



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

March 5, 2007

VIA E-MAIL TRANSMISSION

Randolph C. Stone, Esq.  
PARSONS, SMITH & STONE, LLP  
P.O. Box 910  
Burley, Idaho 83318  
E-mail: rcstone@pmt.org

Re: City of Burley water rights

Dear Randy:

This letter is in belated response to your letter of August 16<sup>th</sup>. The big push for IDWR to get the SRBA recommendations filed in all the remaining Basins is now complete, and we can now begin getting back to resolving outstanding objections to previously filed recommendations.

In summary response to your letter, let me begin by saying that I am optimistic that IDWR should be able to go at least part way down the path to addressing your client's concerns in the SRBA. However, there are some housekeeping tasks that need to be done before we can begin addressing in depth the four big issues raised in your letter. And I think that some of what you ask for will need to be addressed through the transfer process as the City moves toward increased integration of its wells into a single system. This is because the purpose of the SRBA is to document the historic use of the City's rights as they existed at the date of commencement of the adjudication. I do not believe that the broad definitions contained in the Municipal Rights Act of 1996 were intended to provide a method in the SRBA to modify existing rights to accommodate the City's future needs to increase the flexibility of its use of its existing system to meet the increased demand caused by future growth. Much of that will need to be done through future transfers as the City modifies its existing systems.

However, since it is not clear now how much of the change to the City's rights can be accomplished through change to IDWR's SRBA recommendations, I think that to maximize the extent to which the City's needs can be met in the SRBA, the City should first amend its claims to seek everything it believes it can make an argument it is entitled to. This is because as a general rule IDWR cannot recommend anything that was not

Randolph C. Stone, Esq.  
March 5, 2007  
Page 2

claimed. Therefore, if the City amends its claims to seek "everything" it gives us both the most leeway within which to negotiate. For instance, it is not clear to me that IDWR can recommend as alternative points of diversion every City well for every City right, since my understanding is that, because the City does not operate a single totally integrated system, each well presently is not physically capable of supplying water for each right. However, as there appears to be conflicting information about just how integrated the City's systems are, and probably legal issues regarding how much of the 1996 Act permits the recognition in the SRBA of alternative points of diversion, if the City were to amend its claims to claim every well as an alternative point of diversion for every right, IDWR would then be able to recommend that if the city should turn out to be entitled to it, or agree to something less if the City were not.

Essentially my understanding of the City's position is that it wants all of its water rights decreed as municipal rights, with a year around season of use, a place of use within the boundaries of the municipal service area, and with all of the City wells listed as alternative points of diversion for each right. Therefore, the first step to accomplishing this is for the City to amend all of its claims to seek these things.

I have reviewed all of the City's claims, and based upon those I am enclosing with this letter an enumeration of what I think needs to be amended on each claim. I have also spoken with Kelly Christensen about this and he is prepared to assist you to the full extent necessary in preparing the amended claims. At this stage in the proceeding a motion to the SRBA Court for leave to file amended claims will be necessary, but I am confident that a single motion for all the claims would suffice.

Now I will address each of your four specific issues in turn.

#### Purpose of Use.

I agree that the language of Idaho Code §42-202B(6) is so broad that all of the City's rights fall within the statute's definition of "municipal." However, it is not clear that the Municipal Rights Act of 1996 applies to all pre-existing rights held by municipal entities to automatically entitle them to be recommended as "municipal" in the SRBA. Chris Meyer, one of the authorities on the Act, in his discussion of the Act in his firm's Water Law Handbook (November 12, 2004), appears to take the position that each City should file a transfer for each of its existing rights having anything other than "municipal" as a purpose of use to change the purpose of use to "municipal." (Chris's article is very instructive. If you do not have a copy of it let me know and I will send you one.) Additionally there is authority in the SRBA that both IDWR and the claimant are bound by the terms of the claimant's licenses, and cannot use the SRBA to collaterally attack a license. Here the City has several licenses for uses other than municipal. It is

Randolph C. Stone, Esq.  
March 5, 2007  
Page 3

not clear that the purpose of use for those licenses can be changed in the SRBA; transfers may be necessary.

#### Season of Use.

The more important question, however, will be whether IDWR can recommend all the City's rights with a year around season of use, since a number of them were developed solely for irrigation use and historically have been used only during the irrigation season. The issue here is whether recommending them with a year around season of use would constitute enlargements of the rights. A particularly intriguing question is what season of use are the low-pressure system rights entitled to? If they were originally developed in part for culinary purposes presumably they were used year around. However, if the year around use subsequently was ceased when the systems were converted to outside irrigation systems, was the non-irrigation season portion of these rights subsequently forfeited? While unlikely, this might be an issue because IDWR takes the position that even rights held by a city can be forfeited for nonuse if the unused portion was not being held for reasonably anticipated future growth.

