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**RECAPTURE, REUSE, AND APPROPRIATION  
OF WASTE WATER**

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**TABLE OF CONTENTS**

I. RECAPTURE, REUSE, AND APPROPRIATION OF WASTE WATER .....1

    A. Overview.....1

    B. Recapture of irrigation waste water by the original diverter for use  
        on the original place of use .....1

    C. Reuse of municipal effluent. ....5

    D. Land application of municipal or industrial wastewater.....10

        1. DEQ permit.....10

        2. Background.....10

        3. Required land treatment.....11

        4. Optional land treatment.....12

        5. Mixing water.....13

        6. Land application where land has existing water right .....13

        7. Where industrial user relies on municipal water.....13

        8. Land application of municipal effluent by cities .....14

            a. Land application pursuant to water rights.....14

            b. Water right not required where undertaken to  
                comply with environmental requirements .....15

    E. Appropriation of waste water by a third party .....17

## I. RECAPTURE, REUSE, AND APPROPRIATION OF WASTE WATER

### A. Overview

Few water uses consume one hundred percent of the water they divert. For example, a surface water irrigator typically diverts considerably more water than is applied to the crops. What is left over goes by various names such as waste water, return flow, and tail water, whose definitions overlap.

We use the terms “waste water”<sup>1</sup> and “return flow” interchangeably to describe, collectively, tail water accruing at the end of an irrigated field, the seepage water that leaks out of canals or reservoirs, the excess water applied to crops that percolates into the soil, and effluent or sewage generated or collected by an industrial user, a municipality, or a sewer district.<sup>2</sup>

This section explores the rights of the original appropriator to recapture his or her own waste water and the rights of third parties to obtain an appropriation of waste water released by another. This section also addresses the rights of municipal entities and industrial users to retain and use effluent (aka “wastewater”) from their municipal treatment facilities or industrial operations.

### B. Recapture of irrigation waste water by the original diverter for use on the original place of use

One principle governing waste water is that an irrigator “is not bound to maintain conditions giving rise to the waste of water from any particular part of its system for the benefit of individuals who may have been making use of the waste.” Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 100 (1968). Thus, the original appropriator is free to abandon or modify the activity producing the waste water. Perhaps the most common scenarios are the conversion from flood irrigation to sprinklers or the replacement of a leaky ditch with a pipeline. After the improvement is made, less water is applied to the field and/or less water escapes along the conveyance. As a result, the neighboring hydrology may be affected and water available to serve other water rights could be reduced. Holders of those rights, however, have no legal basis to object to such efficiency improvements by their neighbors.

This right to increase efficiency includes the appropriator’s right to recapture waste water before he or she has relinquished control by allowing the waste water to reach a natural stream or aquifer. “It is settled law that seepage and waste water belong

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<sup>1</sup> Note that wastewater—typically written without a space—refers to effluent from industries or municipal treatment plants. In the irrigation context, waste water has a somewhat different meaning (any water left over after the initial irrigation), and is typically (but not consistently) written as two words.

<sup>2</sup> In *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P.3d 78 (2005) (emphasis omitted), the Idaho Supreme Court (quoting the SRBA Court) defined waste water as: “(1) water purposely discharged from the project works because of operation of necessities, (2) water leading from ditches and other works, and (3) excess water flowing from irrigated lands, either on the surface or seeping under it.”

to the original appropriator and, in the absence of abandonment or forfeiture, may be reclaimed by such appropriator as long as he is willing to put it to beneficial use.” *Reynolds Irrigation Dist. v. Sproat*, 70 Idaho 217, 222, 214 P.2d 880 (1950).<sup>3</sup> For example, a farmer may capture tail water running off the low end of a field and pump it back to a portion of the field that, due to topography or other factors, was chronically under-irrigated. This recapture may even occur years after the original diversion is initiated. Since the right of recapture is considered part of the original water right, it would be allowed under the priority date of the original diversion—provided the recaptured waste water is put to beneficial use on the original parcel (for example to water an area that previously was under-irrigated). Others who may have come to rely on the waste water may not insist that the original appropriator maintain the artificial conditions from which they have benefited. However, it perhaps conveys the wrong message to conclude that all seepage and waste water literally “belong” to the original appropriator.

The right to recapture waste water does not override other principles of water law, the most important of which likely is the rule against enlargement of a water right. In *United States v. Haga*, 276 F. 41 (Dist. Idaho 1921), the District Court suggested that the beneficial use of the conserved waste or seepage must occur within the same lands for which the water originally was appropriated.<sup>4</sup> This limitation—that recaptured waste or seepage water may be used only on the original lands—reinforces Idaho’s anti-enlargement policy. Allowing a water user to make more complete use of water under his or her water right within the licensed or decreed place of use, and for the licensed or decreed purpose, promotes efficiency and the full beneficial use of water under the right; doing so logically has been seen by Idaho courts as fully within the original right. Obviously, however, the limitation to the original land and purpose of use sharply constrains the right to recapture and reuse. Notably, the farmer is not free to use that recaptured water to bring new lands under cultivation.

This rule against enlargement was articulated again by the Idaho Supreme Court in *Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (Basin-Wide Issue No. 4). It was reinforced a few years later in *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water District*, a 2005 opinion where the Court ruled that “A&B may use the [reclaimed waste] water on its original appropriated lots.” *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 752, 118 P.3d 78, 84 (June 21, 2005). The *A&B* Court not

<sup>3</sup> See also *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980); *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927) (third parties may appropriate waste water, subject to the original appropriator’s right, in good faith, to cease wasting it and put it to a beneficial use); and *In re Boyer*, 73 Idaho 152, 248 P.2d 540 (1952). None of these cases addresses the question whether one may reduce waste, then transfer the surplus to some new use. Later opinions make clear that an appropriator may not do this. See, e.g., *Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (Basin-Wide Issue No. 4).

