

Keen, Shelley

From: Christopher H Meyer [ChrisMeyer@givenspursley.com]
Sent: Tuesday, August 23, 2016 3:42 PM
To: Keen, Shelley
Subject: CHM Ltr #4 to IDWR re IDWR proposal (corrected).PDF [IWOV-GPDMS.FID525891]
Attachments: CHM Ltr #4 to IDWR re IDWR proposal (corrected).PDF

Shelley,

Following up on my voicemail to you yesterday, here is a copy of my latest letter to you.

I was reviewing it today and noticed an error on page 4 (referring to licensed rights as permits).

Not of any great consequence, but it was a head scratcher for a minute.

So, for your convenience, I'm sending you a corrected version, with the error correction shown in redline.

Best to you.

-Chris

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March 25, 2016 (corrected 8-23-2016)

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Re: North Kootenai Water and Sewer District

Dear Shelley and Dan:

Thanks to both of you for inviting me to meet with you last Tuesday. Speaking for me and for North Kootenai Water District ("NKWD" or "District"),¹ we very much appreciate the effort that you and others at the Idaho Department of Water Resources ("IDWR" or "Department") have put into the resolution of pending issues concerning the District's water rights.

I write to confirm my understanding of where things stand. Please let me know if I have failed to understand the Department's proposed actions. Once we confirm that we are on the same page, I look forward to working with you to iron out the remaining wrinkles and bring this to conclusion. I believe that is possible, given the good progress we have made here.

APODs

The Department is prepared to recognize alternative points of diversion ("APODs") for each of NKWD's ground water rights, permits, and claims (except for No. 95-4027 discussed below). This will encompass all 24 currently active wells within NKWD's service area. Each of these wells diverts from the Rathdrum Aquifer.

¹ NKWD is formally known as the North Kootenai Water and Sewer District.

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For the CSRBA claims, where APODs are not already listed on the license or permit, the accomplished transfer statute allows IDWR to recommend only those wells that were in place as of the date of commencement in 2006. Accordingly, it will be necessary to add the post-2006 APODs via a transfer of the existing rights. Do I understand correctly that this transfer could be done now, before the Department's recommendations are made?

APODs would also be included on the three permits that are now up for licensing (Nos. 95-9129, 95-9244, and 95-10019).

SCADA

We understand that the Department's agreement to APODs is conditioned upon all of the wells being connected and controlled via a SCADA system, which is capable of reporting the total, system-wide instantaneous flow rate and cumulative volume of ground water diversions on a daily basis.

NKWD confirms that its SCADA system is now fully operational throughout its service area. NKWD will work with the Department on a protocol to most efficiently and economically provide the pertinent data to IDWR. We do not want to make this more complicated than necessary.

No. 95-4027 (statutory claim)

We understand that the Department will recommend disallowal of Water Right No. 95-4027, based on how it is currently claimed. This is a beneficial use claim in the CSRBA that corresponds to a statutory claim filed by Washington Water Power Company in 1970. That facility was later acquired by NKWD and has been in use ever since.

The problem is on the face of the claim. It claims a priority date of September 1, 1963, which is a few months after the effective date of the mandatory permit statute for ground water rights.

Accordingly, NKWD is looking for documentation that the beneficial use occurred prior to that time. It is my understanding that if that appropriate documentation of timely beneficial use is provided, IDWR will consider recommending that right for approval, with APODs.

Rates for permits

For two of the three pending licenses, IDWR proposes to reduce the rate of flow below what NKWD believes is appropriate.

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For No. 95-9129, the right is permitted at 0.95 cfs. NKWD anticipated it being licensed at 0.53 cfs based on theoretical calculations. However, IDWR is now proposing 0.20 cfs. We did not discuss this during our meeting, and do not yet know the reason for this reduction.

For No. 95-10019, the permit states 0.20 cfs, but IDWR is proposing to license it at 0.04 cfs. This appears to correspond to the pumping capacity of the well associated with the East Season Acres development. We understand that IDWR does not believe that proof may be based on the other APODs listed on the permit. I do not yet understand that reasoning.

This combined reduction of 0.49 cfs (see table below) is an area of disagreement. Thankfully, it is a small disagreement in terms of size.

Water Right No.	Status	cfs on face of license or permit	cfs Anticipated by NKWD	cfs Proposed by IDWR	Loss of cfs
95-07271	License	0.83	0.83	0.83	0.00
95-09129	Permit	0.95	0.53	0.20	0.33
95-10019	Permit	0.20	0.20	0.04	0.16
TOTAL		1.98	1.56	1.07	0.49

Annual volume limits

NKWD owns 18 ground water rights, permits, and/or claims. In conjunction with recognizing system-wide APODs for these, IDWR proposes that each will be subject to an annual volume limit. This has been the subject of dispute between NKWD and the Department for some time. Some areas of disagreement remain, but it appears that, for the most part, we are now in agreement.

