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August 8, 2014

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RECEIVED
AUG 12 2014
DEPARTMENT OF
WATER RESOURCES

Re: Water Right Permits 95-9129, 95-9244, and 95-10019 and Transfer
Application 79275

Dear Shelley:

This responds to your letter of June 4, 2014 ("*June 4 Letter*") addressed to Mike Galante, Manager of the North Kootenai Water and Sewer District ("NKWSD").¹ Thank you for providing us additional time to respond.

Two issues are presented. Both reflect troubling reversals of departmental policy regarding municipal providers. The first is whether municipal providers like NKWSD may secure alternative points of diversion ("APODs") across discrete distribution systems drawing out of the same aquifer source and operated with an integrated, system-wide supervisory control and data acquisition ("SCADA") system. The second issue is whether municipal providers like NKWSD that serve customers predominantly in unincorporated areas are entitled to the same treatment as municipal providers serving customers in cities.

Today's letter continues the discussion initiated by Daniel Nelson's letter of June 10, 2013 to Mike Galante, which was followed by my response dated July 10, 2013, our meeting at IDWR on February 13, 2014, my proposed license conditions dated February 14, 2014, Mike Galante's letter on telemetry dated April 2, 2014, Mike Galante's letter of May 27, 2014 dealing

¹ As noted previously, NKWSD and NKWD are one and the same.

with the transfer, your letter of June 4, 2014, and Mike Galante's letter of June 18, 2014 noting the need for additional time to respond.

Let me begin by noting the one small area of progress and agreement. Your letter acknowledges that NKWSD qualifies as a municipal provider under Idaho Code § 42-202B(5)(b). *June 4 Letter* at 1.

The significance of falling under subsection (b) is that NKWSD is a municipal provider but not a "municipality," which makes inapplicable the provision in section 42-202B(9) limiting a municipality's service area outside the city limits to areas served by a common water distribution system. Instead, as you now agree, a different portion of section 42-202B(9) applies, which recognizes a single, flexible service area encompassing everything that the provider "is authorized or obligated to serve."² Thus, we now agree that the Municipal Water Rights Act of 1996 ("1996 Act") provides for a single, growing service area that includes all of NKWSD's discrete (but nearby) distribution systems as they evolve.³

From there, however, your letter takes a turn that I believe is inconsistent with recognition of a single, combined service area. You say that the Department can no longer allow NKWSD to secure system-wide APODs in different delivery systems.

You acknowledge that the Department has issued many such system-wide APODs for NKWSD's municipal water rights (Nos. 95-7827, 95-8522, 95-7713, 95-7138, 95-8639, 95-9199, 95-9217, 95-9129, 95-9244, 95-10019, and 95-12599), a practice that was consistently followed for over a decade. Despite this, your letter concludes that "the authorization of its APODs is not consistent with longstanding IDWR practice." *June 4 Letter* at 2. This is a non-sequitur.

Nor is there a basis for your suggestion that the Department approved the APODs "under the impression that the systems would be integrated." To the contrary, these APODs were approved for licenses following field exams. The Department was fully aware of what it was doing. Until recently, the Department recognized the benefits and basic logic of allowing APODs where wells draw on a common source to serve a common service area—even if parts of it are not plumbed together. The action now proposed by the Department reflects a fundamental change in policy, which you should at least acknowledge. We suggest that the change is unwise and unwarranted, and we urge you to reconsider.

You have acknowledged that the Legislature has mandated a single, expanding service area corresponding to the area that NKWSD "is authorized or obligated to serve." Idaho Code

² You conclude: "IDWR concurs that the service area for each of the three licenses, when they are issued, should be the NKWSD's generally described service area, including all its discrete components located across the Rathdrum Prairie." *June 4 Letter* at 2.

³ You also noted that the service area for the Sylte right (No. 95-9129) needs to be amended. Thank you for offering to draft a proposed amendment to make its place of use correspond to the entire service area.

§ 42-202B(9). You have recognized that NKWSD's wells "all withdraw water from a single source, the Rathdrum Prairie aquifer." *June 4 Letter* at 2. You acknowledged that "NKWSD uses electronic telemetry and a SCADA (integrated data collection) system to monitor real-time diversion from each of its wells." *June 4 Letter* at 3.

