

November 25, 2003

The Honorable Clint Stennett
P.O. Box 475
Ketchum, Idaho 83340

The Honorable Wendy Jaquet
P.O. Box 783
Ketchum, Idaho 83340

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Senator Stennett and Representative Jaquet:

This letter is in response to the questions presented in your October 29, 2003, inquiry regarding the State of Idaho's domestic use preference.

QUESTIONS PRESENTED

1. Would you please clarify for the city the intent of the drafters of our Constitution in establishing that the appropriation of water for domestic use takes priority over any other use or right.
2. How does one (in this case, the City of Gooding) protect and preserve its right to the use of its water for domestic purposes?

CONCLUSION

Article XV, section 3 of the Idaho Constitution authorizes the holder of a junior priority water right for domestic purposes to exercise a delivery preference over the holders of more senior water rights for other purposes when there is insufficient water to satisfy all users. In exercising this preference, however, the junior domestic right holder must pay just compensation to the holder of any non-domestic water right from whom water is taken in order to comply with the provisions of article I, section 14 of the Idaho Constitution, which requires compensation for the taking of private property for public and private use.

The City of Gooding has at least two options it may pursue to preserve its rights to the use of water for domestic purposes in times of shortage without resorting to an exercise of the domestic preference under article XV, section 3. The City may seek coverage under an approved mitigation plan designed to mitigate the effects of the City's junior priority water withdrawals on senior right rights, or it may purchase more senior water rights in the area.

ANALYSIS

A. Article XV, Section 3 of the Idaho Constitution

On July 3, 1890, Congress approved the Idaho Constitution, including article XV, section 3. With the exception of a 1928 amendment that allows the state to regulate waters for “power purposes,” article XV, section 3, has remained unchanged since 1890.¹ Article XV, section 3 of the Idaho Constitution presently reads as follows:

§ 3. Water of natural stream—Right to appropriate—State’s regulatory power—Priorities. The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriations shall give the better right as between those using the water; *but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose;* and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. *But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.*

(Emphasis added.)

B. Idaho Case Law Interpreting Article XV, Section 3

In 1911, the Idaho Supreme Court examined the meaning of the domestic preference in article XV, section 3 of the Idaho Constitution in Montpelier Milling Co. v. City of Montpelier, 19 Idaho 212, 113 P. 741 (1911). The Montpelier Milling Company owned a flourmill that diverted waters from Montpelier creek. The mill had been diverting waters from the creek for beneficial use since 1891. In April 1908, at a point two miles above the Milling Company’s point of diversion, the City of Montpelier began diverting waters from the creek for domestic use. In the winter months that followed, the City’s diversion of water for domestic use resulted in a deprivation of the Milling Company’s non-domestic prior appropriation right.

The Milling Company sought to enjoin the City from diverting water from the creek. After the Milling Company's injunction was denied, it appealed the judgment to the Idaho Supreme Court. On appeal, the City argued that even though the Milling Company's water right was first in time, "it was the intention of the framers of the Constitution [in article XV, section 3] to make an appropriation of water for domestic uses a right superior to an appropriation made for manufacturing uses, without reference to the time or priority of such appropriations." *Id.* at 218, 113 P.2d at 743. The court rejected the City of Montpelier's interpretation.

We do not think that the language thus used in the Constitution was ever intended to have this effect, for it is clearly and explicitly provided in said section that the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied; that priority of appropriation shall give the better right as between those using the water. This clearly declares that the appropriation of water to a beneficial use is a constitutional right, and that the first in time is the first in right, without reference to the use, but recognizes the right of appropriations for domestic purposes as superior to appropriations for other purposes, when the waters of any natural stream are not sufficient for the service of all those desiring the same. This section clearly recognizes that the right to use water for a beneficial purpose is a property right, subject to such provisions of law regulating the taking of private property for public and private use as referred to in section 14, art. 1, of the Constitution.

It clearly was the intention of the framers of the Constitution to provide that water previously appropriated for manufacturing purposes may be taken and appropriated for domestic use, upon due and fair compensation therefor. It certainly could not have been the intention of the framers of the Constitution to provide that water appropriated for manufacturing purposes could thereafter arbitrarily and without compensation be appropriated for domestic purposes.

....

It is clear, therefore, that under the provisions of the above-quoted section of the Constitution, a municipality cannot take water for domestic purposes which has been previously appropriated for other beneficial uses without fully compensating the owner, and in this case it appearing that the respondent appropriated waters of Montpelier creek and applied the same to a beneficial use in 1891, the appellant had no right to interfere with such appropriation, to the injury of the respondent, without full compensation.

