

January 29, 2016

Chief Water Judge Russ McElyea  
601 Haggerty Lane  
PO Box 1389  
Bozeman, MT 59771-1389

RE: WPIC- Suggestions for Water Administration Statutes

Dear Chief Water Judge Russ McElyea:

**Statement of the Issue.** The place of use identified in many water rights issued, held, or used for municipal purposes does not correspond to area served or planned for future service.

Various public and private entities in Montana acquire, hold, and use water rights for “municipal” purposes. Often, rights held for municipal purposes specify places of use that do not correspond with the area being served. The problem is widespread and while there are a number of contributing factors the dominant reason for the disparity is that areas served by public water systems change over time. Indeed, decreed municipal rights, which comprise a significant number of the rights at issue, are tied to historical pre-1973 place of use by statute. Obviously, many Montana communities have grown significantly over the past 40 years. As municipal water systems have grown, water rights, often from multiple sources, have been added and combined to meet growing total demand resulting in patchwork coverage as evidenced in Attachment 1 – Place of Use Exhibit Direct Flow Municipal Water Rights Owned by City of Bozeman.

Presently, holders of municipal water rights seeking to match the authorized places of use to the area served must use the change procedures codified at MCA 85-2-402 and ARM 36.12. The change process presents an imperfect solution at best. Not only is the change process time and resource intensive, creating some reluctance that has certainly contributed to the problem, but changing the place of use for a municipal water right is a temporary solution. Whenever the area served changes (e.g., by annexation) the entire process will result in a need to repeat the process for all of the rights used in combination to meet demand.

**Proposed Solution.** The issue can be resolved with legislation that allows the approved places of use for municipal water rights to be tied to the area served by those rights. Such legislation should address existing municipal water rights *and* those acquired in the future. Most importantly, the suggested legislation should allow the place of use for municipal water rights to track approved changes in the area served over time. Legislation adopted by other states can help inform legislation in Montana to resolve this growing issue.

**Washington.** The state’s 2003 Municipal Water Law allows a “municipal water supplier” to expand its water right’s place of use to a service area identified in a Department of Health

(DOH) approved planning or engineering document. To receive this benefit, the municipal water supplier must meet three criteria and include additional information in its planning or engineering documents.

1. The municipal water supplier's planning or engineering document must be "not inconsistent" with adopted local plans and development regulations.
2. The municipal water supplier's planning or engineering document must be "not inconsistent" with adopted watershed plans.
3. The municipal water supplier must comply with the terms of its water system plan or small water system management program.

A consistency requirement exists when the "municipal water supply" is not owned by local government. If the local government does not complete the consistency review, the municipal water supplier must document its efforts to obtain a local review and then determine consistency itself. The provision says:

The effect of the department of health's approval of a planning or engineering document that describes a municipal water supplier's service area under chapter 43.20 RCW, or the local legislative authority's approval of service area boundaries in accordance with procedures adopted pursuant to chapter 70.116 RCW, is that *the place of use of a surface water right or groundwater right used by the supplier includes any portion of the approved service area that was not previously within the place of use for the water right if the supplier is in compliance with the terms of the water system plan or small water system management program, including those regarding water conservation, and the alteration of the place of use is not inconsistent, regarding an area added to the place of use, with: Any comprehensive plans or development regulations adopted under chapter 36.70A RCW; any other applicable comprehensive plan, land use plan, or development regulation adopted by a city, town, or county; or any watershed plan approved under chapter 90.82 RCW, or a comprehensive watershed plan adopted under RCW 90.54.040(1) after September 9, 2003, if such a watershed plan has been approved for the area.*

RCW 90.03.386(2) (*emphasis supplied*).

The quoted provision was among several in the act that were judicially challenged. Ultimately, the Supreme Court of Washington held: "nothing in the amendments before us today themselves deprive any vested rights holder of any vested right as a matter of law." Lummi Indian Nation v. State, 170 Wn.2d 247, 269-71, 241 P.3d 1220, 1232-33 (2010).

