previously has been released to the stream or where the city proposes to sell it to third parties.

In *City of Walla Walla v. Blalock Irr. Dist. No. 3*, , Washington Superior Court for Walla Walla County, Case No. 54787 (September 27, 1971), the trial court enforced an earlier decree and adopted a stipulation of the parties, both to the effect that the City was required to continue discharging its treated sewage to the creek that provided supply to certain irrigation entities. The order provides no discussion of either the facts of the case or legal precedent in Washington, but is an indication that effluent discharges might not be subject to recapture in that state.

Another opinion along these lines is *City of San Marcos v. Texas Comm'n on Envtl. Quality*, No. 03-02-00724, 2004 WL 35541 (Tex. App. Jan. 8, 2004). There, a city interpreted its water right as including the right to reclaim its effluent by re-diverting an equivalent amount of water from the river, then treating and reusing it in the municipal system. The Texas appeals court disagreed, in significant part because the city would not literally recapture the effluent itself, but rather an equivalent volume of water from the river after the effluent had been diluted with native water to the point that it provided a more useful supply for the city. The court found that the city essentially was attempting to make a new appropriation of river water as part of a water treatment scheme that was not purely one of "recapture."

Yet another with similar facts is *Wyoming Hereford Ranch v. Hammond Packing Co.*, 236 P. 764, 772 (Wyo. 1925), in which the city contracted to sell its sewage effluent to a private entity which proposed to divert it from the stream into which the city discharged. Downstream irrigators objected, and the Wyoming Supreme Court agreed with them. Interestingly, the Wyoming court ruled that:

the waters that have become a part of the sewage may, because of the necessity of disposing of the sewage, require that such water . . . be consumed, or so diverted that it does not again become a part of the waters of the stream. But the sewage deposited in Crow creek is not consumed, and is not so diverted. . . . The city's right to the beneficial use of the water has been fully enjoyed, and the water has been returned to the stream where it is susceptible of further beneficial use by other appropriators.

Id. at 772. While at first glance this case appears to cut against a reuse argument, it tacitly supports it, so long as the city reuses it—and perhaps even fully consumes it—as a means of “disposing of the sewage.” Still an open question is whether a city may do so after a long period of discharges without recapture, or whether a utility serving as a municipal provider to the city may assert a recapture claim.

The rule in Colorado is that adding recapture and reuse to a water right can occur only if the water is “imported” or “foreign” water, in which case it can be reused to extinction. *See City of*

Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996). The imported water in *City of Thornton* was diverted across the continental divide and thus was never previously part of the receiving system. With respect to “native” or “tributary waters, we have held that the owner of a water right may not reuse or make successive uses of the return flow independent of the priority system.” *Water Supply and Storage Co. v. Curtis*, 733 P.2d 680, 682 (Colo. 1987), citing *Pulaski Irrig. Co. v. City of Trinidad*, 70 Colo. 565, 203 P. 681 (1922).” See also *City and County of Denver v. Fulton Irrigating Ditch Co.*, 179 Colo. 47, 506 P.2d 144 (1972). But if it is imported water, in Colorado it can be recaptured and reused to extinction.

d. The Idaho Department of Water Resources’ guidance on land application of effluent is helpful, but does not fully answer the questions.

In its 2009 Administrator’s Memorandum on water right transfers, IDWR briefly addresses the proposed land application of effluent for irrigation, as a means of water treatment, by an industry or commercial entity.⁸ This portion of the IDWR Transfer Memo contains only a summary description as to when the land application will require a transfer and when it will not. The gist of it is that filing for a transfer in the place of use under an industrial or commercial water right will not be required where the proposed irrigation will take place on land already having an appurtenant irrigation water right, but will be required where the land has no such right. The memorandum does not discuss whether different rules might apply in the case of a municipal provider with an expanding service area. Nonetheless, this policy arguably bolsters the argument that a municipality is entitled to reuse waste water for irrigation within its service area because a municipal use already includes irrigation.

But there is more on this subject in the IDWR Transfer Memo. The portion of the Memo addressing enlargement of use comes closer to addressing the proposed recapture of treated effluent from a municipal sewage treatment plant.

