



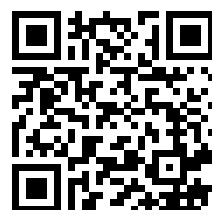
What is the best way to manage Idaho water?

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Introduction

Wandering through the aisles of Albertsons and choosing between a Honeycrisp or Grannysmith apple is an enjoyable part of the grocery-shopping experience. Our abundance of choices, and the freedom to make these choices independently, are integral to the American experience. Consumer protections ensure that trying a new type of apple is safe, and provides grounds for beneficial interactions between growers and buyers to promote a healthy economy. Our free market works great at the store. But can we say the same about our natural resources, like water?

Water is both a commodity and a necessity. “Commodity” means a basic economic good that can be bought or sold. Not all commodities are necessities, but water is. In this way, water is fundamentally different from apples. It is a fundamental component of the environment, and a requirement in industrial, domestic, and recreational spaces. For example, Micron relies on water in Idaho just as a Coho salmon does.

So, should private entities be allowed to buy control of a river that an entire community relies on? How can we balance the economic growth that a free market requires with ecological preservation? Using Boise and the state of Idaho as a starting point, this paper looks at whether water rights should be managed by supply and demand, like apples, or whether water management ought to be governed by the state.

While a free-market approach might initially appear to be appealing, state and local water regulations are ultimately necessary. This paper will answer whether water should be bought and sold like other products in a free market or should be managed by state government. I conclude that a state-regulated water system is imperative and provide recommendations for policy improvement.



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KEY INFORMATION COLUMN

IDAHO WATER LAW

1890

Statehood and
constitutional adoption
of prior appropriation

1903

Water Code formalizes
permits and public
records

Source: paper's historical
discussion and notes 1–5.

Historical Development of Idaho's Water Laws

Idaho became a state in 1890. Before statehood, however, the Idaho Territorial Legislature required individuals to file a written notice of diversion of water sites to establish a right. When Idaho became a state, the Idaho Constitution adopted the “Prior Appropriation Doctrine.”¹ Under this doctrine, “first come, first served” policy was instituted.

Then between 1899 and 1903, the first comprehensive water codes were established.² This was the start of the state permit application system managed by the State Engineer, the predecessor of today's Idaho Department of Water Resources. Before these statutes were passed, people relied on antiquated English laws that stated only owners of land directly bordering bodies of water had the legal right to that water. They also had to leave that water “undiminished in quality and quantity for downstream neighbors”.³ This framework did not make sense for the arid climate of Idaho and the American West, and when it started to be explored by miners in the gold rush, the old English common law shifted.⁴ Miners and farmers in the desert needed to divert water miles away from rivers to hydrate land, which greatly affected stream flows. In areas with no formal government, the rule of “first in time, first in right” was followed. Essentially, whoever first diverted the water from its original stream flow for productive use gained the right to keep diverting it. Farming communities continued to grow in the Snake River basin during the 1860s and 1870s, and the informal rules became the standard. Water rights were therefore determined simply through “constitutional or beneficial use”. So, if one dug a ditch or used water to irrigate crops, he or she effectively owned a water right starting on the day it was diverted. Since people established water rights simply by digging ditches, which was commonly done without telling the government, there were no central records. As populations grew and rivers ran dry in late summer, dangerous conflict would erupt over who was truly the first to divert a water source. Therefore, Idaho eventually passed formal statutes with the 1903 Water Code, which created a public record base, forced people to obtain permits, and sought to curb excessive water use.⁵

¹ Act of Feb. 10, 1881, 1881 Idaho Terr. Sess. Laws 267, § 3. <https://archive.org/details/lawsterritoryid05idahgoog/page/n21/mode/2up>

² Act of Feb. 25, 1899, 1899 Idaho Sess. Laws 380; Act of Mar. 11, 1903, 1903 Idaho Sess. Laws 223 <https://idwr.idaho.gov/water-rights>

