

MEMORANDUM

DATE: September 6, 2016

TO: Water Right Files 95-9244, 95-10019, and 95-12599

FROM: Shelley W. Keen ^{SWK}

RE: Meeting with Chris Meyer to discuss NKWD water rights

On August 24, 2016, Dan Nelson and I met with Chris Meyer, at his request, to continue discussing whether the water rights for North Kootenai Water and Sewer District ("NKWD") can be permitted, licensed, transferred, or recommended with all of NKWD's wells listed as alternative points of diversion ("APODs").

In a discussion Dan and I had with Chris earlier this year, we expressed IDWR's willingness to recognize APODs on NKWD's ground water rights, provided the potential for enlargement is prevented and there is a reasonable method available to regulate diversions from the APODs. We even presented an option for using NKWD's Supervisory Control And Data Acquisition ("SCADA") system to account for the use of NKWD's water rights so that enlargement could be prevented. Chris responded with a letter on March 25, 2016, reacting to IDWR's views. Because NKWD and IDWR see the possibility for enlargement differently, on August 24, 2016, we mainly discussed IDWR's views on how authorizing APODs could lead to enlargement and how such enlargement could be prevented. We also informed Chris of the opinion within IDWR's Adjudication unit that it cannot recommend APODs as accomplished transfers pursuant to Idaho Code § 42-1425. This memo summarizes the discussion on these points and a few others.

Enlargement

The prohibition of enlargement when modifying a water right is a common requirement throughout Title 42, Idaho Code. See Idaho Code §§ 42-222(1) and 42-1425(2), for example. See also Idaho Code § 42-211, which does not use the word *enlargement*, but does direct IDWR not to approve an amendment of permit that would "result in the diversion and use of more water than originally permitted." In fact, the phrasing in Idaho Code § 42-211 provides a useful definition of enlargement.

Dan and I explained to Chris that IDWR is concerned authorizing APODs could cause enlargement in a couple of ways. The first is that changing a water right to be diverted from many more points of diversion for multiple water systems, as the APOD strategy proposes, provides an opportunity for a water use increase that would not otherwise have been available, at least not in the near term, within the individual water system. The number of users in multiple water systems is greater, and is likely to grow faster, than in a single water system. From IDWR's perspective, allowing a water right established within a single water system to meet the needs of multiple water systems would result in its enlargement unless suitable restrictions are

implemented. To prevent enlargement through the conversion to APODs, IDWR has proposed limiting NKWD's water rights to annual diversion volumes based on historic beneficial use.

Chris felt like IDWR's view is inconsistent with a municipal water right holder's opportunity under the Growing Communities Doctrine to expand a water right's volume as the community expands. We responded that IDWR agrees a municipality or similar municipal provider can enlarge the volume diverted pursuant to its water rights as its water system and community grows, but IDWR believes changing water rights to make them available to other community systems via APODs would result in enlargement without proper safeguards, such as a volume limit based on the use in the original community system.

IDWR's second concern about APODs resulting in enlargement has to do with NKWD's desire to use its junior water rights first while reserving its senior water rights for later in the year, in case there is a mid-year delivery call. IDWR does not disagree that, in general, in times of administration a water right holder owning multiple water rights has the legal right to determine, at any given time, under which right(s) it wishes to pump. For NKWD, however, that principle must be juxtaposed against the prohibition of enlargement. Practically speaking, a policy of using the junior rights first has not been historically possible for NKWD for two reasons. First, NKWD has never been under administration and, therefore, has never had to account for which water rights it has relied on when there has been a choice. Second, most of NKWD's water rights were developed and used in small water systems with only one or two water rights. With only one or two rights serving a particular system, NKWD had very little choice in which water right it relied on in each system. Therefore, the only conclusion can be that NKWD historically relied on most of its water rights each day.