In effect, it allows municipal water suppliers (which, again, now include many water rights holders who prior to 2003 might have been considered private) to change the place of use of water anywhere within their service system (the area where they provide water) upon the approval of the Department of Health or local legislative body and without Department of Ecology approval and process required for non-municipal water rights holders so long as the change is consistent with other local planning documents. *Compare* RCW 90.03.386(2) *with* RCW

90.03.380(1) (setting forth circumstances where notice and comment must be sought before water right can be changed).

Lummi Nation, ¶ 28.

The challengers argued a facial violation of due process because changes might be approved without notice or comment to other rights holders. The Court found that the law gave considerable process before any change could be made, and that any impact on the rights of others will be at best collateral and indirect. Lummi Nation, ¶ 29 (citations omitted). In the end, the Court concluded that due process is satisfied because nothing in RCW 90.03. 386(2) allows the vested rights of others to be unvested as a matter of law, and if a change in place of use does harm another water rights holder, that can be dealt with prospectively on a case by case basis.

**Idaho.** It does not appear that the pertinent provision in Idaho’s code has been addressed in any reported judicial decision. A "municipal provider" in Idaho is any municipality, corporation or association authorized to provide water for municipal purposes within a defined service area, or any corporation or association operating a regulated public water supply, to provide water for “municipal purposes,” defined as “water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality. IC § 42-202B(5) and (6). A key provision related to municipal place of use is found in the definition of “Service Area,” which is the:

area within which a municipal provider is or becomes entitled or obligated to provide water for municipal purposes. For a municipality, the service area shall correspond to its corporate limits, or other recognized boundaries, *including changes therein after the permit or license is issued.*

IC § 42-202B(9).

The definition of service area for municipalities extends to areas outside a city’s corporate limits in an established planning area that shares a common distribution system. Providers that are not a municipality, operate within service areas that they are authorized or obligated to serve, also “*including changes therein after the permit or license is issued.*” Id.

**Oregon.** By statute, “[a]ny water used under a permit or certificate issued to a municipality, or under rights conferred by ORS 538.410 (Confirmation of water rights acquired prior to February 24, 1909, for municipal supply) to 538.450 (Pendleton), or under the registration system set forth in ORS 537.132 (Exemption from permit requirement for use of reclaimed water), may be applied to beneficial use on lands to which the right is not appurtenant if:

(A) The water is applied to lands which are acquired by annexation or through merger, consolidation or formation of a water authority, so long as the rate and use of water allowed in the original certificate is not exceeded;

- (B) The use continues to be for municipal purposes and would not interfere with or impair prior vested water rights; or
- (C) The use is authorized under a permit granted under ORS 468B.050 (Water quality permit) or 468B.053 (Alternatives to obtaining water quality permit) and for which a reclaimed water registration form has been filed under ORS 537.132 (Exemption from permit requirement for use of reclaimed water).

ORS 540.510(3)(a).

Among other things, regulations adopted to implement Oregon's statute allow water used under a permit or certificate issued to a municipality, to be applied to beneficial use on: "[a]ny lands acquired by the municipality through annexation, merger, consolidation, or by the formation of a water supply authority in accordance with ORS 540.510(3)(a)(A) so long as the rate and duty allowed under the right is not exceeded. OAR 690-380-2410(1). The state defines "municipal purposes" broadly as municipal use, quasi-municipal use, group domestic, domestic use, and human consumption as defined in OAR chapter 690, division 300. OAR 690-380-2410(4).

**Summary and Conclusion.** Other states have dealt with disparities between the place of use defined in municipal water rights and the area to be served by adopting legislation that ties the authorized place of use to the area served as it changes over time. Montana should craft its own legislation that recognizes decreed existing (pre-1973) municipal rights, and later acquired rights approved for municipal use, may be used to their full extent within defined boundaries and ties the use of those rights prospectively to the defined boundaries as they change over time. The City of Bozeman is confident that all Montana stakeholders will come together in resolving this important issue.

