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DEPARTMENT OF
WATER RESOURCES

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DEPT OF WATER RESOURCES
SOUTHERN REGION

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 80621 IN THE NAME OF) **EXCEPTIONS TO PRELIMINARY**
THE CITY OF KETCHUM) **ORDER FOR TRANSFER APPROVAL**
_____)

COMES NOW the City of Ketchum ("Ketchum"), by and through its attorney of record, Cherese D. McLain of MSBT Law, Chtd., with exceptions to the Transfer No. 80621 dated March 4, 2016 in the above captioned matter. These exceptions are filed pursuant to IDAPA 37.01.01.730.02(c).

I. FACTS

1. In late 2015, the City of Ketchum filed a transfer for water right nos. 37-2628, 37-4413, 37-4414, 37-7682, 37-8195, 37-8269, and 37-8575B.
2. On March 4, 2016, the Department issued a preliminary order approving Transfer of Water Right No. 80621, authorizing the City of Ketchum to divert seven ground water rights held by the City from seven different wells.

ORIGINAL

3. On March 18, 2016, the City's consulting engineer, Brockway Engineering, provided notice to the Department seeking a petition for reconsideration and/or clarification of Condition 3.
4. On March 21, 2016, the Department provided a letter to the City's consulting engineers and attached *Pocatello v. State of Idaho*, (In re SRBA Case No. 39576), 152 Idaho 830 (2012)("Pocatello").
5. At Ketchum's request, IDWR conducted a phone conference between the parties on March 28, 2016. During that meeting, it was the City's understanding that the Department's position was that Condition 3 was a direct result of the Pocatello SRBA case and the Department's efforts to protect from potential well interference issues when a municipality consolidates their points of diversion in an interconnected distribution system. The parties agreed that the City would provide substitute language for the Department to consider.
6. On April 1, 2016, the City provided a letter further describing its position and support for the petition for reconsideration.
7. On April 8, 2016, the City received the Order Denying Petition for Reconsideration.

II. DISCUSSION

This matter arises from the Department's Transfer Approval Notice, dated March 4, 2016, wherein it provides approval of consolidating Ketchum's points of diversions ("PODs") pertaining to its shared water system. As part of those approvals, a condition was placed on all of the water rights which states:

“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.”

See Water Right Nos. 37-2628,37 -4413,37-4414, 37-7682, 37-8195, 37-8269, and 37-8575B (“Condition 3”).

Ketchum has several concerns regarding this condition and does not believe it should be included in its Transfer. The City’s exceptions are: (1) that Condition #3 in Transfer No. 80621 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. The specific relief sought by the City is to either strike Condition #3 entirely or substitute Condition #3 with more concise and limited language that provides what condition precedent must occur prior to the Department imposing limited pumping at some or all of Ketchum’s PODs.

The City is aware that the language set forth in Condition #3 is substantially similar to the language upheld by the Idaho Supreme Court in *Pocatello v. State of Idaho*, (In re SRBA Case No. 39576), 152 Idaho 830 (2012). At that point in the process, the Court was not entitled to rewrite the condition but rather determine whether the Department was entitled to impose that condition. Here, the City and the Department have the opportunity to draft a condition that accomplishes the goals of the Department while protecting the public from misunderstanding the condition because of ambiguity.

The City of Ketchum supports the Departments goals to uphold its original position and the Idaho Supreme Court’s decision from *Pocatello*. Specifically, the Court held that the condition was necessary during priority administration in order to protect from physical interference between water rights during a time of shortage. See 152 Idaho at 835. This analysis

leads to the conclusion that this condition would only apply during priority administration during a water delivery call.

The Department has not set forth a policy regarding this condition nor in what circumstances Condition #3 will be imposed. In *Pocatello*, the Court discussed the logic behind allowing the city's PODs to be consolidated. The Court agreed with the Department that Pocatello's "wells in its interconnected water distribution systems had become an alternate point of diversion for all water rights associated with that system pursuant to Idaho Code section 42-1425(2)." 152 Idaho at 834. Accordingly, because the wells are all part of an interconnected delivery system, the PODs could be consolidated so long as a condition was imposed protecting other senior water right holders as discussed herein. See *Id.*¹

After careful review of the *Pocatello* case and knowing the Department's good intentions, Ketchum provides the following suggested substitute:

"3. To the extent necessary for priority administration during delivery calls 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 date for well locations and original quantity of water that can be pumped from the well, in this instance, set forth in the decree dated 6/29/2011."

See *Pocatello v. Idaho*, 152 Idaho at 835 (The Court discusses the reason for the condition during times of priority administration and that the original priority stays with each well). Ketchum believes this substitute condition concisely addresses what the Department and Court was concerned with in the *Pocatello* case. It also provides clear guidance to Ketchum as to when this condition applies. Notwithstanding Ketchum's position that the Department should omit this

¹ Ketchum does not disagree with this logic but it does not appear that the Department is exercising that reasoning. For example, when Ketchum asked the Department whether this condition applied to anyone other than municipalities, for instance, a large irrigation distribution system, the Department stated they were unaware of any other entities this applied to. It seems inconsistent and unfair that municipalities seem to be the only target.

comment entirely until it can provide a relevant policy, in the alternative, Ketchum would support a substitute condition as provided herein.