Id. at 219-21, 113 P. at 743-44 (emphasis added).

The Idaho Supreme Court found its interpretation of article XV, section 3, consistent with an interpretation reached by the Colorado Supreme Court that examined a similar provision in the Colorado Constitution:

In the case of *Town of Sterling v. Pawnee Extension Ditch Co.*, 42 Colo. 421, 94 Pac. 339, 15 L.R.A. (N.S.) 238, the Supreme Court of Colorado construed section 6, art. 16, of the Constitution of that state, which is very similar to section 3, art. 15, of the Constitution of this state, and said: “Section 6, art. 16, Const., states that those using water for domestic purposes shall have the preference over those claiming for other purposes, but this provision does not entitle one desiring to use water for domestic purposes, as intended by the defendant town of Sterling, to take it from another who has previously appropriated it for some other purpose, without just compensation. Rights to the use of water for a beneficial purpose, whatever the use may be, are property in the full sense of that term, and are protected by section 15, art. 12, Const., which says that ‘private property shall not be taken or damaged for public or private use without just compensation.’ That a city or town cannot take water for domestic purposes which has been previously appropriated for some other beneficial purpose, without fully compensating the owner, is so clear that further discussion seems almost unnecessary. Any other conclusion would violate the most fundamental principles of justice, and result in destroying most valuable rights. It would violate that right protected by our Constitution, that property shall not be taken from the owner either for the benefit of the public or for private use without compensation to the owner.”

Montpelier, 19 Idaho at 219-20, 113 P. at 743-44.

C. Applying Article XV, Section 3

Article XV, section 3, is not intended to function as an exception to the prior appropriation doctrine. See Basinger, 30 Idaho 289, 164 P. 522; Montpelier, 19 Idaho 212, 113 P. 741. Article XV, section 3, is limited in its application and may only be invoked over non-domestic users “when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same” The phrase “waters of any natural stream” has been construed for related purposes to include surface water as well as ground water. See Idaho Code §§ 42-103; Silkey v. Tiegs, 51 Idaho 344, 5 P.2d 1049 (1931).

Once a domestic user has exercised its rights under article XV, section 3, the user must pay just compensation to the non-domestic user as provided for in the last sentence of article XV, section 3. Just compensation for the water taken is necessary to comply with article I, section 14, which provides: “Private property may be taken for public use,

but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.”

D. How can the City of Gooding Protect and Preserve its Right to the Use of its Water for Domestic Purposes?

Your letter indicates that the City of Gooding is concerned about the potential curtailment of its rights to divert water for domestic use under an anticipated order from the Idaho Department of Water Resources. The concern is assumed to arise from the Director of the Department of Water Resources’ Order issued on February 19, 2002, creating Water District No. 130, pursuant to the provisions of Idaho Code § 42-604. On January 8, 2003, the Director issued a further order extending the boundaries of Water District No. 130 to include an area encompassing the City of Gooding. The Director created Water District No. 130 to provide for the administration of water rights, pursuant to the provisions of chapter 6, title 42, Idaho Code, for the protection of prior surface and ground water rights. Among the duties to be performed by the watermaster for Water District No. 130 is the duty to: “Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.”

As the holder of water rights within Water District No. 130, the City is subject to water delivery calls made by the holders of senior priority surface or ground water rights diverted from the same source or an interconnected water source. The principal means available to the City to protect against such a delivery call is to participate in a mitigation plan approved by the Director of the Department of Water Resources that adequately mitigates for the effects of the City’s diversions upon the source of water relied upon by the holders of the senior priority water rights making the delivery call.

As a domestic user, the City may exercise its rights under article XV, section 3, when there is insufficient water to service all users. While the City cannot take water from other domestic users pursuant to the preference in article XV, section 3, the City could take water from non-domestic users, provided the City pays just compensation to any non-domestic user for the value of the water taken. To avoid taking water from non-domestic users in times of shortage, and being forced to pay just compensation, the City could purchase more senior water rights in the area.

Sincerely,

PHILLIP J. RASSIER
Deputy Attorney General
Natural Resources Division

¹ In 1928, the legislature proposed an amendment to article XV, section 3: “The right to divert and appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied,

except that the State may regulate and limit the use thereof for power purposes.” S.L. 1927, p. 591, H.J.R. No. 13 (emphasis in original). The italicized amendment was subsequently approved by voters in the November 1928 general election. *Id.*