

---

# The Water Gram

A PUBLICATION OF THE IDAHO RURAL WATER ASSOCIATION

---

SUMMER 2020



## IRWA ANNUAL FALL CONFERENCE, GOLF TOURNAMENT & TRAP SHOOT

September 29 – October 1, 2020  
Post Falls, Idaho

**REGISTER  
NOW**



Address service requested:  
Idaho Rural Water Association, 6395 West Gowen Road, Boise, Idaho 83709



EMERGENCY PREPAREDNESS | SATELLITE COMMUNICATIONS FOR SMALL RURAL CITIES





# Idaho's "Private" Water? Springs and Regulation

Since 1911, Idaho law recognized as "private" use those springs and certain kinds of lakes wholly lying within a landowner's property boundaries. Even so, these established "private" use waters continued to be water "owned" by the "public." In other words, the 1911 law exempted springs and certain kinds of lakes from use permitting by the state but are not necessarily "privately owned" water sources. The application of this law may be even more limited by the recognition of hydrological connection between surface water and groundwater in Idaho.

## Public Ownership of Water Resources

The Idaho Constitution, Art. XV, § 1 states that the "use of all waters" within the state "is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law." Further, Idaho Code § 42-101 declares that "[a]ll waters of the state . . . are declared to be the property of the state . . ." Under these authorities, the waters of Idaho could not be privately owned.

In addition, the public trust doctrine might also limit the state's ability to divest ownership of water to private

parties. Idaho courts recognized that water rights are "impressed with the public trust" for a time after the decision in *Idaho Conservation League, Inc. v. State*. 128 Idaho 155, 157 (1995). However, the state legislature swiftly passed legislation in 1996 that explicitly stated that the public trust doctrine does not apply to water rights. See Idaho Code § 58-1203(2)(b). The constitutionality of this statute has not been tested, but does not appear to allow certain water sources, like springs, to be privately owned.



**SCHROEDER**  
LAW OFFICES, P.C.

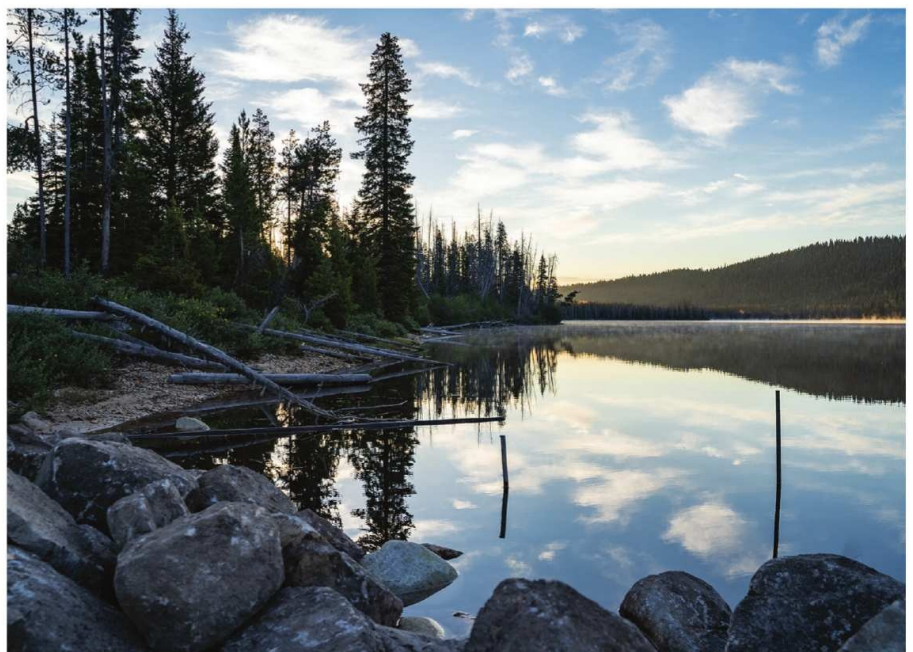
"We do EVERYTHING Water!"

*Legal education  
and advocacy supporting  
water for people.*

*Jim Browitt*  
[j.browitt@water-law.com](mailto:j.browitt@water-law.com)

*Laura Schroeder*  
[schroeder@water-law.com](mailto:schroeder@water-law.com)

*Boise: (208) 994-7007*  
[www.water-law.com](http://www.water-law.com)





### Requirement to Obtain a Water Right for "Private" Waters?

To use water in Idaho, one must, in most instances, obtain a water use permit or license. See Idaho Code §§ 42-201(2)-(3), 42-227. However, the Idaho Department of Water Resources ("IDWR") is generally prohibited from issuing permits to appropriate water to any "any lake not exceeding five (5) acres in surface area at highwater mark, pond, pool or spring in this state, which is located or situated wholly or entirely upon the lands of a person or corporation." Idaho Code § 42-212. IDWR may only issue a permit to use these types of water sources to the said landowner or to other appropriators pursuant to the landowner's written permission. Thus, this requirement, while not privatizing water ownership, provides a limit to IDWR's ability to issue water use permits on these sources.

In *Maheer v. Gentry*, the Supreme Court of Idaho indicated that these types of water sources "belong exclusively to the owners of the land." 67 Idaho 559, 566 (1947). In making its holding, the *Maheer* court limited the application of the 1911 statute, Idaho Code § 42-201(2), to apply only to those the waters that do not form a "natural stream or streams flowing off the premises on which they arise," which are considered public waters. *Id.* While not binding authority, this case does appear to support a limited version of private title to water.

### Hydrogeology and "Wholly" Upon Private Land

While the drafters of Idaho Code § 42-201(2) likely did not consider hydrological issues when drafting the statute, modern understanding of the connections between surface water and groundwater would likely make it difficult to find a water source that is "wholly or entirely" on private land. Springs, for instance, typically originate from aquifers as a form of discharge. In turn, these aquifers can extend over great distances underground. In turn, it may be difficult to locate a spring with a source that is considered "wholly" within the property boundaries on a particular tract of

private land. Therefore, it may be possible that few, if any, surface water sources could be considered "private" today.

### About the Authors

Schroeder Law Offices, P.C., was founded by Laura Schroeder and represents water-rights clients in six western states and consults internationally. Jakob Wiley is an associate attorney with

Schroeder Law Offices and licensed to practice in Oregon and Nevada. James Browitt practices water law in Idaho and Washington with his firm, Browitt Law Office, and works as Of Counsel for Schroeder Law Offices. You can read more about this topic and other water rights issues at Schroeder Law Offices' Water Law Blog, <http://water-law.com/home/blog/>. 

## Superior Accuracy. Zero Maintenance.

Reduce Non-Revenue Water and truck rolls.  
The Neptune® MACH 10® ultrasonic water meter has no moving parts, guaranteeing accuracy for the life of the meter.



**NEPTUNE**  
TECHNOLOGY GROUP

[neptunetg.com/mach10](http://neptunetg.com/mach10) #winyourday