³ Wells A. Hutchins, *The Idaho Law of Water Rights* (Boise: Idaho State Department of Reclamation, 1956), 12–15. <https://search.law.villanova.edu/Record/216450?sid=56902181>

⁴ *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 122 (1912) (affirming that Idaho law abrogated the common-law doctrine of riparian rights) <https://supreme.justia.com/cases/federal/us/224/107/>

⁵ Act of Mar. 11, 1903, 1903 Idaho Sess. Laws 223 (codified as amended at Idaho Code §§ 42-201 to -219) <https://legislature.idaho.gov/statutesrules/idstat/title54/t54ch19/sect54-1903/>

*Water connects
agriculture, industry,
ecosystems, and
communities.*

Current Regulations

In Idaho today, water is legally a public trust resource. No one directly “owns” it; instead, it is the property of the state, which holds all legal power to supervise its use. Therefore, it is not primarily in the hands of private owners. Idaho administers water to private ownership under the Doctrine of Prior Appropriation, which stemmed from the original “first in time, first in right” principle. Under this framework, individuals, agricultural districts, and corporations do not have ownership of water. Instead, they obtain usufructuary rights, which are defined as property rights to use water for something beneficial, like irrigation or industrial application, based on priority dates. The Idaho Department of Water Resources (IDWR) is the sole executive regulatory body that oversees all water rights permits and basin distributions through the state. The IDWR does everything from processing transfers to enforcing compliance and monitoring volume limits across all groundwater and surface water. To maintain public oversight of water, public databases are updated and published by IDWR. This allows citizens to review all uses and ownership transfers and keep the government accountable for water management. Transparent Idaho, which is managed by State Controller Brandon Woolf, is updated daily and allows citizens to see any state spending on water infrastructure.

The Eastern Snake Plain Aquifer (ESPA) is roughly 10,000 square miles in south Idaho and is a perfect example of water conflicts in the state.⁶ Surface water and groundwater have been regulated independently in the past, but under Conjunctive Management Rules (IDAPA 37.03.11) mandated by the Idaho Supreme Court and enforced by IDWR, surface water and connected groundwater are managed as a single integrated resource. After many years of extreme groundwater depletion, mostly driven by agricultural and industrial use, spring flows that feed the Snake River were considerably reduced. Surface water rights tend to predate groundwater permits, so those with seniority surface water rights frequently demand that the IDWR comply with their full historic rights to water. In response, the IDWR will issue a curtailment order which requires groundwater pumpers to stop pumping (unless state-approved for certain projects).

A Case for State Regulation

From the previous information given, it is evident that treating water as a free economy would not be beneficial. Aside from not always being a perfectly quantifiable resource, it is also a resource that must be shared. Government guidelines create a space where individuals have the power to reserve water for themselves, but also gives power to the state to veto detrimental water uses. Here are a few scenarios in which this is a prudent measure.

⁶ U.S. Geological Survey, Groundwater Conditions in the Eastern Snake River Plain Aquifer, USGS Fact Sheet 2018-3012 (Reston: USGS, 2018), 1. <https://pubs.usgs.gov/publication/pp1837>

The paper weighs the benefits of market flexibility against the risks of unregulated allocation.

In the event of an extremely wealthy company, for example, it could potentially have the means to buy up all areas of water. This would give one individual firm a monopoly on the well-being of an area, because accessible water is necessary to live. Prohibiting this protects the public interest and also prevents monopolies from depleting large bodies of water for personal use or overcharging for the right to drink, for example. Aside from monopoly use, Mandatory Minimum Stream flows are set by the IWRB to protect the health of our environment, like fish and water ecosystems, as well as public spaces for recreation along Idaho rivers.⁷ One example of this is the state-enforced Snake River minimum stream flow at Swan Falls Dam. In 1984, the IWRB made minimum flow levels at the dam legally protected so that diversions due to farming would never force so much water out of the river that the stream would be dried completely.⁸ This makes it so that we have a continuous water volume that maintains Idaho Power hydroelectric turbines and protects ecosystems. It also preserves the recreational access enjoyed by Idahoans further down the river. This prevents other parties from depleting the river for their own monetary gain.