<sup>4</sup> The court referred only to the beneficial uses on the “project” lands, which in that case included a federal irrigation project in the Boise River Basin.

only emphasized this point, but went beyond it to state that an excess of waste water obligates the appropriator to diminish its diversion to reduce the waste:

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

*A&B*, 141 Idaho at 752, 118 P.3d at 84.<sup>5</sup>

Thus, if recapture and onsite re-use proves so effective that less water is required to accomplish the licensed or decreed beneficial use, the user may be required to reduce his or her diversion accordingly. This may mean that the right itself is reduced, either immediately or at some time in the future—such as when it is evaluated in a transfer, for example. On the other hand, depending on the circumstances, the user may retain the right to cease the recapture and revert to the prior regime.

But there is more to say about the ruling in *A&B*, and it further reinforces the point that seepage cannot be used for enlargements, such as irrigation of new lands. The central dispute in the case concerned 2,363 acres the irrigation district was irrigating but which were in excess of the water right's licensed acreage. The district explained that the acres were irrigated with waste water originating from both the district's ground water delivery system and natural runoff, and argued that it should be allowed to do this because it "owned" the waste water. The plaintiffs, who were junior ground water users, asserted that these additional acres were illegal enlargements and that a water right to irrigate them could be recognized, if at all, only under Idaho's amnesty statute, Idaho Code § 42-1426, in which case the right would have to take a subordinated priority tied to the 1994 date the statute was passed. This had been the essential ruling in *Fremont-Madison*. Indeed, the amnesty statute itself explains the Legislature's recognition that enlargements arose "through water conservation and other means" that allow more acres to be irrigated with the same diversion. Reducing or recapturing waste water is a classic example of water conservation.

The *A&B* court took an exacting approach in its discussion of recaptured drain or seepage water which again emphasizes that this water cannot serve new lands without a new water right. The irrigation district had contended that the "source" of water to irrigate the extra acres is waste water, and not ground water under the district's original water right (even though the waste water originated primarily from the ground water supply). Although the Idaho Supreme Court ultimately rejected this and agreed with the district court that the source was the district's original ground water source, it did entertain the question of what would happen had it viewed the source as simply "waste

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<sup>5</sup> 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.

water” not originating from the district’s licensed diversion. It found the result in that case would be that:

A&B’s additional 2,363.1 acres neither qualifies as an enlargement or for amnesty under I.C. § 42-1426 based upon a finding that the water source is recaptured drain and/or waste water. A&B is not seeking to expand the number of acres it irrigates with original ground water under right no. 36-02080. Rather, it relies on an unappropriated source, that of recaptured drain and/or waste water to irrigate its additional acres. This is in violation of the mandatory water permit requirements. Idaho Code § 42-229 (2003). Treating the water as something other than ground water, A&B must seek a new water right for this water source prior to any further use on the 2,363.1 acres.

*A&B*, 141 Idaho at 751-52, 118 P.3d at 83-84.

In a footnote, the Court held that “appropriation under the mandatory permit scheme is the only method by which this water can now be put to beneficial use.” *A&B*, 141 Idaho at 752 n.1, 118 P.3d at 84 n.1. Ultimately, the Court found that the district’s source was water diverted under its original ground water right (although recaptured on the surface as seepage or waste), and that the district therefore did qualify for the amnesty. Accordingly, the district was able to continue irrigating the enlarged acres, but was required to accept the subordination condition on the new water right for them.

Provisions of Idaho’s water code other than the amnesty provision discussed above also are consistent with the non-enlargement principle when it comes to an appropriator’s collection and use of waste water arising from his irrigation practices. An Idaho statute authorizes the construction of wells by a person owning irrigation works “for the sole purpose of recovering ground water resulting from irrigation under such irrigation works for further use . . . on lands to which the established water rights of the parties constructing the wells are appurtenant.” Idaho Code § 42-228.<sup>6</sup> In other words, this statutory pronouncement on the recapture of waste or seepage water expressly restricts the use of the recaptured water to the original place of use—that is, enlargements are not allowed. Likewise, Idaho’s transfer statute expressly prohibits enlargements as a result of any transfer. Idaho Code § 42-222(1).

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<sup>6</sup>This statute allows shallow ground water wells to recapture seepage originating from the surface irrigation of a parcel, roughly equivalent to a seepage ditch at the end of a field from which the farmer pumps water back to fully irrigate the parcel.

In summary, although the cases authorizing an appropriator's recapture and re-use of waste water<sup>7</sup> did not expressly address the enlargement issue, it now has been addressed, and in clear terms. If additional lands or other uses are to be added to a water right through the recapture of waste water, a new water right will be necessary.

### C. Reuse of municipal effluent.

The same basic principles of recapture and reuse apply in the context of municipal wastewater. Thus, a city may recapture and reuse effluent from its sewage treatment plant before it is released to a public water body. Likewise, farmers or others who had come to rely on the prior discharge of that wastewater cannot complain when the city recaptures and reuses it.

But there are differences when it comes to municipal wastewater. Under Idaho law, municipal water rights are different from others in two important respects. First, they do not have a fixed place of use. Instead, a municipal service area grows over time as does demand. Idaho Code § 42-202B(9). This moots the constraint applicable to irrigators and industrial users limiting the re-use to the original place of use (at least, without a transfer).

In addition, municipal use encompasses a broad range of uses from low consumptive domestic uses to high consumptive uses by industries served by the municipal provider. This mix may change over time. Accordingly, the Department deems municipal water rights to be potentially 100 percent consumptive. As a result, cities may recapture wastewater and reuse it for other municipal uses (such as watering parks, golf courses, or lawns) and such use is not deemed to be an enlargement. "This rule [limiting reuse to the original irrigated land] was changed for municipalities, without an adjustment period for those who had relied on the return flow, when the courts allowed municipalities to start consuming their sewage effluent through disposal methods that no longer sent it back to the stream as return flow." Robert E. Beck, *Municipal Water Priorities/Preferences in Times of Scarcity: The Impact of Urban Demand on Natural Resource Industries*, 56 Rocky Mtn. Min. L. Inst. § 7.02[4] (2010).

