

MEMORANDUM

TO: Shelley Keen

FROM: Christopher H. Meyer 

RE: Status report on IDWR discussions

DATE: August 29, 2017

TABLE OF CONTENTS

I.	Purpose of this memorandum	2
II.	Status of individual water rights	3
	A. Nos. 95-9199 & 95-9217	3
	B. Nos. 95-7138, 95-7713, 95-7827, 95-8522, and 95-8639	3
	C. Nos. 95-2144, 95-2205, 95-7185, 95-7231, and 95-7763	3
	D. Nos. 95-9129, 95-9244, and 95-10019	4
	(1) No. 95-9129	4
	(2) No. 95-9244	5
	(3) No. 95-10019	5
	E. No. 95-7271	5
	F. No. 95-4027	5
	G. No. 95-12599	6
III.	Enlargement and volume limits	6
IV.	APODs for existing rights without APODs in CSRBA	6
V.	Accounting	7
VI.	RAFN application	7

I. PURPOSE OF THIS MEMORANDUM

The North Kootenai Water and Sewer District (“NKWD” or “District”) has a number of matters that have been before the Idaho Department of Water Resources (“IDWR” or “Department”) for some time. The most pressing matters are:

- (1) Three pending licenses for permit (Nos. 95-9129, 95-9244, and 95-10019)
- (2) The RAFN application seeking an appropriation of 32 cfs (which has tentatively been broken into four applications)
- (3) IDWR’s recommendations on CSRBA claims

These matters have been tied up in discussions about the following:

- System-wide alternative points of diversion (“APODs”)
- System-wide service area
- Annual volume limits
- A few water-right-specific issues on diversion rates
- Allocation (accounting) of diversions to individual rights that share points of diversion

This discussion was initiated by Daniel Nelson’s letter June 10, 2013 to NKWD addressing the three permits set for licensing. Two of those were permitted with system-wide APODs, a system-wide service area, and no volume limits. In a reversal of prior IDWR policy, Mr. Nelson proposed that those permits be licensed with annual volume limits, with a service area limited to a discrete delivery system for each right, and with APODs also limited to these discrete delivery systems (which I refer to as “mini-APODs”).

Over the course of the last four years NKWD and the Department have engaged in a thoughtful, collegiate discussion that has made substantial progress in resolving our disagreements.

Last month, on July 28, 2017, you sent me a copy of your memorandum to the file from a year earlier (dated September 6, 2016) outlining IDWR’s current thinking. You asked for me to get back to you after reviewing that memorandum.

In this memorandum I will endeavor to keep the advocacy to a minimum. (What little advocacy there is, is confined to sections IV, V, and VI). Instead, my main purpose is to make certain that we understand IDWR’s position, so that we may identify the current state of agreement and disagreement between NKWD and IDWR. The good news is that it appears we agree on a great number of things.

There are some complicated matters and interconnections among issues here. I thought it best to set these out in detail to insure that we understand each other's viewpoint. After that, we will be in a position to explore where we go from here.

Would you please let us know whether this memorandum accurately captures IDWR's current thinking?

II. STATUS OF INDIVIDUAL WATER RIGHTS

A. Nos. 95-9199 & 95-9217

NKWD has two licensed ground water rights with system-wide APODs and no volume limits (Nos. 95-9199 and 95-9217). It is my understanding that IDWR will recommend these in the CSRBA as-is:

- Each will be recommended with the 23 APODs showing on the license.
- Each will be recommended with an annual volume corresponding to diversion of the full authorized diversion rate 24/7 (effectively no limit).
- Each will be recommended with a POU covering the District's entire service area.

B. Nos. 95-7138, 95-7713, 95-7827, 95-8522, and 95-8639

NKWD has five licensed ground water rights with system-wide APODs that have express volume limits (Nos. 95-7138, 95-7713, 95-7827, 95-8522, and 95-8639). I understand that IDWR will recommend these in the CSRBA as-is:

- Each will be recommended with the APODs showing on their licenses (20 APODs for Nos. 95-7138, 95-7713, 95-7827, 95-8522 and 23 APODs for No. 95-8639).
- Each will be recommended with the annual volume limits showing on each license.
- Each will be recommended with a POU covering the District's entire service area.

C. Nos. 95-2144, 95-2205, 95-7185, 95-7231, and 95-7763

NKWD has five licensed ground water rights with single PODs that have express volume limits (95-2144, 95-2205, 95-7185, 95-7231, and 95-7763). I understand that IDWR will recommend these in the CSRBA as follows:

- Each will be recommended with "mini-APODs" reflecting only those wells within the associated delivery system.

- Each will be recommended with the annual volume limits showing on each license.
- We have not discussed what POU will be recommended for these rights. I assume, however, that IDWR will recommend POUs corresponding to the associated delivery system.

