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WATER RESOURCES
WESTERN REGION

BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

EXCEPTIONS TO ORDER DENYING PETITION FOR RECONSIDERATION

EXCEPTIONS TO ORDER DENYING PETITION FOR RECONSIDERATION - 1

FACTS

The City of Meridian filed Application for Transfer No. 79778 with IDWR on January 6, 2015. The purpose of the transfer is to enable the City to divert all of its water rights from any of its wells to provide for flexibility, backup, and a safe and secure water supply. IDWR issued its approval of Transfer No. 79778 on March 17, 2016.

The March 17, 2016 approval was issued with two conditions with which the City is concerned that were imposed upon all of the water rights subject to the transfer:

1. "Administration" Condition

The "Administration" condition provides as follows:

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 [decree or license] dated [decree/license date].

This condition is denominated by IDWR as no. 8 in water right nos. 63-12416, 63-31677, 63-12378, 63-12181, 63-12560, 63-31138, 63-31318, 63-31630, 63-31281, 63-10840; as no. 9 in water right nos. 63-2893, 63-3252, 63-7105, 63-7978, 63-8331, 63-8332, 63-9849, 63-10105, 63-32567, 63-11737, 63-32568; as no. 10 in water right nos. 63-12039, 63-11922, 63-12295; and as no. 11 in water right nos. 63-12173 and 63-12162.

2. Condition re: Use of Surface Water prior to Use of Ground Water for Irrigation

This condition provides as follows:

The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface

water rights are not available for use or where the use of surface water was replaced by the use of water diverted in connection with this right before the approval of Transfer 79778. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping.

This condition (the “Surface Water First” condition) is denominated by IDWR as no. 5 in water right nos. 63-11922, 63-10840, 63-12173, 63-11737, 63-12162, 63-12295, 63-12416, 63-31677, 63-12378, 63-12181, 63-12560, 63-31677, 63-31138, 63-31318, 63-31630, 63-31281; as condition no. 6 in water right nos. 63-2893, 63-3252, 63-7105, 63-7978, 63-8331, 63-8332, 63-9849, 63-10105, 63-32567, 63-32568; and as condition no. 7 in water right no. 63-12039. This condition (or similar language) was present only in water right nos. 63-31677, 63-12560, 63-31138, 63-31281, 63-31318 and 63-31630 prior to approval of Transfer No. 79778.

ARGUMENT

The “Administration” condition should be revised to assure certainty in its application, and the “Surface Water First” condition should be removed from the water rights in which it was not present prior to transfer approval because it diminishes the pre-condition usability and flexibility of the City’s water rights.

1. The “Administration” Condition Should be Revised

This condition is vague and confusing. It is unknown exactly what is meant by the word “administration.” It could mean any administrative action connected with the water right subject to the condition, however remotely. Examples of its potential implementation are instructive.

Example #1 - Basin Wide Administration

In a situation involving basin wide administration (where curtailment of all ground water rights with priority dates later than that determined by IDWR to be necessary to protect the water

supply for senior users occurs), the language of the “Administration” condition requires that the City’s water rights be limited to only one single diversion point for the majority of its water rights, depriving the City of the ability to flexibly provide water from many different wells to meet changing demand and demographics. This flexibility becomes even more important should one or more of the City’s later priority water rights be curtailed under basin wide administration.

In such a situation, if all of the City’s water rights were limited only to their original, single point of diversion under the “Administration” condition, the newest wells with the highest productivity would be entirely curtailed (because the associated water right would be the latest in priority) and would not be able to be used for diversion of earlier priority water rights that would be limited only to older wells that might not even be able to provide the entirety of that water right. The intent of curtailment of later priority water rights under basin wide administration is to prevent overall groundwater drawdown, not to prevent the City from flexibly using its earlier priority water rights to meet changing demand due to administration - and yet implementation of this condition would have exactly that effect.

Such a situation would be restrictive and debilitating for the City, potentially overloading its system and preventing it from providing a safe and secure water supply to its citizens. In fact under the point of diversion restrictions of the “Administration” condition, the City would be unable to supply water to residents in certain pressure zones and service levels. It does not seem that such an outcome is the intent of IDWR in imposing the condition on the City’s water rights, but under the condition’s current language, this could be its effect.