At our meeting on February 13, 2014, we explained that while NKWSD is not a city, it operates just like any other traditional municipal provider. Its goal and obligation—mandated by the Legislature—is to serve all comers, and to treat all customers equally and fairly. In times of shortage, it is not acceptable simply to shut down water service to those served by the newest distribution systems. The only responsible thing to do is to share the burden among all customers, presumably by placing water restrictions across the board while allowing everyone at least some water service. That can only be accomplished by allowing the more senior water rights to be shifted about as the need arises. That is what APODs are for. That is why, for over a decade, the Department has encouraged their use.

Your suggesting that this can be accomplished instead by dividing up each water right and transferring a fraction of it to served each water distribution system is ludicrous. The whole point of APODs is to allow flexibility. How are we supposed to know today exactly what portion of each right might be needed to serve each part of NKWSD's constantly changing and growing collection of distribution systems? Even if this could be accomplished (presumably with the help of a crystal ball), it would need to be revised constantly as the system morphs over time. The administrative burden this would place on both the water user and the Department would be enormous. And pointless. This is the opposite of what the Legislature had in mind when it enacted the 1996 Act.⁴

Yet you conclude that NKWSD should be denied the flexibility of using its most senior water rights to divert water from whichever wells it determines appropriate to enable it to respond to curtailment situations. What good is a single service area including all distribution systems if the provider cannot get its most senior rights to where they are needed? Denying the use of APODs undermines the Legislature's express mandate for a single, flexible service area. We are, frankly, at a loss to understand why this Administration appears so consistently hostile to implementation of the 1996 Act.

Your letter notes that after our meeting—which seemed to be heading toward a sensible solution—you discussed the situation with your colleagues, who raised four new concerns. You do not say who these colleagues are. One wonders why you would not first share those concerns with us, so that we might have an opportunity to respond, before announcing a decision. In any event, I will take this opportunity to respond now. I hope it is not too late.

This was the first concern:

⁴ Indeed, it is conceivable that a response to a curtailment of junior rights could involve moving senior water rights from well to well on a daily or even hourly basis.

Recognizing that a water right may be used only in a single water system is one of the essential ways individual water rights are distinguished from each other. Allowing the use of a single water right in unconnected systems may make it very difficult for IDWR to track the “movement” of the water right and to regulate it in a way that will prevent enlargement and injury to other water right holders. While NKWSD’s extensive SCADA system could theoretically allow for the necessary regulation during a curtailment, IDWR is reluctant to set a precedent that might lead to regulation difficulties with others over large areas of Idaho.

This concern is misplaced. In a curtailment context, there is no need for IDWR to track “movement” of a municipal provider’s water rights in order to prevent injury and enlargement.⁵ When a provider installs a sophisticated SCADA system and makes the results transparently available to the Department, the Department’s job is made remarkably simple. You look at the total authorized diversion under water rights that have not been curtailed, and confirm that the amount diverted does not exceed that number.

One would think the state-of-the-art monitoring service NKWSD is able to provide through its SCADA system is just the thing the Department would want to encourage. We are at a loss to comprehend why this is a precedent you fear.

The second concern was:

Water rights are limited by volume as well as by diversion rate. Among NKWSD’s water rights are some with volume limits and some without volume limits. If APODs are authorized on all those rights, how would the water rights with volume limits be regulated? With APODs, pumped volumes could almost always be attributed to one or more of the rights without volume limits, which could lead to enlargement of use.

⁵ Individual well interference disputes or restrictions based on management areas covering only a portion of a provider’s service area are a different matter. In such cases, the Department may need to look at individual water rights and their respective priority dates in order to protect water rights held by others that are senior to approval of the APODs. This is an issue that the Department used to understand quite well. It developed “APOD condition language” in the context of accomplished transfer claims in the Snake River Basin Adjudication. The condition retained the original priority and quantity information for purposes of administration in well interference disputes and management area restrictions, while allowing free movement of water rights among APODs in the context of region-wide curtailment. I and other clients of mine supported the Department in that effort, filing an amicus brief in support of the Department’s position when it was challenged by the City of Pocatello. We prevailed. *In Re SRBA*, Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (Melanson, J.), *aff’d*, *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.). NKWSD has agreed (see my letter of February 14, 2014) to that very language here.

Every municipal provider with which I am familiar has APODs covering a mixed bag of water rights. Some have volume limits; others do not. In other words, if this is a problem, it is not unique to NKWSD, and it has nothing to do with separate delivery systems. Do you intend to reverse course on every municipality in Idaho?