Although the non-enlargement principle is articulated by Mr. Beck in the context of re-use within the city for traditional municipal uses, presumably the same would be true for reuse in the form of land application.

While Idaho courts have not yet had occasion to address the issue, other state courts have consistently upheld the right of municipal providers to recapture and reuse municipal effluent and even, in some cases, to sell it to others.<sup>8</sup> The only limitation

<sup>7</sup> E.g., *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927); *In re Boyer*, 73 Idaho 152, 248 P.2d 540 (1952); *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980).

<sup>8</sup> In addition, at least five states have adopted statutes regulating, facilitating, and encouraging the reuse of municipal effluent. Or. Rev. Stat. §§ 537.131, 537.132, 540.510; Cal. Water Code §§ 13551-13556; Nev. Rev. Stat. Ann. § 533.024; Wash. Rev. Code §§ 90.44.062 to 140; Utah Code Ann. §§ 73-3c-1 to 73-3c-8.

seems to be that the recapture occur before the water reaches a public water body.<sup>9</sup> These principles have been confirmed in informal guidance from the Idaho Department of Water Resources.<sup>10</sup>

A city's right to recapture and reuse municipal effluent was recognized in *Reynolds v. City of Roswell*, 654 P.2d 537 (N.M. 1982). This case dealt with a water system on the former Walker Air Force Base, all of which had been acquired by the City. The City filed an application to add additional points of diversion and change the place of use, the effect of which would be to integrate the original air force water right into the City's municipal system. Prior to the application, the City (and the air force before that) sold some of the sewage effluent associated with the air base to farmers and to a golf course and discharged the rest into the Hondo River. The State Engineer approved the change application but added a condition requiring the City to continue to discharge into the river at the same ratio as under prior practice. "The State Engineer's conditions required that the City either continue selling treated effluent to the farmers east of the City and to the Roswell Country Club or to continue discharging treated effluent directly into the Hondo River." *City of Roswell*, 654 P.2d at 538. The City challenged the condition, contending that it should be allowed to recapture and reuse the effluent in its municipal system if and when it saw fit. The New Mexico Supreme Court sided with the City. It affirmed the district court's ruling that "[t]he City of Roswell's sewage effluent

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<sup>9</sup> Perhaps a city could engage in an aquifer storage and recovery project employing treated effluent. Doing so would require affirmative steps to measure and control the stored water, as well as the acquisition of corresponding water rights and/or approval of a mitigation plan.

<sup>10</sup> "You confirmed my understanding that a city may recapture and reuse its municipal effluent and apply it to other municipal uses within its growing service area, and that doing so does not cause legal injury to other water uses. You also confirmed that, if required to meet environmental regulations, treatment utilizing an infiltration basin would be viewed as being within the existing municipal use. You also confirmed that the uses could be modified over time. For example, as conditions change and demand grows, the City could put less water into treatment of effluent by infiltration and use some or all of the effluent to serve new customers (e.g., for lawn or open space irrigation). Finally, you confirmed that these uses would not require a transfer—assuming that the reuse of the effluent was required in order to satisfy environmental requirements." Letter from Christopher H. Meyer to Garrick L. Baxter and Jeff Peppersack (May 24, 2011) and response from Garrick L. Baxter (May 26, 2011) (edits from reply are reflected in quotation).

"This responds to your letter of August 18, 2011 requesting confirmation that the City of McCall ("City") has authority to land apply its municipal effluent to lands located beyond the city limits but within the City's service area. I have reviewed your letter with the staff of the Idaho Department of Water Resources ("IDWR") and am able to confirm that on the issue of whether municipal reuse of waste water comes within the original use of the municipal right, your analysis is consistent with current IDWR policy. Waste water treatment necessary to meet adopted state water quality requirements is considered by IDWR as part of the use authorized under a municipal right so long as the treatment process complies with the best management practices required by the Idaho Department of Environmental Quality, the U.S. Environmental Protection Agency, or other state or federal agency having regulatory jurisdiction. For new uses of municipal wastewater that are not necessary to meet water quality requirements, an application for permit to appropriate water should be filed as required by Idaho Code § 42-202." Letter from Garrick L. Baxter to Christopher H. Meyer (Sept. 7, 2011). The September 7, 2011 letter went on to say that, under the 1996 Municipal Water Rights Act, the land application could occur outside the boundaries of the city so long as "the constructed water delivery system for the area outside the city limits shares a common water distribution system with lands located within the corporate limits." The city limits issue, however, is mooted by S.B. 608 (Idaho Code § 42-201(8)) enacted in 2012.

is private water which the City may use or dispose of as it wishes.” *City of Roswell*, 654 P.2d at 538.

The Court limited its ruling, however, noting that the recapture must occur before the City loses control of the effluent:

The City readily acknowledges, and we agree, that once the effluent actually reaches a water course or underground reservoir [i.e., an aquifer], the City has lost control over the water and cannot recapture it. That is what the courts state in the cases relied upon by the State Engineer. See *Brantley v. Carlsbad Irr. Dist.*, 92 N.M. 280, 587 P.2d 427 (1978); *Kelley v. Carlsbad Irrigation District*, 76 N.M. 466, 415 P.2d 849 (1966); *State v. King*, 63 N.M. 425, 321 P.2d 200 (1958); *Rio Grande Reservoir and Ditch Co. v. Wagon Wheel Gap Improvement Co.*, 68 Colo. 437, 191 P. 129 (1920).

We stress that the specific legal issues on appeal in this case do not concern the recapture of water which has escaped into and have become commingled with the natural public waters, whether surface or underground. The issue here is whether Roswell may take the sewage effluent before it is discharged as waste or drainage water and reuse it for municipal purposes.

