

Merritt, Allen

From: Cherese D. McLain [CDM@msbtlaw.com]
Sent: Friday, April 01, 2016 2:25 PM
To: Merritt, Allen; Keen, Shelley
Cc: Robyn Mattison; 'Wendy Pabich'; 'Zach Latham'; 'Charles G. Brockway'; Suzanne Frick; Nina Jonas
Subject: City of Ketchum Petition for Reconsideration Response re Transfer 80621
Attachments: Ketchum Petition for Reconsideration Transfer 80621 Condition 3 signed.pdf

Dear Allen and Shelley,

Please find attached the City's response letter, as previously discussed amongst the parties, to be provided today.

Thank you for your consideration regarding this matter.

Sincerely,

Cherese



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City of Ketchum
Public Works

Idaho Department of Water Resources
Attn: Allen Merritt
650 Addison Ave. W. St. 500
Twin Falls, Idaho 83301

Sent via email 4/1/16

Re: City of Ketchum Petition for Reconsideration re: Transfer No. 80621 Condition 3

Dear Mr. Merritt:

Thank you for arranging a phone conference between IDWR representatives, including yourself, and City of Ketchum consultants and Public Works Director, Robyn Mattison, on March 28, 2016. This matter arises from the Department's Transfer Approval Notice, dated March 4, 2016, wherein it provides approval of consolidating the City's 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"). The City through its consulting engineer, Brockway Engineering, provided notice to the Department on March 18, 2016, seeking a petition for reconsideration and/or clarification of Condition 3. In response, the Department sent a letter dated March 21, 2016 and attached *Pocatello v. State of Idaho*, (In re SRBA Case No. 39576), 152 Idaho 830 (2012) ("Pocatello").

At the City's request, IDWR conducted a phone conference between the parties on March 28, 2016. During that meeting, it is the City's understanding that the Department's position is 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 City has several concerns regarding this condition and does not believe it should be included. First, the City would argue that the facts surrounding Pocatello's POD's and hydrology of the Eastern Snake Plain Aquifer are substantially different from those of the City of Ketchum's POD's and the Big Wood Valley. Second, the language as currently written is overly broad and provides no guidance as to when or in what circumstances the Department could apply this condition to limit pumping by the City at some or all of its PODs.

In *Pocatello*, the Idaho Supreme Court provided reasoning to uphold the condition imposed against 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 it will impose said condition. 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 as discussed herein. See i.d. The City of Ketchum does not disagree with this logic but it does not appear that the Department is exercising that reasoning. For example, when the City 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.

Lastly, the Department's application of this condition to municipalities is also inconsistent. Attached hereto is a partial compilation of municipalities that have sought transfers in the last 3 years. Upon reviewing this list, the City could not find any rhyme or reason with how the Department did or did not apply Condition 3 to these municipalities. This is very disconcerting. If the Department believes a condition is necessary in order to protect from well-interference by city pumping of its several PODs, then a policy should be in place guiding the Department and informing the public.

The City of Ketchum is grateful that the Department recognizes the City's concerns with Condition 3, as written, and is willing to consider alternative language to Condition 3. After careful review of the *Pocatello* case and knowing the Department's good intentions, the City 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 (Court discusses the reason for the condition during times of priority administration and that the original priority and quantity stays with each well). The City believes this substitute condition concisely addresses what the Department and Courts were concerned with in the *Pocatello* case. It also provides clear guidance to the City as to when this condition applies. Notwithstanding the City's position that the Department should omit this comment entirely until it can provide a relevant policy, in the alternative, the City would support a substitute condition as provided herein.

Thank you for your time and consideration regarding this matter. If you have any questions, please contact either the City Public Works Director, Robyn Mattison, rmattison@ketchumidaho.org, or the City Attorney, Cherese McLain, cdm@msbtlaw.com. We look forward for resolution of this matter.

Sincerely,


for Suzanne Frick
City Administrator

Water right transfers involving cities in southern Idaho, points of diversion additions or rearrangements, in 2012 or later (likely not an exhaustive list)

CGB 3/29/2016

City of Gooding

T#78928 submitted September 20, 2013; approved March 7, 2014. This transfer added three points of diversion to the City's existing three wells under water rights 37-4080 and 37-11221. IDWR added the Pocatello condition.

City of Mountain Home

T#78273 submitted October 18, 2013; approved September 22, 2014. This transfer added seven points of diversion to the City's existing 13 wells under 10 water rights. IDWR did not add the Pocatello condition.

City of Dietrich

T#78013 submitted June 1, 2012; approved August 9, 2012. This transfer added one point of diversion to the City's existing single well under one water right. IDWR did not add the Pocatello condition.

City of Idaho Falls

T#80438 submitted October 6, 2015; approved November 19, 2015. This transfer added a bunch of points of diversion to 13 water rights. IDWR added the Pocatello condition.

City of Kimberly

T#79596 submitted February 11, 2015; approved. This transfer added all existing seven wells to all four of the City's rights. IDWR did not add the Pocatello condition.

City of Blackfoot

T#78872 submitted June 24, 2014; approved August 4, 2014. This transfer added all existing wells to all 14 of the City's rights. IDWR added the Pocatello condition.

City of Arco

T#78637 submitted June 4, 2013; approved July 12, 2013. This transfer moved one of the four PODs on the City's three water rights from the decreed location to a different location. IDWR did not add the Pocatello condition. Although not the same as a "consolidation" transfer, if IDWR were consistent it would have added the condition.

City of Fairfield

T#78089 submitted August 15, 2012; approved October 26, 2012. This transfer added a point of diversion to both of the City's water rights. IDWR did not add the Pocatello condition.

City of Jerome

T#78803 submitted August 27, 2013; approved September 1, 2015. This transfer moved an irrigation right into the City system and made it appurtenant to all five of the City's wells, where previously it had been an irrigation right 3 miles east of the City appurtenant to two wells. IDWR did not add the Pocatello condition.

City of Meridian

T#79778 submitted January 6, 2015; approved March 17, 2016. This transfer added all of the City's wells plus added points of diversion (26 PODs total) to the City's 27 water rights. IDWR added the Pocatello condition.