Example #2 - Groundwater Degradation/Contamination

A second, but equally compelling concern for the City related to implementation of the

“Administration” condition is the possible inability to move diversions from well to well in the event of changing ground water chemistry and/or deteriorating water quality in any given well. Continuously evolving EPA regulations for constituents in natural groundwater and the current and future spectre of anthropogenic subsurface contamination are also an every day reality for the City that it addresses with its ability to flexibly divert its water rights from multiple points of diversion. In fact, as EPA regulations have changed, the City has on occasion been able to “blend” water diverted from certain wells to meet these changing rules, instead of being unable to use one or more wells for potable purposes at all. In a situation of basin wide administration resulting in holding the City’s water rights to their original point of diversion, such “blending” to meet water quality regulations might be impossible.

Potential contamination is a real and ongoing threat to the City’s water supply that has previously resulted in contaminated wells that can no longer be used for potable purposes. If an early priority water right is limited by the “Administration” condition language (under the same basin wide administration scenario described above) to being diverted from its original point of diversion where the groundwater chemistry changed for any number of reasons, then it will not be possible to use that earlier priority water right to provide a safe water supply to the City’s residents. Again, it does not appear that this would be IDWR’s intent in imposing the “Administration” condition, but it certainly could be but one of its unintended effects.

Example #3 - Assertion of Priority at New PODs Against Juniors

Another example of the potential harmful application of the “Administration” condition is that under its language, the City’s priority dates are limited to the water right’s original point of diversion when a junior water right holder seeking administration of the City’s senior water right

at its new point of diversion appropriated the junior water right either before or after approval of the transfer. In other words, under the Administration condition a junior priority water right holder can insist that the water right be limited to its original point of diversion, and the City will never be able to assert the priority dates of its water rights at the new points of diversion approved under the transfer against any other water right. In addressing this argument, the *Order* states that

the Department finds the language of [the "Administration" condition] affirms the priority of the water right at the points of diversion identified in the license or decree confirming the water right. The language is silent on the priority the city can assert at points of diversion authorized after the right was initially licensed or decreed.

Order, p. 1.

The *Order* is in error. The condition language does not merely affirm the priority date at the licensed or decreed point of diversion. Instead, it states that "for administration" the priority date is limited to the licensed or decreed point of diversion without specifying what is meant by administration.

In contrast, the language that is the progenitor of the Administration condition contained in the City's original SRBA-decreed rights does in fact come closer to accomplishing the *Order*'s stated purpose of the condition. For example the language from one SRBA-decreed City of Meridian water right provides as follows:

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, ground water was first diverted under this right from Meridian Well No. 10 located in T3N, R1E, Sec. 6, NWSE

Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 63-08332 (Mar. 19, 2009). This

language is present in all of the City's SRBA-decreed water rights. Although this language, just as with the language in the "Administration" condition, is itself vague (particularly with respect to what is meant by the term "administration"), importantly it merely specifies the facts of the water right's original point of diversion rather than limiting that water right to that point of diversion under any "administration."

Moreover, while the language from the City's decreed rights is vague and imperfect, it does have the advantage of approval by the Idaho Supreme Court. See *City of Pocatello v. State of Idaho*, 152 Idaho 830 (2012). In *City of Pocatello*, the exact language present in the City of Meridian's decrees was challenged by Pocatello, and affirmed by the Court. *City of Pocatello* at 851. The Court agreed that the language in Pocatello's decrees accomplished the goal of protecting junior water rights from diminishment of their priorities during priority administration. *Id.* The "Administration" condition language could easily be applied to go further than protecting junior water rights as the Supreme Court specified was the intent of such a condition, and result in damaging the City's ability to flexibly use its water rights to protect the quality of its water supply.

Summary

The language imposed by the "Administration" condition goes further than that approved by the Court in *City of Pocatello*. Because of this language, the City may very well be prevented from diverting its water rights from wells approved as points of diversion pursuant to Transfer No. 79778 under any circumstances of administration. This could result in any of the scenarios described above, or other unseen future scenarios that would also damage the City's ability to ensure a flexible, safe and secure water supply for its citizens. Accordingly, the

“Administration” condition should, at a bare minimum, revert to the language originally approved by the Supreme Court in *City of Pocatello, supra*. Alternatively, the Director and IDWR should meet with the City to craft superior language that meets IDWR’s goals, but does not have additional negative impacts. The City did not have the time within the two week period for filing these Exceptions to draft better language to assist IDWR, but it would welcome such an opportunity to jointly work and develop appropriate condition language.