An application for transfer filed to provide for the disposal of wastewater, by land application on cultivated fields or other beneficial use disposing of the wastewater, resulting from use of water under non-irrigation uses such as a dairy or other confined animal feeding operation, or “municipal” or “industrial” water rights where the use of water is considered to be fully consumptive, is not considered an enlargement of the commercial, municipal, or industrial water right. While not an enlargement of the water right, such use of wastewater must not injure other water rights and must comply with best management practices. . . .

IDWR Transfer Memo at 29. This provision answers some questions and raises others. It is helpful to municipal providers that the Department considers a municipal water right to be “fully consumptive” for purposes of a transfer analysis, and therefore (presumably) immune from a charge of enlargement that might otherwise result from a particular reuse. However, this portion of the Memo implies that, before the sewage plant owner can dispose of effluent by using it, the owner first must apply for a transfer. If this is IDWR’s intent, it could significantly impede the implementation of municipal reuse programs. In addition, the Memo requires that the proposed new use “not injure other water rights.” With this proviso, the Department arguably has taken away with one hand what it has given with the other.

⁸ IDWR, Administrator’s Memorandum, Transfer Processing No. 24 (Jan. 21, 2009) (“IDWR Transfer Memo”) at 3 and 7.

However, a logical way to read the IDWR Transfer Memo is to conclude that, as a matter of policy, municipal water rights are presumed at the outset to be fully consumptive and therefore (and simply by definition), their transfer cannot injure other water rights—at least not with regard to interruption of return flows from the sewage plant.⁹ As to the implied requirement to file a transfer application, the better argument is to take the earlier provision in the Memorandum at its word: at least where the new use of wastewater is within the municipality's service area, no transfer application is required.

This is consistent with the Department's September 27, 1996 Application Processing Memorandum No. 61 ("Memorandum 61")¹⁰ which addressed reuse of effluent from industrial uses. Similar to the Department's approach to municipal water rights, a basic premise of Memorandum 61 is that "the consumptive use authorized by a water right for industrial purposes can be 100% of the amount diverted." The Memorandum 61 concluded that, for industrial water rights:

- (i) "waste water treatment necessary to meet adopted state water quality requirements will be considered to be a part of the use authorized under the industrial right";
- (ii) consumptive use "can increase up to the amount determined to be consistent with the original water right as reasonably necessary to meet treatment requirements";
- (iii) if the industrial user employs "land application on cultivated fields or any other method that beneficially uses the water, the industrial right must be changed to include the new use" and this "will require a transfer application";
- (iv) for "new uses of industrial waste water that are not necessary to meet water quality requirements," a new permit application would be required; and
- (v) fresh water "required to dilute the waste water for treatments such as land application must be diverted in accordance with a water right," which can be the industrial right "if adequate rate and volume are available" under it.

Thus, the Department's approach to industrial water rights is similar to its approach to municipal water rights: they are considered fully consumptive (even if they are not), and they are entitled to reuse

⁹ The IDWR Transfer Memo's conclusion that municipal water rights are fully consumptive, or that the reuse of effluent (particularly for irrigation) would be fully consumptive, must be taken as something of a legal fiction. The fact that the municipality's sewage treatment plant discharges to the river is itself proof that the municipal water right has not been fully consumed. Perhaps it would be more accurate to say that the Department considers municipal water rights entitled eventually to fully consume all the water they divert, even if the full consumption does not occur under a given municipal right until many years have passed and the right effectively has been fully used up in absorbing population and commercial growth.

¹⁰ Memorandum 61 was accompanied by a legal analysis by the Department's former senior counsel, Phil Rassier, in which he concluded that, among courts in the West, "the majority view is that the proper disposal of effluent from waste treatment facilities comes within the parameters of the beneficial use of a municipal water right." *Memorandum to Norm Young from Phil Rassier Re: Land Application Industrial Effluent* (September 5, 1996), citing, in part, *Arizona Public Service Co. v. Long*, 160 Ariz. 429, 773 P.2d 988 (1989), discussed below. Memorandum 61 remains in effect except as superseded by the IDWR Transfer Memo.

effluent at least as part of required waste water treatment. The water right holder will be required to employ a transfer only if the new use for water treatment (say, irrigation) is not already within the nature of use of the holder's water right.