D. Nos. 95-9129, 95-9244, and 95-10019

NKWD holds three permits that are now set for licensing (Nos. 95-9129, 95-9244, and 95-10019). No. 95-9129 is permitted with one POD and a limited service area. No. 95-9244 is permitted with 21 APODs. No. 95-10019 is permitted with 23 APODs. Nos. 95-9244 and 95-10019 are permitted with a system-wide service area.

IDWR proposes to license them as follows, basically tracking the permits:

- No. 95-9129 will be licensed with a single POD and a limited POU.
- Nos. 95-9244, and 95-10019 will be licensed with the APODs shown on the permit and with a POU covering the District's entire service area.¹
- IDWR has proposed volume limits on each of these. (See spreadsheet prepared by IDWR and provided to NKWD on March 23, 2016.) These limits are based on reasons unique to these rights (as discussed below), as opposed to enlargement concerns related to the APODs.
- Prior disagreements over the diversion rate have been resolved (as discussed below).

(1) No. 95-9129

This right is permitted at 0.95 cfs. NKWD proposes that it be licensed at 0.53 cfs based on theoretical calculations. IDWR previously proposed licensing at 0.20 cfs. IDWR now concurs that the rate should be 0.53 cfs.

IDWR proposes an effective annual volume of zero (based on a combined use limit). This is based on the unique history of the right, which was originally issued for Selkirk Meadows subdivision.

¹ IDWR's willingness to license these with system-wide APODs and POU is based on NKWD's integrated monitoring system (Supervisory Control And Data Acquisition or "SCADA"), aka electronic telemetry, which effectively "connects" the geographically discrete delivery systems. This sophisticated and centralized system allows the District to control, monitor, and report on diversions and deliveries from throughout its system. Because it is able to report the total, system-wide instantaneous flow rate and cumulative volume of ground water diversion on a daily basis, it provides assurance to the Department that, in the event of curtailment, water right diversions can be accurately and effectively controlled.

(2) No. 95-9244

The diversion rate on this right (2.00 cfs) is not in dispute.

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.

(3) No. 95-10019

This right is permitted for 0.20 cfs. IDWR previously proposed licensing it at 0.04 cfs based on the diversion rate measured by Welch Comer for the East Seasons Acres well. In my letter of March 25, 2016, I noted that the permit includes APODs which should be taken into account in determining the licensed rate. IDWR now “agrees that this right may need further analysis and discussion.” Keen Memo of September 6, 2016 at page 3. NKWD will work with IDWR to pin down the appropriate diversion rate.

IDWR proposes to license No. 95-10019 with an effective annual volume of zero (via a combined use limit). IDWR notes 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.

E. No. 95-7271

No. 95-7271 is a licensed ground water right with a single POD and no volume limit. IDWR proposes to recommend an annual volume of 66 AFA for No. 95-7271 notwithstanding that the current license for this right contains no stated volume limit. IDWR’s position is 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. In other words, this volume limit is unique to the history of this water right.

IDWR will recommend this right with “mini-APODs” and a service area corresponding to the associated delivery system.

F. No. 95-4027

No. 95-4027 is a statutory claim based on beneficial use (no permit, license, or decree). It was claimed with a priority date after the deadline mandatory permitting of ground water rights (March 25, 1963). IDWR is waiting for NKWD to submit supporting documentation to show that this right was used prior to that date. NKWD understands that if it is unable to provide such documentation, IDWR will recommend disallowal.

G. No. 95-12599

No. 95-12599 is the last of NKWD's four permits. It is permitted for 25 APODs with no express annual volume limit. Its proof is not due until 2021. Consequently, we do not need to address licensing issues at this time.

III. ENLARGEMENT AND VOLUME LIMITS

We have a conceptual disagreement on the issue of whether recognition of system-wide APODs for existing rights that do not already have them requires an annual volume limit in order to avoid enlargement. NKWD believes that municipal water rights are allowed to grow (in annual volume) over time and that expanding and integrating delivery systems is one of the ways that municipal rights may be expected to grow. In other words, this is not enlargement.

However, the disagreement appears to be largely academic. This is due to the following:

- Each of the licensed rights for which NKWD seeks a recommendation of new APODs already have either express volume limits (Nos. 95-2144, 95-2205, 95-7185, 95-7231, and 95-7763) or will be recommended with an express volume limit for reasons unrelated to the APOD issue (No. 95-7271).
- The three permits going to license (Nos. 95-9129, 95-9244, and 95-10019) will have annual volumes based on conditions based on circumstances unique to their individual histories.
- Two licensed rights (Nos. 95-9199 and 95-9217) already have APODs without volume limits in their licenses, which terms will be retained in IDWR's recommendation.
- Five licensed rights (Nos. 95-7138, 95-7713, 95-7827, 95-8522, and 95-8639) already have APODs, but will retain the express volume limits in their licenses.
- Statutory Claim No. 95-4027 will be disallowed.
- Permit No. 95-12599 is the only right where this may become an issue. But we do not need to grapple with this until proof is due in 2021.