Sincerely,

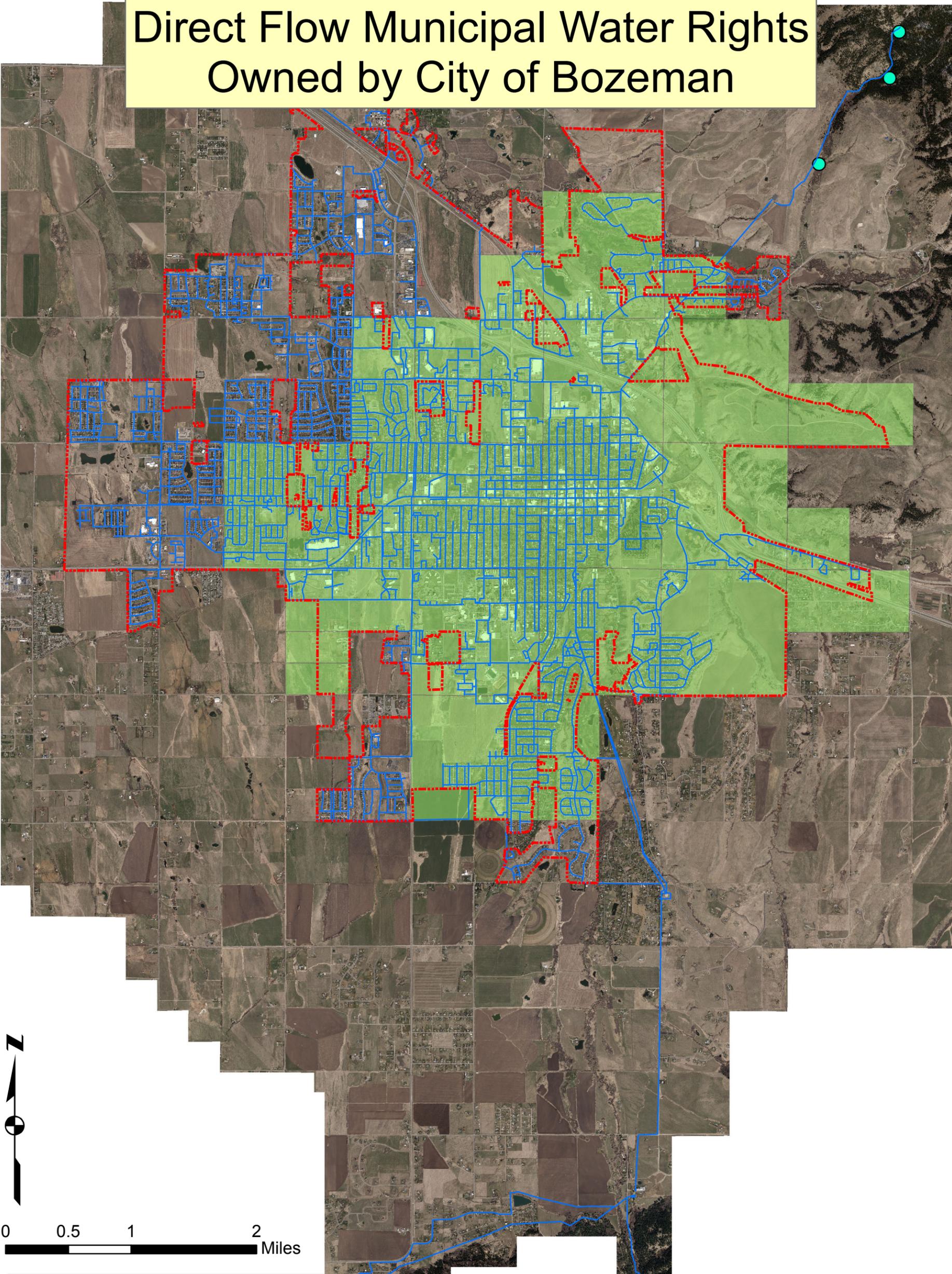
BOZEMAN CITY ATTORNEY'S OFFICE

A handwritten signature in blue ink that reads "Tim Cooper". The signature is stylized with a large, sweeping initial "T" and a cursive "C" that loops around the name.

TIM COOPER  
ASSISTANT CITY ATTORNEY

# Place of Use Exhibit

## Direct Flow Municipal Water Rights Owned by City of Bozeman



0 0.5 1 2 Miles

**Legend**

-  Place of Use: City-owned direct flow rights
-  Point of Diversion: City-owned direct flow rights
-  City Limits
-  Water Distribution System