An additional argument an Idaho municipal provider might make is that its surface-discharged effluent should be treated as "imported" to the extent it originated in deep aquifers that may have limited (or even no) connection to the stream reaches relevant to senior diversions. This would require hydrogeological analysis, but is a plausible theory to bring a given Idaho ground water diversion the same type of protection, and the right to reuse to extinction, as recognized in the context of trans-basin imports into Colorado's Front Range. *See, e.g., City and County of Denver v. Fulton Irrigating Ditch Co.*, 179 Colo. 47, 506 P.2d 144 (1972).

- e. Third parties are free to appropriate waste water, but have no recourse if the waste stream is changed or cut off by the original appropriator's lawful actions.

Idaho law authorizes a person to make an appropriation of what often is called waste water, and many water rights have been established on drainage ditches and similar waterways. Such a right of course will carry the priority date of its establishment, and will be administered as necessary alongside all other water rights in the system.

Even the person who constructs a drain cannot simply claim the water in it, and (with the exception of the recapture entitlement discussed above) would need to obtain a water right to divert from it. These legal principles pertaining to waste water have been followed in the Snake River Basin Adjudication ("SRBA").¹¹ For example, in *Janicek Properties, LLC*,¹² the Bureau of Reclamation and its contracting irrigation district argued that they constructed a drain and could trace most or even all of the water in it to seepage and return flows from the district's irrigated lands. They contended that the drain was not a natural watercourse and that they should be deemed the owner of the drain and the water in it. They asked the adjudication court to invalidate a farmer's 1951-priority licensed water right pursuant to which he pumped water from the drain to irrigate his crops. The Special Master rejected this challenge to the farmer's drain water right, ruling that, regardless of who constructs a drain, the water in it is "public water of the state of Idaho and subject to appropriation and beneficial use."¹³ The court found that whether the drain is a natural watercourse "is immaterial—what matters is that the water is water of the state" and is subject to appropriation.¹⁴

While appropriations of waste water are allowed, an important caveat is that the waste water appropriator has no guarantee that the waste water will continue to be available.¹⁵ For instance, the

¹¹ *See, e.g., Special Master's Report, In re SRBA*, Case No. 39576, Subcases 75-4471 and 75-10475 (Silver Creek Ranch Trust) at 4 and 6-7 (September 28, 2009).

¹² *In re: Janicek Properties, LLC, Memorandum Decision and Order on Motion for Summary Judgment, In re SRBA*, District Court of the Fifth Jud. Dist. Of the State of Idaho, Subcase No. 63-27475 (May 2, 2008).

¹³ *In re: Janicek Properties, LLC, Memorandum Decision and Order on Motion for Summary Judgment, In re SRBA*, District Court of the Fifth Jud. Dist. Of the State of Idaho, Subcase No. 63-27475 (May 2, 2008), Slip Op. at 6.

¹⁴ *Id.* at 8.

¹⁵ An irrigator "is not bound to maintain conditions giving rise to the waste of water from any particular part of its system for the benefit of individuals who may have been making use of the waste." Thus, the original appropriator is free to abandon or modify the activity producing the waste. Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 100 (1968); *Sebern v.*

original appropriator who generates the waste water could cease diverting altogether so as to leave the new appropriator without a water source. Likewise, the original appropriator might alter his or her operation to reduce the amount of waste water generated (e.g., by ditch lining). Finally, (as noted) the original appropriator may recapture the waste before it leaves his or her control for use on existing lands.