You should not reverse course, because there is nothing to fix. Administering a mix of water rights (with and without stated volume limitations) is not difficult. The fact is, every water right has an annual volume limit. For those that are not stated on the face of the right, the volume limit is the volume produced by pumping at the authorized rate 24 hours a day for 365 days. Thus, if administration were called for, the Department would simply total up the authorized annual volume limits for all non-curtailed rights that may be used interchangeably through APODs. That number could then be compared—on an ongoing basis—with the diversion record, which is readily available to the Department through NKWSD's SCADA system. If the annual volume is reached, NKWSD would be prohibited from pumping any more. It seems that this Administration is fixated on thinking up problems that are really nothing more than excuses to deny municipal providers the ability to operate efficiently.

The third concern was:

In a time of curtailment, is it appropriate for the oversight agency to employ and trust the right holder's monitoring system, as opposed to being in the field observing actual curtailment?

This is an astonishing statement. For the Department to suggest that it cannot trust a political subdivision of the State of Idaho to honestly report its water use is offensive. Sadly, statements of this kind appear to be reflective of this Administration's general distrust of municipal providers and its reluctance to embrace the goals of the 1996 Act.

The same goes for private entities. The Department ought not operate from the premise that any of its customers (as water users used to be known) cannot be trusted to report of their water usage. This is certainly not how EPA or the DEQ operate. Those agencies rely extensively on self-reporting of environmental monitoring data.

Ronald Reagan employed the Russian proverb "doveriyai no proveryai" (trust, but verify). That is appropriate here. The Department can and should take steps to verify that data reported is accurate. When we met with you on February 13, 2014, Mike Galante made clear that NKWSD would provide the Department unfettered to its SCADA system. If NKWSD or any other water user were to misreport water usage, the Department should throw the book at them. But it is fundamentally wrong to deny APOD flexibility based on the presumption of guilt.

Moreover, what do you mean by suggesting that the Department should be "in the field observing actual curtailment"? A municipal provider is not farm, where you simply look to see if a field is irrigated or not. One cannot tell how much municipal water is being used by wandering around the city or looking at satellite imagery. In times of administration, municipal

providers will take a variety of steps to reduce demand. The whole purpose of having APODs is to allow the municipal provider maximum flexibility during such times. For example, the provider might choose to put all of its customers on a rotation system, giving everyone some water for particular purposes on particular days or time of day. It is the provider's job to enforce any water use restrictions that might be imposed. All the Department need do is look at the bottom line: Is the total pumping, as shown by the SCADA data, within the authorized amount? The flexibility that APODs provide to the provider also simplifies enforcement for the Department. This is a win-win situation. The current Administration's opposition to APODs does not appear to be rational, but rather appears to be reflective of a fundamental disinterest in working with municipal providers.

The fourth concern was:

In 1996 the Idaho Legislature amended the Idaho Code to provide opportunity for municipal water providers to establish water rights for reasonably anticipated future needs. At that time, the legislature could also have explicitly given municipal providers the opportunity to establish APODs, but it did not do so.

Do you really believe that the absence of reference to APODs in the 1996 Act means that the Department lacks authority to recognize them? If so, the Department also lacks authority to approve APODs for any other municipal provider. It would mean that the Department's recommendations for APODs for municipal providers throughout the Snake River Basin Adjudication was unlawful. And it ignores the Idaho Supreme Court's approval of APODs for municipal providers in *City of Pocatello v. Idaho* (see footnote 5 at page **Error! Bookmark not defined.**).

The 1996 Act did many things. But it did not attempt to address every water rights issue under the sun. It left some things in place, including the Department's authority to use common sense in the administration of water rights. If the Department wishes to reverse course on APODs, so be it. But such an about-face cannot be justified on the basis of the 1996 Act's silence on the subject of APODs.

Turning to the second issue, your letter confirms the Department's change in direction on the issue of annual volume limits.

Before going further, let me be clear that we have no quarrel with volume limits on non-municipal water rights, initially issued with volume limits, that have been acquired by NKWSD. Our concern is with water appropriated by NKWSD for municipal purposes.

The Department's past practice, as you know, has been to issue non-RAFN (reasonably anticipated future needs) municipal water rights to NKWSD without an annual volume limit, just as it does for all other traditional municipal water providers. This is in contrast to the Department's practice of including a volume limit on non-RAFN water rights issued to

developers and homeowner associations. In other words, the Department has always treated water and sewer districts—which are political subdivisions of the State—like municipalities, not like private developers and associations.