Ten of NKWD's ground water licenses contain express volume limits (95-2144, 95-2205, 95-7138, 95-7185, 95-7231, 95-7713, 95-7763, 95-7827, 95-8522, and 95-8639). The Department intends to retain those annual volume limits. NKWD agrees this is appropriate.

IDWR will not address No. 95-12599 at this time, because proof is not due until 2021 and no claim has been filed. That makes sense.

IDWR will recommend an effective zero volume limit (via a combined use limit) for No. 95-9244. This is because of a condition on the permit requiring that, at the time of licensing, NKWD demonstrate that the system-wide portfolio is insufficient to meet current system-wide need. NKWD is evaluating this conclusion. We acknowledge that the Department has raised a legitimate issue.

IDWR proposes to recommend an annual volume of 66 AFA (acre-feet per annum) for No. 95-7271 notwithstanding that the current license for this right contains no stated volume limit. We understand IDWR's position to be that Nos. 95-7271 and 95-2205 were both initially intended for a development of 80 homes, which, at 1.2 AF/home would need 96 AFA. Since No. 95-2205 already has a limit of 30 AFA, that leaves 66 AFA for No. 95-7271.

Similarly, IDWR proposed to license No. 95-10019 with an effective annual volume of zero (via a combined-use limit). IDWR says that this permit was obtained for a discrete subdivision known as East Seasons Acres and that its wells and service area are "covered" by the much larger License No. 95-9199 (one of the licenses that IDWR has agreed should not have a volume limit). In other words, IDWR views this permit as authorizing some additional cfs, but no additional volume.

Based on similar reasoning, IDWR also proposes to license No. 95-9129 with zero effective annual volume (based on a combined use limit).

NKWD disagrees with IDWR's reasoning as to these three rights (Nos. 95-7271, 95-9129, and 95-10019). These were permitted and/or licensed as municipal water rights. Municipal rights include an expanding service area and the right to grow into the full diversion rate over time. The fact that these rights originally may have been precipitated by the need to serve a particular subdivision does not matter. That is how most municipal water providers grow their service area—one water right at a time. To my thinking, there is no justification for treating these rights differently than any other municipal right.

That said, in the grand scheme of things, this is not a large disagreement. If pumped year-round at the rate proposed by IDWR, they would yield a total of 775 AFA. Instead, IDWR proposes a total of 66 AFA, for a loss of 709 AFA. See table below.

Water Right No.	Status	cfs Proposed by IDWR	AFA based on pumping 24/7	AFA Proposed by IDWR	Loss of AFA
95-07271	License	0.83	601	66	535
95-09129	Permit	0.20	145	0	145
95-10019	Permit	0.04	29	0	29
TOTAL		1.07	775	66	709

IDWR proposes to ~~issue licenses recommend decrees~~ for ~~licensed right permit~~ No. 95-9199 (for 8.83 cfs) and ~~permit-licensed right~~ No. 95-9217 (for 2.51 cfs) with annual volumes based on the volume that would be produced if diverted at the full authorized rate nonstop for a year. In other words, it does not serve as a limit. Rather, the annual volume will be stated on the

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face of the rights in order to facilitate spreadsheet tracking of all water rights in NKWD's portfolio. This more generous treatment of Nos. 95-9199 and 95-9217 is based on the recognition that these rights were licensed with APODs and without a volume limit.

Based on 24/7 pumping, the "volume limit" for No. 95-9199 would be 6,393 AFA and the "volume limit" for No. 95-9217 would be 1,818 AFA, for a total of 8,211 AFA. Adding in the volume limits for the other water rights in the ground water portfolio (discussed above), this totals to 11,087 AFA that NKWD is authorized to divert system wide through all of its APODs. This is reflected in the spreadsheet you shared with me at the meeting.

While NKWD disagrees with the elimination of 709 AFA, as described above, the District recognizes that this is a small area of disagreement compared to the 11,087 AFA where we agree.

RAFN applications

NKWD is now re-evaluating its RAFN applications in light of this potential resolution of outstanding issues on its existing portfolio. We will follow up with you shortly. (It is my understanding that NKWD has requested additional time to respond to the Department's information request.)

In the meantime, it bears emphasis that NKWD's RAFN applications, like all RAFN applications, are based on cfs, not AFA. Thus, the recognition of authorized diversion volumes in its existing rights does not obviate the need for the RAFN applications.

Once we are ready to move forward on this, we anticipate seeking to re-consolidate the RAFN applications into a single application with system-wide APODs, as it was initially filed. We do not see this as a change in the application, and expect that the priority date will not be adjusted.

Draft permit language

When we met, you were kind enough to provide draft Applications for Amendment to Permit for the three permits up for licensing (Nos. 95-9129, 95-9244, and 95-10019).