My general understanding in talking to Kelly is that the City has at least five separate water systems: (1) the low-pressure irrigation system north of the railroad tracks; (2) the low-pressure irrigation system south of the railroad tracks; (3) the general municipal system for the entire City service area; (4) an irrigation system for the golf course; and (5) an irrigation system for the cemetery.

The rights for the general municipal system are already recommended as year around municipal.

The golf course and cemetery systems are more problematic in that they were developed for irrigation and to my understanding historically have only been used during the irrigation season. Moreover, 45-7092 for the golf course and 45-7114 for the cemetery are both licensed rights, licensed for irrigation with an irrigation season of use. I doubt that IDWR can recommend them for year around use without that constituting an enlargement of use, when they never have been so used and are not physically tied into the year around system. However, we can address that issue after they are claimed as year around municipal. Additionally, it is important to note that according to Kelly Christensen the golf course rights have been underclaimed, so that when amended claims are prepared the quantity elements also should be amended. Kelly can talk to you about the details of this.

Place of Use.

Generally speaking, the place of use of a municipal right is the municipal service area. That is how IDWR recommended the place of use for all City rights it recommended as municipal, viz. the culinary system rights and the low pressure irrigation system rights. However, where the distribution systems are not interconnected so as to allow the water of any given right to reach the entire service area, the issue is whether rights in such systems can have the entire service area listed as the place of use if their purpose of use is not municipal. There is language in Idaho Code §42-202B(9) that suggests at least for areas planned to be brought into the service area in the future, the system for those areas must be connected to the system for the service area. This would suggest that the place of use for rights from wells connected to a system that does not serve the entire municipal service area would have a place of use limited to those areas that are reached by that particular system. It may be that transfers will be required to expand the place of use of the City's various systems as they become more integrated. But this is a question that will take further investigation. In the meantime the City's claims should be amended to assert the municipal service area as the place of use for all the rights.

Alternate Points of Diversion.

There is no question that all the wells within any interconnected system can be listed as alternative points of diversion for all the interconnected rights. But it is not clear to me that wells that are not physically connected to a given system can be listed as alternative points of diversion for that system. IDWR's policy is to only recommend as alternative points of diversion wells that are physically tied into the system. My understanding is that traditionally, when a well has been physically connected to a system it was not previously tied into, a transfer has been needed to add the well as an additional point of diversion. The reason for this is that while municipal rights generally are protected from forfeiture, they are not exempt from the prohibition against enlargement and injury to other rights. Therefore, not listing all the City's points of diversion as alternative points of diversion on every right is not necessarily an "artificial" restriction.

However, it is premature to address this question before the City's claims are amended to seek alternative points of diversion. Additionally, a number of questions concerning the use of alternative points of diversion for municipal rights, and the scope of IDWR's authority—if any—to place conditions on the use of alternative points of diversion have been raised in the City of Pocatello's objections to IDWR's recommendations of its municipal rights. Those issues were the subject of a week-long trial that was held before Special Master Bilyeu just last week. Within two or three months we should have a decision from her that will give both of us guidance in how alternative points of diversion can be recommended and decreed for municipal rights. It

Randolph C. Stone, Esq.  
March 5, 2007  
Page 5

would behoove us to wait for that decision before we begin to discuss the City of Burley's concerns about the use of alternative points of diversion.

Additionally, I wish to address some specific housekeeping matters regarding particular rights that can be resolved as part of the City filing amended claims.

Right no. 45-4096.

At the time this claim is amended to seek a year around season of use and alternative points of diversion, its priority date also ought to be amended to reflect the 4-14-1905 priority date that we are all in agreement this right should have.

Right no. 45-4095.

At the time this claim is amended to seek a year around season of use and alternative points of diversion, a companion late claim and motion for late claim need to be prepared. The purpose of the late claim is to allow 1.11 cfs of the diversion rate for this right to be recommended with a 1917 priority date. To do this, 45-4095 can be amended to claim a diversion rate of 1.11 cfs and a 1917 priority date. A new companion claim can then be prepared to cover the remaining 1.34 cfs with the present 1939 priority date. Kelly Christensen will work with you on ironing out the details of this.

Right no. 45-4097.