Lastly, regulated permits for water force users to prove that their use is not harmful and does not pose threats to other owners. These regulatory systems create a sustainable renewal system and a good way to ensure our water is sustained. These three examples create a baseline for strong reasoning as to why our mixed economy for Idaho water is imperative and a complete free market would be detrimental.

Another example is the Swan Falls Dam agreement. The dam was built in 1901 along the Snake River south of Boise. It is the oldest hydroelectric dam on the river. By the late 1970s, groundwater pumping was expanding very quickly, which began significantly depleting the flows of the river. This threatens Idaho's ability to generate electricity. This created a legal battle between the state, private power (Idaho Power), and agricultural pumpers like farmers. The agreement shows that state intervention is necessary to prevent upstream private users from completely drying up a river, and it maintains that water stays in the Snake River.

A Case for The Free Market

If water were under no statutory control, there would also be benefits. Under water law now, if you don't use the water that you have a permit assigned to you for, you can lose your legal right to it. This can put people in a position where they feel like they must use water, so eradicating this measure may stop people from using it inefficiently to fulfill a government requirement.⁹ A free market allows people to rent out rights to their extra water instead (which is already permitted today, but it is a lengthy process). This would then give farmers a reason to upgrade their irrigation systems to be more environmentally efficient, because they could make money off any water saved.

⁷ Idaho Code § 42-1502(f) (2024) <https://legislature.idaho.gov/statutesrules/idstat/title42/t42ch15/sect42-1502/>

⁸ Swan Falls Settlement Agreement, Idaho Power Co.-State of Idaho (Oct. 25, 1984) <https://idwr.idaho.gov/settlements/swan-falls-settlement/>

⁹ Janet C. Neuman, "Have We Got a Deal for You: Can the East-West Water Bank Model Work in Idaho?," Idaho Law Review 38, no. 1 (2001): 134-38 <https://inthepublicinterest.org/wp-content/uploads/Water-Privatization-Trends-in-US.pdf>

KEY INFORMATION COLUMN

*The author proposes
faster leasing while
retaining state
oversight.*

A free-market approach would also put water where it has the most value economically. When water becomes scarce, market prices would push the water to what makes the most revenue. This would put it towards expanding cities, for example, instead of keeping them tied to outdated claims from decades prior. A free market would also create flexibility during droughts, because the government couldn't force private entities to shut off their wells during dry years. Users could negotiate with one another. A city in desperate need of water would have to pay a farmer for theirs (which could look like a farmer leaving a field unplanted), leaving farmers with monetary compensation and the industrial plant with water.

All these benefits of a free market are not omitted by our current system. If we transitioned to a completely unregulated system now, we would face a few big risks. Water is interconnected naturally, so a lot of transactions result in consequences. A private transaction can end up affecting other water supplies in a multitude of ways, and it's hard to correctly compensate those affected. Also, the price-driven allocation can create private monopolies that may hoard or inflate prices and price out smaller farms, low-income communities, and environmental projects.

A free market for water in Idaho may improve flexibility and incentivize technological conservation. We will next discuss a deeper comparison of the gains and drawbacks of each. The Idaho Water Supply Bank is government-regulated, acting as a controlled market. So, while users can't rent water directly, water holders can deposit unused water, and someone else can rent it, which shows that flexibility works even with state regulations. The issue here is that it can take one to three months. This can be difficult for farmers to navigate, because their crops could die within a 90-day waiting period. If a farmer faces a sudden heatwave in the middle of summer, by the time a lease for more water is approved, it could be too late. This system may also malfunction during severe droughts, when too many people apply at once, and there is not enough to go around. An economic freeze at the exact time quick adjustments are needed is detrimental to our agricultural industry.