In *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*,¹⁶ the Idaho Supreme Court unanimously reaffirmed the principle that a third-party appropriator of waste water may not compel the original diverter to continue the practices leading to the generation of the waste water. The court emphasized that it makes no difference whether the waste water arises before the use (from a leaky canal) or after the use (from post-irrigation tail water). The original appropriator may at any time cease the practice giving rise to the waste water, even to the detriment of those who hold valid water rights in that waste water—subject, of course, to the limitations as to non-enlargement and beneficial use as described in *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*¹⁷

Interestingly, the Arizona Supreme Court has interpreted the waste water recapture principle in that state to allow the original appropriator—at least if it is a municipality and the waste water is treated sewage—to recapture the water and fully use it or dispose of it, even by sale to third parties. *Arizona Public Service Co. v. Long*, 160 Ariz. 429, 773 P.2d 988 (1989). The Arizona court rejected the objections of downstream water users and recited the familiar rule that they are not entitled to have the waste continue. However, the court did not go the next step and inquire whether the new use of the waste would be an enlargement of the water right. As it stands, *Arizona Public Service* is helpful, if non-binding, precedent for a municipality desiring to reuse effluent in Idaho.

f. Policy and practical considerations.

Many cities are being required by environmental laws to reduce or eliminate their discharges of effluent into public waters. Both the EPA and IDEQ have guidelines addressing the land application of effluent or the reclamation and reuse of municipal and industrial waste water.¹⁸ The technology is there to allow significant reductions in pollutants, such as nutrients. Prohibiting the reuse of waste water would make it more difficult for them to meet these environmental mandates. Furthermore, a city's ability to reuse treated water will reduce its reliance on its primary supply by an equivalent amount. Many municipal providers, both private entities and municipalities, are seeking to reuse water to squeeze maximum use from the same initial diversion, especially as supplies become scarcer and growth continues. Cities and other municipal providers are obligated to serve all residents, so the reuse of effluent will not entail an additional draw on the resource that would not be there otherwise. As a policy matter, municipal providers have strong arguments in favor of the reuse concept.

Moore, 44 Idaho 410, 258 P. 176 (1927)(an appropriation of waste water is “subject to the right of the owner [that is, the person generating the waste water] to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use.”).

¹⁶ *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980).

¹⁷ 141 Idaho 746, 752, 118 P.3d 78, 84 (2005).

¹⁸ U.S. Environmental Protection Agency, *Guidelines for Water Reuse*, document no. EPA/625/R-04/108 (September 2004); Idaho Department of Environmental Quality, *Guidance for Reclamation and Reuse of Municipal and Industrial Wastewater* (September 2007).

As noted above, there may be cases where a municipal provider can plausibly assert that the ground water it delivers to customers and which ultimately shows up in the sewage treatment plant is to a large extent “imported” because, without the provider’s pumping, its point of contact with the surface waters occurred far downstream from the points where other appropriators could benefit. While this is dependent upon the facts of the case, it is a plausible argument.

2. **How do owners of wastewater treatment plants secure water rights to the final product water when many times the source of the water is from multiple entities (private wells, public wells, surface water, and industry)?**

Brief response: This should not change the analysis set forth above.

Longer response: This question, like most of the questions in the area of reuse, currently has no definitive answer. It is possible that the source of the effluent—or the fact that it is comprised of water originating from both municipal and non-municipal sources—may raise additional questions. However, it is unlikely that this fact would dictate a result different from that reached in the situation where the owner of the wastewater treatment plant is the same municipal entity that supplies drinking water.

It seems obvious that any centralized sewage system, regardless of its ownership, will carry waste water originating from more sources than simply the owner’s own wells or other municipal water supply. There are bound to be domestic and commercial well diversions in the mix, as well as infiltration from irrigation returns, storm drains, and other sources. Attempting to account for these other sources would appear impractical and pointless. Accordingly, the better argument is that the “mixed input” issue should not be a consideration in the reuse debate. If it is an issue, then the reuse available for recapture presumably could be readily calculated based on the metered deliveries the municipal provider makes to customers.

3. **Are there legal mechanisms available that would allow a municipality to reuse water on privately owned land outside its corporate boundary without annexation? What if the land is located in another municipal provider’s territory? Can the planning area be expanded to add land for water reuse? Does land within the municipal service area have to be contiguous with land within the corporate boundary, or can it be a noncontiguous, separate parcel that is serviced with irrigation by a pipeline? What is the definition of a municipal “planning area” in context of the “place of use” defined in a municipal water right?**

Brief Response: A municipality is free to contract to supply water outside its boundaries, but presumably would be required to secure an approved transfer of place of use from the Department. This also would be the case if the land were in another municipality’s service territory. The planning area can be expanded by annexation or by including it in the city’s area of impact. Annexed areas must be contiguous.

