

Albert P. Barker  
John A. Rosholt  
John K. Simpson  
Travis L. Thompson  
Shelley M. Davis  
Paul L. Arrington\*  
Scott A. Magnuson

\* Licensed in Idaho & Washington



195 River Vista Place, Suite 204  
Twin Falls, Idaho 83301  
(208) 733-0700 telephone  
(208) 735-2444 facsimile

1010 West Jefferson, Suite 102  
Post Office Box 2139  
Boise, Idaho 83701-2139  
(208) 336-0700 telephone  
(208) 344-6034 facsimile  
brs@idahowaters.com

Paul L. Arrington  
pla@idahowaters.com

## MEMORANDUM

TO: Board of Directors, Galena GWD  
FROM: BRS  
DATE: November 24, 2015  
RE: GWD Membership/Domestic v. Municipal v. Mixed Use Domestic

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At the initial board meeting of the Galena GWD, held on November 18, 2015, a number of questions arose about subdivision water rights. After a lengthy discussion during the meeting, the discussion was stopped with the direction to counsel to research the issues further.

Of particular concern is the treatment of water rights for subdivisions and whether such water rights can be included within the GWD and whether the GWD will advance certain arguments on the treatment of subdivision water rights in delivery calls.

### SOURCE OF THE CONCERN

The source of concern appears to be derived from historically inconsistent treatment of subdivision water rights by the Idaho Department of Water Resources. Historically, when subdivisions have acquired water rights, IDWR has identified the use as:

1. Domestic;
2. Municipal; or
3. Domestic and Irrigation

Although, generally speaking, the water rights were identical in relative quantities per house and uses, their designated purposes of use were different.

### GENERAL LAW REGARDING MEMBERSHIP IN A GWD

A GWD is a creature of statute and must act within bounds set by the statutes. The GWD statutes provide the following definitions relevant to this discussion of membership:

(8) "Ground water user" means the legal or beneficial owner of a ground water right, or the user of a ground water right pursuant to lease or contract of a ground water right to divert ground water of the state for a beneficial use or purpose, *except for those diverting under rights used solely for domestic or*

*stock use as defined by sections 42-111 and 42-1401A, Idaho Code*, and provided, that for purposes of this chapter, the term ground water user shall not include any ground water right held by or on behalf of an Indian tribe or by tribal members for diversion and use within an Indian reservation, ground water rights held by the United States or ground water rights held by the state of Idaho. ...

(9) “Ground water irrigator” means a ground water user holding a ground *water right for irrigation purposes* within a ground water district.

...

(11) “Nonirrigator” means a ground water user holding a ground water right for *commercial, municipal, or industrial* purposes within a ground water district. A ground water user will be deemed a nonirrigator for purposes of this chapter even though: (a) some component of the user's ground water use is for irrigation; or (b) the user holds a ground water right for irrigation that is incidental to, or normally associated with, the user's commercial, municipal or industrial purpose.

I.C. § 42-5201 (emphasis added). A few observations are important as to these provisions:

- According to subsection (8), a “ground water user” will not include domestic, tribal, federal or state water rights.
- A “ground water irrigator” is one with a right that authorizes “irrigation purposes”
- A “nonirrigator” means one holding a ground water right for commercial, municipal or industrial purposes. This list implies that ground water rights used solely for other purposes (i.e. aesthetic ponds) cannot be included in the GWD.<sup>1</sup>

The GWD statutes provide the following relative to who can be a member of a GWD and their method of joining the district:

1. **Irrigators:** Pursuant to section 42-5214(1), “all ground water irrigators” are automatically included within a GWD. The code further provides that, although an “irrigator” is automatically included within the GWD, the irrigator may petition out of the GWD. I.C. § 42-5251.
2. **Nonirrigators (i.e. commercial, municipal, industrial):** A nonirrigator may be included in a GWD in any of 3 different processes:

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<sup>1</sup> There is additional uncertainty in the statute in that some water users – such as those with an aesthetic water right – are considered ground water users under the statute, but are not considered an “irrigator” or a “nonirrigator” and, therefore, are not able to join a GWD. An amendment to the statute would be required to allow such users to join a GWD.

- a. A nonirrigator who chose to participate in the election will be considered a member of the GWD. I.C. § 42-5210 & 5214(2).
  - b. Within 60 days of the formation of the GWD, a nonirrigator may submit notice to the Board of the GWD that it desires to be a member of the GWD. I.C. § 42-5214(3).
  - c. A nonirrigator may Petition the Board to be annexed into the GWD. I.C. § 42-5245.
3. **Domestic:** Pursuant to section 42-5245, “*any user of ground water for domestic or stock use as defined by sections 42-111 and 42-1401A, Idaho Code*” may submit a petition to the Board for annexation into the GWD.

### DOMESTIC

An important aspect of the discussion is the definition of a domestic water right. Idaho Code defines a domestic use as follows:

DOMESTIC PURPOSES DEFINED. (1) ... the phrase “domestic purposes” or “domestic uses” means:

- (a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or
- (b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.

(2) For purposes of the sections listed in subsection (1) of this section, domestic purposes or *domestic uses shall not include water for multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in subsection (1)(b) of this section.*

I.C. § 42-111 (emphasis added).

The Conjunctive Management Rules provide the following exemption for domestic rights:

**Domestic and Stock Watering Ground Water Rights Exempt.** A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition set forth in Section 42-111, Idaho Code ...

CM Rule 020.11.

I researched the definition of domestic uses and the Department's treatment of subdivision rights in water calls. The Department has issued two memos discussing domestic uses. Administrator's Memorandum No. 22 "Definition of 'Domestic'" and Adjudication Memorandum No. 4 "Domestic and/or Stockwater Claims". In addition, I spoke with Garrick Baxter, attorney for the Department.