I have reviewed with Department's guidance on this subject over the years.⁶ While there are some references to municipal water rights being for cities, the special treatment (diversion rate based on installed capacity and no volume limit) is usually described more generally in terms of applying to municipal water rights. Nothing in the guidance specifically says that the same treatment should not be accorded to municipal providers serving inside and outside of incorporated areas.⁷

And why should there be any difference? Development occurs and populations grow both inside and outside of cities. Municipal providers serving customers outside of cities have the same goals and obligations as those serving customers inside cities. Indeed, many (including NKWSD) serve both inside and outside of city limits. Divvying up water rights based on service inside and outside municipal boundaries and adopting distinct licensing and administration protocols for each is a pointless and expensive exercise. It is certainly not mandated by the 1996 Act which reinforces that there is no distinction. For example, the act includes counties—which provide services primarily to areas outside of city limits—within the statutory definition of “municipality.” Idaho Code § 42-202B(5)(b).

Nothing in the 1996 Act, the common law, or common sense mandates drawing the distinction the Department has recently seized on. To the contrary, for decades the Department recognized that entities serving unincorporated areas such as NKWSD are entitled to hold municipal rights (as opposed to the domestic and irrigation rights historically granted to developers and homeowners associations). In short, the Department has long provided special treatment to traditional municipal providers, and has long recognized that this includes entities that provide municipal water service to customers outside city limits.

⁶ “The growth of a city should be recognized in recommending the rate of diversion for which a license is issued. Therefore, normally the rate of diversion recommended should be that of the capacity of the system unless it exceeds the permitted amount. The annual use in ‘acre feet per year’ should be omitted from the license for municipal use.” A. Kenneth Dunn, *Administrator's Memorandum – Licensing Procedures* at 1 (Apr. 7, 1975). “A municipal right should not be limited by volume. . . . These three preferences allow the city to increase water use under an existing right.” Norman Young, *Administrator's Memorandum – Definition of Municipal* (Nov. 5, 1979). “In the past, municipal water right holders generally already utilized the benefits offered by the amended code sections [the 1996 Act], since the department has issued municipal water rights which provide for future development up to the volume of water capable of being produced by the installed diverting works.” L. Glen Saxton, *Memorandum – Water Rights for Municipal Use* at 1 (Mar. 18, 1998).

⁷ From time to time, the Department and the Attorney General's office have looked at the authority of cities to serve customers outside of city limits. But that is an issue involving the scope of authority of granted to cities by the Constitution and statute. It is not a water rights issue, as such. And it has no applicability to a water and sewer district that is plainly authorized to serve unincorporated areas.

The fact that the Department now seeks to make it more difficult for those serving unincorporated areas to obtain long-term water rights appears to be based more on the current Administration's policy preferences regarding land use planning. With all due respect, land use planning is not the Department's job. The Legislature, in enacting statutory authorizations for water and sewer districts, has determined that entities like NKWSD should be in the business of providing municipal water to unincorporated areas.

If Idaho is to continue to grow, and to protect its water supplies on a long-term basis from its thirsty neighbors, it is essential that we work together to facilitate efficient delivery of water by all municipal providers, consistent with the Prior Appropriation Doctrine.

Obviously, we are far apart on the issues outlined above. I remain hopeful, nonetheless, that further dialog may enable us to better understand each other's position. Although I believe the Department's indicated change in policy is unwarranted, I have no doubt that it is offered in good faith. We have worked together on so many things in the past, including litigation on which we mutually prevailed in the Idaho Supreme Court this week.⁸ I am confident that we share the same ultimate goals, even if we do not see eye-to-eye just yet on how to get there.

If you would be willing, my client and I would like to meet with you again on this subject. If we cannot make further progress, we will have to grapple with where to go next. But I do not think we should give up just yet.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Meyer", written in a cursive style.

Christopher H. Meyer

⁸ *A&B Irrigation Dist. v. State*, 2014 WL 3810591 (Idaho, Aug. 4, 2014) (single fill rule—Basin-wide Issue No. 17). In addition to the Pocatello litigation mentioned above, we have pulled together on the following cases, all of which achieved successful results: *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007) (conjunctive management of ground and surface water); *Chisholm v. Idaho Department of Water Resources*, 142 Idaho 159, 125 P.3d 515 (2005) (Burdick, J.) (water rights—local public interest); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 947 P.2d 400 (1997) (partial forfeiture water rights case); *Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (interpretation of water right amnesty statute); *State, ex rel. Higginson v. United States*, 128 Idaho 246, 912 P.2d 614 (1995) (constitutionality of Snake River Basin Adjudication legislation). I mention these because it pains me to find myself and my client at loggerheads with the Department. This is not where I would expect to find us.

Shelley W. Keen
August 8, 2014
Page 9 of 9

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