Comparative Analysis

A free market gives companies like Micron operational freedom because it contributes to a high-value tech company. It could also, for example, contribute to a high-efficiency farming network. But it also promotes conservation because it lets people sell excess water for profit. The issue is that public assets that don't generate profit, such as fish habitats, public recreation, or minimum stream flows, get ignored because nature cannot buy its own rights in a free market. This issue is clear when looking at salmon in Idaho. Ella Jenveja, a Youth Salmon Protector and activist, emphasized that salmon hold "monetary and cultural value to the Pacific Northwest," especially for indigenous communities who "value salmon as a connection to their lineage and a resource to promote sustainable practices of living off the land while maintaining their cultural traditions." Protecting these populations requires water condition maintenance, like minimum stream flows, which prevent toxic algae blooms and also lower the water temperature. Building on this, Jenveja notes that "raising minimum stream flows allow for adequate protection of the aquatic ecosystem," explaining that when water quality, temperature, and mineral levels are off balance, it results in "negative implications for the ecosystem."

KEY INFORMATION COLUMN

*The proposal
combines expedited
transfers, temporary
leasing, and
conservation funding.*

**Nothing in this publication
shall be construed as an
attempt to aid or hinder the
passage of any legislation.**

While a state-regulated system contributes to health, the environment, and historic fairness (priority system), public databases encourage accountability and maintain it. The main issue is that it creates problems with first come first serve because sometimes historic priority can put big amounts of water into inefficient low yield agriculture uses instead of modern economic growth. What if we could fix this issue of seniority wasting water?

Recommendation

Idaho's current system has one limitation, and it is the administrative speed at which it functions. Even though water can be leased to others through the Idaho Water Supply Bank, the processing timeline can be anywhere from 30-90 days, which is extremely inefficient and has the potential to cost farmers their profits. A multiple-month delay during a heatwave makes the system effectively worthless. To combat this, Idaho should implement a program for expedited priority leasing for farmers. This policy reform would update the IDWR processes in a few ways:

1) Pre-Approved Transfer Zones: IDWR could give certain water areas (like specific sub-basins for ESPA, for example) pre-approved short-term transfers. Water amounts could be calculated beforehand, and this could make it possible for agricultural and industrial users to receive approval in a matter of days, rather than months.

2) Leasing Senior Water Rights: Senior Water Rights (first come, first served) could be leased temporarily without forfeiting them. Currently, farmers know that if they temporarily lease their water, they may lose their seniority because "use it or lose it" forfeiture clauses could be violated. This policy would ensure that leasing senior priority status into the water bank during drought years would legally be a "beneficial use". Another result would be that senior water holders get financially compensated immediately by the company they lease it to.

3) Conservation Effort Fee: Because a big concern in Idaho is keeping wildlife protected from industrialization, this expedited leasing program could include a mandatory fee percentage of revenue generated that would be allocated to water restoration efforts. The IWRB could finance local river cleanup projects or streamflow improvement along riverbeds that need extra attention.

Conclusion

In summary, while our American spirit typically encourages independence, water allocation is a distinct area that requires state oversight for all Idahoans to prosper. As discussed, water is both a necessity and a commodity. It is at the foundation of Idaho's public health, natural environment, and economy.

Idaho's mid-nineteenth-century influx of miners and farmers started with a "first in time, first in right," which proved unsustainable over time. Growing populations came with growing water demand, as well as the need to protect our environment. State oversight through the IDWR remains essential to preserve treasured Idaho experiences like floating the Boise River or kayaking Payette Lake in McCall. This oversight also prevents monopolies.

State oversight does not, however, mean total administrative control. Our hybrid system that is currently in place balances both. As seen in the ESPA example, private water decisions can start reactions with great impact. Decades of heavy groundwater pumping threatened historic seniority, proving that state regulation is essential. The proposed reforms would help improve the current state-regulated water system.



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ABOUT THE AUTHOR

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