When a water right or a portion thereof to be changed is held by a municipal provider for reasonably anticipated future needs as defined in the 1996 Municipal Water Rights Act, it shall not be changed to a place of use outside the service area. See Idaho Code § 42-202B.

Non-contiguous areas can be served by a municipal provider, so long as they are within their permitted service area. There is no definition of “planning area” in the water code; only a definition of “service area.” Idaho Code § 42-202B(9).

4. **Would the Hayden Area Regional Sewer Board and the Eastern Idaho Regional Wastewater Authority qualify as “municipal providers” as defined by Idaho Statute 42-202B? If not, what would be necessary so they would qualify?**

Brief Response: According to a recent Department ruling, in *M3 Eagle*, neither of these entities would qualify as a “municipal provider” under Idaho Code § 42-202B(5) unless it currently provides water for municipal purposes, or holds a franchise to do so. To qualify, they would need to begin serving customers through a public water supply system. The *M3 Eagle* decision is on appeal.

5. **Can a city transfer part of its right to use water to extinction to a third party for a beneficial use? What are the requirements for a city to transfer a water right to a third party? (maybe this is the same question asked differently)**

Brief Response: This assumes a city has a right to use water to extinction, which is perhaps implied by the IDWR Transfer Memo, but is not necessarily a given. Again, the question has not been litigated or squarely addressed by the Legislature or the Department. Assuming a city in Idaho does have such a right, and the water right carrying this entitlement is not a “future needs” water right obtained under the 1996 Municipal Water Rights Act, the city would be free to convey it to any other party, which then could seek to transfer it to a use elsewhere. But the water right at the new place of use almost certainly would be restricted to the consumptive use volume that the city previously experienced under the right. If the water right is a “future needs” right obtained pursuant to the 1996 Act, then the city is not entitled to convey it to a third party for uses elsewhere.

Another element to consider in the “use to extinction” concept is this: municipal providers in Idaho have not had a volume limit imposed on their water rights, but this does not necessarily translate into using water to extinction because there almost always are return flows from municipal uses. Another way of thinking about the no volume limit benefit is that municipal providers will be able to increase their average diversion over time, eventually diverting under a particular right fulltime at its licensed or decreed peak. But such a diversion still would not necessarily entail full consumption.

6. **With regards to IDWR Policy Memo No. 24 and reuse of industrial water, when are transfers required and when are they not required?**

Brief Response: This question about the IDWR Transfer Memo is discussed above.

7. **If a parcel has historically received surface water for irrigation and reuse becomes available, can the land owner just decline to take the surface water (Part 1) and then can the irrigation district use that surface water elsewhere (Part 2)? If the irrigation delivery entity accepts reuse water for delivery to their patrons, can they expand their place of use to irrigate additional acres (Part 2a)?**

Brief Response 1: The likely answer is “yes,” although there is no clear authority on this issue. This situation implicates the recent statute requiring the use of surface water for irrigation if it is reasonably available. Idaho Code § 67-6537. If the parcel is within an irrigation district or canal company and was served by the entity’s irrigation water, the irrigation entity may oppose the landowner’s proposed switch to reuse water (although the entity’s basis for doing so is not clear). In any event, and unless the parcel is excluded from the district or its owner is allowed to transfer its shares, the entity presumably will seek to continue to impose assessments or taxes as if the parcel did receive the entity’s water.

Brief Response 2: The answer is “yes,” the irrigation district can make beneficial use of the water elsewhere in its service area (i.e, its decreed place of use) according to the terms of its water right.

Brief Response 2a: The likely answer is “yes” if the district annexes the additional land or enters into a lease or other contract arrangement whereby it is entitled to serve the area without violating its obligations to its existing patrons.