*Reynolds*, 654 P.2d at 540-41.

In reaching its decision, the *Reynolds* Court quoted at length from a 1925 decision by the Wyoming Supreme Court directly addressing the right of a city to reuse its wastewater to extinction:

It is not strange that we are unable to find any cases considering the right of a city to dispose of its unpurified sewage for irrigation purposes. Most of the controversies with respect to sewage that have gotten into the courts concern the rights of those who claim that in disposing of its sewage the city is guilty of maintaining a nuisance. In this case both the plaintiff and defendant are satisfied, for the present at least, and in fact insist, that the city discharge its sewage in such a way and at such place as will permit them to use it. It is well known that the disposition of sewage is one of the important problems that embarrass municipalities. In order to dispose of it without injury to others, a city may often be confronted with the necessity of choosing between several different plans, and in the selection of the plan to be followed we think it should be

permitted to exercise a wide discretion. In determining how it will make a proper disposition of that which may be termed a potential nuisance, we think the city should not be hampered by a rule that would always require the sewage to be treated as waste or surplus waters. Sewage is something which the city has on its hands, and which must be disposed of in such a way that it will not cause damage to others. It would often be considered the height of efficiency if it could be disposed of in some other manner than by discharging it into a stream. Even in this state, where the conservation of water for irrigation is so important, we would not care to hold that in disposing of sewage the city could not adopt some means that would completely consume it.

*Wyoming Hereford Ranch v. Hammond Packing Co.*, 236 P. 764, 772 (Wyo. 1925) (emphasis supplied). This 1925 decision continues to be cited and quoted for its bedrock principles.

In *Wyoming Hereford*, the City of Cheyenne contracted with a packing company for the disposal of the city's sewage effluent, which had previously been discharged into a creek. Under the contract it was delivered to the packing company "in such a way and at such place as will permit [the packing company] to use it." *Wyoming Hereford*, 236 P. at 772. The Court ruled that whether this was permissible depended on whether the sewage effluent was delivered directly to the new use or via a public stream. There were two sewage lines in this case. Under the contract, one of them (the sanitary sewer east of Lake Minnehaha) delivered water straight to a ditch on land owned by the packing company. The other (the sanitary truck line) discharged into Crow Creek where it flows across the lands of the packing company. The Court upheld the City's right to recapture and convey to the packing company with respect to the first but not with respect to the second. Once the water "becomes commingled with the waters of the stream" it is no longer the City's to recapture. *Wyoming Hereford*, 236 P. at 773. This limitation on the right to recapture is consistent with that in *Reynolds*, discussed above, and *City of San Marcos v. Texas Comm'n on Env'tl Quality*, 128 S.W.3d (Texas Ct. App. 2004), discussed below. Where water is delivered straight to the new use, the Court perceived no problem:

It might, we think, be diverted to waste places, or to any chosen place where it would not become a nuisance, without any consideration of the demands of water users who might be benefited by its disposition in some other manner. In providing such a place, the city might acquire the right to discharge the sewage on the lands of any person willing to suffer such a use of his lands, and we see no reason why this right might not be gained by the city in

consideration of the landowner's right to use or dispose of the sewage in any lawful way. From these views with reference to the city's rights, it follows that the sewage deposited from the so-called "sewer east of Lake Minnehaha" should not be considered as a part of the public waters of the state subject to the rights of the appropriators from Crow creek. It is our opinion, therefore, that the plaintiff, as an appropriator of waters of Crow creek, has no right to question the contract between the city and the defendant in so far as it provided for the discharge and use of sewage from the sewer line last mentioned.

*Wyoming Hereford*, 236 P. at 772-73.

This Wyoming case, in turn, was relied on by the Arizona Supreme Court in reaching a similar conclusion confirming the right to recapture municipal effluent in that state. *Arizona Public Service Co. v. Long*, 773 P.2d 988 (Ariz. 1989).<sup>11</sup> In the Arizona case, holders of junior downstream irrigation rights had come to rely on effluent discharged by Phoenix and other cities. They sued to stop the cities from selling that effluent to a utility that would use it for cooling water at a nuclear power plant. The Arizona Supreme Court upheld the cities' right to do so, holding that they could put their sewage effluent to any reasonable use that would allow them to maximize its use and its economic value. The Arizona Court of Appeals confirmed these principles in *Arizona Water Co. v. City of Bisbee*, 836 P.2d 389 (Ariz. Ct. App. 1991), a case involving a city's sale of effluent to Phelps Dodge for use in copper leaching operations.

In *Barrack v. City of Lafayette*, 829 P.2d 424 (Colo. Ct. App. 1992), the Colorado Court of Appeals released the city from liability for no longer providing effluent water under a contract with plaintiffs when environmental regulations made that delivery illegal. In so ruling, the court ruled that plaintiffs' procedural due process was not violated because they had no property interest in the effluent.

In *City of San Marcos v. Texas Comm'n on Env'tl Quality*, 128 S.W.3d (Texas Ct. App. 2004), the Texas Court of Appeals found that the City of San Marcos did not have the right to recapture its wastewater effluent in a river three miles downstream of the sewage treatment plant. The City sought to recapture the water, treat it, pipe it back to the City, and add it to its municipal supply. The purpose of leaving it in the river for so long was to allow the effluent to be diluted with cleaner river water, thus reducing the cost of treatment after recapture. In rejecting the plan, the court concluded that the character of the water changed once the city released it to the river, whereupon it became public water. "By intentionally discharging its effluent into the river, where it eventually

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<sup>11</sup> This important case is discussed in Ginette Chapman, Note, *From Toilet to Tap: The Growing Use of Reclaimed Water and the Legal System's Response*, 47 Ariz. L. Rev. 773 (2005), and 2 Robert E. Beck, *Waters and Water Rights* § 13.04 (2000).

commingles with the State's water, the City effectively abandons its control over the identifying characteristics of its property. This physical reality suggests that the City is voluntarily and intentionally abandoning its ownership rights over the effluent." *San Marcos*, 128 S.W.3d at 277. By clear implication, however, the City would have been allowed to recapture and reuse its wastewater if it had done so before returning it to the river. Indeed, as the court noted, that was exactly what the City's opponents said: "If the City wants to reuse its wastewater, it should use it directly rather than unnecessarily mixing it with the pure river water." *San Marcos*, 128 S.W.3d at 267.<sup>12</sup>

#### **D. Land application of municipal or industrial wastewater**

##### **1. DEQ permit**

Certain land applications of effluent require a permit from the Idaho Department of Environmental Quality, pursuant to the Department's Recycled Water Rules (formerly Wastewater—Land Application Rules) at IDAPA 58.01.17. A discussion of these permitting requirements is beyond the scope of this Handbook.