As we explained to Chris, allowing NKWD to use its junior water rights while reserving its senior rights would enlarge the junior rights. Historically the senior rights have been gradually used throughout the year in the individual systems where they were established. NKWD used junior rights only in those systems where they originated, presumably to provide demand the senior rights could not meet. Thus, the use of a junior water right would have been restricted to the demand within the single water system where it was established. Applying APODs and enabling NKWD's junior rights to be relied on for their full potential throughout its many systems would enlarge NKWD's use of the junior rights because the demand is greater in many systems than in single systems. IDWR believes the way to allow APODs while preventing such enlargement is to apportion the water use among all of NKWD's water rights each day, mirroring the historic use pattern. The accounting spreadsheet IDWR shared with Chris earlier this year is a good faith effort from IDWR to show how NKWD's water use, as identified in its SCADA system, could be apportioned among all of NKWD's water rights each day to prevent enlargement.

Adjudication Perspective

In the Snake River Basin Adjudication ("SRBA") IDWR's Adjudication staff argued successfully that the City of Pocatello's wells must be physically connected to the municipal water system to be listed as points of diversion for the City's municipal water rights. The current staff working on Coeur d'Alene – Spokane River Basin Adjudication claims believe they need to remain consistent with the outcome in the SRBA. Therefore, they are not inclined to recognize

that NKWD established APODs in unconnected water systems through accomplished transfers. Chris was clearly disappointed by this news. Dan and I discussed with Chris that one option for overcoming the need to rely on the accomplished transfer statute is to obtain APOD authorization through the administrative transfer process. Chris indicated he understood the transfer option and would discuss it with his client.

No. 95-4027 (statutory claim)

Chris asked about the CSRBA claim based on statutory claim 95-4027. He has apparently collected information showing the point of diversion existed before the 1963 mandatory permit requirement, as did a subdivision plat. However, he does not have evidence that the beneficial use occurred prior to 1963. I responded that Chris could submit what he has for review by the Adjudication staff, but it does not seem like a strong confirmation of beneficial use by the required date.

Rates for permits

We told Chris that after re-evaluating the information in the water right file, IDWR concurs with NKWD that a diversion rate of 0.53 cfs appears appropriate for the licensing of Permit 95-9129.

We also discussed the diversion rate for Permit 95-10019. The permit states 0.20 cfs, but IDWR is proposing to license it at 0.04 cfs, which was the diversion rate measured by Welch Comer for the East Seasons Acres well and reported in the beneficial use field report for permits 95-10019, 95-9244, and 95-12599. Since the permit was amended to include APODs before NKWD submitted proof of beneficial use, it makes sense that the capacity of PODs other than the East Seasons Acres well should be considered when determining the diversion rate for the right. Therefore, IDWR agrees that this right may need further analysis and discussion.

RAFN applications

We discussed that IDWR thinks the confirmation of NKWD's water rights through the CSRBA and administrative licensing processes is a necessary prerequisite to the evaluation of NKWD's application for water to serve reasonably anticipated future needs ("RAFN"). The process to confirm existing water rights will determine whether APODs are appropriate for all of NKWD's water rights. That determination is likely to be a major factor in establishing how many RAFN applications NKWD ultimately pursues. In addition, the quantification of NKWD's existing water rights is necessary for the gap analysis to determine the difference between NKWD's existing rights and its projected needs over its chosen RAFN planning horizon. Whether additional rate or volume or both can be justified in a RAFN application will depend on the gap analysis. Therefore, IDWR thinks it is too soon to know how many RAFN applications may be necessary and whether the existing applications can be consolidated into one.

Licensing of Permits 95-9244, 95-10019, and 95-12599

Chris told us about allegations from the engineering firm working for NKWD that IDWR won't issue licenses for Permits 95-9244, 95-10019, and 95-12599. Dan and I reassured Chris that the reason we initially entered into the conversation with NKWD two years ago was a responsibility

to issue the three licenses. That responsibility remains our primary motivation for continuing forward. However, we are convinced that the licensing effort should remain, for now, part of a broader discussion about how NKWD's rights, including CSRBA claims and RAFN applications, will be defined.

Draft license language

IDWR previously shared with Chris some draft licenses that included approval conditions. We discussed that the impact of the enlargement issue on APODs and volumes is critical to the final determination of the elements of each right. Therefore, it is too early for IDWR to identify a specific set of approval conditions.