IV. APODs FOR EXISTING RIGHTS WITHOUT APODs IN CSRBA

As noted above, NKWD disagrees with IDWR on the recommendation of for NKWD's five licensed ground water rights with single PODs that have express volume limits (95-2144, 95-2205, 95-7185, 95-7231, and 95-7763) and its one licensed ground water right with a single POD and no current volume limit (No. 95-7271).

For reasons spelled out in my letter of August 30, 2016, NKWD believes that the *City of Pocatello v. State* decision allows these rights to be recommended with system-wide PODs and

system-wide POUs. That case dealt with two issues: (1) whether APODs recommended on the basis of accomplished transfer should be subject to a condition applicable in times of administration and (2) whether combined APODs can be recognized for water rights from different sources (ground and surface water). The case did not analyze the city's separate water system for the airport. (No one sought APODs for that system which, apparently, was outside of the city and was not viewed as part of the city's municipal delivery system.) Nor did it analyze the extent of physical or other integration necessary to achieve APODs via accomplished transfer.

V. ACCOUNTING

All of NKWD's wells are authorized points of diversion for multiple water rights. Accordingly, for purpose of administration, it is necessary to track which water rights are being diverted at any given time.²

IDWR has proposed a spreadsheet-based accounting of each ground water right. IDWR proposes to allocate diversions from each well proportionately to each water right then in priority that is authorized to divert from that well. Thus, senior rights and junior rights will all fill simultaneously.

This works to NKWD's disadvantage in the event of a mid-year curtailment. NKWD has objected to this. NKWD contends that water right owners who hold multiple water rights that divert from the same POD are entitled to declare which of their water rights then in priority is diverting at any given time. This would allow NKWD to fill its junior rights first, saving its senior rights in the event of a mid-year curtailment.

As we understand it, IDWR's concern is with APODs being added to existing rights. It appears, however, that IDWR's proposed spreadsheet applies to all of NKWD's ground water rights, including those with existing APODs (Nos. 95-9199, 95-9217, 95-7138, 95-7713, 95-7827, 95-8522, 95-8639, 95-9129, 95-9244, 95-10019, 95-12599), as well as to any new RAFN appropriation.

VI. RAFN APPLICATION

IDWR has suggested that that NKWD's existing rights may need to be determined through the CSRBA and administrative licensing processes before the RAFN application(s) can be processed. IDWR raises two concerns. First, IDWR says that the RAFN permit application must be delayed because the determination of other water right quantities will affect the gap analysis. Second, IDWR says that the CSRBA will determine what APODs are appropriate.

I believe these concerns are unfounded for the following reasons.

² This is not necessary for municipal providers whose portfolios consist of rights with no volume limits (because it does not matter which right is being pumped, so long as total instantaneous diversions do not exceed the sum of all rights then in priority). NKWD, of course, has many water rights with volume limits, so this accounting is necessary for it.

NKWD already addressed the “shifting gap analysis” issue when it filed its RAFN application. NKWD seeks an appropriation of 32 cfs, based on the gap between its existing ground and surface water licenses and its projected future demand. Of course, that gap will shrink if any of its permits and unlicensed claims are licensed or decreed. Consequently, NKWD proposed a combined use limit capping all diversions at the level of projected future demand (45.33 cfs). That condition, as a practical matter, will shrink the new appropriation by the amount of any additional diversion authority ultimately licensed or decreed.

Moreover, while the gap is likely to shrink, it will not disappear. Even if all of NKWD’s permits and unlicensed claims are approved with no reduction in quantity, there will be a gap. This is because all pending permits and unlicensed claims add up to less than the quantity sought in the new appropriation. This is explained in “Checklist Exhibit E: Gap Analysis” to the permit application(s).

As for the APOD issue, the CSRBA Court will address that issue only in these limited contests: First, it will be asked to decree licenses with existing APODs (Nos. 95-9199, 95-9217, 95-7138, 95-7713, 95-7827, 95-8522, and 95-8639). The Court will not look behind IDWR’s recommendation absent an objection. Second, the CSRBA will be presented with recommendations for mini-APODs for Nos. 95-2144, 95-2205, 95-7185, 95-7231, and 95-7763, and 95-7271. That will not present any global APOD issue, unless NKWD objects and seeks more expansive APODs.

In any event, IDWR is capable of making a decision on APODs in the context of a new appropriation independent of the CSRBA. There is little chance of an inconsistent decision. Any appeal of the decision would go to the same Court (Judge Wildman) as the CSRBA.

cc: Mike Galante, District Manager, NKWD
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