

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 80621 IN THE NAME OF
CITY OF KETCHUM**

**ORDER ADDRESSING
EXCEPTIONS AND AMENDING
TRANSFER APPROVAL**

PROCEDURAL HISTORY

On March 4, 2016, the Idaho Department of Water Resources ("Department") issued a preliminary order approving Transfer No. 80621 ("Transfer") authorizing the City of Ketchum ("Ketchum") to divert ground water for municipal purposes from seven wells under each of their seven water rights. The Transfer included the following as a condition of approval ("Condition #3"):

To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, this right retains its original priority for well locations authorized under this right as identified in the decree dated 6/29/11.

On March 18, 2016, Ketchum filed a petition for reconsideration of the order ("Petition"). After communication between Ketchum and the Department to clarify Condition #3, the Department issued an order denying the Petition on April 8, 2016.

On April 22, 2016, Ketchum filed its *Exceptions to Preliminary Order for Transfer Approval* ("Exceptions").

EXCEPTIONS TO PRELIMINARY ORDER

Ketchum takes exception with Condition #3 and argues:

1. Condition #3 is vague, over-broad, and confusing.
2. The Department has been applying this condition inconsistently and should first set forth a policy that states the circumstances which warrant this Condition.

Exceptions at 3.

Ketchum requests that the Department strike Condition #3 or substitute language to clarify when limited pumping would be imposed. *Id.*

The Transfer authorizes Ketchum to use its city wells as alternate points of diversion for each of its municipal water rights. The effect of the Transfer is that Ketchum can divert its most senior rights from any of its wells. This raises the potential for injury to other water rights existing prior to the Transfer, either due to local interference between wells or due to a geographically limited¹ delivery call. Condition #3 was applied to each right in the Transfer to identify well locations associated with the priority date under each right in the event administration of rights becomes necessary.

The language in Condition #3 is substantially similar to language used by the Department which was upheld by the Idaho Supreme Court in *City of Pocatello v. Idaho*, 152 Idaho 830 (2012). In that case, the Court agreed with the Department that the condition was necessary to assist in the administration of water rights and to avoid injury to other water rights. *Id.* at 835.

Ketchum argues that, in *City of Pocatello*, “the Court held that the condition was necessary during priority administration in order to protect from physical interference between water rights during time of shortage” and therefore the “condition would only apply during priority administration during a water delivery call.” *Exceptions* at 3-4 (emphasis in original). Ketchum equates “priority administration” to “a water delivery call.” Ketchum suggested an alternate condition that would limit application of the condition to “priority administration during delivery calls.” *Id.* at 4

Ketchum seeks to impose a limitation that is not imposed by the Idaho Supreme Court in *City of Pocatello* and is not consistent with the record in that case. Ketchum’s argument focuses on one section of the Court’s decision and seeks to limit the condition to its application only in a delivery call. The problem with this interpretation is that the Court in *City of Pocatello* did not limit the application of the condition to just a delivery call situation. To the contrary, the Court recognized that the key consideration is injury to senior priority water rights. As the Court recognized, “Priority in time is an essential part of western water law and to diminish one’s priority works an undeniable injury to that water right holder.” *City of Pocatello*, 152 Idaho at 835. The reason for the condition was to address well interference issues and mitigation requirement for aquifer wide regulation. *Supplemental Director’s Report Regarding City of Pocatello’s Basin 29 State-Based Water Rights* in SRBA subcase 29-271 *et al* (April 17, 2006), at 14. Application of the condition is not limited to just a delivery call. The Director disagrees with the narrow application of the condition suggested by Ketchum because it would preclude application in a well interference situation.

Idaho Code § 42-222 requires that the Department “examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby...” The Department is not limited in its use of conditions to protect from injury only during a delivery call. Application of Condition #3 should be applied broadly to any situation where the approval of alternate points of diversion under a water right for a municipality has the potential to injure other rights. The condition should be applied to municipal rights specifically, because municipal rights generally identify (or have the potential to identify) a much larger place of use than other water rights and injury

¹ The condition helps ensure that a municipality cannot circumvent the curtailment of ground water diversions within a defined geographic area by bringing in water rights from outside the curtailment area to protect junior priority wells within the curtailment area.

situations may not arise for years or even decades due to the growing service area of a municipality.

Ketchum also argues that the Department's application of Condition #3 to municipalities is inconsistent, and therefore arbitrary. *Exception* at 5. Ketchum submitted a list of transfers approved by the Department for municipalities that either included the condition or did not include the condition without explanation. Ketchum believes the Department should develop a policy to guide the Department and inform the public regarding use of the condition.