We will continue to review the conditions. However, based on an initial perusal, none of the condition language jumps out as being an issue. The only edit that I have now is to suggest that condition No. 2 be modified to read:

2. Place of use is within the service area of North Kootenai Water District as provided for under Idaho law. At the time

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of this approval. The place of use is generally located within T51N, R3W, 4W and 5W; T52N, R3w and 4W; T53N, R3W, 4W and 5W.

That edit would conform to the language to that in condition No. 3, which is consistent with the statutory definition of an evolving service area.

By the way, the drafts that you shared with us contain the correct number of APODs, but the list is not up-to-date. It includes two wells that have been abandoned (Lancaster 1 and 2), and two active wells that need to be added (Hayden Well 2 and Lancaster 5). NKWD will work with you directly to make sure you have the latest information. For your convenience, however, I attach an up-to-date APOD spreadsheet that was provided to me by NKWD's consultant.

Claims for permits

You noted that the Department would prefer that NKWD file claims for Nos. 95-9129, 95-9244, and 95-10019 in the CSRBA once the licenses are issued. We agree that it makes sense to get all of these nailed down in the adjudication.

Allocation of diversions to water rights

The discussion above outlines small areas of disagreement and large areas of agreement. There is one other issue, however, that may require further discussion. This is the question of how system-wide diversion volume is allocated among NKWD's water rights.

At our meeting on Tuesday, you previewed for me a spreadsheet now in development by IDWR that could be used for tracking NKWD's water rights. As I understand it, the input to the spreadsheet would be NKWD's daily system-wide diversion volume. The spreadsheet would allocate that daily volume number among NKWD's water rights that are then in priority (in other words, those water rights that have not been curtailed and whose annual volume has not been reached).

That makes perfect sense. The problems is with how the volume is allocated among the water rights. The spreadsheet allocates water proportionately among all rights then in priority. NKWD does not use its water rights in that fashion. It uses its junior water rights first, preserving its senior rights to the extent possible in the event of a curtailment.

NKWD has the right to do this. It owns every water right in its portfolio. These are property rights. Accordingly, NKWD has the right to determine which of its water rights that are then in priority it will use at any given time.

This concept is fundamental to the rationale of why we have APODs in the first place. In times of shortage, NKWD may decide that it will pump its available senior water rights for this well or that well as it sees fit. It may do that on a rotating basis, for instance, in order to share the pain among its customers.

It is no different during times of no administration. If a water right holder owns multiple water rights that may be diverted from a single well, it has the legal right to determine, at any given time, under which right(s) it wishes to pump.

The only time this is not the case is when an express condition in the permit or license mandates the order in which water rights must be used. For example, ground water rights sometime contain a condition requiring that surface rights be used first. In the absence of such a sequencing condition, the holder is free to choose how to deploy its water rights.

To illustrate, let me suggest the following hypothetical. Imagine, if you will, that a farmer has two 40-acre plots, each with a well. Each well has its own water right—one senior, one junior. Both rights have a permissible place of use covering all 80 acres, and there is a delivery system that allows that flexibility. Both rights have an annual volume based on irrigation of 40 acres, and both rights have a diversion rate capable of serving all 80 acres at once, subject to a combined use limit.

Surely we agree that the farmer has the legal right to physically turn on (or off) either well as she chooses, so long as the associated right is in priority and the water is used beneficially within the permissible place of use.

Given that the farmer has this flexibility, she would be smart to pump from the well with the junior right at the beginning of the season. Then, if that right is curtailed later in the season when some or all of the volume limit is used up, she may irrigate her farm from the senior well.²

Is that an evasion of the priority system or the curtailment order? No. That is how property rights work. You use them to your advantage.

If we can agree on that, then I will suggest that there is no difference between the right of the farmer to select which well to turn on and the right of NKWD to select which water right to divert under. One involves a physical act (turning on a well). The other involves an accounting

² By the way, this only makes a difference if the curtailment occurs midway during the season. If the same junior rights remain curtailed into the second year, the farmer will have no ability to pump from the junior well at all and will be unable to “use up” the volume associated with that well’s water right.

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action. But there is no legal difference between the physical right to select which well to turn on and the accounting action to declare which right is being pumped from that well.³

Such allocations (including those described in footnote 3) might be viewed as strategic, but that does not make them wrong. The law has never viewed it as improper to use one's property strategically. And no other right holder can claim injury because her neighbor used her water rights when they were in priority in a sequence that allowed them to be used as long as possible before curtailment.

Frankly, I do not understand why the Department would want it any other way, particularly when a municipal provider is involved. In times of shortage, it will be hard enough to curtail use on farms. I should think that the last thing the Department would want to do is to curtail municipal providers. That is where the pain is most acute and the economic impact the most severe. If curtailment must occur, I should think that the Department would want to facilitate efforts by municipal providers to get the most out of their water rights. The right of municipal providers to sequence use their water rights in order to maximize use of their senior water rights in times of shortage is not only mandated by the law of property rights, but is good public policy.