The Department's application of this condition to municipalities is inconsistent, and therefore arbitrary. Attached to the City's letter dated April 1, 2016, the City provided a compilation of municipalities that have sought transfers in the last 3 years. Upon reviewing this list, Ketchum could not find any rhyme or reason with how the Department did or did not apply Condition 3 to these municipalities. The Department imposed this condition on Ketchum, Gooding, Idaho Falls, Blackfoot, and Meridian's transfers. The Department did not impose this condition on Mountain Home, Dietrich, Kimberly, Arco, Fairfield or Jerome's transfers. If the Department believes a condition is necessary in order to protect from injury by city pumping of its several PODs, then a policy should be in place guiding the Department and informing the public.

Currently, Condition #3 as written could be applied in a broader and more limiting manner than what the *Pocatello* Court contemplated. The City of Meridian has also filed a Petition for Reconsideration with related concerns. Condition #3 puts the cities in a weaker position and subject to administration by a junior water right holder contrary to Idaho water law principles. Attached hereto as Exhibit "A" is a true and correct copy of the City of Meridian's Petition for Reconsideration filed with the Department of Application for Transfer No. 797788 on April 1, 2016.

III. CONCLUSION

For the reasons set forth above, the City of Ketchum hereby respectfully requests that the Department strike Condition #3 or in the alternative provide substitute language as provided by the City or other language that clearly provides when limited pumping would be imposed.

Oral argument is requested.

DATED this 22nd day of April, 2016.

MSBT LAW, CHTD.



Chere D. McLain
Attorney for City of Ketchum

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of April, 2016, I caused to be served a true and correct copy of the foregoing **EXCEPTIONS TO PRELIMINARY ORDER FOR TRANSFER APPROVAL** via prepaid, U.S. Mail, to the following:

1. Original Hand Delivered to:

IDWR Document Depository
P.O. Box 83720
Boise, Idaho 83720-0098

Copy to:

Allen Merritt
IDWR
650 Addison Avenue W. Suite 500
Twin Falls, ID 83301



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WATER RESOURCES
WESTERN REGION

Attorneys for Petitioner/Applicant City of Meridian

BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 797788 IN THE NAME OF
THE CITY OF MERIDIAN

PETITION FOR
RECONSIDERATION

COMES NOW, Petitioner/Applicant City of Meridian (hereinafter "City"), and hereby petitions the Idaho Department of Water Resources ("IDWR") to reconsider its Preliminary Order approving Transfer Application No. 79778 issued in the above-captioned matter on March 17, 2016. This petition is filed pursuant to IDAPA 37.01.01.730.02(a) and I.C. § 67-5243. The grounds for this Petition are: (1) that a specific condition added to all water rights that are part of Transfer Application No. 79778 is vague and confusing; and (2) that a specific condition regarding the use of surface water for irrigation purposes prior to the use of water under any of the rights subject to transfer was impermissibly added to the rights even though it was not present prior to approval of the transfer. The specific relief sought by petitioners is the substitution of more appropriate language with respect to the first condition that is not vague and confusing as agreed upon by IDWR and the City through discussion and analysis, and removal with respect to the second condition.

PETITION FOR RECONSIDERATION - 1

EXHIBIT "A"

DISCUSSION

1. "Administration" Condition

IDWR approved Transfer Application No. 79778 with a condition in each of the water rights subject to the application that provides information to be used in the event of administration. This condition is denominated 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.

The language of the 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].

The purpose of this language is to ensure that the priority date of the City's transferred water rights can only be applied against other water rights at its original point of diversion. In other words, the language seeks to ensure that the priority dates of the City's transferred water rights can not be applied against junior water rights appropriated prior to approval of Transfer No. 79778 at the City's water rights' new points of diversion, because the junior water rights were appropriated under conditions where the City's senior water rights were not diverted from those new points of diversions. Application of the City's senior priority from new points of diversion against junior priority water rights appropriated prior to approval of Transfer No. 79778 would be both unfair to

the juniors and directly contrary to the principle of Idaho water law that a water right holder is entitled to rely upon conditions present at the time of the water right's appropriation.

The City's concerns lies with the fact that, under the language of the condition, the City's priority dates are limited to the water right's original point of diversion whether the junior water right seeking administration appropriated the junior water right before or after approval of the transfer. In other words, under the condition, 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. This is clearly in opposition to established law and must be corrected.

The City has experience with drafting and analyzing these types of conditions, and as the water right holder subject to the conditions, desires to be involved in any IDWR discussions and/or decisions regarding the same. The City hereby makes itself and its attorney and consultant available to IDWR to participate in the process of drafting an appropriate condition to protect both junior water right holders and the City.

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

The Transfer was also approved with a condition in each of the water rights providing for the requirement that available surface water sources be used for irrigation prior to the use of the groundwater rights subject to the application for transfer. This condition is denominated 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 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.

The 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.

The problem with this condition is that it was not present in a majority of the water rights at the time of appropriation, at the time of decree or licensure, or at any time prior to approval of Transfer no. 79778. The added condition 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.

For the reasons discussed above, the City hereby requests that IDWR reconsider its Preliminary Order approving Transfer Application No. 79778 and: (1) draft, with the City's input and assistance, new condition language to replace that applying in circumstances involving administration of the City's new points of diversion; and (2) remove the condition regarding the use of surface water prior to use of ground water from water rights where the condition was not present prior to the approval of the transfer.

Respectfully submitted this 1st day of April, 2016.

HONSINGER LAW, PLLC

By: Charles L. Honsinger

Charles L. Honsinger

Attorney for Petitioner/Applicant