2. The “Surface Water First” Condition Should be Removed from the Water Rights on Which it Was Not Imposed Prior to Approval of Transfer No. 79778

The “Surface Water First” condition was not originally present in 20 of the water rights subject to Transfer No. 79778 at the time of those water rights’ decree or licensure (as the case may be), or at any time prior to approval of the transfer. The added condition restricts these 20 water rights from use under certain circumstances that have previously arisen, and that could arise again. Moreover, as briefly discussed above, the City is subject to constantly changing water quality regulations related to its municipal supply, some of which are certainly unforeseeable. Imposition of the “Surface Water First” condition may prevent the City from flexibly using its water rights to ensure compliance under future water quality regulations.

The City currently uses lower quality water from certain wells to irrigate lands with appurtenant surface water rights to protect higher quality water in other wells. This situation has occurred in the past and is also likely to arise in the future. At times, water quality in certain City wells has deteriorated, or has been regulated by the Idaho Department of Environmental Quality or the U.S. Environmental Protection Agency such that the City has determined that water from those wells should not be used as part of the City’s domestic (culinary) water supply. This

problem not only impacts the subject well, but also the geologic section (aquifer) from which the well withdraws water. To lessen migration of lower quality or regulated groundwater from moving across gradient into an unaffected aquifer or geologic section, the City has increasingly taken steps to ensure that groundwater used for irrigation is pumped out of lower quality groundwater sections when possible. This results in maintaining natural groundwater pressure gradients between the deteriorated or regulated groundwater sections and high quality potable sections, which in turn can reduce or eliminate the migration of undesirable water into other groundwater sources of supply. Thus, the imposition of the “Surface Water First” condition on those water rights that are not currently so restricted has real-world impacts, and will certainly affect the City’s water supply, its flexibility of use, and the water resource as a whole.

The *Order* itself denied the City’s *Petition to Reconsider* imposition of the “Surface Water First” condition by stating that the high quality water present in the aquifer relied upon by the City for its water supply must be protected for future development. *Order*, p. 2, Finding of Fact no. 5. The *Order* concludes that the “Surface Water First” condition is a permissible limitation of the City’s water rights because “it promotes conservation of water resources within the state of Idaho without restricting established uses of the city’s water rights.” *Order*, p. 2, Conclusion of Law no. 4. In fact, as discussed above, the condition does restrict the established use of the City’s water rights, and will negatively impact the conservation of water resources within the State of Idaho because its implementation may cause the degradation of additional clean water sources currently available for development. The “Surface Water First” condition also constitutes the impermissible restriction of a valid property right, and should be removed from those rights where it was not present prior to approval of Transfer no. 79778.

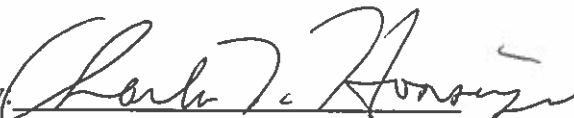
CONCLUSION

The water rights subject to Transfer No. 79778 have provided much flexibility to the City as it has sought to provide a safe, high quality water supply to its residents. The City has relied upon the characteristics of its water rights as assets to do so both currently and in its plans for the future. By adding these two conditions, IDWR is changing the characteristics of the water rights such that the City will lose flexibility and be more uncertain of securing a safe and secure water supply for the future.

For the reasons discussed herein, the City hereby requests that the Director reverse the *Order Denying Petition for Reconsideration* issued by IDWR in the above captioned matter, and: (1) draft, with the City's input and assistance, new language to replace the "Administration" condition, or alternatively, at a bare minimum replace the language with that approved by the Supreme Court in *City of Pocatello, supra*; and (2) remove the "Surface Water First" condition from water rights where the condition was not present prior to the approval of the transfer.

Respectfully submitted this 5th day of May, 2016.

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