The City has already filed an amended claim for this right, along with a late claim for 45-13895, a split of this right. The claim needs an additional amendment to seek multiple points of diversion (it already is being claimed for year around municipal). However, it has an additional problem that need to be fixed: it claims the 1905 priority date that rightfully should go claimed under 45-4096. Therefore it should be further amended to claim a 1917 priority date and a diversion rate of 1.11 cfs. (The additional quantity that was developed when a replacement well was drilled in 1925 and a larger pump was installed in 1926 is already covered by late claim 45-13895.) Kelly Christensen knows what needs to be done to correct these problems and will work with you on getting them fixed.

Right nos. 45-4085 and 45-7092.

The golf course rights have been underclaimed. A 70-acre place of use was claimed for 45-4085, but Kelly Christianson found that the irrigated place of use for the golf course in fact is 76.6 acres. Therefore at the time the claims are amended to year around municipal use, the size of the place of use for 45-4085 need to be increased. Kelly Christensen will work with you on fixing this.

Randolph C. Stone, Esq.

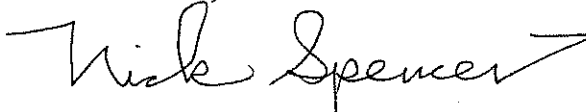
March 5, 2007

Page 6

Finally I note that we have a pre-trial conference scheduled in less than two weeks and a trial scheduled in less than three weeks. We clearly are not ready to go to trial yet, nor is there any purpose in going to trial until after we have resolved every issue we can through discussion and negotiation. I am sure there is a lot we can resolve short of trial. I think we need to have a joint telephone conference with the Special Master as soon as conveniently possible to seek additional time for the City to amend its claims, and for Kelly, you and I to continue our settlement discussions.

Thank you for your attention to what has turned into a lengthy letter. Please let me know your thoughts.

Best wishes,

A handwritten signature in black ink that reads "Nick Spencer". The signature is fluid and cursive, with a long horizontal stroke at the end.

NICHOLAS B. SPENCER

Deputy Attorney General

Enc: 1

Cc: Kelly Christensen

## **AMENDMENTS NEEDED TO CITY OF BURLEY RIGHTS**

### **36-4080 (culinary system)**

Amend to add multiple PODs.

NOTE: This will create the unusual situation that a Basin 36 right could end up with most of its PODs in Basin 45. However, the Basin 36 number should be retained in order to reflect that this right has a POD in Basin 36, and that it serves the portion of the city north of the river. IDWR understands this well is physically connected to the municipal delivery system south of the river.

### **45-4085 (golf course)**

Amend to municipal with year around SOU, municipal service area as POU, and multiple PODs. Also the claimed place of use should be increased by 6.5 acres.

### **45-4086 (senior citizens system)**

If the City wishes to continue asserting a claim to this right, amend to municipal with municipal service area as POU and multiple PODs.

NOTE: This claim was disallowed. No evidence of priority was submitted. When Kelly Christensen met with Jessie Mabry in 2004 he was informed this well was not being used and the City did not wish to pursue the claim.

### **45-4087 (cemetery)**

Amend to municipal with year around SOU, municipal service area as POU and multiple PODs.

### **45-4089 (irr north system)**

Amend to year around SOU and multiple PODs.

### **45-4090 (irr north system)**

Amend to year around SOU and multiple PODs.

### **45-4091 (irr north system)**

Amend to year around SOU and multiple PODs.

### **45-4092 (irr north system)**

Amend to year around SOU and multiple PODs.

**45-4093 (irr south system)**

Amend to year around SOU and multiple PODs.

**45-4094 (irr south system)**

Amend to year around SOU and multiple PODs.

**45-4095 (irr south system)**

Amend to year around SOU and multiple PODs.

NOTE: This claim also needs a LATE CLAIM for a companion right in order to move 1.11 cfs of the diversion rate onto a 1917 priority date.

**45-4096 (irr south system)**

Amend to year around SOU and multiple PODs.

NOTE: This claim also needs an amendment to priority date to claim a priority date of 4-14-1905.

**45-4097 (irr south system)**

Amend to multiple PODs.

NOTE: This claim has already been amended once, but it needs corrections to the prior amendment.

**45-4098 (culinary system)**

Amend to multiple PODs.

**45-4099 (culinary system)**

Amend to multiple PODs.

**45-7092 (golf course)**

Amend to municipal with year around SOU, municipal service area as POU, and multiple PODs.

**45-7114 (cemetery)**

Amend to municipal with municipal service area as POU and multiple PODs.

**45-7436 (irr south system)**

Amend to year around SOU and multiple PODs.

**45-11133 (irr south system)**

Amend to year around SOU and multiple PODs.