##### **2. Background**

In recent years "land application" of waste water has become increasingly common. This refers to the disposal of wastewater from industrial processes or municipal sewage effluent by applying it to land to irrigate crops or grasses. Typically, the untreated waste water is applied directly to crops, though it is often mixed with clean (or at least irrigation-quality) water to dilute it.<sup>13</sup> The basic goal is to use natural processes to eliminate pollutants in the waste water and, at least to a large degree, consume the water. At the risk of oversimplification, the pollutants in the industrial or municipal wastewater (such as phosphorus or other nutrients) are broken down and/or taken up by the plants and thereby kept out of soils and water. In some cases, valuable crops are produced. In other cases, the application irrigates grasses or other plants of little or no economic value, which are mowed and discarded.<sup>14</sup>

This raises the question whether the discharger must obtain a new water right or a change in water right to apply the waste water to the land. In other words, should the land application be viewed simply as part of the original industrial or municipal water right (requiring no transfer)? Or should the land application be viewed as a new

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<sup>12</sup> Texas, by the way, is the only western state that applies a rule of capture (rather than the prior appropriation doctrine) to ground water. (The City's water supply, and hence its effluent, was based entirely on ground water.) The court discussed the rule of capture at some length, but it does not seem that the outcome would be any different had the prior appropriation doctrine applied instead.

<sup>13</sup> In one project (now proposed in Gooding County) waste water would be treated, before irrigation, to remove all pollutants. Biosolids removed from the treated waste water would be metered back in to the clean water before being applied to crops. This technologically sophisticated approach is very different from the typical land application project.

<sup>14</sup> In some cases, crops or cut grasses may be removed from the immediate watershed to prevent their up-taken nutrients from entering the water system.

beneficial use that requires a new water right or a change in the original industrial water right? Likewise, will a change in place of use be required? Will a new water right be required for the water used to dilute the waste water?

The law on this subject is premised in large part on the general principles of recapture and reuse discussed above. In addition, the Department has issued specific guidance on the subject of land application. Nearly all of it, however, is in the context of land application of industrial wastewater. Two guidance documents were issued by the Department in 1996. Phil Rassier, Chief Counsel, *IDWR Memorandum: Land Application of Industrial Effluent* (Sept. 5, 1996); Norm Young, IDWR, *Administrator's Memorandum – Application Processing No. 61* (Sept. 27, 1996). This guidance has been updated and modified to some extent by a broader guidance document, *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) (revised Dec. 21, 2009).

The answers to the last two questions are not difficult. If the land application falls outside the originally described place of use, then a change in place of use will be required. A water right for the make-up water will be required, just like any other. The original industrial water right could serve this purpose, if the land application is close enough to be physically supplied by it, and the additional quantity is available under the right. Or it might be obtained from another source (e.g., a new appropriation or a transfer of an irrigation water right).

The hard question is the first: can the original industrial water right accommodate the land application use? Or must the appropriator apply for a change of water right to include this new use, or seek a new water right entirely? According to the Department's 1996 guidance, the answer depends on whether the land application is "mandated" by environmental requirements, or is being undertaken for the independent purpose of producing crops.<sup>15</sup>

### 3. Required land treatment

Let us suppose that an existing industrial facility with an existing industrial water right decides to switch its disposal strategy to land application. The Department has announced that land application of waste water by the industrial facility will be considered part of the industrial use (hence a beneficial use) if it is mandated by environmental requirements and is consistent with best management practices established by the State.

This discussion assumes that the owner of the industrial water right is authorized to consume 100 percent of the water. If that is not the case (that is, if the owner is

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<sup>15</sup> This distinction is a blurry one. It is not always easy to draw a line between environmental programs which are "required" and those which are not. Are a company's actions "required" if the company is acting to anticipate future regulations and stay out in front of them? What if the company designed the system to remove more pollution than is strictly required under the regulation? The Department's guidance does answer these questions. However, we anticipate that the Department will not be unduly strict, so long as the project is generally designed to address environmental regulatory concerns.

obligated to return a certain portion of the water diverted to a natural source as return flow), then none of the discussion below applies.

This discussion also assumes that the water user does not relinquish physical control over the water resource in accomplishing the land application. In other words, the waste water from the industrial use should be delivered directly (e.g., through a pipe) to the industrial use. If the waste water is allowed to reenter the public domain, there is a strong argument that it is no longer part of the original water use. In this case, it could be recaptured, via a separate water right with a junior priority.

If the land use application involves the cultivation of crops or any other new beneficial use, a change in nature of use (and presumably place of use) must be sought by the water right holder and approved by IDWR. (If the original use was municipal use, no change would be needed for the irrigation of parks, etc., because such uses would have been included under the broad municipal uses. It is less clear whether growing crops with municipal effluent is a use included within the scope of a municipal purpose.) If the land application does not entail the cultivation of crops or otherwise produce value, the land application will be deemed part of the original industrial purpose.<sup>16</sup> Even so, the land application may require approval by the Department of a change in place of use, if the land application does not occur on the industrial site. Thus, the requirement of a change application may be avoided only where the new treatment method is within the original place of use and entails no new beneficial use.