Based on these sources, the Department treats domestic uses as follows:

- A single home domestic use will be exempt from a water call so long as it falls within the criteria of 42-111(1)(a) – i.e. 13,000 gallons per day and ½ acre irrigation.
- Any subdivision will only be exempt if the cumulative total water use falls within the exemption of 42-111(1)(b) – i.e. no more than 2,500 gallons per day and 0.04 cfs total for the entire subdivision.
- Since most subdivision water rights use more than 0.04 cfs and/or 2,500 gallons per day, they will not be exempt from a water call.
- In a delivery call, the Department has historically treated subdivisions as follows:
  - a. In-home use is treated as “nonconsumptive” and will not be subject to a call;
  - b. Outside use (i.e. irrigation, etc.) will be treated as consumptive and will be subject to a call.
- This is the case regardless of the actual use identified on the water right. In other words, a subdivision with either a domestic, domestic/irrigation or municipal water right will be treated the same.

This research has clarified the Department's view of the domestic exemption. As the Board meeting, I misstated the Department's treatment of domestic water rights. I stated that the Department would consider a domestic exemption cumulatively based on the number of homes within the development. That is wrong. The Department only recognizes the domestic exemption for single owner residential units that fall within the limitations (i.e. ½ acre irrigation and 13,000 gallons per day). Multiple owner subdivisions, however, cannot cumulatively use any more than 0.04 cfs and 2,500 gallons per day. Since all of the subdivision water rights at issue here exceed these diversion limitations, they do not meet the domestic exemption and will therefore be subject to a water call as described above.

#### **CONCERNS RAISED AT THE BOARD MEETING**

During the Board Meeting, several concerns were raised about the Galena GWD's acceptance and treatment of subdivision water rights. Below is a discussion of the issues raised:

1. **Greenhorn Owners Association (“GOA”):** The GOA is a subdivision within the GWD boundaries. The GOA owns two water rights. Right No. 37-7935 authorizes a diversion rate of 0.28 cfs for “domestic” use. We were advised at the meeting that this use is for “in home” use only. GOA also holds Right No. 37-8464 authorizing a diversion rate of .24 cfs for “irrigation” use. Based on the above statutory provisions, the “irrigation” right is automatically included in the Galena GWD. The “domestic” right will not be included in the GWD, but GOA may petition to include that water right in the GWD under the annexation statutes.

Furthermore, the irrigation portion of the GOA water right will be subject to a call. The “in home” water right will not be subject to the call. I asked Garrick why GOA would have received a notice of the water call specific to its “in home” water right. He indicated that the Department sent notices to all nonexempt water rights. Since the GOA “in home” water right authorizes a diversion rate of 0.28 cfs (i.e. more than 0.04 cfs), it does not meet the exemption requirements and received a notice of the call. However, should GOA be able to demonstrate that the right is used entirely for in home purposes, the “in home” use under the right will not be subject to the call.

2. **Southern Comfort HOA:** Jim Laski represents another subdivision, the Southern Comfort HOA. The HOA holds Right No. 37-21743, authorizing a diversion rate of 0.29 cfs for “municipal” use. Based on the above statutory provisions, the “municipal” right is not include in the district unless the HOA either provides notice within 60-days or petitions the Board for annexation. In a water call, the HOA’s municipal right will be treated like any other subdivision water rights, as described above.

3. **Domestic Water Rights and a Water Call:** The primary thrust behind the concerns revolves around the treatment of domestic water rights under the Conjunctive Management Rules. This treatment was discussed above.

Messrs. Speck and Laski questioned whether their clients should be a member of a GWD if domestic uses are exempt from a water call. Mr. Laski was concerned that his client’s water right – which, although identified as a “municipal” right is essentially a domestic right in quantity and use – may not be given the exemption because it is not identified as “domestic.” He asked whether the GWD would advance the argument that his client’s “municipal” right is really a “domestic” right that should not be subject to a water call. Mr. Speck echoed similar concerns relative to his client’s “irrigation” right, which, he asserts, is also within the diversion limitations of the domestic limitations.

As discussed above, however, since the subdivision water rights do not fall within the diversion limitations of the domestic exemption, they will not be exempt from the water call. Finally, a few other observations are relevant here:

- **Validity of the Rule:** The CM Rule that exempts some users from a delivery call may be unconstitutional. Similar rules have been struck down in other states. The primary concern would be that the provision exempts some water users from a delivery call even though they may be contributing to the overall material injury – thus potentially forcing

the mitigation obligation for the injury onto other non-domestic water users. To date, there has been no Idaho court decision directly addressing this provision and whether or not it is constitutional.

- **Involvement of the GWD in Making Arguments on Domestic Use:** During the meeting, the Board was asked whether it would advance arguments on behalf of its member subdivisions that their uses, including irrigation uses, are within the domestic exemption and should, therefore, be exempt from a delivery call. Such a request would pit some members of the district against others. For example, if a subdivision is not subject to the domestic exemption then it will be required to contribute to curtailment or mitigation to offset material injury, which would proportionally reduce the obligations of the other members of the district. Conversely, if the subdivision is is subject to the domestic exemption, the subdivision will not be subject to curtailment or mitigation and the proportional obligations of the other members of the district will increase.

If the Board decides not to advance such arguments, certain water users may decide not to be a member of the GWD (for the municipal and domestic right) or to seek exclusion from the GWD (for the irrigation use). If these water users were not members of the district that would free the district to take a position on whether or not these types of rights should be subject to a delivery call. These water users would then be free to petition to be annexed back into the GWD at a later time.

I think a look at the case law on what a public entity can and cannot do when its members have a conflict over what is in their best interests is something that you need to do before you make a recommendation.