8. **Alternatively or in combination with the above, could the irrigation entity and the city enter into agreements whereby the irrigation entity diverts less as a mitigation measure so that the municipality can divert more? Using a city on the Big Wood River as an example where the city has traditionally discharged to the Big Wood but needs to now cease discharge due to increased regulatory standards, what are the water right ramifications? Was the return flow quantity accounted for against the city’s diversions, thereby reducing the city’s mitigation requirements for diverting under junior priority water rights? If return flows were not accounted for as a balance to diversions, can the city now irrigate new lands with reuse water without increasing their mitigation requirements for diverting under junior rights? If return flows are accounted for in balance, would the city need to reuse on lands previously irrigated with existing rights. What options are there for the water right no longer used because of reuse supplies?**

Brief Response: A city and an irrigation entity (irrigation district or canal company) would be able, within the bounds of their respective statutory authorities, to enter into such agreements. Of course, the agreement to provide such mitigation would need to be backed up by an approved transfer, exchange, approved mitigation plan or similar authorization by the Department.

The other questions have been addressed elsewhere in this paper.

9. **Previous discussions have described that IDWR views municipal wastewater can be used to extinction. Has this ever been challenged in Idaho? i.e. a historic wastewater discharger discontinues discharge resulting in that water not being available to downstream users that may have water rights historically augmented by the wastewater flow.**

Brief Response: No, it has not been challenged or tested. As indicated above, the premise that a municipal water right can be used to extinction—which necessarily assumes reuse and even multiple episodes of reuse—is implied in the IDWR Transfer Memo but has not been addressed by an Idaho court.

It seems clear that a City or other municipal provider can apply for a new water right and announce that the intent is to use and reuse it to extinction. This simply establishes at the outset, as a matter of water right permitting, that the right is to be processed as one that will entail full consumption.

As noted, the law of using water to extinction has had perhaps the greatest judicial scrutiny in Colorado. In that state, the future needs, or growing communities, concept is well accepted in terms of cities “growing into” their water right portfolios; a municipal provider can hold water rights for extended periods (in Colorado the undeveloped portion is known as a “conditional right”). However, in Colorado the entitlement to recapture waste water and reuse it, perhaps even to extinction, is limited to those situations where the appropriator is using imported water—that is, water foreign to the basin in

which it is being used. Colorado's geography presents a particularly clear distinction between foreign and "native" water because it straddles the continental divide and substantial amounts of water are piped from the Colorado River Basin to the Platte, Arkansas, and other Mississippi River tributaries to the east. The appropriators in these tributaries never had a claim on the Colorado Basin water, and the courts have allowed the parties bringing it through the mountains to use it completely, without providing return flows to the east-slope users.

Presumably, an applicant for a new municipal water right is free, at the outset, to apply for the right to use and reuse the water involved. In that case, the "use to extinction" entitlement would be a part of the right from the beginning, and other water users would be on notice of it at the application stage. There would appear to be no problem with applying for a water right with such an entitlement. The more difficult issue, which really is at the heart of all of these questions, is how to treat a proposal to begin reusing effluent after it has been flowing downstream to other users for many years.

10. **Can an Idaho city auction its effluent water rights, similar to the Prescott deal?**
<http://ag.arizona.edu/azwater/awr/1ea7fee9-c0a8-0164-00b5-79279d479a00.html>

Brief Response: Maybe. Assuming a municipal provider in Idaho can recapture and reuse effluent, there would appear to be no policy reason to prevent the marketing of this water. Indeed, the myriad barriers to free-market transactions in water rights are difficult to justify in the increasingly water-short West; the Prescott example shows how necessity may remove these artificial barriers.

An important feature of the Prescott auction is that the effluent must be used within the city where it was generated. Such a condition might protect such a sale, if attempted in Idaho with respect to a "reasonably anticipated future needs" water right (of which there currently are few), from being invalidated by the provision in the 1996 Municipal Water Rights Act prohibiting municipal providers holding such water rights from transferring them to a use outside their service area. Also, it might protect a non-RAFN municipal water right because reuse within the service area may be seen as permissible in Idaho, as noted above.

As with most other questions in this area, there is no definitive answer. Municipalities and other municipal water providers, sewer districts, and developers are simply going to have to begin proposing these innovative measures and we'll see what happens. In the end, necessity will move water to the marketplace.