Sincerely,



Christopher H. Meyer

Encl: APOD spreadsheet prepared by NKWD
cc: Mike Galante, District Manager, North Kootenai Water and Sewer District
Necia Maiani and Ashley Williams, Welch Comer Engineers

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³ Indeed, this sort of accounting decision in declaring how rights are used is a familiar one in the context of municipal water rights.

For example, a municipal provider might hold an entitlement to storage water in a federal reservoir that, by federal law, may only be used for irrigation. Or it might have acquired an irrigation right and not converted it to municipal use. IDWR has always recognized the right of such users, as a matter of accounting, to allocate this water to the "irrigation component" of its customer usage.

Likewise, a municipal right holder might have a portfolio serving an integrated delivery system that included both RAFN and non-RAFN water rights. The holder might elect to declare that it was using the non-RAFN rights in order to protect them from forfeiture, while holding the RAFN rights in reserve until needed.

North Kootenai Water District: Points of Diversion

Well Name	Notes	Source	1/4 1/4	Section	Township	Range	County
1 Lancaster 3	Active	GROUND WATER	SESWSW	Sec. 02	Township 51N	Range 04W	KOOTENAI County
2 Lancaster 4	Active	GROUND WATER	SWSW	Sec. 02	Township 51N	Range 04W	KOOTENAI County
3 Lancaster 5	Active	GROUND WATER	SWSW	Sec. 02	Township 51N	Range 04W	KOOTENAI County
4 Lancaster 2	Abandoned	GROUND WATER	NWNE	Sec. 11	Township 51N	Range 04W	KOOTENAI County
5 Lancaster 1	To Be Abandoned	GROUND WATER	NWNWNE	Sec. 11	Township 51N	Range 04W	KOOTENAI County
6 Hayden Orchards	Active	GROUND WATER	NWNE	Sec. 14	Township 51N	Range 04W	KOOTENAI County
7 Valley Green	Active	GROUND WATER	SWSE Lt 7	Sec. 15	Township 51N	Range 04W	KOOTENAI County
8 GTE 1	Active	GROUND WATER	SWSE	Sec. 23	Township 51N	Range 04W	KOOTENAI County
9 Hayden Well 1	Active	GROUND WATER	NESE	Sec. 23	Township 51N	Range 04W	KOOTENAI County
10 Hayden Well 2	Active	GROUND WATER	NESE	Sec. 23	Township 51N	Range 04W	KOOTENAI County
11 Hayden Pines	Active	GROUND WATER	NESE	Sec. 23	Township 51N	Range 04W	KOOTENAI County
12 GTE 2	Active	GROUND WATER	SWSE	Sec. 23	Township 51N	Range 04W	KOOTENAI County
13 Finucane	Active	GROUND WATER	NWSW	Sec. 24	Township 51N	Range 04W	KOOTENAI County
14 Meadowland Acres	Active	GROUND WATER	SESE	Sec. 23	Township 51N	Range 05W	KOOTENAI County
15 Echo Street	Active	GROUND WATER	NESW	Sec. 32	Township 51N	Range 05W	KOOTENAI County
16 Elk Street	Active	GROUND WATER	SESW	Sec. 32	Township 51N	Range 05W	KOOTENAI County
17 Chilco 1	Active	GROUND WATER	SWNW	Sec. 08	Township 52N	Range 03W	KOOTENAI County
18 Chilco 2	Active	GROUND WATER	SWNW	Sec. 08	Township 52N	Range 03W	KOOTENAI County
19 Ohio Match 1	Active	GROUND WATER	NWSE	Sec. 18	Township 52N	Range 03W	KOOTENAI County
20 Echo Beach	Active	GROUND WATER	NENE	Sec. 06	Township 52N	Range 04W	KOOTENAI County
21 Tree Farm #1	Active	GROUND WATER	SESE	Sec. 17	Township 52N	Range 04W	KOOTENAI County
22 Tree Farm #2	Active	GROUND WATER	SESE	Sec. 17	Township 52N	Range 04W	KOOTENAI County
23 Atlas Acres	Active	GROUND WATER	NESE	Sec. 28	Township 52N	Range 04W	KOOTENAI County
24 Ranch Valley	Active	GROUND WATER	SENE	Sec. 33	Township 52N	Range 04W	KOOTENAI County
25 Ohio Match 2	Not In Service						
26 Syite Well	Active	GROUND WATER	NENE	Sec. 28	Township 52N	Range 04W	KOOTENAI County
27 East Seasons Acres	Active	GROUND WATER	NENW	Sec. 28	Township 53N	Range 04W	KOOTENAI County