

THE CURRENT SITUATION

DNRC CHANGE APPLICATION RULES

Any time a municipal water supplier needs to make a change in an underlying water right, they bump into the following DNRC rule, which went into effect on 1/1/2005:

“The amount of water being changed for each water right cannot exceed or increase the flow rate historically diverted under historic use, nor exceed the historic volume consumptively used under the existing use.”

ARM 36.12.1902(2). It is very common for municipal suppliers to need to make changes to their water rights:

- their service area increases resulting in a change in Place of Use;
- they need to add a well in order to efficiently distribute their water;
- they need to add storage capacity.

When making such changes, DNRC limits the extent of a municipal water right to what they can prove has already been used, resulting in zero remaining water right, and thus no water right for growth. For Pre-73 rights, municipal suppliers will also likely have to forfeit any Post-73 increased use of Pre-73 rights, upon which they have relied for over 30 years.

- Such limitation by DNRC appears contrary to the protections required of the Water Court under MCA 85-2-227(4).

Furthermore, under the language of ARM 36.12.1902(2), DNRC will not only limit the water right to what has historically been diverted (volume of water pumped), but will limit the change to “volume consumptively used,” which is often less than ten percent of the amount pumped (much municipal water use is returned to groundwater or surface water via sewage treatment works, and may not be considered “consumed”).

NEW CONNECTIONS ARE AN UNPERMITTED NEW WATER USE

- DNRC's policies and current interpretation of Montana's Water Use Act has the effect that any new connection to a municipal system with a pre-73 existing water right is an un-permitted new use of water.
- This policy of DNRC, combined with HB831(2007), results in municipal water suppliers being forced into acquiring new permits for any growth, in many basins requiring purchase of mitigation water.
 - In other words, municipalities that believe they have ample water rights for some reasonable growth will find they have zero water rights available for growth, and that they must acquire new permits under the new and extremely expensive environment of mitigation, as required by HB831(2007).
- This policy of DNRC further pushes development to individual exempt wells, as the price gap between exempt wells and municipal systems widens.

Also, utilities will be forced to install lengthy buried pipes and new pumps at great cost to ratepayers in order to respond to growth, rather than having the flexibility to make changes to existing water rights, such as adding new Points of Diversion (additional wells).

MUNICIPAL WATER RIGHTS ARE DIFFERENT THAN OTHER WATER RIGHTS

- Municipal suppliers have little control over growth.
- Municipalities have no power to stop growth.
- Municipalities are often forced to make changes to their water rights.
- Growth will be “pushed” to exempt wells in outlying areas.

HOW OTHER APPROPRIATION DOCTRINE STATES TREAT DEVELOPMENT OF MUNICIPAL WATER RIGHTS

Other western states have adopted a “Growing Communities Doctrine,” recognizing that municipal water rights are distinct from other types of water rights, and that flexibility in traditional water law is necessary when considering a city’s development.

COLORADO

Colorado has recognized that municipal water rights must allow for reasonable growth since 1939, when its Supreme Court ruled “the factors which enter into a determination of a beneficial use” for a municipality is “based upon a normal need, [which for a municipality] are more flexible than those relating to the use of water on agricultural land.” The court also ruled that “A specified tract of land does not increase in size, but populations do, and in short periods of time.” *City and County of Denver v. Sheriff, et al*, 105 Colo. 193 96 P.2d 836 (Colo. 1939).

WYOMING

Wyoming law allows a municipality to incrementally develop its water right. In a ruling in favor of the City of Cheyenne, the Wyoming Supreme Court ruled that so long as a municipality is gradually developing its capacity to use its appropriated water, it is entitled to the full amount, and that the priority date relates back to the date of the original appropriation. *Van Tassel Real Estate & Live Stock Co. v. City of Cheyenne*, 49 Wyo. 333, 54 P.2d 906 (Wyo. 1936).

NEW MEXICO

New Mexico recognizes that municipal water rights cannot be limited to historical use, and instead must allow for growth. “When determining the extent of a municipal water right, it is appropriate for the court to look to a city’s planned future use of water from the well caused by an increasing population.” *State v. Crider*, 78 N.M. 312, 431 P.2d 45 (1967). The New Mexico Court has also stated explicitly that “the amount of water a city is presently using from a well may not be the limit of its water right.” *State ex rel. Martinez v. City of Las Vegas*, 135 N.M. 375, 89 P.3d 47, 59 (N.M., 2004). By statute, New Mexico allows municipalities 40 years to reasonably develop their water rights. NMSA 1978, § 72-1-9 (2003).

IDAHO AND CALIFORNIA

Idaho and California have both specifically protected municipal water rights from forfeiture for lack of historical use when they are held in anticipation of future needs. Idaho Code 42-222 and 223. California Water Code 106.5 .