The Department's guidance states that consumptive use can increase up to the amount determined to be consistent with the original water right, but diversion rate, annual volume diverted, and period of use cannot change. Thus, if the industrial user initially had the right to use and reuse the water to exhaustion, but was not actually doing so, the user may switch to land application. If, on the other hand, the original water right was expressly or implicitly restricted to its prior consumptive use, then it cannot be changed to expand the consumptive use; in this case a new water right must be obtained for the land application.

#### **4. Optional land treatment**

The discussion above was premised on the assumption that land application (or some other form of treatment) is required to meet environmental regulations (and, therefore, is "part of" the industrial process). Suppose, on the other hand, that land application is not required to meet water quality requirements, but is merely convenient or economical. In this case, the Department has said it will view the cultivation as a separate use, requiring a separate appropriation of water.

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<sup>16</sup> In many instances, even though there is income from the sale of crops, the overall farming operation may be unprofitable or negligibly profitable. In other words, the economic purpose of the operation is not to make money farming, but to dispose of the contaminants. The Department's guidance does not address whether such minimal, incidental economic benefit would be treated as creating a "new beneficial use." Until the situation is clarified, however, it is safer to assume that the Department will treat this as a change in use.

Although the Administrator's Memorandum does not address this, the new water right presumably could be obtained by filing for a junior "waste water" right at the point of discharge from the industrial facility. (See discussion in section I at page 1.)

#### **5. Mixing water**

If additional fresh water is required to dilute the waste water, the fresh water must be obtained pursuant to a water right. If the existing industrial right allows additional pumping (without exceeding the right's established rate and volume), it may be used for this purpose. Otherwise, the operator will have to obtain another water right by appropriation or transfer for this purpose.

#### **6. Land application where land has existing water right**

The 2009 version of Transfer Processing Memorandum No. 24 includes new provisions reflecting a more liberal approach to land application by the Department. Specifically, it provides (in several places) that no transfer application is required "for a proposed change in the place of use under a water right for uses such as industrial, dairy, or confined animal feeding operations that would allow land application of wastewater from that use or change the location of lands used for application of wastewater, when there is a full existing water right for irrigation of the place of use receiving wastewater." Transfer Processing Memo No. 24 ¶2 at page 7.

#### **7. Where industrial user relies on municipal water**

The Administrator's 1996 Memorandum is based on the assumption that the industrial user holds its own industrial water right. The Memorandum then addressed the issue of when the land application could be viewed as "part of" the original industrial right.

The memorandum does not address the situation where the industrial user purchases water from a municipal provider. (In this case, the municipal provider is the water right holder.) In this circumstance, can the land application be viewed as "part of" the municipal right?

Municipal purposes are broadly defined in Idaho.<sup>17</sup> On the other hand, municipal uses do not ordinarily include crop irrigation. Does that mean they cannot be part of a municipal right, where the economics allow municipal water to be used for crop irrigation?

A strong argument can be made that any beneficial use made by a customer of a legitimate municipal provider, with the approval of the provider, is a municipal use. Under this theory, it should not matter whether the land application were "required" or "optional." Moreover, under this theory, there would be no need to obtain a change in

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<sup>17</sup> Idaho Code § 42-202B(6) (definition of "municipal purposes"). This broad statutory definition is consistent with case law across the West.

place of use (assuming the new land application use physically occurred within the municipal provider's broadly described service area).

On the other hand, the industrial user may choose to file for a new appropriation in its own name.<sup>18</sup> This would eliminate any uncertainty regarding use of the right for irrigation purposes, and create a valuable property right and asset.

## **8. Land application of municipal effluent by cities**

### **a. Land application pursuant to water rights**

In 2012, the Idaho Legislature amended the water code to allow land application and other disposal undertaken pursuant to environmental requirements to occur without a water right. That is discussed in section I.D.8.b at page 15. This section addresses the law prior to that amendment. This section is also applicable to the extent that the municipality or similar entity elects to undertake land application pursuant to a water right (in order to protect the right) or where Idaho Code § 42-201(8) is for some reason not applicable.

Very few cases, and none in Idaho, deal with land application of municipal effluent. (A notable exception being the *Wyoming Hereford* case discussed above.) Likewise, the guidance discussed above is focused on land application by industrial users. The 1996 guidance is expressly limited to land application of industrial wastewater. The 2009 transfer memo mentions municipal effluent only in one place:

Disposal of Waste Water. An application for transfer filed to provide for the disposal of wastewater, by land application, 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 (see Application Processing Memorandum No. 61 as revised under Section 1 of this memorandum) and must comply with the best management practices required by the Idaho Department of Environmental Quality, the U.S. Environmental Protection Agency, or other state or federal agency having regulatory jurisdiction.

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<sup>18</sup> A waste water appropriation will not be allowed, if there is no release of control of the water back into the natural environment. However, the industrial user may obtain a new water right that piggy-backs the original municipal right and adds an additional use (but with a junior priority).

*Transfer Processing Policies & Procedures* (Transfer Processing No. 24) ¶5d(9) at page 31 (revised Dec. 21, 2009). This confirms that, because municipal uses are 100 percent consumptive, land application does not constitute an illegal enlargement of the water right. However, the statement is in the context of a discussion of transfer applications. This begs the question of whether a transfer is required at all.

Arguably, no transfer should be required for land application of municipal effluent, so long as the land application is within the municipal service area and so long as the land application is deemed part of the municipal use. Moreover, the requirement in paragraph 3 on page 3 of the 1996 Rassier memorandum (saying that a transfer is required for land application on cultivated fields) has been overridden by the 2009 version of Transfer Processing Memorandum No. 24, which provides that no transfer is required if the land application occurs on lands that were previously cultivated under another water right. In other words, so long as no new land is brought under cultivation, it is unnecessary to determine whether the land application falls within the previously authorized municipal uses.