The Department's Administrator's Memorandum – Transfer Processing No. 24 dated December 21, 2009 includes the following policy statement (see p. 24):

An application for transfer that is approved to provide alternate points of diversion from ground water under one or more municipal water rights to develop or expand a common delivery system shall include conditions of approval to identify the point(s) of diversion authorized under each right prior to the transfer. The purpose of the condition is to provide for future administration of water rights in situations where increased municipal pumping over time is determined to cause injury through interference with other nearby wells.

The Department's policy states that the purpose of the condition is to address injury through interference with other nearby wells. The policy does not expressly address injury due to delivery calls. Nonetheless, Condition #3 should address possible injury due to delivery calls. The policy statement instructs staff to include a condition when alternate points of diversion are added to a municipal right through a transfer.

The Director agrees that Condition #3 should be applied consistently. Absence of the condition would not excuse a municipal right holder from a determination of injury due to the use of alternate points of diversion. Inconsistent use of the condition on transfer approvals is not justification for an applicant to injure a senior water right. The condition is not arbitrary.

FURTHER ANALYSIS ON REVIEW

Ketchum asserts that Condition #3 is vague, over-broad and confusing. There is no substantive difference between the language in Condition #3 and the language in the condition upheld by the Idaho Supreme Court in *City of Pocatello*. Ketchum seems to believe otherwise, however. To remove any question regarding the language, however the Director will edit the Transfer approval. First, those water rights decreed in the SRBA with an alternate point of diversion condition (for example water right no. 37-2628) will retain the decreed condition identifying where ground water was first diverted under the water right. Second, for those water rights which previously did not include an alternate point of diversion condition (for example, water right no. 37-4413), a condition similar to the SRBA decreed alternate point of diversion condition will be added if the location information is available to the Department. Third, the Department will include the following condition for each right in the Transfer as follows:

Transfer _____ authorizes additional Well No(s) _____ located in T_____, R_____, S_____, _____ as a point(s) of diversion under this right as of the date of approval.

The additional condition is necessary to identify which points of diversion are alternate points of diversion authorized by the Transfer, which is pertinent information for a transfer with regard to potential injury claims by other water rights.

Ketchum further asserts the condition should be removed because the Department has not explained “in what circumstances Condition #3 will be imposed.” *Exceptions* at 4. The record in the City of Pocatello provides information on how the condition operates. In a basin wide curtailment action by the Department encompassing all the points of diversion in the entire Ketchum system, the alternate point of diversion conditions would have no impact on Ketchum because the city would only be required to curtail its junior water rights, but would retain flexibility to use its remaining senior water rights at alternate locations. *See Brief for Respondent* at 9, fn. 2, *City of Pocatello v. State of Idaho*, (S.Ct. Doc. No. 37723-2010).² In a limited curtailment action by the Department that does not encompass all the points of diversion in the Ketchum system, the alternate point of diversion conditions only serve to identify the original locations for points of diversion associated with the priority date under each right to ensure that Ketchum does not attempt to avoid curtailment of its junior priority water rights by moving them outside the curtailment area and moving its senior water rights into the curtailment area to undermine the curtailment. *See id.*

When well-to-well interference is an issue, the alternate point of diversion conditions ensure that if a well owner holding a water right bearing a priority date senior to the date of alternate points of diversion for the Ketchum well, alleges injury from pumping water from the Ketchum well, and Ketchum’s increased pumping under a water right not originally diverted from the well is shown to be the reason for the interference, Ketchum will be required to reduce pumping to not cause interference. *See Supplemental Director’s Report Regarding City of Pocatello’s Basin 29 State-Based Water Rights* in SRBA subcase 29-271 *et al* (April 17, 2006), at 14. Ketchum cannot pump water from alternate points of diversion to the detriment of other existing well owners.

For the reasons stated, the Department will not remove the alternate point of diversion conditions, but will amend the transfer approval as discussed above.

ORDER

IT IS HEREBY ORDERED that Transfer No. 80621 is APPROVED with amended conditions as shown in the accompanying approval document.

Dated this 27th day of October, 2016



GARY SPACKMAN
Director

² Available on Westlaw at 2011 WL 3512891.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of October 2016, a true and correct copy of the document described below was served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, to the following:

Document Served: Order Addressing Exceptions and Amending Transfer Approval and Explanatory information to accompany a Final Order

CITY OF KETCHUM
ROBYN MATTISON
PO BOX 2315
KETCHUM, ID 83340

MSBT LAW
CHERESE MC LAIN
950 W BANNOCK ST, STE 520
BOISE, ID 83702

BROCKWAY ENGINEERING
2016 N WASHINGTON ST, STE 4
TWIN FALLS, ID 83301



Deborah Gibson
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.