Another complication for land application of municipal effluent is that, unlike industrial effluent, it cannot be assumed that all of the water physically derives from the original diversion. Municipal effluent may contain other sources of water, such as storm water or water from domestic wells with their own water rights. The situation is further complicated if the municipality or sewer district operating the sewage collection system was not itself the supplier of municipal water. In such a case, it may be appropriate to think about this as entailing an appropriation of water or, in the case of recapture of water from domestic wells, an appropriation of waste water.

Such has occurred in the past. Phil Rassier's 1996 legal memorandum notes the precedent of issuing "waste water permits" (Nos. 29-7431 and 29-7437) to the City of Pocatello and the J.R. Simplot Company, respectively, in connection with land application of the city's effluent. Phil Rassier, Chief Counsel, *IDWR Memorandum: Land Application of Industrial Effluent* at page 3 (Sept. 5, 1996). This would appear, however, to predate the Department's current thinking that the land application use may be viewed as a part of the original right.

**b. Water right not required where undertaken to comply with environmental requirements**

In 2012, the Idaho Legislature enacted H.B. 608, codified at Idaho Code §§ 42-201(8), 42-221(P). This legislation provides:

Notwithstanding the provisions of subsection (2) of this section [which requires a water right for all diversions], a municipality or municipal provider as defined in section 42-202B, Idaho Code, a sewer district as defined in section 42-3202, Idaho Code, or a regional public entity operating a publicly owned treatment works shall not be required to

obtain a water right for the collection, treatment, storage or disposal of effluent from a publicly owned treatment works or other system for the collection of sewage or stormwater where such collection, treatment, storage or disposal, including land application, is employed in response to state or federal regulatory requirements. If land application is to take place on lands not identified as a place of use for an existing irrigation water right, the municipal provider or sewer district shall provide the department of water resources with notice describing the location of the land application, or any change therein, prior to land application taking place. The notice shall be upon forms furnished by the department of water resources and shall provide all required information.

Idaho Code § 42-202(8).<sup>19</sup> Idaho Code § 42-221(P) sets the fee for filing a notice of land application.<sup>20</sup>

This section is contained in the same part of the water code that exempts certain other uses from the requirement to obtain a water right. (For example, a water right is not required to fight an existing fire. Idaho Code § 42-201(3)(a).) The basic premise is that if a municipality, sewer district, or similar entity is engaged in land application or some other treatment or disposal strategy in order to comply with environmental regulations, this is analogous to fighting a fire. It is something they must do, not something they wish to do. This legislation makes clear that no water right is required, even if some beneficial use (such as growing crops) is entailed. The legislation also makes clear that if a municipality stops directing its effluent to a stream and instead directs it to a land application or other treatment or disposal use, water users downstream who had come to rely on that effluent have no legal complaint.

This legislation does not preclude a municipality from obtaining a water right for its land application or other use. It simply says that it is not required to obtain a right. As a practical matter, there is not likely to be any consequence to not having a water right. Without a water right, the municipality may not “call” for the water to be delivered to its land application. But that is probably the least of the city’s concerns. The practical fact is that the sewage effluent will be there.

For reasons discussed above, this legislation is not necessary for a city that is land applying water traceable to its own municipal water rights. Cities have the right to use

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<sup>19</sup> This legislation was recommended for passage unanimously by both germane committees, and adopted by unanimous vote in both the House and Senate.

<sup>20</sup> The Idaho Department of Water Resources sought and obtained language requiring the municipality to notify it of land application. This way, the Department is able to reconcile satellite imagery showing irrigation with information about municipal land application not undertaken pursuant to a water right.

and reuse their water rights to extinction. However, the legislation would make a difference in the following situations:

(1) Sometimes the entity undertaking the land application does not have a municipal water right. For example, a sewer district typically does not provide municipal water. Likewise, some cities (such as McCall) land apply treated sewage that is collected from outside the city's municipal water service area and thus cannot be traced to a municipal water right. In other situations (such as the City of Boise), a city may provide wastewater treatment, but is not in the business of providing municipal water.

(2) Sometimes the land application occurs at a location outside the city limits that is not physically plumbed to the city's municipal water treatment system. For example, it may rely on delivery via an irrigation district's canal system. There is uncertainty as to whether this is covered by the "service area" description in the 1996 Municipal Water Rights Act.

#### **E. Appropriation of waste water by a third party**

A distinct issue is presented where a person seeks a new appropriation of waste water generated by another appropriator. Since the new appropriation would carry a junior priority date, and would be allowed only in the absence of injury to other users, it does not present the same enlargement concerns described above. Indeed, such waste water appropriations are common and are analyzed essentially like any other new appropriation.

However, as indicated above, an important caveat is that the new appropriator of waste water has no guarantee that the waste water will continue to be available. For instance, the original appropriator who generates the waste water could cease diverting altogether so as to leave the new appropriator without a water source. Likewise, the original appropriator might alter his or her operation to reduce the amount of waste water generated (e.g., by ditch lining). Finally, as noted, the original appropriator may recapture the waste water for use on existing lands.

In *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927), the court confirmed the basic right to appropriate waste and seepage water made available as a by-product of the diversions of other appropriators. (Prior to this decision, there was some thought that appropriations might be limited to water naturally occurring.) Indeed, in *Sebern*, the waste water appropriator was allowed to re-establish his diversion of waste water after a waste ditch was relocated by another appropriator. The court added the now-familiar caveat, however, that the waste water appropriation is "subject to the right of the owner [that is, the person generating the waste water] to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use." *Sebern*, 44 Idaho at 418. This is significant given that in a change or transfer application, the prior appropriator is not allowed to make any change (even in good faith) that would injure a junior.

In *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980), the Idaho Supreme Court unanimously reaffirmed the principle that a third-party appropriator of waste water may not compel the original diverter to continue the practices leading to the generation of the waste water. The court emphasized that it makes no difference whether the waste water arises before the use (from a leaky canal) or after the use (from post-irrigation tail water, for example). The original appropriator may at any time cease the practice giving rise to the waste water, even to the detriment of those who hold valid water rights in that waste water (subject, of course, to the limitations as to non-enlargement and beneficial use as described in *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 752, 118 P.3d 78, 84 (2005)).

These legal principles pertaining to waste water have been followed in the Snake River Basin Adjudication (“SRBA”). Special Master Terry Dolan reiterated these principles in *Special Master’s Report, In re SRBA*, Case No. 39576, Subcases 75-4471 and 75-10475 (Silver Creek Ranch Trust) at 4 and 6-7 (September 28, 2009). Similarly, in *In re: Janicek Properties, LLC, Memorandum Decision and Order on Motion for Summary Judgment, In re SRBA*, District Court of the Fifth Jud. Dist. of the State of Idaho, Subcase No. 63-27475 (May 2, 2008), the Bureau of Reclamation and its contracting irrigation district argued that they constructed a drain and could trace most or even all of the water in it to seepage and return flows from the district’s irrigated lands. They contended that the drain was not a natural watercourse and that they should be deemed the owner of the drain and the water in it. Based on this reasoning, they asked the adjudication court to invalidate a farmer’s 1951-priority licensed water right pursuant to which he pumped water from the drain to irrigate his crops. The Special Master rejected this challenge to the farmer’s drain water right, ruling that, regardless of who constructs a drain, the water in it is “public water of the state of Idaho and subject to appropriation and beneficial use.” *Janicek Properties*, slip op. at 6. The court found that whether the drain is a natural watercourse “is immaterial—what matters is that the water is water of the state” and is subject to appropriation. *Id.* at 8.

Once water is released by the original appropriator and is beyond his or her control (whether that be to an artificial conveyance such as a drain or to a natural stream or aquifer), it becomes public water once again and subject to appropriation. Referring to such a source as “waste water” undoubtedly has led to some confusion over the years. Other than the caveat discussed above (that the new appropriator cannot complain if the waste water is no longer supplied), there is little to be gained in attempting to distinguish it from water occurring naturally. Even a constructed drain at times will carry natural runoff. Similarly, natural stream flows in agricultural areas nearly always contain some measure of return flow and seepage, either those flowing to the stream as surface returns or those arriving through ground water discharge. The essential rule is simply that public waters are subject to appropriation regardless of their origin or whether they are found in drains or similar structures.

Of course, appropriation of waste water, like appropriation of any water, is subject to a no injury test.

## CHRISTOPHER H. MEYER



In 2011, *Best Lawyers in America* named Chris Meyer “Lawyer of the Year” in Idaho for natural resources. This capped three decades of work in water law, land use and zoning law, natural resources law, road and public access law, and constitutional law. His clients include Fortune Ten companies, major league energy companies, food producers, mining companies, municipal water providers, land developers, and local governments. He is described in the Idaho Yearbook Directory as “centrally located in the world of Idaho public affairs” and “a key figure in Idaho water law.” He has served for over a decade as President of the Idaho Environmental Forum. Before joining Givens Pursley in 1991, Chris taught water law and negotiation at the University of Colorado Law School. Prior to that, he practiced environmental law in Washington, D.C. Chris has written extensively on natural resource law subjects and lectures on a variety of legal topics. Chris has broad experience in transactions involving land use and water rights. He also has extensive litigation experience and has played a significant role in shaping legislation.

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### LEGAL EMPLOYMENT

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#### **Givens Pursley LLP, Boise, Idaho.**

Partner. August 1991 to present.

#### **University of Colorado Law School, Boulder, Colorado.**

Associate Professor Adjoint. August 1984 to July 1991. Held this teaching position while serving as counsel to NWF Natural Resources Clinic. Taught seminars in advanced water law, environmental law, and negotiation.

#### **National Wildlife Federation, Washington, D.C.**

Counsel. May 1981 to July 1984.

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### PROFESSIONAL RECOGNITION

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#### Best Lawyers in America (since 2006)

Named “Lawyer of the Year” (top lawyer in Idaho) for natural resources in 2011  
Recognized in water law, land use & zoning law, natural resources, and environmental law

#### Mountain States Super Lawyers (since 2007)

Recognized in energy and natural resources law

#### Chambers USA (since 2008)

Band 1 (highest ranking) for natural resources and environment

#### Martindale-Hubbell (since 1996)

Highest ranking (“AV”)

Who's Who Legal: The International Who's Who of Environment Lawyers (since 2010)  
One of only eight lawyers recognized in Idaho

Litigation Counsel of America (since 2010)  
Fellow in honorary society composed of less than one-half of one percent of American lawyers

Marquis' Who's Who in the World, Who's Who in America, and Who's Who in American Law Idaho Yearbook Directory (2001)  
Described as a "key figure in Idaho water law" and "centrally located in the world of Idaho public affairs"  
Listed among top 100 most influential Idahoans

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## EDUCATION

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### **University of Michigan, School of Law**

Juris Doctor, 1981

- cum laude

### **University of Michigan**

Degree in economics, 1977

- high distinction (magna cum laude)
- Phi Beta Kappa
- James B. Angell Scholar
- honors program in economics, class honors
- Osterweil Prize in Economics

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## SELECTED LITIGATION

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*Buckskin Properties, Inc. v. Valley County*, Case No. CV-2009-554-C (Idaho, Fourth Judicial Dist., Jan. 7, 2011) (successfully defended county in action involving alleged illegal impact fees).

*American Independence Mines and Minerals Co. v. USDA*, 733 F. Supp. 2d 1241 (D. Idaho 2010) (NEPA, standing, and road law issues).

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#### BAR MEMBERSHIPS

Member of the bars of Idaho, Colorado, and the District of Columbia.  
Admitted to practice in federal courts in the District of Columbia, Eighth, Ninth, and Tenth Circuits.